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Commission

Telecommunications services — Declaration provisions

— a guide to the declaration provisions of Part XIC
of the Trade Practices Act





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Part XIC of the Trade Practices Act

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Important notice

Please note that these guidelines are a summary designed to give you the basic information you need. They do not cover the whole of the Trade Practices Act and are not a substitute for professional advice.

Moreover, because they avoid legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the Act to that conduct.

Preface

Part XIC of the *Trade Practices Act 1974* is a key component of the regulatory framework supporting the development of a competitive telecommunications industry. It establishes a regime under which service providers can access 'declared' services in order to supply competitive services to end-users. The Australian Competition and Consumer Commission is responsible for declaring services which are subject to the access obligations of this regime.

The purpose of this guide, originally published as a draft in April 1998, is to outline the Commission's approach to declaration issues under Part XIC. Its objective is to guide the industry on the matters that the Commission wishes to consider, and how it will consider them, in performing its declaration responsibilities.

The guide also contains a section dealing with procedural issues, including the public inquiry process. This replaces a previous Commission publication entitled *Declaration of Telecommunications Services: The Public Inquiry Process*, published on 31 July 1997.

The Commission is now publishing the guide in its final form. It may, however, be appropriate later to revise it to ensure that it continues to reflect the Commission's experience with administration of the regime.

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Introduction

The regulatory framework for telecommunications in Australia seeks to promote the development of sustainable competition in the industry. Part XIC of the *Trade Practices Act 1974* (the Act) is one of the cornerstones of this framework.¹ It sets out the regime under which providers of carriage services, and of services supplied by means of carriage services, can obtain access to specific services in order to conduct their businesses. In the main, these services are provided by means of communications networks.

The Australian Competition and Consumer Commission is responsible for declaring the services which are subject to the regime. It is also responsible for conducting compulsory arbitration where the access provider and access seeker cannot agree on the terms and conditions of access and an access dispute is notified to it.

As with most new regulation, there is a degree of uncertainty as to how Part XIC will be interpreted and applied. Accordingly, the Commission has decided to publish this guide outlining its general approach to applying the Part XIC criteria in relation to its declaration responsibilities. The guide is also intended to assist those making submissions to the Commission in the context of declaration inquiries. It complements the Commission's publication *Access Pricing Principles: Telecommunications – a guide*, published in July 1997.²

1 While Part XIC is entitled '*Telecommunications Access Regime*', it also applies to services other than telecommunications services (for instance, broadcasting services).

2 This publication is available from the Commission's web site at <http://www.accc.gov.au>

This guide is divided into eight sections.

- **Section 1** outlines the Part XIC regime with particular reference to the policy issues underpinning the regime. It highlights two key areas which will be explored in subsequent sections; namely, the description of the service being considered for declaration and the long-term interests of end-users objective.
- **Section 2** outlines the procedural issues.
- **Section 3** explores issues relevant to the service description.
- **Section 4** explores the 'long-term interests of end-users' objective with a view to explaining how the Commission will apply it in determining whether to declare services.³
- **Sections 5, 6 and 7** examine the matters to which the Commission must have regard in determining whether declaration will promote the long-term interests of end-users; namely, whether declaration will promote competition, achieve any-to-any connectivity and encourage efficiency.
- **Section 8** examines the issue of declaration review.

3 The 'long-term interests of end-users' objective underpins the operation of Part XIC of the Act. The Commission must apply this objective in deciding whether to declare particular services, grant exemptions from the standard access obligations for particular declared services, accept or make an access code, accept access undertakings and make access arbitration determinations. By focusing in this guide on application of the long-term interests of end-users objective in the context of declaration, it is not intended to suggest that the objective has a different meaning for the other processes.

Outline of Part XIC

Development of a more competitive industry has been one of the key elements of telecommunications reform. Importantly, the reform program is directed toward using competition to drive improvements in productivity, lower prices and innovation.

The first reform phase involved granting limited market entry to new telecommunications carriers along with access rights which were not available to other telecommunications service providers. In addition, the incumbent carrier (Telstra) was subject to anti-discrimination prohibitions which limited its pricing flexibility.

In approaching this next reform phase, the intent has been to adopt a less interventionist approach and remove the distinctions between carriers and other providers of telecommunications services.⁴ Specifically, Parliament has repealed regulation restricting market entry and aligned telecommunications regulation more closely with the national competition policy framework. Telecommunications service providers are now subject to general competition law. And, where additional regulation has been necessary, it has been built upon the competition law concepts found in Parts IIIA and IV of the Act.

Establishing a more competitive environment is a challenging task. While the repeal of regulation restricting market entry removes the absolute entry barrier, other barriers may inhibit the development of competition. In particular, a new entrant must be enabled to obtain access to existing networks or build new competing networks. In addition, telecommunications networks are characterised by 'network externalities'; i.e. all users benefit when more

4 *Hansard* Parliamentary Debates, Senate, Tuesday 25 February 1997, pp. 894-895.

people are connected to the network.⁵ This means that for a new entrant to attract customers (particularly the incumbent's customers), it must be able to provide those customers with the ability to call and receive calls from people on other networks (i.e. any-to-any connectivity).

In light of these entry barriers, obtaining access to the incumbent's network is an important step in developing telecommunications competition. The preferred course would be for access issues to be resolved through commercial negotiation. Where, however, the incumbent operates at the retail level, it may have an incentive to refuse a new entrant access to its network, or charge an access price which limits the entrant's ability to compete. Part XIC constrains the extent to which the incumbent can act in this way.⁶

How Part XIC operates

Part XIC establishes a process whereby providers of carriage services, and of content services supplied by means of carriage services, can obtain access to particular (input) services. There is no general right of access. Rather, the Commission must first declare the service.

