

# IMPORTANT NOTICE

This publication is under review following recent amendments to the *Trade Practices Act 1974* (the Act).

## Amending legislation

### **Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009**

This legislation amended the Act to introduce new cartel provisions and associated criminal penalties. The following forms of cartel conduct are prohibited by the new provisions:

- price fixing
- restricting outputs in production or supply chains
- allocating customers, suppliers or territories
- bid-rigging.

A civil prohibition will operate in relation to the same forms of cartel conduct.

Under the legislation it is a criminal offence for a corporation to make or to give effect to a contract, arrangement or understanding that contains a cartel provision. Any person knowingly concerned in the cartel conduct will also commit a criminal offence and be liable to imprisonment for up to 10 years.

The per se prohibition on price fixing contained in ss. 45 and 45A of the Act has been repealed and replaced by the new cartel provisions.

The legislation exempts certain joint ventures from the criminal offence and civil prohibition.

Also included in the legislation are provisions that:

- enhance the ACCC's capacity to conduct search warrants
- set out a new regime to enhance confidentiality of cartel information provided to the ACCC
- enable telephone interception to be used for investigation of the cartel offence.

## More information

More information about these changes is available on the ACCC website ([acc.gov.au](http://acc.gov.au)) or by contacting the ACCC Infocentre on 1300 302 502.

# IMPORTANT NOTICE

## Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009

The Parliament of Australia has passed the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (the Act), which amended the *Trade Practices Act 1974* (TPA) to provide criminal penalties for cartel conduct

The main provisions of the Act commence on 24 July 2009. The Act contains criminal penalties for proscribed forms of cartel conduct.

A civil prohibition will operate in relation to the same forms of cartel conduct.

Also included in the Act are provisions that:

- enhance the ACCC's capacity to conduct search warrants
- enhance confidentiality of information provided to the ACCC in relation to cartel conduct
- enable telephone interception to be used for investigation of the cartel offence.

### The mechanics—how the Act does it

The Act provides for a civil cartel prohibition and a criminal cartel offence. Both are centred upon the existence of a cartel provision within a contract, arrangement or understanding (CAU).

The definition of 'cartel provision' includes four varieties of cartel conduct:

- price fixing
- output restrictions
- allocating customers, suppliers or territories
- bid-rigging.

The definition of cartel provision also requires that at least two of the parties to the agreement as to price, output restrictions etc. be persons who are, or are likely to be, in competition with each other.

As did s. 45A of the TPA (now repealed), the cartel provision addresses price-fixing agreements on a 'purpose' or 'effect' basis. It remains the case that the prohibition on cartel conduct in the form of output restrictions, allocation of customers and bid-rigging is based on purpose.

A company will have contravened the civil prohibition if it makes a CAU containing a cartel provision with its competitor or if it gives effect to the cartel provision.

The element that distinguishes the cartel offence from the civil prohibition in the Act is the need to establish certain fault elements under the *Criminal Code Act 1995*. An overview of the application of those fault elements is provided below:

#### Making a CAU containing a cartel provision

It will be necessary to establish that an individual or corporation **intended** to enter into a CAU and that they **knew or believed** the CAU contained a cartel provision.

#### Giving effect to a cartel provision

It will be necessary to establish that an individual or corporation **knew or believed** a CAU contained a cartel provision and that they **intended** to give effect to that cartel provision.

### What will stay in the TPA and what will go?

The per se prohibition on price fixing contained in ss. 45 and 45A of the TPA has been repealed and replaced by the new cartel provisions. Conduct that was captured by s. 45A will be captured by the new provisions.

Section 45 of the TPA otherwise remains and will continue to prohibit a CAU that contains an exclusionary provision or provisions that have the purpose, effect or likely effect of substantially lessening competition. The prohibition of exclusionary provisions by ss. 45 and 4D is retained as a backstop for the new cartel provisions, primarily because the new cartel provisions do not capture the same breadth of conduct as s. 4D.

With the repeal of s. 45A, the joint venture defence for price fixing, s. 76D, is also repealed. A new joint venture exception has been introduced for the cartel offence and civil prohibition.

### How liability will be determined

#### The cartel offence

The prosecution will need to prove the charge beyond reasonable doubt and a unanimous jury verdict is required.

#### The civil prohibition

The prosecution will need to establish the contravention on the balance of probabilities.

#### Accessorial liability, attribution of liability

A new head of accessorial liability will be created: 'attempts to contravene' (paragraph 79(1)(aa)).

The TPA will continue to permit the state of mind and/or conduct of a director, employee or agent to be attributed to that person's employer via s. 84.

### The penalties

#### Individuals

For individuals, the cartel offence is punishable by imprisonment of up to 10 years and/or fines of up to \$220 000 per contravention.

Under the civil prohibition, individuals may be liable to a pecuniary penalty of up to \$500 000 per contravention.

#### Corporations

For corporations, the fine or pecuniary penalty for each contravention of the cartel offence or civil prohibition (whichever applies) will not exceed the greater of:

- \$10 000 000
- three times the total value of the benefits obtained by one or more persons reasonably attributable to the commission of the offence/act or omission in contravention of the civil prohibition
- where those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in the 12-month period when the offence/contravention occurred.

Other forms of relief relating to the cartel offence and civil prohibition include injunctions, orders disqualifying a person from managing corporations and community service orders.

## Other new provisions

### Investigative powers that can only be used criminally

Telephone interception and surveillance device warrants can be sought for investigation of the cartel offence and accessorial liability in relation to that offence.

### Investigative powers that can be used both civilly and criminally

Other investigative powers for cartel conduct, such as TPA search warrants and s. 155 notices, can be used for both civil and criminal investigations.

### Search warrants

The ACCC's ability to conduct search warrants has been enhanced by the Act, particularly in relation to seizure of electronic information.

Other amendments include:

- capacity to seize material relating to obstruction during a search warrant
- permitting Australian Federal Police assistance to the ACCC in the execution of search warrants
- allowing temporary exit of premises being searched and resumption of the search
- extending the period of time a seized article may be retained from 60 to 120 days
- the ability for a magistrate in any state or territory to issue a warrant that can be exercised across Australia.

### Section 155

A change in the wording of s. 155 means that documents produced to the ACCC by an individual under paragraph 155(1)(b) can be used against that individual in criminal proceedings.

If the material already exists, it can be used against the individual in criminal proceedings. A corporation has no right against self-incrimination.

### Protected cartel information

A new regime has been created to enhance confidentiality of cartel information provided to the ACCC. It is based on the concept of **protected cartel information**—that is, information given in confidence to the ACCC about a potential breach of the cartel offence or civil prohibition.

In certain circumstances the ACCC will be able to disclose protected cartel information and the court will also be able to compel the ACCC to provide such information. The test used by the ACCC and the court will be the same.

The regime provides for restrictions upon use of the information in secondary proceedings.

### Exceptions to the new cartel regime

Certain exceptions exist to the new cartel regime. Broadly, they relate to:

- conduct subject to a collective bargaining notice
- conduct subject to authorisation
- joint ventures
- agreements between related bodies corporate
- collective acquisition of goods or services
- 'anti-overlap' provisions.

### Collective bargaining notices

Section 44ZZRL provides that if you have a collective bargaining notice in place, businesses will be exempt from the cartel offence and civil prohibition insofar as the conduct is in relation to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- but **not** bid-rigging.

### Authorisation

Authorisation is available for conduct in relation to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- bid-rigging

if the public benefit from the conduct would outweigh any public detriment.

### Joint ventures

An exception to the cartel offence and civil prohibition has been created for joint ventures. The party claiming the joint venture exception will need to ensure that the portion of their agreement that would otherwise attract attention as a cartel provision is contained in a contract.

The party will also need to ensure that:

- the cartel provision is for the purposes of a joint venture
- the joint venture is for joint production or supply.

The joint venture exception extends to a situation where a person has an arrangement or understanding, but intended it to be, and reasonably believed it was, a contract.

### Agreements between related bodies corporate

Much like the existing exception in subs. 45(8), s. 44ZZRN ensures that agreements solely between related bodies corporate will not fall within the cartel offence or civil prohibition.

### Collective acquisition of goods or services

Much like the existing exception in subs. 45A(4), s. 44ZZRV ensures that there is an exception to the cartel offence and civil prohibition (for price fixing) for the collective acquisition of goods or services and/or the joint advertising of the price for the re-supply of the collectively acquired goods or services.

### Anti-overlap provisions

Much like the existing 'anti-overlap' provisions in subss. 45(5) to (7), the new provisions governing cartel conduct will not apply to conduct captured by ss. 45B (covenants), 48 (resale price maintenance), 47 (exclusive dealing), 49 (dual-listed companies) and 50 (acquisition of shares or assets).

### More information

More information about these changes is available on the ACCC website ([acc.gov.au](http://acc.gov.au)) or by contacting the ACCC Infocentre on 1300 302 502.



# Telecommunications industry — ACCC role

an outline

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### **Important notice**

The information contained in this publication is not legal advice and should not be relied upon as such. All care has been taken in its preparation but readers should note that it is intended to provide a general understanding of the subject matter only. Readers should also note that it reflects the law and legislation as it stands at the date of publication.

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## Preface

The Australian Government introduced a package of legislation to give effect to a policy that would provide a more competitive telecommunications industry from 1 July 1997.

The package of legislation, comprising 11 separate acts, included substantial amendments to the *Trade Practices Act 1974* (TPA) and a new *Telecommunications Act 1997* (Telecommunications Act) which, amongst other things, removed regulatory barriers to market entry, revised technical regulation of the industry, and introduced into the TPA telecommunications-specific competitive safeguards and provisions regulating network access.

Regulatory arrangements were restructured so that the Australian Competition and Consumer Commission (the Commission) would have the responsibility for competition and economic regulation of telecommunications, while technical regulation would rest with the Australian Communications Authority (ACA). The ACA was established as the result of a merger between the Australian Telecommunications Authority (known as AUSTEL) and the Spectrum Management Agency (SMA).

