

Pay TV, Cables and Service Bundling: Challenges for Regulators

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Introduction

I am pleased to have the opportunity to talk to you today about the issues surrounding cable and television service provision from the point of view of the competition and consumer regulator.

Regulation of these new areas of technology is presenting many challenges for regulators all over the world as we are being faced with issues that we have never seen before. These industries cannot be considered in isolation from the many issues relating to the deregulation of telephony.

The Commission's role

Deregulation of telephone and pay TV services on a broader scale raises supplementary issues for my organisation, the Australian Competition and Consumer Commission. The ACCC has a central role in ensuring that competition occurs in all industries and markets in Australia through its role in administering the *Trade Practices Act 1974*. As our name implies, the Commission's obvious role is to promote competition and protect consumers.

In considering how the Commission might look at a particular matter, one should note first that the object of the Act is:

"...to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection." (Sections 2)

Competition is not an objective in itself. There must be ultimate benefits from competition to make it a worthwhile objective to pursue.

What are these benefits? Competition is about increasing efficiency in markets for the ultimate benefit of consumers in terms of lower prices, higher quality and greater diversity of choice. Free and open competition in a market is conventionally viewed as the best means of promoting economic efficiency and thus delivering benefits to consumers. Through competition, resources are shifted to the production of those products more highly valued by consumers. Competition also obliges each business in the market to be efficient and supply their products to the consumer at the lowest possible price. Competition ensures that the efficiency gains are dynamic as business strives to remain competitive through product innovation and new investment.

These benefits are ultimately consumer benefits. Therefore, the twin objectives of promoting competition and protecting consumer welfare are, to a large extent, in lock-step.

In Australia, the primary means of realising the benefits of competition are through the Commission's enforcement of the *Trade Practices Act 1974*. It is our principle legislative weapon to ensure that consumers get the best deal from competition.

I will now give a brief outline of the Act. An understanding of the Act's main provisions and how the Commission seeks to enforce them is necessary to understand how the Commission seeks to promote competition and benefit consumers.

The Trade Practices Act

First, the Act prohibits a wide range of anti-competitive conduct under Part IV, including:

- anti-competitive agreements between competitors (s 45);
- misuse of market power (s 46);
- exclusive dealing (s 47);
- resale price maintenance (s 48); and
- mergers that result in a substantial lessening of competition (s 50).

A public authorisation process is available under the Act for certain forms of anti-competitive conduct. Essentially the authorisation process involves a balancing by the Commission of public benefit and public detriment arising from the conduct.

The Act also contains, under Part V, a range of provisions protecting consumers from various forms of unfair conduct, including misleading and deceptive conduct. Part IVA of the Act prohibits unconscionable conduct in consumer and commercial transactions.

In addition to the general application of the Act to all conduct in broadcasting, the Commission has a specific role in the allocation of pay TV licences under section 97 of the *Broadcasting Services Act*. It must report on competition issues raised by license allocations before they are allocated by the Australian Broadcasting Authority (the ABA). In addition, section 97A of that Act requires the ABA to consult with the Commission in monitoring cross-media ownership of licence holders.

The specific role of the Commission in broadcasting reflects the on-going micro-economic reform process of making protected and regulated industries more efficient and responsive to consumer needs by opening them up to the forces of competition.

Of particular importance to the process of micro-economic reform, a new Part IIIA of the Trade Practices Act was enacted in June 1995 following the Hilmer review of national competition policy. Essentially, Part IIIA creates a new access regime to facilitate access to the services provided by facilities of national significance in order to encourage competition in upstream or downstream markets.

Most relevantly for pay TV and satellite technologies, there is before Parliament legislation whereby a new Part XIB will be inserted into the *Trade Practices Act 1974* to deal with anti-competitive conduct in telecommunications in the open access regime post July 1997. The legislation will also provide a new Part XIC dealing with access. These access provisions are similar in concept to the general Part IIIA access provisions of the Act but with the object of promoting the long term interests of end users of carriage services or of services provided by means of carriage services (*cl 152AB Trade Practices Amendment (Telecommunications) Bill 1996*).

As part of these changes, the Commission will assume the economic regulatory functions of the current telecommunications regulator, AUSTEL.

