
Report I

Telecommunications competitive safeguards

Contents

1. Telecommunications competitive safeguards 2000–01	7
1.1 The 2000–01 financial year for the ACCC	7
1.1.1 Anti-competitive conduct and consumer safeguard activities	7
1.1.2 Information-gathering activities	8
1.1.3 Access related activities	9
1.1.4 ACCC activities under the Telecommunications Act	10
1.1.5 ACCC participation in self-regulation processes	11
2. Overview of the state of competition in telecommunications markets — in retrospect and prospect	12
2.1 Introduction	12
2.2 Measures of effective competition	12
2.3 State of competition in telecommunications markets	13
2.3.1 National long-distance and international calls	13
2.3.2 Mobile services market	15
2.3.3 Local call services	16
2.3.4 Summary	17
2.4 Future competition issues	18
2.4.1 Structural issues	18
2.4.2 Conduct issues	19
2.5 Concluding remarks	20
3. Anti-competitive conduct provisions	21
3.1 Anti-competitive conduct	21
3.1.1 Competition notices	21
3.1.2 Exemption orders	23
3.2 Investigations under the anti-competitive conduct provisions	23
3.2.1 ADSL	23
3.2.2 Internet peering	24
3.2.3 MegaPop	24

4. Consumer safeguards provisions	26
4.1 Acceptable use policies	26
4.2 Slamming	27
4.3 Telstra's SMS billing for pre-paid mobile phones	28
5. Tariff filing and record keeping rules	29
5.1 Tariff filing	29
5.1.1 Tariff filing directions under division 4 of Part XIB	29
5.1.2 Tariff filing by Telstra under division 5 of Part XIB	29
5.2 Record keeping rules	30
5.2.1 Financial record-keeping rules	31
5.2.2 Non-financial record keeping rules	31
6. Access to telecommunications network services	33
6.1 Framework for access to declared services	33
6.2 Public inquiries into declaration of telecommunication services	34
6.2.1 Transmission services inquiry	34
6.2.2 Challenges to the ACCC's decision to declare the broadcasting access service and analogue subscription television broadcast carriage service	35
6.3 Exemption applications	36
6.3.1 Local carriage service exemption applications	36
6.4 Access undertakings	37
6.4.1 ACCC's final decision regarding Telstra's access undertaking for the domestic PSTN access services	37
6.5 Access disputes	38
6.5.1 Notification of access disputes	39
6.5.2 ACT review of PSTN arbitration decisions	42
6.6 Pricing principles	42
6.6.1 Mobile number portability	42
6.6.2 Unconditioned local loop service	43
6.6.3 Local carriage service	44

6.6.4	Domestic PSTN originating and terminating access service supplied by non-dominant or smaller fixed networks	45
6.6.5	Domestic GSM originating and terminating access services	45
6.7	TAF telecommunications access code	46
7.	Number portability	47
7.1	ACCC directions to the ACA on number portability	47
7.1.1	Mobile number portability	47
7.1.2	National and premium rate services	48
7.2	Disputes on number portability arbitrated by the ACCC	48
8.	Other functions and responsibilities under the Telecommunications Act	49
8.1	Direction to develop an interconnection standard	49
8.1.1	Inter-carrier short message service interconnection between GSM and CDMA networks	49
8.1.2	Interconnection standard for optical interconnection and network-to-network interfaces for the provision of services such as ATM and frame relay	50
8.2	ACCC directions to the ACA on electronic addressing	50
8.3	Facilities access code	51
8.4	International rules of conduct	52
8.5	Price control review	52
9.	ACCC participation in self-regulation processes	54
9.1.	Australian Communications Industry Forum	54
9.2	Telecommunications Access Forum and other processes	55
9.3	Numbering Advisory Committee	56
9.4	.au Domain Administration Advisory Panel	56

Appendixes

1.	ACCC telecommunications publications published in the 2000–01 financial year	57
2.	ACCC Telecommunications Group	59

1. Telecommunications competitive safeguards 2000–01

Part XIB, Division 11, sub-section 151CL(1) of the *Trade Practices Act 1974* requires the ACCC to review and report each financial year on competitive safeguards within the Australian telecommunications industry. This is the report for the financial year 2000–01.

1.1 The 2000–01 financial year for the ACCC

The 2000–01 financial year was an eventful one for the ACCC, with several developments within the Australian telecommunications industry requiring its involvement.

The ACCC was heavily involved in a number of anti-competitive conduct and consumer protection investigations. While some were initiated during the 2000–01 financial year, such as the ADSL investigation, others continued from the previous year, such as the slamming investigation.

The pattern of steadily increasing complaints with regard to anti-competitive conduct and consumer protection issues continued, with the reason for the increase being difficult to pin point. However, a number of factors are likely, including an increase in carriage service providers (CSPs) numbers, the use of telecommunication services, and public awareness of the ACCC and its functions.

In the 2000–01 financial year, the ACCC continued to use its information-gathering powers in performing its functions and exercising its powers under Parts XIB and XIC of the *Trade Practices Act*. It was also involved in a number of access related activities which, among other things, included the development of pricing principles for particular services and the arbitration of access disputes.

The ACCC also exercised its power under the *Telecommunications Act* with regard to number portability for telecommunications services and other matters.

An important role for the ACCC was participating in self-regulatory processes. In particular, its involvement in a number of organisations, including the Australian Communications Industry Forum (ACIF) code committees, the Telecommunications Access Forum (TAF), the Numbering Advisory Committee and the .au Domain Administration Advisory Panel.

1.1.1 Anti-competitive conduct and consumer safeguard activities

Anti-competitive conduct

There was an increase in anti-competitive conduct complaints received during 2000–01. The ACCC continued and initiated major investigations into possible contraventions of matters such as the following:

- Telstra's asymmetrical digital subscriber line (ADSL) service;
- Internet peering arrangements; and

-
- PSTN terminating access arrangements.

The specific details of these investigations are in section 3.2 of this report.

Consumer safeguards

The ACCC experienced a significant increase in consumer protection complaints about telecommunications. Many related to the ACCC's three major investigations involving the following matters:

- acceptable use policies (i.e. policies to limit or withdraw services to end-users who are taking advantage of an 'unlimited' or 'free' offer);
- slamming (the unauthorised churning of end-users from one carrier to another); and
- Telstra's SMS billing for pre-paid mobile phones.

The specific details of these are in section 4 of this report.

1.1.2 Information-gathering activities

Tariff filing

The ACCC continued to receive weekly and monthly tariff filing information from Telstra, as well as briefings on significant changes to Telstra's standard form of agreement. The ACCC used this information to help it assess market behaviour (particularly where there were concerns about anti-competitive conduct) and to respond to consumer queries and complaints regarding Telstra's retail activities.

Details on tariff filing are in section 5.1 of this report.

Record keeping rules

The ACCC finalised the new financial record-keeping rules (RKR's). The written instrument containing the new RKR's for the telecommunications industry is the Telecommunications Industry Regulatory Accounting Framework (RAF). The RAF replaces the previous financial reporting obligations set out in the AUSTEL Chart of Accounts and Cost Allocation Manual. It consists of 22 rules and 11 schedules that detail the financial reporting requirements that apply to certain carriers and CSPs notified by the ACCC. Under the new financial RKR's, these carriers must provide the ACCC with information on their revenues, costs, capital and service usage across a broad range of services, and across the retail, internal wholesale and external wholesale businesses.

There was progress in establishing an electronic information-gathering and reporting process, known as ToLI. Given that ToLI would capture information from the various operation support systems of carriers and CSPs, it is expected that ToLI will override the need for the ACCC to impose a pre-determined set of non-financial RKR's. The ACCC did, however, issue two non-financial RKR's to Telstra in the 2000–01 financial year. They related to Telstra's compliance with the standard access obligations for the roll-out of ADSL services.

The specific details on record keeping rules are in section 5.2 of this report.

1.1.3 Access related activities

Public inquiries into declaration and exemption applications

The ACCC finalised its public inquiry into whether to vary the transmission capacity service to exclude intercapital transmission capacity from the declaration. In its final report the ACCC concluded that varying the service description to remove the remaining intercapital transmission routes from declaration (the service description was previously varied to exclude the Melbourne–Canberra–Sydney route from declaration) will be in the long term interests of end-users. Consequently, the transmission capacity service between the capital cities, which includes Brisbane, Sydney, Canberra, Melbourne, Adelaide and Perth, was no longer regulated from 31 May 2001. The ACCC will, nevertheless, continue to monitor the provision of the service.

Following Telstra and Foxtel appeals of the Federal Court of Australia decision, the Full Federal Court upheld the validity of the ACCC's 1999 declaration to declare the analogue-specific service, but held that the initial deeming statement with respect to the broadcasting access service was invalid. Foxtel sought special leave to appeal the decision to the High Court of Australia. In the post-reporting period (August 2001), the High Court refused the application. The judicial decision means that, subject to capacity being available, Telstra must provide access to its HFC cable network to access seekers, which will allow access seekers to provide pay television services to end-users.

Details on these matters are in section 6.2 of this report.

During the 2000–01 financial year the ACCC released discussion papers relating to Telstra's first and second applications for exemption from the standard access obligations to supply the local carriage service to its competitors. The first application related to the CBD areas of Melbourne, Sydney, Brisbane, Adelaide and Perth. The second application related to the CBD areas of Hobart, Canberra and Darwin, metropolitan areas of all capital cities, and three regional centres, Newcastle, Wollongong and Geelong.

Details on the ACCC's considerations are in section 6.3 of this report.

Access undertakings

The ACCC finalised its assessment of Telstra's second access undertaking, submitted on 24 September 1999, relating to the declared PSTN services. The ACCC rejected the undertaking as it considered the proposed charges were too high. Telstra had proposed a headline charge for the originating and terminating services of 2.37 cents per minute for 1999–2000 and 2.01 cents per minute for 2000–01. The undertaking did not cover non-price terms and conditions.

By contrast, the ACCC considered that the appropriate price for access to Telstra's PSTN services should have been, on average, 1.77 cents per minute for 1999–2000 and 1.53 cents per minute for 2000–01. In reaching its final decision the ACCC based its assessment of an appropriate access price on estimates of the efficient cost of providing access to the PSTN services. To determine this it used a modified cost model originally prepared for it by National Economic Research Associates (n/e/r/a).

Details are outlined in section 6.4 of this report.

Access disputes and pricing principles

At the end of the 2000–01 financial year a total of 38 access disputes were notified to the ACCC under Part XIC of the Trade Practices Act, including those completed and/or withdrawn.

The ACCC made progress in resolving them; in particular, five final determinations regarding the domestic PSTN originating and terminating access services, and the domestic data access service. The ACCC also made nine interim determinations regarding the domestic PSTN terminating access service for data calls to ISPs, the broadcasting access service, unconditioned local loop service and the local carriage service.

Twenty-five disputes were withdrawn or terminated: 12 during the financial year, and 13 during the post-reporting period (up to November 2001).

Following the final determinations of the PSTN originating and terminating access services, Telstra lodged two applications with the Australian Competition Tribunal (ACT) for a review of the ACCC's final arbitration determinations in relation to two access disputes to which Telstra is a party: one with AAPT and one with Primus. The details are in section 6.5.2 of this report.

During the 2000–01 financial year the ACCC finalised pricing principles for the following services:

- mobile number portability;
- local carriage service;
- domestic PSTN originating and terminating access services supplied by non-dominant or smaller fixed networks; and
- domestic GSM originating and terminating access services.

The ACCC also released a draft pricing paper on the unconditioned local loop service. This was finalised in the post-reporting period.

Details on the ACCC's development of these pricing principles are in section 6.6 of this report.

1.1.4 ACCC activities under the Telecommunications Act

Number portability

The ACIF published a number of documents on mobile number portability (MNP), including a framework document that details the network architecture to be used for implementing MNP in Australia, the IT specifications, the MNP industry code, the MNP operations manual and a consumer guideline. The development of these industry solutions and documentation needed to implement MNP follows a September 1999 ACCC final report concluding that MNP should be mandated and directing the ACA to amend the *Telecommunications Numbering Plan 1997* to provide for MNP.

At the end of the 2000–01 financial year, the ACCC released a draft report containing preliminary views on whether portability for premium and national rate services should be mandated.

The ACCC was also notified of two access disputes in relation to freephone and local number portability.

Details on the ACCC's responsibilities and associated activities regarding number portability issues are in section 7 of this report.

Directions on interconnection standards, electronic addressing, review of price control arrangements, facilities access code and international rules of conduct

The ACCC received two requests to direct the ACA to develop interconnection standards. One was from Telstra concerning the establishment of an inter-carrier SMS interconnection standard between GSM and CDMA networks. The other was from PowerTel regarding the development of an interconnection standard for optical interconnection and network-to-network interfaces for the delivery of services such as asynchronous transfer mode (ATM) and frame relay.

The ACCC also released its final report on whether the price control arrangements applying to Telstra in 2000–01 should continue and, if so, in what form. The final report followed a direction by the Minister for Communications, Information Technology and the Arts to undertake a public inquiry.

During the 2000–01 financial year, the ACCC was not notified of any disputes about access to facilities, nor did it issue a direction to the ACA on electronic addressing, or conduct any investigations about international rules of conduct.

Details on the ACCC's responsibilities under the Telecommunications Act are in section 8 of this report.

1.1.5 ACCC participation in self-regulation processes

The ACCC continued its involvement with a number of self-regulatory organisations, including in the ACIF code committees, the TAF, the Numbering Advisory Committee, and the au. Domain Administration Advisory Panel.

Details on the ACCC's involvement in these organisations are in section 9 of this report.

Overview of the state of competition in telecommunications markets — in retrospect and prospect

2.1 Introduction

Since opening telecommunications markets to full competition in 1997 some significant steps have been taken toward developing competition in many telecommunications markets. However, the effectiveness of competition has tended to vary across different telecommunications markets and, in many instances, the emergence of effective competition appears to be some time away. In fact, competition has not developed as fruitfully as originally hoped when the industry initially opened up to full competition. Recent adverse investor sentiment also has the potential to constrain available capital necessary for the future development of facilities-based competition.

In addition, the ACCC considers it is likely to face many emerging issues that will have an impact on the level of competition in the future. These issues have the potential to affect the structure and/or conduct of participants in the market.

In order to consider these issues, the remainder of this section:

- provides comments on the state of competition in different telecommunications markets using various performance measures; and
- outlines the range of emerging issues which the ACCC believes will have an impact on the level of competition in telecommunications markets in the future.

2.2 Measures of effective competition

There are a number of indicators that the ACCC can refer to in determining whether competition is effective in a given market. These can be based on either market structure characteristics or on market outcomes.

