



Telecommunications competitive safeguards for 2004–2005

Changes in the prices paid for
telecommunications services
in Australia 2004–05

ACCC telecommunications reports

2004–05

This publication contains two reports:

- | | |
|-----------------|---|
| Report 1 | Telecommunications competitive safeguards for 2004–05 |
| Report 2 | Changes in prices paid for telecommunications services in Australia, 2004–05 |



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27 April 2006

Senator the Hon. Helen Coonan
Minister for Communications, Information Technology and the Arts
Parliament House
CANBERRA ACT 2600

Dear Minister

The Australian Competition and Consumer Commission (the ACCC) is required under the *Trade Practices Act 1974* (the Act) to annually review and report on:

- competitive safeguards within the Australian telecommunications industry (sub-section 151CL(1) of the Act)
- changes in prices paid by consumers for telecommunications services (sub-section 151CM(1)(a) of the Act).

Enclosed are the two reports for financial year 2004-05. As you are aware, subsections 151CL(5) and 151CM(3) of the Act require that within 15 sitting days of receipt of these reports you table them in each house of parliament.

I have highlighted the key messages in each report below.

Report 1—Telecommunications competitive safeguards

The telecommunications industry continued to progress toward a more competitive environment in 2004-05. The key features of 2004-05 were the decline of high margin voice revenues across the industry, as substitution occurred between fixed and mobile segments, and within the fixed-line segment; and substantial growth in broadband take-up, where more than 100 per cent annual growth was observed in four consecutive quarters of the 2004-05 year.

The benefits of competition were most evident in areas where facilities-based competition or quasi-facilities based competition has been strongest. Telstra's competitors have indicated that the increasing take-up of broadband services is helping to justify a transition from heavy reliance on Telstra's wholesale digital

subscriber line (DSL) services to their own DSL infrastructure for the provision of services. Such investment can lead to quasi-infrastructure based competition. The benefits of full infrastructure-based competition are most clearly illustrated in the retail mobiles segment where separate mobile networks facilitate more competitive outcomes.

Meanwhile, the development of technologies including satellite broadband, various forms of wireless and mobile broadband and even other emerging technologies such as the use of power-line technologies for broadband, have the potential to allow competitors to bypass most parts of Telstra's fixed network.

The changes observed in the industry over the past year signal that the industry is on the verge of making significant advancements in service delivery. However, in spite of the positive developments observed, the ACCC remains concerned that various threats to existing and future competition exist.

The ACCC's concerns mainly involve the copper local access network. In most parts of Australia, Telstra continues to be the sole provider of this network, which connects virtually every home and business. The ongoing reliance on access to Telstra's copper network influences the investment incentives for many competitors and potential new entrants. Most competitors must purchase at least some wholesale services from Telstra in order to participate in fixed-line retail markets, while at the same time competing against Telstra's retail arm in those markets.

Further, while technological innovation can enable the industry to evolve for the benefit of consumers, technological development and the associated benefits are vulnerable to foreclosure both as a result of the incumbent's actions and responses.

The ACCC holds the view that evolution of service provision and pricing should occur via competitive market processes as much as possible, as this will ultimately deliver the best possible outcomes for consumers. With this in mind, the ACCC is currently undertaking a broad ranging review of the regulation of fixed-line services.

The inquiry has primarily resulted from the ongoing need to review a number of existing declarations of certain fixed services, as required by the Act. However, the ACCC wants to use this opportunity to look at the broader question of whether regulation of certain fixed services is required, including what combination of services may still need to be regulated, having regard to emerging market, technological and network developments.

In terms of the ACCC's work in the 2004-05 financial year, the report provides a detailed overview of the activities undertaken by the ACCC in fulfilling its regulatory functions.

Report 2—Changes in prices paid for telecommunications services in Australia

The ACCC estimates that the overall average price paid by consumers for telecommunications services fell in real terms by 6.6 per cent in the 2004-05 financial year. This overall decline was the result of a fall of 1.2 per cent in prices paid for PSTN services and a decrease of 13 per cent in prices paid for mobile telephony services.

The disaggregated results for PSTN services show that the average price fall for business consumers was 2.9 per cent and 0.3 per cent for residential consumers. Therefore, as in previous years, falls for businesses continue to outstrip price falls for residential consumers in 2004-05.

The ACCC notes that the results within the business group are far from uniform with the index for small business consumers increasing by 15.8 per cent while the index for larger businesses fell by about 18 per cent in 2004-05.

However, ACCC analysis indicates that only part of the increase in the small business index can be directly attributed to actual price changes in the carriers' tariff and small business pricing plans in 2004-05, and that structural factors are primarily responsible for the rise in the small business index in 2004-05. Specifically, Telstra (the biggest provider of PSTN services to small business) has reported falling revenues and traffic for small business consumers in 2004-05. As the rate of decline in revenue has been smaller than the decline in traffic, corresponding yields have increased and led to an increase in the small business sub-index.

Factors the ACCC has identified and Telstra has provided to explain the changes in revenue and traffic leading to the increase in the small business index include changes in the definition of small business consumers, the movement of more price sensitive consumers out of this group or to competing carriers, prices of and conversion to competing non-PSTN services such as ISDN, fixed to mobile migration, migration to other technologies such as VoDSL and lag in the implementation of higher tariff charges introduced in 2003-04.

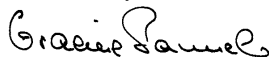
The ACCC assesses that the fall in prices for the larger business consumer group has more clearly been attributable to price factors such as the prevalence of 'off-tariff' or individually negotiated contracts and the significant bargaining power of larger businesses to negotiate discounts with suppliers of PSTN services due to higher volumes and expenditure. The use of tenders and consultants to select suppliers and the intense competition from other carriers to supply larger business consumers have also driven down prices in this market.

As noted above, the average price paid by consumers for mobile services fell by 13 per cent in 2004-05. Prices for GSM services fell by 12.9 per cent and prices for CDMA services declined by 13.8 per cent.

The fall in mobile prices was mainly due to the introduction of so called 'capped' or 'bucket' plans by carriers which resulted in large falls in prices paid by consumers for post-paid services, in particular for consumers in the higher consumption groups. In this regard, prices for GSM post-paid services fell by 15.3 per cent and prices for post-paid CDMA services fell by 14.2 per cent.

Prices paid by consumers for prepaid GSM services declined by 5.6 per cent and prepaid CDMA prices fell by 12.4 per cent. The larger fall for CDMA prepaid consumers was due in part to Orange significantly cutting short message service (SMS) prices and per minute charges for its customers.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graeme Samuel', with a stylized, cursive script.

Graeme Samuel
Chairman

Telecommunications competitive safeguards for 2004–05

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1 Summary

Under Part XIB, Division 11, sub-section 151CL(1) of the *Trade Practices Act 1974* (the Act), the Australian Competition and Consumer Commission (ACCC) is required to 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 2004–05 and ongoing actions immediately afterwards. All of the ACCC publications referred to in this report are available at <http://www.accc.gov.au>.

The key findings of the report are outlined below.

1.1 State of competition

The telecommunications industry continued to progress toward a more competitive environment in 2004–05. The key features of 2004–05 were the decline of high margin voice revenues across the industry, as substitution occurred between fixed and mobile segments, and within the fixed-line segment; and substantial growth in broadband take-up (more than 100 per cent annual growth).

These outcomes have created incentives for all operators to capitalise on the market's shift away from higher-cost fixed-line services through the provision of lower cost services such as broadband. For example, Telstra's competitors have indicated that the increasing take-up of broadband services—which was more than two million in June 2005—helped to justify the transition from heavy reliance on Telstra's wholesale digital subscriber line (DSL) services to their own DSL infrastructure for the provision of services. In addition, the development of technologies including satellite broadband, various forms of wireless and mobile broadband and even other emerging technologies such as the use of power-line technologies for broadband, have the potential to allow competitors to bypass most parts of Telstra's fixed network.

The benefits of competition were most evident in regard to mobiles and broadband which are both areas where facilities-based competition or quasi-facilities based competition has been strongest. The increasing investment in alternative infrastructure by Telstra's competitors can lead to quasi-infrastructure based competition. Meanwhile, the benefits of full infrastructure-based competition are most clearly illustrated in the retail mobiles segment where separate mobile networks facilitate more competitive outcomes.

The competitive activity observed in 2004–05 was not limited to wholesale investments. At the retail level, fixed-line operators offered various bundling deals to protect market share in fixed-voice services. These bundles generally involve broadband access, and calls to mobiles in some cases.

The changes observed in the industry over the past year signal that the industry is on the verge of making significant advancements in service delivery. However, in spite of the positive developments observed in the past year, the ACCC remains concerned that various threats to existing and future competition exist.

The ACCC's concerns mainly involve the copper local access network. In most parts of Australia, Telstra continues to be the sole provider of this network, which connects virtually every home and business. The ongoing reliance on access to Telstra's copper network influences the investment incentives for many competitors and potential new entrants. Most competitors must purchase at least some wholesale services from Telstra in order to participate in fixed-line retail markets, while at the same time competing against Telstra's retail arm in those markets.

Further, while technological innovation can enable the industry to evolve for the benefit of consumers, technological development and the associated benefits are vulnerable to foreclosure both as a result of the incumbent's actions and responses.

The ACCC holds the view that evolution of service provision and pricing should occur via competitive market processes as much as possible, as this will ultimately deliver the best possible outcomes for consumers. With this in mind, in December 2005 the ACCC launched a broad ranging review of the regulation of fixed-line services.

This major inquiry has been initiated by the ACCC to look at the future regulation of certain key fixed network and wholesale services. The inquiry has primarily resulted from the ongoing need to review a number of existing declarations of certain fixed services, as required by the Act. The ACCC wants to use this opportunity to look at the broader question of whether regulation of certain fixed services is required, including what combination of services may still need to be regulated, having regard to emerging market, technological and network developments.

1.2 Anti-competitive conduct and consumer safeguards

In 2004–05 the ACCC conducted six investigations into potential anti-competitive conduct, two of which were concluded within the financial year.

On 21 February 2005 the ACCC revoked the Part A competition notice that it issued to Telstra on 19 March 2004 for the wholesale and retail pricing of Telstra's residential broadband internet services.

The ACCC considered one third line force notification.

There were substantive investigations into 13 telecommunications consumer issues including investigations relating to the following companies:

- Hutchison Telecommunications (Australia) Ltd
- Australian Communications Network Pty Ltd
- Phoneflasher.com Pty
- 1CellnetLLC.

These matters are outlined in more detail in chapter 4.

1.3 Tariff filing, record-keeping, monitoring and reporting

- Telstra complied with requirements to give the ACCC tariff filing information.
- The ACCC released a market indicator report based on information collected through its regulatory accounting framework (RAF) record keeping rules.
- The second report on competition in the corporate segment of the business customer group was submitted to the minister. The ACCC also continued to produce quarterly statistics on the take-up of broadband services.

1.4 Access related activities

In 2004–05 the ACCC concluded declaration inquiries into:

- the integrated services digital network (ISDN) and digital data access service (DDAS)
- mobile international roaming
- internet interconnection.

It also initiated inquiries into:

- the local carriage service (LCS)
- key fixed network and wholesale services (review of the regulation of fixed network services).

The ACCC also considered a number of fixed network and mobile access undertakings and notifications for arbitration:

- In 2005 the ACCC rejected Telstra's undertakings relating to the monthly charges for the unconditioned local loop service (ULLS) and the line sharing service (LSS). Telstra subsequently appealed the ACCC's decision regarding the LSS to the Australian Competition Tribunal. Telstra submitted another undertaking for the ULLS in January 2006.
- The ACCC received notification of arbitrations relating to the ULLS and LSS.
- On 8 November 2005 the ACCC rejected Optus' undertaking in relation to the mobile terminating access service (MTAS). In February 2006 the ACCC released its final decision to reject the Optus undertaking.
- On 22 November 2005 the ACCC released its draft decision to reject Vodafone's undertaking in relation to the MTAS.
- On 7 October 2005 the ACCC received six access undertakings from Hutchison Telecommunications (Australia) Limited (HTAL) and Hutchison 3G Australia Pty Ltd (H3GA) in relation to the MTAS. On 13 October 2005 Hutchison lodged a submission in support of the undertakings.

- The ACCC received a special access undertaking from Foxtel in relation to the terms and conditions of supply of the digital set top unit service.
- The ACCC was notified of 14 access disputes for arbitrations in relation to the MTAS.

In addition, pricing principles were issued for the DDAS and ISDN services.

1.5 Activities under the Telecommunications Act

The ACCC commenced its review of the price control arrangements that should apply to Telstra following the expiry of the current arrangements on 30 June 2005.

The ACCC participated as an observer in several committees and the Next Generation Networks Framework Operations Group of the Australian Communications Industry Forum (ACIF).

2 Overview of the state of competition in telecommunications markets

2.1 Overview

Innovation, lower prices, and a high degree of responsiveness to consumer preferences are typical characteristics of competitive markets. In this sense, in 2004–05 the industry continued towards a more competitive environment in some respects. However, some threats to existing and future competition remain.

Competition has been strongest where there is more infrastructure or quasi-infrastructure based competition. There is an important distinction between these two concepts. Infrastructure competition—also referred to as facilities-based competition—can occur when there are competing forms of stand-alone infrastructure that are capable of providing a range of end-to-end telecommunications services that are substitutable for services provided on similar networks. This creates a basis for more durable competition. The market within which retail mobile services are provided, where there are four competing mobile networks, is an example where infrastructure-based competition has evolved significantly over the past 15 years.

By contrast, quasi-infrastructure competition, or access-based competition, occurs where it is economic for firms to provide a wider range of services using a combination of their own facilities and access to parts of another party's network. This is most easily seen in relation to Telstra's fixed-line network.¹

In 2004–05 more providers announced their intentions to deploy their own infrastructure such as digital subscriber line access multiplexers (DSLAMs) to provide broadband, as well as applications such as voice over internet protocol (VoIP) services, to supply fixed-line services more efficiently. However, many of these proposals still involve a considerable degree of reliance on access to parts of Telstra's copper network, and in the context of proposals by Telstra to substantially reconfigure the architecture of the copper network, there is considerable uncertainty about the long-term viability of competitors' DSLAM-based network plans. As Telstra's copper customer access network (CAN) cannot be economically duplicated, the ACCC is concerned that the reliance of the industry on Telstra for the provision of fixed telecommunications will restrict the degree of innovation, and other competitive benefits provided to consumers in the longer term.

Telstra's competitors have indicated that the increasing take-up of broadband services—totalling more than two million in June 2005—helped to justify the transition from heavy reliance on Telstra's wholesale DSL services to their own DSL infrastructure for the provision of services. In 2004–05, a number of telecommunications suppliers announced plans to increase their deployment of DSLAM

¹ However, quasi-infrastructure competition is not possible with mobile networks.

ports in Telstra's exchanges to provide faster and higher quality broadband services than those being made available under Telstra's wholesale DSL plans.

In addition, the development of technologies including satellite broadband, various forms of wireless and mobile broadband and even other emerging technologies such as the use of power-line technologies for broadband, have the potential to allow competitors to bypass most parts of Telstra's fixed network.

