

Report 1

**Telecommunications
competitive safeguards for the
2001–2002 financial year**

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1 Summary

Under the *Trade Practices Act 1974* (Part XIB, Division 11, sub-section 151CL(1)), the Australian Competition and Consumer Commission (ACCC) must provide the Minister for Communications, Information Technology and the Arts with an annual report on competitive safeguards within the Australian telecommunications industry.

This report covers financial year 2001–02 and ongoing actions immediately afterwards.

All of the ACCC publications referred to in this report are available at <http://www.accc.gov.au>.

1.1 The ACCC in 2001–02

The ACCC considers that competition has not developed as extensively as was generally expected after full competition was introduced in 1997 and that various telecommunications markets are not yet effectively competitive. During 2001–02 progress towards achieving competitive telecommunications markets slowed, with little change in the number and size of industry players and slowing price decreases.

During 2001–02 the focus of telecommunications competition regulation changed greatly as the number of arbitrations before the ACCC dropped from 21 to two. This was mainly because 16 disputes were withdrawn by the parties after signing commercial agreements. In many cases the disputes were withdrawn when the ACCC was close to finalising its deliberations and, most importantly, publishing its findings.

The ACCC agreed to release a range of pricing principles and indicative prices—information that would have been made available when the arbitration decisions were published. This gave access seekers an indication of the prices that the ACCC would have set through the arbitration process.

With the settlement of these arbitrations, the ACCC moved to undertake broader work to ensure compliance with regulatory obligations. The ACCC also refined the range of services currently regulated, granting two exemptions from standard access obligations (SAO) for local carriage service (LCS) in metropolitan areas, declaring line sharing service (LSS) and broadening the mobile services declaration to make it technology neutral.

A significant number of investigations were commenced under the anti-competitive conduct and consumer protection provisions of the Act—more than in the previous financial year.

1.1.1 State of competition in telecommunications markets

During 2001–02 progress in achieving effectively competitive telecommunications markets slowed, with little change in the number and size of industry players and slowing price decreases.

As in previous years, signs of competition in the national long-distance and mobile services markets continued in 2001–02. However, the ACCC still does not regard the markets for these services as being effectively competitive. It also considers that the markets for local call and fixed-to-mobile services are a long way from being effectively competitive. There are also an increasing number of competition issues surrounding internet services.

The state of competition in telecommunications markets is assessed in detail in section 2 of this report.

1.1.2 Anti-competitive conduct and consumer safeguards

Anti-competitive conduct

The ACCC received 210 complaints about possible anti-competitive conduct in telecommunications markets, of which 13 progressed to substantive investigation and five continued at the end of the financial year. Compared to the previous year this represents a substantial increase both in the number of complaints (up from 60 in 2000–01) and in the number that progressed to substantive investigation (up from eight in 2000–01).

The key investigations included:

- Telstra's asymmetrical digital subscriber line (ADSL) wholesale service
- public switched telephone network terminating access arrangements
- two-way satellite internet services in extended zones
- internet interconnection
- pay TV arrangements—Foxtel and Singtel Optus (Optus), and Foxtel and Telstra
- complex local number portability (LNP) charges
- faults management and provisioning.

The details of these investigations are in section 3.2.

Consumer safeguards

The ACCC received 6 862 complaints regarding telecommunications consumer protection matters in 2001–02. Of these, 37 per cent were not within the ACCC's jurisdiction and were referred on to other agencies. Of those remaining, many hundreds were about the same or

similar issues. Eighteen issues (representing many hundreds of complaints) progressed to substantive investigation. Four of the major consumer complaints investigations were:

- slamming—Axxess Australia and Benchmark Sales Pty Ltd
- transfer of former One.Tel customers—Telstra
- pair gain systems—Telstra
- pre-paid mobile terms and conditions—Vodafone.

The specific details of these are in section 4.

1.1.3 Information-gathering activities

Tariff filing

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

Details on tariff filing are in section 5.1.

Record keeping rules

The ACCC continued to help the five principal carriers (Telstra, Optus, Vodafone, AAPT and Primus) implement the telecommunications industry regulatory accounting framework (RAF), which was introduced in May 2001. During 2001–02 the ACCC established a comprehensive internal database to help assess the accuracy and reliability of the data received under the RAF. It also issued record keeping rule (RKR) directions to Telstra regarding the LCS and unconditioned local loop service (ULLS). The ACCC further developed its position on disclosing some RKR information—releasing a discussion paper in January 2002, and a draft report in the post reporting period (August 2002).

Details on RKRs are in section 5.2.

1.1.4 Access related activities

Public inquiries into declaration and exemption applications

During 2001–02 the ACCC conducted a public inquiry into whether LSS should be declared, issuing a draft decision in April 2002 that supported regulation of LSS. The service was declared in August 2002. The ACCC also varied the domestic global systems for mobiles (GSM)

originating and terminating access determination to make it technology-neutral and enabling it to incorporate code division multiple access (CDMA) technology in April 2002.

Details on these matters are in section 6.2.

The ACCC also considered an application by Telstra seeking exemption from the standard access obligations for the LCS. In September 2001 the ACCC issued a draft decision that it intended to grant a class exemption to Telstra and other carriers regarding access obligations for the LCS. In July 2002 the ACCC made a final decision providing a conditional individual exemption for Telstra and an unconditional class exemption for all other carriers and carriage service providers (CSP).

Details on these declaration and exemption decisions are in section 6.3.

Access disputes

At the beginning of 2001–02 the ACCC was arbitrating 21 active disputes. By the end of the financial year, 16 had been withdrawn by the parties after they signed commercial agreements, in two cases the ACCC issued final determinations, in one the ACCC assessed that it did not have the jurisdiction to proceed with the case and terminated the arbitration, and two were outstanding going into 2002–03. In most cases the disputes were withdrawn after the ACCC had substantially reduced the number of contentious issues using arbitration—in several cases it had issued draft determinations or made its likely final position clear.

During the year the ACCC engaged consultants to review its dispute resolution guidelines. It issued draft guidelines in April 2002 and they were finalised and released in October 2002.

In April 2002 Telstra withdrew its appeals to the Australian Competition Tribunal regarding the ACCC's final determinations in the PSTN originating and terminating access services arbitration, after the parties entered into commercial agreements.

Details on access disputes are in section 6.5.

Pricing principles

During 2000–01 the ACCC finalised pricing principles for the ULLS. It also revised pricing principles and/or indicative prices for the LCS and domestic PSTN originating and terminating access for non-dominant fixed networks. While assessing whether line sharing should be declared, the ACCC also outlined some pricing principles for the service.

Details on these pricing principles are in section 6.6.

1.1.5 ACCC activities under the Telecommunications Act

Number portability

In July 2001 the ACCC released a draft report setting out its views on national and premium rate number portability. During the year the ACCC closely monitored the introduction of mobile number portability (MNP) (introduced in September 2001).

Details on number portability issues are in section 7.

Directions on interconnection standards, electronic addressing, facilities access code and international rules of conduct

Two industry members asked the ACCC to direct the Australian Communications Authority (ACA) to develop a standard for short messaging service (SMS) interconnection between GSM and CDMA mobile networks. The ACCC advised that before issuing a direction, the industry should develop a code. An Australian Communications Industry Forum (ACIF) working group was established in April 2001 and the final version of the code was released in December 2002. The code is awaiting ACA registration.

During the reporting period the ACCC did not issue any directions on electronic addressing, was not notified of any disputes about access to facilities, and it did not conduct any investigations using the international rules of conduct.

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

1.1.6 ACCC participation in self-regulation processes

During 2001–02 the ACCC participated in a number of ACIF working groups. The Telecommunications Access Forum (TAF) was disbanded in January 2002.

Details are in section 9.

2 Overview of the state of competition in telecommunication markets

2.1 Overview

The Australian telecommunications market has changed significantly in the five years since it was opened up to full competition. Many new competitors, technologies and service delivery possibilities have arisen. There has been some building of infrastructure, particularly in the central business districts of major capital cities and some metropolitan areas, and an increasing focus on delivery of telecommunications services to consumers. Prices for most per call services have also dropped over the last four years.

However, competition has not developed as extensively as expected after full competition was introduced in 1997. In this regard, the ACCC considers the various telecommunications markets are not yet effectively competitive for reasons, including the industry structure (and in particular Telstra's network ownership and the integrated nature of its operations) as well as the global downturn in telecommunications markets. While some industry participants believe less than effective competition is due to the ACCC setting access prices too low, the ACCC believes its cautious approach to regulation has actually resulted in higher rather than lower access prices.

While some competition has emerged in the various telecommunications markets, the extent and depth of this competition varies greatly. For example, the extent of facilities-based competition varies across services and geographic regions. Where the ACCC has observed development of infrastructure that provides competitive alternatives, it has tried to be less interventionist in its regulatory approach. Regarding price competition, the results in the report, *Changes in the prices paid for telecommunications service in 2001–02* (the Division 12 report which is Report 2 in this publication) show differing price decreases across services and consumer groups. Various factors may contribute to these price movements including competition and improvements in factor productivity. Isolating these effects is difficult.

The ACCC's assessment of the state of competition in 2001–02 is not dissimilar to previous years. It shows that progress is slowing in achieving effectively competitive telecommunications markets. There was little change in the number and size of industry participants and price decreases slowed. For instance, the prices paid for telecommunications services for 2001–02 fell by approximately 2.6 per cent in real terms, the lowest percentage fall since 1998–99.¹ Telecommunications markets also appear to still be recovering from the global downturn in the industry.

¹ There are many possible reasons for this slowing of price decreases, including the exit of One.Tel late in the 2000–01 financial year or industry consolidation.

As in previous years, there were signs of competition in national long-distance and mobile services, but the ACCC still does not regard these markets as being effectively competitive. It also considers that the markets for local call and fixed-to-mobile services are a long way from being effectively competitive.

The ACCC will set out its views on possible reforms that would address these concerns in its 2003 report to the Minister for Communications, Information Technology and the Arts, regarding emerging market structures.

While new and different regulatory challenges continue to emerge, particularly those created by the convergence of services and markets, the ACCC will continue to consider many ongoing issues over the 2002–03 financial year. These include pricing of fixed-line services, regulating next generation networks, broadband internet issues and bundling. It will also increasingly focus on implementation of accounting separation and reviewing the mobile services market.

The remainder of the chapter details:

- the various measures of effective competition
- the state of competition in different telecommunications markets using the various competition measures
- the ongoing and emerging structural and conduct issues which the ACCC believes will affect competition in the future.

2.2 Measures of effective competition

Competitive markets cannot usually be identified by a single, one-dimensional measure. The nature and extent of competition depends on both structural and behavioural factors, which the ACCC considers when assessing competition. As different measures will sometimes give conflicting results, views about the level of competition in particular markets may require a degree of judgement.

Market structure reflects the underlying cost and demand conditions in a particular industry. Elements of market structure which the ACCC has used in the past to assess the state of competition in a market include: the presence of natural monopoly characteristics, the degree of market concentration, market share estimates, the height of barriers to entry, and the presence of vertical and horizontal integration. The analysis below will focus largely on market concentration and market share estimates as well as the presence of vertical and horizontal integration. A discussion about the other structural measures can be found in previous reports.²

² See, for example, ACCC, *ACCC telecommunications report—report 1*, July 2002.

The level of vertical and horizontal integration is particularly significant in Australian telecommunications markets. In particular, Telstra's near-ubiquitous fixed-line network and highly integrated nature ensure that even when other market participants compete with it to deliver retail services, they nevertheless rely on access and/or 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.³

Market behaviour and outcomes also reflect market structure and can also be used to determine the degree of effective competition in a market. Indicators of market behaviour and outcomes include movements in the retail and wholesale prices for telecommunications services, and the extent of the gap between retail prices and input costs.

2.3 State of competition in telecommunications markets

2.3.1 Local telecommunications services

The local telecommunications services market, which includes basic access lines and local calls, is a long way from being effectively competitive. This reflects the structure of the market and generally the limited nature of alternative infrastructure.

Telstra continues to maintain its dominance in this market and in 2001–02 had approximately 93 per cent of totally directly connected access lines. This includes 10.5 per cent of access lines resold by its competitors. Of the remaining 7 per cent of directly connected access lines, Optus provided 6.1 per cent and other carriers like AAPT and Primus the remaining 0.9 per cent.⁴ Telstra's market share for access lines has also not changed substantially in the last five years. These figures reflect the limited degree of wholesale competition, given the ubiquity of Telstra's fixed line network. But they also reflect that some competition exists at the retail level as seen in the resale of access lines and local call services and Optus' own provision of these services.

At the wholesale level, the ACCC notes that a degree of facilities-based competition has emerged in the CBD areas of some capital cities. In these areas, as well as alternatives such as fibre and some fixed wireless networks, there are a number of regulated alternatives, such as the ULLS and PSTN services. In July 2002 the ACCC removed access regulation of the local carriage service for CBD areas having noted the increased availability of new facilities as well as the existing regulated alternatives.⁵ The ACCC expects that this decision will encourage the use of

³ Unlike telecommunications, significant parts of other network industries have been structurally separated to various degrees.

⁴ Market shares were estimated based on figures in the ACCC's forthcoming report *Telecommunications Infrastructure in Australia 2002*. Expected to be released in 2003, this is the second such report released by the ACCC. The first report, *Telecommunications Infrastructure in Australia 2001*, details the stock of physical infrastructure as at 30 June 2001. It was prepared for the ACCC by BIS Shrapnel.

⁵ The ACCC notes that subsequent to its decision the take-up of ULLS has been disappointing.

these alternatives and thereby help to develop competition in the market for local telecommunications services.