This outline provides an overview of the new legislative and regulatory regime, in so far as it relates to the Commission's new regulatory responsibilities. It is intended to provide general information only on the Commission's role and should not be considered a substitute for the legislative provisions and other sources to which it refers. In interpreting relevant legislative provisions, readers should seek their own legal advice in relation to the legislation and other matters referred to in this outline.

# Chapter 1

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## An overview

Under the TPA amendments and other legislation the Commission has been given various powers and responsibilities to achieve its objective of enhancing the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection, within a telecommunications context. The Commission's main responsibilities are briefly outlined below.

## Competitive safeguards

Part XIB of the TPA is a telecommunications-specific regime which establishes a number of additional powers for the Commission to deal with anti-competitive conduct by carriers or carriage service providers. Briefly, those powers are as follows.

- **Issuing competition notices for contraventions of the competition rule.** Where the Commission forms the view that a carrier or carriage service provider has contravened the competition rule, which is defined as engaging in anti-competitive conduct in telecommunications markets, the Commission has a discretion whether to issue a competition notice. Competition notices are enforceable in the Federal Court.
- **Issuing tariff filing directions.** The Commission has specific powers to obtain information about what carriers or carriage service providers, who have substantial power in a telecommunications market, are charging for specified telecommunications goods and services.

- **Record-keeping rules.** The Commission has a discretion in deciding whether to require one or more carriers or carriage service providers to keep and maintain records which, among other things, will enable the Commission to effect accounting separation requirements to assist in its telecommunications powers and functions.

## Access provisions

Part XIC of the TPA establishes a telecommunications-specific regime for facilitating access to the networks of competing carriers, based on the general access provisions found in Part IIIA of the TPA, but with certain refinements to take into account the specific characteristics of telecommunications networks. Briefly, the Commission's responsibilities under Part XIC are as follows.

- **Approval of the Telecommunications Access Forum (TAF).** The Commission has a discretion in deciding whether to declare a body consisting of carriers and carriage service providers, which is capable of generating a telecommunications access code and recommendations to the Commission relating to access service declarations. On 28 May 1997 the Commission declared the Australian Communications Access Forum Inc, an incorporated association composed of carriers and carriage service providers, to be the TAF.
- **Declaration of services.** The Commission may, taking account of relevant criteria, declare a specific network service which would make it generally available to access seekers following recommendation by the TAF or following a public inquiry.
- **Approval of a TAF access code.** If the Commission is satisfied certain criteria have been met it may approve a telecommunications access code generated by the TAF. Otherwise the Commission may make its own code.
- **Approval of access undertakings.** The Commission may accept or reject access undertakings given by individual carriers or carriage service providers to comply with terms and conditions specified in the undertaking in relation to standard access obligations, or in terms of

model terms and conditions which may follow those in the approved TAF access code.

- **Arbitration of access disputes.** Where agreement on access cannot otherwise be reached between the parties and there is no applicable access undertaking in force relating to terms and conditions of access, the terms and conditions of access may be determined by the Commission acting as arbitrator.

## Transitional provisions

A number of transitional provisions were also introduced to allow for the smooth introduction of the new access regime after 30 June 1997. Those provisions are as follows.

- **Deeming of access services.** The Commission was required, prior to 1 July 1997, to prepare an instrument that declared those services supplied under an access agreement registered under the *Telecommunications Act 1991*, for the purposes of the access provisions in Part XIC, unless the Commission was satisfied that specifying a service would not be in the long term interests of end-users. On 30 June 1997 the Commission issued an instrument under the title *Deeming of Telecommunications Services*.
- **Determine that certain connection obligations were to continue on specified terms and conditions.** The Commission was required to determine, prior to 1 July 1997, the terms and conditions under which the connection of certain eligible services would be made to carriage service providers who reserved their rights of connection prior to 1 July 1997. The services which came within the determination were those primarily suitable for carriage service providers who were operating prior to that date.
- **Develop access pricing principles.** Following a request by the Treasurer the Commission produced a document titled *Telecommunications Access Pricing Principles — a Guide* which outlined the approach the Commission proposed to adopt when considering access pricing issued under Part XIC.

## Other telecommunications powers and functions

In addition to its powers and functions under the TPA, the Commission is also obliged to administer certain specific provisions under other telecommunications legislation. Those other provisions are as follows.

- **Administration of international conduct rules.** Under Part 20 of the Telecommunications Act the Minister has power to make rules of conduct to deal with unacceptable conduct by international telecommunications operators. The Commission is responsible for investigating a contravention of the rules of conduct and for generally monitoring the administration of these rules.
- **ACCC directions on number portability, electronic addressing and technical standards on interconnection of facilities.** The Commission can give directions to the ACA under various provisions in the Telecommunications Act in relation to number portability and technical standards regarding interconnection of facilities. It also has a power of direction over a declared person or association known as the 'manager of electronic addressing'.
- **Arbitration under the Telecommunications Act 1997.** In addition to its arbitration responsibilities in relation to declared services under Part XIC of the TPA, the Commission can also arbitrate disputes which relate to various matters under the *Telecommunications Act 1997*. These can relate to telecommunications facilities, information relating to the operation of telecommunications networks, operator services, directory assistance services, the provision of number portability, pre-selection, emergency call services and the supply of carriage services for the use of the Department of Defence or the Defence force.
- **Price control.** The Commission also has responsibilities in administering telecommunications-specific final price regulation under the *Telstra Act 1991* (Telstra Act). These arrangements relate to certain price controls (i.e. price caps and notification and disallowance

requirements) which apply to Telstra Corporation Limited.

- **Spectrum acquisition.** Amendments to the *Radiocommunications Act 1992* have extended the scope of the TPA by deeming the allocation of spectrum and apparatus licences to be acquisitions for the purposes of the mergers and acquisitions provision of the TPA (s.50). This amendment will provide greater scope for the Commission to take action where the Commission forms the view that an allocation would have the effect or likely effect of substantially lessening competition.

## General provisions of the TPA

In addition to the telecommunications-specific provisions of the TPA dealing with anti-competitive conduct in telecommunications markets and regulation of access, the other general provisions of the TPA also apply and will play an important role in enhancing the welfare of Australians through the promotion of competition and fair trading. These objectives are served through various provisions which prohibit not only restrictive trade practices but unfair trading activities such as misleading and deceptive conduct, unconscionable conduct and which imply into consumer contracts certain warranties and conditions as to fitness for purpose and merchantable quality.

The general restrictive trade practices provisions found in Part IV of the TPA can be seen as establishing boundaries between what constitutes acceptable and unacceptable market conduct and that, subject to keeping within those boundaries, market participants are free to order their affairs as they see fit. Part IV contains various prohibitions, for example, dealings between competitors that restrict competition, misuse of market power, anti-competitive exclusive dealing, primary and secondary boycotts, resale price maintenance, and mergers or acquisitions of assets that substantially lessen competition.

Where market participants feel at risk under those provisions they can apply for authorisation on the grounds that the conduct results in a public benefit which outweighs the

detriment to competition constituted by the conduct. The exception to this is the prohibition against misuse of market power. Exemption from the exclusive dealing provisions can be achieved also through a formal notification process which exempts the conduct until the Commission revokes the protection. As with a number of the decisions made under Parts XIB and XIC, persons affected by the Commission's decisions can seek a review by the Australian Competition Tribunal.

The telecommunications-specific provisions described in this outline should be seen as complimenting the general TPA provisions rather than offering substitutes. While recognising that the new telecommunications provisions have been designed to provide a regulatory mechanism which will assist in bringing about timely and effective responses to the special characteristics of a newly deregulated industry, the Commission will use a case-by-case approach in deciding which of the powers (both general and telecommunications specific) it should use.

## Summary

It is important to note that the new regulatory arrangements are premised on an assumption that commercial negotiation between market participants will be a primary mechanism for resolving matters such as access to services and facilities, as the industry moves forward from the interventionist style of the previous regime embodied in the *Telecommunications Act 1991* to the more general provisions of the TPA. Accordingly, the industry-specific provisions dealing with matters such as anti-competitive conduct and arbitration of access are viewed as a means of facilitating competitive outcomes in the event that commercial initiatives fail. The Commission for its part will expect parties to exhaust commercial remedies before requests are made for regulatory intervention.

The remaining part of this outline, which explains in more detail the telecommunications-specific provisions listed above, is structured as follows.

- Chapter 2 covers the new competition provisions under Part XIB of the TPA, including the new record keeping and Ministerial reporting provisions in relation to the



way the competition provisions are being used and how consumers are faring under the new regime.

- Chapter 3 examines the telecommunications-specific access provisions under Part XIC of the TPA including the arbitration provisions.
- Chapter 4 covers the Commission's responsibilities under the *Telecommunications Act 1997*.
- Chapter 5 outlines the Commission's new retail price control responsibilities.
- Chapter 6 outlines the Commission's new responsibilities in administering competition provisions under s.50 of the TPA in relation to the acquisition of radiocommunications spectrum.

## Competitive safeguards

The Commission is responsible for administering an industry-specific regime established by Part XIB of the TPA which empowers the Commission to deal with anti-competitive conduct in telecommunications markets and obtain information to assist it in monitoring competition in the telecommunications industry.

The regime applies in addition to Part IV of the TPA, which regulates restrictive trade practices in general. It was felt by government that total reliance on Part IV may be ineffective to constrain anti-competitive conduct in the telecommunications industry, given the still developing state of competition. The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in this industry meant that any anti-competitive behaviour, if remained unchecked, could cause rapid damage to the limited competition that had already developed and severely hamper new entry.

Part XIB has therefore been designed to increase the ability of the Commission to respond quickly where there is evidence of anti-competitive conduct.

## Anti-competitive conduct

Section 151AJ sets out the two circumstances in which a carrier or carriage service provider will be said to engage in anti-competitive conduct under Part XIB.

The first circumstance set out in s.151AJ(2) defines anti-competitive conduct where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market.

This is an effects based test which does not require any examination of the purpose for which the conduct is being engaged.

The second circumstance set out in s.151AJ(3) defines anti-competitive conduct where a carrier or carriage service provider engages in conduct relating to a telecommunications market which contravenes certain provisions in Part IV, namely:

- Section 45 — contracts, arrangements or understandings that restrict dealings or affect competition;
- Section 45B — covenants annexed to or running with an estate or interest in land that affect competition;
- Section 46 — misuse of market power (requiring an examination of purpose);
- Section 47 — exclusive dealing; or
- Section 48 — prohibition on resale price maintenance.