Meanwhile, late in 2005 Telstra provided a significant briefing on innovations it had planned for its key networks. The central plank in terms of the CAN is a proposal to deploy fibre-to-the-node (FTTN) to reach around 20 million homes and provide higher quality voice and broadband services. Although Telstra later made a statement that its FTTN proposal was on hold,² these proposals are essentially a response to emerging competition, including greater substitutability between various telecommunications services and the threats from competing DSLAM installations. This supports the notion that competition provides the strongest impetus for investment in innovative services for consumers.

In 2004–05 all fixed network operators (Telstra, Optus and AAPT) recorded declines in voice connections and call traffic made purely on fixed-line networks.

When compared with the increasing volumes of mobile phone minutes and subscribers, the reduction in fixed-line call volumes and minutes could be interpreted as evidence of FTM substitution. However, much of the substitution has occurred within the fixed-line market. A major factor is the migration from dial-up to broadband, necessitating fewer premises to have multiple connections (such as second phone lines). There have also been increased offerings of VoIP services by competitors in the corporate segment. Overall, industry-wide fixed-line revenues continued to exceed mobile industry revenues in 2004–05. Telstra's fixed-line revenue alone (around \$12.5 billion in 2004–05) exceeded industry-wide mobile revenue (less than \$11 billion in 2004–05).

Nevertheless, key features of 2005 were the declining revenues from the supply of traditional voice services, and more than 100 per cent growth in the take-up of broadband services.

These results create a range of incentives for operators in various telecommunications markets.

All incumbents are faced with incentives to maximise the market's shift away from higher cost, fixed-line services through the provision of lower cost services such as VoIP, and broadband, which tend to increase the size and usage volume of consumers' telecommunications spending. The large growth in DSL broadband take-up should assist such shifts.

Fixed-line operators are likely to try to defend their revenue base through various bundling offers such as discounts for fixed voice services and DSL broadband. Clearly Telstra is in a strong position to do this as the largest wholesaler and retailer of fixed access lines, its high retail DSL broadband market shares, strong position in mobiles, and healthy margins.

² Telstra, Announcement to the Australian Stock Exchange, *Fibre-To-The-Node*, 21 December 2005.

Fixed-line operators who also provide mobile services may attempt to strike a balance between maintaining fixed-line customers with the need to promote revenues in the mobiles market, for example through bundled offerings involving fixed, mobile, and broadband services.

In spite of these positive developments, the ACCC remains concerned that various threats to existing and future competition exist.

The ACCC's concerns mainly involve the copper local access network. In most parts of Australia, Telstra continues to be the sole provider of local access through its copper-based network. This network connects virtually every home and business. The ongoing reliance on access to Telstra's copper network influences the investment incentives for many competitors and potential new entrants. Most competitors must purchase at least some wholesale services from Telstra to participate in fixed-line retail markets, while at the same competing against Telstra's retail arm in those markets.

Competitors in this position have the alternative options—they can either resell Telstra's end-to-end service, or they can bypass some or all of Telstra's network by choosing to deploy their own competitive infrastructure. The ACCC understands that subsidy programs such as the HiBIS (now Broadband Connect) and Networking the Nation schemes are starting to encourage the entry of new competitive infrastructure into regional areas, particularly in relation to broadband internet—but these can also be used to provide a wide range of other services, including voice services.

At the same time, new technological platforms for the provision of telecommunications services are vulnerable to the risk of becoming foreclosed in the event that Telstra makes major changes to the configuration of the copper network on which these investments are based, or Telstra aggressively invests in matching infrastructure. Indeed, protection of its existing profits gives it a strong incentive to do so.

Technological development can enable the industry to evolve for the benefit of consumers, and care must be taken to ensure that the regulatory environment does not hinder this. The ACCC holds the view that evolution of service provision and pricing should occur via competitive market processes as much as possible, as this will ultimately deliver the best possible outcomes for consumers. With this in mind, in December 2005 the ACCC launched a broad ranging review of the regulation of fixed-line services.

This major inquiry has been initiated by the ACCC to look at the future regulation of certain key fixed network and wholesale services. The inquiry has primarily resulted from the ongoing need to review a number of existing declarations of certain fixed services, as required by the Act.

The ACCC wants to use this opportunity to look at the broader question of whether regulation of certain fixed services is required, including what combination of services may still need to be regulated, with regard to emerging market, technological and network developments, including:

- the pending expiry of declarations of a number of key network services: in particular the unconditioned local loop service (ULLS); the domestic PSTN originating and terminating access (domestic PSTN OTA) services; and the local carriage service (LCS)
- the possibility that Telstra may introduce an IP core network, and indications it will consider deploying FTTN³

³ This is despite Telstra's decision to suspend, at least for now, its FTTN deployment until it is satisfied with the regulatory settings that may apply to this investment.

- the continued evolution of potential substitute technologies, such as new generation mobile and other wireless services, and their impact on the sustainability of the existing fixed customer access bottleneck
- ongoing competition concerns surrounding the wholesale supply of certain currently non-declared services such as the wholesale line rental service, and various forms of wholesale DSL services.

Although these inquiries were not occasioned or caused by Telstra's fibre network proposal, it is fortunate that the fixed services review is being held at a time when these matters can be taken directly into account in decisions on the future regulation of fixed network services.

The existing regulation of fixed-line services focuses on the near-ubiquitous, bottleneck nature of the CAN. A key issue of the fixed-line services inquiry, therefore, is to look at the enduring or sustainable nature of this bottleneck.

While the inquiry will examine whether certain existing declarations should continue in some form or be revoked after 2006, any such analysis will look more broadly at the scope and nature of regulation and the impact of market and technological developments, such as those noted above. The ACCC intends that the review will take explicit account of these matters when looking at the regulation of existing services rather than treating them as separate or distinct issues. A fundamental issue for consideration will be the need for continued regulation, and the optimal combination of service declarations, taking account of both current and prospective developments.

2.2 Measures of competition

In essence, effective competition can be characterised as a process of rivalry between firms that constrains market participants to supply goods and services to consumers of a given quality at the minimum cost.

The sustainability of competition is another important consideration which can be defined on several different levels. Broadly speaking, competition can be considered sustainable if the competing firms are viable in the long term.

Sustainable competition also requires that actual entry has occurred, as opposed to the potential for entry. Competitive entrants must have tested the various competitive strategies available and made an impact on the incumbent's position.

One of the fundamental objectives of telecommunications policy is that regulation be removed where competition is effective and sustainable. In this context, a market can be considered to be sustainably competitive if the benefits that have accrued in the market would not be lost if regulation were removed.

2.2.1 Assessing effective and sustainable competition

The definition of the relevant market is integral to an assessment of competition.

In telecommunications, the precise definition of the boundaries of the markets and the subsequent assessment of competition within them is complicated by the following:

- the complex nature of the networks used to provide telephony services; the constantly evolving service types and network technologies
- difficulties in estimating the underlying costs of providing services on these networks
- the extent to which telecommunications service providers tend to bundle services.

Nevertheless, as noted by the Australian Competition Tribunal in *QCMA*,⁴ consideration of the following elements of a market are central to an assessment of competition:

- the number and size of independent sellers, and the degree of market concentration
- the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market
- the extent of product differentiation in the industry
- the extent of vertical integration
- the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

The existence of market power—which provides a firm with discretion over their price and output decisions, as distinct from competitive firms who are compelled to perform by the discipline of the market—is another fundamental consideration.⁵

The type of competition is also relevant. There are many levels at which competition may operate; moving from a complete reliance on wholesale/resale, through the competitive supply of various network elements, to a complete facilities-based model.

Benefits of competition, such as innovation, product differentiation, and price discipline are more likely to materialise where there is competition throughout the various levels of a given supply chain. In turn, this situation is facilitated when competitors rely more on their own infrastructure, than the wholesale services provided via access to the incumbent's network.

The ACCC regards facilities-based competition as more important because competition will occur in more elements of the end-to-end service and therefore, more elements of the price-service package. Facilities-based providers have to compete in how and when they develop new services and invest in their networks. By contrast, access regulation, which is derived from the recognition that facilities-based competition is not viable in all circumstances, can only go so far in providing this impetus, as competitors rely more heavily on incumbent services and facilities to compete.

⁴ *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976), ATPR 40-012, at 17,246.

⁵ ACCC, *Merger Guidelines*, p. 23.

The ability for the market to make this progress is another important aspect of effective competition. Consequently, regulation plays an important role in facilitating these outcomes.

The ACCC has traditionally held the view that access-based competition is an important factor in enabling the market to progress toward facilities-based competition. That is, facilities-based competition can occur gradually as non-incumbents make use of the access regime to build scale, which itself is used as a 'stepping stone' to investment in their own infrastructure and more sustainable competition. As facilities-based competition develops, the lessening or removal of regulation may become appropriate.

This is not to say, however, that facilities-based competition is a desirable goal in all circumstances. For example, it would not be appropriate to encourage facilities-based competition where the demand for services in a market can be satisfied at a lower cost by one facility than two or more facilities. In these circumstances, the goal of competitive downstream markets would be best served by an effective access regime.

To date, access regulation has been focused on unbundled services instead of end-to-end wholesale services. However, some key factors have led the ACCC to consider the advantages and disadvantages of the current approach to regulating services in the context of promoting facilities-based competition. Firstly, the ACCC considers that the stepping stone approach may not have significantly promoted facilities-based competition to the extent and within the timeframe originally envisaged. Secondly, substantial changes such as the network modernisation plans announced by Telstra in November 2005, have the potential to alter the economics of ULL-based competition going forward.

Therefore, in relation to fixed network services, the ACCC is considering whether the mix of regulation is appropriate for attaining the longer-term objective of facilities-based competition. One consideration is whether the scope of service declarations should change. The notion of access regulation that is more narrowly defined is discussed in the 'ladder of investment' approach described by Cave.⁶ Under this approach, access regulation of certain services would be calibrated in a way that encourages investment in progressively less replicable infrastructure by competitors, and the level of regulatory intervention would change over time. This is not to say that Cave's approach is necessarily appropriate for the Australian market. However, the ACCC has indicated that it will consider whether its approach should be targeted more closely toward end-to-end wholesale services in the interests of achieving more sustainable competition.

2.3 State of competition in telecommunications markets

As with the ACCC's past practice, the state of competition is assessed here on a service-by-service basis. This should not, however, be taken as a definitive view on the boundaries of particular markets. In some cases the markets may be more granulated, based, for example, on a consideration of geography and consumer types and in other cases more aggregated, due to bundling and

⁶ Cave, M., *Making the ladder of investment operational*, Warwick Business School, University of Warwick, November 2004.

substitution possibilities. In general, market boundaries are subject to change and are contingent on a number of factors, such as current modes of competition and directions in regulation.

2.4 Fixed-line telecommunications services

A full fixed-line service consists of:

- basic access, which is charged on the basis of a connection fee and monthly line rental
- local calls, which must be provided on a per-call rate
- national long-distance or STD calls
- international or IDD calls
- FTM calls.

Carriers usually bundle the first two services together to make up the local telecommunications service.

2.4.1 Local telecommunications services

Basic access is a prerequisite for consuming all fixed-line products and also ADSL broadband.

Basic access can be provided using one of several possible networks. It is primarily provided over Telstra's near-ubiquitous copper network. The vast majority—up to 87 per cent of Australian homes and businesses—rely on voice services provided using Telstra's CAN. Telstra's copper CAN portrays natural monopoly characteristics for the provision of basic access (and other fixed services), and is the source of Telstra's dominance in the provision of several telecommunications services.

Wholesale service provision

Current market arrangements allow for three competitive models for the provision of basic access and local calls:

- a selection of wholesale services—the local carriage service (LCS), local PSTN origination and termination (PSTN O/T) and domestic PSTN O/T—can be bought from Telstra and used to sell local calls. Because all these services are declared, they must be supplied to access seekers on terms that satisfy standard access obligations (SAOs)
- competitors may rent the unbundled local loop (ULL) from Telstra and combine it with their own or others' infrastructure to provide local calls (and basic access) and a number of other products
- competition from other networks and new technologies.

Approximately 12 per cent of basic access is provided by Optus' Hybrid Fibre Coaxial (HFC) network, which passes approximately 2.5 million homes. Telstra also owns an HFC network which passes approximately 2.2 million homes, most of which are in similar areas as those passed by Optus' HFC network. However, Telstra's HFC network is not presently used to provide basic telephony services.

Local access networks provided using microwave, fixed wireless, optical fibre and satellite services have emerged but only to a very minimal extent. While this is not to say that networks such as these will not be of greater importance in the future, it is evident that these are yet to have any real bearing on the bottleneck nature of Telstra's copper CAN.

ACMA estimates that there were 11.46 million fixed-line standard telephone services (STS)⁷ in operation at 30 June 2005, and that there was an overall reduction in the number of basic access lines supplied in the industry.⁸ On the basis of these figures, Telstra provides 87 per cent of STS.⁹

Although the take-up of Optus' HFC network for retail broadband services has increased, its use as a platform for resellers to provide basic access and local calls has not changed in the past year, suggesting that its position as an alternative form of infrastructure has matured due to its limited geographic reach (approximately 2.5 million homes).

Therefore, despite the increase in services resold by Telstra's competitors, the degree of reliance on Telstra's infrastructure remains largely unchanged, and alternative networks have not increased their influence.

Retail

Market shares for the provision of basic access and local calls continue to be highly concentrated.

Of all the basic access and local call services, approximately 70 per cent are supplied directly by Telstra's retail business, meaning that around 17 per cent are supplied by resellers of Telstra's wholesale line rental service. This represents a 4 per cent increase in the volume of retail services re-sold by Telstra's competitors on the past year. However, Telstra increased the number of wholesale access lines supplied to the industry, of which all were taken up by competitors for the resale of basic access and local calls at the retail level.

Most of Telstra's reduced retail market share appears to have been taken up by Optus, whose local call resale customers grew by 6.8 per cent in the year to 30 September 2005.¹⁰

The measurement of services covered by the customer service guarantee standard (CSG) provides an indicator of movements of services provided to customers who have five lines or fewer—effectively, the residential and small business lines. On the basis of services provided under the CSG standard, ACMA reported that Telstra and Optus supplied 77.3 per cent and 12.4 per cent of these services respectively in 2004–05. As with the previous year, the absolute volume of these figures declined in 2004–05, with Telstra's CSG services decreasing by 4.8 per cent, and Optus' services declining by 3.0 per cent. AAPT increased its CSG-eligible services in 2004–05, giving it approximately

⁷ ACMA defines the standard telephone service (STS) as a carriage service providing voice telephony or an equivalent service.

⁸ ACMA reports that the number of STS in operation decreased by 1.7 per cent in 2004–05 to 11.46 million fixed-line STS in operation, ACMA, *Telecommunications Performance Report 2004–05*, p. 58.

⁹ Telstra Corporation Limited and controlled entities, half-year results and operations review, Half-year ended 31 December 2005, p. 8.

¹⁰ Optus, Media Release, *The SingTel Group's results for the second quarter and half year ended 30 September 2005*, 10 November 2005.

6 per cent market share of total CSG services.¹¹ The data for STS and CSG services as reported by ACMA and Telstra show that while Telstra's market share is declining, this is occurring slowly and it still dominates the residential customer segment for the supply of basic access and local calls.