However, facilities-based competition has been limited in most metropolitan areas and is often non-existent in regional and rural areas. The ACCC's facilities audit of telecommunications investment at June 2002 supports this conclusion.⁶ It reveals that the extent of investment in alternative local access infrastructure beyond CBD areas is not substantial and that planned investment in these areas is limited. Also, where networks have been deployed, unsurprisingly none possess the same ubiquity as Telstra's fixed-line network.

Recognising that improved wholesale pricing information and guidance may assist the industry and encourage competition in the market for local call services, the ACCC released final access pricing principles and indicative wholesale prices for the various fixed line services in April 2002.⁷

The Division 12 report reveals some price competition in the local call services market for 2001–02. During this period, the average real retail price of local calls decreased by about 11.7 per cent for the industry as a whole. However, this decline was much less than that of 17.9 per cent during 2000–01. The ACCC report, *Telstra's compliance with the price control arrangements 2001–02*, (the 'price control report' and report 3 in this publication) shows that over 2001–02 Telstra's local call nominal prices⁸ decreased by only 7.6 per cent.⁹

The Division 12 report also reveals that price decreases for local calls varied across different consumer groups. For instance, large corporate businesses experienced the greatest price decrease (about 15.4 per cent) in local calls in 2001–02. This compares to falls of about 3 per cent and 10.9 per cent in the price of local calls paid by small business and residential consumers, respectively. These results may reflect the greater degree of facilities-based competition in CBD areas, where many large corporate businesses are located. These consumers may also have been able to negotiate better 'off-tariff' discounts with suppliers of PSTN services.

Real retail prices for local calls have been declining since the 1999–00 financial year. An important factor contributing to this trend has been the government's decision to ease the restriction on Telstra's pricing of line rental. This has given Telstra the opportunity to 're-balance' the structure of its prices for telephony services by decreasing the average price of fixed-line call services, such as local calls, to counter the increase in the access line services. Under previous price control

⁶ Details of the facilities audit as at 30 June 2002 are contained in the ACCC's forthcoming report, *Telecommunications Infrastructure in Australia 2002*, expected to be released in 2003.

⁷ The ACCC released its final access pricing principles and indicative wholesale prices for the following services: the unconditioned local loop, the local carriage service and PSTN originating and terminating services.

⁸ Real price decreases allow for movements in the Consumer Price Index, where as nominal price movements do not.

⁹ The ACCC's price control report finds that the ACCC is satisfied that Telstra has complied with the price control arrangements in its 2001–02 report for all services, except line rentals. That is, the ACCC notes it has been unable to confirm that Telstra has complied with its price-cap obligations in relation to this service. The ACCC is pursuing further investigating possible breaches of the government's price control determination by Telstra in this matter, before deciding on an appropriate course of action. Hence, comparisons regarding the price movements for line rental, as reported in the ACCC's Division 12 and price control compliance reports, should be treated with caution.

arrangements, Telstra had been constrained in the extent to which it could increase the price of access lines.

In light of this the ACCC estimated that the price Telstra charged for access lines was below the average long-run incremental cost of providing this service.¹⁰ As a result, Telstra set the price for per call PSTN services above long-run incremental cost, partly to recover the loss it makes on average access line services.

Following the easing of price control arrangement, Telstra has taken advantage of this opportunity and increased the price of access lines.¹¹ Other price controls have also encouraged Telstra to re-balance its telephony pricing structure by decreasing the average price of per call PSTN services, such as local calls, national long distance and international call services. Other carriers have also tended to follow this trend.

Regarding the retail pricing trends for access lines, the Division 12 report reveals that the average real price for these services has increased over the past year. For instance, during 2001–02 the average price of access lines increased by 13.2 per cent for the industry as a whole. The ACCC's price control compliance report shows that Telstra increased its nominal price for access lines by 9.5 per cent. Going forward, access line revenues will form a greater proportion of Telstra's total revenues as its rebalancing initiatives take effect. Rebalancing will also continue to influence the retail price movements for access lines and local calls.

2.3.2 National long distance and international calls

Competition in the market for national long distance and international calls appears to be developing well. However, certain elements which largely stem from the structure of the market suggests that, it may not yet be effectively competitive.

The ACCC's estimates of market share reveal that concentration in the market for national long distance and international calls has continued in 2001–02. Telstra still retains a sizeable market share in the supply of these services, followed by Optus, AAPT and Primus.

Telstra's market share in part reflects its ownership of the ubiquitous fixed-line network. While competitors can access inter-capital transmission services from a variety of carriers (for example, Optus, PowerTel, Macrocom), they are generally limited to acquiring origination and termination services from Telstra's fixed-line network if they want to provide national long distance and international call services to consumers. Telstra's network ownership provides it with a distinct and seemingly impassable advantage over its competitors.

Of particular significance is the considerable price-cost gap for these services, suggesting that this market may not be effectively competitive. The ACCC has information on national long

¹⁰ See, for example, ACCC, *Review of the price control arrangements*, February 2001.

¹¹ See, for example, *Telstra carrier charges—price control arrangements, notification and disallowance determination no. 1 of 2002*.

distance costs showing that the full average attributable per-minute cost of providing national long distance calls (including retail costs) is approximately half the retail price. Only a small portion of this gap can be explained by the access deficit contribution.¹²

Pricing behaviour at the retail level in these markets indicates the presence of some competition. For instance, the real retail price of national long distance calls decreased by an average of 8.7 per cent during 2001–02, compared to a 6.3 per cent decline in the previous year. These price decreases are to be expected given the price-cost gap noted above.

However, the decrease in the retail price of national long distance calls has not mirrored the large drop in the wholesale price of this service. To illustrate, Telstra's 2001–02 Annual Report indicates that the average revenue per minute of national long distance fixed-to-fixed calls has decreased from 15.84 cents in 1998–99 to 13.06 cents in 2001–02. This represents a total fall of about 2.78 cents or approximately 17.6 per cent. However, over the same period, the cost of access has fallen by 4.4 cents per minute or about 63 per cent.¹³ Even the fall in the retail price of national long distance calls of 22.5 per cent over the same period for the market as a whole is less than the 63 per cent fall in wholesale access prices.

Also, the price competition in the supply of international calls in previous years appears to be moderating. For instance, in the last two financial years (2000–01 and 2001–02), the real retail prices for these services have decreased by about 17.2 per cent and 15.3 per cent, respectively. These decreases are much lower than in previous years—27 per cent in 1999–00 and 20.7 per cent in 1998–99.

Interestingly, Telstra's price control compliance report reveals that for 2001–02 Telstra's nominal prices fell by 10.7 per cent for international calls.¹⁴

In May 2001, recognising the need to encourage competition in this market and countering the imbalance in the bargaining strength between Telstra and its competitors, the ACCC published its view on wholesale prices for fixed-line services for 2001–02. Publishing such price information should reduce the uncertainty about the ACCC's general views regarding the wholesale pricing of these services, and thereby encourage parties to settle their differences more quickly. Mechanisms such as the publishing of wholesale prices for PSTN services should further promote competition in the market for long distance and international calls.

¹² The access deficit contribution is a component in the price Telstra charges other carriers for access to the PSTN and that has to be retrieved by Telstra in its retail pricing.

¹³ The cost of access has fallen from 7 cents in 1998–99 (3.5 cents x 2), to 3.4 cents in 1999–00 (1.7 cents x 2), to 3.06 cents in 2000–01 (1.53 cents x 2), and to 2.6 cents in 2001–02 (1.3 x 2) (the cost figure of 1.7 cents in 1999–00 and 1.53 cents in 2000–01 are the ACCC's estimates of the cost of PSTN originating and terminating access found in A report on the assessment of Telstra's undertaking for the domestic PSTN originating and terminating access services, July 2000. The cost figure of 1.3 cents in 2001–02 was offered by Telstra, and considered to be reasonable by the ACCC).

¹⁴ The decrease in the price of national long distance and international calls since the 1999–00 financial year reflects the 'rebalancing' of the structure of prices for telephony services. As with the discussion on local telecommunications services, rebalancing of the structure of prices has provided Telstra with the opportunity to reduce the price of its per call services, such as national long distance and international calls, to counter the increase in basic access services.

2.3.3 Mobile services market

Competition in the mobile services market has developed considerably since 1997. This market has exhibited the most encouraging market outcomes compared to the other telecommunications markets. However, the ACCC is concerned that certain elements of the mobile markets may not be as effectively competitive as others.

At the retail level, the mobile services market seems to be reasonably competitive. Four carriers have deployed mobile networks and numerous mobile resellers operate in this market. This has resulted in many different service offerings, and generally competitive pricing over the years. The ACA reported that during 2001–02, Australian consumers could select a mobile service from 13 service providers and fee structures from more than 700 different rate plans.¹⁵

ACCC estimates reveal that Telstra remains the leading mobile network carrier with about 43.5 per cent of the total market share. Optus maintained a significant share at 32.6 per cent, while Vodafone and Hutchison achieved market shares of 18.3 per cent and 5.6 per cent respectively.¹⁶ These market shares are largely the same as in 2000–01.

While a cursory look at these market shares does not elicit any strong concerns about competition, concentration indexes for mobiles as a whole indicate a concentration level greater than that of equal-sized triopolists. Also, the ACCC considers that mobile network owners have the incentive and ability to keep mobile termination rates above cost. In turn, this can lead to retail prices for fixed-to-mobile and mobile-to-mobile calls being above cost. Mobile network owners achieve this via their control over wholesale mobile termination services and the high prices for these services (as discussed further in section 2.3.4 below).

In July 2001 the ACCC released pricing principles to address these competition concerns in downstream retail markets.¹⁷ In particular, the principles require the prices for wholesale mobile termination services to decrease at the same rate as retail prices for mobile services. The ACCC believed the competitive pressures in the retail market (for example, a 11.9 per cent real decline in the average price of GSM mobile telephony services in the 1999–00 financial year) should be brought to bear on the prices for wholesale mobile termination.

However, an examination of recent retail price movements reveals that the extent of price competition has substantially diminished. The Division 12 report shows that for 2001–02, the average real retail prices for mobile services declined by about 2.5 per cent, compared to the previous year. Importantly, this is the smallest decline for mobile services over the four years since

¹⁵ ACA, *Telecommunications Performance Report 2001–02*, November 2002, p. 157.

¹⁶ Market share estimates are based on revenue figures in the mobile carrier's annual report. Note that these market shares do not include those held by mobile resellers.

¹⁷ These pricing principles initially applied only to GSM services, as detailed in the ACCC's report, *Pricing Principles for the GSM termination service*, released in July 2001. However after public consultation, they were also applied to CDMA services as contained in the ACCC's *Variation to make the GSM declaration technology neutral*, which was released in the post-reporting period (September 2002).

1997–98. This decline does not necessarily reflect any correlation between slowing retail competition in mobile services and the ACCC's pricing principles for mobile termination services.

However, it is not clear whether the ACCC's pricing principles have addressed the competition concerns identified in its final pricing principles report. When it released its pricing principles, the ACCC believed that competition would continue to exist in the retail provision of mobile services, noting, though, that it would need to review its pricing principles in 2003.

In light of slowing retail price movements and changing dynamics in this market, 2003 is a particularly opportune time to review the mobile market. These changing market dynamics are apparent in a variety of factors:

- In 2001–02 the mobile market experienced some consolidation stemming from financial pressure at the retail level, with mobile carriers taking over direct service provision of some medium-sized resellers.
- The market also appears to be reaching saturation with growth in subscriber numbers in the mobile services market dropping to about 5 per cent by June 2002, compared to an average of 32 per cent during 2000.¹⁸
- The composition of new subscribers is changing. The major driver of recent subscriber growth is the growing number of pre-paid users, which is outstripping that of traditional contract customers. Company figures reported to the Australian Stock Exchange show that pre-paid mobile user numbers increased by 23 per cent in the 2002 calendar year compared to the previous year, while post-paid consumers grew by only 4 per cent over the same period.¹⁹
- MNP, which came into effect on 25 September 2001, has not had the major impact that was expected. For instance, during 2001–02 the ACA reported a customer churn rate of approximately 4 per cent per month, only a slight increase on the 2 per cent per month churn rate for the 2000–01 financial year.²⁰ This differs from overseas experience where MNP created higher churn levels, particularly among business users. However, it should be noted that the ACA's porting statistics do not include intra-carrier ports, that is, ports between service providers on the same carrier network. Further, the anticipated churn rates have been affected by the existence of mobile contracts, early termination charges and porting fees.

Most mobile carriers also seem to be taking a cautious approach to capital expenditure, and implementing cost cutting measures to maintain cash flows. These developments suggest that the mobile service market is maturing after a period of heightened market activity during which competing mobile service providers tried to capture market share.

¹⁸ Ovum, *Australia (mobile market)*, 2002, p. 1.

¹⁹ TeleResources Engineering, *Mobiles*, August 2002, p. 1.

²⁰ ACA, *Telecommunications Performance Report 2001–02*, November 2002, p. 11;
ACA, *Telecommunications Performance Report 2000–01*, November 2001, p. 78.

2.3.4 Fixed-to-mobile services

Competition in the supply of fixed-to-mobile calls is a long way from being fully effective, particularly in terms of driving retail prices down towards underlying costs. This is despite the large number of carriers supplying these services at the retail level. The ACCC considers this is largely a result of the mobile termination input costs and more specifically the price of wholesale mobile termination services.

At least ten carriers provide fixed-to-mobile call services, including Telstra, Optus, AAPT and Primus. While clear market share figures are not available for fixed-to-mobile services, it is useful to consider the market share figures for national long distance calls. This is because the pre-selection determination requires national long distance and fixed-to-mobile call services (as well as international call services) be taken as a part of a bundle.²¹ As noted above, there is some concentration in the market for long distance services, with Telstra retaining the highest market share followed by Optus, AAPT and Primus.