Part XIC confers power on the Commission to declare 'eligible services'. An eligible service is:

- a carriage service between two or more points, at least one of which is in Australia; or
- a service that facilitates the supply of such a carriage service.⁷

5 Armstrong M, *Competition in Telecommunications*, *Oxford Review of Economic Policy*, Vol 13, No. 1, Spring 1997, p. 67.

6 Where the incumbent operates only at the wholesale level, it may nevertheless have an incentive to exploit its market power. In such a situation, the incumbent is likely to be willing to provide access but only at a 'monopoly' price. Part XIC could be used in this situation also to regulate the access price.

7 Subs. 152AL(1) of the Act. See also, s. 16 of the *Telecommunications Act 1997*. A carriage service is a service for carrying communications by means of guided and/ or unguided electromagnetic energy — s. 7 of the *Telecommunications Act*.

As part of the transition from the previous to the current regulatory regime, the Commission prepared and published a ‘deeming’ statement which provided that specified ‘eligible services’ were declared.⁸ The statement specifies all eligible services covered by access agreements registered under the previous regime, except for those where the Commission was satisfied that specification would not promote the long-term interests of end-users. The Commission declined to specify several services which it considered were contestable, subject to other regulation or obsolete.

Now that the regime has commenced, the Commission can declare other eligible services in one of two ways, namely:

- in accordance with a recommendation from the Telecommunications Access Forum; or
- after holding a public inquiry, if it is satisfied that making the declaration will **promote the long-term interests of end-users** of carriage services or services provided by means of carriage services.

In the main, this guide is concerned with the second method of declaration.

Once a service is declared, those supplying **the service** (known as ‘access providers’) to themselves or others are subject to ‘standard access obligations’. These obligations require the access provider, upon request, to provide the service to service providers (i.e. access seekers).⁹ In doing so, the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access provider provides to itself.¹⁰ Additionally, the access provider must, upon request:

8 Deeming of Telecommunications Services — A statement pursuant to s. 39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, 30 June 1997.

9 Paragraph 152AR(3)(a) of the Act.

10 Paragraph 152AR(3)(b) of the Act.

- permit interconnection of its facilities with those of service providers;¹¹
- provide billing information in connection with the supply of the declared service;¹²
- take all reasonable steps to ensure that the service provider receives 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.¹³

There are limited exceptions to these obligations. These are set out in subs. 152AR(4) and (9) of the Act. In addition, the Commission can grant exemptions from the access obligations. The exemptions can relate to a class of access providers or to a specific access provider.¹⁴

Where an access provider is subject to the standard access obligations, they must be complied with on such terms and conditions as are either agreed, or are set out in an undertaking, or are determined by the Commission pursuant to an arbitration.¹⁵

The emphasis of Part XIC is on encouraging access providers and service providers to negotiate access to declared services without recourse to further regulatory intervention. Accordingly, Part XIC provides for the industry to establish an access code and for access providers to give undertakings to the Commission setting out the terms and conditions of access. Where, however, negotiation fails, the Commission can undertake compulsory arbitration upon request from one of the parties.

In July 1997 the Commission published a guide outlining the pricing principles which it will apply in assessing the

11 Subs. 152AR(5) of the Act.

12 Subs. 152AR(6) of the Act. See also subs. 152AR(7) of the Act and regulation 28S of the Trade Practices Regulations.

13 Paragraph 152AR(3)(c) of the Act.

14 See ss. 152AS and 152AT of the Act.

15 Section 152AY of the Act.

access code and access undertakings, and in making arbitration determinations. These principles set out a pricing methodology (the total service long run incremental cost) which will be generally appropriate for declared services:

- that are well developed in the market;
- that are necessary for competition in dependent markets; and
- where the forces of competition, or the threat of competition, work poorly to constrain the price of access to efficient levels.¹⁶

For other declared services (for example, services declared in order to achieve any-to-any connectivity), a different methodology may be appropriate.

The relationship between access regimes and competitive conduct rules

Parts IV and XIB of the Act establish market conduct rules designed to prevent participants undermining the competitive process. These rules prohibit anti-competitive agreements, misuse of market power, exclusive dealing and resale price maintenance. In particular, the misuse of market power provisions (ss. 46 and 151AK) prohibit an organisation with a substantial degree of market power from taking advantage of that power (in the case of s. 46) for the purpose of:

- eliminating or substantially damaging a competitor;
- preventing the entry of any person into any market; or
- deterring or preventing any person from engaging in competitive conduct in any market;

or (in the case of s. 151AK) with the effect or likely effect of substantially lessening competition in a telecommunications market.

16 Australian Competition and Consumer Commission, *Access Pricing Principles — Telecommunications*, July 1997, at p. 13.

Network industries such as the telecommunications industry have been historically characterised by a monopoly service provider. Introducing effective competition to these industries involves new entrants obtaining access to the network services of the incumbent provider. By reason of its historical monopoly position, the incumbent has, however, had the opportunity to develop a position of significant and pervasive market power. Consequently, there is considerable scope for the incumbent to use this power in relation to the supply of network services to new entrants and thus stifle the emergence of competition.

It is possible that Part IV or XIB could be used in situations where an incumbent refuses access to services which are necessary for competition. Part IV (and in particular s. 46) is not, however, regarded as capable of fully addressing situations where access would be appropriate¹⁷ and hence, the Act has been amended to include regimes for access to infrastructure services — namely, Parts IIIA and XIC. The inclusion of these regimes means that there are now additional tools for dealing with access issues. These new tools are supplementary to, rather than in substitution for, the competitive conduct rules in Part IV of the Act.¹⁸

The relationship between the Part XIC and Part IIIA access regimes

Part XIC is a specific access regime for the telecommunications industry. Accordingly, in relation to the supply of declared services to service providers, it displaces the generic access regime in Part IIIA of the Act.¹⁹

17 See, for instance, Hilmer FG, Rayner M and Tapperell G, *National Competition Policy*, Report by the Independent Committee of Inquiry, 1993, AGPS, Canberra at p. 243. See also, The Treasury, *National Competition Policy Draft Legislative Package*, 1994, at p. 1.10. These views would also seem to hold for Part XIB of the Act.