Anti-competitive conduct as defined in s.151AJ is limited in its application to conduct taking place in a telecommunications market. This is defined as a market where the following are supplied:

- carriage services;
- goods or services for use in connection with a carriage service; or
- access to facilities.

## Competition rule

Part XIB also introduces the term ‘competition rule’. The competition rule states that a carrier or carriage service provider must not engage in anti-competitive conduct as detailed above.

A carrier or carriage service provider does not engage in anti-competitive conduct (and therefore does not breach the competition rule) if that conduct does not constitute a contravention of ss45, 45B, 46, 47 or 48 because an authorisation or notification under Part VII is in force.

## Issue of competition notices

If the Commission is of the view that a carrier or carriage service provider has contravened the competition rule the Commission has a discretion under Part XIB in deciding whether to issue a 'competition notice' stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule and setting out particulars of that contravention. The legislation requires that when the Commission has 'reason to suspect' that there has been or is a contravention of the competition rule, it must act expeditiously in deciding whether to issue a competition notice.

Accordingly, there are three stages involved in the process of deciding whether to issue a competition notice.

Firstly, the Commission will undertake a preliminary analysis of conduct (which may be prompted by the receipt of a complaint) for the purpose of assisting the Commission in considering whether it has a 'reason to suspect' that a contravention of the competition rule has occurred or is occurring.

Secondly, if the Commission has a reason to suspect that a contravention of the competition rule has occurred or is occurring, it will then commence an investigation of that conduct. In the course of that investigation the Commission will, under most circumstances, notify the subject of the investigation, and other persons who may be able to provide relevant information.

Once that investigation is complete, the Commission will then decide whether it believes, in good faith and on reasonable grounds, that there is currently or has been a contravention of the competition rule. If the answer to that question is 'yes', the Commission will then decide whether to issue a competition notice, having regard to matters listed in guidelines which it is required to publish for this purpose, in addition to any other matters the Commission considers relevant.

In proceedings under Part XIB a competition notice is *prima facie* evidence of the matters in the notice.

The Commission can seek an injunction restraining a carrier or carriage service provider from engaging in anti-competitive conduct, without issuing a competition notice. However, once a competition notice has been issued the Commission and third parties can seek remedies or other orders in the Federal Court. Third parties (for example competitors affected by the conduct) may seek injunctions or ancillary orders such as damages or require disclosure of information. The Commission may also seek orders and pecuniary penalties up to \$10 million for each contravention and \$1million each day that the contravention continues.

A competition notice remains in force for 12 months, unless revoked sooner, and the Commission may issue a fresh notice that relates to the same matter as an expired notice.

As a means of informing industry and other interested persons of the manner in which the Commission will analyse anti-competitive conduct in the telecommunications industry, the Commission has published an information paper titled '*Anti-competitive conduct in Telecommunications Markets*'.

## Exemption orders

Under Part XIB a carrier or carriage service provider may apply to the Commission for an order exempting specified conduct from the scope of anti-competitive conduct as defined in s.151AJ. While an exemption order is in force the Commission cannot issue a competition notice in relation to conduct specified in the exemption order. However, rights of action for a contravention of Part IV or Part V of the TPA will not otherwise be affected.

An application must be made in a form approved in writing by the Commission, with payment of a \$7500 fee, prescribed by regulation.

In granting an exemption order the Commission must be satisfied that:

- the conduct will result, or will be likely to result, in a benefit to the public and that the benefit outweighs the detriment to the public constituted by any lessening of competition; or
- the conduct is not anti-competitive conduct.

In considering what public benefits might result in granting an exemption order the Commission may have regard to certain matters listed in the legislation, namely:

- the extent to which the conduct relates to supplying goods or services on favourable terms to those disadvantaged on financial or health grounds, or to certain non-profit organisations or educational or health institutions;
- the extent to which the conduct relates to supplying goods or services for community, charitable, educational or health and safety purposes;
- the need to satisfy any universal service obligation;
- the extent to which the conduct prevents or reduces (or is likely to prevent or reduce) pollution and degradation of environmental amenity; and
- the extent to which the conduct contributes (or is likely to contribute) to technical innovation or the development of new goods or services by Australian industry.

The above list does not limit the matters to which the Commission may have regard.

The Commission must allow the applicant, and any other interested person, a reasonable opportunity to make submissions about the exemption order and it may place an application for an exemption order in abeyance while it considers an application for authorisation, or a notification of exclusive dealing in relation to the same conduct.

It is an offence for a carrier or carriage service provider to intentionally or recklessly give false or materially misleading information to the Commission in connection with an application for an exemption order.

An exemption order may remain in force for a specified period and be subject to conditions. It may be revoked if based on false or misleading information, if a condition has been contravened or if a material change in circumstances has taken place.

## Tariff filing directions and record keeping rules

In addition to the Commission's general powers to obtain information under s.155 of the TPA the Commission has also been given telecommunications-specific information gathering powers relevant to performing its functions or exercising its powers under Parts XIB or XIC. These powers, known as tariff filing directions and record keeping rules, are discussed below.

### **Tariff filing directions**

Where the Commission is satisfied that a carrier or carriage service provider has a substantial degree of power in a telecommunications market, it may direct the carrier or carriage service provider to give the Commission certain information in relation to charges for specified carriage services and/or ancillary goods or services (including goods or services for use in connection with a carriage service) or information on its intentions in relation to those goods or services. This power will allow the Commission to examine pricing conduct of carriers and carriage service providers where the Commission has concerns about potential anti-competitive conduct.

In particular, a tariff filing direction may require a carrier or carriage service provider to:

- provide the Commission with information about charges for specified goods or services within the scope of the direction;
- give specific information to the Commission within a specified time at least 7 days (or such shorter period as the Commission determines) before imposing a new charge, or varying or ceasing to impose charges for goods or services within the scope of the direction;
- give specific information to the Commission on imposing new charges, or varying or ceasing charges for goods or services.

The Commission must provide written reasons for issuing a tariff filing direction and a tariff filing direction may be in force for a specified period, otherwise it is of indefinite duration.

The Commission has a discretion enabling it to vary or revoke a tariff filing direction at any time.

In addition to the general tariff filing direction powers discussed above, Telstra Corporation Limited is required to give the Commission at least seven days written notice before imposing a new charge, varying a charge, or ceasing to impose a charge for basic carriage services which were in force before 1 July 1997.

Tariff information provided to the Commission can be made available for public inspection and purchase only if the Commission is satisfied that the disclosure of the information would result, or be likely to result, in a benefit to the public; and that the benefit would outweigh both:

- the detriment to the public constituted by any lessening in competition that would result, or be likely to result, if the information were disclosed; and
- any substantial prejudice to the commercial interests of a person that would result, or be likely to result, if the information were disclosed.

Should the Commission decide to make the information obtained under a direction publicly available, the person from whom information has been obtained may apply to the Australian Competition Tribunal for a review of the Commission's decision.

It is an offence for a carrier or carriage service provider to intentionally or recklessly give false or materially misleading tariff information to the Commission in purported compliance with a tariff filing direction and related requirements.

### **Record keeping rules**

Another information gathering provision is that which enables the Commission to make record keeping rules which specify the manner and form of records which specified carriers and carriage service providers must keep.

The Commission must not exercise its powers under the record keeping rules unless the records contain, or will contain, information that will be relevant to the Commission:

- ascertaining whether the competition rule has been, or is being complied with;

- ascertaining whether tariff filing directions have been, or are being, complied with; or
- performing or exercising its powers and functions under Parts XIB or XIC, administer the rules of conduct about dealings with international telecommunications operators under Part 20 of the Telecommunications Act, or the regulation of Telstra Corporation Limited's charges under Part 6 of the *Telstra Corporation Act 1991*.

It is an offence for a carrier or carriage service provider to intentionally or recklessly keep incorrect records in purported compliance with a requirement of the record keeping rules.

### **Registers of competition notices, exemption orders and tariff filing directions**

There are a number of public registers pertaining to Part XIB which the Commission is required to maintain. Persons may inspect the registers and obtain copies on payment of a fee. They are as follows.

A register of competition notices which includes particulars of all competition notices, including those that have expired.

A register of exemption orders including orders that have expired in addition to particulars of all revocations and variations of such orders.

A register of tariff filing directions, including directions that have expired, as well as particulars of all revocations and variations of such directions. As noted above, information obtained in relation to a tariff filing direction will not be made publicly available unless the Commission has specifically made a decision to do so and the decision has not been reviewed by the Australian Competition Tribunal.

## Ministerial report on competitive safeguards and consumer charges

The Commission is required to review and report to the Minister each financial year on:

- competitive safeguards within the telecommunications industry, including matters relating to the operation of Parts XIB and XIC, in addition to other matters relating to competition in the telecommunications industry as the Commission thinks appropriate; and
- on charges paid by consumers for listed carriage services, and goods and services for use in connection with a listed carriage service.

In addition, the Commission will be required, if so directed by the Minister, to review and report to the Minister within the period given in the direction on specified matters relating to competitive safeguards within the telecommunications industry.

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## Access provisions

Part XIC of the TPA establishes an industry-specific regime for regulated access to carriage services. The regime provides for the Commission to declare carriage services and services which facilitate the supply of carriage services to be declared by the Commission. Declarations may take place on the recommendation of an industry body, known as the Telecommunications Access Forum, or after a public inquiry by the Commission.

Once declared, carriers and carriage service providers are, unless otherwise exempt, under an obligation to supply the declared services and specified ancillary services to carriers or carriage service providers (including content providers) requesting the services.

There are a number of ways by which the terms and conditions of access for declared services can be determined. They are by agreement through commercial negotiation (which may be registered with the Commission), by an undertaking submitted to the Commission, or under arbitration by the Commission.

The Commission is obliged, in the performance of its statutory functions, to consider whether its actions will advance the stated objects of Part XIC, in addition to considering other specific criteria.