Market structure relates to the cost structure and demand conditions in a particular industry and is important because it is a major determinant of market outcomes. Measures the ACCC has used in the past to indicate whether market structure is consistent with effective competition include the presence of natural monopoly characteristics, measures of dominance, concentration indexes such as the Herfindahl index, market share estimates and its own declaration process. A discussion of these market structure measures, including their merits and limitations, are provided in the ACCC's *Review of the price control arrangements*.¹

¹ ACCC, *Review of price control arrangements — final report*, February 2001.

An alternative means of determining the degree of effective competition in a given market is by examining market outcomes. Relevant examples might include changes in the retail price paid for telecommunication services, the change in retail and wholesale prices associated with the introduction of competition, and the extent of the gap between price and full attributable long-run cost.

In the ACCC's experience, different measures will sometimes give conflicting answers, and none are definitive. In the end, some degree of judgment is required based on conflicting pieces of evidence, and different analysts can and do reach divergent conclusions about the same market.

Finally, it is noted that while each of these measures can be considered on an individual basis, a key feature of telecommunications markets is the high level of vertical integration involving many of these markets. In particular, Telstra's near-ubiquitous network and integrated nature ensure that even when other competitors operate in competition with it in the delivery of retail services, they rely on interconnection to some part of its network in almost every circumstance. This level of vertical integration is not matched to anywhere near the same extent in any other network industry.²

The strong reliance that Telstra's competitors have on attaining access to its networks means that Telstra's market power derives not just from its market share, but from its control of inputs essential to the provision of downstream services. Unconstrained, this has the potential to enable Telstra to leverage its control over essential inputs in one market to generate market power in other downstream markets.

Seen from a holistic perspective, therefore, the level of effective competition in one market can be heavily influenced by the level of effective competition in vertically related markets.

2.3 State of competition in telecommunications markets

2.3.1 National long-distance and international calls

On the surface there are indications of substantial competition in the markets for national long-distance and international calls. However, there are also factors suggesting that competition may not be effective.

With respect to market structure, competitors other than Telstra appear to be gaining some ground in the retail international call market, with Telstra's market share at 48 per cent, Optus with 18 per cent, AAPT with 6 per cent, and other carriers making up the remaining component.³ However, it is observed that long-distance and international components of the production chain display some natural monopoly characteristics, such that the potential for further replication is limited. For instance, while a small number of entrants (in particular Optus and Macrocom) have established independent long-distance transmission facilities on major routes, especially between capitals, there is a clear lack of effective competition on non-major routes.

In addition, there is no alternative means for suppliers of long-distance and international calls to reach the majority of their potential customers without access to Telstra's PSTN network. Examination of concentration indexes in the national long-distance and international call markets

2 Unlike telecommunications, significant parts of other network industries have been structurally separated to various degrees.

3 Productivity Commission, *Telecommunications Competitive Regulation*, December 2001, p. 122.

based on the market share data above provides further evidence of the likelihood of ineffective competition in these markets.

Taking a behavioural or market outcome approach also reveals that these markets are not effectively competitive as yet. In particular, it is observed that even though retail prices for national long-distance and international calls are falling, the gap between price and cost of provision has not changed greatly over time.

In the case of changes in retail prices, the ACCC's report into *Changes in the prices paid for telecommunications services in Australia* (Division 12 report which is Report 2 in this publication) indicates that prices of international calls have fallen by 54.9 per cent between 1997–98 and 2000–01 on average across a range of telecommunications carriers as a whole. Over the same period, national long-distance calls have fallen by 22.1 per cent on average. Equally encouraging, these price reductions were still strong in the later stages of this period with international calls decreasing by 17.5 per cent and national long distance calls by 8.1 per cent in the 2000–01 financial year. Interestingly, comparison of these figures with the *Telstra price control compliance report for 2000–01* (Telstra price control report which is Report 3 in this publication) indicates that the market as a whole is reducing prices faster than Telstra alone for these services. That is, the price charged by Telstra decreased by 9.8 per cent for international calls, and by 5.3 per cent for STD calls, during the 2000–01 financial year.

With respect to the price-cost gap, however, information on long-distance costs available to the ACCC suggests that the full average attributable per-minute cost of providing STD calls (including retail costs) is less than half the average per-minute price. Only a small portion of this gap can be explained by the access deficit contribution (ADC).⁴

In addition, even though STD retail prices have fallen since the industry opened up to full competition, information in Telstra's 2000–01 Annual Report indicates it has decreased the average revenue per minute of fixed-to-fixed calls from 16.80 cents in 1997–98 to 15.84 cents in 1998–99, 14.83 cents in 1999–2000, and 14.17 cents in 2000–01. This represents a total fall of nearly 16 per cent or about 2.63 cents per minute. However, this is less than the fall in the cost of interconnection which has fallen by almost 4 cents per minute over the same period.⁵ Even when one looks at the fall in national long-distance calls of 22.1 per cent on average over the same period for the market as a whole, this decrease is still less than the 4 cents per minute fall in interconnection rates.

Further, while international retail call prices have fallen more rapidly than national long-distance prices, information available to the ACCC indicates the presence of a substantial remaining gap between price and cost inclusive of a reasonable profit. This gap is proportionately less than in STD if cost includes the international settlement price, but the weighted average per-minute price is still substantially above the full average attributable cost including retail costs.

This implies that despite the access regime allowing Telstra's competitors to access essential upstream originating and terminating infrastructure, a lack of facilities-based competition in the downstream stage of production would appear to be hampering the development of effective competition in retail markets for these services.

4 The ADC is a component in the price Telstra charges other carriers for interconnection to the PSTN and that has to be retrieved by Telstra in its retail pricing.

5 The cost of interconnection has fallen from 7 cents in 1998–99 (3.5 cents x 2), to 3.4 cents in 1999–2000 (1.7 cents x 2) and to 3.06 cents in 2000–01 (1.53 cents x 2) (the cost figures of 1.7 cents in 1999–2000 and 1.53 cents in 2000–01 are the ACCC's estimates of the cost of PSTN originating and terminating access as found in *A report on the assessment of Telstra's undertaking for the domestic PSTN originating and terminating access services*, July 2000.)

2.3.2

Mobile services market

Another example of an area where competition appears to have been developing since 1997 is the mobile telephony market. The appearance of a high and growing level of competition in mobile services, however, does not necessarily constitute effective competition. In particular, in assessing the state of competition in the mobile services market a distinction is drawn between fixed-to-mobile services and all other services. As discussed below, competition appears to be much less advanced with fixed-to-mobile services.

Examination of the market shares of industry participants indicates a reasonably competitive mobile market. At the end of March 2001, while Telstra remained the leading mobile network carrier with 45.5 per cent of the total market share, significant positions were also held by Optus (33.1 per cent) and Vodafone (19 per cent), with other operators such as Hutchison accounting for the remaining market share.⁶ In addition, concentration indexes for mobiles as a whole indicate a concentration level greater than that of equal-sized triopolists. On the surface this places the mobile market still at around the threshold of concern with respect to concentration.

With regard to market outcomes, the Division 12 report indicates retail prices for mobile services have decreased by a substantial 24.8 per cent between 1997–98 and 2000–01 on average across a range of telecommunications carriers. The same report indicates that retail prices came down in 2000–01 by around 10.4 per cent on average in the mobile services market. Of interest, the Telstra price control report indicates Telstra reduced prices at a rate faster than the rest of the market over this period, with price falls of around 14.2 per cent.

The ACCC notes that factors such as the failure of OneTel and its consequent exit from the mobile market, and a number of other more recent developments have tended to make the ACCC take a more cautious approach in its assessment of the level of competition in the mobile telephony market. The ACCC considers, however, that these developments may reflect a market that is maturing after an initial period of heightened market activity as competing service providers sought to win market share, rather than a sign of a failure in the level of effective competition.

Fixed to mobile services

Since the introduction of fixed-to-mobile pre-selection from July 1999, the number of providers of this service has increased beyond the then only two providers, Telstra and Optus. This has not, however, resulted in the emergence of an effectively competitive market.

In examining changes in the retail price for fixed-to-mobile services, the Division 12 report indicates that the retail prices for fixed-to-mobile services have fallen by 18.1 per cent on average for the market as a whole in the period from 1997–98 to 2000–01. In 2000–01 the rate of decrease for retail prices of fixed-to-mobile services moderated to 5.9 per cent on average for the major providers of these services.

The ACCC considers that the extent of the retail price reductions is limited by the lack of competitive pressure in the supply of the GSM termination service, a key component in the provision of fixed-to-mobile calls. Accordingly, it is not surprising that the ACCC believes the wholesale provision of the GSM termination service is priced above cost.⁷

6 Productivity Commission, *Telecommunications Competitive Regulation*, December 2001, p. 129. Note that these market shares do not include those held by mobile resellers.

7 ACCC, *Pricing methodology for the GSM termination service — final report*, July 2001.

In addition, information available to the ACCC suggests that the retail price of fixed-to-mobile calls appears to be high relative to all input costs, suggesting an ineffectively competitive market. Telstra's average retail price for fixed-to-mobile calls in 2000–01 was 39 cents per minute,⁸ while market inquiries indicate that the full cost appears to be much lower.

2.3.3 Local call services

The local telecommunications market is an example of one that appears a long way from being effectively competitive. On the surface there appears to be little competition in the local call services market. Telstra has the only ubiquitous fixed-line network with the full range of capabilities, including the provision of line rental and local call services.

Market concentration indexes for local call services indicate Telstra has an almost complete monopoly as only it has direct access to every household and business in Australia.

The ACCC also notes that other than facilities-based competition for an increasing number of services in CBD areas of the major capital cities, Telstra's competitors do not have any real alternative to seeking access to Telstra's fixed network services to provide local call services to end-users. In almost all cases there is a lack of ubiquity in networks other than Telstra's, and it remains necessary for other carriers to interconnect with Telstra's customer access network (CAN) to provide these services to end-users. This situation is likely to persist for some time for these services in most metropolitan areas, and indefinitely in less densely populated geographic areas.

In addition, in terms of the market for basic access, Telstra directly retails 83.2 per cent of this market itself, with another 12.4 per cent provided through resale of its access lines. Accordingly, Telstra has an overall market share of 95.6 per cent of directly connected lines. Of the remainder, CWO provides the vast majority with 4.3 per cent of the overall market.⁹ Further, and as indicated above, the significant market share held by Telstra in the market for directly connected lines gives it the potential to leverage its market power in other markets such as the long distance market.

In relation to retail pricing trends for basic access, the Division 12 report indicates that there have been steady increases in the price of line rental charged by carriers over the 1999–2000 and 2000–01 financial years. Interestingly, however, Telstra seems to have increased the price of this service at a faster rate than the market as a whole. That is, while the market as a whole increased the price of line rental on average by 10 per cent during the 2000–01 financial year, the Telstra price control report indicates Telstra increased the price of basic access by 16.5 per cent over the same period.

However, while the exclusivity of Telstra's ubiquity remains, there are various ways that competitors are entering the local services market. The ACCC believes that competitors are eroding this monopoly through the building of localised fibre access networks, the 'regulated' availability of unconditioned local loop service (ULLS), wireless networks etc., particularly in CBD areas. Local call resale, while not providing competition in the wholesale component of these services, promotes competition in the retailing of local calls and enhances the service offerings of competitors.

In particular, in the Division 12 report an accelerated decrease in the price of local calls over the 1999–2000 and 2000–01 financial years is observed. Decreases in the price of local calls have, in part, been driven by price control arrangements that have required Telstra to decrease the price of

8 According to Telstra's 2000–01 Annual Report, it had revenue from fixed-to-mobile calls of \$1261m and carried 3266 million minutes, giving an average of 39 cents per minute (table 6).

9 Productivity Commission, *Telecommunications Competition Regulation*, December 2001, p. 114.

local calls should it also want to increase the price of basic access. Further, the ACCC believes decreases in the price of local calls may in part be explained by the ACCC's declaration of the local carriage service in August 1999. The ACCC, however, is of the view that this does not necessarily indicate that the market for the supply of local calls is effectively competitive. As previously noted, the ACCC believes that competition in local telephone services is limited as there is no current effective competitor to Telstra's ubiquitous local network.

2.3.4 Summary

The state of competition, measured using several performance indicators, reveals that the effectiveness of competition varies across the different market areas, ranging from substantially ineffective in local call services to being relatively competitive in the market for mobile-to-mobile services.

The mobile services market appears to have fewer natural monopoly characteristics than does the fixed-line markets, and perhaps three or four network carriers seem to be able to fit into the market. Market outcomes are also encouraging with respect to mobile services. However, the ACCC notes that the level of competition in the provision of mobile call services (i.e. mobile origination) has tended to fluctuate such that the ACCC has taken a cautious approach in making assessments about the degree of competition in this market.

Competition does not appear to be effective in the provision of fixed-to-mobile services, where the decrease in the retail price for fixed-to-mobile calls has been at a slower rate than for mobile-specific prices. The price-cost gap for fixed-to-mobile calls would also appear to be significant.

In the local call services market, the current state of competition indicates that the emergence of effective competition is some time away. Although there are some competitors entering this market via various avenues, for instance by building local access networks and using the regulated ULLS, there is no effective competitor for Telstra's ubiquitous local network beyond certain CBD areas.

While the national long distance and international call markets exhibit the appearance of strong competition, the ACCC believes there is sufficient evidence of ineffectiveness of competition in these markets to take a cautious approach with these services. There are natural monopoly characteristics in those parts of the production chain where facilities-based entry has occurred and market outcomes indicate that competition has been associated with consistent price falls. However, these price decreases are yet to make a substantial inroad into the gap between price and cost, especially in the national long distance market.

In a general context, it is fair to surmise that while the extent of market power imbalances has changed since the introduction of open competition, Telstra's extensive market power is likely to remain in many telecommunications markets into the future. The ACCC notes that, at the time of the introduction of competition in telecommunications markets, there was widespread expectation that infrastructure alternatives to Telstra's local loop (such as wireless local loops) would be developed to act as viable competitive substitutes. To date, however, this type of facilities-based competition has not materialised, and there is some concern that in the current capital constrained market such infrastructure investment will continue to be limited.

Looking forward, therefore, the ACCC believes that if competitors are to provide many of their service offerings to consumers in the future, there will be an ongoing need for access regulation.

2.4

Future competition issues

In addition to continuing to address issues relating to the development of competition in traditional telecommunications markets, the ACCC is also focusing on a number of future competition issues, some of which have already begun to emerge over recent times. They can be divided into those likely to affect the structure of the market, and those related to the conduct of market participants.