Of these many functions of the Commission, I want to address a number of major issues of relevance to the telecommunications and the pay TV industry. These are:

- how the Commission views the 'market';
- bundling of services;
- pay TV mergers;
- consumer protection
- the Commission's likely role in competition and access issues in the telecommunications' industry post July 1997.

Market definition

Focussing on the provisions in Part IV of the Act dealing with anti-competitive conduct, it is necessary to understand how the Commission interprets and enforces these provisions to gain an insight into how the Commission sees its role in relation to competition in broadcasting.

To generalise - there are always exceptions and variations - most anti-competitive conduct is prohibited if it has the purpose or likely effect of substantially lessening competition in a market.

Broadly speaking, a substantial lessening of competition occurs when market power has been achieved or enhanced as a result of certain market conduct.

Market is a crucial term. Competition does not occur in a vacuum. It occurs in a market and to assess whether competition has been substantially lessened in a market, one must determine the bounds of that market.

In this sense, market definition is but a tool to assess the degree of anti-competitive effect or market power. It cannot be assessed otherwise than by reference to a market.

However, being an analytical tool, it is important that it be defined correctly in order to achieve the appropriate result. Too broad a market definition, and the expected competitive outcome may be less than which actually occurs. At the other extreme, too narrow a definition may yield an expected competitive outcome greater than that which actually occurs.

How does the Commission go about defining market boundaries? An understanding of this is vital to an understanding of the various Commission decisions that have been made over the last few years in pay TV and broadcasting - a recent example being its decision on the proposed merger between Foxtel and Australis, which I will discuss in some detail shortly.

At the outset, the Commission tends to view the concept of a market somewhat differently from the common perception of a market as a place for buying and selling a range of goods and services. This 'place' can be perceived as broadly as a country, for example 'the Australian market'.

The Commission takes a more technical view. Indeed, it must as market is a term-of-art specifically defined in section 4E of the *Trade Practices Act* to include:

'..... a market for those goods and services and other goods and services that are **substitutable** for, or otherwise competitive with, the first-mentioned goods or services'.

The key concept in this market definition is that of substitutability. As the Trade Practices Tribunal has observed on this point in the **Queensland Co-operative Milling Association (QCMA)** case (1976) ATPR 40-12 at 17247:

'A market is the area of close competition between firms, or, putting it a little differently, the field of rivalry between them.... ...within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another.

'...in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more", would there be, to put the matter colloquially, much of a reaction? ...It is the possibilities of such substitution which sets the limits upon a firm's ability to "give less and charge more".'

Implicit in this nearly classic observation of a market is that products must be **closely** substitutable to be considered in the same market.

Substitutability involves matters of degree. In a broad sense, everything is substitutable. All types of food are substitutable. All forms of entertainment are substitutable - one may chose to go to the football rather than watch a movie on television. But that does not necessarily mean that all entertainment should be considered in the same market, nor should all foodstuffs.

The **Arnotts** case (1990) ATPR 41-061 is relevant in this respect. In this case, the Full Federal Court found that the relevant product market was biscuits. It did not include non-biscuit and other food products, although at times they are substitutes. Applying the test in the **QCMA** case, the Full Court observed that a rise in the price

of tea would probably cause a few consumers to abandon tea for coffee. The fact is that tea and coffee are distinct beverages, for each there is a distinct demand. The fact that, upon some occasions, some consumers select one product rather than the other does not establish that the two products are 'substitutable'.

What is most relevant is whether a rise in price of one product causes a significant core group of consumers to shift their demand to another product. If so, the products are considered to be close substitutes and are thus likely to be in the same market - for close substitutes act as a competitive constraint on pricing and other behaviour of corporations in the same market - as defined in trade practices terms.

Bundling of services

In recent times, the ACCC has been looking at service bundling and the provision of cable television services together with telephone and/or internet services. As a wider variety of services become available and infrastructure becomes more compatible, the Commission expects bundling to become a bigger issue.

The Act makes it unlawful for companies to engage in what is colloquially known as "third line forcing" which occurs when a company offers goods or services or discounts in relation to those goods or services on condition that the purchaser acquires goods or services from a third party. These provisions apply even if the parties are related to each other. Penalties of up to \$10 million are provided for in the Act. It is possible however for parties to notify the Commission of their proposed conduct. **Notification** provides immunity from the Trade Practices Act for exclusive dealing conduct, including third line forcing, that may otherwise breach the Act. The immunity remains in force until the ACCC formally advises (by notice) that it is satisfied that the likely benefit to the public does not outweigh the likely detriment to the public.