18 Sections 44ZZNA and 152AK of the Act.

19 Section 152CK of the Act.

When introducing the legislation for Part XIC the Government stated:

... the Government's philosophy in preparing the telecommunications access regime has been to follow an approach based on Part IIIA of the Trade Practices Act as far as practicable, but nevertheless to introduce some additional refinements to ensure that the arrangements will work effectively for the telecommunications industry.²⁰

In doing so, the Government established:

- different criteria for the declaration of services under Part XIC; and
- standard access obligations which become operative once a service is declared under Part XIC.

The different declaration criteria for Part XIC respond to specific features of the telecommunications industry. Important among these is the need for carriage service providers to have any-to-any connectivity, i.e. the ability of end-users of a service or similar service to communicate with each other, regardless of the network to which they are connected.

Once a service is declared under Part XIC, those supplying the service are automatically subject to standard access obligations. Hence, in deciding whether to declare a service under Part XIC, the Commission must decide whether access should be provided, whereas under Part IIIA this question is left to the arbitration phase.²¹ This means that issues which might be left to the arbitration phase in the context of a Part IIIA declaration, arise for consideration in the context of a Part XIC declaration. For instance, in deciding whether to declare a service under Part XIC, the Commission will need to devote specific attention to technical feasibility issues and to the legitimate commercial interests of the access provider.

20 *Hansard* Parliamentary Debates, Senate, Tuesday 25 February 1997, at p. 895.

21 In this regard, it should be noted that declaration under Part IIIA of the Act does not give rise to a right of access, but rather a right to negotiate backed up by compulsory arbitration. When undertaking the compulsory arbitration, the Commission considers whether access should be provided, and if so, the terms and conditions of access. See subs. 44V(3) of the Act.



The Commission's approach is to give full effect to the provisions of Part XIC, but wherever possible adopt an approach which is consistent with the provisions of Part IIIA. This approach avoids unnecessary inconsistencies and fosters greater certainty as to how the legislation will be interpreted and applied. Furthermore, it recognises Parliament's desire to align telecommunications regulation more closely with general competition regulation.

Procedural issues²²

As indicated in Section 1, the Commission may declare an eligible service either:

- in accordance with a recommendation from the Telecommunications Access Forum (TAF); or
- pursuant to a public inquiry following which the Commission is satisfied that the making of the declaration will promote the long-term interests of end-users of carriage services or services provided by means of carriage services.

Declaration following a recommendation from the TAF

If the Commission receives a recommendation from the TAF, the Commission may declare that a specified eligible service is a declared service if:

- the declaration is in accordance with the 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 TAF's processes for considering proposals about the recommendation services for declaration are discussed in the *TAF Telecommunications Access Code*.

22 The material in this section was previously included in a document entitled *Declaration of Telecommunications Services: The Public Inquiry Process* published on 31 July 1997. This section supersedes the whole of that document.

The Commission's role in regard to declarations made on the recommendation of the TAF relates to ensuring that the TAF has undertaken appropriate consultation with representatives of likely access seekers and consumers and to making a written instrument formally declaring the service. The Commission is not required to undertake a public inquiry into declaration of the service. This can potentially allow services to be declared sooner than if the Commission were to hold a public inquiry.

Opportunity to comment by representatives of persons likely to be access seekers

The Commission is required to ascertain whether the TAF has given representatives of persons who are likely to be access seekers a reasonable opportunity to comment on a proposal to make the recommendation.

Part XIC contemplates that access seekers will be service providers who have, or are likely to seek, access to a declared service.²³ Accordingly, the Commission will seek to ascertain whether the persons from whom the TAF has sought comments are representatives of such service providers. In this regard, the Commission will seek to establish whether:

- the persons from whom the TAF has sought comments have any actual or apparent authority or mandate to speak for one or more of the likely access seekers; and
- the views of the persons from whom the TAF has sought comments are likely to be representative of the views of the key persons who are likely to be access seekers.

The Commission considers that 'a reasonable opportunity' to comment on a proposal requires at least that the representatives have had:

- reasonable notice of the details of the proposal (for example, the representatives have access to copies of the proposal); and

23 Section 152AG of the Act.

- a reasonable time in which to discuss the proposal with likely access seekers and comment to the TAF.

Opportunity to comment by representatives of consumers

The Commission is required to ascertain whether the TAF has given representatives of consumers a reasonable opportunity to comment on a proposal to make the recommendation.

In the Commission's view, 'consumers' refers to consumers generally, not just persons who are consumers of the relevant service. The Commission will seek to establish whether notice of a proposal to make the recommendation has been given to the public at large, or whether it has been given only to 'representatives' of consumers. Where the latter is the case, the Commission will seek to establish whether:

- the persons to whom notice was given have any actual or apparent authority or mandate to speak for consumers; and
- the views of the persons to whom notice was given are likely to be representative of the spectrum of consumer interests.

The Commission considers that 'a reasonable opportunity' to comment on a proposal requires at least that the public at large has, or representatives of consumers have had:

- reasonable notice of the details of the proposal (for example, the representatives have access to copies of the proposal); and
- a reasonable time in which to consider the proposal (and in the case of representatives of consumers, to discuss the proposal with consumers) and comment to the TAF.

Declaration following a public inquiry

The second method involves the Commission first holding a public inquiry about a proposal to make the declaration. It may decide to do so:

- on its own initiative; or
- following a request by a person to hold a public inquiry.

The Commission must hold a public inquiry if the Minister gives it a written direction to do so.