The ACCC's Division 12 report indicates that the real price of fixed-to-mobile calls (as supplied by the major providers) declined over 2001–02 by 3.2 per cent on average. This price decrease is less than previous years. For example, real prices declined by 6.2 per cent in 2000–01 and by 7.9 per cent in 1999–00. Since 1998–99 prices for fixed-to-mobile calls have decreased by 16.4 per cent. Further, information available to the ACCC suggests that the retail price of fixed-to-mobile calls is high relative to input costs. Telstra's average retail price for fixed-to-mobile calls in 2001–02 was 38.5 cents per minute, while market inquiries indicate that the full costs of supplying this service appear to be much lower.²²

The retail market for fixed-to-mobile calls has been growing over recent years, as can be seen in Telstra's 2001–02 results where it derived more revenue from fixed-to-mobile calls than national long-distance calls. This is despite the fact that Telstra carried more than double the number of long-distance minutes than fixed-to-mobile minutes.

These factors highlight the increasing need to address the competition concerns detailed in last year's report. In particular, consideration needs to be given to the probability that mobile network owners' control over mobile termination services—the key wholesale input in providing fixed-to-mobile services—has resulted in a lack of effective competition in the supply of fixed-to-mobile services.

The ACCC's pricing principles were intended to address these competition concerns. However, with diminished retail price decreases in the mobile services market, it is not clear that this has occurred. As a result, these pricing principles, along with the mobile services market generally, will be reviewed in 2003.

²¹ It is more instructive to look at long distance call service market shares as opposed to international call service market shares as several carriers who supply only international calls use override codes. These carriers, therefore, do not provide national long distance or fixed-to-mobile calls.

²² According to Telstra's Annual Report 2001–02, it derived \$1419 million in revenue from fixed-to-mobile calls and carried 3691 million minutes, giving an average of 38.5 cents per minute. This is 0.5 cents per minute lower than for 2000–01.

2.3.5 Data and internet services

Data and internet services are increasingly becoming a core part of business operations and residential demands, making up some 17 per cent of total telecommunications revenue in 2002.²³ It therefore becomes more important to consider the competitive environment in providing these services, although the ACCC's recent considerations have been confined to specific conduct rather than more exhaustive analysis. Accordingly, the purpose of this section is not to provide definitive views regarding market definition and the state of competition. Rather, it provides a broad overview of the competitive environment and emerging issues in the provision of these services.

Broadly speaking, data and internet services achieve data transfer (text, still images, video, voice and high quality sound) from one location to another. A variety of technologies are currently used to deliver these services to businesses and residential consumers but with different quality, reliability and speed characteristics. These technologies often rely on fixed-line and transmission services as key inputs. They include ISDN, frame relay, ATM, data and leased lines, ADSL, HFC and optical fibre cable, satellite and microwave.

Data services are primarily supplied to, and used by, large corporate businesses. These include ISDN, frame relay and ATM services as well as data and leased lines. Such services are not regulated under the Part XIC access regime and to date the ACCC has received few complaints from industry or businesses about the competitive supply of these services. None of the complaints received raises competition concerns.

In contrast, internet services are supplied to large corporate business, small-to-medium enterprises and residential consumers. These include narrowband dial-up internet services supplied over the fixed-line network (primarily used by residential consumers and small businesses) as well as broadband internet services supplied using ADSL or HFC/ optical fibre cable. Internet services are supplied to consumers by a large number of internet services providers (ISPs), however, there was some consolidation in 2001–02 with the number of ISPs dropping from 665 to 571.²⁴

The take-up of broadband internet services over 2001–02 improved with about 160 000 new consumers connecting for the first time. This took total broadband internet take-up to 283 600 services representing an increase of around 130 per cent. Supply to residential customers is a large part of this take-up—about 67 per cent. Importantly, given the limited deployment of HFC cable, the growth in uptake is largely in ADSL services (the take up for residential customers grew by 200 per cent for ADSL services compared to 47 per cent for cable customers). This said, the ACCC considers the uptake of ULLS and ADSL services has been disappointing to date.

²³ ABN AMRO, *Australian Telecommunications Markets 2003*, December 2002, p. 13.

²⁴ ACA, *Telecommunications Performance Report 2001–02*, November 2002, p. 141.

The ACCC has received many complaints from industry and consumers about broadband internet services, and has been encouraging a competitive environment for broadband services. In 2001–02 the ACCC issued its ADSL competition notice facilitating a greater prospect of competition in the supply of broadband internet services. The notice resulted in reductions of Telstra's wholesale price and changes to the architecture of the wholesale ADSL service which appeared to allow wholesale customers to compete against Telstra's retail ADSL services. Several competitive ADSL offerings are now available which will hopefully lead to competitive pricing and a wider range of services to residential consumers.

The ACCC's decision regarding declaration of line sharing should also encourage competition in supplying broadband internet services. This declaration, made shortly after the reporting period but reflecting the inquiry held during 2001–02, will allow carriers to gain access to Telstra's copper pairs. These carriers will be able to provide a variety of broadband internet services (including xDSL services) to consumers at the same time as Telstra supplies voice services to the same consumers over the same copper pair.

In 2001–02 the ACCC was also involved in ensuring commercial agreements were struck between Telstra and carriers supporting ISPs for PSTN data terminating access. This ensured that these carriers could compete for ISP business.

Further, in the post-reporting period the ACCC has received complaints about internet peering and is monitoring industry developments with a view to conducting a declaration inquiry.

2.4 Future competition issues

While new and different regulatory challenges continue to emerge, particularly those created by the convergence of services and markets, many current competition issues will continue to be the focus of the ACCC's work. These issues cut across various telecommunications markets, and have immediate and/or long term effects. They can be categorised depending on whether their effect is on the structure of markets or the conduct within those markets.

In the post-reporting period, several reforms have been implemented regarding the telecommunication provisions of the Act, which are likely to have significant implications for the conduct and structure of telecommunications markets in the future.²⁵ The key elements of the reforms include:

- giving carriers the opportunity to apply for anticipatory exemptions or lodging voluntary access undertakings with the ACCC
- removing merit review to the Australian Competition Tribunal from the arbitration process

²⁵ These changes are provided in the *Telecommunications Competition Act 2002*, which enacts changes to Part XIC of the Trade Practices Act 1974.

- requiring the ACCC to set and publish benchmark terms and conditions for the core services in the ULLS, PSTN and LCS
- requiring Telstra to implement accounting separation between its retail and wholesale activities.

As a whole, these reforms should help to promote competition in telecommunications markets, and also provide greater certainty for industry participants in the future. Some of these elements are discussed further below.

2.4.1 Access and structural issues

As identified in last year's report an issue of key importance regarding the structure of telecommunication markets is that of increased convergence of services, technologies and markets. In the context of existing networks being digitised and the evolution of new types of networks this phenomenon is expected to become increasingly relevant in the future. However, there is still significant uncertainty about the nature, extent and timing of any impact.

For example, convergence of services may result in new and different telecommunications services being provided on different platforms, offering the prospect of increased competition in telecommunications markets. Conversely, it may also result in dominant carriers using their market strength in one market to leverage power into a converged market. This may restrict competition through increasing barriers to entry for new competitors. Therefore, given the uncertainty of outcomes, the Commission will continue to monitor the situation.

The new accounting separation regime for Telstra's wholesale and retail operations may, depending on how it is specified and what use is made of additional monitoring provisions, create a more transparent environment that assists such monitoring. It may also help in identifying emerging competition issues, as well as investigating current concerns that arise regarding the level of Telstra's vertical integration. However, as accounting separation does not change a carrier's underlying incentives or conduct it will not necessarily address the limitations created by the current industry structure.

The emergence of new types of networks will also directly affect the structure of telecommunications markets, as well as having implications for convergence. In particular, as 'next-generation' and data-based networks are progressively deployed, access to and interconnection with more traditional forms of networks such as fixed and mobile networks will be imperative to ensure any-to-any connectivity in the future. The ACCC also notes that traditional, more quantifiable methods for pricing access such as time, volume and distance may become increasingly problematic to use for next generation networks.

The ACCC has been particularly active in promoting discussion about interconnection of different networks, recognising that the effect of these developments has implications for the ACCC's regulatory task. In particular, the number and complexity of negotiations for wholesale access are likely to increase. These negotiations can therefore affect the price, quality and range of

services provided to consumers. The ACCC believes that unless the industry assesses these issues systematically now, it may trigger high levels of industry disputation about appropriate access and interconnection arrangements in the future.

Another emerging issue which is likely to affect the structure of telecommunications markets is the ACCC's review of existing declarations. It is part of the ACCC's requirement, in the new section 152ALA of the Act, to specify an expiry date for each existing declaration. These reviews are particularly significant in ensuring that regulation of declared services will only continue when it is in the interests of end-users.

2.4.2 Conduct issues

Conduct issues will continue to be a priority for the ACCC, reflecting the industry structure, and the strong market position of Telstra, as well as the presence of oligopolistic features in some telecommunications markets.

A key conduct issue is that of wholesale price and non-price terms and conditions, particularly where it is not clear that effective facilities-based competition is likely to emerge. The ACCC believes that in these cases price and non-price conduct of carriers is critical in facilitating competitive market outcomes and can affect markets structures (for example, where efficient prices result in entry). As noted above, in the post-reporting period changes to the telecommunications provisions of the Act have placed requirements on the ACCC to set and publish price and non-price benchmark terms and conditions for the core services in the ULLS, PSTN and LCS.

A key focus for the ACCC will also be on assessing the competitive implications of bundling conduct. This reflects the continued emphasis carriers are placing on service delivery via bundled offerings (to both large corporate business and residential consumers). Increasingly, therefore, the ACCC is likely to be involved in ensuring bundling is used solely as a pricing strategy to achieve better outcomes for consumers.

In the post-reporting period the ACCC released a draft information paper on bundling in telecommunications markets. This detailed a proposed framework for assessing and monitoring bundling conduct. Importantly, it noted that the ACCC would likely assess bundling conduct case by case, particularly given that there are both costs and benefits from bundling, to both consumers and the industry. To effectively assess bundling conduct, more information is required and so the ACCC proposed use of a record-keeping rule. The ACCC will also increasingly focus on information collection to improve transparency and help in specific anti-competitive conduct investigations.

3 Anti-competitive conduct provisions

This section examines the investigations the ACCC undertook into potential breaches of the telecommunications anti-competitive provisions of the Act during 2001–02.

The Part XIB provisions of the Act apply specifically to anti-competitive conduct in the telecommunications industry. They were introduced because the government believed 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

Part XIB prohibits 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 contravenes 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—compared with the general s. 46 misuse of market power provisions which do require it.

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
- 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 1999–00 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 consider any guidelines it has 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, but are not exhaustive—the ACCC may also take into account any other matters it considers relevant.

The ACCC considers that in many investigations of anti-competitive conduct where it believes that the carrier or CSP has contravened, or is contravening, the competition rule, the issuing of a competition notice will be an appropriate and positive step to achieve policy goals. However, sometimes other responses might lead to a more effective or appropriate outcome than issuing a competition notice.

Part A competition notices

The ACCC may issue a part A competition notice when it believes that a carrier or CSP has engaged, or is engaging, in anti-competitive conduct. 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 expects the carrier or CSP to cease the conduct. 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 pecuniary penalties of up to \$10 million and \$1 million per day that the conduct continues.

During 2001–02 the ACCC issued one part A competition notice to Telstra. Details are in section 3.2.1 of this chapter.

Advisory notices

If a part A competition notice is in force, the ACCC may issue a written notice advising the carrier or CSP who received the notice of the action it should take to ensure that it does not 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 on how the carrier or CSP can change its conduct to avoid contravening the Act. However, a court may consider an advisory notice when determining the orders against a carrier or CSP found to have contravened the Act.

During 2001–02 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 help prove 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 breach.

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 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 2001–02 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 normally breach the competition rule can apply to the ACCC for an exemption order. The ACCC may grant an exemption order if 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 subject to an exemption order will not be anti-competitive for the purpose of the competition rule.

The ACCC has never received an application for an exemption order.

3.2 Investigations under the anti-competitive conduct provisions

During 2001–02 the ACCC received 210 complaints that raised issues under Part XIB. Of these, 13 progressed to substantive investigation, five were ongoing at the end of the financial year, and the remainder did not raise issues requiring action under Part XIB. This was an increase from the previous year where 60 complaints were received, and eight progressed to substantive investigation.

Some of the key investigations are outlined below.

3.2.1 Telstra's ADSL wholesale services

In February 2001 the ACCC began investigating complaints by actual and potential customers of Telstra's wholesale ADSL services regarding:

- an apparent price squeeze between Telstra retail and wholesale ADSL services; and
- the technical engineering or architecture that Telstra was using to provide these services.

ADSL is a technology that uses the common copper telephone wires to provide high-speed data services, such as internet access.

Complainants said that there was either a small positive or a negative margin between the price at which Telstra was supplying its wholesale ADSL services to wholesale customers and Telstra's retail prices for the same service.

Wholesale customers also stated that as a result of Telstra's architecture (layer 3 of the Open System Interconnection model) they received a highly 'processed' service that did not enable them to provide additional applications or services or change the quality of service provided to retail customers. They argued that they were effectively forced to sell a 're-badged' Telstra retail service.

The ACCC issued a part A competition notice to Telstra for the above conduct on 7 September 2001. It took this action because it believed Telstra was:

- supplying its wholesale ADSL high-speed internet services at prices whereby competitors buying the wholesale ADSL services were unable to compete with Telstra's own BigPond retail prices.
- refusing to structure the wholesale ADSL services in a manner that would allow its competitors to offer services substantially different from those Telstra offered its residential and small business customers. These new services included video on demand and voice telephony over the internet.
- refusing to configure its wholesale ADSL services to allow for a high-speed internet service to be provided to a residential customer at a different quality of service from what BigPond offered.