Towards the end of last year, the ACCC considered the first of what I believe will be a series of notifications about bundling of services on a pay TV cable.

In August 1996, Optus Vision notified the ACCC that it intended to provide free installation for pay television on condition that consumers acquire local telephony services from Optus Networks. The offer would be available until 1 July 2000.

The ACCC announced in September 1996 that it would not take action to revoke the notification as it was considered that the bundling conduct would not be detrimental to the market information available to consumers in relation to the individual products, or in relation to consumer choice. Consumers would not be forced to take two products when they only wanted one, and would be free to buy pay TV and telephony services from either Optus or its competitors. Furthermore, those consumers who wanted to take the 'bundled' services offered by Optus would benefit as they would get the services at a lower cost than if they were to purchase each service separately.

The ACCC was of the view that as Optus did not have a substantial market share in the relevant markets and the discount was limited to free installation for pay TV

television services (and also limited to those areas serviced by Optus Vision's cable network), the conduct was not likely to be detrimental to competition.

A similar notification was lodged at the same time by Optus Mobile and Optus Networks and involved the bundling of mobile and long distance telephony services. The ACCC also allowed this notification to stand. The ACCC found that Optus did not have substantial market shares in the relevant markets and any advantage it might gain as a result of the conduct would not be beyond a competitive response from other providers of mobile and long distance telephony services.

In both cases, the ACCC decided that although it would not revoke the notifications, it would monitor the practical effects of the conduct.

The Commission expects that bundling will become more common in the future as more service providers appear and existing cable service providers diversify. An obvious example of diversification is that Pay TV cables provide superior access to the internet than is the case at present and thus would be more attractive to consumers. All other things being equal, consumers would be likely to choose the system with the faster 'connectivity' and telephone internet service providers would have to offer more to compete. Bundling of pay TV services with internet services of others may well come about.

Factors that are considered by the Commission in assessing a third line forcing notification include (but are not limited to):

- whether consumers are forced to take both goods/services, or are they free to purchase the same goods/services separately, and if so the level of choice consumers have in selecting the supplier of the second product;
- whether the tie is to the advantage of consumers, such as by obtaining a discount if a package of goods/services is taken, or will only one or both of the suppliers benefit from the tie;
- are the conditions of the tie appropriately disclosed to consumers;
- whether there effective competition in the relevant markets;
- will the conduct enhance the level of competition in the relevant markets; and
- whether any supplier involved in the tie has substantial market power.

Bundling provides a new challenge for regulators as well. The ACCC will be involved in looking at not only the impact on customers of changes to the immediate service, but also the impact that the changes will have on competition for the peripheral services that have been bundled.

Pay Television: Mergers

Pay television has been providing many issues for the Commission in both its competition role and its consumer protection role.

Under s 50 of the Trade Practices Act 1974, the Commission must assess mergers or joint ventures and may oppose them where they lead to a substantial lessening of competition. The Commission has assessed several joint programming agreements.

(i) *Australis and Foxtel joint programming agreement*

In April 1995, the Commission cleared a pay TV programming alliance between Australis and Foxtel. The central concern of the Commission in that case was whether Australis and Foxtel would continue to compete when they had the same core programming. However, after receiving assurances that the parties would continue to compete vigorously in respect of price, programming control and transmission means the Commission agreed that the alliance could proceed.

The Commission cleared the programme-sharing alliance primarily on the basis of these assurances and this limited evidence. The Commission noted that television broadcasting is a dynamic industry and that free-to-air and pay TV may evolve separately and, while free-to-air may exert some pressure in the future, it may not be enough to materially constrain pay TV.

(ii) *Nine and Seven involvement in Optus Vision*

The Commission in mid 1995 was asked to clear a shareholding arrangement that included Channel Nine, Channel Seven, Optus Communications and Continental Cablevision in changing proportions. The Commission did not oppose this agreement, because it believed that the most likely outcome would be increased competition between Optus Vision, Australis and Foxtel in the pay TV segment and continuing competition between Nine and Seven in the free-to-air agreement.