The remainder of this section relates to procedural issues arising from a public inquiry about a proposal to make a declaration.

Who may request a public inquiry?

In general, the Commission would expect requests to hold a public inquiry to come from service providers seeking access to an eligible service, or from an industry forum such as the TAF. However, the Act does not restrict requests to hold a public inquiry to requests from service providers. Therefore, the Commission will consider a request to hold a public inquiry from anyone. However, it will expect the person requesting the inquiry to provide supporting information.

Requesting a public inquiry

Requests to hold a public inquiry must be in writing.²⁴ The request should include the following information.

- **A description of the service.** The legislation provides for a high level of flexibility in relation to the specification of an eligible service for declaration. Section 3 of this guide more fully explores issues relevant to service description.
- **Eligible service and existing access obligations.** The Commission would expect evidence that the service is

24 See paragraph 152AM(2)(b) of the Act.

an eligible service. The notion of an ‘eligible service’ is discussed later in this section. If the service in question is already subject to other access obligations, the person requesting the public inquiry should also indicate how access obligations arising as a result of declaration would be different to any existing access obligations.

- **Likelihood of the service being provided without declaration.** The information should also outline any efforts by service providers to obtain the service.
- **Demand for the service and how the service will be used.** Information that there will be service providers who will request supply of the eligible service if it is declared. The information should also indicate how the service will be used by the service providers — for instance, a description of the downstream services that will be supplied using the declared service.
- **Long-term interests of end-users.** Supporting reasons as to why declaration will promote the long-term interests of end-users of carriage services or services provided by means of carriage services. These reasons should address the three objectives to which the Commission is required to have regard under subs. 152AB(2). Sections 4 to 7 of this guide more fully explore issues relevant to the long-term interests of end-users.
- **TAF involvement.** Whether the matter has been considered by the TAF and if so, the outcome of deliberations in the TAF.
- **Other information.** Any other information that the person requesting the inquiry thinks is relevant.

Unless the person making the request indicates that particular information is confidential, the request for the public inquiry will be treated as a public document. The Commission will consider confidentiality requests on a

case-by-case basis. The person making the request should put forward reasons for seeking confidentiality.

Consideration of requests to hold an inquiry

Public inquiries about proposals to declare eligible services are to be governed by the procedures set out in Division 3, Part 25 of the Telecommunications Act.²⁵ Under section 497 of that Act, the Commission may hold a public inquiry if it considers that it is 'appropriate and practicable' to do so.

In determining whether it is appropriate and practicable to hold a public inquiry about the declaration of a specified service, the considerations to which the Commission will have regard may include the following:

- whether the service is an eligible service;
- whether the service is already subject to access obligations or likely to be so in the future;
- efforts made to obtain access to the eligible service;
- whether the service, if declared, would be an 'active' declared service;
- if the service is not already supplied, whether it is capable of being supplied;
- whether there is likely to be demand for the service; and
- whether the TAF has considered recommending that the Commission declare the service.

These matters are addressed in greater detail below. In addition, the Commission will consider any other matters that it thinks are relevant.

The Commission will have regard to information provided by the person requesting the inquiry. Where appropriate, it will also consult other persons who may have an interest in the Commission's decision to hold an inquiry. This may, for

25 See paragraph 152AL(3)(a) of the Act.

instance, be appropriate where the proposal has not been previously considered at the industry level through the TAF.

The Commission will generally determine whether or not to hold an inquiry within 30 days of receiving the written request. If it does not hold a public inquiry, it will inform the person who requested the inquiry of the reasons for that decision.

Eligible service

The Commission will hold public inquiries into the declaration of only those services which are eligible services. An eligible service is:

- a carriage service between two or more points, at least one of which is in Australia; or
- a service that facilitates the supply of such a carriage service,

where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider. A carriage service is 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'.²⁶

Consistent with Part IIIA, the telecommunications access regime in Part XIC provides for the declaration of a service as distinct from particular facilities. This recognises that a facility may be used to provide multiple services, thus allowing greater flexibility in the declaration context.

The declaration of services that facilitate the supply of carriage services, as opposed to carriage services themselves, is intended to perform two functions:

- to avoid disputes over whether a particular service proposed to be declared is properly characterised as a carriage service; and
- to facilitate the unbundling of services where that is justified.²⁷

26 Section 7 Telecommunications Act.

27 Explanatory Memorandum for the Trade Practices (Telecommunications) Amendment Bill 1996, item 6, proposed s. 152AL.

A service that facilitates the supply of a carriage service does not include the use of intellectual property except to the extent that it is an integral but subsidiary part of the declared service.²⁸

Access obligations

The Commission may decide not to hold a public inquiry into the declaration of a specified service if:

- equivalent access obligations already exist in relation to that service; or
- other processes are in train which are expected to provide access obligations in relation to that service earlier than would be possible through declaration of that service after a public inquiry.

Access obligations may exist as a result of the service, or an equivalent or like service, already being declared,²⁹ including in generic form, or as a result of other legislative provisions. For example, the Telecommunications Act establishes certain rights and obligations in relation to pre-selection, facilities and network information access. Unless the nature of the access obligations arising as a result of the declaration of the specified service would be materially different to any existing access obligations, it may be redundant for the Commission to consider declaring such a service through a public inquiry.

It may also be inappropriate for the Commission to hold a public inquiry into the declaration of a service if it expects equivalent access obligations to be established by an alternative process before a public inquiry would be undertaken. This could be the case, for example, if the Commission expected the TAF to recommend the service for declaration or if the Australian Communications Authority were to establish access obligations pursuant to the Telecommunications Act.

28 Subs. 152AL(6) of the Act.

29 Service declaration creates access obligations in relation to that particular service and in relation to certain ancillary services covered by the standard access obligations.