The competition notice was to come into force on 30 November 2001, giving Telstra 12 weeks to alter its conduct.

During this 12-week period there were significant price changes—some buyers of Telstra's wholesale ADSL services were given reductions of more than 30 per cent. However, the ACCC assessed that these changes did not go far enough to allay concerns of anti-competitive conduct and thus enable the revocation of the notice. In particular, the architecture of the service continued to be of concern.

The ACCC recognised that Telstra would need more time to implement a technical solution that would give wholesale customers the flexibility to provide differentiated services to their retail customers so that they could properly compete with Telstra's BigPond retail offering. Therefore,

on 20 November 2001 the ACCC varied the competition notice, allowing Telstra until 21 March 2002 to bring about promised further pricing and network changes.

On 21 March 2002 the competition notice came into effect because the ACCC was not satisfied that the conduct that had originally caused the ACCC to issue the competition notice had been fully addressed. In particular, while Telstra had developed a technical solution (layer 2 tunnelling protocol) allowing wholesale customers access to the wholesale ADSL services, it was not clear that commercial offers had been made to wholesale customers.

The ACCC revoked the competition notice on 15 May 2002 following further reductions in Telstra's wholesale price and changes to the architecture of the wholesale service which appeared to allow wholesale customers to compete against Telstra's retail ADSL services.

Several competitive ADSL offerings are now available which will hopefully lead to competitive pricing and a wider range of service offerings to residential consumers. The ACCC continues to closely monitor the deployment and take-up of broadband internet services.

3.2.2 PSTN terminating access arrangements

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 PSTN terminating access (PSTN TA) services from carriers wanting to service downstream customers that provide end-users with access to the internet. Complainants stated that Telstra, as the access seeker, was refusing to pay other networks 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.

While Telstra had previously agreed to PSTN TA interconnection arrangements, in late 2000 it changed its approach and refused to acquire this service from those providing wholesale or retail ISP services, although it did not refuse to acquire the PSTN TA service for voice calls. In justifying its refusal to purchase PSTN TA in relation to data calls, Telstra said that:

- it was unable to recover the full cost of holding a long data call, thereby incurring unacceptable commercial losses on data calls to ISPs
- 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. Telstra advised the ACCC MegaPop performed the same function as interconnection for ISP dial-up access calls. However, unlike interconnection arrangements that typically involve payments by Telstra to a competitor, MegaPoP required

Telstra's wholesale customers to pay Telstra for handing over data calls. The complainants asserted that MegaPoP was 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
- adopting MegaPoP effectively made the alternative networks mere resellers of Telstra's MegaPoP retail dial-up service, precluding them from competing with Telstra in providing wholesale network services.

In response to the concerns raised about MegaPoP, Telstra offered an alternative interconnection service for data calls—Dial Internet Access Service which was similar to the PSTN TA model but instead of Telstra paying the other network a termination fee, it required the other network to pay Telstra for the delivery of the traffic.

The ACCC attempted to facilitate mediation with several parties and Telstra after Part XIC processes failed to achieve an outcome. The mediation was also unsuccessful and, after further complaints, the ACCC reopened its Part XIB investigation late in 2001 into Telstra's conduct.

However, in December 2001, the ACCC suspended its Part XIB investigation on request from complainants and Telstra, so that the parties could attempt to resolve outstanding issues by commercial negotiation. In February and March 2002 the parties informed the ACCC that agreement had been reached with Telstra regarding outstanding issues and accordingly the ACCC discontinued its investigation.

3.2.3 Two-way satellite internet services in extended zones

In December 2001 the ACCC began investigating a complaint from Optus alleging that Telstra was engaging in conduct in breach of the Act regarding the supply of two-way satellite internet services in extended call zones. Optus alleged that Telstra was providing installation and equipment free of charge to businesses within extended zones and then connecting those customers to Telstra's Big Pond internet service via its two-way satellite service. Optus alleged that by installing equipment below cost to customers, Telstra was engaging in predatory pricing in breach of s. 46 of the Act and/or with the effect of substantially lessening competition in the market for two-way satellite internet services in breach of s. 151AK.

There are 111 extended zones, ranging in size from 8400 to 304 000 square kilometres, located in the most sparsely populated areas of Australia. Within these zones, which cover close to 80 per cent of Australia's land mass, there are about 28 000 customers and 40 000 services.

The services provided by Telstra relate to a contractual agreement entered into by Telstra and the Commonwealth Government in June 2001 following a tender process. Under the contract, Telstra was to provide untimed local calls and untimed internet access to extended zones (areas that were previously charged as long distance timed calls). Part of the offering by Telstra included providing 'always on' two-way satellite internet services.

After reviewing a copy of the agreement between Telstra and the Commonwealth and seeking advice on it, the ACCC exercised its discretion not to pursue the matter further, nor issue a competition notice.

The ACCC took into account various submissions from interested parties and considered relevant matters, including:

- the competitive tender process of the Commonwealth
- the carrier licence conditions imposed on Telstra to provide the two-way satellite service
- the fact that the ACCC had several other litigious vehicles on foot challenging the findings of *Bradken v BHP*
- Optus retained a right to seek injunctive relief for a breach of the competition rule under Part XIB of the Act
- Optus retained a right of private action under Part IV of the Act in relation to the conduct
- the needs of rural and regional Australia.

The ACCC closed its investigation in May 2002.

3.2.4 Internet interconnection

In mid-2001 the ACCC received complaints from several internet access providers (IAPs) concerning the commercial arrangements in place for the exchange of internet traffic across the backbones of the four tier one players: Telstra, Optus, World Exchange and Connect.com.

The ACCC has previously investigated internet interconnection—issuing a competition notice to Telstra in May 1998. It has also attempted to develop industry thinking on the issues surrounding internet interconnection—for example releasing a discussion paper in cooperation with the ACIF in February 2000.

In these new complaints it was alleged that the tier one IAPs charged the smaller or tier two IAPs for data carried across the tier ones' backbone networks, but refused to pay the tier two IAPs for the transmission of data over the tier two's backbone networks.

The ACCC investigated these complaints: engaging in discussions with the tier one players; requesting information about current internet interconnection arrangements between the four tier one players and those tier two players involved in the dispute; and requesting information about the reasons why the carriers have favoured particular internet interconnection arrangements with various players.

Regarding these specific complaints the ACCC assessed that it would not intervene but would continue to actively monitor the internet interconnection arrangements which exist between the industry players and the effect they may have on the competitive process.

3.2.5 Pay TV arrangements—Foxtel and Optus, and Foxtel and Telstra

On 5 March 2002 Foxtel and Optus approached the ACCC with a proposal relating to the supply of Foxtel pay TV content to Optus governed by an agreement, the Content Supply Agreement (CSA). The CSA essentially provided for Foxtel to supply its pay TV channels to Optus for resale on its HFC network system until 31 December 2010. Under the CSA, Foxtel assumes the majority of Optus' financial obligations under most of its content agreements with content and program suppliers.

Under a related agreement, the satellite services agreement, Foxtel proposed to lease 12 out of 20 transponders from Optus, with an option to lease a further two transponders, on the Optus C1 satellite.

In the ensuing months, the ACCC investigated the impact of these agreements and analysed the clauses and terms and conditions of the agreements. It also conducted extensive market inquiries to understand the competition effects of the agreements if they were implemented and to help it assess whether the agreements resulted in a substantial lessening of competition in any of the relevant markets.

On 21 June 2002 the ACCC concluded that the proposed CSA were likely to breach the Act. It cited several areas of concern: the acquisition and distribution of content; supplying subscription television services to households; and providing channels to third parties intending to supply pay TV to customers.

Where the ACCC concludes that a proposed transaction will breach the Act, the parties to the transaction may offer undertakings under s. 87B of the Act to try and overcome the ACCC's concerns.

In the post-reporting period Foxtel, Optus, Telstra and Austar offered undertakings and on 13 November 2002 the ACCC announced that they addressed its concerns about the CSA's potential anti-competitive effects.

In outlining its decision the ACCC noted that:

- the ACCC's decision related to the specific case under consideration and acceptance of the undertakings did not alter the pre-existing competitive landscape of the pay TV industry
- in this case there was evidence that Optus' inability to access and supply key pay TV content to its customers was adversely affecting its competitive position in the market—the CSA should enable Optus to improve its programming and to ensure consumers are offered a better quality pay TV service
- the court enforceable undertakings accepted by the ACCC should allow rival pay TV operators like TransACT and Neighbourhood Cable to buy and offer consumers a more comprehensive range of programming including popular movies and sports
- it should also allow rival pay TV operators to use Foxtel and Telstra's analogue and proposed digital pay TV infrastructure—Telstra's cable network and Foxtel's set-top boxes—to provide competing services to consumers.

Several processes must still be completed in the post reporting period, including:

- an assessment of Telstra and Foxtel's analogue access undertakings under s. 152BS of the Act that set out the price and non-price terms and conditions upon which access will be provided to analogue pay TV services. These analogue undertakings were received in the post-reporting period.
- consideration of exemption applications made under s. 152ATA of the Act by Telstra and Foxtel whereby they seek exemption from access obligations if their pay TV networks are digitised. These exemption applications were also received in the post-reporting period.

In a related matter Foxtel and Telstra also advised the ACCC of arrangements in which Telstra would obtain the Foxtel pay TV services and provide them as part of its Options Rewards scheme. However, the structure of the arrangement, whereby Telstra Pay TV (a wholly owned subsidiary of Telstra Corporation) provides, or offers to provide, pay TV services at a discount to retail customers on condition that the purchaser buys telecommunications services from Telstra Corporation, constitutes a third line force under the Act. It also constitutes a third line force as the discount is being provided on the condition that the services are acquired together.

Third line forcing is a specific form of exclusive dealing and is a *per se* breach of the Act—that is, it is prohibited no matter what its effect on competition. In this particular case the third line force arose under ss. 47(6) and (7) of the Act. Although third line forcing is prohibited, suppliers may seek immunity from court action under the notification and authorisation process in the Act.

In the post-reporting period, Telstra Corporation Limited and Telstra Pay TV Pty Limited notified the ACCC of the conduct. Under the notification process, immunity from court action for third line forcing conduct is obtained automatically 14 days after lodgment, and continues unless the ACCC issues a notice removing the immunity. The ACCC announced on 13 November 2002 that it did not intend to intervene at this stage.

3.2.6 Complex porting charges

In October 2001 the ACCC received complaints from a number of carriers, CSPs and business consumers alleging Telstra was imposing excessive charges for providing complex LNP.

Under the *Telecommunications Numbering Plan 1997*, carriers and CSPs are obliged to provide LNP, including complex LNP, which allows customers to change their supplier of local telephone calls but still keep their telephone number. Many customers place a high premium on being able to retain their numbers, especially business customers.

Charges usually apply when porting telephone numbers associated with complex services. These charges are generally levied when the customer ports their numbers away from their carrier.

Complainants asserted that the imposition of excessive charges acted as a disincentive for Telstra's customers to change carriers and thereby inhibited competition. They also claimed Telstra's

charges breached the ACCC's pricing principles for LNP, which sets out how the costs associated with providing LNP should be attributed between the various parties in the porting process.

One of the main principles is that CSPs are responsible for costs incurred in their own network to meet their obligations to provide LNP. This gives them an incentive to adopt the most efficient methods of providing LNP to customers, therefore resulting in lower costs for CSPs and ultimately lower porting prices for customers. The LNP pricing principles allow service providers to recover the *efficiently* incurred costs of providing LNP.

The ACCC's preliminary investigations revealed grounds for concern and these were raised with Telstra in late October 2001.

After lengthy negotiations, Telstra agreed to reduce its charges in line with those of other carriers and CSPs. This has resulted in appreciably lower costs (about 50 per cent lower) for service providers and ultimately for business customers wanting to port their numbers.

3.2.7 Faults management and provisioning investigation

The ACCC received a series of complaints from several of Telstra's wholesale customers (and their customers) in late 2001 about the operation of Telstra's fault management and provisioning services. The complaints focused on perceived discriminatory behaviour by Telstra between the standard of services provided to Telstra's retail customers compared with its wholesale customers.

The ACCC asked Telstra to make detailed presentations on this issue and made further inquiries, including field investigations of Telstra's wholesale and retail operations and day-to-day processes. The field investigations were a necessary step to gain greater knowledge of Telstra's systems in managing faults and provisioning.

The ACCC's preliminary findings supported measures being implemented to ensure transparency in Telstra's fault management and provisioning processes, minimising the possibility of discriminatory behaviour. This included implementation of monitoring programs for:

- fault rectification times for Telstra wholesale customers as opposed to retail customers
- the outcomes of complex provisioning orders (which is the focus of complaints against Telstra) for Telstra retail customers as opposed to its wholesale customers.

The ACCC also considered that regular briefings from Telstra about the progress and direction in developing and implementing Telstra's new fault management system (to become operational during 2003) would ensure wholesale customers received equitable service standards with Telstra's retail customers.

Some of these proposals have since been overtaken by the development of the Government's accounting separation regime.

4 Consumer safeguards provisions

This section details major ACCC investigations involving potential telecommunications breaches of the consumer protection provisions in Part V of the Act. The Act does not have consumer protection provisions specific to the telecommunications market.

A total of 6 862 consumer protection complaints regarding the telecommunications industry were registered with the ACCC in 2001–02. This is a major increase from the previous financial year when 3 232 complaints were received.¹ This increase is partly attributable to the ACCC Infocentre being set up in May 2001, which has improved both initial handling and recording of consumer complaints.