(iii) *The proposed merger of Australis and Foxtel*

In October 1995 Foxtel and Australis approached the Commission about a proposed merger. After lengthy discussions with the parties, Optus and others the Commission in February last year issued a statement to say that it considered that the proposed acquisition of Foxtel by Australis would be likely to breach s 50 of the *Trade Practices Act 1974* as it would be likely to lead to a substantial lessening of competition in both the pay TV and telephony markets. This proposed merger brought into sharp focus the inter-relationship between pay TV and telephony.

Subsequently, Australis and Foxtel developed proposals to try to overcome the problems raised by the merger in its original form. Practical difficulties arose with implementation of the proposals and the Commission was not satisfied they would overcome all the competition concerns.

On 19 April 1996 the Commission was informed by Australis that the proposed merger with Foxtel would not be proceeding.

The Commission came to the view that the merger in its original proposed form would have substantial anticompetitive effects in three main areas:

- the supply of pay TV services;
- the supply of local telephony infrastructure and services; and
- the supply of broadband infrastructure.

The Commission was particularly conscious that the effects of the merger reached beyond pay TV, with implications for the future of competitive local telephony infrastructure and services and also for broadband customer access networks. It was careful to consider the effect the merger would be likely to have on consumers in these areas well into the future.

I shall deal with each in turn.

Pay TV

The Commission concluded that the merger would substantially lessen, prevent or hinder competition in the provision of pay TV services. Implicit in that conclusion was the view that pay TV was in a separate and distinct market from free-to-air television such that the pricing of pay TV services was, or would be, largely unconstrained by the availability of free-to-air services.

Within a narrow pay TV market which excluded free-to-air, the proposed merger would have resulted in a reduction in the number of main competitors from three to two.

A merged Australis/Foxtel would also have the advantage of using three delivery technologies (cable, satellite and MDS) while its main competitor, Optus Vision was restricted to cable at least until July 1997 when the statutory limitations on satellite delivery are to be lifted.

The Commission considered that, in respect of the pay TV market, there was a substantial lessening of competition arising largely from a reduction in the number of pay TV competitors combined with a *first-mover advantage* afforded a merged Australis/Foxtel through significant control of satellite and MDS delivery at least until July 1997.

Local Telephony

A major reason for Telstra Multimedia's broadband cable roll-out is to defend its telephony market share as Optus Vision accelerates its cable roll-out and builds a new broadband services business based on its own broadband infrastructure.

Through Telstra's 50 per cent partnership in the Foxtel pay TV joint venture, Foxtel has an important role to play in Telstra's telephony defence and the building of its new broadband business.

This role arises not only because Foxtel will be the first broadband revenue stream from Telstra's broadband cable, but also because of certain synergies between the marketing of pay TV and telephony.

Evidence before the Commission from the UK was that more than 50 percent of subscribers to the one cable company take both pay TV and telephony from the same company. The Commission believes similar trends will emerge in Australia, thus giving the early entrant a decided advantage.

Furthermore, there is strong evidence that a combined pay TV and telephony service helps reduce the number of consumers who switch or 'churn' services between suppliers.

A merged Australis/Foxtel through the use of satellite and MDS would be able to obtain a first-mover advantage in areas where Optus Vision had not rolled-out its cable or it could not reach until at least July 1997 through satellite.

The Commission considered that this advantage of being first-in, combined with the synergies between marketing of pay TV and telephony, would damage competition in the marketing of local telephony services over broadband cable networks, as well as disadvantaging Optus Vision in its cable roll-out to domestic premises.

The Commission considered that an Australis/Foxtel merger would be likely to have the effect of substantially preventing or hindering competition in the relevant local telephony market. Given broad agreement that revenues from telephony and related services will far exceed revenues from pay TV, the Commission was particularly concerned about the implications for the telephony market.

Broadband implications

While the current short-term implications of the merger were largely about pay TV and telephony, the Commission considered that should the merger proceed it would have had long-term implications for the future of competition in the provision of broadband distribution infrastructure, and possibly in broadband services provided over that infrastructure.

Pay TV has afforded Australia the opportunity to have facilities-based broadband competition in metropolitan residential areas. This is occurring through the residential roll-out of the Optus Vision broadband network.