In terms of retail revenue, only 7.2 per cent of basic access revenue and 9.5 per cent of local call revenue was earned by competitors other than Telstra and Optus in 2003–04.¹² Further, ACMA states that carriers other than Telstra and Optus provide only 916 000 of a total of 8.9 million basic access lines that are sold under the CSG.¹³ Given that this share of the market is divided among approximately 10 competitors, it may be concluded that retail competition is still relatively immature.

Indeed, imputation testing shows that competitors as efficient as Telstra that resell only wholesale line rental and the local carriage service, would not be able to make a profit. Therefore the sale of local calls and basic access, without the provision of other fixed services such as long distance, international and FTM calls, would not appear to be a viable entry option. Not surprisingly, none of the competitors that have entered the resale market sell local calls only. This suggests that new entrants may be viable only if they enter as a full voice service operator.

As noted above, the overall number of basic access lines supplied in the industry has declined, a key reason being consumers' migration from dial-up to broadband internet, thus reducing the need for multiple connections such as second phone lines. These points tend to suggest that competitors cannot look to new customers in the market for building up a customer base. Instead, they would need to rely on customer churn.

Pricing conduct

According to the ACCC's Division 12 price changes report, overall prices for local calls decreased by 7.7 per cent in 2004–05. The overall decrease largely consisted of reductions in local call charges for residential and large business customers, whose charges decreased by 11.1 per cent and 18.8 per cent, respectively. The prevalence of bundled service offerings, of which low-priced or free local calls are a major part, is likely to have influenced the price reductions for residential customers.¹⁴ There was relatively more vigorous competition in the corporate customer segment, which contributed to the price reductions observed in that segment, as described in section 2.4.5 below.

While competitive responses appear to have driven the reduction in local call prices, the retail price control arrangements that apply to Telstra should also be taken into consideration.

Under the minister's Telstra Carrier Charges—Price Control Arrangements, Notification and Disallowance Determination No.1 of 2002 (the determination), Telstra was subject to price control arrangements that applied to three separate baskets of services in 2004–05. Compliance with these arrangements was a condition of Telstra's carrier licence. The price controls, which were amended after the 2004–05 financial year, are designed to drive efficiency improvements and lower overall prices.

¹¹ ACMA, *Telecommunications Performance Report 2004–05*, p. 60.

¹² ACCC, *Telecommunications Market Indicator Report 2003–04*, June 2005, p. 11.

¹³ ACMA, *Telecommunications Performance Report 2004–05*, p. 60.

¹⁴ Bundling generally refers to the situation where two or more products or services are sold as a single package. The price of the package is usually at a discount to that of acquiring given amounts of a product separately. The residential consumer is likely to receive only one bill for all the services provided in bundles.

The first basket of services consists of local calls, trunk calls and international calls. The second basket contains line rentals and the third basket comprises connection services. The first basket was subject to a price cap of the consumer price index (CPI)—4.5 per cent. This means that Telstra was entitled to change the individual prices of the services within the price cap as it wished, but the aggregate price of all services in the basket had to decline by 4.5 per cent annually in real terms (that is, net of inflation). For example, if the CPI increased by 3.0 per cent, the nominal price of the basket had to decline by 1.5 per cent.

The second basket, comprising line rentals, was subject to a price cap of CPI + 4.0 per cent. That is, any increase in average line rental charges in excess of the CPI will have to be limited to 4.0 per cent. For example, if CPI increased by 3.0 per cent, Telstra was entitled to increase line rentals by 7.0 per cent.

The third basket, comprising connection services, was subject to a price cap of CPI—0 per cent. This meant that the overall revenue-weighted price for these services could not rise in real terms.

Competition for basic access and local calls is enabled by regulation of the LCS. The relevant access prices are determined using Telstra's unbundled local call price, but in recognition that basic access is actually bundled with local calls, the access prices are calculated on the basis of the costs of transforming the wholesale line rental and local call products into the corresponding retail products. This approach, known as the retail-minus-retail-cost (RMRC) approach is designed to ensure competitive neutrality between access seekers and Telstra at the retail level.¹⁵

However, Telstra's unbundled local call price, and hence the access price, is significantly higher than its packaged/bundled offerings. This may create uncertainty for access seekers as to the true scope for competitive entry using a bundled service offering. Also, there is a possibility that Telstra will have an incentive to increase the unbundled component price relative to the bundled service offering it makes to customers, potentially causing a price squeeze.

Basic access prices increased overall in 2004–05 by 5.2 per cent. The only price reductions were observed in the large customer segment, with a decrease of 14.8 per cent. In the residential and small business segments, basic access prices increased by 7.5 per cent, and 14.5 per cent, respectively. These results support the view that alternative access networks have made very little competitive impact to date.

Wholesale barriers to entry

There are substantial barriers to entry which limit the ability of new entrants and existing players to deploy customer access networks and compete effectively in local telecommunications using only their own infrastructure.

The establishment of telecommunications access infrastructure involves substantial investment that largely becomes sunk. This increases the risks of investment and potential for failure, making new investment less attractive.

¹⁵ These principles are currently under review as part of the ACCC's local call service declaration inquiry.

Telecommunications networks are also characterised by significant economies of scale, so duplication of existing networks is unlikely to always be efficient. These economies of scale are reinforced by the significant economies of density that exist over the customer access network in metropolitan and central business district areas.

Together, these economies are likely to continue to limit the extent of network deployments in the foreseeable future.

In such circumstances, the threat of entry is not sufficient to constrain a firm's conduct and actual entry would be necessary. Given the large economies of scale inherent in telecommunications, actual new entry would need to be of sufficient scale to generate effective competition.

The sunk network costs of the incumbent can also lead to aggressive wholesale pricing aimed at the new entrant and act as an additional barrier to entry. If considered necessary, the ACCC is able to use the anti-competitive conduct provisions of Parts IV and XIB of the Act to address competition concerns that may arise from these barriers to entry and the market power they bestow. Use of these provisions will, however, need to be analysed on a case-by-case basis. The conduct under assessment can often raise certain evidentiary challenges and take a reasonable period of time to resolve.

Retail barriers to entry

While there are fixed costs associated with establishing operations as a retailer of local telecommunications services on the basis of resale arrangements, these are not nearly as significant as those associated with establishing infrastructure for the provision of these services.

Nevertheless, potential entrants would be aware that Telstra and Optus are likely to face a range of costs that are significantly lower than their own, giving a new entrant less scope to respond if Telstra and Optus offer lower prices. To build a large customer base, a new entrant may need to sell below costs while waiting for market share and greater scale benefits to push average costs down. This can involve significant risks for a new entrant.

As noted above, the declining number of STS in operation suggests it is likely that local telecommunications competitors will need to rely on customer churn, rather than new customers to increase market shares and operate profitably.

However, customer inertia, or status quo bias, can also act as a barrier to achieving sufficient scale to compete effectively.¹⁶ When combined with actual switching costs (contract lock-in, etc.), and information asymmetry about the range of available contracts, Telstra has considerable advantages as the default provider of local telecommunications.¹⁷ Potential competitors must provide an inducement, such as lower prices, to overcome this bias.

¹⁶ 'Status quo bias' refers to a concept where consumers prefer not to change their service providers unless there is a compelling reason to do so.

¹⁷ It is difficult to ameliorate status quo bias in the short-medium term, as it is consumers' greater knowledge of and confidence in alternative providers and their service offerings that will mitigate consumers' tendency to stick with their original service provider. A more detailed discussion of status quo bias is contained in the 2004 *Competitive Safeguards Report*.

The ACCC has previously noted that many of Telstra's consumers pay more for a Telstra plan than a similar, potentially cheaper plan offered by another service provider. In considering bundled plans offered by competitors, Telstra's customers are likely to compare these against Telstra's bundled plan. Data available to the ACCC at 30 June 2005 indicates a modest increase in the take-up of Telstra's bundling plans, even including those with higher line rental rates. This is consistent with the results observed in the previous year. There was also a slight decrease in the number of end-users who made a pre-selection in favour of competing carriers.

These points suggest that there may be more scope for Telstra to offer lower retail prices than previous imputation tests have suggested. Consequently, the margins available to equally efficient competitors may also be smaller.

Competitors who provide local telecommunications services rely on Telstra to provide wholesale services as well as maintenance and customer switching (churn) processes. Economic theory suggests that in these circumstances the incumbent will face a strong incentive to discriminate against its competitors by providing lower quality or higher cost wholesale services.¹⁸

Finally, to provide a full service bundle, a new entrant would need to arrange contracts for termination services, at minimum, with Telstra, Optus, Vodafone, and Hutchison, intra-capital and inter-regional transmission providers, and for an international termination service.

The ACCC has previously indicated its concern with the effectiveness of the Part XIC access regime to deliver timely access outcomes on reasonable terms and conditions. Access seekers must seek declaration of the relevant service (generally a process of at least six to 12 months), after which they can seek arbitration by the ACCC or the access provider can submit an undertaking. Each of these processes can take at least a further six to 12 months, and often longer, to resolve. In the case of undertakings, the rigidity of the ACCC's requirement to accept/reject means that the assessment process must start again if the first undertaking is unacceptable. It can also be the case that an undertaking is lodged as the basis for commercial negotiation, irrespective of its prospects for ACCC approval. The cumulative effect of these processes is often a period of years before access issues are decided. The ACCC anticipates that upcoming amendments to the procedural rules applying to the undertakings and arbitration processes will help to overcome difficulties experienced in this area.

Overall, there are significant barriers to entry for local call and basic access resale. At the network/wholesale level, the significant economies of scale of existing networks and sunk costs associated with large scale infrastructure investment increases the risk of investment and potential for failure. The resale competitive model provides an opportunity for competition at the retail level. However, due to barriers such as status quo bias, and the reliance on Telstra—itself a retail competitor—for the provision of the necessary wholesale inputs, it is difficult for new entrants to gain sufficient market share to compete sustainably. This is highlighted by the dominance of Telstra's copper access network for the provision of basic access and local call services.

¹⁸ Literature on the economics of sabotage was reviewed in the ACCC's *Competitive Safeguards Report 2003–04*.

2.4.2 ULLS-based competition

The ULLS involves access to unconditioned cable such as twisted copper pairs within the customer access network. The ULLS provides access seekers with direct access to the subscriber, and is used as a component for the supply of high bandwidth data communications, and voice services.

Therefore, the ULLS allows access seekers greater choice regarding the products and services they provide to end-users. As direct access to the local loop enables competitors to bypass sections of Telstra's network, it can make the deployment of new infrastructure, (such as DSLAMs for xDSL provision), more economic and practical, thereby promoting more quasi-facilities-based competition. Access to the ULLS also allows access seekers to provide a much higher quality, and more diverse range of broadband services than is currently possible by simply reselling Telstra's existing ADSL service.

The ACCC views the ability for competitors to access Telstra's copper network to provide a larger range of services as an important part of promoting better end-user outcomes. It is particularly significant given there is no alternative, widespread cable or wireless services available or in prospect to compete with the near-ubiquitous copper network.

Several carriers have signalled their intention to take-up large numbers of ULL services over the 2005–06 financial year as part of plans to install their own DSLAMs for the provision of xDSL products.

Industry analysts recently reported that Optus, iiNet, and Primus are currently undertaking national deployments of DSL infrastructure, and estimated that by the end of 2006, these carriers will have deployed around 200 000 DSL ports. It also appears that several niche ISPs are installing DSLAMs in regional areas.¹⁹

Although some carriers have indicated a reluctance to proceed with ULL-based investment due to uncertainty over future pricing of the ULLS and Telstra's announcements regarding a FTTN deployment, others have elected to accelerate their investments. Optus indicated that it plans to have ULL deployed in 100 exchanges by April 2006.²⁰

These announcements indicate the potential for increased access-based competition, (particularly in the broadband segment), and suggest that competition outside of metropolitan areas may also emerge gradually.

Barriers to entry

Taking advantage of access to the ULLS as a basis for competitors to provide fixed-line and broadband services requires significant investment by potential competitors, which quickly becomes sunk. Therefore, the risks are high and large scale is necessary to enter in a viable manner to compete effectively with Telstra. This is generally achieved through the resale of other wholesale services prior to committing to a deployment of ULLS-based infrastructure. However, as noted above, there are difficulties in achieving the necessary customer base through resale activities, including status quo bias, and the need to obtain the necessary wholesale inputs from Telstra. Additionally, as Telstra is the

¹⁹ Macquarie Research, *ULLS—big decisions, high stakes*, 9 November 2005.

²⁰ Decisive Publishing (Communications Day), *Optus puts converged services at the heart of revival strategy*, 9 February 2006.

wholesale provider of the inputs for the resale local telecommunications services as well as the ULLS, it may have an incentive to employ sabotage tactics, such as price and non-price discrimination, to frustrate new entry. There is also a risk that this form of quasi infrastructure-based competition can become stranded through changes to the network architecture upon which ULLS-based investments are made.

Telstra failed the most recent imputation test for the provision of ADSL services to residential customers through the core ULLS by over 100 per cent in the September 2005 quarter.²¹ This may mean that the costs for Telstra to supply ADSL to residential customers are far lower than the access prices, and that Telstra's actual margins are larger than the imputation test indicates, giving it more flexibility in terms of price competition. On the other hand, access seekers face some information asymmetry as to the potential margins available in ULLS-based investment. In combination, these factors can act as a barrier to the long-term development of ULLS-based competition.

Despite the signals that ULLS-based competition can provide a platform for effective competition, there are also risks to the sustainability of such competition. Major changes to the existing network architecture, such as Telstra's initial FTTN plans, could result in those assets becoming stranded. The ACCC is considering these issues, and more broadly, the future regulatory environment for ULLS services, in the review of fixed network services.

2.4.3 New technologies

There has been increased interest over the past one or two years in the impact of new technologies and their potential to break the dominance of the incumbent fixed-line network.

For example, technologies including wireless broadband networks are increasingly capable of offering a full array of more advanced services to retail customers without needing access to the PSTN or traditional fixed network. Similarly, advances in both fibre and HFC²² networks over the next few years may also provide an alternative to the traditional copper CAN based network, although on a limited geographic basis.

VoIP

VoIP services require a broadband connection which could be provided over different infrastructures (e.g. DSL, HFC, WiFi, and optical fibre).²³ VoIP service offerings (through low cost or zero cost calls and value-added data services) have the potential to provide a competitive alternative to traditional fixed-line (circuit-switched) voice and data services and more access-based competition because they can be provided over existing broadband services without duplicating extensive access infrastructure networks, although access to the copper lines that carry DSL is necessary.

²¹ Imputation tests measure the margin between Telstra's retail prices and the prices it charges to access seekers to use its network to compete.

²² Hybrid fibre-coaxial cable networks are currently used to provide Pay TV as well as telephony and broadband services.

²³ Department of Communications, Information Technology and the Arts (DCITA), *Examination of policy and regulation relating to voice over internet protocol (VoIP) services, Report to the Minister for Communications, Information Technology and the Arts*, November 2005, p. 14.

Not surprisingly therefore, to date, the take-up of VoIP has mainly occurred in the corporate market. Although ACMA has licensed 15 carriers with the intention to provide fixed voice services using VoIP since 2002, including nine in the past year²⁴, most of the carriage service providers (CSPs) did not actually provide VoIP services to the market.²⁵

However, widespread take-up in the residential and small business sectors is not expected to occur before a number of key concerns are addressed. These include significant concerns about the quality of VoIP services, as well as uncertainty over numbering issues, customer equipment, the workability of VoIP services providing access to the emergency call service, privacy, call charging accuracy, preselection issues and number portability.