2.4.1

Structural issues

One of the competition issues the ACCC is currently addressing is the effect of the convergence of services on the structure of telecommunications markets. The potential impact of the convergence of services on infrastructure development and use, market structures and consumers is considerable, but still uncertain in its nature, extent and timing. Conflicting effects on competition are likely as a result of convergence.

On the one hand, increased competition in the markets for telecommunications services may be expected as digitalisation of existing networks allow the delivery of more services. This could result in greater competition if existing networks provide broadband telecommunication-type services e.g. digital pay TV, interactive services. It may also result in a stronger business case for new infrastructure investment, as more revenue streams are available e.g. broadband, Internet, telephony and pay TV.

However, it may also be the case that combining a range of digital services into full service networks may enable new economies of scope to be developed and exploited, thereby creating the potential for a significant service provider in one (or more) market(s) to 'leverage' into a significant or dominant position in another market or industry.

In this regard the ACCC observes that Telstra's high level of vertical integration, and the significant position it holds in the market for PSTN services, gives it considerable scope to extend its market power into the full range of converging markets. For example, this may occur if Telstra ultimately becomes the carrier with broadband connections into every home or business.

It follows, therefore, that access regulation alone may not be sufficient to curb market power in converging markets such that it may be necessary to consider whether structural separation of ownerships of inputs to these services is required.

Another area where structural changes may occur in telecommunications markets is through the increase in next generation infrastructure deployment. Next generation infrastructure deployment — which often utilises the Internet and data-based switching technology — is making interconnection arrangements more complex, as individual carriers have to negotiate interconnection between traditional and emerging network elements to ensure any-to-any connectivity. This is particularly the case as many new services now require interconnection between different networks such as traditional circuit-switched and newer types of packet-switched networks.

As a result, there is likely to be an increase in the number and complexity of the inter-carrier negotiations related to wholesale interconnection. The effect of these developments has implications for the ACCC's regulatory task. Given the potential negotiation difficulties which may arise, the ACCC has engaged a consultant to prepare a discussion paper to consider a wide variety of interconnection issues. This paper will be released in the post-reporting period.

In response to changing market structural conditions, the ACCC is also considering the need to continue access regulation where competition has increased, for instance, in the case of intercapital transmission capacity and the local carriage service for specified CBD and metropolitan areas. The

ACCC considers that where alternative delivery mechanisms emerge, scope may develop to make access regulation progressively more light-handed.

However, consistent with its comments on the level of effective competition in local call services markets, the ACCC is of the view that the extent of facilities-based competition, in particular, is likely to be limited in some areas and its timing uncertain. For instance, to date facilities-based competition has developed in certain CBD areas and some regional centres, but in a relatively patchy manner in other areas of the country. In areas where facilities-based competition has not developed, and particularly where it is unlikely to develop for some time, the ACCC is of the view that a strong access regime will continue to be required.

Increased merger and acquisition activity within the telecommunications markets and other related communications markets could also have an impact on the structure of the markets, and thus the degree of competition. In this regard it is expected that global factors are likely to play a more direct role in affecting the Australian telecommunications markets, particularly given the trend in the acquisition of domestic telecommunications businesses by foreign entities.

A significant focus for the ACCC is the effect that price and non-price terms and conditions in the negotiation and determination of access prices can have on the structure of telecommunications markets. Non-price terms and conditions, such as confidentiality arrangements, have gained some prominence in the arrangements between competitors. The importance of price terms and conditions is reflected in one of the amendments to the Part XIC in the post-reporting period, which requires that the ACCC must consider access pricing principles at the same time as, or as soon as is practically possible after, the ACCC declares a service to be a declared service, and if the ACCC varies a declared service.¹⁰ This will streamline the operation of the access regime, and facilitate the commercial settlement of access disputes.

2.4.2 Conduct issues

In addition to the structural issues that have emerged, the ACCC is aware of a set of competitive conduct issues starting to surface that are also likely to have an effect on the level of competition in telecommunications markets.

A continued focus for the ACCC in the future will be addressing the competition issues arising in relation to the conduct of service providers in the bundling of services. For instance, service providers are increasingly bundling new, higher growth services such as mobile and data services with lower growth, traditional services. Service offerings which bundle services across traditional industry boundaries are also emerging. Telephone, broadcasting and Internet services are among the bundles available in some markets. Such developments offer service providers the opportunity to share common network costs across a larger number of services, and develop and exploit economies of scale and scope.

However, service providers may also price items within bundled baskets in ways which allow them to effectively cross-subsidise particular products or consumers. If sustained, this risks distorting consumption and investment patterns, creating new barriers to entry, and damaging efficient operators in affected markets. This may have implications for the way the ACCC performs its regulatory task, particularly in combating anti-competitive practices and protecting consumers.

¹⁰ Section 152AQA, *Trade Practices Amendment (Telecommunications) Act 2001*, No. 124, 2001.

Finally, the significant market share of Telstra, combined with the presence of oligopolistic features in some markets, clearly suggests the importance of strong anti-competitive conduct and consumer protection provisions specifically directed to the particular needs of telecommunications markets. These provisions are and will continue to be imperative for swift sanctions to provide effective deterrents to conduct threatening the development of effective and sustainable competition.

2.5 Concluding remarks

As the telecommunications industry moves towards its fifth anniversary since the opening of telecommunications markets to competition in 1997, new regulatory challenges have surfaced reflecting the changing industry. These new competition challenges, along with existing ones in traditional telecommunications areas, will be a major focus for the ACCC in the future.

3. Anti-competitive conduct provisions

This section of report 1 examines the investigations the ACCC undertook into potential breaches of the telecommunications anti-competitive provisions of the Trade Practices Act during the 2000–01 financial year.

The Part XIB provisions of the Act apply specifically to anti-competitive conduct in the telecommunications industry. These provisions were introduced because the Government considered that Telstra's market power and scope to engage in anti-competitive conduct, as well as the dynamic nature of the industry, would not allow the general anti-competitive conduct provisions (Part IV) to sufficiently constrain possible anti-competitive conduct. The telecommunications-specific provisions were intended to supplement Part IV by increasing the ACCC's ability to respond swiftly to anti-competitive conduct in the industry.

3.1 Anti-competitive conduct

The Part XIB provisions prohibit a carrier or CSP from engaging in anti-competitive conduct — a prohibition known as the competition rule. Section 151AJ sets out the two circumstances under which a carrier or a CSP can contravene the competition rule.

The first circumstance is when a carrier or CSP takes advantage of a substantial degree of power in a telecommunications market with the effect, or likely effect, of substantially lessening competition in that, or any other, telecommunications market. An examination of the purpose of the conduct is not required under the competition rule as it is required under the general s. 46 misuse of market power provisions.

The second circumstance is when a carrier or CSP engages in conduct relating to a telecommunications market that contravenes the anti-competitive conduct provisions in Part IV of the Act. In particular:

- s. 45 — contracts, arrangements or understandings that restrict dealings or affect competition;
- s. 45B — covenants affecting competition;
- s. 46 — misuse of market power;
- s. 47 — exclusive dealing; or
- s. 48 — resale price maintenance.

3.1.1 Competition notices

Under Part XIB the ACCC may issue competition notices in response to alleged anti-competitive conduct. In the 1999–2000 financial year the Government introduced amendments to the competition notice regime, partly because the ACCC was concerned that the process did not facilitate prompt action.

As a consequence, a two-part competition notice regime was established. Under the new regime the ACCC has a discretion to issue part A and part B competition notices. When exercising this discretion it must have regard to any guidelines issued under s. 151AP(2). The guidelines identify matters the ACCC must take into account when deciding whether to issue a part A or part B competition notice, although it must also have regard to any other relevant matters. The guidelines are therefore not exhaustive.

The ACCC considers that in many investigations of anti-competitive conduct where it has a reason to believe that the carrier or CSP has engaged, or is engaging, in a contravention of the competition rule, the issuing of a competition notice will be an appropriate and positive step to achieving policy goals. However, there may be some circumstances when other responses might lead to a more effective or appropriate outcome than the issuing of a competition notice.

Part A competition notices

The ACCC may issue a part A competition notice when it has reason to believe that a carrier or CSP has engaged, or is engaging, in an instance of anti-competitive conduct, or at least one instance of anti-competitive conduct of the kind described in the notice. In contrast with the previous competition notice regime, a part A competition notice does not constitute *prima facie* evidence of the matters in the notice.

On receiving a part A competition notice the ACCC would expect that the carrier or CSP would cease to engage in the conduct detailed in the notice. When the carrier or CSP contravenes the competition rule by engaging in the conduct detailed in the notice, the ACCC has a variety of options. For example, it may seek orders for, and commence proceedings to recover, pecuniary penalties of up to \$10 million and \$1 million per day that the conduct continues.

During the 2000–01 financial year, the ACCC did not issue any part A competition notices.

Advisory notices

If a part A competition notice is in force in relation to a carrier or CSP, the ACCC may issue a written advisory notice advising the notice recipient of the action it should take, or consider taking, to ensure that it does not engage, or continue to engage, in the kind of conduct dealt with in the part A notice.

An advisory notice is not legally binding. In issuing such a notice the ACCC is only offering advice to the recipient on how it can change its conduct to avoid contravening the Act. However, it is open to a court to have regard to an advisory notice when determining the orders against a carrier or CSP found to have contravened the Act.

During the 2000–01 financial year, the ACCC did not issue any advisory notices.

Part B competition notices

Part B competition notices are optional notices which the ACCC can issue to assist the proof of a contravention of the competition rule. A part B competition notice states that a specified carrier or CSP has contravened, or is contravening, the competition rule and sets out particulars of the contravention.

Once issued, a part B competition notice is *prima facie* evidence of the matters set out in the notice (i.e. the facts comprising the particulars of the contravention) in any proceedings under, or arising out of, Part XIB. It does not conclusively establish that a carrier or CSP has engaged in anti-competitive conduct, which is a matter to be determined by the court.

During the 2000–01 financial year, the ACCC did not issue any part B competition notices.

3.1.2 Exemption orders

A carrier or CSP proposing to engage in conduct which may breach the competition rule may apply to the ACCC for an exemption order. The ACCC may grant an exemption order where it is satisfied that:

- the resultant public benefit outweighs any public detriment of lessened competition; or
- the conduct will not breach the competition rule.

Conduct, which is the subject of an exemption order, will not be anti-competitive conduct for the purpose of the competition rule.

During the 2000–01 financial year, no exemption order applications were received.

3.2 Investigations under the anti-competitive conduct provisions

The ACCC experienced an increase in the number of anti-competitive conduct complaints received during the 2000–01 financial year. It also undertook three major investigations into possible contravention of the anti-competitive conduct provisions, details of which are outlined below.

3.2.1 ADSL

In February 2001 the ACCC began investigating complaints by actual and potential customers of Telstra's wholesale asymmetrical digital subscriber line (ADSL) service.¹¹ ADSL transmits an asymmetric data stream, with more of the stream going downstream to the subscriber and less coming back.¹² The complaints related to the technical engineering or 'architecture' that Telstra had chosen to provide its wholesale ADSL services over, and the apparent 'price squeeze' between the Telstra retail and wholesale ADSL services.

Complainants stated to the ACCC that as a consequence of the selected architecture, wholesale customers were unable to differentiate — either in terms of functionality or quality of service — its retail services from Telstra's retail services. As a result of the architecture that Telstra has chosen, wholesale customers were only provided with a Layer 3 (of the open system interconnection model (OSI)) service.¹³ Complaints indicated that this service provided by Telstra is so highly 'processed' that wholesale customers were unable to offer additional applications or services when using it as an input into their own ADSL product offerings, nor could they offer better quality of service. As they are unable to differentiate their retail ADSL services from Telstra's retail ADSL services, they claim that they have effectively been forced to sell a 're-badged' Telstra retail service.

11 The term DSL is the generic name for a technology that uses complex modulation schemes to extend wideband and broadband services over copper pairs.

12 BIS Shrapnel, *Telecommunication Infrastructures in Australia 2001*, July 2001, p. 64.

13 Layer 3 refers to the network layer of the commonly referenced multi-layered communications model, OSI. The network layer is concerned with knowing the address of the neighbouring nodes in the network, selecting routes and quality of service, and recognising and forwarding to the transport layer incoming messages for local host domains. A router is a Layer 3 device, although some newer switches also perform Layer 3 functions.

In addition, complainants indicated that Telstra was supplying its wholesale ADSL services to customers at prices with only a small positive or negative margin between the wholesale prices and Telstra's retail prices for the same service.

The ACCC issued a part A competition notice to Telstra in relation to the above conduct in the post-reporting period. The ACCC also issued two non-financial record keeping rules (RKR's) to Telstra related to compliance with the standard access obligations for the roll-out of ADSL services (see section 5.2.2).

3.2.2 Internet peering

The ACCC continues to monitor the competitive environment for the provision of Internet access services by Internet backbone network providers. In particular, there is on-going monitoring and investigation of the outcomes generated by the issue of the two competition notices to Telstra under Part XIB of the Act in May and June 1998. Immediately following the issuing of these notices, Telstra commenced negotiations with the then three largest alternative Internet access network owners. The outcome of which was an agreement by these four parties (Telstra, Optus, UUNet and Connect) to interconnect their backbone networks on a reciprocal, no-payment or 'peering' basis. However, some of the parties subject to the peering arrangements following the ACCC's intervention in 1998 have not extended peering or reciprocal interconnection arrangements to other parties.

Following the release of its discussion paper in February 2000 regarding issues and factors relevant to the interconnection of Internet networks, the ACCC has watched the development of interconnection arrangements as they affect competition across an increasing number of telecommunications markets. Initiatives include further investigation of the effect of failure to offer interconnection between networks as technology moves to 'always on', packet-switched services, and away from short duration, circuit switched services. The ACCC is also moving to assess the impact that the general transition from voice to data applications will have on the development and deployment of next generation networks.

Another discussion paper will be released in the post-reporting period on these issues.

3.2.3 MegaPop

In April 2001 the ACCC received complaints from wholesale ISPs and network providers alleging that Telstra was engaging in anti-competitive conduct by refusing to purchase public switched telephone network terminating access (PSTN TA) from carriers looking to service downstream customers that provide access to the Internet to end-users. In this situation Telstra, as the access seeker, refused to pay the other network a termination fee when it passed on the data call which originated from its PSTN network.

The interconnection of competing networks is a central component to achieving effective facilities-based competition, as it allows end users on competing networks to communicate. The promotion of any-to-any connectivity was one of the main reasons for the ACCC's decision to mandate access to PSTN networks on 1 July 1997.