As Optus Vision would be substantially hindered in its pay TV and local telephony plans by the proposed merger, in the Commission's opinion it would be substantially hindered or prevented in rolling-out its broadband cable and that -as a result - there would be a substantial lessening of competition in the provision of broadband infrastructure services.

There was a strong possibility that the 'window of opportunity' for broadband competition would be foreclosed by the merger.

In conclusion, the Commission considered that the proposed merger if it had proceeded in its proposed form, would have substantially lessened competition in a number of areas: pay TV, local telephony and broadband facilities.

Regardless of the definition of the pay TV market - Courts ultimately decide these matters - the Commission felt that the merger would nonetheless have had the requisite effect on competition in local telephony or broadband facilities.

After 1 July 1997, the 'first mover advantage' will have little relevance.

(iv) Australis Media Limited and Optus Vision infrastructure joint venture

The Commission announced in October 1996 that it would not oppose the satellite infrastructure joint venture between Australis and Optus Vision. The joint venture was considered in the context of a deed that was previously entered into between Australis and a subsidiary of PBL as a result of PBL providing certain funding guarantees as part of Australis' recapitalisation plans.

After careful consideration of the matter, the ACCC decided that there was no reason to intervene. The Commission decision was on the basis of the information before it, and it determined that it would closely monitor the implementation of the joint venture to check if its analysis was correct. The Commission was of the opinion that the two satellite pay TV providers would compete in terms of pricing, marketing and program content. Their independence in this respect is specifically provided for in the terms of the joint venture.

A consideration for the Commission was the fact that Australis and Optus Vision would be sharing the technical facilities but would not be combining their program offerings. Neither party would have had access to the other's subscribers data base, and both parties would continue to compete for satellite pay TV subscribers.

The ACCC also received explicit written confirmation from both Optus Vision and Australis that they will not take any steps to provide to subscribers any combination of programming without first obtaining the approval of the ACCC. Interactive services and near video on demand are excluded from the joint venture.

The Commission decided that this joint venture differed from the proposed merger of Australis and Foxtel that I described above in a number of ways:

- the joint venture is an infrastructure sharing arrangement only;
- the joint venture does not lead to the disappearance of one of the three metropolitan pay TV operators;
- the joint venture has little or no impact on telephony;
- unlike the Foxtel/Australis arrangements, this joint venture will not be implemented until mid 1997 when the market is opened to all potential entrants; and
- a further consequential difference is that the joint venture does not give Optus Vision a significant advantage over Foxtel in securing new programming (unlike the Foxtel/Australis merger).

Consumer protection issues

With the introduction of pay TV to Australia, several consumer protection issues have arisen, particularly in regard to the accuracy of various claims made by the video rental and pay TV industry about each other's product.

For example, the video industry has complained about the pay TV industry marketing its movie channels as featuring 'new release' movies.

The industry's contentions were based on the general overseas experience of a 12 month window between the release of movies for video rental and their subsequent broadcasting on pay TV. With such movies commonly appearing at cinemas months before video release, video industry representatives claimed ;'new release' and similar phrases were inappropriate descriptions for pay TV operators to use and were likely to mislead consumers.

On the other hand, the pay TV industry complained that video retailers were unable to state categorically that there would always be a 12 month video window before the pay TV release of movies. Though a 12 month window had traditionally been the practice of film distributors, notable exceptions do exist and are likely to continue to exist as competitive pressure begins to 'squeeze' the video and pay TV windows.

The Commission has so far resolved particular complains of misleading claims in a conciliatory fashion with the parties concerned.

As pay TV is a new industry in Australia, the Commission is keen to ensure that the potential consumers of the pay TV product make accurate and informed choices. Inaccurate or misleading information about competing products will inhibit the ability of consumers to make informed choices.

Another consumer issue which the Commission is starting to receive some complaints about is that, unlike the typical situation in the US and the UK, subscribers must subscribe to two or more competing systems to obtain a full range of programming. For example, a Galaxy subscriber must subscribe to Optus Vision if a 24-hour AFL coverage is also desired. As the pay TV structure has developed in Australia, this is fair comment. However, it has its benefits. Exclusive programming in Australia has had the effect of promoting competition in pay TV with a subsequent downward pressure on prices.

