

17 June, 2002

Mr Ken Walliss
Director – Regulatory
Telecommunications
Australian Competition and Consumer Commission
GPO Box 520J
Melbourne VIC 3001

Dear Ken

Resolution of Telecommunications Access Disputes

ATUG welcomes the opportunity to comment on the ACCC's Resolution of telecommunications access disputes – a draft guideline. We do so to provide an end user perspective on access decisions and processes after five years of open competition. Our comments go to the principles of telecommunications access rather than the detail of the guidelines for implementation and are made with reference to ATUG Focus Policies 2002 (Attachment 1)

ATUG would also refer the ACCC to our submission on Information Disclosure and Record Keeping (March 2002 – Attachment 2). The use by the ACCC of its information powers is critical to achieving the goal of promoting the long-term interest of end users, whether by declaration, determination or case management processes. Information is the strongest regulatory tool for achieving the incentives needed to make the access regimes effective.

I have included information from a survey ATUG commissioned in May 2002 to assess the thinking of the ASX Top 100 companies on the effectiveness of competition in telecommunications. This information, which is at Attachment 3, should be treated as Commercial in Confidence.

There are two central themes that concern ATUG:

- 1) The commercial value and leverage of Telstra's network is so significant as to make the creation of incentives to support even-handed commercial negotiation a critical objective for the ACCC. Information plays a key role in this endeavour.
- 2) End users look to the ACCC for positive assurance that their long-term interests are being addressed. There is very low likelihood that end-users ever being seen legally to have sufficient direct interests to warrant their direct participation in access related processes. They can only participate indirectly through the ACCC commitment to competition and consumers. ATUG regards as critical the role of the ACCC in influencing and where necessary determining access outcomes. End-users doubt that reliance on commercial negotiation alone will produce the right long-term results and prefer the ACCC to have active oversight, by way of benchmark processes and information disclosure, of even "commercial" outcomes.

Yours sincerely,

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**Comments on ACCC Draft Guide
on
Resolution of Telecommunications Access Disputes**

June 2002

ATUG's conclusion on progress towards achieving competition after 5 years is that there remains an over-emphasis on process rather than outcomes and that sustainable competition has not been achieved. The telecommunications access regime was designed to promote the long-term interests of end users and the efficiency and international competitiveness of the Australian telecommunications industry. In practice this regime has proved difficult to use and has needed a series of amendments. ATUG appreciates that the purpose of the guidelines is to support the effectiveness of the regulatory framework in achieving the policy objectives outlined above,

In reviewing 5 years of experience and assessing the proposed guidelines, it seems to ATUG that there are a number of tensions between policy objectives and practice in telecommunications:

- 1) A privatised incumbent operating in a competitive industry will always focus on maximising shareholder returns
- 2) The "industry self-regulation" approach to competition policy is not effective in dealing with end-user issues
- 3) In practice, the focus on process rather than outcomes has led to delay rather than decisions
- 4) In practice the focus on infrastructure (facilities) competition rather than services competition has resulted in wasted capital and a negative reaction from the capital markets
- 5) The size and spread of the market have created difficulty in diffusing competition beyond the CBDs. Progress has only been achieved by direct Government funding

It is important that any changes to the administration of the telecommunications regulatory framework are designed to overcome these difficulties where possible.

Development of Australia's telecommunications services is essential for social and economic development. Telecommunications is a "utility" for its end users – there is no option to not have "the phone". Four factors have guided development in the telecommunications industry – technology, regulation, financial interests and market needs. These factors are interdependent, each influencing the other dynamically and iteratively.

Technology

The technologies of relevance are broadband transmission, wireless, 3G, and IP based switching networks. Many of the issues around access and interconnection pricing, terms and conditions will arise afresh as these new networks are developed.

Regulation

In 1991 de-regulation was introduced. In 1997 open competition was permitted because of the benefits this would bring to users in terms of price, service and innovation. These outcomes have been achieved to varying degrees, but regulation has been an important factor in this result. Competition seems increasingly fragile and needs continued regulatory support to ensure the gains made do not disappear.

Financial Sector interests

The interest of the financial sector in the industry since 1997, when T1 was issued, has had significant influence on industry directions. It has also created unforeseen tensions between the interests of the shareholders and the interests of the end users. In 2001/02 the capital market is saying: reduce capex, improve earnings and cut costs. The impacts on users will be higher prices, reduced levels of service and possibly delayed innovation. Capex levels have been relatively static over ten years.