In late 2000 Telstra reviewed its approach of agreeing to PSTN TA interconnection arrangements and refused to acquire this service, in particular from those providing wholesale or retail Internet service provider (ISP) services. Telstra has not refused to acquire PSTN TA in relation to voice calls. In justifying its refusal to purchase PSTN TA in relation to data calls, Telstra indicated that:

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- it was unable to recover the full cost of holding a long data call, thereby incurring unacceptable commercial losses on data calls to ISPs; and
 - the carriage of data calls on the PSTN is inefficient.

In lieu of agreeing to network interconnection, Telstra originally offered the complainants a wholesale product known as MegaPoP, which Telstra advised performs the same function as interconnection for ISP dial-up access calls. However, unlike interconnection arrangements that typically involve payments by Telstra to a competitor, the MegaPoP alternative requires Telstra's wholesale customers to pay Telstra for handing over data calls. The complainants asserted that MegaPop is unsuitable for the requirements of all ISPs because:

- it lacked fundamental functionality required to deliver useful services to the ISP connected to these alternative networks; and
- adopting MegaPoP effectively makes the alternative networks mere resellers of Telstra's MegaPoP retail dial-up service, effectively precluding them from competing with Telstra in the provision of wholesale network services.

In response to the concerns raised about MegaPoP, Telstra offered an alternative interconnection service for data calls called dial Internet access service (DIAS). DIAS is similar to the PSTN terminating model but instead of Telstra paying the other network a termination fee, it requires the other network to pay Telstra for the delivery of the traffic.

The ACCC will continue to investigate matters relating to PSTN interconnection, particularly the viability of DIAS, through the 2001–02 financial year.

4. Consumer safeguards provisions

This section of report 1 details major ACCC investigations involving potential breaches of the consumer protection provisions in Part V of the Trade Practices Act which are specifically related to telecommunications. The Act does not have consumer protection provisions which are specific to the telecommunications market.

During the 2000–01 financial year, the ACCC experienced a significant increase in the number of consumer protection complaints specifically related to telecommunications. These totalled approximately 2292, up from 820 the previous financial year. Many related to three major investigations the ACCC conducted into possible contravention of the consumer protection provisions, details of which are below.

4.1 Acceptable use policies

In the 2000–01 financial year, acceptable use policies (AUPs) were an area of considerable concern for the ACCC. An AUP is typically a policy that has been used by an ISP to limit or withdraw services if it believes a consumer is taking advantage of an 'unlimited' or 'free' offer. The ACCC was particularly concerned about the numerous complaints from consumers about the use of AUPs by a range of carriers and CSPs. While the ACCC recognises the need for AUPs to deter abuse in network industries, this needs to be balanced with the need for consumers to have certainty about the services for which they are purchasing.

After receiving numerous complaints from consumers the ACCC investigated Optus' advertisement of an 'unlimited' local call package and an 'unlimited' cable Internet service.

With regard to the 'unlimited' local call package, Optus initially advertised its package in March 2000, with the statement 'your household can make hundreds or thousands of local calls a month'. In early May 2000, however, Optus introduced the 'Optus Local Fair Go Policy' that sought to limit the 'unlimited' local calls to fewer than 500 calls per month. The ACCC accepted a s. 87B undertaking on 7 September 2000, with Optus agreeing to allow all customers on the unlimited local call packages to make unlimited calls.

In late 2000 the ACCC's attention was also drawn to the advertising of the Optus@Home cable Internet service. The service was advertised as offering an 'unlimited' service when in fact some users had been terminated from the service for overuse. The matter was resolved when the ACCC accepted an undertaking from the owners of Optus@Home — Cable & Wireless Optus and Excite@Home — on 23 October 2000, requiring that they:

- remove all references to 'unlimited' in relation to the service;
- replace the AUP with a more practically focused fair-use policy;
- provide a mechanism for users to be able to track their use of the service; and
- compensate all customers who had been terminated from the service under the previous AUP.

In light of the publicity surrounding the ACCC's actions, a number of ISPs including Telstra BigPond, have amended the terms and conditions of use of services to avoid potential uncertainty that may arise from using the term 'unlimited download subject to AUP'.

It should be noted that, while not stemming directly from the Optus matter, the ACCC released a publication on 15 February 2001 in response to an increasing number of complaints from consumers about the advertising practices of ISPs, particularly in using the words 'free' and 'unlimited'. The publication, entitled *fair.com*, is directed at helping ISPs to meet their consumer protection obligations when advertising or promoting goods and services. The publication reflects the ACCC's commitment to educate businesses about their consumer protection obligations.

The ACCC remains concerned about the continuing number of complaints about the use of AUPs, and it is anticipated that this area of advertising will be closely monitored over the 2001–02 financial year.

4.2 Slamming

The high incidence of unauthorised customer churn proved to be a major focus of the ACCC's consumer protection activities in the 2000–01 financial year.

During the 2000–01 financial year, the ACCC investigated the selling practices of Primus and One.Tel, taking them to court for activities including:

- misleading and deceptive conduct; and
- unconscionable conduct in taking unfair advantage of consumers with disabilities and the elderly.

On 13 December 2000 the matter was settled by way of consent orders including injunctions in the Federal Court and s. 87B undertakings. The injunction orders included that Primus and One.Tel be restrained from engaging in misleading and deceptive conduct, fraudulently obtaining signatures or consent over the telephone, and coercing or harassing potential customers in transferring their phone services. The s. 87B undertakings stated that both companies would:

- write to all affected customers;
- provide compensation to such customers where appropriate; and
- engage an independent assessor to undertake a review of business practices, including marketing methods and complaint handling arrangements.

Further, both parties agreed to contribute \$500 000 toward a public awareness campaign aimed at stamping out unauthorised customer transfers. The fund is being administered by ACIF's Public Education Campaign Committee, which was established in April 2001. In the post-reporting period the committee launched a four-week campaign covering industry codes and laws, selling practices and rights of consumers to more information when transferring or entering into new telephone service contracts.

In investigating the conduct of Primus and One.Tel, the ACCC also acknowledged that the door-to-door seller and telemarketing agents had directly engaged in the impugned behaviour, even though it considered that it was the responsibility of the telecommunications companies involved to ensure their representatives were adequately supervised to avoid liability under the Act.

As such, on 28 May 2001, the ACCC instituted proceedings in the Federal Court against Axxess, a door-to-door sales agent allegedly involved in the above conduct. The ACCC alleged that Axxess and its door-to-door agents illegally obtained signatures from consumers by:

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- falsely advising people that, in signing or initialling a form, they were simply requesting further information;
 - signing up elderly and vision impaired people; and
 - unconscionably insisting that the person sign the transfer document immediately, without having the opportunity to read or comprehend it.

The ACCC is seeking injunctions restraining Axxess and its door-to-door selling agents from engaging in the conduct of concern, and orders requiring the implementation of trade practices corporate compliance programs and attendance at trade practices seminars. Settlement negotiations were continuing at the end of the 2000–01 financial year.

The significance of consumer protection in relation to customer transfer is reflected in the registration, on 23 May 2001, of an industry code titled *Customer Transfer* (ACIF C546: 2001) by the ACA. The work involved in developing this code coincided with the ACCC's aforementioned investigations into slamming. The customer transfer code outlines appropriate guidelines on the transfer of consumers' telecommunications services. It seeks to minimise the incidence of improper transfer of a customer from one service provider to another without the customer's full knowledge and consent.

It is anticipated that unauthorised customer churn will continue to be the focus of further investigations in the 2001–02 financial year.

4.3 Telstra's SMS billing for pre-paid mobile phones

In August 2000 Telstra introduced the short message service (SMS) to pre-paid GSM Telstra customers. At that time Telstra's billing platform was such that the SMS message bill could be delayed by up to 48 hours. Because of this delay, customers sometimes found themselves with an account balance of less than zero even though the product was 'pre-paid'. This is despite the central benefit of pre-paid phones being that they allow consumers to control their spending and pay for services up-front so they do not find themselves in debt.

Customers only realised that they had a negative balance when they bought a recharge card, and the new balance reflected the recharge value less the cost of any SMS message sent after the balance had reached zero. In some instances customers had their entire recharge card go towards paying their negative balance.

The ACCC became aware of this through complaints to it and the Telecommunications Industry Ombudsman. Following investigation the ACCC became concerned there was not adequate disclosure of the fact that owners of pre-paid GSM Telstra mobile phones could go into debt because of the billing delay. The ACCC raised its concern with Telstra.

Telstra responded by ensuring that the balances of pre-paid customers cannot fall below zero. Telstra agreed to credit those customers who recharged their cards while they had a negative balance by the amount that was used to credit the negative portion, and to bring all customers who had a negative balance up to a zero balance.

5. Tariff filing and record keeping rules

This section of report 1 outlines the tariff filing and record keeping rules (RKR) provisions of the Trade Practices Act, including the development of the new regulatory accounting framework that captures financial information for specified carriage services.

The ACCC has specific information-gathering powers relevant to performing its functions or exercising its powers under Parts XIB and XIC of the Act (in addition to its general powers to obtain information under s. 155). These powers allow it to examine the pricing conduct of carriers and CSPs where there are concerns about anti-competitive conduct, or for use in determining appropriate access prices. They also enable the ACCC to be aware of market behaviour within the telecommunications industry and to develop appropriate regulatory responses.

5.1 Tariff filing

The ACCC's tariff filing powers can be divided into two distinct parts:

- general telecommunications tariff filing (division 4 of Part XIB); and
- Telstra-specific tariff filing (division 5 of Part XIB).

5.1.1 Tariff filing directions under division 4 of Part XIB

Where the ACCC is satisfied that a carrier or CSP has a substantial degree of power in a telecommunications market, it may direct the carrier or CSP under division 4 of Part XIB to provide the ACCC with certain information on charges for specified carriage services and/or ancillary goods or services (including goods or services for use in connection with a carriage service) or information on its intentions regarding those goods or services.

In the 2000–01 financial year, the ACCC did not find it necessary to use these powers.

5.1.2 Tariff filing by Telstra under division 5 of Part XIB

Division 5 of Part XIB requires Telstra to file information for all basic carriage services (BCSs) with the ACCC. These are services that allow for communication between two or more distinct places, and which are supplied by means of fixed line or satellite-based facilities. They do not include supply of customer equipment.

Specifically, Telstra is required to provide the ACCC with a written statement setting out its proposed pricing changes for BCSs. Telstra is required to provide this information at least seven days before imposing, varying or ceasing to impose a charge for a BCS. The ACCC may shorten the seven-day period or exempt a charge for a specified BCS from filing.

A strict interpretation of division 5 would require Telstra to provide complete details of all offerings, both standard and individualised (non-standard), along with all variations made to these offerings.

However, provision of all information under division 5 was seen as being administratively burdensome for both the ACCC and Telstra. A streamlined process was developed by identifying the relevant BCSs and charging information which would assist the ACCC in detecting potential anti-competitive behaviour.

In this regard, in June 1998 the ACCC and Telstra agreed that relevant information would be provided for certain BCSs while not causing practical and resource difficulties. The agreement also provides an effective and efficient tariff filing process that meets the fundamental objectives of division 5.

The agreement consists of the following four elements:

- Telstra is to provide its standard form of agreement on a weekly basis, along with a list of all amendments (additions, variations and withdrawals) that have taken place during that week;
- Telstra is to provide a monthly summary report of any non-standard form of agreements that it entered into for that calendar month;
- Telstra is to provide a briefing to the ACCC where it has introduced, varied or withdrawn an offering for a BCS and considers that change to be significant; and
- the ACCC may also request a briefing to obtain information about any amendments to Telstra's standard form of agreement or where further detail is required on a non-standard form of agreement.

Exemptions exist for particular BCSs when there is:

- a limited potential likelihood for anti-competitive conduct;
- information already available to the ACCC through the access regime; and
- information otherwise available from the previous tariff filing agreement between Telstra and AUSTEL.

Examples of exempted BCSs are services which are declared or which are provided for defence purposes. In these cases the ACCC may request a briefing from Telstra.

During the year Telstra complied with the requirements to provide tariff filing information to the ACCC on all but one occasion. On this occasion, Telstra failed to act within the spirit of the tariff filing arrangements by failing to notify the ACCC of an increase in line rental until the afternoon before the increase was announced publicly.

5.2 Record keeping rules

Under s. 151BU of Part XIB of the Trade Practices Act, the ACCC has the power to make RKR by written instrument and require that carriers and CSPs comply with these rules. The rules may specify what records are kept, how reports are prepared and when these reports are provided to the ACCC. If the ACCC notifies a carrier or CSP that particular RKRs apply to them, the ACCC must give that carrier or CSP a copy of the rules.

The ACCC cannot require the keeping of records unless they contain information relevant to the responsibilities of the ACCC. For the purposes of s. 151BU, these responsibilities include the operation of Parts XIB and XIC (e.g. establishing if a carrier or CSP is complying with the competition rule).

5.2.1 Financial record-keeping rules

In May 2001 the ACCC finalised a new financial RKR regime and notified carriers of their requirement to report under these rules. The written instrument containing the new RKRs for the telecommunications industry is the *Telecommunications Industry Regulatory Accounting Framework* (RAF). The RAF replaces the previous financial reporting obligations set out in the AUSTEL Chart of Accounts and Cost Allocation Manual.

The RAF consists of 22 rules and 11 schedules detailing the financial reporting requirements that apply to certain carriers or CSPs notified by the ACCC. The carriers currently required to report are Telstra, CWO, Primus, Vodafone, and AAPT.

The RAF introduces a vertical and horizontal accounting separation model that requires reporting carriers or CSPs to provide the ACCC with information on their revenue, costs, capital and service usage across a broad range of services, and across the retail, internal wholesale and external wholesale businesses. This information is provided to the ACCC at six-monthly intervals.

The RAF facilitates accounting separation, which can particularly assist investigations of possible anti-competitive conduct, and in arbitrations of access disputes. It also provides the ACCC with a base of regular and audited financial information which help in declaration (and revocation) inquiries and in preparing reports on competition in the industry.

The ACCC is currently assisting carriers to implement the RAF, as set out in the RKRs. The ACCC may make minor amendments to the RAF to overcome any practical problems that may emerge over the initial implementation phase. The ACCC also plans to review the RAF in 2003.

It should be noted that during the 2000–01 financial year the ACCC initiated internal work on the public disclosure of RKRs information (this includes, but is not limited to, information collected under the RAF). The ACCC has been keen to consider disclosure of some of this RKR information to reduce information asymmetries between access providers and access seekers, and to therefore increase certainty, reduce industry disputation and promote competition in downstream telecommunications markets.

Sections 151BUA–BUE give the ACCC the power to disclose reports prepared in accordance with the record keeping rules to the public or specified persons. These sections require the ACCC, for it to release RKR information, to be satisfied that disclosure would be likely to promote competition or facilitate the operation of Parts XIB or XIC. The ACCC must also have regard to the legitimate commercial interests of the carriers involved, and any other relevant matters, in not disclosing the information.