While pay TV has a critical short to medium term role in funding the investment required to roll-out the competing cable networks, the roll-out is largely about telephony and broadband services of which Internet services are a prime example. Internet services are already raising issues of concern to the Commission, including these offerings by Internet Service Providers which do not fully disclose all the charges and requirements involved in using internet services. This new industry has the potential to provide a whole new raft of consumer complaints about misleading and deceptive conduct similar to those experienced with the provision of mobile phones. It will be disappointing if the same problems that occurred with mobile phones were to recur with these new .

In that respect, I am pleased to note that the internet service providers are working hard to reduce this possibility and have formed the Internet Industry Association of Australia (INTIAA) which is actively developing a code of conduct with all involved parties to reduce the likelihood of such similar occurrences occurring in the internet industry. The development of codes of conduct by industry is recognised by the Commission as one of the most effective ways of protecting consumers.

In addition, and more troublesome, is the use of the Internet to promote fraudulent services and make misleading offerings on the net itself. Frequently, the offending or

fraudulent web site will have been set up outside Australia. Trying to track down the offender, who will frequently be overseas and outside our jurisdiction, will be very difficult. The Commission is working on an issues paper and is in touch with a number of overseas regulators. It may well be that there will be a need to develop a series of bilateral enforcement agreements to be able to effectively crack down on such activity.

Telecommunications Regulation post 1 July 1997

Trade Practices Amendment (Telecommunications) Bill 1996

The proposals currently before Parliament will result in significant responsibilities being conferred on the Commission. As you are aware, post 1 July 1997, the current duopoly will end so that it will be possible for anyone to apply for a carrier licence.

At the same time, the current economic regulation of the industry will move from AUSTEL to the Commission.

The most significant changes are in the application of special industry-specific competition laws to those companies with a substantial degree of power in the telecommunications market and the rules relating to access to declared services.

Competition law

In the Second reading speech the Minister stated that:

"... there remain good reasons for there to continue to be industry-specific competition regulation for telecommunications. The removal of regulatory barriers to entry does not automatically result in the appearance of normal competitive market structures.

Telstra continues to wield significant market power derived primarily from its historical monopoly position. There is also scope for incumbent operators generally to engage in anti-competitive conduct because competitors in downstream markets depend on access to the carriage services controlled by them. The possibility, for example, of incumbents engaging in anti-competitive cross-subsidy practices could threaten the further development of a competitive environment.

All members of the telecommunications industry will be fully subject to general trade practices law contained in Part IV of the *Trade Practices Act*. The exemption from Part IV given to carriers under the *Telecommunications Act 1991* for the supply of basic carriage services will not be continued.

Total reliance on Part IV of the TPA to constrain anti-competitive conduct might, in some cases, prove ineffective given the still developing state of competition in the telecommunications industry. The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in this industry mean that any anti-competitive behaviour could cause rapid damage to the competition that has already developed and severely hamper new entry.

Therefore, as well as Part IV of the Act applying fully to telecommunications, the amendments made by the Bill will supplement Part IV by increasing the ability of the ACCC to respond swiftly where anti-competitive conduct is evident.

These provisions [in Part XIB] are in addition to the general competition law. Under the general law, it is an offence to take advantage of a substantial degree of market power *for the purpose of* damaging competitors. Under the Bill it will be possible for the Commission to issue a **competition notice** to a company with a substantial degree of power in a telecommunications market where the *effect* is to damage competition or where there is a breach, in the Commission's opinion, of the restrictive trade practices provisions of the competition rule which mirrors substantially the restrictive trade practices provisions of the Act. If the conduct is continued the Commission may go to the Federal Court to seek penalties of up to \$10 million and \$1 million per day or other remedies such as injunctions.. The notice is also *prima facie* evidence of the facts in the notice which will assist the Commission in seeking interim injunctions. Other persons will be able to seek injunctions and claim damages if such conduct continues while the competition notice is in force.

The Commission is required to publish guidelines as to how it will administer these provisions and I expect that draft guidelines will be available for industry comment by mid-April.

The Minister has stated that the operation of these special provisions will be reviewed prior to July 1, 2000 with a view to relying solely on general competition law thereafter.

In support of these powers the Commission is given special information gathering powers to require tariff filings (which, unlike the tariff filings today, would be confidential to the Commission unless the Commission considered release of the information would be in the public interest, taking into account the damage to competition and the commercial interests of the parties. Note that the Commission's decision to release the information is appealable to the Australian Competition Tribunal.) The Commission is also given additional information gathering powers through record keeping rules and extending section 155.