Market Needs

Market demands are changing and will create opportunities for the industry. Wireless and Internet services are clear examples. Well-priced value added services also present opportunities. The key learning from the market over the last five years is that customers want one bill for communications services. This has important implications for competition policy. Service based competition must be supported with regulation so that end users can choose between bundled offerings from a range of service providers. The market has doubled in size from 1995 to about \$26 billion. On average residential spend has grown faster than the market overall. Households now spend on average \$1380 pa on communications services. The Top 500 companies have doubled their communications spend over the last seven years.

There are four key issues for ATUG in reviewing the draft guidelines:

- 1) Competition is not yet robust or effective in all market sectors
- 2) There is no evidence that investment is at risk from over regulation
- 3) Access to fixed network services should be open, speedy and transparent
- 4) Long-term interests of end users must remain central to the objectives of the legislation

Taking these in turn:

1) Competition is not yet robust or effective in all market sectors

When Telstra has 75% of the industry revenue, spends 67% of industry capex but earns 95% of the industry profit, ATUG's conclusion is that competition framework has not yet been fully effective. This pattern does not appear in any other industry in Australia.

This financial asymmetry, coupled with information asymmetry and ownership of the core asset of the industry, creates a massive on-going competitive advantage for Telstra. Telstra, through the process of bilateral commercial negotiation, is in a position of having great detail about all its competitors. None of them has a similar knowledge base.

Recent commercial settling of arbitrations was driven in ATUG's view more by investors' need for certainty than by commercially satisfactory outcomes. The evidence is that all Telstra's competitors are, almost certainly, paying higher prices than an arbitrated process would have delivered, with the result that end users are paying higher prices than they need to.

An unexpected consequence of this is that information relating to these "commercial settlements" is not available publicly, reducing even further the availability of this information to access seekers in their negotiations with access providers.

It remains to be seen whether the ACCC will be able to address the problem of information asymmetry more effectively via public disclosure of information collected via the telecommunications record-keeping rules or under the new powers recently suggested by Senator Alston in further amendments to the Trade Practices Act.

The increasing use by Telstra of its fixed network services in bundled offerings, when none of its competitors can provide a comparable competitive offering, means that, at the very least, regulatory support for open, speedy and transparent access to fixed network services must remain in place.

Since Telstra is part-privatised, solutions such as structural separation are difficult and the practical reality of self-regulation, supported by light touch regulation in an industry where significant commercial interests exist, is questionable. Regulation is still needed to promote competition, even where facilities competition is in place, because of the need for any to any connectivity.

Reporting, disclosure and record keeping rules are important regulatory tools. In particular the issue of equality of treatment by Telstra of Telstra Retail vis-a-vis its competitors, is a matter where the ACCC should be proactive and public disclosure of information is important to ensuring competitive fairness.

2) Investment is not at risk from over regulation

ATUG does not accept the argument that investment levels are a proxy for the competitive strength of the telecommunications market, any more that we accept that numbers of carrier licences per se are an indicator of competitive sustainability.

A number of policy options currently under consideration are based on an over emphasis on the theoretical regulatory risk to investment. ATUG sees no evidence to support this concern.

In reality there has been little change in Telstra's capex spending since 1996. In ATUG's view the time for decision making on the basis of economic theory is over – there is sufficient actual information now about investment and returns to use facts rather than theory in deciding whether and how to amend the regulatory framework.

Since 1991 over \$55bn has been invested in the Australian telecoms sector. Telstra has spent \$37bn or 67% of this. Telstra currently earns 49% EBITDA and 95% of the total industry profit. Clearly, none of its competitors remotely approach these levels of investment and performance.

Recent reaction by the investment community is, in fact, to what it sees as **over** investment in capex in the telco sector, based on expectations that have not been met for adequate, timely returns.

Investment per se and carrier licences do not by themselves indicate a robust market. The real test of competitive strength is whether the companies concerned are generating cash to pay debts and dividends and to fund expansion. After almost five years this has not been achieved in telecommunications.

3) Access to fixed network services should be open, speedy and transparent

The central policy problem as at 2002 is that the Access Regime as implemented and as amended in 2001 has not yet achieved open, speedy and transparent access to fixed network services.

Recent research by ATUG into Top 100 users of telecommunications reveals that the core network is a very significant commercially valuable asset. It is a strong factor in the buying practice of this group, which spends about \$5 billion on telecommunications per annum.