The success of VoIP is also affected by the need to pay what effectively amounts to an additional line rental charge to obtain an xDSL connection. This is the case since wholesale ADSL charges already include an imputed line cost. As well, current bundling practices provide line rental with relatively cheap (or free) local calls, but it remains to be seen whether the move to VoIP is a tempting option for local telecommunications for residential customers, especially in the light of current quality concerns.²⁶ This double rental cost, however, can be avoided where competitors use ULLS or LSS to provide broadband, traditional voice or VoIP services using their own infrastructure.

Additionally, providers of VoIP services will continue to rely on networks managed by separate network operators, which raises the possibility that broadband network owners could be in a position to favour their own services over those of VoIP competitors, and affect the take-up of residential VoIP services in many regions.

Fibre

Fibre cable services offer the potential to substantially increase the speed and reliability of a connection between the local exchange and the end-user, thereby significantly enhancing the quality of broadband services compared to those provided over the copper local loop.

On 15 November 2005 Telstra announced plans for the deployment of a FTTN network providing a minimum of 12 Mbps to 100 per cent of households and businesses in the five largest Australian capital cities.

Telstra foreshadowed that this investment would only occur if it received 'reasonable regulatory outcomes' to protect investment risk assumed by shareholders. On 21 December 2005, following the minister's announcement that no decision on an access holiday for the proposed investment was made, Telstra announced that its plans were on hold.

FTTN centres around laying fibre from exchanges to the cabinets that sit on street corners, that is, replacing portions of existing copper local access loops with fibre. Depending on the precise technical aspects of such a development, there may be significant implications for access seekers who use ULL/LSS services in conjunction with their own DSLAM equipment in local exchanges.

²⁴ ACMA, *Telecommunications Services Availability in Australia 2004–05*, p. 13.

²⁵ ACMA, *Telecommunications Performance Report 2004–05*, p. 195.

²⁶ See for example, Ponderosa Communications Pty Ltd, *Options for Supply of Telephone Services: A Report for the Australian Competition and Consumer Commission*, October 2004.

Wireless

While the number of licensed carriers provides only a very limited indication of the competition in the sector, at least 25 of the 40 new licences issued by ACMA in 2004–05 were to carriers proposing to deploy broadband wireless access technologies.

The ‘wireless local loop’ is a system that connects subscribers to the PSTN using radio frequency signals as a substitute for the copper wire for all or part of the local loop. Fixed wireless networks differ from conventional (mobile) wireless networks (such as mobile phones and personal digital assistants (PDAs)) in that the transmitter and receivers are stationary, such as a modem on a desk or an antenna fixed to a house. The base station is generally a radio mounted on a high local point (e.g. on a tower or a tall building), and transmits and receives from all directions.²⁷

ACMA suggests that the government’s higher bandwidth incentive scheme (HiBIS) has contributed to the installation of wireless broadband networks. As of 30 June 2005 approximately 4000 (or 11.5 per cent) of HiBIS connections were by wireless broadband. This suggests there are improving prospects for facilities-based competition in a market that has so far relied on wholesale access for competitive pressure.

A report by Ovum states that as broadband take-up is growing rapidly in Australia and many customers are likely to become locked into contracts, it will be important for wireless broadband providers to obtain scale quickly. This will require substantial spending on marketing to achieve customer awareness of wireless brands, but more fundamentally, educating the market on the capabilities of wireless broadband itself. This may be difficult given that broadband is a low-margin, price-driven service,²⁸ and given the range of low-priced DSL broadband options offered by incumbents, including those offered within a package of bundled services.

New entry for the provision of wireless access technologies requires access to or construction of towers and sites for base stations, which is covered by a specific facilities access regime. New operators must also obtain access to spectrum, which is subject to rules administered by ACMA. The ACCC notes that these rules are currently undergoing reform to allow more entities to use relevant spectrum.

Conclusion

The emergence of these technologies presents alternative methods for the provision of voice and data services, and the potential for increased competition. However, to date the influence of these technologies has only been felt in the corporate segment and some other small niche markets. Nevertheless, these developments are important for future competition since it is innovation which ultimately drives the provision of higher-quality, lower cost services for consumers.

However, the sustainability of competition offered via these platforms is uncertain. As outlined above, major changes to the architecture of the CAN, such as a FTTN deployment, may change the economics of deploying alternative networks including those described here. Behavioural factors,

²⁷ http://broadband.gc.ca/pub/technologies/tech_factsheets/wireless/index.html.

²⁸ Ovum, *Wireless broadband in Australia—recent developments*, 2005.

such as price and non-price discrimination conduct by the incumbent, may also undermine efficient investment in competing infrastructure. In addition, potential investors may face some information asymmetries in relation to the true underlying costs of existing networks. Therefore, it is important for the regulator to ensure that access prices for the existing copper-based networks are cost reflective, so that efficient investment in alternative infrastructure can be properly evaluated. It is also important that discriminatory and other types of conduct which raise competition concerns are quickly and effectively addressed through application of the Act.

Meanwhile, the fixed-line services review will consider the ability of new and existing technologies to break the dominance of the copper local loop, and what the appropriate mix of regulatory intervention should be.

2.4.4 Assessment of competition in local telecommunications

While resellers have made some inroads into Telstra's retail market share in the provision of basic access and local calls, this has been minimal, and there are significant barriers to new entrants obtaining sufficient scale to compete sustainably. Further, the overriding characteristic of the market is that there is still a large degree of reliance on Telstra's network for the provision of local telecommunications services and hence very little infrastructure-based competition. These factors combine to provide the major source of Telstra's profitability and market power.

The development of new technologies indicates there is a prospect of increased access-based competition, however, these technologies are largely still in their infancy and are yet to exert any strong competitive influence. While greater take-up of VoIP and wireless services may occur in the next few years, a number of factors can threaten the ability of these technologies to become sustainably competitive in the longer term. A major influencing factor is the ongoing reliance on a wholesale access line provided by Telstra and the potential for discrimination associated with this. General uncertainty surrounding Telstra's proposals for a major network upgrade, including concerns that assets may become stranded, may also hinder the deployment of alternative access-based infrastructure where this might have been efficient otherwise.

There are also significant barriers to entry at the retail level; one of the most significant being the ongoing dominance of Telstra as a retailer of local telecommunications services, as well as the main wholesale provider of inputs necessary for other retailers to compete.

In this context, in 2005 the government introduced legislation for the operational separation of Telstra. The operational separation model is designed to improve the equivalence of Telstra's internal dealings with those which Telstra has with its external wholesale customers, and to make these more transparent.

Operational separation requires that Telstra provides access to key network services to its wholesale competitors on equivalent terms and conditions to those which it provides to its own retail business. This requirement is consistent with the obligations that Telstra already faces under Part XIC of the Trade Practices Act. The main difference is that Telstra will have to make its existing internal operations more transparent to verify that the equivalence obligations are upheld. Operational separation

may also have the effect of assisting Telstra in determining whether it is complying with its existing obligations.

More generally, the appropriate nature and scope of future regulation will be determined by the extent to which the copper CAN bottleneck can be eroded by alternative technologies and over what timeframes. The ACCC is currently considering these issues in more detail in its review of fixed-line services, due to be completed by mid-2006.

2.4.5 Competition in corporate markets

Corporate customers are large entities who procure fixed voice services, mobiles services, data, and potentially managed services, which may be acquired as 'whole-of-business' or 'whole-of-government' packages. Typically, corporate customers have multi-site operations with complex communications requirements and large telecommunications expenditure. Supply, particularly to premises with higher telecommunications demands, may be via different technologies such as digital network, direct fibre connections, and packet based networks (usually via PABXs). Supply to other corporate premises may use methods that are commonly used to supply residential and smaller businesses, such as broadband access. Increasingly, corporate customers are acquiring voice services utilising the internet protocol (VoIP). Procurement of services by corporate customers generally occurs through tender and multi-stage bidding processes.

In July 2005 the ACCC released the second in a series of reports concerning competition in corporate markets.²⁹ The first report was a starting point from which the reporting series was developed. It did not draw any firm conclusions on the state of competition in the corporate segment, but delineated the corporate customer segment and outlined the analytical framework that the ACCC would employ in assessing the effectiveness of competition for future reports.

For the most part, the second report outlined the ACCC's framework for competition analysis and initial views on the collection of the information necessary for future reports. However, some preliminary observations on the state of competition in the corporate segment could be made.

The average price of fixed voice services for business customers (larger than SMEs) decreased by 34.6 per cent between 1997–98 and 2003–04, including a decrease of 5.6 per cent in 2003–04. These reductions are due in part to:

- the ability of large corporate customers to negotiate 'off-tariff' discounts as a result of either new entry or the threat of new entry; in part due to greater facilities-based competition in CBD areas in particular
- the bundled nature of corporate customers' service needs.

Decreasing prices, the effective bargaining power of customers, and the emergence of competing infrastructure indicate that there is potential for more competition in the corporate customer segment than in many other telecommunications markets. This is particularly so in CBD areas where a number of customer access networks, particularly optic fibre, are being deployed.³⁰ However, competing

²⁹ ACCC, *Competition in the corporate customer segment of the telecommunications industry: January 2004–December 2004*, July 2005.

providers are still heavily reliant on access to Telstra's networks to provide geographic coverage for corporate customers who require supply in many different geographic areas.

Additionally, the strategic value of corporate customers gives rise to concerns about the incentives for Telstra to stave off competition by discriminating against competitors by:

- bundling bottleneck-based services with contestable services
- delaying supply of relevant wholesale services
- providing access on unreasonable terms and conditions.

The recently introduced operational separation requirements seek to address these concerns by establishing a set of equivalence principles for key network and wholesale services.

More generally, the ACCC remains concerned that the conduciveness of corporate customers to bundled service offerings can give rise to anti-competitive conduct. That is, a firm is able to extend its market power in certain markets by tying (through bundling discounts) the supply of a service in which market power is held with another service that is competitively supplied.

2.4.6 National long-distance, international long-distance and FTM calls

As noted above, imputation tests indicate a local-only strategy may not be a viable competitive option, but that a carrier, equally as efficient as Telstra at providing local calls with other fixed-line services (including fixed-to-mobile (FTM), national and long-distance calls), would be able to earn a positive margin.

Competition in the provision of long-distance and FTM call services is possible through three competitive models:

- a competitor may enter as a preselect provider, supplying long-distance and FTM services to a consumer who buys basic access and local calls from another provider
- a company may enter as an override competitor, offering long-distance calls, international and FTM calls to consumers that are willing to enter an override code
- a company may compete through calling cards
- various forms of internet access can be calibrated to provide calls via VoIP technologies.

Each of these strategies requires access to Telstra's PSTN, including where bundled services are provided.

³⁰ ACCC, *Telecommunications Infrastructure in Australia 2004*, June 2005.

Telstra and Optus are the only full service carriers, both supplying the entire range of mobile, fixed voice, internet, data, and pay TV services. They supply to all market segments, and represent the dominant players in the telecommunications industry.

Outside the local call segment, Telstra has a dominant role in providing long-distance and FTM services, albeit slightly less pronounced. Telstra has a market share of 65 per cent in national long-distance, 52 per cent in international and 65 per cent in FTM.³¹ If both long-distance and FTM services are considered together, Telstra is estimated to have 63 per cent market share, Optus is the second largest provider with 12 per cent, AAPT has 9 per cent, Primus Telecom has 7 per cent and the remaining 9 per cent is divided among other carriers.³²

There are substantial margins in the provision of these services. Telstra's margins vary significantly among the three retail services and between the residential and business customer segments. Telstra's most recent imputation tests indicate that an equally efficient access seeker would earn margins of 68 per cent and 66 per cent in business and residential domestic long distance respectively. The international long distance margins are 57 per cent and 47 per cent for business and residential services respectively. FTM margins are 24 per cent and 41 per cent for business and residential customers respectively. Margins increased in all segments in 2004–05 with the exception of domestic long distance calls.

Prices for all services fell in 2004–05, with reductions of three per cent in national long-distance, 4.1 per cent in international, and 3.9 per cent in FTM. This continues the trend of the previous six years. As noted above, a competitor as equally efficient as Telstra could not make profits if it only sold local services. This may indicate that long-distance services subsidise local telecommunications, and that national long-distance and international call prices are in excess of costs. Creating more effective competition in the long-distance market will therefore rely on removing the distortions that are currently present in the provision of local call services.

Several carriers provide long-distance calls through preselection arrangements. Some provide services via calling cards or override numbers, which allow customers to retain their existing contract but make a call-by-call choice. All of these carriers offer broadband ADSL products in addition to long-distance calls.

However, there are significant difficulties associated with attempting to compete in the long-distance call market by way of preselection. Customers opting to receive long-distance services from alternative providers will be charged a higher price for basic access and local call services, and will not be eligible for Telstra's 'reward options'.

The preselect competitor must compensate the customer for these losses. The main form of long-distance competition, therefore, occurs by way of bundled offerings rather than preselect or override competition, which characterised early competition when it first evolved in the early-mid 90s. The concern is that as bundling grows it will become increasingly difficult to operate as a preselect provider alone. In the current market, this is a limited, but potentially useful, competitive option.

³¹ National long-distance and international market shares are taken from Telstra, *Annual report 2004*. FTM market share is taken from ACCC, *Mobile service review: mobile terminating access service*, June 2004 and are for the 2002–03 financial year.

³² Deutsche Bank, *Aust/NZ Telecommunications*, 15 June 2004, p. 27.

As noted above there has been a modest decline in the number of consumers who have chosen a preselection offer in favour of bundling offers made by Telstra. However, Telstra's 'rewards' packages accentuate the decline in preselection, because if customers do not purchase Telstra's full bundle of services, they must pay an extra charge for the services that they do buy.

Calling-card and override competition in the national long-distance market requires, at a minimum, the purchase of a local call or PSTN origination and PSTN termination. It therefore relies on the current access pricing regime and is not sustainably competitive in the long-run.

Calling-card and override competition in the international market, however, may take two forms. In one model the competitor buys PSTN origination and provides a traditional circuit switched call. This will be a high-quality call but will rely on the PSTN access pricing regime and is therefore not sustainably competitive. Or a calling card provider can buy a local call, and use a packet switched (usually VoIP) service to provide the call. The local call can be bought from Telstra retail. This option therefore does not rely on regulation and will generally be a more sustainable competitive option. As this option involves relatively low costs of entry, and reduced reliance on Telstra's PSTN, sustainable competition in this segment can be expected to eventuate.

Indeed, ACMA reported that there were 38 carriers using their own network infrastructure to provide fixed-line telephone services to residential and small business customers in 2004–05. Of the 20 new carriers that entered the market since 2002–03, 15 are using VoIP to provide directly connected fixed voice services to residential and small business customers connected via wireless and wireline broadband technologies.³³ However, most of these are niche service providers or focussed on CBD/business areas. Nevertheless, these are positive signs for more sustainable competition and, consequently, prices that are more closely aligned with the underlying costs of service provision, particularly in the long-distance segments.