Where the Commission expects the TAF to recommend the declaration of a service and such a recommendation would be likely to be provided in a shorter period than would be taken by the holding of a public inquiry, then the Commission may decide that it would be inappropriate to hold a public inquiry. If the Commission decided that there was a risk that a recommendation from the TAF would be delayed or not occur, it would consider whether to hold a public inquiry regardless.

Efforts to obtain access

Where the person requesting the inquiry is seeking access to the service, that person should demonstrate the efforts made to obtain access through commercial negotiation or to raise the matter in an industry forum. Where no efforts have been made, it may be inappropriate for the Commission to hold a public inquiry into declaration of the service.

Active declared service

A declared service is an ‘active declared service’ if a carrier or carriage service provider supplies the declared service (whether to itself or to other persons).³⁰ Standard access obligations apply only to active declared services.³¹ While it is not a condition of declaration that the eligible service also be an ‘active’ service, declaration of a service which is not ‘active’ may be ineffective.

Part XIC contemplates the declaration of eligible services which are capable of being supplied by a carrier or a carriage service provider. Thus, whilst the Commission may consider whether or not the eligible service is also an ‘active’ service when considering a request to hold a public inquiry, the fact that an eligible service is not yet active will not necessarily preclude a decision to hold a public inquiry.

30 Subs. 152AR(2).

31 See s. 152AR generally.

Capable of being supplied

Where a proposed service is not ‘active’, it should at least be ‘capable of being supplied’ to be an eligible service.³² Therefore when considering whether to hold a public inquiry, the Commission may take into account information relevant to the technical feasibility of supplying and charging for the proposed service. However, it will expect to explore the issue of technical feasibility more fully during the course of a public inquiry.

Demand for the service

Requests to hold a public inquiry should not be frivolous or vexatious. When considering whether to hold a public inquiry, the Commission may take into account information about likely demand for the service.

Telecommunications Access Forum

The Commission will consult with the TAF as a matter of course in considering whether to hold a public inquiry. It may expedite the declaration process for people wishing to have a service declared to first approach the TAF. Active consideration of the declaration of the service in the TAF would be taken into account by the Commission in considering whether it should hold a public inquiry.

The conduct of a public inquiry

If the Commission decides to hold a public inquiry, the relevant procedures are governed by the provisions of Part 25 of the Telecommunications Act. In conducting a public inquiry under Part 25, the Commission must:

- publish notice of certain matters relating to the inquiry;³³
- provide a reasonable opportunity for submissions from the public;³⁴ and

32 Subs. 152AL(1) of the Act.

33 Section 498 of the Telecommunications Act.

34 Section 500 of the Telecommunications Act.

- publish a report on the inquiry.³⁵

In addition, in conducting a public inquiry, the Commission may:

- publish a discussion paper;³⁶
- hold one or more hearings;³⁷
- undertake market inquiries; and
- seek expert advice on particular issues (for example, advice on technical feasibility issues).

These matters are explored in further detail below.

Indicative time frames

When a public inquiry is announced, the Commission will outline the period within which the inquiry is to be held, including:

- the time frames for issuing a discussion paper;
- the period set aside for comments from interested parties;
- dates for any public hearings that are held; and
- indicative time frames for the release of the draft report and final report.

In the case of major or complex declaration inquiries where the Commission considers the release of a draft report appropriate, it will endeavour to release a discussion paper, hold any hearings and issue a draft report within six months. It will then expect to release a final report within a further three months.

In the case of other declaration inquiries, the Commission will endeavour to complete its work and issue a final report within six months of commencing the inquiry. In such

35 Section 505 of the Telecommunications Act.

36 Section 499 of the Telecommunications Act.

37 Sections 501 to 504 of the Telecommunications Act.

inquiries, it may choose not to hold a public hearing and would also need to consider whether a draft report is appropriate, having regard to the nature of the issues that are relevant.

In some situations, it may be necessary to extend these timeframes due to unforeseen events. Where this is the case, the Commission will inform interested persons of the extension and the reasons for doing so.

Figure 1 at the end of this section outlines the public inquiry process and indicative time frames.

Notice to the public

Part 25 of the Telecommunications Act requires the Commission to publish, in whatever ways it thinks appropriate, notice of:

- the fact that it is holding the inquiry;
- the period during which the inquiry is to be held;
- the nature of the matter to which the inquiry relates;
- the period within which, and the form in which, members of the public may make submissions to the Commission about that matter;
- the matters that the Commission would like such submissions to deal with;
- the address or addressees to which submissions must be sent.

Part 25 does not require the Commission to publish at the same time, or in the same way, notice of all the matters referred to above.

The Commission will usually provide notice of the fact that it is holding an inquiry by issuing a media release to that effect. The media release will not necessarily include all the matters referred to above. Notice of some of the matters may be given in a discussion paper or another publication.

With inquiries about proposals to declare one or more eligible services, the general approach adopted by the Commission is to look initially to those seeking access to

describe the service they want. The Commission then uses these descriptions as examples to develop the eligible service under consideration. In developing the service description, there are likely to be issues that the Commission will wish to explore with interested persons. Where this is the case, the Commission may use the inquiry process to do so.

Discussion paper

The Commission may, but is not required to, prepare a discussion paper which:

- identifies the issues relevant to the matter to which the inquiry relates; and
- sets out background material about, and discussion of, those issues.

In more complex inquiries, the Commission may supplement an initial discussion paper with further discussion papers to explore particular issues that emerge during the inquiry.

If a discussion paper is prepared, the Commission will make copies of the paper available at all its offices and make an on-line version of the paper available at its Internet website <http://www.accc.gov.au>.

Submissions from the public

Under Part 25 there must be a reasonable opportunity for any member of the public to make a written submission to the Commission about the matter to which the public inquiry relates. Where the Commission proposes to publish a discussion paper, it will generally use the discussion paper to identify the issues about which it is particularly interested in receiving submissions.