A discussion paper with the ACCC's preliminary views and seeking industry comments was released in the post-reporting period. The ACCC will review submissions to the discussion paper and finalise disclosure arrangements during the next reporting period.

5.2.2 Non-financial record keeping rules

After the release of a discussion paper and receiving submissions from parties on non-financial RKRs last financial year, the ACCC decided not to impose a pre-determined set of non-financial RKRs. In making this decision, the ACCC was particularly conscious that the ACIF was considering establishing an electronic information-gathering and reporting process that would capture information from the various operation support systems generated by carriers and CSPs. The ACCC considered this would override the need for it to create a non-financial regime.

During the 2000–01 financial year, there was progress in the establishment of an electronic information-gathering and reporting process, known as ToLI. The ACCC made an initial disbursement to this ACIF initiative from funds paid by Telstra in settling the commercial churn litigation matter in February 2000. The Electronic Information Exchange (InterOperator) Reference Panel (EIERP) is managing the establishment of ToLI, with the aim of developing effective and efficient business-to-business e-commerce systems to streamline industry interworking.

The development of the electronic process, known as the electronic information exchange (EIE) project, has advanced to the industry consultation stage. Once that is completed there will be the design and build phase, during which the industry standards and codes necessary to run the EIE will be developed and the role of ownership and management of the EIE will be finalised. This stage is expected to be completed by early 2002.

In deciding not to create a similar general regime for non-financial RKR as that for financial RKR, the ACCC decided that it would apply the non-financial RKR on a case-by-case basis, where this was seen as necessary to fulfil its regulatory responsibilities. The ACCC did conclude, however, that it would generally be considered appropriate to apply the non-financial RKR to determine compliance with the standard access obligations, as opposed to determining compliance with the anti-competitive conduct provisions in Part XIB.

Reflecting its considerations, the ACCC issued two non-financial RKR to Telstra during the 2000–01 financial year. Both related to Telstra's compliance with the standard access obligations for the roll-out of ADSL services.

After receiving complaints from access seekers about the length of time it took to get physical access to exchanges, the ACCC issued a RKR to Telstra on 21 August 2000 requiring it to provide detailed information on how Telstra provides its competitors with access to its copper network. The issuing of this RKR reflected the fact that while declaration of the ULL service in July 1999 allowed Telstra's competitors direct access to the copper lines that connect customers to local telephone exchanges, it was also important to ensure that access seekers were given timely access to exchanges. The ACCC found that once the RKR was in place, many of the concerns of the access seekers were addressed and that fewer delays were experienced in obtaining access to exchanges.

In November 2000 the ACCC issued another RKR to Telstra involving the deployment and fault handling of ADSL services. The Act requires Telstra to take all reasonable steps to ensure that it provides access seekers with service equal in technical and operational quality to the service it provides to itself. There are similar equivalence requirements in relation to fault detection, handling and rectification. This RKR was designed to ensure that Telstra's role in the delivery of high-speed data services, as a wholesale and retailer of such services, is more transparent.

6. Access to telecommunications network services

This section of report 1 details the ACCC's involvement in regulating access to telecommunications networks, including the declaration of telecommunication services and arbitrating access disputes. It also describes the process of developing pricing principles for particular services, which are likely to be used by the ACCC to settle access disputes.

Part XIC of the Trade Practices Act establishes the industry-specific access regime for the telecommunications industry. The primary objective of Part XIC is to promote the long-term interests of end-users (LTIE), which is determined by assessing whether an action is likely to achieve the objectives of:

- promoting competition in telecommunications markets;
- achieving any-to-any connectivity (i.e. ensuring communication between users of different networks); and
- encouraging the economically efficient use of, and investment in, infrastructure.

In administering Part XIC, the ACCC encourages industry participants to negotiate and settle their own disputes. Consistent with the general policy guiding the telecommunications regulatory provisions, as provided in s. 4 of the Telecommunications Act, the ACCC also encourages the industry to implement self-regulatory processes where possible. However, where intractable disagreements arise or anti-competitive conduct occurs the ACCC will seek to use its regulatory powers to settle them.

6.1 Framework for access to declared services

The Part XIC access regime only applies to services which are declared or were deemed to be declared. Deemed services are telecommunications services which were supplied under pre-existing access agreements before Part XIC was introduced on 1 July 1997 and for which the ACCC decided declaration was in the LTIE.

Declaration is the process of determining whether a service should be brought within the regulatory net. The ACCC's guide, *Telecommunications services— declaration provisions*, provides information on the ACCC's approach to particular declaration issues, including the matters that the ACCC must consider and the way in which it will consider them in performing its declaration functions. The guide also contains a section dealing with procedural issues, such as the public inquiry process.

The two ways in which a service can be declared are:

- through the recommendation of the Telecommunications Access Forum (TAF), which is an industry body representing the interests of both access providers and seekers of telecommunications carriage services, and which was established to assist in the self-regulation of the telecommunications industry;¹⁴ or

¹⁴ As at 31 January 2002 the TAF was dissolved.

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- after a public inquiry is held by the ACCC.

The ACCC seeks to use the declaration process to develop the optimal scope for telecommunications access regulation. As competition increases through the entry of new carriers and CSPs, and greater substitutability between different technologies, the extent of regulation required for some existing services may diminish. However, to the extent that new services have features that would warrant regulation, the ACCC may still have to consider whether services need to be declared.

Once a service is declared the access provider is subject to standard access obligations. These require the access provider to provide the service, on request, to the access seeker. In doing so, the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access providers provides to itself. While the terms and conditions of access are not specified in the Act, it does provide three ways in which they can be determined, namely:

- by commercial negotiation between the access provider and access seeker;
- if commercial negotiations cannot reach an agreed outcome the ACCC, following notification of an access dispute, can determine the access terms and conditions in an arbitration between the access seeker and provider of the declared service; and
- the ACCC can accept an undertaking by the access provider, which will determine the terms and conditions of access.

6.2 Public inquiries into declaration of telecommunication services

During the 2000–01 financial year, the ACCC finalised its public inquiry into transmission services. There were also further developments in relation to the ACCC's decision to declare the broadcasting access service, where Telstra and Foxtel have challenged the ACCC's decision.

The specific details of these matters are provided below.

While occurring post-reporting period, it is also worth noting that the ACCC has initiated a number of public inquiries. These include the consideration of whether to declare a line sharing service, and a proposed variation to the GSM service description with the effect of making the GSM declaration technologically neutral with respect to technologies currently deployed or in use in Australia.

6.2.1 Transmission services inquiry

Transmission capacity above 2 Mbps was deemed to be declared in June 1997, except for transmission between the mainland capital cities (known as intercapital transmission). Transmission capacity is used for the transmission of voice, data or other communications between a point of interconnection located in different capital cities. The ACCC varied the transmission capacity declaration on 4 November 1998 following a public inquiry process. The variations involved, *inter alia*, adding intercapital transmission to the declared services except for the Melbourne–Canberra–Sydney route.

When the ACCC varied the declaration on transmission capacity, it also noted that it would establish a monitoring program. In light of the information collected as part of the monitoring program, the ACCC decided to review the declaration relating to intercapital transmission capacity. As such, the ACCC issued a discussion paper on this matter in June 2000.

After receiving and considering submissions to its discussion paper, the ACCC released a final report, *Domestic Transmission Capacity Service*, in May 2001 containing its decision to vary the transmission capacity service to exclude intercapital transmission capacity from the declaration. Consequently, the transmission capacity service between the capital cities, which includes Brisbane, Sydney, Canberra, Melbourne, Adelaide and Perth, was no longer regulated from 31 May 2001.

The ACCC's view was that varying the service description to remove the remaining intercapital transmission routes from declaration will be in the long-term interests of end-users. The ACCC particularly noted that the intercapital transmission market appears to be in transition towards greater competition. While new entry has focused on the traffic intensive routes on the eastern seaboard (Melbourne, Canberra, Sydney and Brisbane), there was also new entry occurring between Melbourne and Perth. The level of new entry and discussions with new entrants suggested that declaration has not had an adverse impact on efficient investment.

Importantly, it appeared that access seekers were already receiving lower prices for transmission and, for larger access seekers, more flexible terms and conditions for the service. With the entry of new carriers, access seekers were expected to receive even more competitive prices which should lead to benefits for end-users in terms of greater choice of suppliers (to the extent that more competitive upstream prices facilitate efficient new downstream entry), lower prices and new services.

The ACCC resolved, nevertheless, to continue to monitor the provision of the intercapital transmission capacity service. It believes there are benefits to continued monitoring that outweigh the cost to the carriers and the ACCC. Such benefits include:

- enabling the ACCC to monitor whether competition continues to develop as expected; and
- the provision of important information for comparison purposes with regional routes (that is, the ACCC could compare trends in prices for intercapital transmission capacity with those for specific regional routes, particularly those close to intercapital transmission routes).

The monitoring program has been broadened to include major new entrants, such as Macrocom, PowerTel, Amcom and Soul Pattinson Telecommunications, in addition to Optus and Telstra. The ACCC contacted these carriers following the release of the final report and has requested information on prices of, and revenue from, intercapital transmission capacity and the level of capacity utilised. The information is to be provided on a six-monthly basis. The first stage of collection, involving information from 30 June 2001, is to be submitted to the ACCC in the post-reporting period.

6.2.2 Challenges to the ACCC's decision to declare the broadcasting access service and analogue subscription television broadcast carriage service

In June 1997 the ACCC deemed the broadcasting access service as a declared service. It subsequently conducted a public inquiry into whether to declare an analogue-specific subscription television service and a technology-neutral subscription television service. In August 1999 the ACCC announced its decision to declare the analogue-specific service, but not to declare the technology—neutral service at that stage.¹⁵

15

See ACCC, *Declaration of an analogue subscription television broadcast carriage service*, October 1999 and ACCC, *Declaration of a technology-neutral subscription television carriage service*, October 1999.

Telstra and Foxtel challenged, in the Federal Court of Australia, the validity of the ACCC's initial deeming of the broadcasting access service and the subsequent decision to declare the analogue specific subscription television broadcast carriage service. The trial judge held that any invalid parts of the 1997 deeming statement could be severed to leave a valid instrument, and he dismissed the challenges to the validity of the 1999 declaration. This decision and decisions in other related proceedings were appealed to the Full Federal Court.

In August 2000 the Full Federal Court upheld the validity of the ACCC's 1999 declaration, but held that the initial deeming statement with respect to the broadcasting access service is invalid.

Foxtel then sought special leave to appeal the Full Federal Court's decision to the High Court of Australia. Foxtel was seeking to argue that it is not a 'carriage service provider', which is important for whether it is required to provide access to the declared analogue-specific service. Foxtel was also seeking to argue that there was an obligation on the ACCC to make specific findings on the market and effect on competition when deciding whether to declare the analogue-specific service. In the post-reporting period (August 2001), the High Court refused to grant Foxtel's application for special leave, thereby terminating Foxtel's ability to argue the matter.

The judicial decisions mean that, subject to capacity being available, Telstra is under standard access obligations to provide access to its HFC cable network to access seekers. In turn, this allows access seekers to provide pay television services to end-users. This will enable alternative content service providers, such as TARBS and Seven Cable Television Pty Limited (C7), to negotiate access with Telstra. If parties are unable to reach agreement, the dispute can be notified to the ACCC for arbitration.

Both TARBS and C7 have sought access to the Telstra cable and have notified the ACCC of the existence of access disputes. During the 2000–01 financial year, the ACCC has been actively arbitrating terms and conditions of access for this service. Although the arbitrations have been delayed as a consequence of proceedings before the courts, the ACCC has issued interim determinations requiring that both C7 and TARBS be given access on certain terms and conditions. In the absence of agreement by the parties, the ACCC will be looking to finalise the determinations in the first half of 2002.

6.3 Exemption applications

Under s. 152AT of the Trade Practices Act, a carrier or CSP may apply to the ACCC for a written order exempting it from any or all of the standard access obligations that apply to a declared service. The standard access obligations require, among other things, an access provider to supply the declared service to the access seeker, if requested. If the ACCC is of the opinion that an order made in respect of an application for an individual exemption is likely to have a material effect on the interests of a person, the ACCC must publish the application and invite submissions on whether the application should be accepted.

6.3.1 Local carriage service exemption applications

On 7 June 2000 the ACCC received an application from Telstra for an exemption under Part XIC from its standard access obligations to supply the local carriage service to its competitors in the CBD areas of Melbourne, Sydney, Brisbane, Adelaide and Perth.

In November 2000 Telstra lodged a second application for an exemption from its obligations to supply the local carriage service to its competitors in the CBD areas of Hobart, Canberra and Darwin, metropolitan areas of all capital cities, and three regional centres: Newcastle, Wollongong and Geelong.

In August 2000 the ACCC released a discussion paper in relation to the first exemption application, inviting interested parties with an opportunity to comment on Telstra's exemption application. In March 2001 it released a discussion paper for the second exemption application. In conjunction with the individual exemption applications from Telstra, the ACCC also decided to consider class exemptions, under s. 152AS, in the areas covered by the applications, and sought comment on these exemptions in the discussion papers as well.¹⁶

The ACCC's consideration of Telstra's exemption applications and the class exemptions draws upon, among other sources, information contained in the report, *Telecommunication Infrastructures in Australia 2001*, prepared for the ACCC by BIS Shrapnel. The reliance by the ACCC on this report, which was completed in July 2001 for consideration of Telstra's exemption applications, meant some delay in the issue of draft decisions on Telstra's exemption applications. As such, the draft decision for the first LCS exemption application titled, *Future scope of the Local Carriage Service — a draft report*, was released in the post-reporting period. Consideration of the second LCS exemption application was also continuing at the end of the 2000–01 financial year.

6.4 Access undertakings

Part XIC includes a mechanism allowing for voluntary access undertakings to be given by access providers on the supply of declared services. The undertaking must set out the terms and conditions upon which the access provider undertakes to comply with the particular standard access obligations.

Under the provisions of Part XIC, the ACCC is required to accept or reject an undertaking. If accepted by the ACCC, a relevant undertaking must be applied in an access dispute by the ACCC.

For that reason undertakings, if accepted by the ACCC, provide a degree of certainty to both access providers and access seekers on those matters specifically addressed in the undertaking.

6.4.1 ACCC's final decision regarding Telstra's access undertaking for the domestic PSTN access services

On 10 July 2000 the ACCC announced it had finalised its assessment of a second access undertaking, submitted by Telstra on 24 September 1999, relating to the domestic declared PSTN originating and terminating services. The ACCC's final decision, detailed in *A Report on the assessment of Telstra's undertaking for the domestic PSTN originating and terminating access services*, was to reject the undertaking as it considered the proposed charges were too high.