Override and calling card competition are most effective in the provision of national and international long distance services as call rates are often cheaper for specific destinations. It is less effective for FTM services for several reasons. First, FTM does not easily allow for the use of VoIP. Second, new entrants may face high contract costs as they must arrange mobile termination services with all four mobile service providers, as well as PSTN origination services from Telstra. Finally, mobile network operators currently have a significant cost advantage to provide mobile termination. The ACCC estimates that average retail mobile termination prices are currently more than double their underlying costs.³⁴ This means that a new entrant would have to pay high termination charges while the mobile operators face lower costs.

The ability of the FTM service provider to set prices close to underlying cost will be limited by the extent to which it can acquire mobile termination services at cost. In this context, a barrier to entry into the market within which FTM services are provided may exist where mobile termination service access prices are above cost. This is because CSPs who purchase wholesale inputs at above cost-access prices may find it difficult to compete with integrated carriers who face lower internal transfer prices for on-net calls. The ACCC is of the view that mobile termination access prices are substantially above

³³ ACMA, *Telecommunications Services Availability in Australia 2004–05*, p. 11.

³⁴ ACCC, *Changes in the prices paid for telecommunications services in Australia 1997–98 to 2004–05*.

the costs of providing the service, leading to a possible price-squeeze by integrated carriers compared with fixed-only carriers.

Therefore, competitors are essentially limited to full-service or preselect competition. The difficulties involved with full-service and preselect competition also exist for FTM services.

It also appears that while these services display substantial margins, they are niche options only. This is due to their specialised application, the degree of inconvenience from having more than one service provider, and because the pre-select option effectively involves higher prices for local call services given current bundling practices.

There are, however, signs that there may be some increase in competition for FTM services. This year's price changes report shows a decrease in FTM prices of 3.9 per cent, continuing the slow downward trend seen over the past six years. As with other services, however, this overall price decrease hides the 19.9 per cent price increases for small business consumers. However, competition for corporate services is more intense, with FTM prices decreasing by 21.3 per cent.

2.5 Mobile telecommunications services

There are four mobile network operators—Telstra, Optus, Vodafone and Hutchison—that all own mobile network infrastructure and operate at the wholesale and retail levels.

The mobile services market also consists of resellers of mobile services, mobile virtual network operators (MVNOs) and retailers. Examples of resellers include Primus Mobile (resells Telstra services), SIMplus (Optus), and BDigital (Optus). ACMA reported that there were almost 90 resellers of mobile services in 2005.³⁵

An MVNO differs from a reseller because, in addition to purchasing wholesale mobile capacity from an existing mobile network operator, it sets up a technical support layer that replicates the mobile network operator's mobile switching centre. This gives it more control over its retail operations.

The market structure, comprising four competing networks, is more inclined to deliver competitive outcomes in downstream markets than the markets for fixed-line services. As outlined previously, infrastructure based competition, as is observed in mobile telecommunications, generally means that sustainable competition in retail mobiles markets is possible, resulting in less need for regulatory intervention. However, having four separate networks does not lead to competitive outcomes for mobile termination services, where regulated access to bottleneck termination services is necessary for the promotion of competition.

There were encouraging signs of more vigorous competition at the retail level during 2004–05, particularly in the residential pre-paid segment. This segment, which made up 51 per cent of 2G retail mobile accounts at 30 June 2005, underpinned the continued growth in the take-up of mobile services. There was a 15.2 per cent decrease in per-minute call charges for pre-paid customers,

³⁵ *ibid*, p. 79. Virgin Mobile was acquired by Optus in late 2005.

and bills for pre-paid and residential customers fell by three per cent overall.³⁶ Average revenue per user (ARPU) also decreased across the industry in 2004–05. Only Telstra’s post-paid segment recorded an increase in ARPU, further illustrating that the overall take-up of mobile services has mostly occurred in the lower value pre-paid segment.³⁷

However, the ACCC remains concerned that competition in the provision of mobile telephony is sluggish.

Although the market share of Vodafone and Hutchison increased since June 2004,³⁸ and there is some anecdotal evidence that the introduction of capped pricing plans has seen a return to price reductions for retail mobile services over the 2004–05 financial year, the market is highly concentrated at the carrier network level. Telstra and Optus have a combined market share of 78 per cent, and the addition of Vodafone’s increased market share means that 95 per cent of the market is concentrated among only three operators. However, Telstra’s and Optus’ respective market shares both declined in 2004–05, whereas Vodafone and Hutchison both increased their market shares (up to 17.2 per cent and 5.2 per cent respectively).³⁹ This indicates increasing customer churn, as well as increased migration of 2G subscribers to 3G services.

More importantly, the ACCC has consistently observed high profit levels among the largest network owners. Telstra’s mobile business EBITDA levels are 42 per cent, and Optus reported EBITDA of 40 per cent for 2004–05.⁴⁰ Although Optus issued profit downgrade warnings for its mobile business, the ACCC notes that its expected profit levels for the 2005–06 financial year are well above those expected in an effectively competitive mobile industry.⁴¹ These are not observations normally considered consistent with effectively competitive markets.

Significant barriers to entry prevent potential entrants operating as a fully effective constraint on the behaviour of the incumbents, and mean the concerns outlined above may be difficult to address. These primarily include the need to provide national geographic coverage, and the high sunk costs associated with a mobile network.

It is possible for a new entrant to achieve national geographic coverage by entering into a roaming agreement, or roaming agreements with other carriers who have such coverage. Or they might simply re-sell carriage services provided on the network of a carrier that has such coverage. However, due to the ability of incumbents to control a new entrant’s access to networks necessary to achieve national geographic coverage, the extent to which such entry represents a threat to the incumbents is diminished. Given that only 10 per cent or less of all retail mobile services sold are sold by resellers,⁴² and that those operators with less than full geographic coverage (such as Hutchison) have very small market shares, it would appear that new entrants seeking to become substantial players face the hurdle of securing national geographic coverage.

³⁶ *ibid*, p. 82.

³⁷ *ibid*.

³⁸ A report by Credit Suisse First Boston indicates that Hutchison’s subscriber market share increased from 3.9 per cent in 2004 to a forecast 5.7 per cent in 2005. See *Australian Telecommunications 2005*, 6 May 2005, p. 41.

³⁹ *ibid*, p 78.

⁴⁰ SingTel Optus *Management Discussion and Analysis of Results of Operations for the Year Ending 31 March 2005*, p. 43.

⁴¹ Christian Guerra, *Australian Mobiles Market? Competitive? You must be kidding*, Goldman Sachs JBWere, 19 May 2005.

⁴² Australian Communications Authority, *Telecommunications Performance Report 2001–02*, November 2001, p. 161.

The costs associated with establishing base stations and other mobile infrastructure to achieve national geographic coverage necessitates significant up-front investment costs by new entrants which quickly become sunk. A mobile operator can reduce commercial risk by setting up local networks and negotiating domestic roaming arrangements with other MNOs. However, the extent of any such reduction will depend on the terms and conditions of any roaming agreements. Carriers may also choose to avoid paying for all fixed costs themselves by entering into infrastructure cost sharing agreements with other mobile operators. In late 2004 the ACCC approved 3G network infrastructure cost sharing arrangements between Hutchison and Telstra, and Optus and Vodafone.

Additionally, as noted above, new entrants can establish retail operations as an MVNO or reseller. However, while new entry according to these models may introduce some competition into the retail market, this is unlikely to diminish the market power of network owners because the incumbents will maintain control over their networks and will be able to control (to at least some extent) the network costs faced by such new entrants.

Over the past year the mobiles market has exhibited strong growth in both subscriber numbers and revenue, and overall prices have continued to fall. The number of mobile services in operation grew by 12 per cent in 2004–05, resulting in 90 per cent penetration in Australia. ACMA reports that penetration may reach 100 per cent in 2006. However, despite the strong growth in mobile services in absolute terms, the growth rate has declined, continuing the trend observed in the previous year. The growth of new services (1.9 million) was slightly lower than in the previous year (2.2 million). These points indicate that the market is close to reaching maturity, and that sustainable new entry might not be expected. Competition appears more likely to come from churn between existing suppliers rather than growth in the market that otherwise could make new entry profitable.

The combination of high margins and a maturing market provide some cause for concern. High margins generally reflect the presence of market power, which enables network owners to charge prices that are well in excess of their underlying costs. In the context of mobiles, the ACCC has long been of the view that prices for the mobile terminating access service (MTAS) are well above costs.

All mobile network operators have control over access to all calls received on their networks. This control over access gives the mobile operators market power over calls to their networks such that they are subject to very weak competitive constraints when setting prices for this service.

High mobile termination prices have negative impacts on wholesale and retail competitors. This is particularly so for FTM calls, where the ACCC's analysis indicates that consumers are paying, on average, more than double the actual cost of a FTM call, partly because of the high price charged by the network service providers for calls received on their networks. This is despite a 3.8 per cent decrease in the prices of FTM calls in 2004–05.

The high termination costs also make it difficult for those providers of fixed-line services that do not own and operate mobile networks to compete with those fixed-line service providers—such as Optus and Telstra—that do. This is because the high price charged for receiving calls on their mobile networks gives Telstra and Optus a cost advantage for calls made and received on their own networks over those who only provide the fixed-line service.

These factors led to the ACCC's decision to declare the MTAS in June 2004. Having declared the service, the ACCC also made a pricing principle determination that indicated the price for calls to mobiles should be lowered to a level closer to the actual cost of the service. As a result of these actions, the ACCC has become engaged in several regulatory processes around this service. This includes the provision of access undertakings by Vodafone, Optus, and Hutchison, and the notification of 14 access disputes in 2004–05.

Australian consumers seem to be making a gradual transition towards consuming new and innovative services of the type that are now being enabled, most recently through the development of 3G networks, which can deliver mobile broadband services. This may counter the slowing growth rates for mobile subscriber numbers and industry revenue that was observed in 2004–05. All mobile network operators are developing 3G network infrastructure and services in response to demand for enhanced mobile services. The deployments of these networks are still in the early stages, but the ACCC expects these developments, and consumer take-up of 3G services, to accelerate in the coming year. For example, Hutchison announced in early 2006 that it intends to migrate its 2G customers to 3G through a range of plans including handset subsidies.⁴³ Optus has indicated the initial deployment of more than 2000 base stations for the provision of 3G services, covering the six major capital cities by March 2007.⁴⁴ Meanwhile, Telstra announced in late 2005 that it will shut down its CDMA network and use the 850 Mhz spectrum to replace the CMDA network with a national 3G GSM network.

As reported in the previous Competitive safeguards report, the growth of 3G mobile services creates both opportunities and challenges for competition. On one hand, the growth of 3G offers a host of new value-added services to consumers and provides a strong new competitor to existing network service providers in the form of Hutchison.

However, 3G also creates potential for growth in market power through the control of content. While it is likely that voice calls will continue to be the main service provided over 3G networks in the short term, the success of 3G mobile networks in the long term is likely to depend on the availability of compelling content to make full use of the higher bandwidth provided by 3G mobile networks. Should individual competitors be able to fully control the availability of certain content, it is possible that they will wield substantial market power over mobile services and competition on 3G mobile services may suffer. The potential for this kind of market domination is even greater when there is an integrated provider that supplies both 3G, broadband, and pay television.

The potential for anti-competitive use of exclusive content will depend on whether there are significant switching costs associated with using more than one network, the availability of demand and supply-side substitutes for the content, and whether the content is valued by a sufficient portion of the market. Using these criteria, the ACCC considers that there are only a few services that may pose difficulties for 3G services.

⁴³ Hutchison Telecoms, Media Release, *Hutchison Telecoms Announces Plans for Orange*, 1 February 2006.

⁴⁴ ACCC, *Optus' undertaking with respect to the supply of its Domestic GSM Terminating Access Service (DGTAS)*, Final Decision, February 2006.

2.6 Internet and data services

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

Internet services are supplied to consumers by a large number of internet service providers (ISPs), the number of which decreased slightly from 694 providers in March 2004 to 689 in March 2005.

Growth in the take-up of broadband continued to be significant in 2004–05. At 30 June 2005, 2 102 800 broadband connections were reported, a 105 per cent increase on the previous year. The growth continued after the 2004–05 reporting period, with 2 484 300 broadband connections reported at 30 September 2005, an increase of 94 per cent from the previous year.⁴⁵ This outcome continues the growth of broadband take-up that emerged during 2004–05. While Telstra's competitors obtained shares of the growing broadband market, the overall shift from dial-up to broadband is helping Telstra, whose market share of new broadband customer acquisitions is more than 50 per cent.

Installation of DSLAMs and wireless networks have been significant areas of activity in 2004–05, with eight carriers undertaking DSLAM installation programs and around 61 wireless broadband providers operating or proposing to operate by the end of June 2005. Industry analysts reported that Optus, iiNet, and Primus are currently undertaking national deployments of DSL infrastructure and estimated that, by the end of 2006, these carriers will have deployed around 200 000 DSL ports. It also appears that several niche ISPs are deploying DSLAMs in regional areas.

Broadband access underpins the infrastructure investment plans of most carriers licensed by ACMA in 2004–05. ACMA reported that 26 of the 40 new carrier licensees propose to deploy wireless broadband access technologies.⁴⁶

Most notably, wireless broadband accounts for the majority of regional broadband network operations.

In remote areas, HiBIS has subsidised the entry of new broadband network operators. ACMA reported that in 2004–05, wireless broadband networks were in development or being deployed in regional, rural, and remote areas. The government's higher bandwidth incentive scheme (HiBIS) contributed to this growth. At 30 June 2005 approximately 11.5 per cent of HiBIS customer connections were by wireless. Wireless broadband networks were also installed and expanded in metropolitan areas during the year.⁴⁷

Future broadband markets will be characterised by the entry of new providers using new generation and wireless and mobile services, such as 3G (super GSM) and WiMax technologies.

⁴⁵ ACCC, *Snapshot of Broadband Deployment as at 30 September 2005*, January 2005.

⁴⁶ ACMA, *Telecommunications Performance 2004–05*, November 2005.

⁴⁷ *ibid.*, p. 2.

However, these developments are still in their early stages. It is an open question as to what extent these new networks can viably compete with broadband services delivered over the existing near-ubiquitous fixed-line network into which substantial costs are already sunk. As for local telecommunications markets, there are several factors that could undermine the sustainability of such competition.

The conjunction of competition and technological change is a powerful recipe for innovation. Innovation ultimately drives the provision of higher-quality, lower cost services for consumers. While innovation of itself is not the preserve of any one player in the market, the ACCC is concerned that the overall degree of innovation in Australia's telecommunications services, particularly broadband, may be restricted.

Customer access services are an input necessary to supply high bandwidth carriage services to end-users. These services can be supplied by means of copper, optical fibre or HFC fixed networks or wireless networks. Telstra is the main supplier of these customer access services and therefore controls access to the majority of inputs needed for competition in the high bandwidth carriage services market.

Technological developments mean that DSLAM infrastructure could deliver broadband at speeds in the range of 6–12 megabits per second (Mbit/s). For competitors, these investments would require access to parts of Telstra's copper access network, but the overall reliance on Telstra would be substantially reduced. At the same time, Telstra's own investment plans, such as the announcement to install FTTN to reach 20 million homes, would have the capability to provide enhanced broadband services. Now that Telstra has indicated that these plans are on hold, the industry may find itself at an impasse. The uncertainty over whether Telstra will return to its FTTN plans means that innovation in broadband services may stagnate, thus acting as an artificial cap on broadband capabilities.