(May 2002 Attachment 3. **This material is Commercial in Confidence and should not be included in public disclosure of ATUG's submission.**)

The current access framework leverages this asset further through its insistence on commercial negotiation – when there is no real incentive on the access provider to do so. This has not been ameliorated by the information powers of the ACCC or existing dispute resolution processes due to the strong policy preference to date for commercial negotiation. Even the effective use of ADR is questionable without strong incentives that create negotiating equality between the parties.

Reality suggests a different approach is needed – as suggested in the Review of Telecommunications Arbitration Processes Report. Arbitration could be used as part of the incentives to achieve true commercial settlement of disputes. For example arbitrated decisions should be fully, publicly disclosed and the process open to public observation.

An alternative approach, that ATUG has previously suggested, is to develop a framework for **Services of National Significance**, which would forestall most future disputes by ensuring services that are critical to robust, effective competition, such as PSTN interconnect and ULL access, are supplied on pre-determined terms and conditions without the need for extended negotiations and time-consuming arbitration and review.

The ACCC would conduct a public process to consider the declaration of certain telecommunications services to be Services of National Significance. In the event of the ACCC making such a determination, it would be required to determine with expedition the terms and conditions (including price) of the supply of these services to access seekers.

This approach could address in a systemic way issues of delay and lack of transparency which have been experienced over the last five years. This is important to the development of sustainable, service based competition with the benefits to price, service and innovation that a competitive market brings. Central to this idea is a pro-active and transparent approach for the ACCC.

4) Long-term interests of end users must remain central to any decision or case management processes.

In ATUG's view, the commercial interests of individual players should come second to the long-term interests of end users and the explicit promotion of competition until there is evidence of sustainable and effective competition.

7.2.1 in the draft Guidelines discusses the Commission's view of the interests of end-users – "...likely to contribute towards the provision of goods and services at lower prices, higher quality or towards the provision of greater diversity of goods and services." ATUG believes this view needs to shift to the clearer position that long-term interests of end users will be served by **cost-oriented pricing** for both competitors and consumers.

ATUG also believes that long-term interests of end users will be better served by transparent setting, and public disclosure, of prices and price-related terms and conditions for access. The ACCC should set benchmark prices for all network-related services at the one time, every three years. This will reduce the possibility for shifting costs between services and over time. Service by service negotiated and then arbitrated determination of prices, that are not disclosed, leads users to question whether their long-term interests are being protected.

Summary

The commercial value and leverage of Telstra's network is so significant as to make the creation of incentives to support even-handed commercial negotiation a critical objective for the ACCC. Information plays a key role in this endeavour. The ACCC should use its information powers pro-actively to address this problem.

End users look to the ACCC for positive assurance that their long-term interests are being addressed. There is very low likelihood that end-users ever being seen legally to have sufficient direct interests to warrant their direct participation in access related processes. They can only participate indirectly through the ACCC's commitment to competition and consumers.

ATUG regards as critical the role of the ACCC in influencing and where necessary determining access outcomes. End-users doubt that reliance on commercial negotiation alone will produce the right long-term results and prefer the ACCC to have active oversight, by way of benchmark processes and information disclosure, of even "commercial" outcomes.

Attachment 1

ATUG Focus Policies 2002

ATUG's Objective

To achieve world class telecommunications services at world class prices for Australian businesses.

Competition

ATUG supports sustainable competition as the best way to deliver choice, reduced prices and innovation. In some areas, ATUG believes competition has stalled. Proactive involvement by government and regulatory bodies is needed to achieve more timely outcomes for the long term benefit of end users.

Open Access

ATUG believes practical equality of access to the Local Loop and PSTN, on fair and reasonable terms and conditions, is essential to effective competition. This has not been achieved through self-regulation. The ACCC should determine prices, terms and conditions for supply of critical network services. All information used to make these decisions should be publicly available. The ACCC decision should be final.

Broadband Connectivity

The benchmark for communications connectivity is affordable always-on broadband access. The impacts of broadband on economic growth, government service delivery and community development are significant. Strong competition in service delivery, government initiatives and policies to support content development will accelerate take-up.

Mobiles

- Users should have access to the most extensive network coverage possible. ATUG supports national roaming between carriers offering mobile services on fair and reasonable terms and conditions.
- ATUG will work for significant reductions in international roaming and fixed-to-mobile charges.

Informed Choice

ATUG supports transparent choice of service levels. Information on prices, usage, conditions and performance standards should be provided in Plain English format by service providers to enable "fit for purpose" choices to be made by users.