The Commission will provide a reasonable opportunity, of at least 28 days, for any member of the public to make submissions.

Hearings

The Commission may, but is not required to, hold hearings for the purposes of the inquiry. The hearings may be held, for example:

- to receive submissions about the matter to which the inquiry relates; or
- to provide a forum for public discussions of issues relevant to that matter.

Part 25 requires that the hearing take place in public and that reasonable public notice of the conduct of the hearing be given. However, the hearing may be conducted in private if the Commission is satisfied that:

- evidence that may be given, or a matter that may arise, during the hearing is of a confidential nature; or
- hearing a matter, or part of a matter, in public would not be conducive to the due administration of the Telecommunications Act.

Market inquiries

During the course of an inquiry the Commission may conduct market inquiries. These are generally undertaken on a one-to-one basis and enable issues to be explored in greater detail with interested persons. They are particularly useful for testing information, proposals and submissions, and also enable the Commission to gather additional information relevant to the long-term interests of end-users. Moreover, they provide those persons who may not have the resources to prepare submissions with an opportunity to participate in the Commission's decisions.

Expert advice

In some inquiries, the Commission may seek expert advice on particular issues. For instance, the Commission may wish to seek independent advice on technical feasibility issues, or advice from an industry forum, so that it can better understand submissions or seek information about issues not fully addressed in submissions. The Commission will generally make this advice available to interested persons upon request.

Report of the inquiry

Part 25 requires publication of a report setting out the Commission's findings as a result of the inquiry. Before concluding the inquiry, the Commission may choose to publish the report in draft form, with a view to seeking submissions on the decision that the Commission proposes to make.

Combined inquiries

Section 152AN of the Act provides for the Commission to hold combined public inquiries into two or more services. Combined inquiries would allow for efficiencies such as a single notice to the public, a single discussion paper and a single hearing process. These efficiencies may facilitate a timely decision whether or not to declare particular services, particularly where the Commission has received several requests for inquiries within a short period of each other. Combined inquiries may also be useful to allow the Commission to consider simultaneously a range of services in the same subject area, such as data transmission. With combined inquiries, the Commission can prepare a single report or separate reports for matters covered by the combined inquiry.³⁸

Variation or revocation of declaration

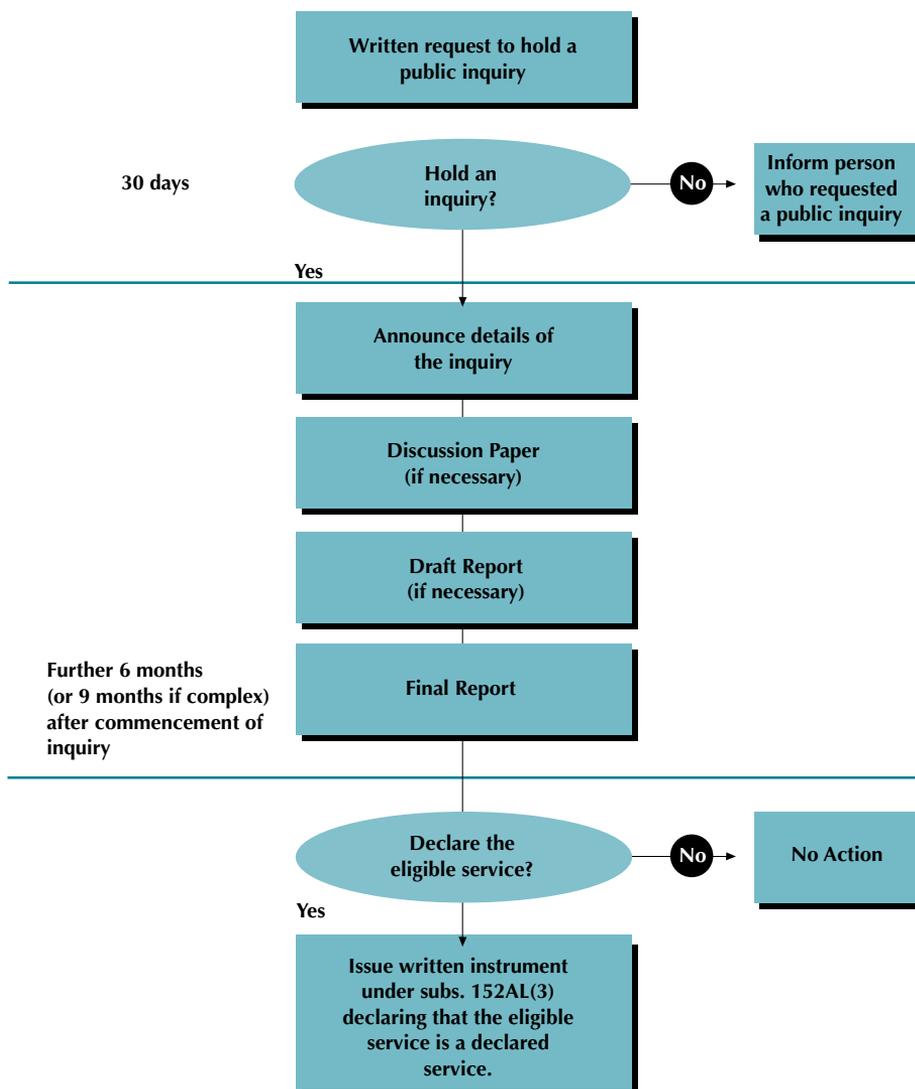
Section 152AO applies, with some modifications, subs. 33(3) of the *Acts Interpretation Act 1901* to the variation or revocation of a declaration made by the Commission. The Commission must not substantially vary or revoke a service declaration, whether following a recommendation from the TAF or from a public inquiry, unless the Commission has held a public inquiry under Part 25 of the Telecommunications Act about the proposed variation or revocation. However, if a variation is of a minor nature, the Commission is not required to hold a public inquiry.