Of the 6 862 complaints, 37 per cent did not fall within the ACCC’s jurisdiction—that is, they were not issues covered by the Act. For example, the ACCC cannot help consumers with telecommunications billing disputes—these must be first taken up with the relevant carrier or service provider and then, if the consumer is unsatisfied with the response, with the Telecommunications Industry Ombudsman.

Also, many of the complaints received related to the same or similar issues. For example, a major issue, such as One.Tel entering receivership or a change in pricing of a service, may generate many hundreds of similar complaints from consumers.

Given finite resources, the ACCC cannot fully investigate all of the complaints that it receives. This resulted in 18 telecommunications issues (each representing many hundreds of complaints) being progressed to substantive further investigation. Four key investigations are outlined below.

4.1 Axxess Australia and Benchmark Sales Pty Ltd

In May 2001, following complaints from consumers that they had been transferred to other telecommunications networks without their consent (known as ‘slamming’), the ACCC issued proceedings against door-to-door sales agent, Axxess Australia Pty Ltd. The ACCC alleged that Axxess and its employees had engaged in unconscionable conduct, misleading and deceptive conduct and had made false and misleading representations. Telemarketing sales company, Benchmark Sales Pty Ltd, was joined to the proceeding in November 2001.

In March 2002 the Federal Court found that Axxess and Benchmark Sales breached the Act when trying to obtain customers for telephone companies and in many instances the conduct complained of resulted in slamming. The court ordered that Axxess and Benchmark Sales

¹ In the 2000–01 report the number of consumer complaints regarding telecommunications services was reported as 2292. The ACCC used different parameters to interrogate its complaints database for this report—thus the difference in the 2000–01 figures. These new parameters will be used in all future reports.

contribute \$60 000 to a fund established by the ACCC to raise awareness of consumer rights when obtaining phone services and issued injunctions restraining Axxess and Benchmark from engaging in a range of misleading and deceptive conduct. The ACCC had previously obtained orders against Primus and One.Tel, two of Axxess' former clients, for slamming.

The ACCC also accepted undertakings from the directors of each company acknowledging that they had breached the Act. They agreed to an independent review of their company's trade practices compliance procedures; to adopt a number of telecommunication industry codes of practice; to pay the ACCC's costs and contribute to the funding of the ACCC's consumer education and awareness campaigns.

4.2 ACCC v Telstra regarding One.Tel mobile customers

In June 2001 the ACCC became aware that Telstra was making incorrect representations to customers of the now defunct One.Tel about the transfer of their mobile services to Telstra. This included representations that customers would be liable for early termination fees if they did not move their service to Telstra before 9 June 2001. After Telstra failed to stop the conduct, despite the ACCC's requests that it do so, the ACCC instituted proceedings on 5 July 2001 in the Federal Court against Telstra for misleading and deceptive conduct and false and misleading representations in breach of the Act.

On 6 July 2001 the Federal Court granted an interim injunction ordering Telstra not to make further representations to One.Tel mobile customers that if they transferred their business to Telstra's competitors, or failed to transfer to Telstra, or failed to transfer to Telstra by a specified date that they may be liable to pay termination fees to One.Tel.

In December 2001 the Federal Court issued consent orders declaring that Telstra had breached the Act and issued injunctions affirming the interim injunctions. Telstra was ordered to develop and implement a compliance program for two years for all staff of its retail mobile telephone business. Telstra was also required to partially repay the minimum monthly access fees for some customers and ordered to pay the ACCC's agreed legal costs.

4.3 Pair gain systems

In April 2002 the ACCC received a number of complaints about Telstra's use of pair gain systems in the PSTN. Complainants alleged they were experiencing slow dial-up speeds when accessing the internet via their telephone line. In other cases, complainants were concerned about their inability to connect to high download speed ADSL broadband, even where the local exchange had been ADSL enabled.

Although PGS do not affect the quality of voice services, they can have unfavourable effects on internet dial-up speeds and also limit the customer's ability to obtain ADSL. Under the Government's Universal Service Obligation (USO) regime a standard telephone service only needs to provide a quality voice service. The mandated data speed across a standard telephone service is 2 400 kilobits per second, which is the minimum speed necessary for teletypewriters and some faxes.

In investigating these complaints, the ACCC assessed that consumers were generally not aware of the existence of pair gain systems, the effect that such systems may have on their dial-up internet access speeds and the inability to access ADSL when using a pair gain.

Following an extensive investigation and detailed communications with Telstra, the ACCC determined that:

- the use by Telstra of pair gain systems is not, in itself, a breach of the Act
- there would be reduced complaints about pair gain systems if there were greater disclosure of pair gain systems, its use and potential effects on data services
- many complaints about pair gain systems arose from disparity between consumers' expectation of the speeds and types of data services which their standard telephone service would support and Telstra's obligations under the USO regime to simply provide a voice quality service.

Following discussions between Telstra and the ACCC, Telstra undertook to increase the level of information it provides to consumers concerning the potential effect that network design decisions have on internet access speed and ability.

Telstra will now specifically ask consumers what their intended purpose for the phone line is when they request the connection of a second line. If a second line is to be used to support a data service and/or to provide ADSL, Telstra will give consumers information about the minimum telephone service it is obliged to provide under the USO and about pair gain systems and its possible impact on data services.

4.4 Vodafone pre-paid terms and conditions

In September 2001 Vodafone changed the terms and conditions for its Fast Fone pre-paid mobile service, reducing the expiry time in which Fast Fone prepaid customers could use their pre-paid call credits, from 365 days to between 40 to 200 days.

The ACCC received complaints from existing Vodafone Fast Fone customers alleging that they were not notified by Vodafone of the change to the terms and conditions. Further new customers alleged they were not made aware of the new expiry periods at the point of sale.

The ACCC notified Vodafone of its concerns that consumers may have been misled through silence by the company not letting consumers know that it had reduced the expiry period. Vodafone told the ACCC that it had tried to communicate the changes to consumers by placing notices in a newspaper with Australia-wide circulation, transmitting an SMS message to its customer base, placing a voice announcement to advise customers when recharging their pre-card service, and directing vendors to remove or amend outdated advertising materials to reflect the change.

Despite these actions, the ACCC's investigations revealed that not all customers could have reasonably been made aware of the change. For example, not all customers were able to receive the SMS message, not all vendors had complied with Vodafone's directions and not all customers had read the newspaper in which the notices were featured. Accordingly, the ACCC believed that Vodafone had engaged in misleading and deceptive conduct in breach of s. 52 of the Act.

Vodafone gave the ACCC court enforceable undertakings, under s. 87B of the Act, that it would remedy the conduct by:

- crediting Fast Fone customers the number of call credits that were lost from their first activation between 3 September 2001 and 24 June 2002
- offering to supply any Fast Fone customer whose service has been de-activated with a new starter pack with appropriate call credits
- not misrepresenting the expiry period of Vodafone Fast Fone pre-paid call credits
- placing corrective advertisements in *The Australian* newspaper
- reviewing and reporting to the ACCC on its trade practices compliance program and internal policies.

The ACCC's action reinforced the need for service providers to appropriately notify all their customers of any changes to their products and services, especially regarding pre-paid services where there is little, and often infrequent, contact between suppliers and customers.

5

Tariff filing and record keeping rules

This section outlines the tariff filing and RKR provisions of the Act, including the development of the new RAF that captures financial information for specified carriage services.

The ACCC has specific information-gathering 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 when there are concerns about anti-competitive conduct, or when determining appropriate access prices. They also enable the ACCC to be aware of market behaviour in 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)
- Telstra-specific tariff filing (division 5 of Part XIB).

5.1.1 Tariff filing directions under division 4 of Part XIB

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

In 2001–02 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 services allow for communication between two or more distinct places, which are supplied by fixed line or satellite-based facilities. They do not include supply of customer equipment.

Specifically, Telstra must give the ACCC a written statement setting out its proposed pricing changes for BCSs. It must do this 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 them. However, providing all information under Division 5 was seen as administratively burdensome for both the ACCC and Telstra. A streamlined process was developed by identifying the relevant BCSs and charging information which would help the ACCC detect potential anti-competitive behaviour.

Therefore, in June 1998 the ACCC and Telstra agreed the relevant information that would be provided for certain BCSs which would not cause practical and resource difficulties. It is 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 brief the ACCC if it has introduced, varied or withdrawn an offering for a BCS and considers that change to be significant.
- the ACCC may also request a briefing to obtain information about any amendments to Telstra's standard form of agreement or about a non-standard form of agreement.

Exemptions exist for particular BCSs when:

- there is a limited likelihood for anti-competitive conduct
- information is already available to the ACCC through the access regime
- information is 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 2001–02 Telstra complied with the requirements to give the ACCC tariff filing information.

5.2 Record keeping rules

Under s. 151BU of Part XIB of the Act, the ACCC has the power to make an RKR by written instrument and require that carriers and CSPs comply with it. 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 its responsibilities. 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 Regulatory Accounting Framework

After notifying five principal carriers (Telstra, Optus, Vodafone, AAPT and Primus) in May 2001 of their requirement to report under a new RKR—the Telecommunications Industry RAF—the ACCC continued to help carriers implement the rule in 2001–02 and received the carriers' first RAF reports.

The ACCC has established a comprehensive internal database to manage the data received under the RAF to help assess its accuracy and reliability.

5.2.2 Non-financial record keeping rules

In 2000–01 the ACCC issued two RKRs to Telstra for the ULLS: the first required Telstra to give detailed information on how it provides its competitors with access to its copper network; and the second involved the deployment and fault handling of ADSL services. During 2001–02 the ACCC monitored Telstra's conduct, via these RKRs, in providing service to ULLS access seekers to ensure, among other things, that Telstra complied with the SAOs, provided timely assessment of competitor complaints and that the ULLS declaration was effective. This also fulfils the ACCC's broader telecommunications market monitoring functions.

5.2.3 Record keeping rule covering Telstra's LCS and ULLS commercial agreements

The ACCC issued a RKR direction to Telstra on 21 December 2001, requiring it to provide all its existing commercial agreements covering its supply of the LCS and the ULLS to other carriers and CSPs. The ACCC requested this information to enable it to review trends in the wholesale price of telecommunications services and to help make a decision on Telstra's exemption application to supply the LCS in CBD areas. Under the RKR, the commercial agreements were given to the ACCC on 15 April 2002.

5.2.4 Information disclosure of record keeping rules

On 21 January 2002 the ACCC released a discussion paper on the public disclosure of information collected as part of its exercise of RKR powers.

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

The discussion paper noted that disclosure of some of the RKR information may reduce information asymmetries between access providers and access seekers, and therefore increase certainty, reduce industry disputation and promote competition in downstream telecommunications markets.

In particular, the discussion paper raised issues about the regular release of Telstra's cost data related to its local loop. It noted that the release of this information may overcome the lack of transparency of Telstra's costs, which impedes successful access negotiations in relation to Telstra's fixed-line network. The paper also proposed the release of market indicator information that may be of use to consumers, industry, academics and policy makers.

Comments on the discussion paper were received during February 2002. Because of uncertainty surrounding the government's proposals in response to the Productivity Commission's report on telecommunications regulation, the release of the draft paper was delayed until the post-reporting period (29 August 2002).

6 Access to telecommunications network services

This section outlines how the ACCC regulates access to telecommunications networks, including the declaration of telecommunication services, arbitration of access disputes, and the development of pricing principles for particular services which the ACCC is likely to use to settle access disputes.

Part XIC of the 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)
- 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. The ACCC also encourages the industry to self-regulate where possible, which is consistent with the general policy guiding the telecommunications regulation, as provided in s. 4 of the *Telecommunications Act 1997*. However, if intractable disagreements arise or anti-competitive conduct occurs the ACCC will use its regulatory powers as appropriate.

The Part XIC access regime only applies to services that are declared or were deemed to be declared. Deemed services are telecommunications services 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 framework. The ACCC's guide, *Telecommunications services—declaration provisions*, explains the ACCC's approach to particular declaration issues, including the matters that it must consider and how it will consider them. The guide also contains a section dealing with procedural issues, such as the public inquiry process.

Services are declared after the ACCC holds a public inquiry.

Previously services could also be declared following a recommendation from the Telecommunications Access Forum (TAF). However, on 31 January 2002 the TAF was officially dissolved because, in its members' view, it has been unable to effectively perform its primary function of making recommendations to declare services.

The ACCC seeks to use the declaration process to develop the optimal scope for telecommunications access regulation. As competition increases with the entry of new carriers and CSPs, and different technologies can be more readily substituted, the extent of regulation required for some existing services may diminish. However, because new services may have features that warrant regulation, the ACCC may still have to consider whether they need to be declared.

Once a service is declared the access provider is subject to SAOs, which require them 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 the service it 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:

- 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
- the ACCC can accept an undertaking by the access provider, which will determine the terms and conditions of access.

6.1 Public inquiries into declaration of telecommunication services

In 2001–02 the ACCC held the following declaration inquiries.

6.1.1 Transmission services inquiry—intercapital transmission monitoring

Intercapital transmission refers to the transmission of voice, data and other communications between Brisbane, Sydney, Canberra, Melbourne, Adelaide and Perth. Before May 2001 intercapital transmission on all routes was a declared service, except for the routes between Sydney, Melbourne and Canberra.

In June 2000 the ACCC issued a discussion paper on the declaration of intercapital transmission. After considering submissions, it 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.

The ACCC also broadened its monitoring program to include all intercapital routes and major new entrants. Operators are now required to provide revenue, pricing and capacity utilisation information every six months.