Uncertainties around the impact of any FTTN network on existing access obligations are likely to be most relevant to particular access-seekers: those who have relied on the availability of CAN access provided by the ULLS and invested substantially to provide better quality services in competition to Telstra. It would seem that any review of current regulatory settings in this context should consider appropriate migration frameworks and timeframes so that competitors are not disadvantaged unduly by any network changes. However, the nature of any regulatory response in dealing with the challenges raised by new network developments needs to be proportionate to the problem at hand and does not have to mean that new declarations or some prescriptive regulatory approach is needed.

3 Anti-competitive conduct provisions

This section examines activities undertaken by the ACCC in 2004–05 in relation to the telecommunications-specific and general anti-competitive provisions of the Act.

Part XIB of the Act comprises telecommunications-specific anti-competitive conduct provisions. These provisions prohibit a carrier or carriage service provider (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—unlike the general s. 46 misuse of market power provisions.

The second circumstance is when a carrier or CSP engages in conduct relating to a telecommunications market that contravenes the general 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 Investigations conducted in 2004–05

During 2004–05 the ACCC conducted six investigations into anti-competitive conduct, including the following:

- alleged anti-competitive conduct in relation to the wholesale and retail pricing of residential broadband internet services (see 3.1.3)
- carriers introducing new retail products to the market before or without making them available to their wholesale customers
- alleged anti-competitive conduct in the corporate sector of the telecommunications market
- alleged anti-competitive conduct in relation to the refusal to supply retail mobile services to resellers
- alleged anti-competitive conduct regarding exclusivity provisions in relation to broadcasting services

- alleged anti-competitive conduct in relation to the wholesale and retail pricing of business-grade DSL services.

Two investigations were concluded in the 2004–05 financial year.

3.1.1 Competition and advisory notices

The ACCC may issue competition notices in response to alleged anti-competitive conduct.

When exercising this discretion it must consider the guidelines it has issued under s. 151AP (2) of the Act and any other matters it considers relevant.

There are two different types of competition notices:

- Part A competition notice—which may be issued by the ACCC when it believes that a carrier or CSP has engaged, or is engaging, in anti-competitive conduct. It does not constitute prima facie evidence of the matters in the notice. If the carrier or CSP does not comply with the notice, the ACCC may choose to seek orders for pecuniary penalties in relation to the period during which the notice was in force of up to \$10 million and \$1 million per day for the first 21 days that the conduct continues.⁴⁸
- Part B competition notice—which the ACCC can issue to set out particulars of a contravention of the competition rule. Once issued, a Part B competition notice reverses the onus of proof in relation to matters in the notice (i.e. it is prima facie evidence of the contravention if proceedings are subsequently brought under Part XIB).

The ACCC may also issue a notice advising a carrier or CSP of the action that it should take, or consider taking, to ensure that it does not engage, or continue to engage, in anti-competitive conduct.

3.1.2 Telstra BigPond broadband competition notice

On 21 February 2005 the ACCC revoked the Part A competition notice that it issued to Telstra on 19 March 2004 in relation to the wholesale and retail pricing of Telstra’s residential broadband internet services.

After reduced wholesale DSL prices were introduced on 1 January 2005 the ACCC considered that efficient wholesale customers were no longer substantially hindered from competing with Telstra BigPond’s retail ADSL services.

Telstra acknowledged that its pricing changes made in February 2004 for its retail broadband services may have adversely affected the competitive position of its wholesale broadband customers. To address the ACCC’s concerns, in addition to reducing its wholesale DSL prices, Telstra agreed to rebate \$6.5 million to affected wholesale customers.

⁴⁸ The penalties for breaches of the Competition Rule were increased in 2005. This is explained in more detail in section 7.

An important part of the resolution of this matter was the introduction of a safeguard mechanism designed to prevent the recurrence of similar conduct in the future. The ACCC has established a formal arrangement that obliges Telstra to advise the ACCC at least 15 working days in advance of future retail broadband prices and specials. The notification protocol should provide the ACCC with sufficient notice of future BigPond broadband price changes to conduct a preliminary assessment of their likely effect on competition and raise any concerns with Telstra.

3.2 Exemption orders

A carrier or CSP proposing to engage in conduct that 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 resulting public benefit outweighs any public detriment of lessened competition,
- 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 a competition rule exemption.

3.3 Third line force notifications

Third line forcing is a specific form of exclusive dealing and is prohibited under ss. 46(6) and (7) of the Act. Businesses may seek immunity from court action under the notification and authorisation process in the Act.

Under the notification processes, immunity from court action for third line forcing conduct is obtained automatically 14 days after lodgment and continues unless and until the ACCC issues a notice removing the immunity.

The ACCC may remove immunity if it is satisfied that the likely benefit to the public would not outweigh the likely detriment of the proposed conduct.

3.3.1 Digital third line force notification

In November 2004 Telstra Corporation Limited and Telstra Pay TV Pty Ltd (Telstra) notified its intention to bundle Foxtel and Austar's digital Pay TV services with Telstra's telecommunications services.

The notifications concerned the supply of Foxtel's and Austar's subscription television and related services as an eligible service in Telstra's Business Rewards Options program.

On balance, the ACCC considered that the notified conduct would result in a net public benefit as it would provide some customers with discounted or bonus telecommunications services. The ACCC decided therefore to maintain Telstra's immunity for the conduct identified in the notifications.

However, while there may be increased scope for competition between Telstra and firms in telecommunications markets in the short term, the effect of Telstra's bundling of these services in the long term is less clear. Accordingly, the ACCC will continue to monitor the effects of Telstra's bundling conduct on competition.

3.4 Information papers

3.4.1 Assessing vertical price squeezes for ADSL services

In May 2005 the ACCC released an information paper which provides guidance on its approach to vertical price-squeeze allegations about ADSL services. A vertical price squeeze is a form of anti-competitive 'low' pricing.⁴⁹ A price squeeze can occur when a vertically integrated firm uses its market power over the supply of a key input to reduce the margin available to competitors to whom it supplies the key input and also competes in the downstream market.

A vertical price squeeze can be identified by the use of imputation testing. The information paper provides industry stakeholders, Telstra and end-users with further guidance as to how the ACCC intends to approach imputation testing for vertical price squeeze allegations for telecommunications products and services (with a focus on ADSL services) when assessing whether conduct contravenes the competition rule.

⁴⁹ A price squeeze is closely related to predatory pricing, although the 'low' pricing refers to the retail price in relation to wholesale price, rather than in relation to cost as per predatory pricing.

4 Consumer safeguard provisions

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

A total of 4403 consumer protection complaints about the telecommunications industry were registered with the ACCC in 2004–05. There were 4464 in the previous financial year.

Of the complaints received, about 28 per cent did not fall within the ACCC's jurisdiction.

Each complaint received does not necessarily represent a single issue. Usually there are several key issues per year that generate most complaints and therefore several hundred complaints may relate to one issue.

Many of the issues identified were resolved through initial ACCC investigations or by initial ACCC contact with the relevant parties.

There were fewer investigations this year, with 13 being undertaken, including the matters outlined below.

4.1 Hutchison Telecommunications (Australia) Limited advertising

On 23 December 2004 Hutchison 3G gave court enforceable undertakings to the ACCC to resolve the ACCC's concerns over Hutchison advertisements and promotional aspects of its mobile phone deals.

The ACCC's concerns related to two separate representations. The first related to Hutchison's variation of the \$99 Talk Cap and Free 10 offer and the second to the advertising and promotion of a handset upgrade.

Hutchison gave court enforceable undertakings that include a commitment to:

- offer specified customers a call rate discount on all calls exceeding either the original \$99 Talk Cap and/or Free 10 offers
- strengthen its existing corporate trade practices compliance program to ensure similar potential breaches of the Act do not occur in the future
- not make representations to consumers in the future to the effect that any offer of specific goods and services is 'free of charge' when in fact there is a charge for those goods or services unless the term is appropriately specified
- offer affected customers who accepted the LG U8110 upgrade offer and who have not already been offered or received some form of restitution from Hutchison, and who believe they had been misled about the initial offer, a refund equalling an amount which is the difference between the \$300 credit and the actual cost of the mobile phone.

4.2 Australian Communications Network Pty Ltd

On 15 November 2004 the ACCC instituted proceedings against Australian Communications Network (ACN), a seller of telecommunications services for alleged breaches of the pyramid scheme provision of the Act.

The ACCC was concerned with ACN's marketing system under which independent representatives pay ACN \$548 (including GST) and sell those services to customers. Independent representatives also have the right to recruit other independent representatives. Those independent representatives can receive commissions from their personal customers as well as commissions from customers of independent representatives they have recruited.

On 23 March 2005, the late Justice Selway, in the Federal Court of Australia, found that the scheme operated by Australian Communications Network Pty Ltd was a pyramid selling scheme in breach of s. 65AAD of the Act.

ACN subsequently gave undertakings to the court to the effect that:

- all participation payments ACN receives from new independent representatives from midnight 23 November 2004 until further order of the Federal Court shall be held in trust
- ACN will refund all participation payments received during the above period, plus any interest accrued, should the Federal Court find ACN in breach of s. 65AAC
- ACN will extend the cooling off period, under which new independent representatives joining during the above period can request a refund of their participation payment, until further order of the Federal Court.

On 20 July 2005 Justice Mansfield made a number of orders, including declarations and injunctions, and orders relating to corrective action.

ACN subsequently appealed Justice Selway's decision and on 25 October 2005 the Full Federal Court allowed the appeal, ordered that the declarations and orders be set aside and that the ACCC pay ACN's costs.

On 21 November 2005 the ACCC filed an application for special leave to appeal to the High Court on the whole of the judgment of the Full Federal Court given on 25 October 2005.

4.3 Phoneflasher.com Pty Ltd

In November 2004 the Federal Court made orders by consent against Phoneflasher.com Pty and its former director, majority shareholder and agent about false and misleading representations made about the Phoneflasher mobile phone accessory. The ACCC alleged that the representations were false and misleading in breach of ss. 52 and 53C of the Act because the product does not work to reduce radiation and provide health benefits as claimed by Phoneflasher.com in packaging and promotional material.

The Federal Court made orders and declarations to the effect that:

- Phoneflasher.com had engaged in conduct that was in contravention of ss. 52 and 53C of the Act
- granted a three-year injunction against making the representations
- pay the ACCC's costs of \$20 000.

The court also declared that the former director, majority shareholder and agent were knowingly concerned in the conduct.

4.4 1Cellnet LLC

The ACCC began proceedings in the Federal Court in August 2004 against 1Cellnet, Unified Interactive Pty Ltd and two individuals for alleged breaches of the pyramid selling scheme provisions of the Act.

The 1Cellnet scheme involved participants making a payment to 1Cellnet with a promise that they would be able to earn income from the 1Cellnet Global Bonus Points scheme. This scheme was promoted throughout Australia and overseas on the internet and at public meetings across Australia. The promotion claimed that the 1Cellnet scheme was able to deliver to members a worldwide business that could generate extensive income, without the member leaving their home.

The Federal Court imposed an injunction restraining all of the parties from continuing the conduct and required 1Cellnet to publish a notice on the internet at any website which is owned, operated or maintained by 1Cellnet and in nominated newspapers that set out the court's orders. A costs order was also made against 1Cellnet.

In September 2005 the Federal Court declared by consent that Unified Interactive Pty Ltd participated in an illegal pyramid selling scheme known as the 1Cellnet Scheme. The court found that Unified's involvement in the discount telephone call pyramid scheme contravened s. 65AAC of the Act.

The court also made orders restraining Unified from establishing, promoting, taking part in or otherwise participating in, or inducing any person to establish, promote, take part in or otherwise participate in the 1Cellnet Scheme, or any similar scheme. Similar restraining orders were made in May 2005 against 1Cellnet LLC. The orders made reflect those sought by the ACCC in its case against Unified.

5 **Tariff filing, record keeping, monitoring and reporting**

In addition to its general powers to obtain information under s. 155, the ACCC has telecommunications-specific information-gathering powers under Part XIB. These powers, including tariff filing provisions and the power to make record keeping rules, allow it to monitor 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 monitor market behaviour in the telecommunications industry and develop appropriate regulatory responses. The Minister for Communications, Information Technology and the Arts can also require that the ACCC monitor and report on various aspects of competition within the industry.

5.1 **Tariff filing**

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

- general telecommunications tariff filing (Division 4, Part XIB)
- Telstra-specific tariff filing (Division 5, Part XIB).

5.1.1 **Tariff filing directions under Division 4, Part XIB**

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

In 2004–05 the ACCC did not find it necessary to use these powers.

5.1.2 **Tariff filing by Telstra under Division 5, Part XIB**

Division 5, Part XIB requires Telstra to give the ACCC a written statement setting out any proposed pricing changes for basic carriage services (BCSs) seven days before the change occurs. BCSs are services that allow for communication between two or more distinct places, supplied by fixed line or satellite-based facilities, but not including supply of customer equipment.

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. To reduce the administrative burden of this requirement on both the ACCC and Telstra, the ACCC and Telstra agreed in June 1998 that relevant information would be provided only for those BCSs that were identified by the ACCC as assisting it in detecting potential anti-competitive behaviour.

The agreement consists of the following:

- 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.

During 2004–05 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 a record keeping rule (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 to be provided. The ACCC cannot require the keeping of records unless they contain information relevant to its responsibilities.

5.2.1 Record keeping rules in relation to the Division 12 report

In December 2004 the ACCC issued a RKR specifying information to be provided by telecommunications carriers and carriage service providers to the ACCC for its annual Division 12 report. Under Part XIB, Division 12, paragraph 151CM(1)(a) the ACCC is required to monitor and report each financial year on charges paid by consumers for telecommunications services. Carriers and carriage service providers reporting under the Division 12 RKR are Telstra, SingTel Optus, AAPT, Primus, Hutchison, Vodafone, Virgin Mobile MCI Worldcom and iiNet.

These carriers and service providers provide revenue, usage and other information to the ACCC about the services they provide to consumers which the ACCC then uses to construct price indexes to estimate changes in the prices paid by consumers for telecommunications services.

The Division 12 report for 2003–04 is the first compiled using data provided under the RKR. Before the RKR was implemented, carriers and service providers provided the ACCC with the raw data for Division 12 reports on a voluntary basis. Each year the ACCC wrote to carriers outlining the information sought.

In recent years, however, the ACCC has experienced significant difficulties in obtaining prompt, reliable, up-to-date and relevant information from some carriers. While some have consistently provided prompt and reliable data, others have submitted information that is late and does not comply completely with the data requested.⁵⁰

5.2.2 Accounting separation

In December 2002 the government made provision for an enhanced accounting separation of Telstra's wholesale and retail operations with the passage of the *Telecommunications Competition Act 2002*. Under this Act, the minister issued a direction on 19 June 2003, instructing the ACCC to issue RKR's requiring Telstra to provide the ACCC with reports on:

- current costs in addition to historical costs under the telecommunications industry accounting framework (CCA reports)
- imputation analysis comparing Telstra's retail prices and the costs faced by access seekers in buying core telecommunications services (fixed network originating and terminating access, wholesale local calls and the unconditioned local loop service) from Telstra (imputation reports)
- key performance indicators on non-price terms and conditions that compare Telstra's customer service performance between specified retail and wholesale supplied services (NPTC reports).