38 Paragraph 152AN(2)(d) of the Act.

Register of declared services

The Commission maintains a register of declared services, variations and revocations and copies of inquiry reports for the benefit of the general public. The Commission will also establish an on-line version of the register on the its Internet website <http://www.accc.gov.au>. The website will also provide details of services being considered under public inquiries.

Figure 1. Indicative timeframes for a declaration public inquiry



Section 3

Service description

Before an eligible service can be declared (in the absence of a recommendation from the Telecommunications Access Forum), the Commission must hold a public inquiry about a proposal to make the declaration. Following the public inquiry, the Commission can then decide whether to declare the service.

In deciding whether to declare an eligible service, the Commission applies the long-term interests of end-users test to a specified service. As the note to subs. 152AL(3) states:

Eligible services may be specified by name, by inclusion in a specified class or in any other way.

The explanatory memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 adds:

In making a declaration of an eligible service, the ACCC will have a high level of flexibility to describe the service, whether it be in functional or any other terms. This will enable, where appropriate, the ACCC to target the access obligations (which are triggered by a declaration) to specific areas of bottleneck market power by describing the service in some detail, or to more broadly describe a service which is generally important (such as services necessary for any-to-any connectivity).³⁹

Principles

When developing the description of an eligible service, the Commission will be guided by the object of Part XIC, which is to promote the long-term interests of end-users. To this end the Commission has formulated the following principles.

- In most cases, some degree of technical specification will be required. However, the Commission's preference will be to describe the service in terms which are as functional as possible. In such a situation,

39 Explanatory Memorandum for the Trade Practices (Telecommunications) Amendment Bill 1996 — item 6, proposed s. 152AL.

the declaration will leave the access provider with flexibility to determine the most efficient way of supplying the service. This also provides more flexibility to the access seeker in the type of service that can be provided within the ambit of the declared service and avoid distorting technological or innovative developments. Technical terms may, however, be appropriate where a functional description would provide scope for ambiguity which could be exploited by the access provider in a manner that hinders access.

- The eligible service should be described in a manner which provides sufficient clarity for application of the standard access obligations.
- The service should be one for which it is technically feasible to supply and charge. In addition, the service should be one which potential access providers are supplying to themselves or others. The Commission will generally use the inquiry process to explore these issues.
- Terms and conditions of access should not be included in the service description. In deciding to declare an eligible service, the Commission is limited to specifying the service (as distinct from the manner in which the service is to be provided). Determination of the terms and conditions upon which the service is to be supplied is, in the first instance, a matter for access providers and those service providers seeking access. That said, in some instances, there is likely to be a 'grey area' between specifying the service and the terms and conditions upon which it is supplied.

These principles should be seen as the Commission's general approach to service description issues. In some instances, certain factors may warrant departure from particular principles or adoption of additional considerations.

Unbundling

Often, eligible services will be seen as bundles of particular network elements, and consequently, in developing a service description, the Commission will form a view as to the degree of unbundling that is appropriate. This issue arises when, for example, the Commission is faced with a choice of declaring a higher level service (such as an end-to-end local carriage service) or declaring the components making up that service (such as the local PSTN originating and terminating services).⁴⁰

The appropriate degree of unbundling is an important matter that is likely to influence the effect of declaration. Accordingly, the Commission's approach to unbundling will be guided by criteria relevant to the 'long-term interests of end-users' objective.

Some of the factors which may be relevant include these.

- Will unbundling lead to any loss of efficiencies? Separation of internal processes so that each element can be provided as a separate service may involve transaction costs that would not be incurred with full integration.
- Is there any demand for the unbundled elements? In the absence of actual or potential demand for unbundled elements, there may be little point in requiring unbundling. Demand for unbundled elements may also be relevant when assessing whether declaration will promote the long-term interests of end-users.

40 See, for instance, the services considered by the Commission as part of its public inquiry into the declaration of local telecommunications services. Australian Competition and Consumer Commission, *Declaration of Local Telecommunications Services: A report on the declaration of an unconditioned local loop service, local PSTN originating and terminating services, and a local carriage service under Part XIC of the Trade Practices Act 1974, July 1999.*

- Does the bundled service contain both contestable⁴¹ and non-contestable elements? Where this is so, it may be preferable to unbundle the service and declare only those elements of the service that are non-contestable.

By way of example, as part of its public inquiry into declaration of local telecommunications services, the Commission was requested to separately declare each element of the fixed network used by carriers such as Telstra to supply local call services. In its draft inquiry report, the Commission noted that while declaration of individual elements may enhance transparency in the costs of service provision, there are likely to be costs involved through the loss of efficiencies. In the absence of demand for individual elements which access seekers would then combine with elements sourced in-house or from other carriers, the Commission adopted a more limited form of unbundling. The approach adopted was to develop service descriptions for the bundles of elements likely to be demanded by service providers.

41 Contestable elements are those which could be supplied by other service providers in competition with the potential access provider.

The long-term interests of end-users

Under Part XIC, the test for declaration is the ‘long-term interests of end-users’ test. That is, the Commission must be satisfied that making the declaration will promote the long-term interests of end-users of:

- carriage services; or
- services provided by means of carriage services.

Carriage services are services for carrying communications using electromagnetic energy. The term ‘communication’ is broadly defined to include communications between people and/ or things and includes speech, music, data, text, visual images and signals.⁴² Services provided by means of carriage services include content services such as a broadcast, information or entertainment, and other services (for example, banking or retail shopping).⁴³

The term ‘long-term interests of end-users’ is a new concept in trade practices legislation. It has some similarities to the concept of ‘public benefit’ which underpins the authorisation process in Part VII of the Act. Public benefit includes:

... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.⁴⁴

42 Section 7 of the Telecommunications Act.

43 See s. 15 of the Telecommunications Act for the definition of ‘content service’ and the Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 — item 6, proposed s. 152AB.