The Commission's statutory functions under Part XIC (which are discussed below) are:

- declare an industry body to be the Telecommunications Access Forum (the TAF);
- approve or reject a TAF access code or develop an ACCC telecommunications access code;
- determine whether a service should be 'declared';

- determine whether an exemption from the standard access obligations should apply;
- accept or reject an access undertaking;
- arbitrate an access dispute; and
- maintain a register of declared services and access codes.

## Objects of access — long term interests of end-users

It is the responsibility of the Commission to determine whether proposed access arrangements promote the objects of the TPA. The primary object of Part XIC is to:

... promote the long term interests of end-users of carriage services or of services provided by means of carriage services<sup>1</sup>

Third party access to telecommunications infrastructure and services should be established under the new access regime where this objective would be advanced. In determining whether a particular thing promotes the long term interests of end-users, the Commission must have regard to specific statutory objectives, as follows.

### ■ **The objective of promoting competition in markets for listed services**

This objective requires the Commission to make an assessment of whether or not a particular thing is likely to promote competition in the markets for listed services. In general, the long term interests of end-users will be promoted by, amongst other things, lower prices (that are sustainable), higher quality and greater choice of services. When assessing access arrangements under Part XIC the Commission will consider the existing levels of competition in the markets to which the proposed access arrangements relate. In particular, regard must be had to the issue of whether a proposed access arrangement will enable end-users to obtain access to an increased range of services.

- **The objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users**

This objective is relevant to the extent that a particular service promotes the long term interests of end-users of a carriage service where that service involves communications between end-users. Any-to-any connectivity will enable end-users to communicate with one another on their fixed line telephones, despite being connected to different networks.

- **The objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied**

This objective requires consideration of the following criteria.

**The technical feasibility of supplying and charging for particular services.** This incorporates a number of elements, including the technology that is in use or available, the costs in supplying and charging for the services, and the effects on the operation of telecommunications networks.

**The legitimate commercial interests of the supplier or suppliers, including the ability of the supplier to exploit economies of scale and scope.** A supplier's legitimate commercial interests encompass its obligations to the owners of the firm, including the need to recover the cost of providing services and to earn a commercial return on the investment in infrastructure.

This would be expected to encourage appropriate incentives for the access provider to maintain, improve and invest in the efficient provision of the service and to fully exploit any economies of scale and scope that are evident from the provision of the service.

**The impact on incentives for investment in infrastructure.** Firms should have the incentive to efficiently invest in infrastructure. The Commission has indicated in its publication entitled, *Access Pricing*

*Principles — Telecommunications*, that an access price consistent with the competitive standard will encourage efficient use and investment in infrastructure. This is consistent with avoiding inefficient duplication and inadequate efficient investment in infrastructure. In considering these legislative criteria the Commission will consider the basic components of economic efficiency. These are briefly described below.

*Productive efficiency* — the efficient use of resources within each firm, such that all goods and services are produced using the least cost combination of inputs.

*Allocative efficiency* — the efficient allocation of a given resource base to the supply of goods and services which maximise economic welfare.

*Dynamic efficiency* — the rate of progress in the economy, in terms of both the number and variety of goods and services and methods of producing and distributing them.

The long term interests of end-users would be promoted through the achievement of each of these kinds of economic efficiency. At times, however, the Commission will need to make a balanced judgment between promotion of either kind of efficiency.

## Terms and conditions to be ‘reasonable’

In addition to the above objects the Commission is required to consider other specific criteria in making decisions such as accepting or rejecting access undertakings or a TAF access code, or arbitrating access disputes. In particular, the Commission must determine whether the terms and conditions of access are ‘reasonable’. In determining what is reasonable the Commission is obliged to consider the following statutory criteria.

- **The promotion of the long term interests of end-users of carriage services and services supplied by means of carriage services**

In determining whether proposed access arrangements under Part XIC advance the long term interests of

end-users, the Commission must have regard to the specific statutory objects of Part XIC as stated above.

- **The legitimate business interests of the carrier or carriage service provider concerned and the carrier's or carriage service provider's investment in facilities used to supply the declared service concerned**

The Commission's publication *Access Pricing Principles — Telecommunications*, provides that, 'regard to the legitimate business interests of access providers requires an access price that at least provides a normal commercial return on prudent investment'.

- **The interests of persons who have a right to use the declared service concerned**

This criteria requires the Commission to have regard to the interests of existing users of a declared service in assessing whether particular terms and conditions are reasonable. In considering the interests of existing users and access seekers, the Commission considers that competition between the respective parties should be based on the relative cost and quality of the services supplied or proposed to be supplied.

- **The direct costs of providing access to the declared service concerned**

Consistent with Part IIIA of the TPA, references in Part XIC to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access, are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for costs which the provider may incur as a result of increased competition in an upstream or downstream market.

- **The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility**

In considering whether particular terms and conditions are reasonable in relation to operational and technical arrangements the Commission considers that an access

price should not lead to arrangements between access seekers and providers that would encourage the unsafe or unreliable operation of a telecommunications network, service or facility.

■ **The economically efficient operation of a carriage service, a telecommunications network or a facility**

In considering this criterion the Commission is of the view that access prices to declared services should encourage firms to select the least-cost method of providing the service and provide those services most highly valued by end-users.

## The Telecommunications Access Forum

In keeping with the intention that industry itself will have an important role in regulating access in the industry, the legislation allows for the Commission to declare a specified body or association as the Telecommunications Access Forum if the Commission is satisfied that the body or association meets the following criteria:

- the membership of the body or association is open to all carriers and providers;
- the body or association is capable of generating recommendations relating to declarations of eligible services;
- the body is able to generate a draft telecommunications access code; and
- the body or association has a written constitution.

On 28 May 1997 the Commission declared the Australian Communications Access Forum Inc, an incorporated association composed of carriers and carriage service providers, to be the TAF.

## TAF access code

In approving a draft code prepared by the TAF the Commission is required to consider the objects of Part XIC and satisfy itself that the following specified criteria have been met.

- In preparing the draft code the TAF has consulted with both access seekers or proposed access seekers in relation to the declared services covered by the code, and consumer representatives.
- The code is consistent with the standard access obligations.
- If any part of the code deals with price or a method of ascertaining price, the code is consistent with any pricing determination of the Minister.
- The terms and conditions set out in the code are 'reasonable'.

## ACCC access code

Notwithstanding the ability for the TAF to draft an access code, the Commission also has power to make an access code where:

- industry consensus fails to develop and a TAF code is not submitted;
- where the Commission does not approve a code submitted for approval; or
- where variations to an approved code are requested and the industry fails to make the variations.

A code developed by the Commission is known as an ACCC telecommunications access code. Neither an ACCC telecommunications access code, nor a TAF code, is binding on a carrier or carriage service provider unless those parties undertake to be bound by the code.

## Declaration of carriage and related services

There are two mechanisms by which carriage and related services may be declared by the Commission and thereby be subject to the provisions in Part XIC. These are discussed below.

### **Deeming of access services which were available before 1 July 1997**

This mechanism provides for the deeming of eligible services which were covered by registered access agreements in existence before 1 July 1997.

The deeming process, governed by s.39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* is intended to facilitate a smooth transition between the pre 1 July 1997 restricted access regime and the new open telecommunications regime, by essentially retaining existing access rights for carriers, extending those rights to service providers and providing access to the carriage of broadcasting services over cable networks.

On 30 June 1997 the Commission deemed the following services which it considered would facilitate the supply of carriage services as 'declared services', with effect from 1 July 1997. The services are derived from almost all the eligible services contained in registered access agreements between the three carriers which were in existence before 1 July 1997.

- domestic PSTN originating and terminating access
- domestic GSM originating and terminating access
- domestic AMPS originating and terminating access
- transmission
- digital data access service
- conditional local loop service
- AMPS to GSM diversion service
- broadcasting access service

## **Declaration of eligible services made on recommendation of the TAF or after public inquiry**

In addition to those services deemed by the process described above, the legislation provides for the Commission to declare a specified eligible service through either of two ways; on recommendation by the TAF, or after holding a public inquiry.

### **Recommendation by the TAF**

The Commission may declare a service if:

- the declaration is in accordance with a recommendation of the TAF;
- the Commission is satisfied that the TAF has given representatives of persons who are likely to be access seekers in relation to the eligible service a reasonable opportunity to comment on a proposal to make the recommendation; and
- the Commission is satisfied that the TAF has given representatives of consumers a reasonable opportunity to comment on a proposal to make the recommendation.

The Commission has the flexibility to accept the recommendation without undertaking an inquiry into the service's declaration and applying the 'long term interests of end-users' criteria to declaration of the service.

If, for example, the Commission has concerns regarding the process by which the TAF decided to recommend the services be declared, including concerns that the interest of those persons who would become bound by standard access obligations as a result of the declaration were not fully considered, the Commission may reject the TAF recommendation or may choose to undertake its own public inquiry into the declaration of the service.

### **ACCC public inquiry**

The Commission may decide to hold a public inquiry to consider the declaration of a service either on its own initiative or following a request by a person.

A service may be declared if the Commission has:

- held a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make a declaration;
- prepared a report about the inquiry and the report was published during the 180-day period ending when the declaration was made; and
- is satisfied as a result of the inquiry that the making of the declaration will promote the long term interests of end-users of carriage services or of services provided by means of carriage services.

In making a declaration of an eligible service the Commission will have a high level of flexibility to describe the service, whether it be in functional or any other terms. This will enable the Commission, where appropriate, to target the access obligations which are triggered by a declaration to specified areas of bottleneck market power by describing the service in detail, or to more broadly describe a service as appropriate.

The Commission, however, cannot include the use of intellectual property in a declaration of a service which facilitates the supply of a carriage service, except to the extent that the use of intellectual property in the services is an integral but subsidiary part of the declared service.<sup>2</sup>

### **Variation or revocation of declaration**

The Commission must not vary or revoke a service declaration made following a recommendation of the TAF unless the Commission has held a public inquiry (under Part 25 of the *Telecommunications Act 1997*) about the proposed variation or revocation. However, if a variation to a declaration made after a public inquiry is of a minor nature the Commission is not required to hold a public inquiry.