The ACCC issued revised RKR's in September 2004 in consultation with Telstra and the industry more broadly. These replaced the 'initial' RKR's issued during 2003 which had been framed to accommodate what could be readily achieved using existing Telstra data and information systems.

The imputation testing RKR was revised to include tests comparing retail pricing of ADSL and fixed-voice services to pricing of the ULLS.

The current cost accounting RKR was revised to require Telstra to implement more robust asset valuation methods for some of its asset classes.

The reporting framework for non-price KPIs was extended to include a measure of recurring faults on basic access services, and the introduction of metrics for ADSL services.

These revised RKR's apply to imputation and non-price terms and conditions reports for the September quarter 2004 onwards and to current cost accounting reports for the half year to June 2004 onwards.

It is a requirement of the direction that the reports be made available to the public.

The ACCC reports six-monthly on CCA, and quarterly on imputation and NPTC.

The direction also requires the ACCC to provide the minister with a six-monthly report on competition in the corporate customer segment of the telecommunications market. This report is subject to a separate process (see 5.3.1).

⁵⁰ Further information about the Division 12 record keeping rule is on the ACCC website at www.accc.gov.au.

5.2.3 Public disclosure of market indicator data

In 2001 the ACCC introduced the telecommunications regulatory accounting framework (RAF), a vertical and horizontal accounting separation model that requires revenue and cost information for wholesale and retail services to be reported to the ACCC. The RAF also requires that service usage information, such as the number of local calls and the number of national long-distance minutes be reported.

In October 2003 the ACCC amended the RAF to improve the robustness and transparency of the reports. The changes related to the notification required by the ACCC for changes to the RAF reports, the audit requirements and auditor standards for audit reports and the treatment of related entities for reporting under the RKR.

The ACCC commenced publishing extracts of the RAF data in market indicator reports.

The published information includes revenues, usage and market share information on a range of retail and wholesale telecommunications services. This information was released in accordance with the approach detailed in the ACCC's disclosure report for RKR information, issued in January 2003.

The ACCC released a market indicator report for the 2003–04 period in June 2005.

5.2.5 Internet interconnection record keeping rule

In March 2005 the ACCC issued a record keeping rule (RKR) and a disclosure direction to 20 leading internet service providers as part of a three-year monitoring regime of internet interconnection services.

The monitoring program is aimed at identifying how interconnection of internet networks works in practice, and what effects that has on the markets that rely on interconnection. Internet interconnection allows customers—business, residential or others—that are connected to one internet network to send and receive emails, access websites and exchange information with users connected to other internet networks.

The ACCC's RKR followed its decision not to declare an internet interconnection service.

5.2.6 Bundling record keeping rule

In March 2003 the ACCC issued a RKR to Telstra seeking information on the effects of bundling on competition in telecommunications markets, and requiring Telstra to provide detailed information about its Rewards and HomeLine residential packages.

The RKR requires Telstra to provide quarterly reports on its bundled service products, including information on matters such as the number of customers receiving, and the total discount given for each bundled offering. During 2004–05 the ACCC began a review of the reporting requirements under the bundling RKR.

5.3 Monitoring and reporting

5.3.1 Corporate competition report

The ministerial direction on accounting separation (see 5.2.2) requires the ACCC to monitor and prepare six-monthly reports on competition in the telecommunications industry in the corporate segment of the business customer group.

The ACCC submitted the first report, covering the July to December 2003 period, to the minister on 2 July 2004. The report was tabled in parliament on 2 December 2004. The second report was tabled in parliament by the minister in October 2005.

The first report was a starting point from which to develop the reporting series. It did not draw any firm conclusions on the state of competition in the corporate segment, but rather delineated the corporate customer segment and outlined the analytical framework the ACCC intended to employ in assessing the effectiveness of competition for future reports.

The second report gives its preliminary competition analysis based on information obtained as part of its other reporting functions, including its competitive safeguards report under Division 11 of Part XIB of the Act.

5.3.2 Broadband competition monitoring

Division 12A of Part XIB of the Act enables the minister to require the ACCC to provide quarterly reports about competition within the telecommunications industry.

In May 2003 the minister issued *Monitoring and reporting on competition in the telecommunications industry determination 2003* (no. 1), which requires the ACCC to provide a quarterly report to the minister on matters relating to competition in broadband services.

Following difficulties encountered with the implementation of the determination, including significant industry compliance costs, the ACCC has been working with the Department of Communications, Information Technology and the Arts to develop an effective broadband take-up monitoring regime. Subsequent to this collaboration, a revised reporting format was proposed in a discussion paper released by the ACCC in August 2005. The ACCC received 25 submissions in response to the discussion paper. The ACCC continues to consider the implementation of the determination with DCITA following the most recent consultation process.

In the meantime, the ACCC has continued to release its quarterly snapshot of broadband deployment, which provides aggregated data on the deployment of broadband services in Australia, disaggregated by technology type. The ACCC will continue to release this report until an expanded monitoring framework is implemented.

5.3.3 Infrastructure report

In June 2005 the ACCC issued Telecommunications infrastructure in Australia 2004. The report, which was based on survey responses from 55 carriers operating in the Australian market at 1 August 2004, details the stock of telecommunications infrastructure owned and operated by telecommunications carriers operating in Australia at 30 June 2004.

The report serves to quantify the customer coverage and geographic reach, level of existing and planned investment, network applications, and the extent of competition between infrastructure operators.

6 Access to telecommunications network services

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

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 by which listed services are supplied
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

The Part XIC access regime only applies to services that are declared. Declaration is the process of determining whether a service should be brought within the regulatory net. Services are declared after the ACCC holds a public inquiry.

A number of services supplied under pre-existing access agreements were deemed to be declared on commencement of Part XIC on 1 July 1997. The ACCC had previously assessed that declaration of these services was in the LTIE.

Once a service is declared, the access provider is subject to standard access obligations (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 result in an agreed outcome, the ACCC, following notification of a 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.

The ACCC has previously encouraged industry participants to negotiate and settle their own disputes and will continue to do so.

6.1 Public inquiries into the declaration of telecommunications services

The ACCC's guide *Telecommunications services—declaration provisions* explains its 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.

6.1.1 Local services review

The local carriage service—a wholesale end-to-end local call service—was declared in 1999. The service allows competitive carriers to compete in the retail local call market. That declaration expires in July 2006.

The ACCC accordingly began a review of the declaration by issuing a discussion paper in April 2005. The aims of the review are to examine whether the declaration should be continued, the extent of any declaration and the pricing of the service. The review also considers alternative services which may be used to provide local calls and reconsiders the need to declare a wholesale line service.

6.1.2 DDAS/ISDN review

The integrated services digital network (ISDN), which was declared in 1998, is used for the carriage of information such as voice, data, high quality sound, text, still images and video over the public switched telephone network (PSTN).

The digital data access service (DDAS) is a service for the domestic carriage of data. The service can combine the use of a customer access line with management to ensure high quality data transmission. The DDAS service was deemed to be declared in 1997.

The declaration expiry date for both services was June 2005. The ACCC accordingly began a review of the declaration in September 2004. The ACCC's final decision was made in June 2005. The ACCC decided that ISDN and DDAS are declining in importance, particularly in CBD and metropolitan areas, but that both services are still significant for data access in rural areas. The ACCC therefore decided to continue the declaration in rural areas for another three years but to allow the declaration to expire in CBD and metropolitan areas on 30 June 2006.

6.1.3 Review of fixed network services

In December 2005 the ACCC initiated an inquiry to examine the future regulation of certain key fixed network and wholesale services. The ACCC issued a discussion paper outlining the relevant issues and seeking comment from interested parties.

The inquiry primarily resulted from the need to review several existing declarations of fixed network services. However, the inquiry also allows the ACCC to look at broader questions about regulation, in light of emerging market, technological and network developments. The inquiry will therefore look at:

- the pending expiry of declarations for the unconditioned local loop, domestic PSTN originating and terminating access and local carriage service
- Telstra's announcement of plans to introduce an IP core network and consideration of a 'fibre-to-the-node' network
- potential substitute technologies such as new generation mobile and other wireless services
- ongoing competition concerns about the wholesale supply of certain non-declared services.

The ACCC will consider the need and degree of regulation that may be appropriate for key fixed services, the impact of the regulation of particular services on the availability of other services and the relative importance of and relationship between these services, particularly given the technological and other factors affecting the industry.

6.1.4 Mobile international inter-carrier roaming report

On 14 September 2005 the ACCC issued its final report on its inquiry into mobile international roaming.

International roaming enables mobile phone subscribers to use their mobile phone while travelling overseas. It enables travellers to make and receive voice calls, short message services (SMS), voicemail and other mobile services.

To enable travellers to use their mobile phones while travelling overseas, international roaming allows consumers to temporarily connect to (or 'roam' on to) a mobile network when using their mobile phones in overseas countries. For this service to be provided, the mobile phone service provider used by a consumer in Australia must enter into a wholesale roaming agreement with a mobile network operator in the overseas country where the consumer is travelling.

The ACCC's final report expresses concerns that prices for international roaming services appear to be very high—especially as compared with charges set for other mobile telephone services. The inquiry also found that the most significant factor in the setting of retail prices paid by Australian travellers for international roaming services is the wholesale charges set by overseas mobile network operators when consumers roam onto their networks.

While these charges are likely to be pushing up the price of international roaming services for Australian travellers, the ACCC does not have jurisdiction to directly regulate wholesale charges set by overseas mobile operators.

However, the final report does observe that competition in the retail market for international roaming services appears to be improving, with the increased availability of substitute services for consumers. These include prepaid international calling cards, SIM cards and mobile phone rentals.

The ACCC also believes that market developments may drive greater price competition among mobile operators and improve price transparency and simplicity for end-users. These developments include advancements in technology that have allowed subscribers to select the network they roam on to,

innovative pricing practices by carriers (such as ‘flat rates’ for world geographical zones), and new entrants in the wholesale roaming market.

The inquiry also found that the information provided by mobile operators to consumers about the prices for, and the use of, international roaming has improved in recent years.

Notwithstanding these developments, the ACCC intends to help emerging competitive forces in these markets by helping Australian mobile phone subscribers to make more informed choices about international roaming services.

6.1.4 Internet interconnection declaration inquiry

In April 2003 the ACCC began an inquiry into whether or not an internet interconnection service should be declared and issued a discussion paper. Internet interconnection is the manner in which internet service providers (ISPs) connect to each other’s backbone networks and transfer internet traffic between them.

In January 2005 the ACCC issued its final decision not to declare the service because:

- while interconnection is an essential feature of providing internet services, there does not appear to be a bottleneck in the supply of interconnection services
- the ACCC does not yet have enough information to see if declaration of an internet service would be in the LTIE.

After receiving public comments on whether internet interconnection arrangements should be subject to a two-year period of monitoring under an RKR, the ACCC issued an RKR for 20 leading ISPs (refer to section 5.2.5).

6.2 Exemption from declaration

The SAOs require, among other things, that an access provider supply a declared service to an access seeker if requested. 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.

If the ACCC believes that if an order made on an application for an exemption is likely to materially affect the interests of a person, the ACCC must publish the application and invite submissions on whether the application should be accepted.

The Act also enables an access provider (or a potential access provider) to apply for and receive an exemption from the SAOs before an investment in a service is made or that service becomes an active declared service.

The ACCC must not grant an exemption order unless it is satisfied that the making of the order will promote the LTIE.

6.2.1 Digital pay TV exemption

In March 2002 Foxtel and Optus announced their intention to enter into a content supply arrangement for pay TV programs. The ACCC concluded then that, if given effect, the arrangement would breach the competition provisions of the Act. To address these concerns, various parties provided the ACCC with undertakings in November 2002 under s. 87B of the Act. These processes are described in detail in the ACCC 2002–03 *Telecommunications competitive safeguards* report.

The s. 87B undertakings included commitments to establish a third party access regime for digital pay TV services.

In December 2002 Telstra and Foxtel applied to the ACCC for anticipatory individual exemptions from SAOs in relation to the then proposed supply of digital pay TV services. The applications provided for a separate access regime for third parties to use Telstra's digitised cable and Foxtel's digital set top units (STUs).

In December 2003 the ACCC granted the exemptions subject to a number of limitations and conditions, including that Telstra and Foxtel further strengthen the terms and conditions of access outlined in the November 2003 access undertakings.

The decisions to grant the exemptions were appealed to the Australian Competition Tribunal in December 2003 by the Seven Network and C7. In September 2004 the tribunal announced that it had upheld this application and that the decision to grant the exemptions be set aside.

The reasons for the tribunal's decision were released on 23 December 2004. The tribunal rejected the applications because it concluded that Foxtel and Telstra were committed to proceeding with the investment even without the exemption order and therefore the tribunal came to the view that it could not be said that the granting of an exemption order would promote the LTIE.

6.3 Access undertakings

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

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. If accepted by the ACCC, undertakings then provide some certainty to both access providers and access seekers.

In assessing access undertakings, the ACCC is required to satisfy itself that:

- the undertaking is consistent with the SAOs outlined in the Act
- the terms and conditions of access are 'reasonable', as defined in the Act.

6.3.1 Core service undertakings

The 'core services' are as follows.

- The domestic public switched telephone network (PSTN) originating and terminating service, used by access seekers primarily to supply long-distance, fixed-to-mobile and mobile-to-fixed calls. It is also used by other network operators to interconnect with Telstra's network.
- The unbundled local loop service (ULLS), which involves the use of the copper 'line' between customers and the local exchange. The service enables access seekers to supply high-speed data services, such as ADSL, as well as traditional voice services.
- The local carriage service (LCS), which provides the carriage of calls from one customer to another customer within the same standard zone. It allows access seekers to provide local calls on a resale or wholesale basis in competition with Telstra.

Telstra had lodged revised undertakings for these three services in November 2003, proposing terms of access until 2004–05. The ACCC released its draft decision on the revised core service undertakings in October 2004. The ACCC's draft decision was to accept the PSTN and LCS undertakings and to reject the ULLS undertaking. Following the draft decision Telstra withdrew its ULLS undertaking.

In December 2004 the ACCC accepted Telstra's undertakings for the PSTN and LCS.

6.3.2 Unconditioned local loop and line sharing service monthly charge and connection undertakings

After the ACCC's final decision in August 2004 to reject Telstra's LSS undertaking and draft decision in October 2004 to reject its ULLS undertaking, Telstra lodged revised undertakings for these two services in December 2004.

Telstra lodged four undertakings, dealing with ULLS monthly charges, LSS monthly charges, ULLS connection charges and LSS connection and disconnection charges. This represented the first time that the ACCC had been asked to consider connection charges for the two services.

The ACCC released draft and final decisions to reject the two monthly charge undertakings in August and December 2005 respectively. The ACCC considered that Telstra's claimed access deficit contribution and inter-exchange network cost components were inconsistent with the statutory criteria, and that Telstra's claimed network costs were excessive. It also considered that ULLS specific costs should be recovered over a broader range of services than has been used in the past. Further details of the ACCC's consideration can be found in its December 2005 undertaking assessment reports.

The ACCC also released a draft decision to reject the two connection charge undertakings in December 2005. Telstra subsequently withdrew its ULLS connection charge undertaking.