In 2001–02 the ACCC received monitoring data for two six-month periods, ending 30 June 2001 and 31 December 2001. An analysis of the data showed competition had increased on the Brisbane to Sydney, Sydney to Melbourne, Sydney to Canberra and Canberra to Melbourne routes. Data from future reporting periods will enable the ACCC to identify any less pronounced changes in the level of competition on other routes.

The ACCC decided that the monitoring program should be continued and enhanced to provide a more comprehensive view of the level of competition. Consequently, operators were asked for additional monitoring information on a historic basis and for future reporting periods.

6.1.2 Variation to make the GSM service declarations technology-neutral

In September 2001 the ACCC began a public inquiry into whether the domestic GSM originating and terminating access service declarations should be varied to become mobile technology-neutral.

The domestic GSM originating and terminating access services are wholesale inputs used by carriers and service providers to supply mobile and fixed-to-mobile retail services to end-users. They were deemed to be declared at the commencement of the regulatory regime in 1997.

The ACCC initiated this inquiry after it decided that a retail benchmarking approach was the most appropriate pricing methodology for the domestic GSM terminating access service.¹ The ACCC noted that many of the issues relevant to the GSM terminating service may equally apply to other mobile technologies that are currently used in Australia, such as CDMA.

The ACCC issued a discussion paper in September 2001 setting out many issues that were pertinent to its decision. In December 2001 the ACCC released a draft report to give interested parties a further opportunity to comment.

Having regard to the submissions received, the ACCC believed that varying the GSM service declarations to include other mobile technologies currently in use would be in the LTIE.

The ACCC is aware that as GSM and CDMA are the only mobile technologies currently in use, the proposed variation will result in service declarations that encompass only GSM and CDMA services.

The ACCC considers that the variation will greatly benefit competition.

It will improve competition in the fixed-to-mobile services market as integrated mobile carriers will have less opportunity to price in an anti-competitive manner, benefiting end-users making fixed-to-mobile calls with lower prices. Also, the competitive neutrality associated with the proposed variation will ensure a level playing field in the mobile services market.

¹ ACCC, *Pricing Methodology for the GSM Termination Service*, July 2001, pp. 5–6.

Allocative efficiency is also like to improve under the proposed variation. With a reduced gap between price and cost, any allocative inefficiencies caused by cross-subsidisation of mobile phone subscribers by fixed line subscribers will diminish as will any excess profits being earned. Any allocative inefficiencies caused by asymmetric regulation would also be avoided.

In March 2002 the ACCC published its final report, *Variation to make the GSM Service Declarations Technology Neutral*, which recommended that including other mobile technologies currently being used in the GSM service declarations would be in the long-term interests of end-users.

In April 2002 the ACCC varied the GSM services declaration to make it mobile technology-neutral for technologies currently in use in Australia, namely GSM and CDMA services.

6.1.3 Line sharing service declaration inquiry

On 21 September 2001 the ACCC announced that it would conduct an inquiry into whether a LSS should be declared. This followed the TAF referring the matter to the ACCC because it had been unable to reach a consensus on whether the service should be declared.

Line sharing refers to two separate carriers providing separate services over a single metallic pair (or line). A metallic pair is capable of providing a broad range of services by using the full spectrum of the line. Until recently only 3.1 kHz—a relatively small part of the several MHz of useable spectrum—has been used to provide voice services with the rest of the spectrum unused.

However, with the development of xDSL technology², which allows low-speed and high-speed services to be provided on a single line at the same time, the remaining part of the spectrum can now be used to provide a variety of broadband services.

With LSS the spectrum of the metallic line is normally split or shared so that one carrier or CSP can use it to provide voice services while another can provide high-speed data services using its own xDSL technology. More specifically, LSS involves an access provider supplying a voiceband PSTN service to an end-user, while providing access to another carrier so that it can provide services to the same end-user over the high-frequency portion of the unconditioned local loop.

The ACCC issued a discussion paper on 25 October 2001 on whether LSS should be declared and conducted market inquiries. It received 10 submissions in response.

On 19 April 2002 the ACCC issued a draft decision to declare a LSS. At that stage, Telstra had indicated it was likely to begin providing an LSS from 1 July 2002, and that it had also reached commercial agreements with some carriers about the price of its LSS. However, in making its preliminary decision to declare the service, the ACCC considered that the prices in these

² xDSL refers to the 'family' of digital subscriber line services (e.g. ADSL=asymmetric DSL, HDSL=high bit rate (or high-speed) DSL etc). For instance, ADSL uses a dedicated line from the customer premises to a network exchange to provide an 'always on' data service with downstream access speeds over 1.5 Mbits per second and upstream speeds typically one quarter of the downstream rate, while supporting an independent PSTN dial-up voice service over the same line.

agreements were likely to be more than those expected in a competitive market for a LSS. And while the ACCC was generally encouraged by these commercial negotiations and by the launch of this service, the ACCC noted some access seekers were concerned about the non-price terms and conditions associated with Telstra's LSS.

Irrespective of whether the terms and conditions were close to those that might best promote the LTIE, the ACCC was doubtful about the long-term fundamental durability of these agreements in the absence of declaration. These concerns stem from the basic structure of the market, where Telstra is the sole provider of an LSS and no other services can exert a sufficiently competitive constraint on Telstra's pricing behaviour. Accordingly, the ACCC queried whether, in the ongoing absence of declaration, Telstra would continue to have an incentive to negotiate with a large range of carriers on competitive terms and conditions. Essentially, Telstra would still have the ability and incentive to either deny access or set terms and conditions inconsistent with the LTIE. Therefore, there was concern that once the prospect of declaration is removed, the conduct in the market would revert to its more natural form, given the market's particular structural characteristics.

The ACCC considered that declaring an LSS would involve the ACCC potentially having a role in setting the terms and conditions of access. The declaration route, therefore, represents a way of continuing to redress the balance of power in commercial negotiations, regardless of whether or not it is currently impinging on commercial negotiations.

In the post-reporting period, Telstra launched its commercial LSS offering as planned. After receiving five submissions from interested parties and conducting further market inquiries, the ACCC made a final decision to declare the service on 30 August 2002.

6.2 Exemption applications

Under s. 152AT of the Act, a carrier or CSP may apply to the ACCC for a written order exempting it from the SAOs that apply to a declared service. These require, among other things, an access provider to supply the declared service to the access seeker, if requested. If the ACCC believes that an order made about 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.

6.2.1 Local carriage service exemption applications

In June 2000 Telstra applied to the ACCC for an exemption from its obligations to supply the LCS to its competitors in the CBD areas of Melbourne, Sydney, Brisbane, Adelaide and Perth. The application noted that it was to be one of several designed to phase out Telstra's SAOs for the LCS over a 12-month period. The ACCC also decided to consider a class exemption under s. 152AS in the areas covered by Telstra's application and sought public comment.

The ACCC issued a draft decision in September 2001, indicating that it intended to grant a class exemption to Telstra and other carriers in the areas specified in Telstra's first application, to take effect one year after issuing any final decision. The one year delay would give access seekers time to alter their business plans to accommodate the exemption.

The ACCC considered submissions from interested parties in response to the draft decision. The ACCC made a final decision in July 2002, providing for two separate exemptions:

- an individual exemption that relates only to Telstra. This will not take effect until 17 July 2003 and has several conditions attached that relate to giving the ACCC certain information for a period of two years from the date of effect.
- a class exemption that applies to all carriers and carriage service providers other than Telstra. It takes effect from the date of gazettal (31 July 2002) and is not subject to any conditions.

Telstra lodged a second application in November 2000 for an exemption from its obligation to supply the LCS to its competitors in the CBD areas of Hobart, Canberra and Darwin, metropolitan areas of all capital cities, and the three regional centres of, Newcastle, Wollongong and Geelong. The ACCC sought public comment about this exemption application and a possible class exemption under s. 152AS in March 2001 and received several submissions in response. Telstra subsequently notified the ACCC that it intended to change the scope of its application and so the ACCC suspended its consideration of the application. Telstra did not submit a revised application during the reporting period.

6.3 Access undertakings

Part XIC includes a mechanism allowing access providers to give voluntary access undertakings on the supply of declared services. They must set out the terms and conditions upon which the access provider undertakes to comply with the particular SAO.

Under Part XIC, the ACCC is required to accept or reject an undertaking. If accepted, the ACCC must apply a relevant undertaking in an access dispute.

For that reason undertakings, if accepted by the ACCC, provide a degree of certainty to both access providers and access seekers.

There were no access undertakings submitted during the reporting period.

6.4 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 to resolve access disputes. The ACCC must undertake arbitrations if notified of an access dispute, but only after private negotiations, mediation and/or conciliation fail. When the ACCC accepts a relevant access undertaking, 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 SAO apply, or will apply, to the carrier or CSP in relation to the declared service
- 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.

6.4.1 Dispute resolution guidelines

During 2001–02 the ACCC engaged consultants to review its arbitration of disputes conducted under Part XIC of the Act and the *Telecommunications Act 1997* because it had become aware of the need for an independent review.

The review found that telecommunications access disputes were typically more complex than normal commercial arbitrations, and that parties frequently lack commercial incentives to reach agreement. To overcome these complexities, consultants Phillips Fox, in conjunction with Resolve Advisors, recommended that the ACCC manage arbitrations case by case.

In particular, the review team advised that the case-by-case management of disputes be overseen by a case management team which, among other things, would consider the use of alternative dispute resolution processes more systematically.

On 30 April 2002, following completion of the review, the ACCC released a draft guide, *Resolution of telecommunications access disputes*. It outlined the arbitration provisions of Part XIC and how the ACCC administers them.

The guide incorporated the review team's recommendations to improve the fairness, effectiveness, efficiency and speed of arbitrations. It also included incremental changes to the ACCC's process, consolidating the lessons learned in conducting arbitrations since 1997 and recent legislative changes to the access regime.

By June 2002 the ACCC had received industry comment and the final guide was issued in the post-reporting period on 10 October 2002.

6.4.2 Arbitrations

At the beginning of 2001–02, the ACCC had 21 separate arbitrations underway. During the reporting period, 16 disputes were withdrawn by the parties after signing commercial agreements, the ACCC issued two final determinations and in one case the ACCC terminated the arbitration as jurisdiction could not be established. Table 1 below summarises the status of all access disputes since 1998.

The ACCC believes that the possibility of the Australian Competition Tribunal (ACT) re-arbitrating disputes was an incentive for smaller operators to settle on terms that, while closer to the ACCC's likely position than the offer before arbitration, were more favourable to Telstra than ACCC decisions would have been. The commercial agreements covering some of these services (to which the ACCC has since had access) confirms this observation.

In most cases, disputes were withdrawn when the ACCC was close to finalising its deliberations and, most importantly, publishing its findings. Publishing final decisions is preferable because it provides information to the market about the prices that the ACCC has set. Given the information asymmetries in the industry this is an important process.

The ACCC decided to publish a range of indicative prices and guidelines to ensure that the work it would have published had the arbitrations been finalised, was available to the market.

See section 6.5 for further details on the release of pricing principles, guidelines and indicative prices.

Analogue pay TV arbitrations

During 2001–02 the ACCC continued its arbitration about the terms and conditions of access to pay TV services.

TARBS and C7 first notified access disputes to the ACCC in 1999 and 2000 regarding access to Telstra's cable to provide pay TV services. These arbitrations were delayed because of various proceedings before the Federal Court in 1999 and 2000 (completed in August 2001).

The ACCC issued interim determinations in these disputes in April 2001. It was asked to help resolve technical/implementation issues preventing the interim determinations taking effect. As a separate but parallel process, the parties were required to make submissions on terms and conditions of access, including pricing, for the ACCC's final determinations. The ACCC commissioned an independent report about these technical issues.

However, the technical difficulties led to a desire on the part of access seekers not to implement the determinations³ and in April 2002 the interim determinations lapsed.

³ This was also related to other developments, in particular the loss by Seven/C7 of the AFL broadcasting rights.

The focus of the arbitrations then shifted to resolving issues ahead of making the final determination. In June 2002, to minimise disputation over process issues and to encourage consideration of substantive issues, the ACCC instituted a case management approach to the arbitration, including employing professional mediators/case managers.

In a related process, Telstra lodged draft Part XIC undertakings with the ACCC in late 2001–02 relating to analogue pay TV services. This was part of the arrangements between Foxtel, Optus, Telstra and others regarding content, digital and analogue access and other matters (see section 3.2.5 for details). This resulted in the pay TV arbitrations being put on hold while the ACCC considered these arrangements.

Part of these arrangements included a proposal to resolve the access dispute—namely that, should it approve the analogue pay TV undertakings, the ACCC should make arbitration determinations in line with those undertakings. Equally, however, if the ACCC rejected the undertakings the arbitration would once again need to be resolved.