## Standard access obligations

Carriers and carriage service providers who provide declared services either to themselves or to other persons are, unless otherwise exempt, required to comply with standard access obligations in relation to those services. Those carriers and carriage service providers are known as **access providers**, and the declared services that they provide are **active declared services**. Standard access obligations provide an immediate right of access to declared services by access seekers.

The terms and conditions on which carriers and carriage service providers are required to comply with the standard access obligations are subject to agreement. An access provider is required to comply with certain access obligations in relation to the supply of active declared services to a service provider, the interconnection of facilities, or the provision of billing information and conditional-access customer equipment.

### **Supply of active declared services to an access seeker**

An access provider must, if requested to do so by an access seeker:

- supply an active declared service to an access seeker in order that the access seeker can provide carriage services and/or content services;
- take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the access seeker is equivalent to that which the access provider provides itself; and
- take all reasonable steps to ensure that the access seeker receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

The above standard access obligations do not apply to the extent that the imposition of the obligation would have any of the following effects:

- (a) preventing an access seeker who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the access seeker's reasonably anticipated requirements, measured at the time when the request was made;
- (b) preventing the access provider from obtaining a sufficient amount of the service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made;
- (c) preventing a person from obtaining, by the exercise of a **pre-request right** a sufficient level of access to the declared service to be able to meet the person's actual requirements;<sup>3</sup> and
- (d) depriving any person of a **protected contractual right**.<sup>4</sup>

### **Interconnection of facilities**

An access provider who either owns or controls one or more facilities, (or is a nominated carrier in relation to one or more facilities), is required to permit, on request, the interconnection of those facilities with an access seeker's facilities. This will enable the access seeker to be supplied with active declared services to provide carriage services and/or content services.

Moreover, an access provider must take all reasonable steps to ensure that:

- the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides itself; and
- if a standard is in force under s.384 of the *Telecommunications Act 1997* — the interconnection complies with the standard;<sup>5</sup> and
- the access seeker receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

## **Provision of billing information**

An access provider who supplies an active declared service to an access seeker must, on request, provide billing information in regard to the supply of active declared services at such times, manner and with such content as are determined in the regulations.

## **Conditional-access customer equipment**

An access provider who supplies an active declared service by means of conditional-access customer equipment (e.g. set-top boxes used for the supply of pay television) must also, on the request by an access seeker, supply any service that is necessary to enable the access seeker to supply carriage and/or content services by means of that active declared service and using equipment.<sup>6</sup>

## **Exceptions**

Standard access obligations do not impose an obligation on an access provider if there are reasonable grounds to believe that:

- the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or
- the access seeker would fail, in connection with that obligation, to protect:
  - the integrity of a telecommunications network; or
  - the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

## **Exemptions from standard access obligations**

The legislation provides that the Commission may exempt each of the members of a specified class of, or individual, carrier or carriage service provider from one or more of the standard access obligations. In considering whether or not to grant an exemption the Commission must be satisfied that the exemption is in the long term interests of end-users.

## **Class exemptions**

Where the Commission proposes to make a determination in relation to a class exemption and it considers that the determination may materially affect the interests of a person, the Commission is obliged to publish a draft and seek comments in response. The legislation allows for the Commission to make a class exemption subject to terms and conditions, as considered appropriate.

## **Individual exemptions from standard access obligations**

Individual carriers or carriage service providers may also apply to the Commission for an exemption relating to one or more standard access obligations. Judgments about the giving of an exemption and the precise nature of exemption **orders** given by the Commission will be made on a case-by-case basis.

As an example, where a proposed investment in infrastructure may provide long term benefits to end-users, and compliance with the standard access obligations would prevent investment in the project, the exemption mechanism could be used to ensure that the project was able to proceed.

Where the Commission receives an application for an individual exemption order the Commission is required to either exempt, by written order, the carrier or carriage service provider from one or more of the standard access obligations, or to refuse the application.

If the Commission decides to refuse the application the Commission must provide written reasons for the decision.<sup>7</sup>

## **Registered access agreements**

Where an access agreement is registered by the Commission the parties may enforce the agreement as if the agreement were a determination of the Commission by relying upon the enforcement mechanisms and remedies contained in PartXIC, in substitution for the remedies available under contract law.

Before registering an agreement the Commission must take into account the public interest and the interests of all persons

who have rights to use the declared service to which the agreement relates. The Commission must, on application by all parties to an agreement, register the agreement where it:

- embodies the terms or conditions on which an access provider is to comply with any of the standard access obligations applicable to the carrier or carriage service provider; or
- provides for access to a declared service, after the service was declared and the parties to the agreement are an access seeker and an access provider who supplies or proposes to supply the service.

## Access undertakings

Part XIC also provides a mechanism for voluntary access undertakings to be given by carriers or carriage service providers in relation to declared services. A voluntary access undertaking must set out terms and conditions upon which the access provider undertakes to comply with the standard access obligations.

An ‘access undertaking’ is defined under the TPA as a

... written undertaking given by a carrier or a carriage service provider to the ACCC under which the carrier or provider undertakes to comply with the terms and conditions specified in the undertaking in relation to the applicable standard access obligations.

### Terms and conditions

Where an undertaking adopts model terms and conditions set out in a TAF access code, it is not possible for the access provider to:

- modify/tailor those terms and conditions;<sup>8</sup>
- exclude specific conditions within the TAF set; or
- supplement the TAF model with individualised terms and conditions within the same undertaking.

The Commission is not only required to consider the terms and conditions of an undertaking in making a decision as to whether to accept or reject the undertaking, but in an

arbitration cannot make a determination which is inconsistent with the given undertaking. Therefore, voluntary undertakings will provide a degree of certainty to not only an access seeker but the access provider in relation to those matters specifically addressed in the undertaking.

### **Approval of access undertaking**

Where an access provider submits an undertaking which does not adopt a TAF access code model terms and conditions the Commission must make a decision to accept or reject the undertaking. In the process of accepting or rejecting an access undertaking the Commission may request further information before deciding whether or not to approve the undertaking.

Where an access provider submits a voluntary access undertaking which does not adopt the TAF model, approval of the undertaking may only be given where the Commission:

- has published the undertaking and considered any submissions concerning the undertaking;
- is satisfied that the undertaking is consistent with the applicable standard access obligations;
- considers that the undertaking is consistent with any Ministerial pricing principles in force, where that undertaking deals with price or a method of ascertaining price;
- considers that the undertaking contains 'reasonable' terms and conditions; and
- the undertaking includes an expiry time within three years after the undertaking is proposed to come into operation.

In the case where an undertaking is rejected the Commission is obliged to provide the reasons for the rejection.

In the absence of a Ministerial pricing determination the Commission expects the undertaking to be consistent with its pricing principles.

### **Enforcement of access undertakings**

The legislation provides that the Commission or a person whose interests are affected by the access undertaking may apply to the Federal Court where the access provider appears to be in breach of the undertaking.

### **Variation of access undertakings**

Where an access provider gives the Commission a variation of an undertaking the Commission must accept or reject the variation. Where the variation is accepted by the Commission, the Commission is obliged to provide a written notice which includes the terms of the variation. Where a proposed variation is rejected the written notice must include the reasons for the rejection.

### **Replacement of access undertaking**

Where an access undertaking is in operation, an access provider is able to give the Commission an undertaking expressed to replace the existing undertaking. If the Commission accepts the replacement undertaking the existing undertaking is taken to have been withdrawn immediately before the time when the replacement undertaking comes into operation.

## **Arbitration**

The Commission is vested with particular arbitration powers enabling it to make directions and 'do all things necessary for the speedy hearing and determination of an access dispute'.<sup>9</sup>

### **Legislative criteria**

For the Commission to engage in arbitration, an access seeker and/or an access provider must notify the Commission of an access dispute.

However, a dispute may only be referred to the Commission for arbitration where each of the following criteria are satisfied:

- a declared service is supplied or proposed to be supplied by a carrier or a carriage service provider;
- one or more standard access obligations apply or will apply to the carrier or provider in relation to the declared service; and

- an access seeker is unable to agree with the carrier or provider regarding the terms and conditions on which the carrier or provider is to comply with the standard access obligations.

Where parties cannot agree on the terms of access, and a relevant access undertaking exists, then the terms of the undertaking will apply. However, if there is no undertaking in place or the undertaking does not cover the matters in dispute, the Commission, through the arbitration process, may determine the terms and conditions on behalf of the parties.

Where a dispute cannot be resolved after private negotiations, mediation and/or conciliation, either of the access parties may refer the matter to the Commission. Arbitration by the Commission would be considered as a final solution for parties in dispute. Where the Commission is notified of an access dispute the Commission must determine the matter, unless it decides to terminate the arbitration or the notification is otherwise withdrawn.

## ACCC arbitration determinations

In the conduct of an arbitration and in making a final determination the Commission is required to have regard to:

- whether the determination will promote the long term interests of end-users of carriage services of services supplied by means of carriage services;
- the legitimate business interests of the carrier or provider and the carrier's or provider's investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct cost of providing access to the declared service;<sup>10</sup>
- the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else;

- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

These are similar to the statutory criteria the Commission is obliged to consider in determining whether the **terms and conditions** of an access undertaking or the TAF code are **reasonable**. Where the Commission is required to determine the access price, regard will be had to these specific statutory criteria and to the general objects of PartXIC. The Commission will also consider the pricing principles outlined in its publication *Access Pricing Principles — Telecommunications*.

In addition to the above the Commission is also obliged to consider whether its determination is consistent with the following.

- **Standard access obligations which apply to a carrier**

For example, the Commission cannot make a determination which would require a carrier or provider to comply with one or more standard access obligations from which the carrier or provider, or class of carrier or provider, is exempt. Further, a determination cannot require a carrier or carriage service provider to supply a declared service in compliance with the standard access obligations, unless that carrier or provider already supplies the declared service to itself or to another person.

- **An existing undertaking given by a carrier**

Where the Commission has approved a voluntary access undertaking in relation to a declared service any determination made by the Commission regarding the declared service must be consistent with the given undertaking.