In the undertaking Telstra had proposed headline charges for the originating and terminating services of 2.37 cents per minute for 1999–2000 and 2.01 cents per minute for 2000–01. By contrast the ACCC considered that the appropriate price for access to Telstra's PSTN services should have been, on average, 1.77 cents per minute for 1999–2000 and 1.53 cents per minute for 2000–01.

16

Under s. 152AS the Commission can determine that each member of a specified class of carriers (e.g. current and future carriers supplying the local carriage service in specified areas), or a specified class of carriage service provider, are exempt from any or all of the standard access obligations.

In reaching its final decision the ACCC based its assessment of an appropriate access price on estimates of the efficient cost of providing access to the PSTN services. To determine this it used a modified cost model originally prepared for it by National Economic Research Associates (n/e/r/a). The final cost modelling undertaken by the ACCC indicated that Telstra's charges were approximately 30 per cent more than the costs an efficient operator would incur. The undertaking did not cover non-price terms and conditions.

The final decision followed the release of a draft report in April 2000. In making its final decision the ACCC considered submissions received on the April 2000 draft decision and performed additional analysis, and concluded that its draft estimates of what were considered to be Telstra's efficient costs were approximately correct. Nonetheless, the ACCC's estimates of the final charges reflected some changes to the input assumptions used in its modelling.

Further work on access pricing for PSTN services

The ACCC considered that it would be constructive to give a public indication of its views on access prices for the period beyond that examined by the ACCC in assessing Telstra's undertaking. This was on the basis that the arbitration determinations based on its prices arising from the assessment of Telstra's undertaking were to expire on 30 June 2001, and that the underlying methodology used to determine the PSTN access prices was also under review by the Australian Competition Tribunal (ACT) (see section 6.5.2 for details on the ACT review).

In addition, there was need to provide greater certainty about pricing outcomes to assist negotiations by the parties for the post 2000–01 period and thereby avoid the possibility of fresh arbitration disputes, pending the finalisation of the ACT process.

On 18 May 2001 the ACCC announced its view that for 2001–02 a provisional headline rate of 1.3 cents per minute for domestic PSTN originating and terminating access on Telstra's network would be reasonable. The ACCC noted that this would result in a similar percentage reduction to Telstra's access prices in 2001–02 as that which the ACCC had formally determined for 1999–2000 and 2000–01. Since announcing its views on a provisional headline rate for 2001–02, the ACCC has not been required to arbitrate access disputes for this service.

6.5 Access disputes

As part of the ACCC's role in regulating access in the telecommunications industry, it has arbitration powers enabling it to issue directions, conduct hearings and make determinations for the purpose of resolving access disputes. The ACCC must undertake arbitrations if notified of an access dispute, but only after private negotiations, mediation and/or conciliation fail. When a relevant access undertaking has been accepted by the ACCC, the terms of the undertaking must be applied in resolving the dispute. If there is not an undertaking relevant to the dispute, then the ACCC may determine the appropriate terms and conditions within the arbitration process.

Before a dispute is referred to the ACCC for arbitration, the following criteria must be satisfied:

- a declared service is supplied, or will be supplied, by a carrier or a CSP;
- one or more standard access obligations apply, or will apply, to the carrier or CSP in relation to the declared service; and
- an access seeker is unable to agree with the carrier or CSP about the terms and conditions on which the carrier or CSP is to comply with those obligations.

It should be noted that in the post-reporting period the ACCC engaged an independent consultant to review its arbitration of disputes conducted under Part XIC of the Trade Practices Act and the Telecommunications Act. The ACCC initiated the review because it became aware of the need to independently review its processes for conducting arbitrations.

The review will focus on the internal procedures and processes of the ACCC. It involves comparisons of domestic and overseas arbitral processes, and interviews of stakeholders on their views about the operation of arbitrations to date. A key output of the review will be recommendations aimed at improving the efficiency of handling arbitration dispute processes.

It is intended that once the review is completed the ACCC will release a public guideline on its dispute resolution processes.

6.5.1 Notification of access disputes

At the end of the 2000–01 financial year, 38 access disputes were notified to the ACCC under Part XIC. This includes access disputes that had either been completed and/or withdrawn. A further dispute was notified under the Telecommunications Act as outlined in section 8.2.

Table 6.5.1 provides details on the access seekers, access providers, carriage service and status of the access disputes. As matters in access disputes are confidential, more specific details or information cannot be released in a public document.

Table 6.5.1. Access disputes at 2000–01 financial year end

Access seeker ^(a)	Access provider	Service(s)	Date notified	Determination/status
AAPT	Telstra	Domestic PSTN originating and terminating access service	11.12.98	Final determination issued under s. 152CP: 13 September 2000
Primus	Telstra	Domestic PSTN originating and terminating access service	5.2.99	Final determination: 18 September 2000
Flow Communications	Telstra	Domestic PSTN originating access service	7.1.00	Final determination: 27 November 2000
AAPT	Optus	Domestic PSTN originating and terminating access service	11.6.99	Withdrawn: 14 March 2001
Worldxchange	Telstra	Domestic PSTN terminating access service	28.12.00	Final determination: 4 May 2001
Optus	Telstra	Domestic PSTN originating and terminating access service	30.3.01	Ongoing at 30 June 2001
Telstra	Primus	Domestic PSTN terminating access service — for data calls to ISPs	7.7.00	Ongoing at 30 June 2001 Interim determination: 21 November 2000
Telstra	PowerTel	Domestic PSTN terminating access service — for data calls to ISPs	5.12.00	Ongoing at 30 June 2001 Interim determination: April 2001

Access seeker(a)	Access provider	Service(s)	Date notified	Determination/status
Telstra	AAPT	Domestic PSTN terminating access service — for data calls to ISPs	22.11.99	Ongoing at 30 June 2001 Interim determination: 4 November 2000
Telstra	The Internet Group (lhug) — notifier	Domestic PSTN terminating access service — for data calls to ISPs	1.11.00	Commission terminated: 6 June 2001
Telstra	Chime Communication (iiNet) — notifier	Domestic PSTN terminating access service— for data calls to ISPs	21.12.00	Commission terminated: 6 June 2001
Optus	Telstra	Integrated services digital network	11.5.99	Withdrawn: 4 September 2000
MCT	Telstra	Domestic data access service	10.5.99	Final determination: 22 December 2000
AAPT	Telstra	Domestic data access service	8.3.99	Withdrawn: 2 January 2001
Primus	Vodafone	Domestic GSM originating and terminating access services	1.10.99	Withdrawn: 5 December 2000
Primus	Optus	Domestic GSM originating and terminating access service	1.1.099	Originating withdrawn: 5 December 2000 Terminating withdrawn: 15 June 2001
Primus	Telstra	Domestic GSM terminating access service	1.10.99	Withdrawn: 7 June 2001
Worldxchange	Telstra	Domestic GSM terminating access service	22.12.00	Ongoing at 30 June 2001
AAPT	Telstra	Domestic GSM originating and terminating access services	16.3.99 & 19.3.99	Ongoing at 30 June 2001
AAPT	Vodafone	Domestic GSM originating and terminating access services	30.11.99	Ongoing at 30 June 2001
AAPT	Optus	Domestic GSM originating and terminating access services	15.6.99	Withdrawn: 2 May 2001
AAPT	Telstra	Local carriage service	21.3.00	Withdrawn: 30 March 2001
Primus	Telstra	Local carriage service	7.3.00	Ongoing at 30 June 2001 Interim determination: 29 January 2001

Access seeker(a)	Access provider	Service(s)	Date notified	Determination/status
RSL Com	Telstra	Local carriage service	5.9.00	Withdrawn: 4 December 2000
Worldxchange	Telstra	Local carriage service	22.12.00	Ongoing at 30 June 2001
People Telecom	Telstra	Local carriage service	28.5.01	Ongoing at 30 June 2001
MCT	Telstra	Local carriage service	29.12.99	Ongoing at 30 June 2001
Optus	Telstra	Local carriage service	13.8.99	Ongoing at 30 June 2001
One.Tel	Telstra	Local carriage service	18.7.00	Withdrawn: 30 April 2001
Dingo Blue	Telstra	Local carriage service	30.8.00	Ongoing at 30 June 2001
AAPT	Telstra	Unconditioned local loop service	24.7.00	Ongoing at 30 June 2001 Interim determination: 22 December 2000
Optus(XYZed)	Telstra	Unconditioned local loop service	27.7.00	Ongoing at 30 June 2001 Interim determination: 22 December 2000
Primus	Telstra	Unconditioned local loop service	9.10.00	Ongoing at 30 June 2001
One.Tel	Telstra	Unconditioned local loop service	4.8.00	Ongoing 30 June 2001 Interim determination: 22 December 2000
Optus	Telstra	Freephone and Local rate number portability	18.12.000	Ongoing at 30 June 2001
Optus	Telstra	Local number portability	20.4.00	Ongoing at 30 June 2001
TARBS	Telstra Multimedia, Foxtel and related parties	Broadcasting access service	23.9.99	Ongoing at 30 June 2001 Interim determination: 24 April 2001
C7	Telstra Multimedia, Foxtel and related parties	Broadcasting access service	31.8.00 & 1.9.00	Ongoing at 30 June 2001 Interim determination: 5 April 2001

Note: (a) access seeker is the notifier unless otherwise specified.

It should be noted that in the post-reporting period 13 access disputes were either terminated or withdrawn. By November 2001 there were only eight on-going access disputes.

6.5.2 ACT review of PSTN arbitration decisions

Under s. 152DO, final determinations made by the ACCC in the context of access disputes (including those in relation to access prices) are subject to review by the Australian Competition Tribunal (ACT). A review by the ACT is a review on the merits and is a full re-arbitration of the matter.

The ACT may affirm or vary the ACCC's final determination. The participants in an ACT review are not restricted from putting fresh material before the ACT, or changing their submissions from those they provided to the ACCC in the course of its consideration of the matter.¹⁷ A decision of the ACCC may continue to apply while a review is underway, or the ACT may make orders staying or otherwise affecting the operation or implementation of the final determination.¹⁸

An ACCC decision is also subject to appeal to the Federal Court of Australia on matters of law. A decision by the ACT is also subject to appeal to the Federal Court on matters of law.

In September 2000 the ACCC made separate final determinations in relation to two access disputes to which Telstra was a party: one with AAPT and one with Primus. The ACCC determinations dealt with the prices at which Telstra should supply AAPT and Primus domestic PSTN originating and terminating access services. Telstra subsequently lodged applications for review by the ACT of the ACCC's final determination in each matter. The ACT hearing is scheduled for the post-reporting period (March 2002). As the review is being conducted in private, specific details of the review cannot be released in a public document at this stage.

6.6 Pricing principles

6.6.1 Mobile number portability

Mobile number portability (MNP) allows customers to change from one CSP to another — irrespective of whether the CSPs are on the same or different mobile networks — and retain their mobile service numbers. On 30 September 1999, MNP was mandated in the Numbering Plan, when the ACCC issued directions to the ACA under the Telecommunications Act.

Following a request from the ACIF, the ACCC issued a draft guide on pricing principles for MNP in February 2000. Industry was generally supportive of the ACCC's draft pricing principles, with the exception of Telstra.

The ACCC delayed finalising the pricing principles of MNP because of industry deliberation about the precise technical solution(s) to be used to deliver MNP, and uncertainty surrounding the ACCC's powers to arbitrate disputes.

With no fundamental changes from the draft MNP pricing principles, the ACCC released its final report, *Pricing Principles for Mobile Number Portability*, in May 2001. The MNP pricing principles set out in the final report are consistent with those published for local number portability in June 1999. These pricing principles outline the approach that the ACCC is likely to apply if required to arbitrate a dispute over the terms and conditions of providing MNP. The ACCC, in its role as arbitrator of the

17 Post-reporting period (27 September 2001) an amendment to s. 152DO was passed which provided that, while final determinations are still subject to merits review by the ACT, no new evidence can be introduced when the matter is being re-arbitrated. This amendment does not affect any matters commenced by the ACT before the amendment came into effect.

18 If an interim determination is in place, it would remain in place if a final determination is stayed, or the ACCC may make an interim determination while a final determination is stayed.

price of MNP would determine the price (if any) that one prime service deliverer (PSD)¹⁹/CSP should pay another. However, it has no direct role in how these costs would be passed on to consumers. This would be largely at the discretion of individual PSD/CSPs.

In assessing the pricing principles for MNP, the ACCC identified six major issues of importance. These were:

- the implications for entry and competition in the provision of mobile services;
- incentives for PSD/CSPs to select efficient solutions to provide MNP;
- 'efficient' porting of mobile service numbers;
- industry-wide costs of providing mobile services;
- incentives for PSD/CSPs to provide appropriate levels of quality and reliability of MNP; and
- ability of customers to reap the rewards of investments in their MSNs.

The ACCC concluded that the following pricing principles would best achieve the legislative criteria set out in s. 8 of the *Telecommunications (Arbitration) Regulations 1997*:²⁰

- each PSD/CSP would bear its own system set-up costs;
- each PSD/CSP would bear its own customer transfer costs; and
- the PSD would be responsible for all efficient call conveyance costs that result from its choice of MNP solution.

Whilst conceding that having the PSD bear all call conveyance costs will prevent these costs from being signalled to the consumer, the ACCC considered this principle essential for ensuring PSDs have the right incentives to choose the most efficient MNP solution. The alternative of having each PSD/CSP bear their own call conveyance costs would only provide a partial remedy in correctly signalling call conveyance costs to consumers (as each CSP/PSD bears its own system set-up costs). It would also fail to provide PSDs with the right incentives to choose an efficient MNP solution.

6.6.2 Unconditioned local loop service

Since declaration of the unconditioned local loop service (ULLS) in July 1999, there has been considerable debate in the industry about appropriate pricing principles for this declared service.

In June 2000 Telstra announced proposed charges for the declared service, which involved a number of components such as a connection charge, a monthly rental charge and other charges relating to service quality and provisioning. The views of access seekers in relation to these charges, particularly the monthly rental, was that these were well above analogous line cost estimates determined as a part of the ACCC's network costing work, conducted for the assessment of Telstra's undertakings in relation to the declared PSTN services.

After June 2000 Telstra and a number of access seekers began negotiations over the terms and conditions of supply of the ULLS, including the price at which the service should be supplied. The ACCC was subsequently notified of four access disputes in relation to the pricing of the declared service.

19 The service deliverer who contracts to provide a carriage or content service to the calling party (or A-party).

20 The ACCC must take into account the legislative criteria under s. 8 of the *Telecommunications (Arbitration) Regulations 1997*, in making an arbitration determination.