Table 1. Access disputes as at the end of the 2001–02 financial year

Access seeker ^(a)	Access provider	Service(s)	Date notified	Determination/status
AAPT	Telstra	Domestic PSTN originating and terminating access service	11 December 1998	Final determination issued under s. 152CP of the Act—13 September 2000
Primus	Telstra	Domestic PSTN originating and terminating access service	5 February 1999	Final determination—18 September 2000
Flow Communications	Telstra	Domestic PSTN originating access service	7 January 2000	Final determination—27 November 2000
AAPT	Optus	Domestic PSTN originating and terminating access service	11 June 1999	Withdrawn—14 March 2001
Worldxchange	Telstra	Domestic PSTN terminating access service	28 December 2000	Final determination—4 May 2001
Optus	Telstra	Domestic PSTN originating and terminating access service	30 March 2001	Withdrawn—5 October 2001
Telstra	Primus	Domestic PSTN terminating access service—for data calls to ISPs	7 July 2000	Final determination—21 November 2001
Telstra	PowerTel	Domestic PSTN terminating access service—for data calls to ISPs	5 December 2000	Final determination—13 November 2001
Telstra	AAPT	Domestic PSTN terminating access service—for data calls to ISPs	22 November 1999	Withdrawn—11 April 2002
Telstra	The Internet Group (lhug)—notifier	Domestic PSTN terminating access service—for data calls to ISPs	1 November 2000	ACCC terminated—6 June 2001
Telstra	Chime Communication (iiNet)—notifier	Domestic PSTN terminating access service—for data calls to ISPs	21 December 2000	ACCC terminated—6 June 2001

Access seeker ^(a)	Access provider	Service(s)	Date notified	Determination/status
Optus	Telstra	Integrated services digital network	11 May 1999	Withdrawn—4 September 2000
MCT	Telstra	Domestic data access service	10 May 1999	Final determination— 22 December 2000
AAPT	Telstra	Domestic data access service	8 March 1999	Withdrawn—2 January 2001
Primus	Vodafone	Domestic GSM originating and terminating access services	1 October 1999	Withdrawn—5 December 2000
Primus	Optus	Domestic GSM originating and terminating access service	1 October 1999	Originating withdrawn— 5 December 2000 Terminating withdrawn— 15 June 2001
Primus	Telstra	Domestic GSM terminating access service	1 October 1999	Withdrawn—7 June 2001
Worldxchange	Telstra	Domestic GSM terminating access service	22 December 2000	7 September 2001— Jurisdiction not established
AAPT	Telstra	Domestic GSM originating and terminating access services	16 and 19 March 1999	Withdrawn—5 October 2001
AAPT	Vodafone	Domestic GSM originating and terminating access services	30 November 1999	Withdrawn— 14 November 2001
AAPT	Optus	Domestic GSM originating and terminating access services	15 June 1999	Withdrawn—2 May 2001
AAPT	Telstra	Local carriage service	21 March 2000	Withdrawn—30 March 2001
Primus	Telstra	Local carriage service	7 March 2000	Withdrawn—5 October 2001
RSL Com	Telstra	Local carriage service	5 September 2000	Withdrawn—4 December 2000
Worldxchange	Telstra	Local carriage service	22 December 2000	Withdrawn—12 November 2001
People Telecom	Telstra	Local carriage service	28 May 2001	Withdrawn—12 November 2001
MCT	Telstra	Local carriage service	29 December 1999	Withdrawn—12 November 2001
Optus	Telstra	Local carriage service	13 August 1999	Withdrawn—5 October 2001
One.Tel	Telstra	Local carriage service	18 July 2000	Withdrawn—30 April 2001
Dingo Blue	Telstra	Local carriage service	30 August 2000	Withdrawn—4 October 2001
AAPT	Telstra	Unconditioned local loop service	24 July 2000	Withdrawn—28 November 2001
Optus(XYZed)	Telstra	Unconditioned local loop service	27 July 2000	Withdrawn—3 December 2001
Primus	Telstra	Unconditioned local loop service	9 October 2000	Withdrawn—23 November 2001
One.Tel	Telstra	Unconditioned local loop service	4 August 2000	Withdrawn—10 August 2001
Optus	Telstra	Freephone and Local rate number portability	18 December 2000	Withdrawn—5 October 2001
Optus	Telstra	Local number portability	20 April 2000	Withdrawn—5 October 2001

Access seeker ^(a)	Access provider	Service(s)	Date notified	Determination/status
TARBS	Telstra Multimedia, Foxtel and related parties	Broadcasting access service	23 September 1999	Ongoing at 30 June 2001 Interim determination— 24 April 2001
C7	Telstra Multimedia, Foxtel and related parties	Broadcasting access service	31 August and 1 September 2000	Ongoing at 30 June 2001 Interim determination— 5 April 2001

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

6.4.3 PSTN tribunal case

During 2001–02 the ACCC worked on the PSTN originating and terminating access services appeal to the Act.

Under s. 152DO of the Act, parties to an access dispute can ask the tribunal to review final determinations issued by the ACCC. Such a review is assessed on the merits and is a full re-arbitration of the matter.

Before the reporting period, in September 2000, the ACCC made separate final determinations for 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. In October 2000 Telstra lodged applications with the tribunal to review the ACCC’s final determination in each matter. The ACCC joined the proceedings as a party assisting the tribunal.

The tribunal conducted nine preliminary hearings, and received detailed submissions and evidence on behalf of the parties, including 81 witness statements. Telstra withdrew the case in April 2002 before it came to hearing, after signing commercial agreements with the last of the disputing parties, AAPT. Telstra had settled with Optus in October 2001 and Primus in February 2002.

The proceedings before the tribunal, conducted in private, were subject to confidentiality restrictions, and therefore the ACCC cannot publicly discuss the issues that were in contention.

The withdrawal of the case has left a large number of matters unresolved regarding the approach and methodology that should be adopted in interconnection pricing disputes, as Telstra publicly highlighted these matters when lodging the appeal⁴. These include the weighted average cost of capital, the access deficit contribution, and methods of depreciation.

⁴ Telstra press release, ‘Tribunal to consider interconnection costs’, 13 December 2000 at <<http://www.telstra.com.au/newsroom/release.cfm?ReleaseID=11101>>.

Many of these issues had been debated previously while the ACCC was assessing Telstra's undertakings and arbitration processes and are detailed in the ACCC's report, *A Report on the Assessment of Telstra's Undertaking for the Domestic PSTN Originating and Terminating Access Services*.

In addition, matters of principle relating to access pricing were discussed in the Productivity Commission's inquiry report into telecommunications competition regulation (provided to government in December 2001). One of the ACCC's responses to the Productivity Commission's draft report, 'Response to the Productivity Commission Draft Report, Telecommunications Competition Regulation, June 2001', outlines the ACCC's views.

6.5 Pricing principles and indicative pricing

During 2001–02 the ACCC published indicative prices for services such as the PSTN⁵, ULLS⁶ and LCS⁷. By releasing its views on what is an efficient price for a particular service, the ACCC informs the market of its likely decisions in arbitrations, thus providing greater certainty to access seekers and promoting the timely resolution of access disputes without having to refer to the ACCC.

As noted in section 6.4.2 the ACCC published a range of indicative prices and guidelines during the reporting period after several arbitrations that were close to finalisation were withdrawn.

As a result of changes to the telecommunications provisions of the Act in December 2002, first mooted by the government in April 2002, the ACCC will be obliged in 2002–03 to publish pricing principles for services that it declares, and also to publish model terms and conditions for a range of core services—PSTN, ULLS and LCS.

6.5.1 Final report on unconditioned local loop service

The ACCC released *Pricing of unconditioned local loop services (ULLS)—Final Report* in March 2002. This was an updated version of the August 2000 discussion paper about the pricing principles that applied to this service.

The release of the final report followed the withdrawal of the last of four ULLS access disputes in November 2001. The final report incorporated significant new work developed as part of the finalisation of the ULLS arbitrations and the ACCC's consideration of pricing issues. It effectively considered all views expressed by the parties to the arbitrations and included substantial additional work on ULLS-specific costs, which was not considered in the earlier discussion paper. The report also included an updated schedule of indicative access prices for 2001–02.

⁵ In May 2001 the ACCC announced its provisional headline rate for 2001–02 for domestic PSTN originating and terminating access on Telstra's network, discussed in further detail below.

⁶ Refer to ACCC, *Pricing of unconditioned local loop services (ULLS)—Final Report*, May 2002.

⁷ Refer to ACCC, *Local Carriage Service pricing principles and indicative prices—Final Report (Revised)*, April 2002

If the final determinations had been issued, the ACCC could have published non-confidential versions of the determinations to inform all market participants and other interested parties.⁸ This would include the ACCC's determined prices as well as the underlying pricing methodology and reasoning. In deciding to release its ULLS pricing report, the ACCC was providing similar information to the market place.

The ACCC felt this information could indicate its views and be used as in commercial negotiations, thereby increasing the chance of resolving differences more quickly and avoiding the need for further ACCC arbitration.

6.5.2 Revised pricing principles and indicative prices for the LCS

The ACCC published revised pricing principles and indicative prices for the LCS in April 2002⁹. Releasing these principles was intended to inform industry, government and other interested parties of the ACCC's likely position when considering an access dispute or assessing an undertaking relating to pricing for the LCS.

The ACCC's power to make general information available on how it carries out its functions or exercises its powers is set out in s. 28(1) of the Act. However, the ACCC is not bound by the pricing principles and parties to arbitrations can still address the ACCC on the relevance and applicability of the principles to their particular dispute.

The revised principles specify that LCS prices should:

- reflect the use of avoidable (i.e. average) retail costs rather than avoided (i.e. marginal) retail costs
- be determined by the subtraction of avoidable retail costs from unbundled retail local call prices that are associated with particular line rental offerings (here 'unbundled' means local calls and line rental supplied without other call services such as domestic long-distance and international call services)
- require access seekers to share the burden where Telstra is required to absorb the GST on local calls (i.e. for calls priced at 22 cents per call, GST inclusive)
- be accompanied by an avoidable retail cost discount on line rental to provide access seekers with a wholesale basic access price
- include a further retail discount on the local call price if such a retail discount on line rental is not offered. This should be equal to line-related retail costs expressed on a per call basis.

⁸ Section 152CRA of Part XIC of the Act was introduced in 2001 to enable the ACCC to publish its arbitration determinations provided this did not disclose commercially sensitive material.

⁹ These were published in the report *Local Carriage Service pricing principles and indicative prices*, Final Report (Revised), April 2002.

The revised principles contain indicative prices for the LCS as determined by the ACCC in February 2002. However, the principles indicate that if at any time Telstra changes the prices in its *unbundled* offerings, the ACCC expects that these would follow through to the retail starting prices to be used for determining LCS prices.

6.5.3 Revised pricing guidelines for domestic PSTN originating and terminating access service supplied by non-dominant or smaller fixed networks

In January 2002 the ACCC released its pricing principles paper, *Revised Pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks*. This followed the ACCC issuing final determinations for several arbitrations concerning the price of terminating data calls to ISPs connected to non-dominant networks.

The guidelines were a revised version of the final report released in March 2001. They detailed the ACCC's decision on the appropriate pricing methodology for smaller fixed network carriers supplying declared PSTN terminating and originating services.

The ACCC decided that imposing a prescriptive pricing rule is not appropriate for the terminating services of non-dominant or smaller PSTN networks. However, the revised guidelines noted that if the ACCC formed a view in an arbitration determination or undertaking assessment, it would be reluctant to set or accept a charge that was higher than the total service long run incremental cost of the dominant carrier's relevant terminating service. The ACCC also acknowledged that a lower price may be appropriate in certain limited circumstances. It believed that such an approach would promote efficient entry and investment decisions for telecommunications infrastructure by both incumbents and new entrants. The ACCC expects that this pricing stance is appropriate as long as network operators possess a degree of market power over termination charges.

The revised guidelines also contained some indicative charges for PSTN terminating access for data calls to ISPs connected to non-dominant networks. However, it was considered this pricing approach should only be applied on a transitory basis. The ACCC believes that interconnection between networks for data calls needs to be discussed industry wide.

The ACCC has therefore begun examining, together with industry and the ACIF, possible ways to resolve long term interconnection with and between new-generation networks.

6.5.4 Appropriate pricing for line sharing services

In April 2002 the ACCC released its *Draft Declaration Decision on Line Sharing*, seeking comment on proposed pricing principles for a declared LSS.

In it, the ACCC proposed that two types of cost could be included in the price of a LSS—incremental LSS-specific costs, and some allocation of the costs of a line over which a LSS is provided.

The ACCC believes that it is reasonable for an access provider to recover incremental LSS-specific costs through the access charge for a LSS.

Regarding whether some allocation of the costs of a line used to provide a LSS should be included in the price, the ACCC noted that in assessing an undertaking or making an arbitral determination about the price of a LSS, it may take into account the prices charged by a carrier for its other services—either declared or retail. However, its powers are limited with regard to specifying the price of these other services.

The ACCC also noted that where Telstra is recovering its line-related costs through other revenue sources, it would be inappropriate to include any allocation of line costs in the price of a LSS. The ACCC believes that Telstra already fully recovers its line-related costs through other revenue sources (including line rental charges for end-users, higher than cost charges for some retail services provided over its PSTN network and through an access deficit contribution in the interconnection access price paid by its competitors for certain PSTN access services). Therefore, the ACCC believes the appropriate price for a LSS should be set referring only to the LSS-specific costs of providing it.

However, if Telstra altered its pricing structure so that it no longer recovered all of its line-related costs through other revenue sources, the ACCC believes it may be appropriate to include an allocation of line-related costs in the price of a LSS. Although estimating the efficient contribution that the price of a LSS should make to recover these costs would be difficult, the ACCC believes a practical cost allocation rule could simply be the difference between the geographically de-averaged cost of the line over which a LSS is provided and the line rental revenue recovered from services provided over the remaining low-frequency portion of the line.

In the post-reporting period, on 30 August 2002, following considering submissions from interested parties, the ACCC released final pricing principles for a LSS as part of its final decision to declare a LSS.

6.6 Telecommunications access code

Under s. 152BJ of the Act, the ACCC is empowered to make a Telecommunications Access Code, even in the absence of the TAF. An ACCC access code would effectively supersede the existing TAF code and, in general, would cover similar issues.

Before it was dissolved the TAF asked that the ACCC consider making a Telecommunications Access Code under Part XIC of the Act to replace and update the existing TAF code.

The ACCC believed that there were several issues that could be included in such a code, including more detailed non-price terms and conditions. However, the ACCC concluded that under the current legislation, such a code would, like the existing code, be voluntary and unlikely to be effective.