## ■ Ministerial pricing determinations

The Commission must be satisfied that a determination of an access dispute is consistent with any Ministerial pricing determination.<sup>11</sup>

The Commission is prevented from making a determination that would have any of the following effects:

- (a) prevent a service provider with existing access arrangements, from obtaining the level of services needed to meet respective demands, measured at the time of the dispute notification;
- (b) preventing a carrier or provider from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements, measured at the time of the dispute notification;
- (c) prevent another person from obtaining, under a pre-notification right, a sufficient level of service to meet the required demands;
- (d) deprive any person of a protected contractual right;
- (e) result in the access seeker becoming the owner of any part of a facility without the consent of the owner;
- (f) require a party (other than the access seeker) to bear some or all of the costs of extending or maintaining enhancements or improvements to a facility;
- (g) require that the carrier provide access, where there are grounds to believe that the access seeker will not comply with the terms and conditions of access or would otherwise affect the integrity of the network.

Where a Commission determination has the effect of depriving a person of a right in force at the time of notification of the dispute the determination must also require the access seeker to:

- pay to the person such compensation (if any) that the Commission considers fair for the loss of the contractual right; and

- reimburse the carrier or provider and the Commonwealth for any compensation that the carrier or provider or the Commonwealth agrees or is required under court order to pay the person as compensation for the loss of the contractual right.

Where there is a dispute between the provider and a third party regarding an earlier Commission determination, the Commission can override the limitations in the matters listed in (a)–(d) above regarding the requirements and rights of the access seeker and the carriage service provider.

## Termination of an arbitration

The Commission can terminate an arbitration at any stage, without making a determination, for any of the following reasons.

- The notification was vexatious.** The Commission will request all notifying parties to substantiate the grounds of the dispute and to establish that the notification is not a means of delaying the parties from reaching reasonable access arrangements.
- The subject matter is trivial, misconceived, or lacking in substance.** The Commission will request the parties to establish that the access issues in dispute are of a significant nature, see (e) below.
- A party to the arbitration of the dispute has not engaged in negotiations in good faith.** This provision enables the Commission to terminate an arbitration where it thinks that any party has not negotiated in good faith. This is intended to enable the Commission to terminate a dispute and issue a good faith direction where such a direction will facilitate the resumption of commercial negotiations.
- Access to the declared services should continue to be governed by an existing contract between the carrier or provider and the access seeker.** Where the Commission considers that existing arrangements between the access parties are reasonable, the Commission has a discretion to terminate the arbitration process.

- (e) **The arbitration is not likely to make a significant contribution to competition in a market (whether or not in Australia).**
- (f) **the access seeker's carriage service or content service is not of significant social and/or economic importance.**

In addition, when a dispute involves varying an existing determination, the Commission has a discretion to terminate the arbitration if it thinks there is no sufficient reason why the existing determination should not continue to have effect in its present form.

## Withdrawal of a dispute

Parties may withdraw a dispute before the Commission makes its final determination or decides to terminate the dispute. The circumstances under which parties can withdraw a dispute is dependant upon the nature of the dispute and the identity of the party which originally notified of the dispute.

If a carrier or service provider notifies the Commission of a dispute then:

- the carrier or service provider can withdraw the notification at any time before the Commission makes its determination; or
- the access seeker may withdraw the carrier's or the provider's notification at any time after a draft determination is issued, but before the Commission makes a final determination.

An exception to the second condition is if the dispute is over a variation of a determination. In such a case an access seeker may not withdraw the notice.

If an access seeker notifies the Commission the access seeker can withdraw at any time before a Commission determination. This will enable the access seeker, who is unwilling to be bound by the terms and conditions included in a draft determination by the Commission, to withdraw the notification and avoid the possibility of being bound by the arbitrated access terms.

## Review of Commission arbitration determinations

Parties to a Commission arbitration can seek review of a determination by the Australian Competition Tribunal. Review of a determination by the Tribunal is by way of re-arbitration of the matter. For the purposes of Part XIC a determination of the Tribunal is taken to be a decision of the Commission.

## Enforcement of Commission arbitration decisions

Where a party contravenes or proposes to contravene a Commission determination, a party to the determination may apply to the Federal Court for enforcement of the determination. The Federal Court has the discretion to make a number of orders including granting injunctive relief or making an order for compensation.

## Arbitration procedure and powers of the Commission

Extensive powers are vested in the Commission for the purpose of conducting an access arbitration under Part XIC. The Commission is not bound by technicalities, legal forms or rules of evidence when hearing an access dispute. The Commission must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute.

The Commission is able to give a direction in the course of, or for the purposes of, an arbitration hearing. The Commission is also able to hear disputes in the absence of a person summoned or served notice to appear, sit at any place and time, refer matters to an expert and give all such directions or do all things necessary for the speeding of hearings and determination of the dispute.

## Good faith directions

Where the Commission has reason to suspect that a person **who is or was a party to the arbitration of an access dispute**, has not negotiated in good faith, the Commission is able to direct that person to do, or refrain from doing, a **specified act or thing**, relating to the conduct of the negotiations. Good faith direction powers are intended to be used by the Commission to remove obstacles from continued negotiations in good faith. For example, the Commission is able to:

- require a party to give relevant information to one or more parties;
- require a party to carry out research or investigations in order to obtain relevant information;
- require a party not to impose unreasonable procedural conditions on the party's participation in negotiations;
- require a party to respond in writing to another party's proposal or request in relation to the time and place of meeting;
- direct a party, or a representative of a party, to attend a mediation conference; and
- direct a party, or a representative of a party, to attend a conciliation conference.

The Commission has the power to make directions at any stage in the arbitration process, prior to determination. For example, where the Commission is not satisfied with the history of negotiations between the parties the Commission can, after receiving a notification, terminate an arbitration and issue a direction that the parties undertake mediation or conciliation.

## Access pricing

### ACCC pricing principles

Following a request from the Treasurer in early 1997 the Commission developed access pricing principles relevant to its responsibilities under Part XIC. The Commission's publication *Access Pricing Principles — Telecommunications* outlines the principles the Commission

is inclined to apply when considering access pricing issues under Part XIC. The Commission will consider these principles when approving or rejecting an access undertaking or in arbitrating an access dispute.

### **Ministerial pricing principles**

In addition, the Minister is able to make determinations setting out principles dealing with price-related terms and conditions relating to the standard access obligations. A Ministerial pricing determination may cover terms and conditions relating to price or a method of ascertaining price.

If the Minister makes a Ministerial pricing determination, the determination must be taken into account by the Commission in the following circumstances:

- in approving or rejecting a draft TAF access code the Commission must be satisfied that the code is consistent with the Minister's pricing determination;
- in developing an ACCC access code the Commission is responsible for ensuring that the code is consistent with the Minister's pricing determination;
- the Commission must be satisfied, in approving or rejecting a draft access undertaking, that the terms and conditions are consistent with the Minister's pricing determination; and
- the Commission must be satisfied that a determination of an access dispute is consistent with the Minister's pricing determination.

If any provision of an access undertaking or an approved TAF code is inconsistent with a Ministerial pricing determination the specific provision will have no legal effect to the extent of the inconsistency.

In the absence of a Ministerial pricing determination the Commission will rely on its own access pricing principles in fulfilling its responsibilities under Part XIC.

## Registers of declared services, access undertakings, access codes, Ministerial pricing determinations and access agreements

The Commission is obliged under various provisions in Part XIC to maintain the following registers:

- declared services;
- access undertakings;
- access codes;
- ministerial pricing determinations; and
- access agreements.

All Commission registers can be maintained by electronic means and any member of the public may inspect and take an extract from, or copy of, the relevant register documents.

## Chapter 4

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### ACCC responsibilities under the Telecommunications Act 1997

The Telecommunications Act has a number of specific functions and powers for the Commission in addition to the other bodies involved in regulating the industry — the Australian Communications Authority (ACA) and the Telecommunications Industry Ombudsman (TIO).

#### The Australian Communications Authority

The ACA is established under the *Australian Communications Authority Act 1997* through the merger of AUSTEL and the Spectrum Management Agency. The ACA's obligations under the *Telecommunication Act 1997* primarily relate to:

- the issuing of carrier and cabling licences;
- the administration of consumer safeguard provisions (e.g. customer service guarantees);
- technical regulation;
- the administration of the numbering plan; and
- the monitoring of the performance of carriers and carriage service providers.

In addition the ACA is responsible for managing the radiofrequency spectrum in accordance with the *Radiocommunications Act 1992*.

## The Telecommunications Industry Ombudsman

Carriers and carriage service providers are, unless otherwise exempted by the ACA, required to enter into and comply with the Telecommunications Industry Ombudsman Scheme. This scheme provides for the TIO to:

- investigate;
- make determinations relating to; and
- give directions relating to

complaints about carriage services by end-users of those services. The complaints may, for example, concern billing or the manner of charging for the supply of carriage services. The TIO, however, is not empowered to investigate complaints about the level of tariffs or the information provided in content services.

## The Australian Competition and Consumer Commission

As distinct from the ACA and TIO the Commission's main powers under the Telecommunications Act relate to telecommunications competition matters coming within that legislation. Various provisions under the Telecommunications Act enable the Commission to have a role beyond that which is found in the TPA. This involves administering rules of conduct which apply to international telecommunications operators, issuing directions to the ACA on competition related matters, providing advice to the ACA on industry codes of conduct, issuing declarations to a 'declared manager of electronic addressing' and arbitrating disputes.

A brief description of the Commission's functions and powers under the Telecommunications Act follows.

## International rules of conduct

In introducing open competition in the Australian telecommunications industry the Federal Government has sought to minimise the potential for abuse by international telecommunications operators outside Australia. There was

concern that international telecommunications operators outside Australia could use market power derived from operations in another country to the detriment of telecommunications operators in Australia.

Part 20 of the Telecommunications Act provides a mechanism by which the Government can deal with what is termed ‘unacceptable conduct’ engaged in by international operators, through empowering the Minister to make **rules of conduct** directed at regulating carriers and carriage service providers in their dealings with international telecommunications operators.<P10>12

### **Unacceptable conduct**

Under s. 367 of the Telecommunications Act an international telecommunications operator engages in unacceptable conduct if it uses power in a market, or any legal rights or legal status, or engages in any other conduct, in a manner that is, or is likely to be, contrary to Australia’s national interest.