In August 2000 the ACCC released a draft pricing paper, *Pricing of unconditioned local loop services (ULLS) and review of Telstra's proposed ULLS charges*. The paper provided the ACCC's preliminary views about both the pricing principles that should apply to the ULLS and Telstra's proposed charges. The ACCC considered that the price should be based on total service long run incremental cost (TSLRIC). Unlike the PSTN, however, the ACCC concluded that pricing for the ULLS should not include an access deficit contribution. It also considered that Telstra's proposed charges were around double that which a TSLRIC approach would achieve.

Since the release of the draft pricing paper, the ACCC has continued to develop its views on ULLS pricing principles, and Telstra's prices as part of its arbitration of the four ULLS disputes. Interim determinations, which further refined the ACCC's pricing approach, were issued to the parties in December 2000. Further work on certain aspects of Telstra's ULLS charges, dealing with the ULLS-specific costs and other elements, were subject to separate scrutiny after this period. The ACCC intends to release a final version of its ULLS pricing paper after the resolution of these ULLS arbitrations in the post-reporting period.

6.6.3 Local carriage service

The declaration of the local carriage service (LCS) took effect on 4 August 1999. The local carriage service is a service for local call resale, offered by an operator over its fixed line network so that other carriers without their own network infrastructure can provide local calls to end-users. In essence, this service involves the supply of an end-to-end voice grade carriage service between two points within the same local call zone.

The ACCC's draft decision on the LCS pricing principles was released in April 2000. Submissions were received in May 2000, with the ACCC's final report, *Access pricing paper — local carriage service*, released in November 2000. In its final report the ACCC did not change the view it expressed in its draft report that the access price of the LCS should be based on the retail-minus avoidable cost methodology. This involves the determination of the wholesale local carriage service price by subtracting the avoidable retail costs of supplying local calls from the retail price of a local call.

The ACCC considers that the retail-minus avoidable cost methodology ensures that access seekers will be able to compete with the access provider over the retail functions of a local call, as they receive the local carriage service at a price equal to the access provider's retail price minus avoidable costs.

The final paper outlined a number of key principles, which are summarised below.

- With regard to the retail costs to be subtracted from the retail price, the ACCC expressed its preference for the use of avoidable costs,²¹ rather than avoided costs,²² on the basis that this would place access seekers on a more competitively neutral position to Telstra in supplying their own local call services to end-users;
- the access provider's 'unbundled' local call price should be used as the benchmark retail price from which to deduct retail costs. The unbundled local call price is the local call price corresponding to a particular line rental charge. The ACCC is of the view that using the

21 Avoidable costs are the average costs of a local call (i.e. it includes not just the marginal cost, but some measure of the fixed retail costs of a local call that the access provider is no longer incurring).

22 Avoided costs are those costs that the access seeker actually avoids when it ceases retailing to end-users who are now supplied by its competitors. Hence, it represents the marginal retail cost of a local call that is now provided to an access seeker.

unbundled local call price as the starting price is likely to avoid the potential for 'ratcheting down of the local call prices'.²³ In addition, given that local calls are commonly provided as part of a bundle of services, this is likely to ensure that access providers have the flexibility to price local call services in the same manner as local call resellers; and

- where the access seeker rebills line rental in taking up this service, a retail discount should be applied to the line rental charge as well. To the extent that this is not done, the ACCC has indicated it may need to consider that retail costs for line rental, expressed in equivalent per call terms, be subtracted from the retail local call price when determining a price for the LCS.

6.6.4 Domestic PSTN originating and terminating access service supplied by non-dominant or smaller fixed networks

Following earlier deliberations on this matter, the ACCC issued its final report on the *Pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks* on 20 March 2001. The final report concluded the following:

- in circumstances where it is conducting an arbitration or reviewing an undertaking assessment, the ACCC is unlikely to set or accept a charge for a service that is higher than the efficient cost incurred by Telstra for the supply of an analogous service. This approach in effect imposes a price ceiling in negotiations for the supply of PSTN originating and terminating services by a smaller or non-dominant fixed network equal to the efficient costs incurred by Telstra, as may be determined by the ACCC;
- the ACCC may consider the costs of the smaller network if these are shown to be significantly below those of the larger network. However, in doing so the ACCC will recognise the need for encouraging and rewarding efficient facilities-based entry; and
- the ACCC also considered it appropriate to cap termination charges taking account of the average call duration for data calls.

It should be noted that the pricing principles for non-dominant networks are a transitory measure. The ACCC is of the view that interconnection arrangements that govern interconnection between such networks needs to be discussed on an industry-wide level. As such, the ACCC engaged the services of an independent consultant post-reporting period to consider, among other things, the issues involved in interconnection with these networks.

6.6.5 Domestic GSM originating and terminating access services

Following notification of several access disputes in the latter half of 1999 regarding GSM originating and terminating access services, the ACCC began consideration of the appropriate pricing principles for these services.

The ACCC sought economic advice from external consultants. A discussion paper was released based on that advice in December 1999. The ACCC subsequently sought submissions from industry and held a 'roundtable' forum. After issuing a draft report in December 2000 the ACCC sought further submissions.

23 Ratcheting down refers to the situation in which any response by the access provider to match a competitor's retail local call prices will correspondingly reduce the LCS price. If this leads to a further reduction in local call rates by access seekers, the access provider may feel forced to drop its retail price again, and so on.

The ACCC released its final report, *Pricing methodology for the GSM termination service*, shortly after the end of the 2000–01 financial year. In the report the ACCC established that there are particular characteristics of the GSM terminating access service requiring regulation at this time. A retail benchmarking approach, such that access prices for the GSM terminating service fall at the same rate as retail price movements for each carrier's overall mobile package, was determined to be the preferred regulatory approach.

The ACCC found that the competitive forces on the GSM terminating access service were limited and that integrated mobile carriers had some ability to restrict price competition in the downstream market for fixed-to-mobile calls. However, the retail element of the mobile market was seen as displaying signs of increased competition with falling retail prices and a wide variety of retail products on offer. Pegging access prices to retail price movements ensures that the provision of the GSM terminating service mirrors the increasingly competitive element of the mobile services market.

6.7 TAF telecommunications access code

Under division 4 of Part XIC the TAF may submit a draft TAF telecommunications access code to the ACCC for approval. The draft code sets out model terms and conditions relating to compliance with the standard access obligations that are capable of being adopted by carriers or CSPs submitting access undertakings to the ACCC for possible approval.

During the 2000–01 financial year, the TAF made further variations to its telecommunications access code, and submitted these for approval. The TAF's consideration regarding these variations was continuing at the end of the 2000–01 financial year.

Following the ACCC's suggestion in April 1999, the TAF also developed a code dealing with service migration and information exchange relating to network changes. The TAF was not able to settle on an agreed version of this code and presented an incomplete code to the ACCC for its consideration.

Such a code was seen as particularly significant to address network changes which, while designed to improve network efficiencies and deliver new services such as broadband services through DSL, may also affect the ability of competitors to continue to offer services on a sustainable basis. The code was intended to balance these competing considerations by providing a mechanism for notification sufficiently in advance of the change and the provision of additional services, as appropriate, to ease the migration process.

The nature of the code prepared by the TAF was so broad, however, that it was not clear that the ACCC could formally make such a code using any of its powers under the Trade Practices Act or the Telecommunications Act. At the same time there was general industry agreement that relevant service migration issues, at least as they affected DSL deployment, could be resolved by further bilateral measures. The ACCC was continuing to monitor these processes in the post-reporting period.

7. Number portability

This section of report 1 outlines the ACCC's legislative responsibilities and associated activities under the Telecommunications Act regarding number portability for telecommunications services.

Division 2 of Part 22 of the Telecommunications Act provides for the regulation of number portability. Number portability provides end-users with the ability to change their CSP within specified number ranges (e.g. the number range used to provide mobile services) and retain the same number. Under s. 458 of the Telecommunications Act the ACCC has statutory powers to direct the ACA on number portability. The ACA cannot establish rules about number portability in the Numbering Plan unless directed to do so by the ACCC and any rules the ACA inserts into the plan regarding number portability must be consistent with any directions issued by the ACCC. The Numbering Plan numbers carriage services in Australia and plans for the allocation and use of numbers in connection with the supply of such services.

In exercising its power, the ACCC must have regard to whether portability of particular number ranges is required to promote the LTIE of carriage services or services supplied by means of carriage services. The ACCC will assess whether the LTIE is promoted using the same criteria as detailed in section 6 of this report.

Under s. 462 of the Telecommunications Act the ACCC is also required to arbitrate any disputes that arise in relation to number portability (if the parties fail to agree on an arbitrator).

7.1 ACCC directions to the ACA on number portability

7.1.1 Mobile number portability

In its final report released in September 1999 the ACCC concluded that MNP should be mandated and, as such, directed the ACA to amend the Numbering Plan to provide for MNP.

On 8 October 1999 the ACIF established a MNP Project Management Group, and a number of other working committees to develop the necessary industry solutions and the documentation needed to implement MNP. During the 2000–01 financial year, the ACIF published a number of documents in relation to MNP. These included a framework document that detailed the network architecture to be used for implementing MNP in Australia, the IT specifications, the MNP industry code, the MNP operations manual and a consumer guideline.

The industry-agreed technical solution for the provision of MNP in Australia is known as the hybrid model. This model is designed to enable each PSD, with a routing obligation under the Numbering Plan, to choose the method of call routing most economic to that PSD. Industry agreed to adopt the hybrid model to provide MNP, subject to the following conditions:

- the use of donor-based routing is subject to agreement on commercial conditions and is limited to an initial start-up period (25 September 2001 to 25 September 2002) which may be extended by bilateral agreement;
- a commercial transit service is available to donor CSPs; and

■ a porting process that facilitates synchronisation of routing databases can be developed.²⁴

During the post-reporting period, the MNP industry code was registered by the ACA, making it an enforceable code.

MNP commenced in Australia on 25 September 2001.

7.1.2 National and premium rate services

In June 2000 the ACCC issued a discussion paper on portability for national and premium rate number services, after the ACA wrote asking it to consider mandating portability for national rate number services. The ACCC decided that it would also be an appropriate time to consider mandating portability for premium rate numbers. Submissions were received in relation to the discussion paper from interested parties. In the 2000–01 financial year, ACCC staff also met with industry representatives and the ACA to seek their views and to request information on the matter.

National rate number services are global services specified in the 170X number range. Telstra held a block of national rate numbers but returned them to the ACA after contending they could not identify a business case for their use.

Premium rate number services are services specified on the 190X number range and are generally used to provide various forms of information services. Examples of premium rate number services include weather information services, competition lines and adult services. A call charge limit does not apply to premium rate services.

At the end of the financial year, the ACCC commenced preparing a draft report containing preliminary views on whether portability for premium rate and national rate services should be mandated.

7.2 Disputes on number portability arbitrated by the ACCC

On 18 December 2000, Optus notified the ACCC of a dispute with Telstra regarding arrangements for freephone (1800 numbers) and local rate number portability (13XX numbers). On 20 April 2001, Optus notified the ACCC of a dispute with Telstra concerning arrangements for local number portability (local numbers). As with access disputes notified under Part XIC, the ACCC considers the matters in dispute to be confidential and accordingly more specific details or information cannot be released in a public document. These matters were ongoing at the end of the reporting period.

24 Sub-section 7.2 of ACIF G556, *A framework for the introduction of mobile number portability in Australia*, August 2000.

8. Other functions and responsibilities under the Telecommunications Act

This section of report 1 outlines the ACCC's other responsibilities and associated activities under the Telecommunications Act. The ACCC's powers under the Telecommunications Act include, among others, the ability:

- to direct the ACA to develop an interconnection standard;
- to direct the ACA regarding electronic addressing;
- to develop a facilities access code;
- to handle unacceptable conduct by international telecommunications operators; and
- when directed to do so, hold a public inquiry.

The Telecommunications Act also requires the ACA to consult with the ACCC on technical standards, facility installation permits, industry codes of conduct and standards, service provider rules and preselection.

8.1 Direction to develop an interconnection standard

During the 2000–01 financial year, the ACCC received two requests, one each from Telstra and PowerTel, to direct the ACA to develop an interconnection standard, under division 5 of Part 21 of the Telecommunications Act. Both requests stemmed from the notifying parties failing to reach commercial resolutions with other parties on interconnection.

It should be noted that in developing such a standard, the ACA can seek industry input into such a process and can ask an appropriate industry group to develop an appropriate standard.

In considering both matters, the ACCC had regard to sub-section 384(5) of the Telecommunications Act which states that the ACCC must not give a direction to the ACA to establish an interconnection standard unless it is necessary to do so to promote the LTIE, or eliminate the likelihood of hindrance to the provision of access to declared services.

Details of the ACCC's decision in these matters is discussed below.

8.1.1 Inter-carrier short message service interconnection between GSM and CDMA networks

On 7 December 2000 the ACCC received a request from Telstra to direct the ACA to develop an inter-carrier SMS interconnection standard for communications between CDMA and GSM networks. SMS refers to a message that originates from either a mobile handset or customer application such as a website, and which is received by a mobile handset or customer application as a text message.

On 3 May 2001, after conducting market inquiries, the ACCC decided not to direct the ACA to develop an inter-carrier SMS interconnection standard between GSM and CDMA networks. While the ACCC was of the view that inter-carrier SMS interconnection between CDMA and GSM networks is likely to promote competition, the ACCC had regard to the fact that:

- the matter had already been referred to the ACIF for consideration and a working committee was being established to resolve the issue; and
- a direction by the ACCC was unlikely to result in a more timely outcome than the current industry self-regulatory processes.

Therefore, the ACCC was of the view that, in the first instance, an inter-carrier SMS interconnection standard between CDMA and GSM networks should be resolved at industry level. That said, the ACCC recognised the importance of the expeditious resolution of this matter, and therefore informally monitored the progress of discussions at the ACIF regarding an inter-carrier SMS interconnection between GSM and CDMA networks. Discussion at the ACIF with regard to this matter was continuing at the end of this financial year.

8.1.2 Interconnection standard for optical interconnection and network-to-network interfaces for the provision of services such as ATM and frame relay

In December 2000 the ACCC received a request by PowerTel to direct the ACA to develop an interconnection standard for optical interconnection and network-to-network interfaces for the provision of services such as ATM and frame relay.

The ACCC considered that competition in the telecommunications market generally, and in the ATM and frame relay markets in particular, would be enhanced if technical standards for optical interconnection and network-to-network interfaces were in place. The ACCC was told that current network interfaces create inefficiencies which result in over expansion of the access network and higher access network costs. The ACCC was also told that alternative interconnection methods involving optical rather than electrical interconnection can potentially result in significant cost savings for access seekers and access providers.