Regional Telecommunications Services

ATUG supports government initiatives to ensure well priced communications services are available for business and residential users in regional, rural and remote Australia.

Attachment 2



**Comments on ACCC Discussion Paper
on Regulatory Principles for Public Disclosure
of Record Keeping Rule Information**

March 2002

BACKGROUND COMMENTS

The policy objective of competition in telecommunications services is to increase choice for users and thus to deliver price and service benefits and innovation.

The promotion of competition can be achieved by a mix of structural means, regulatory means, information and market pressure. The tools to be applied, in ATUG's view, depend on the level of competition in a particular market, measured not only by customer share but also by costs, revenues and margins.

Information is clearly as an important tool for the ACCC in administering competition regulation in the telecommunications industry. The two main areas of focus, assessing anti-competitive behaviour and guaranteeing access to network services on terms and conditions that are reasonable, both rely on access by the ACCC to proper information.

ATUG supports the Commission's view that disclosure of record-keeping information can promote competition by:

- 1) Reducing the information asymmetry between access providers and access seekers
- 2) Increasing the transparency of decisions with regard to part XIB and part XIC matters and
- 3) Informing consumers, policy makers, other firms and investors to enable them to participate more effectively in the telecommunications market.

1) Information Asymmetry

Disclosure is an important answer to the information asymmetry problem identified. As an alternative to mandatory disclosure, the ACCC might consider using industry wide ADR processes for certain decisions eg access deficit and interconnect rates.

Given the increasing movement of the industry, with the help of the ACCC, towards dispute resolution rather than arbitration (a move ATUG applauds) it is important that information disclosure is not confined to that collected in arbitral processes but applies also to information gathered under the record-keeping rules.

ATUG suggests that the developing communications skills of the industry in alternative dispute resolution processes should be applied to an industry based determination of the access deficit and the interconnect rate going forward. The ACCC and industry participants should develop an industry-agreed position on

these important questions. Such an approach could help to achieve the open, speedy and transparent access as discussed in recent amendments to the Trade Practices Act.

The concern expressed in the Act that disclosure be constrained by regard for the **legitimate commercial interests** of firms rests on an assumption that the legislation has been effective in promoting competition. ATUG does not believe this has been achieved yet given the revenues, margins and profitability of Telstra compared to any, indeed all, of the competing firms. The focus should be on promoting competition until success has been achieved against this paramount objective. The relevant tests are whether disclosure is in the long-term interests of end users and whether disclosure would promote competition.

2) Transparency

ATUG supports the disclosure of information as a means of ensuring transparency of regulatory decision-making, a concern traversed at length by the Productivity Commission Report. Concerns by participants as to the basis for ACCC decisions should be eased by the disclosure of the information on which these decisions are based.

For purposes of reassuring users that progress is being made in the competitiveness of the industry, information should be publicly available on an aggregated basis. This assurance is more important given the direction of price movements upwards over the last 6 months. The ACA Annual Report 2000-01 (page 48) indicates that the vast majority of benefits to consumers from the telecommunications regime have been **non-price** benefits (89% of upper limit benefits of \$12 billion). Given the small % that price benefits comprise after 5 years it is important that the ACCC adopt a positive position on information disclosure to the public that price changes are cost related.

ATUG has a preference for public disclosure wherever possible in keeping with our specific policy of Informed Choice. For competition to be effective in the telecommunications industry not only the competitors but also users need to have a secure information base on which to make decisions about prices. Where markets are clearly competitive the need for this information support is not required. Where a product or service is essentially monopoly provided then information about costs should be readily available to competitors and users.

ATUG is of the view that information should be made available by ACCC at the time of any price increases in services that are not yet competitive, to provide assurance to the public that increases are cost related.

SPECIFIC REMARKS

Q1 ATUG agrees with the Commission's approach that is to disclose information if this promotes competition and facilitates the operation of Part XIB and XIC. ATUG believes that the balance of interests should rest with these factors over a concern for the commercial interests of an individual firm where that firm has significant market power.

Q2 Yes – at present the dominant carrier Telstra has significant information power by comparison to other carriers. This can in part be redressed through the disclosure of record keeping information. In ATUG's own experience trying to assess the basis of policy positions which are argued is difficult due to lack of information – marked in the Commission's own documents as "c-i-c".

Q3 Yes – as we have seen recently the commission's powers relating to bi-lateral negotiations are completely negated when disputes are "resolved" bilaterally. The industry may feel that the best possible prices, terms and conditions have been reached. The users have no such confidence and certainly no transparency on the outcomes.