### **Rules of conduct**

The rules of conduct which the Minister may make, to prevent, mitigate or remedy any unacceptable conduct by an international telecommunications operator, are as follows:

- prohibit or regulate dealings between international telecommunications operators and other carriers and carriage service providers;
- authorise the Commission to make determinations of a legislative nature imposing requirements, prohibitions or restrictions on carriers or carriage service providers;
- authorise the Commission to give directions to carriers or carriage service providers of an administrative nature which impose requirements, prohibitions or restrictions;
- require carriers and carriage service providers to comply with Commission determinations and administrative directions; and
- authorise the Commission to make information available to the public, a specified class of person or a specified person.

## ACCC directions to the ACA on number portability and the numbering plan

In administering the numbering plan under Part 22 of the Telecommunications Act the ACA cannot include rules about number portability unless directed to do so by the Commission, and any rules the ACA puts in the plan regarding number portability must be consistent with any directions by the Commission.

In making directions to the ACA the Commission must have regard to whether portability is in the long term interests of end-users of carriage services or of services supplied by means of carriage services. Whether portability of particular allocated numbers or services promotes the long term interests of end-users is to be determined in the same manner as the term is determined for the purposes of Part XIC of the TPA.

In addition to the above, before making or varying the numbering plan, or determining an allocation system for telephone numbers, the ACA must consult with the Commission. The ACA may, by writing, delegate any or all of the powers conferred on the ACA by the numbering plan to a body corporate. In these circumstances the delegate is, in the exercise of a delegated power, subject to the written directions of the ACA. However, before giving a direction to that body corporate the ACA is required to consult the Commission.

## ACCC directions in regards to electronic addressing

Division 3 of Part 22 of the Telecommunications Act provides for the regulation of electronic addressing by empowering the ACA to determine that a specified person or association is the **declared manager of electronic addressing** in relation to a specified kind of listed carriage service.

The ACA must not make such a determination unless:

- the ACA is directed to do so by the Commission; or

- the ACA is of the opinion that the person or association is not managing electronic addressing in accordance with generally accepted principles and standards.

The Commission must not give a direction to the ACA unless, in the Commission's opinion, compliance with the direction is likely to have a bearing on competition. The ACA must consult with the Commission before it gives a direction. A direction given by the ACA has no effect to the extent to which it is inconsistent with a direction given by the Commission.

The ACA and the Commission may only give directions to a declared manager of electronic addressing so long as the electronic addressing is of public importance. In determining whether the electronic addressing is of public importance regard must be had to the extent to which the addressing is of significant social and/or economic importance to service providers and end-users of carriage services. This does not by implication limit the matters to which the Commission may have regard.

A person who intentionally or recklessly fails to comply with a direction is guilty of an offence punishable on conviction by a fine.

## ACCC directions on technical standards

Part 21 of the Telecommunications Act establishes a scheme whereby the ACA may make a technical standard relating to the interconnection of facilities, but must not do so unless directed by the Commission. A direction by the Commission must not be given unless it is necessary to:

- promote the long term interests of end-users of carriage services or of services supplied by means of carriage services; or
- reduce or eliminate the likelihood of hindrance to the provision of access to declared services.

Before it makes a standard the ACA is to allow an opportunity for an industry association or body to make a standard. The ACA is required to consult with the Commission before it decides whether or not the attempt at an industry standard has failed.

## **ACCC consultation on facility installation permits**

Before making a decision to issue, or to refuse to issue, a permit authorising a carrier to carry out the installation of one or more facilities (a 'facility installation permit' under Schedule 3 of the Telecommunications Act) the ACA must consult the Commission.

## **ACCC advice on industry codes of conduct and standards**

Part 6 of the Telecommunications Act provides for industry self regulation of a wide range of telecommunications activities by means of industry developed codes of conduct which may be registered by the ACA. While the regime gives industry scope to develop its own codes of conduct the legislation also provides that the ACA may intervene and establish its own requirements, should the industry fail, by declaring an industry standard.

However, before the ACA registers an industry code it must be satisfied that the Commission has been consulted about the development of the code, and it must not declare or vary an industry standard before it has consulted with the Commission.

## **ACCC consultation on service provider rules**

Part 4 of the Telecommunications Act, which sets out definitions of carriage service providers and content service providers, establishes a regime enabling the ACA to make written determinations. This is in addition to specific rules found in Schedule 2 of that Act setting out rules that apply to service providers in relation to the supply of either or both specified carriage or content services. However, before making a service provider determination in relation to carriage or content services the ACA must consult the Commission.

## ACCC consultation on preselection

Under Part 17 of the Telecommunications Act the ACA may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Pre-selection must include over-ride dial codes for selecting alternative carriage service providers on a call-by-call basis.

Before making a determination requiring a carrier or carriage service provider to provide pre-selection the ACA must consult the Commission.

## ACCC arbitration responsibilities under the Telecommunications Act

Under various provisions in the Telecommunications Act the Commission may become involved in the arbitration of disputes in relation to the following matters.

- The provision of carrier access to:
  - supplementary facilities;
  - telecommunications transmission towers, transmission tower sites, eligible underground facilities;
  - certain information relating to the operation of telecommunications networks (i.e. network information, information databases, network planning information, quality of service information);
  - certain operator services to end-users of standard telephone services; and
  - directory assistance services to end-users of standard telephone services.
- The provision of number portability in compliance with the numbering plan administered by the ACA.
- The provision of pre-selection in favour of specified carriage service providers.

- 
- The provision of access to facilities for the purpose of emergency call services.
  - The supply of a specified carriage service for the use of the Department of Defence or the Defence force.

The conduct of an arbitration by the Commission in relation to any of these issues will occur only where the parties cannot agree upon the terms and conditions of access and where the parties cannot agree upon a private arbitrator.

Where the Commission is obliged to arbitrate a matter under the Telecommunications Act regard will be had, to the extent applicable, to the arbitration criteria in Part XIC of the TPA. In addition, the Commission will also have regard to any guidelines developed in relation to arbitration under Part XIC and to any regulations which affect arbitration under the Telecommunications Act.

# Chapter 5

## Telecommunications price regulation

From 1 July 1997 the Commission gained new responsibilities in administering telecommunications-specific price regulation. The main provisions for price regulation are price controls on Telstra Corporation Limited (Telstra) under the *Telstra Corporation Act 1991* (Telstra Act).

Some of the Commission responsibilities in administering the above price control arrangements came into effect from 1 July 1997 through a transfer of that regulatory power from AUSTEL to the Commission to administer the arrangements.

Other measures for telecommunications price regulation may come into effect as a result of:

- the Government's review of the current Telstra price caps in 1997–1998;
- amendments to the Telstra Act in relation to local calls; and
- any price monitoring direction made by the Minister to the Commission to extend its general prices surveillance responsibilities to telecommunications.

### Price caps

The current provisions for price cap arrangements on Telstra tariffs which commenced on 1 January 1996 will continue to apply until 31 December 1998.<sup>13</sup> Over this period a price cap set at Consumer Price Index (CPI) minus 7.5 per cent is applied to Telstra's charges for a revenue weighted basket of main services: connections; line rentals; local, trunk (including both STD and calls to mobile phones) and international calls; cellular mobile telephone services; and leased lines.

In addition, there are individual price caps set at CPI minus 1 per cent on Telstra's individual stand alone charges for the following residential services: connection; line rentals; trunk

(including both STD and calls to mobile phones) and international calls. The aim of these price caps is to allow the benefits of increased competition to flow to all consumers and give Telstra an incentive to lower its costs.

## Local calls

Under the Telecommunications Act certain additional pricing provisions have been introduced. These include the extension of untimed local call availability and arrangements to ensure that reductions to local call charges are reasonably and broadly accessible across different parts of Australia.

For example, from 1 January 1996 to 31 December 1998 the standard local call charge of 25 cents and public payphone prices of 40 cents are prohibited from increasing in nominal (actual) terms. In addition, Part 8 of the Telecommunications Act establishes a scheme for ensuring that customers in Australia who historically have had access to untimed local calls will continue to get such access. It does not matter who supplies the standard telephone service to the customer. For example, if a carrier supplies this service, but the customer deals with a switchless reseller, then in relation to any eligible calls the customer is charged for by that reseller, the customer should receive the option of having them charged for on an untimed basis.

Telstra price control arrangements will be amended to ensure that untimed local call prices across Australia are equitable, and that the maximum price of a local call reflects reductions in prices resulting from competition in local call markets. The price ceiling for untimed local calls will be revised on an annual basis.

## Notification and disallowance of charges

Under the notification and disallowance provisions any proposal from Telstra to introduce a charge for directory assistance services, for example, must be notified to the Minister. The Minister may disallow the charge on public interest grounds following referral of the proposal to the Commission for advice.

Current notification and disallowance provisions are applied to directories assistance services and payphones.

## Price control provisions for universal service providers

Part 7 of the Telecommunications Act establishes a universal service regime for telecommunications. This regime is designed to ensure that a minimum level of telecommunications services is reasonably available to all people in Australia on an equitable basis, regardless of where they reside or carry on business. Some of the key elements of the universal service regime are the specification of the universal service obligation, the declaration of universal service providers, and the regulation of universal service charges. Each of these elements are described below.

### Universal service obligation

Part 7 of the Telecommunications Act sets out the legislative framework for the delivery of the universal service obligation (USO) after 1 July 1997. The fundamental purpose of the USO is to safeguard access to a minimum level of essential telecommunications services for all people in Australia. The USO obligation ensures that:

- standard telephone services;
- payphones; and
- prescribed carriage services

are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business.

### Universal service providers

The Minister may make a declaration that a specified carrier is the national universal service provider or a regional universal service provider for a specified service area. A universal service provider must take all reasonable steps to ensure that its universal service plan, which sets out how it is to fulfil its USO, is complied with.