6.3.3 Optus MTAS

On 23 December 2004 Optus Mobile Pty Limited and Optus Networks Pty Limited (together 'Optus') lodged an ordinary access undertaking for the supply of its domestic GSM terminating access service (DGTAS) with the ACCC. The DGTAS relates to a 'subset' of the declared MTAS because it only covers services on Optus' GSM network.

The Optus undertaking proposed a 'target' price for the DGTAS of 17.0 cpm, and that this target price should be reached via an adjustment path over a three-year period. This target price, which was based on modelling undertaken on Optus' behalf by Charles River Associates Pty Ltd (CRA), included two 'mark-ups' on the 'forward-looking long-run incremental cost; one for the recovery of Optus' 'fixed and common costs' based on Ramsey-Boiteux principles and the other for the inclusion of a 'network externality surcharge' on the DGTAS.

On 25 February 2005, the ACCC released a discussion paper on the Optus undertaking seeking the views of interested parties on the undertaking and the substantial amount of supporting material (five separate expert reports prepared on Optus' behalf). The ACCC received detailed submissions from seven interested parties in response to the discussion paper. The ACCC also engaged two economic consultants—Analysys Consulting Ltd and WIK Consult—to help it consider the Optus undertaking.

On 8 November 2005 the ACCC released its draft decision to reject the Optus undertaking and set a closing date for submissions on 29 November 2005. The ACCC issued its final decision to reject the undertaking on 3 February 2006.

6.3.4 Vodafone MTAS

On 26 November 2004 Vodafone lodged an ordinary access undertaking for the supply of its MTAS with the ACCC (the Vodafone undertaking). The Vodafone undertaking only covers the MTAS on Vodafone's GSM network.

The Vodafone undertaking proposed a 'target' price for the MTAS of 17.5 cpm, and that this price should be reached via an adjustment path over a three-year period. The Vodafone undertaking also included a proposed 'FTM pass-through safeguard' which proposes that access seekers should reduce the average price of FTM calls terminating on Vodafone's GSM network in accordance with an adjustment path provided by Vodafone.

However, upon initial consideration of the Vodafone undertaking, and the supporting material, which included a cost model developed for Vodafone by PricewaterhouseCoopers (PwC), the ACCC discovered errors in the traffic volumes used by PwC to determine a per-unit estimate for the MTAS. On 13 January 2005 a letter was sent to Vodafone clarifying this issue.

As a result of this error, Vodafone opted to withdraw its original undertaking for the MTAS on 12 April 2005. On 23 March 2005 Vodafone submitted a new undertaking for the MTAS on its GSM network. The new undertaking proposed a 'target' price for the MTAS of 16.15 cpm via a three-year adjustment path, and retained a 'FTM pass-through safeguard'.

On 13 April 2005 the ACCC released a discussion paper on the Vodafone undertaking seeking the views of interested parties. In reply the ACCC received submissions from five interested parties. The Commission also engaged two economic consultants—Analysys Consulting Ltd and WIK Consult—to help it consider the Vodafone undertaking.

On 22 December 2005 the ACCC released its draft decision to reject the Vodafone Undertaking.

6.3.5 Hutchison MTAS

On 7 October 2005 Hutchison Telecommunications (Australia) Limited (HTAL) and Hutchison 3G Australia Pty Ltd (H3GA) (together Hutchison) lodged six access undertakings (the undertakings) in relation to the MTAS. On 13 October 2005 Hutchison lodged a submission in support of the undertakings. Three of the undertakings have been submitted on behalf of HTAL and the remaining three on behalf of H3GA. The undertakings lodged for H3GA are the same as those lodged for HTAL.

The undertakings lodged for the Hutchison companies specify certain terms and conditions upon which Hutchison undertakes to meet its standard access obligations to supply the MTAS.

The first form of undertaking proposes that Hutchison will supply the MTAS for all mobile-to-mobile calls (MTM) at a price of 12 cpm where the access seeker agrees to charge Hutchison, or is required to charge Hutchison, 12 cpm to supply the MTAS. If this condition is not met, then Hutchison will supply the MTAS, for MTM calls, at a price of 21 cpm.

The second form of undertaking sets alternative terms and conditions for Hutchison's supply of the MTAS for MTM calls. These undertakings propose that Hutchison will supply the MTAS at a price of 12 cpm on the reciprocal basis outlined above. However, this form of undertaking does not set out a default rate in the event the reciprocal condition is not met.

The third form of undertaking applies to all calls that are not MTM calls—namely, fixed-to-mobile calls and calls originating on overseas networks—and proposes the supply of the MTAS at a price of 18 cpm.

Hutchison's undertakings also set out non-price terms and conditions of access.

On 18 November 2005 the ACCC released a discussion paper on the Hutchison undertakings seeking views of interested parties.

6.3.6 Special access undertaking in relation to Foxtel's digital set-top unit service

FOXTEL Management Pty Ltd and FOXTEL Cable Television Pty Ltd (Foxtel) lodged a special access undertaking under s.152CBA in Division 5 Part XIC of the Act with the ACCC on 6 October 2005. The undertaking specifies the terms and conditions upon which Foxtel undertakes to supply what it terms as the digital set top unit service.

A digital set top unit is a device located at a customer's premises that is used for the reception and decryption of digital subscription TV signals.

Under s. 152CBA of the Act a special access undertaking can be lodged by a person who is, or expects to be, a carrier or a carriage service provider, so long as the service is not an active declared service. This is the first time that the ACCC has assessed a special access undertaking under Part XIC of the Act.

The ACCC released a discussion paper on Foxtel's special access undertaking on 10 November 2005.

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 no 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 SAOs 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 Arbitrations for fixed network services

The ACCC received a number of new arbitrations in 2004–05 for ULLS and LSS. It was the first time a dispute relating to the LSS was notified and the ULLS arbitrations were the first to be notified to the ACCC since March 2001.

Primus Telecommunications Pty Ltd notified two access disputes with Telstra Corporation Ltd, relating to the connection prices for the LSS (notified in December 2004) and the ULLS (notified in June 2005). Those disputes were both continuing at the end of 2004–05. (SingTel Optus notified disputes for the ULLS in 2005.)

6.4.2 Arbitrations for mobile services

There was also a significant number of access disputes notified in 2004–05, after the ACCC's decision in June 2004 to declare the MTAS. In the 2004–05 period, the ACCC was notified of 14 access disputes, under Part XIC of the Act, relating to the domestic mobile terminating access service (MTAS).

The arbitrations involve the following parties:

- AAPT Ltd (access seeker)—Vodafone Network Pty Ltd (access provider)

- Hutchison Telecommunications (Australia) Ltd (access seeker)—Vodafone Network Pty Ltd (access provider)
- Hutchison 3G Australia Pty Ltd (access seeker)—Vodafone Network Pty Ltd (access provider)
- PowerTel Ltd (access seeker)—Vodafone Network Pty Ltd (access provider)
- Primus Telecommunications Pty Ltd (access seeker)—Vodafone Network Pty Ltd (access provider)
- Telstra Corporation Ltd (access seeker)—Vodafone Network Pty Ltd (access provider)
- AAPT Ltd (access seeker)—Optus Networks Pty Limited, Optus Mobile Pty Limited and Optus Vision Pty Limited (access provider)
- Hutchison Telecommunications (Australia) Ltd (access seeker)—Optus Networks Pty Limited, Optus Mobile Pty Limited and Optus Vision Pty Limited (access provider)
- Hutchison 3G Australia Pty Ltd (access seeker)—Optus Networks Pty Limited, Optus Mobile Pty Limited and Optus Vision Pty Limited (access provider)
- PowerTel Ltd (access seeker)—Optus Networks Pty Limited, Optus Mobile Pty Limited and Optus Vision Pty Limited (access provider)
- Telstra Corporation Ltd (access seeker)—Optus Mobile Pty Limited (access provider)

Telstra subsequently withdrew its access disputes with both Vodafone and Optus.

However, in December 2005 Telstra notified the ACCC of another access dispute with Optus.

Interim determinations in the Vodafone disputes were made in July and August of 2005 year and in four of the Optus disputes in July, August and October of 2005. The interim determinations are in effect for 12 months or until a final determination comes into effect or the interim determination is revoked.

The interim determinations set an initial price for the MTAS of 18 cents per minute, decreasing to 15 cents per minute on 1 January 2006 for the remainder of the 12-month period.

The interim determinations and the ACCC's reasons for the determinations were published on the ACCC's website.

6.5 Pricing principles and indicative pricing

Following the declaration of a service, it has often been ACCC practice to develop and release pricing principles to inform the market of its likely decisions in arbitrations and so provide greater certainty to access seekers and promoting the timely resolution of access disputes without having to refer them to the ACCC.

Changes to the legislation in December 2002 required that pricing principles be issued for each newly declared service.

6.5.1 Pricing principle for the DDAS and ISDN services

Section 152 AQB of the Act required that the ACCC publish model terms and conditions relating to access to the DDAS and ISDN services following its decision on declaration of the two services in June 2004 (see above).

The ACCC released a high level pricing principle for the two services at the same time as it released its final decision on declaration. That principle stated the ACCC's view that it believes that the total service long run incremental cost (TSLRIC) method is the most appropriate basis for determining regional DDAS and ISDN prices, and that more detailed guidance would be given should industry express concerns about pricing.

6.6 Other access work

6.6.1 Facilities access

In late 2004 the ACCC received complaints from some access seekers that access to Telstra exchanges to install DSLAM equipment, capable of providing high-speed internet access, had been hindered or delayed by Telstra. The ACCC accordingly initiated a consultative process with Telstra and industry to better understand and resolve these non-price access issues.

In June 2005, the ACCC engaged a technical consultant to provide the ACCC with information and advice on a range of technical and operational issues associated with exchange access.

6.7 Telecommunications access code

Under s. 152BJ of the Act, the ACCC is empowered to make a Telecommunications Access Code. In 2004–05 the ACCC did not consider that a code was required.

7 Number portability

This section outlines the ACCC's legislative responsibilities and associated activities under the *Telecommunications Act 1997* on 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, Part 22 of the Telecommunications Act requires the Australian Communications Authority (ACA)⁵¹ to develop a numbering plan outlining the allocation and use of numbers in connection with the supply of carriage services.

Under the Telecommunications Act, the ACCC has statutory powers to direct the ACA/ACMA on number portability. The ACA/ACMA cannot insert rules about number portability in the Telecommunications Numbering Plan 1997 unless directed to do so by the ACCC, and any rules the ACA/ACMA includes in the Numbering Plan on number portability must be consistent with any directions by the ACCC. The Numbering Plan is the plan for the numbering of carriage services in Australia and the allocation and use of numbers in connection with the supply of such services.

In November 2004, the ACCC issued a discussion paper on whether or not it should direct the ACA to set out rules about data network access service (DNAS) number portability in the Numbering Plan. DNAS number portability allows a customer that changes its DNAS provider to retain the same DNAS number.

Comments were sought from industry participants, other stakeholders (including end-users) and the public more generally on a range of issues associated with DNAS number portability.

After the release of its discussion paper, uncertainty surrounding the continued operation of Comindico—a supplier of data network access services—was resolved, and the ACCC received relatively few submissions. In addition, the ACCC conducted follow-up market inquiries to help it reach its final view.

In June 2005, as a result of the comments received, the ACCC determined not to issue a direction on DNAS number portability.

⁵¹ Now the Australian Communications and Media Authority (ACMA).

8 Other responsibilities under the Telecommunications Act

8.1 Operational separation

On 14 September 2005 parliament approved legislation that includes provisions for the operational separation of Telstra.

Operational separation has been introduced by the government to strengthen the existing requirement that Telstra provide access to key network services to its wholesale competitors on equivalent terms and conditions to those that it provides to its own retail business.

Telstra will be required to make its existing internal operations more transparent to verify that the equivalence obligations are upheld. Operational separation may also have the effect of helping Telstra see if it is complying with its existing obligations under Parts XIB and XIC of the Trade Practices Act.

Operational separation will be implemented through the *Telecommunications Act 1997*, which establishes the framework by which Telstra is to make an operational separation plan (OSP). The details and contents of the plan are to be specified in ministerial determinations. The minister's initial determination can include declared and non-declared services, but any subsequent determinations can only specify that declared services are included in the OSP, unless Telstra consents otherwise.

A new Division 14 has been added to Part XIB of the Trade Practices Act which requires the ACCC, in administering Part XIB, to have regard to relevant conduct engaged in by Telstra to comply with operational separation.

8.2 Australian Communications Industry Forum (ACIF)

During 2004–05 ACCC staff participated as observers on several code committees organised by ACIF, the industry body for telecommunications companies.

ACIF committees comprise representatives of the telecommunications industry, consumer groups and government regulators (such as the ACCC, the ACMA and the Telecommunications Industry Ombudsman).

Progress was made on several codes within ACIF during 2004–05, covering:

- consumer contracts
- prices, terms and conditions (revision)

- rights of use—premium calls services
- local number portability (revision).

The ACCC's involvement in ACIF committees includes consumer protection issues, as well as operational and network issues.

ACIF's Code Administration and Compliance Scheme will continue to monitor compliance of industry participants who are signatories to these codes. If codes are registered with the ACMA, it can take enforcement action against industry participants for failure to comply.

8.3.1 Consumer contracts

ACCC staff participated in working committee discussions on the draft code during 2004.

The industry code specifies rules to determine when consumer contract terms may be considered unfair, including having regard to the intelligibility and accessibility of contract terms that enhance consumer comprehension. The code was registered by the ACA in May 2005.

8.3.2 Prices, terms and conditions

In 2004–05 the ACCC continued to participate in the review of the customer information on prices, terms and conditions code (PTC code). The PTC code specifies minimum requirements for suppliers to meet in informing customers about the prices, terms and conditions of goods and services on offer.

The code was revised to clarify provisions for the presentation of information, the availability and pricing of the product and/or service, bundling of products and comparative advertising. The revised code was registered by the ACA in April 2005.

8.3.3 Local number portability

During 2004–05 the ACCC participated in a review of the local number portability (LNP) code. LNP allows customers to retain their telephone number when changing or porting between service providers.

The code was revised to remove the restriction that a ported telephone number remain within the donor carrier's exchange service area—making the code consistent with the numbering plan.

8.3.4 Rights of use—premium call services

ACCC staff participated in meetings convened by ACIF to develop an industry code on rights of use for premium call services. The code specifies the minimum requirements for the identification and transfer of the rights of use (ROU) holder for premium rate service numbers. The code was registered by the ACA in June 2005.

8.3.5 Next generation networks

ACCC staff also contributed to meetings of ACIF's next generation framework operations group (NGN FOG), which was originally tasked with progressing interconnection issues associated with the emergence of NGNs and multimedia services they are intended to deliver. The ACIF FOG submitted its final report policy and regulatory considerations for new and emerging services to the Department of Communications, Information Technology and the Arts in August 2004.

8.4 Other codes

8.4.1 eMarketing Code of Practice

ACCC staff participated in the development of the draft eMarketing Code of Practice. The eMarketing Code of Practice was developed by the Australian eMarketing Code Development Committee, chaired by the Australian Direct Marketing Association (ADMA), to establish comprehensive industry rules and guidelines for the sending of commercial electronic communications in compliance with the *Spam Act 2003*. The code was registered with the ACA in March 2005, making it enforceable.