Access

The key to successful competition in the telecommunications industry is provision of access. The Government has proposed a special access regime [Part XIC}. The Minister's Second Reading speech states as follows:

'The access regime provides for regulated access rights to be established for specific carriage services and related services, and provides a framework within which the terms and conditions of access can be determined. It will reduce the power of those owning or controlling important infrastructure or services which are necessary for competitive services to be supplied to end-users. In doing so, judgements by new and existing operators about whether to build their own networks or buy capacity on existing networks will be driven by normal commercial factors - decisions to build will only be taken where commercial considerations clearly favour this strategy. The regime will therefore promote the efficient use of and investment in infrastructure.'

These provisions are based on the general access regime in the *Trade Practices Act* as set out in Part IIIA of the Act. The provisions allow the Commission to approve an industry self regulatory telecommunications access forum (known as the TAF). The TAF will make recommendations to the Commission as to declaration of services for interconnection and produce an access code setting out model terms and conditions for complying with the standard access obligations.

The Commission has the power to declare access services itself and produce a default access code if the TAF fails to produce one to the Commission's satisfaction. The major carriers and service providers have been working on the structure of the TAF and the code and keeping the Commission informed of their activities.

Undertakings can be given by the parties to the Commission which include the terms and conditions in the access code or seek to establish different terms and conditions. The Commission is required to consult with the public before approving such undertakings.

Where agreement cannot be reached (following the declaration of a service) and after negotiation between the parties based on applicable access codes or undertakings between the parties, the Commission will have powers to arbitrate..

The Commission will be developing *access pricing principles* for use by the parties and by the Commission-for example in arbitrating disputes- to provide guidance to market in March this year.

Changes to the spectrum allocation environment

Late last year, the Radiocommunications Amendment Bill ("the Bill") was introduced into Parliament by the Government. From a Trade Practices viewpoint, the Bill in its current form has some important implications for future allocations of spectrum, including:

- *Extensions to the application of the Trade Practices Act.* Previously, the issue of new spectrum and apparatus licences by the Government were not subject to the application of some aspects of the Trade Practices Act. Under the changes proposed in the Bill, the issue of new spectrum and apparatus licences will be deemed to be acquisitions for the purposes of section 50 (mergers) and subsection 88(1), 88(9), 89(5A) and 90(9) (authorisations) of the TPA. Consequently, the Commission will now be able to seek injunctions where it believes that the issue of new spectrum and operators' licences will result in a substantial lessening of competition in a market.
- *Ministerial limits on the allocation of spectrum.* The Bill provides the Minister for Communications and the Arts with the power to limit the amount of spectrum that may be issued to a person. This power provides the Minister with an important tool for bringing about pro-competitive spectrum allocations that might not otherwise have been achieved under the Trade Practices Act. These powers are to apply at the time of allocation only. Subsequent transfers of spectrum or licences are subject to the Trade Practices Act only.
- *ACCC information gathering powers.* The Bill contains provisions to enable the Spectrum Management Agency ("SMA") to gather information on behalf

of the ACCC. These provisions will ensure that the ACCC will have access to the information it requires to administer its role in the spectrum allocation process.

Initially, these provisions are likely to be applied to the upcoming sale of spectrum in the 1.8 GHz bands by the SMA. The ACCC is currently undertaking work to determine how the TPA might be applied to this sale. While it seems likely at this stage that the 1.8 GHz spectrum is most suited to telecommunications applications, the new provisions in the Bill would clearly have relevance to any future issue of spectrum that might be used for providing pay television services.

Anyone interested in obtaining spectrum in the future for pay television applications should therefore consider any implications that might arise from the proposed regulatory changes. Should you have any queries in this regard, staff from the ACCC would be happy to discuss the issues with you.

Conclusion

The Commission recognises that it has much to learn and has been and will be consulting widely. We welcome and need industry input. About how the markets work, about new technologies, about overseas developments.

It is apparent that both the industry and the Commission have many challenges before them. Not the least will be to try and determine what is the industry. A week does not pass without some new alliance being proposed, without some new technology that will shortly revolutionise the world being touted.

Whatever else one may say about these industries, it won't be boring!

Thank you.