### Universal service charges

A universal service charge is a charge imposed, or proposed to be imposed, by a universal service provider for a particular area for:

- (a) the supply of standard telephone services to persons in the area;
- (b) calls made from payphones in the area; or
- (c) the supply of prescribed carriage services to persons in the area.

It is intended that the full range of charges relating to these services should be universal service charges and be eligible for price control including, but not limited to, charges for network extension, charges for service connection, annual or periodic rental charges (including for customer equipment) and charges for local, national and international calls.

Universal service charges can apply only to services provided under the USO and in areas where a person is the universal service provider. Thus, if a person is a universal service provider in one region and also supplies services in another region where it is not a universal service provider, its charges in the second region are not subject to price controls under Division 5.

## Regulation of universal service charges

In the past, because Telstra has been the universal service carrier and has been subject to price controls under the Telstra Act, the prices at which services were supplied under the USO has not been an issue. Price controls have meant that prices for services supplied under the USO in loss-making areas have remained generally affordable and comparable with those of services supplied in profitable service areas. However, with the possibility of carriers other than Telstra becoming universal service providers after 1 July 1997, there is a need for the Government to regulate the charges at which they provide services under the USO.

### **Price control determination**

Division 5 of the Telecommunications Act provides for the regulation of universal service charges. This division, together with the Telstra price control arrangements in Part 6 of the

Telstra Act, are intended to provide a means of ensuring the prices of services supplied under the USO can be controlled, with a view to ensuring they are affordable.<sup>14</sup>

In this regard, the Minister is able to make a declaration (under the Telecommunications Act) that specified universal service charges are subject to price control arrangements setting out:<sup>15</sup>

- price cap arrangements and other price control arrangements that are to apply in relation to the charge; and/or
- principles or rules in accordance with which the universal service provider may impose or alter the charge.

Price control determinations may set out any manner of price controls, including maximum monetary charges, the exact level of a particular charge, parity with charges in other areas, rates at which existing charges may change, notification and disallowance provisions and different provisions with respect to different customers.<sup>16</sup>

Moreover, a price control determination may:

- prohibit a charge from being imposed or altered without the consent of the Minister or the Commission;
- prohibit a charge from being imposed or altered without prior notice being given to the Minister or the Commission; or
- empower the Minister to direct the Commission to give the Minister such reports and advice as the Minister requires for the purposes of assisting the Minister in deciding whether to give a consent in accordance with the determination.

Non compliance with price control provisions could make a universal service provider subject to civil penalty provisions involving pecuniary penalties of up to \$10million.

## Price monitoring

The *Prices Surveillance Act 1983* enables the Commission to examine the prices of selected goods and services in the Australian economy. The Minister (in this case the Treasurer) determines which organisations, goods or services should be subjected to prices surveillance. The Treasurer is able to direct the Commission to monitor prices, costs and profits relating to the supply of goods or services by persons in a specified industry or by a specified person and report the results to the Treasurer.

The Government has indicated that in the future prices surveillance may be applied in those markets where competitive pressures are not sufficient to achieve efficient prices and protect consumers. For its part the Commission, in carrying out its new telecommunications responsibilities, will continue to observe price trends generally in this market and advise the Government where it considers that formal price monitoring should be imposed.

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### Amendments to the Radiocommunications Act

Amendments to the *Radiocommunications Act 1992* have implications for persons wishing to obtain access to the radio-frequency spectrum through the allocation of spectrum or apparatus licences from the ACA. Those amendments have extended the scope of the TPA by deeming the allocation of a spectrum or apparatus licences, or authorisation by another person to operate a licence, to be an acquisition of an asset for the purposes of s.50 of the TPA and thereby subject to the prohibition against acquisitions of assets that would have the effect or likely effect of substantially lessening competition in a market.<sup>17</sup>

#### **Application of s.50 of the TPA**

Prior to the amendments the section was limited in its scope when applied to the allocation of spectrum and apparatus licences by a government agency because it applied only to subsequent trading in licences after the initial allocation. The Commission can act against subsequent transfers of licences by using its powers (unavailable to other parties with the exception of the Minister) to seek an injunction preventing the transfer from taking place. The recent amendments to the Radiocommunications Act now mean that the Commission has the added responsibility for considering whether it should take action at the stage when a licence is allocated (and thereby deemed to be an acquisition of an asset) where it believes the acquisition will result in a substantial lessening of competition in a market.

#### **Ministerial limits on the allocation of spectrum**

In addition to extending the scope of the TPA, amendments to the Radiocommunications Act also provide the Minister for Communications and the Arts with the power to limit the allocation of new spectrum and apparatus licences to a person. This power provides the Minister with a mechanism

for bringing about pro-competitive allocations that might not otherwise have been achieved under the TPA. The application of this power is limited to the time of allocation by the Government agency. Subsequent transfers of spectrum assets (for example, from a successful bidder to another person) are subject to the general provisions of the TPA.

### **ACCC information gathering powers**

The amendments to the Radiocommunications Act also contain provisions enabling the ACA to provide specified information to the Commission. These provisions will ensure that the Commission will have access to the information it requires to administer its role in the allocation process.

## **The role of the ACCC**

As indicated above the test which the Commission will apply to the allocation, or subsequent transfer of spectrum licences or apparatus licences, will be pursuant to s.50 of the TPA.

The Commission's general approach to application of s.50 is documented in the *Merger Guidelines* which the Commission published in July 1996. The approach is constructed around identifying the relevant market and analysing the effect of the acquisition on competition in that market.

### **Identification of the relevant market**

It should be noted that identification of the relevant market is not an end in itself, but rather a tool to be used in the wider process of identifying market power and the effect on competition.

In brief, this approach involves identifying the set of goods and services that are substitutable for, or otherwise competitive with each other and requires an analysis of the four dimensions of a market, i.e. the product, geographic, functional, and time dimension.

Importantly, the process of market definition can be viewed as establishing that area of product, functional and geographic space within which a hypothetical current and future profit maximising monopolist would impose a small

but significant and non-transitory increase in price, above the level that would prevail absent the acquisition.

When such an analysis is applied to the sale of spectrum it would seem appropriate in the first instance to define a market for spectrum. In addition to the analysis which would take place at the time of allocations by way of auction, the Commission would also need to examine competition issues that might arise in any relevant downstream market.

Since it is proposed to sell the spectrum by way of a licence a use is not prescribed, and hence the Commission will need to examine the likely uses of the spectrum. For example, that spectrum being made available at auction could be used for a range of wireless services including cellular mobile, personal cordless systems, or wireless local loop.

## Competition analysis

Once the relevant market analysis has been advanced the Commission will then move to a competition analysis. The key question to be addressed in the competition analysis is: could an accumulation of spectrum in a particular band by one bidder, or a group of bidders, have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia?

In evaluating whether such an acquisition is likely to satisfy that test, sub-s.50(3) of the TPA requires that regard be had to a non-exhaustive list of 'merger factors'. Those factors are as follows:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market, or are likely to be available in the market;

- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of vigorous and effective competition; and
- (i) the nature and extent of vertical integration in the market.

## Enforcement

At the conclusion of the competition analysis, if the Commission considers that an acquisition contravenes s.50 and the parties do not agree to modify or abandon the acquisition, the Commission can apply to the Federal Court for an injunction, divestiture or penalties. An acceptable modification to an acquisition proposal may involve the offer of a suitable access undertaking. Alternatively, the party seeking to acquire the spectrum could apply for an authorisation under PartVII of the TPA, exempting the acquisition from the application of s. 50 on the grounds that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

## Endnotes

### Chapter 3

- 1 Sub-s.152AB(1).
- 2 This safeguard provision reflects a similar provision in s.44B of PartIIIA of the TPA and is intended to ensure that the declaration of a service which facilitates the supply of a carriage service will not provide direct access to intellectual property, although it may enable access to a service produced, carried or delivered with the aid of intellectual property.
- 3 A pre-request right means a right under a contract, or under a determination (within the meaning of Division8 of PartXIC) in force at the time when the request was made.
- 4 A protected contractual right means a right under a contract that was in force at the beginning of 13September 1996.
- 5 Section 384 of the *Telecommunications Act 1997* enables the ACA to make technical standards in relation to the interconnection of facilities.
- 6 Necessary services may include access to a subscriber management system which manages the services that customers are authorised to receive via conditional-access customer equipment system; or access to, or information about, smart cards used to control access by customers and/or billing.
- 7 A person whose interests are affected by Commission decision (to make/refuse an exemption), will be able to seek merits review of the decision by the Australian Competition Tribunal.

- 8 While an undertaking which adopts the TAF set may not be used to also modify the TAF terms and conditions, a second undertaking may be filed by an access provider. Two separate undertakings may be submitted in regard to a declared service, one adopting the TAF model (or part thereof), the other containing relevant terms and conditions which apply for that particular access provider.
- 9 Section 152DC.
- 10 While the term 'direct cost' is specifically referred to in the Act, no definition of the term is provided. However, direct costs are explained in the Commission's publication *Access Pricing Principles — Telecommunications*, within the context of the Commission's approach to determining a reasonable price for access. In particular the guide provides that direct costs 'are those costs necessarily incurred (caused by) the provision of access'.
- 11 As at the date of this publication there were no Ministerial pricing determinations in place.

## **Chapter 4**

- 12 On 18 June 1997 the Minister for Communications and the Arts made *Rules of Conduct about dealings with international telecommunications operators No.1 of 1997* to take effect on 1 July 1997.

## **Chapter 5**

- 13 Telstra (including its previous forms as Telecom and OTC) have been subject to price control arrangements of this kind since 1989.
- 14 Division 5 is modelled on Part 6 of the Telstra Act.
- 15 It is feasible for Telstra to be subject to price control determinations under both this Act and the Telstra Act, albeit in relation to mutually exclusive charges.

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- 16 A price control determination may apply price controls in relation to specific classes of customer, for example, educational institutions, medical facilities or public libraries.

## **Chapter 6**

- 17 The amendments also deem an allocation of a licence as an acquisition of an asset for the purposes of the authorisation and divestiture provisions of the Act.

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**ACCC web site**

The Commission has its own Internet web site which includes media releases, speeches and many Commission publications and discussion papers.

The address is: **<http://www.accc.gov.au>**