Q4 In ATUG's view information around the access deficit and interconnect charges, particularly fixed to mobiles are specific examples.

Q5 Yes. This should assist to promote competition and improve the operation of parts XIB and XIC. The disclosure of this information should redress the need for Merit Appeal to the ACT, and should mean Administrative Decisions Judicial Review processes should suffice.

Q6 Yes. The more informed the participants in the policy process, the better the outcomes. This should assist in promoting sustainable competition with users understanding more about the cost base for the industry.

Q7 ATUG is not clear whether this would give buyer firms private rights of enforcement as well as industry competitors.

Q8 Yes. Consumers do not need a vast amount of detailed information, rather they need a positive assurance by the ACCC that price movements are related to costs not monopoly profits. A summary of the information supporting this assurance should be available on request.

Q9 Yes. The information described in Figure 1, Table 1 and Table 2 are a start. With regard to Table 1 any telecommunications project which receives government funding should have costs disclosed eg Mobile Coverage on Highways project, Untimed Local Calls in Extended Zones, NTN projects. With regard to Table 2 additional matters might include connections data, fault costs,

hotline prices and costs, flagfalls, minimum charging units, price per second, per 30 second, volume discounts, bundled discounts, access deficit information.

Q10 Information on the access deficit could assist in reviewing compliance with price controls. In addition a review of ‘case study’ consumers and small business could confirm whether the price cap benefits are achieved in practice given new pricing strategies of discounting only for volume and bundled buying.

Q11 ATUG is concerned about costs for international roaming. Record keeping rule information should be sought and disclosed in this area.

Q12 The commercial interests of individual players should come second to the long-term interests of end users and the explicit promotion of competition until there is evidence of sustainable and effective competition. Profitability, free cash flow and investment levels may be useful indicators. ATUG does not feel the use of theoretical economic modelling is of use now that the industry has five years real data.

Q13 and Q14 The commercial interests of individual players should come second to the long-term interests of end users and the explicit promotion of competition until there is evidence of sustainable and effective competition. Certainly the onus should be on the party seeking to deny disclosure to prove the competitiveness of a market and therefore the case for potential harm to its commercial interests. The ACCC may consider establishing a panel of financial and other experts to advise in this area if the previous suggestion is unworkable. Market share (numbers and \$\$), revenue shares, margins and profitability, price reductions, service quality improvements, innovation would all be relevant evidence of competition or otherwise.

Q15 ATUG supports open disclosure unless there is clear evidence of strong and effective competition.

Q16 Market indicator information will assist decision making by participants in the industry. Financial reports currently disclose significant amounts of market information but this information is not easily interpreted, compared or made available beyond shareholders and the financial community. Information is only being used as a proxy for competition to deal with information and resource asymmetry and to promote competition. When competition is effective. Perhaps ABS data for competitive industries may provide guidance in this area.

Q17 If data is collected quarterly then different reporting periods can be aligned. Again ABS data collection may provide guidance as to timing.

Q18 Information on the local loop is key to promoting competition, to providing transparency in decision making, to speeding up access decisions, to reducing disputation, to alleviating user concerns about monopoly pricing and price

movements. It is essential that information about Telstra's local loop be disclosed in order to further promote and stimulate competition. In general any information Telstra discloses to the financial sector in its own interests in markets which are not yet competitive should be made available to the ACCC under the record keeping rules and disclosed in the interests of competition and users.

Q19 The Commission should release information at wholesale and retail levels to assure competitors and users of even handedness between divisions of Telstra compared to Telstra competitors. Figure 1 and Table 1 provide a good outline of suitable information.

Q20 In the interests of transparency the Regulatory Accounting Procedures should be released on request.

Q21 Information on the local loop should be released publicly in summary form to enable consumers to be confident that price increases are cost justified and to enable large users to negotiate on a proper basis with Telstra.

The impact of ownership of the fixed network on costs, prices and profitability is significant. Therefore, access seekers should be provided with detailed information to overcome information asymmetry problems and to promote competition.

Q22 ATUG believes the ACCC should continue to use record-keeping rule data in its administration of the regulatory framework – Parts XIB and XIC of the Trade Practices Act. ADSL is a very good example of the effectiveness of this approach a part of a strategy to ensure control of the local loop was not used to deny access to competitors. Market and service data combined with the financial data will give the ACCC a comprehensive basis on which to make decisions that promote the long-term interests of end users.