After consulting with the ACA and industry, the ACCC considered that the development of technical standards for optical interconnection and network-to-network interfaces should, in the first instance, be undertaken at industry level. The ACCC understands that relevant international specifications exist, upon which the industry could base appropriate Australian standards. As a result, in May 2001, the ACCC wrote to ACIF and requested it to commence work on the development of Australian standards for these services.

The ACCC has been advised that ACIF is setting up a working group to undertake this work in 2002.

8.2 ACCC directions to the ACA on electronic addressing

Division 3 of Part 22 of the Telecommunications Act provides for the regulation of electronic addressing by empowering the ACA to determine that a specified person or association is the declared manager of electronic addressing of a specified kind of listed carriage service. The ACA is then able to direct the declared manager to do, or refrain from doing, specified actions relating to electronic addressing.

The ACA must not determine that a specified person or association is the declared manager unless:

- the ACA is directed to do so by the ACCC; or
- the ACA is of the opinion that the person or association is not managing electronic addressing in accordance with generally accepted principles and standards.

The ACCC must not give a direction to the ACA unless it considers that compliance with the direction is likely to have a bearing on competition. To determine whether electronic addressing is of public importance, regard must be had to the extent to which electronic addressing is of significant social and/or economic importance to CSPs and end-users of carriage services.

During the 2000–01 financial year, the ACCC did not issue any directions under division 3 of Part 22 of the Telecommunications Act. The ACCC was, however, involved in the competition considerations relating to Internet domain names through its involvement in the auDA (section 9.4 provides further details).

8.3 Facilities access code

Part 5 of schedule 1 of the Telecommunications Act provides that carriers must, under certain circumstances, provide access to requesting carriers to telecommunications transmission towers, related sites and underground facilities. Part 5 also provides that the ACCC may make a code setting out conditions of access to these facilities. This code becomes a carrier licence condition and is enforceable by the ACA.

On 13 October 1999, following extensive public consultation involving industry, regulatory agencies and community representatives, the ACCC released *A code of access to telecommunications transmission towers, sites of towers and underground facilities*. This sets out the conditions which are to be complied with by carriers in relation to the provision of access to eligible telecommunication facilities under Part 5.

In addition, in October 1999, the ACCC and the ACA jointly released a guide to facilities regulation. The guide covers the regulation of facilities access, including compliance with the facilities access code, and other aspects of facilities regulation relating to the installation of facilities.

The purpose of the facilities access code is to ensure that, as far as possible, telecommunications facilities are co-located. A policy of co-location or facilities sharing is intended to improve environmental amenity and promote competition by permitting new entrants to share the use of existing mobile and fixed line telecommunications infrastructure.

The code seeks to affirm and complement statutory rights of facilities access by providing, in terms of administrative and operational procedures, standards of practice that will allow access to be as timely as possible. Without a facilities access code, access could be unnecessarily delayed or protracted by onerous administrative requirements and disputes over what might constitute compliance with Part 5. The facilities access code establishes default or minimum administrative standards intended to ensure speedy access to facilities.

The ACA has responsibility for enforcing compliance with the code and the ongoing monitoring and review of the code. Only where the ACCC is notified of a dispute in relation to access to facilities would it have any involvement in the issue.

In the 2000–01 financial year, the ACCC was not notified of any disputes about access to facilities.

8.4 International rules of conduct

Division 3 of Part 20 of the Telecommunications Act provides a mechanism by which the Government can deal with 'unacceptable conduct' engaged in by international operators.

An international telecommunications operator is considered to be engaging in unacceptable conduct if it uses:

- market power;
- legal rights or legal status; or
- engages in any other conduct in a manner that is, or is likely to be, contrary to Australia's national interest.

The Minister for Communications, Information Technology and the Arts is empowered by Part 20 of the Telecommunications Act to make rules of conduct directed at preventing, mitigating or remedying any unacceptable conduct by an international telecommunications operator.

On 18 June 1997 the Minister made *Rules of conduct about dealings with international telecommunications operators No. 1 of 1997* to take effect on 1 July 1997. The rules of conduct:

- authorise the ACCC to make determinations of a legislative nature imposing requirements, prohibitions or restrictions on carriers or CSPs;
- authorise the ACCC to give directions to carriers or CSPs of an administrative nature which impose requirements, prohibitions or restrictions;
- require carriers and CSPs to comply with ACCC determinations and administrative directions; and
- authorise the ACCC to make information available to the public, a specified class of persons or a specified person.

During the 2000–01 financial year, the ACCC did not conduct any investigations under division 3 of Part 20 of the Telecommunications Act.

8.5 Price control review

Under division 3 of Part 25 of the Telecommunications Act, the ACCC must hold a public inquiry if directed to do so by the Minister. On 21 August 2000 the ACCC was directed by the Minister for Communications, Information Technology and the Arts to undertake a review of the Telstra price controls which the ACCC administers.

The direction required the ACCC to hold a public inquiry into whether there was a need for price control arrangements on Telstra to continue after the expiry of the *Telstra carrier charges — price control arrangements, notifications and disallowance determination No. 1 of 2000* on 30 June 2001. The direction also required that should the ACCC consider there was still a need for price control arrangements, the public inquiry should determine what form they should take, including their duration, means of implementation and mechanisms for their review.

On 14 February 2001 the ACCC provided the Minister with its final report. The report concluded that competition was still not sufficiently developed in all telecommunications markets to warrant the full removal of price control arrangements. In addressing what form future price control arrangements should take, the ACCC made the following recommendations in its final report:

-
- a broad CPI-X per cent price cap should be retained for the next price control period (although mobile services²⁵ and leased line services should be removed from the cap);
 - the level of X for the broad basket of services should be in the order of 5 per cent, and should apply for three years;
 - all other existing sub-caps in the price control arrangements (other than the 22 cent sub-cap on local calls and the local call parity requirement) should be removed;
 - the revenue weights used to determine whether Telstra has complied with its price control arrangements should be based on past period revenue levels;
 - targeting of low-income groups should be based on measures of income rather than usage levels of telecommunications services;
 - targeted assistance or other equity measures recommended in the report should be funded from broader bases such as government or industry-based sources; and
 - there should be an adjustment period over which rebalancing of the price of line rental is allowed to occur.

The ACCC's final report was still being considered at the end of the reporting period. In the meantime the Government decided to roll forward the price control arrangements that apply for 2000–01 to 2001–02.

25 With the exception of fixed-to-mobile services.

9. ACCC participation in self-regulation processes

This section of report 1 details the ACCC's involvement in a number of organisations, including participation in the ACIF code committees, the TAF, the Numbering Advisory Committee and the .au Domain Administration Advisory Panel.

Section 4 of the Telecommunications Act states that:

The Parliament intends that telecommunications be regulated in a manner that:

- (a) promotes the greatest practicable use of industry self-regulation; and
- (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry.

In this regard, various industry processes have been established, including the formation of the bodies referred to above. The ACCC recognises the important role that these organisations perform with regard to the promotion of industry self-regulation and seeks to assist and participate in relevant processes subject to its work priorities and staff availability.

9.1. Australian Communications Industry Forum

The ACIF is an industry owned, resourced and operated company established by the telecommunications industry in 1997 to implement and manage communication self-regulation in Australia.

The ACIF committees comprise representatives of the telecommunications industry, consumer groups, the Telecommunications Industry Ombudsman and government regulators (i.e. the ACCC and the ACA).

During the 2000–01 financial year, the ACCC was an observer on a number of working groups and committees organised by the ACIF regarding both consumer protection issues and operational and network issues. It also participated in the development of industry codes on a number of specific telecommunications issues, including:

- privacy;
- customer information on prices, terms and conditions;
- complaint handling;
- billing;
- credit management;
- selling practices;
- customer transfer;
- high capacity local loop (copper);
- customer contracts;
- mobile number portability;

-
- unconditioned local loop services; and
 - SMS interchange.

The ACIF's Code Administration and Compliance Scheme will continue to be used to monitor compliance of industry participants who are signatories to these codes.

Where codes developed by the ACIF are registered with the ACA, enforcement action can be undertaken by the ACA against industry participants for failure to comply with these codes, irrespective of whether a particular participant is a signatory to the code.

9.2 Telecommunications Access Forum and other processes

In keeping with the intention that industry will have an important role in regulating access in the industry, s. 152AI of the Trade Practices Act allows for the ACCC to declare a specified body or association as the TAF. On 28 May 1997 the ACCC declared the Australian Communications Access Forum Inc, an incorporated association composed of carriers and CSPs, to be the TAF.

The TAF may recommend to the ACCC that an eligible service be declared and submit draft TAF telecommunications access codes to the ACCC for approval.

During the 2000–01 financial year, the ACCC participated in a number of TAF processes including:

- the development of network modernisation rules;
- proposed amendments to the local carriage service access code and the unconditioned local loop service access code; and
- proposed declaration of the generic mobile access service and the local telecommunications resale service by specific TAF members.

With regard to the issue of network migration, the TAF submitted an incomplete code to the ACCC. This was as a result of the lack of industry consensus on the matters raised. Following this process the ACCC was informed that the industry was dealing with the issue of network migration on a bilateral basis. The ACCC has been monitoring how this issue is being addressed by industry in order to inform itself of whether regulatory intervention is required. At this stage the ACCC does not consider this to be necessary.

The proposed amendments to the local carriage service and unconditioned local loop service access codes were given a low priority for the ACCC during the reporting period. Following the reporting date these two issues are being considered within the broader context of reviewing the utility of a non-TAF access code.²⁶

The TAF provided several submissions from its members regarding the proposed declaration of a generic mobile access service and a broader local carriage service. This followed a lack of consensus by the TAF on whether such services should be declared under Part XIC.

In relation to the mobile service, the ACCC determined that it would be premature to institute any inquiry until related work on mobile pricing principles was completed. Subsequently, after the reporting period, the ACCC instituted a public inquiry into the declaration of the CDMA mobile phone service.

26 This issue has arisen as a result of the dissolution of the TAF taking effect from 31 January 2002.

In relation to the proposed declaration of a broader local telecommunications resale service, the ACCC decided not to proceed with any form of inquiry. This was on the basis that it believed it had the power in the context of an arbitration to determine the price of line rental as a related term and condition of access to the local carriage service. The ACCC is also examining whether the existing local carriage service access provisions are sufficient as part of its assessment of an exemption application by Telstra.

9.3 Numbering Advisory Committee

The Numbering Advisory Committee (NAC) provides advice and recommendations on issues related to the ACA's numbering functions with the objective of improving the benefits to suppliers and end-users of carriage services, and facilitating competition.

The NAC comprises representatives of carriers and CSPs (e.g. Telstra, CWO and Vodafone), the ACCC, the ACA, the Department of Communications, Information Technology and the Arts, telecommunications end-users (e.g. Australian Telecommunications Users Group and Small Enterprise Telecommunications Centre) and the telecommunications supply industry (e.g. Australian Information Industry Association and Australian Electrical & Electronic Manufacturers' Association).

During 2000–01 financial year, the NAC met four times to discuss a range of issues pertaining to the Numbering Plan. The range of matters discussed by NAC members included:

- proposed amendments to the Numbering Plan;
- issues relating to number portability;
- issues regarding the apportionment of annual numbering charges; and
- participation in international activities.

9.4 .au Domain Administration Advisory Panel

In April 1999 the National Office of the Information Economy established the auDA. This body is responsible for the self-regulation of second level domain name spaces in Australia. Its creation was part of a recognition of the growing economic value of domain names and the benefits to the wider community that are likely to flow from the competitive supply of them.

The historical development of the Internet meant that the issuing of second level domain names within the .au space (such as .gov.au, .com.au and .net.au) had been delegated to specific Australian individuals under what amounts to a monopoly arrangement. The auDA was established to determine a process which would address the deficiencies in the present domain name registration. The panel is to develop recommendations and policies that will apply to the eligibility of applicants to register domain names.

Throughout the 2000–01 financial year, the ACCC was represented on the various policy panels established by auDA, including the competition policy panels. The competition policy panels are charged with recommending to the auDA board potential options in establishing the competitive framework for the introduction of competition among domain name registrars and registries in respect of the .au second level domain name space.

Appendix I

ACCC telecommunications publications published in the 2000–01 financial year

Reports

July 2000	Report on Telstra's compliance with the price control arrangements: January 1998 to June 1999
July 2000	A report on the assessment of Telstra's undertaking for the domestic PSTN originating and terminating access services
February 2001	Review of price control arrangements
March 2001	Pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks — Final report
April 2001	Telecommunications competitive safeguards and Telstra's compliance with the price control arrangements 1999–2000
April 2001	Changes in the prices paid for telecommunication services in Australia 1996–97 to 1999–2000
May 2001	Pricing principles for mobile number portability
May 2001	Domestic transmission capacity service — A final report examining possible variation of the service declaration for the domestic transmission capacity service

Draft reports

August 2000	Pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks — Position paper
August 2000	Pricing of unconditioned local loop services (ULLS) and review of Telstra's proposed ULLS charges
November 2000	Telecommunications industry regulatory accounting framework (record-keeping rules)
December 2000	Pricing methodology for the GSM termination service
December 2000	Review of price control arrangements
March 2001	Domestic transmission capacity service — A draft report examining possible variation of the service declaration for the domestic transmission capacity service

Consultation and discussion papers

June 2000	Transmission capacity service — A discussion report examining possible variation of the service declaration for the transmission capacity service
July 2000	National rate and premium rate number portability
August 2000	Future scope of the local carriage service declaration
September 2000	Review of price control arrangements
November 2000	Access pricing paper — local carriage service
December 2000	Public inquiry into the AMPS declaration
March 2001	Pricing guidelines for access prices of PSTN terminating and originating services provided by non-dominant or smaller fixed networks
March 2001	Future scope of the local carriage service declaration — Discussion paper II

Guidelines and information papers

August 2000	Internet auctions — what you should know before you bid or sell
January 2001	Fair.com — advertising and promoting Internet access
May 2001	Telecommunications industry regulatory accounting framework (record-keeping rules)
May 2001	Infrastructure industries: Telecommunications

Speeches by Commissioners

(Only speeches published on the ACCC website have been included.)

18 July 2000	Commissioner Ross Jones, Developing a regulatory framework for the new digital era
31 July 2000	Chairman, Professor Allan Fels, Primus Telecommunications
8 August 2000	Chairman, Professor Allan Fels, A comparison across electricity, gas, telecommunications sector
9 October 2000	Chairman, Professor Allan Fels, The benefits of institutional integration: antitrust enforcement and regulatory interventions in Australia

Appendix 2

ACCC Telecommunications Group