In April 2002, shortly after the ACCC considered this issue, the government announced a proposed package of measures in response to the PC's review of telecommunications competition regulation. A key component was the requirement that the ACCC publish benchmark terms and conditions for access, to fulfil the standard access obligations. This should enable faster resolution of access disputes.

7

Number portability

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

Number portability provides end-users with the ability to change their service provider within specified number ranges (e.g. the number range used to provide mobile services) and retain the same number.

Division 2 of Part 22 of the Telecommunications Act requires the ACA to develop a numbering plan outlining the allocation and use of numbers in connection with the supply of carriage services. Under s. 458 of the Telecommunications Act the ACCC has statutory powers to direct the ACA regarding number portability. The ACA cannot establish rules about number portability in the numbering plan unless the ACCC directs it to do so and any rules the ACA inserts into the plan must be consistent with ACCC directions.

In exercising its power, the ACCC must consider whether portability of particular number ranges is required to promote the LTIE of carriage services or services supplied using 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 concerning 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

On 25 September 2001 MNP became a reality in Australia. MNP allows customers to retain their mobile phone number when changing or porting between mobile service providers. MNP has also given customers the flexibility to switch between GSM and CDMA mobile services.

The ACCC believes that MNP will increase competition between mobile carriers and should benefit customers if they are well informed about porting and thus able to take full advantage of it.

Consumers also need to be aware of the terms and conditions of their existing mobile phone contracts. Porting to another carrier does not cancel out contractual obligations with a customer's existing service provider.

Strict time limits have been agreed by industry for completing a port. The Australian Communications Industry Forum (ACIF) Code on MNP C570 sets out these time limits. In the absence of technical difficulties, porting a single number should take no more than a few hours. This sets a new international best practice standard for porting.

With the introduction of MNP, the ACCC will continue to strongly enforce the consumer protection provisions under the Act, particularly any complaints alleging unconscionable conduct, misleading or deceptive conduct and/or false or misleading representations. The ACCC has put all carriers on notice that it will be thoroughly investigating all MNP consumer complaints.

The ACCC, in conjunction with the ACA and Telecommunication Industry Ombudsman, has developed an information package covering a range of consumer issues. It can be downloaded from the ACA website at <http://www.aca.gov.au/consumer/faq/mnp.htm>.

7.1.2 National and premium rate services

In July 2001 the ACCC released a draft report setting out its preliminary views on portability for national and premium rate numbers. It invited interested parties to comment on these views.

The ACCC became aware that an ACIF working committee was considering 'rights of use' of premium rate 19xx numbers. This is essentially an issue about whether customers would have the right to change their premium rate service provider and port their 19xx numbers. Therefore, the ACCC delayed considering this issue, pending an outcome from ACIF. ACIF reached agreement on this issue in the post-reporting period.

Given the substantial delay since the ACCC released its draft report, it issued a revised report in October 2002, outlining its preliminary view that:

- mandating portability for premium rate numbers is likely to benefit end-users by promoting competition and that this benefit is likely to outweigh the cost to industry of implementing portability
- a decision on number portability for national rate numbers should be delayed as these services are not currently available and the industry is yet to identify a business case for them.

8 Other functions and responsibilities under the Telecommunications Act

This section outlines the ACCC's other responsibilities and associated activities under the Telecommunications Act. Under the Telecommunications Act the ACCC can:

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

The Telecommunications Act also requires the ACA to consult 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

The ACCC has the power to direct the ACA to develop an interconnection standard under division 5 of Part 21 of the Telecommunications Act. It must only do so if it considers such a standard necessary to promote the LTIE, or to eliminate the likelihood of hindrance to providing access to declared services. In developing such a standard, the ACA can seek industry input and can ask an industry group to develop an appropriate standard.

8.1.1 SMS interchange code

During 2000–01 the ACCC received two requests, one each from Telstra and PowerTel, to direct the ACA to develop an interconnection standard for communications between CDMA and GSM networks. Both Telstra and PowerTel took this action because they had failed to reach commercial resolutions with other parties on interconnection.

But in May 2001, after conducting market inquiries, the ACCC decided not to direct the ACA to develop an intercarrier SMS interconnection standard between GSM and CDMA networks. While the ACCC believed that inter-carrier SMS interconnection between CDMA and GSM networks is likely to promote competition, the ACCC took into consideration the fact that:

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

It therefore believed the matter should be resolved at industry level.

In April 2001 ACIF agreed to establish the SMS interchange working committee to undertake this work. During 2001–02 the ACCC informally monitored the progress of discussions within the committee. In March 2002 a draft version of the SMS interchange code was released for public comment. The code specifies industry conventions for implementing the translations required to deliver inter-carrier short messages between CDMA and GSM networks. ACIF published a final version of the code in December 2002.

8.2 ACCC directions to the ACA on electronic addressing

Division 3 of Part 22 of the Telecommunications Act empowers 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 can then direct the declared manager to take specific actions relating to electronic addressing.

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

- the ACCC directs the ACA to do so
- the ACA believes that the person or association is not managing electronic addressing according to generally accepted principles and standards.

The ACCC must not direct the ACA to do so unless it believes it is likely to have a bearing on competition. To determine whether electronic addressing is of public importance, the extent of its significant social and/or economic importance to CSPs and end-users of carriage services must be assessed.

During 2001–02 the ACCC did not issue any directions under Division 3 of Part 22 of the Telecommunications Act. However, it was involved in the competition considerations relating to internet domain names through its involvement in the .au domain administration advisory panel (auDA) (section 9.4 provides further details).

8.3 Facilities access code

Under Part 5 of schedule 1 of the Telecommunications Act carriers must, under certain circumstances, give requesting carriers access to telecommunications transmission towers, related sites and underground facilities. It also states 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.

In 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 that carriers are to comply with when giving access to eligible telecommunication facilities. The ACCC and the ACA also jointly released a guide to facilities regulation, which covers the regulation of facilities access including compliance with the facilities access code and the installation of facilities.

The purpose of the facilities access code is to ensure, as far as possible, that telecommunications facilities are co-located or shared. Its objective is 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 affirms statutory rights of facilities access by setting out, through administrative and operational procedures, standards of practice to enshrine speedy access to facilities. Without a code, access could be unnecessarily delayed by onerous administrative requirements and disputes over what might constitute compliance with Part 5.

The ACA is responsible for enforcing compliance with the code and the ongoing monitoring and review of the code. The ACCC would only become involved if notified of a dispute about access to facilities.

During 2001–02 there were no disputes about access to facilities brought before the ACCC.

8.4 International rules of conduct

Division 3 of Part 20 of the Telecommunications Act sets out a mechanism for the government to deal with unacceptable conduct by international operators.

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

- uses its market power in a manner that is, or is likely to be, contrary to the national interest
- uses any legal rights or legal status that it has as a result of foreign laws in a manner that is, or is likely to be, contrary to the national interest

- engages in any other conduct in a manner that is, or is likely to be, contrary to the 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 to prevent, mitigate or remedy 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
- authorise the ACCC to make information available to the public, a specified class of persons or a specified person.

During 2001–02 the ACCC did not conduct any investigations into unacceptable conduct by an international carrier.

9 ACCC participation in self-regulation processes

This section of report 1 details the ACCC's involvement in a number of organisations involved in self-regulation of the industry, including ACIF, the TAF, the Numbering Advisory Committee and the auDA.

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.

Therefore 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 in promoting industry self-regulation and assists and participates in relevant processes subject to its work priorities and staff availability.

9.1. Australian Communications Industry Forum

The Australian Communications Industry Forum (ACIF)—an industry owned, resourced and operated company—was 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).

The ACIF's Code Administration and Compliance Scheme monitors compliance of industry participants who are signatories to these codes.

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

During 2001–02 the ACCC was both an observer and participant in a range of ACIF activities including:

- privacy
- customer information on prices, terms and conditions
- complaint handling
- billing
- credit management
- customer transfer
- customer contracts
- mobile number portability
- unconditioned local loop services
- SMS interchange
- local number portability
- pre-selection
- next generation networks.

The ACCC does have some concerns about the ability of self-regulation alone to ensure adequate consumer protection via the development of consumer codes. As a result, the ACCC has increased its telecommunications consumer protection enforcement activities. These are highlighted in section 4.

9.2 Telecommunications Access Forum

In keeping with the intention that industry will have an important role in regulating access in the industry, s. 152AI of the 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 Telecommunications Access Forum (TAF).

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

However, on 31 January 2002, after much consideration, the TAF was officially dissolved because its members believed it had been unable to effectively perform its primary function of making recommendations to declare services.

In April 2002, the government announced as part of a package of measures in response to the PC's review of telecommunications competition regulation, that it would amend the Telecommunications Act to formally abolish the TAF.

9.3 **Numbering Advisory Committee**

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

The NAC comprises representatives of carriers and CSPs (e.g. Telstra, C&W Optus and Vodafone), the ACCC, the ACA, the Department of Communications, Information Technology & the Arts, telecommunications end-users (eg. 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 2001-02 the NAC met four times to discuss issues concerning the Numbering Plan. They included:

- proposed amendments to the Numbering Plan
- charges for local rate calls
- number portability performance issues
- issues regarding the apportionment of annual numbering charges
- a review of the NAC (including its objective, membership, frequency of meetings, management of issues and confidentiality).

9.4 **.au Domain Administration Advisory Panel**

In April 1999 the National Office of the Information Economy established auDA. This body is responsible for the self-regulation of second level domain name spaces in Australia. It was created to recognise 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 issuing 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's brief is to determine a process that addresses the deficiencies in the present domain name registration. The panel will develop recommendations and policies to define the eligibility of applicants to register domain names.

Throughout 2000–01 the ACCC was represented on the various policy panels established by auDA, including the competition policy panels. These panels recommend to the auDA board potential options in establishing the competitive framework for introducing competition among domain name registrars and registries for .au second level domain name space.

9.5 Interconnection of next generation networks

On 4 April 2002 the ACCC released an issues paper, titled *The Future of Interconnection Arrangements in Australian Telecommunications Networks*. The paper, prepared by the Centre for International Research in Communication and Information Technology (CIRCIT) for the ACCC, promotes awareness of the issues surrounding interconnection in the information technology and telecommunications sector, and invited views from the industry.

There is presently a global trend by telecommunications carriers to recast their networks to take advantage of the efficiencies inherent in packet-based networks, principally the internet.¹

With the rise of the internet, there has been a rapid and sustained growth in the number of router networks operated by ISPs. In addition, deregulation in the telecommunications industry has led to increasing numbers of telecommunications networks. With the move to the digital presentation of information (including signalling) the technology used by both the telecommunications and computer sectors has converged. This means that ISPs can become telecommunications carriers, and carriers can become ISPs.

These advances in technology have led to the development of so-called next-generation or multimedia services, such as electronic messaging services (e.g. email and SMS); information services such as the World Wide Web; interactive services such as chat rooms, electronic commerce, distributed computing and video-conferencing, and entertainment services such as video-on-demand, games and webcasts.

The networks that take advantage of the convergence of computing and telecommunications technologies, and that will provide these services, are sometimes referred to as next-generations networks (NGNs).

The ACCC believes that a range of potential issues (technical, regulatory and commercial) may arise as these technologies are implemented and services brought to the public. For instance, there are no generally accepted standards for how the NGNs should operate, and care should be taken to ensure that the process of setting these standards results in the most efficient outcome.

¹ Traditionally, data had been supplied over circuit-switched telephone networks. This required a transmission link to be made between the two computers, with data being supplied via time slots. In packet networks information is supplied in data packets that can take different routes, meaning that a direct link does not need to be made. This allows multiple users to utilise the one transmission link at the same time, something that could not be done with a circuit-switched network.

Also, the proliferation of networks means that more networks are being used for transit, rather than origination and termination services, which complicates how the cost of the end-to-end service is apportioned between the various parties incurring the cost of carriage.

Also, there is a corresponding increase in retail pricing models, which do not necessarily provide a simple correlation between end use and cost of use.

These factors mean that the traditional terminating access model of interconnection may no longer be appropriate for the emerging generation of networks. Under the terminating access model, the originating carrier charges the A-party and passes part of the revenue to the terminating carrier.² The ACCC has been monitoring interconnection arrangements since it issued competition notices to Telstra in 1998 for the interconnection of internet networks, sometimes known as 'peering'.³

To determine what approach, if any, the ACCC should take to regulating NGN services and the networks which provide them, the ACCC has determined that industry should initially be given the opportunity to resolve these issues itself. However, to facilitate the industry's consideration of these issues, the ACCC embarked on an industry-wide program with the ACIF and the ACA.

Shortly after its release in April 2002, the CIRCIT paper became the subject of an industry seminar hosted by the ACIF. The main objectives of the seminar, held in May 2002, were to discuss:

- what the rollout of NGNs will mean for the industry
- what NGNs will require in terms of new technical, commercial and regulatory arrangements
- how the industry will develop and implement the necessary new arrangements.

As a result of the seminar, the ACIF has formed the NGN Framework Options Group.

This group has a brief to manage and drive this work. It comprises representatives of the telecommunications industry and internet community, policy makers, regulators (including the ACCC), carriers, service providers, equipment suppliers and consumer groups. It held its first meeting in June 2002 and discussed the challenges to traditional interconnection arrangements presented by the rise of dial-up ISP traffic.

² The term A-party refers to the party who originates a call, while the B-party is the recipient.

³ The 1998 Competition Notices were issued when Telstra charged competing internet access providers for supplying their internet traffic over Telstra's network, but refused to pay when competitors carried Telstra traffic. 'Peering' refers to a type of agreement between internet access providers where interconnection of backbone networks occurs on a reciprocal, non-payment basis.