44 *Re Queensland Co-operative Milling Association Limited* (1976) ATPR ¶40-012 at p. 17, 242.

In *Re ACI Operations Pty Ltd*⁴⁵, the Commission listed matters which in its opinion could constitute a 'public benefit'. These include promotion of competition, supply of better information to consumers, business efficiency, economic development, and promotion of industry cost savings resulting in contained or lower prices at all levels of the supply chain. Hence, public benefit includes benefits to consumers, producers and society as a whole.

Despite the similarities, the long-term interests of end-users concept is not to be equated with public benefit. Rather, in the Commission's view, end-users should be seen as a subset of the public.

In the Commission's view, whether declaration of the relevant service will promote the long-term interests of end-users is essentially a question of whether declaration will contribute to the establishment of an environment which will increase the likelihood of those interests being improved over the long term.

Who are end-users?

The Commission takes the view that end-users are the consumers of carriage services and other services supplied using carriage services, rather than the suppliers of these services.

The term 'end-users' includes both consumers with a direct contractual relationship with a carrier or service provider (i.e. customers) and other end-users of carriage services or content services (such as members of the customer's household).⁴⁶ While the term would not include service providers, in the Commission's view end-users need not be limited to households or individuals. For example, a business which uses telecommunications services in the supply of its goods or services (such as a travel agency) would be an end-user.

45 (1991) ATPR (Com) ¶ 50-108 at p. 56,067.

46 Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 — item 6, proposed s. 152AB.

What are their long-term interests?

Their interests

The access provisions in Part XIC seek to promote the long-term interests of end-users through exposing telecommunications markets to greater competition and creating an environment where there are incentives for investment and innovation. In general, competition fosters innovation, drives efficiency, and puts pressure on business to deliver consumers 'value for money'. Consequently, in interpreting the term 'long-term interests of end-users' within the context of Part XIC, the Commission is of the view that the term refers to end-users' economic interests. These interests include lower prices, increased quality and greater diversity of goods and services.

The long-term

Use of the expression 'long-term' indicates an intention that the Commission should consider the long-term consequences of declaration on end-users' interests. The Commission does not interpret this expression to exclude consideration of the short to medium-term consequences of declaration but, to ensure that it considers the consequences of declaration over a period beginning with the immediate future and extending to the long term.

To form a view as to the consequences of declaration, it will in most cases be appropriate to identify particular short to medium-term impacts that are likely to occur as a result of declaration. These impacts can be then used to form a view as to the consequences of declaration over the long term. For instance, if the Commission is of the view that declaration is likely in the short to medium-term to promote competition by reducing barriers to market entry, it can form a view about the consequences of reduced barriers to entry in terms of the end-users' interests over the long term.

The expression 'long-term' is not defined in the Act. Reflecting its use within the context of economic concepts such as 'competition' and 'efficiency', the Commission is of

the view that 'long-term' should be interpreted from an economic perspective.⁴⁷ Accordingly, in its view, the long-term is not a set period, but rather the time taken for the substantive consequences of a declaration decision to unfold.

Applying the long-term interests of end-users test

While Part XIC is concerned with promoting the economic interests of end-users, the immediate impact of a declaration decision is upon the economic interests of service providers. This is because a declaration applies to the (input) services acquired by service providers.

Accordingly, to evaluate the consequences of declaration on the interests of end-users, the Commission often will be concerned with the effect on service providers in terms of rivalrous behaviour and investment decisions. This should enable the Commission to form a view about the economic benefits likely to flow to end-users in terms of price, quality and diversity of services as a result of declaration.

In order to determine whether declaration will promote the long-term interests of end-users, s. 152AB of the Act provides that the Commission must consider the extent to which declaration is likely to result in the achievement of the following objectives:

- the objective of promoting competition in markets for carriage services and services supplied by means of carriage services;
- for carriage services involving communication between end-users, the objective of achieving any-to-any connectivity; and
- the objective of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.⁴⁸

47 In this regard, the 'long-term' is the time within which suppliers can vary all factors of production (e.g. in response to an increase in customer demand).

48 Subs. 152AB(2) of the Act.

In the Commission's view, these objectives are essentially 'secondary objectives'.⁴⁹ They are not ends in themselves but are the means by which the primary objective (of promoting the long-term interests of end-users) is to be realised.

Where declaration is likely to result in the achievement of one or more of these objectives, it will generally promote the long-term interests of end-users. For instance, if declaration is likely to promote competition in a market for the supply of local telephony services to end-users, then end-users are likely to benefit through lower prices and improved customer service. Similarly, encouraging efficient investment would be expected to promote end-users' interests through enhancing the efficiency with which telecommunications services are supplied. The enhanced efficiency would be generally reflected in lower prices. The Commission may also conclude that efficient investment will be likely to increase service diversity.

With respect to any-to-any connectivity, the Commission takes the view that the achievement of this objective will generally benefit end-users through facilitating increased communication between them. Any-to-any connectivity may also facilitate competition by ensuring that, when migrating between service providers, end-users do not lose their ability to communicate with other end-users.

The approach adopted by the Commission will generally involve case-by-case analysis to form a view about the likely result of declaration on the achievement of each secondary objective. Not only does this ensure that the Commission considers the impact of declaration in terms of each objective, but it also assists the Commission to reach a decision in terms of the overall effect on the long-term interests of end-users where declaration is likely to have mixed effects.

49 Part XIC of the Act does not use the adjectives 'primary' and 'secondary' to distinguish between the objectives. Rather, the Commission uses these adjectives to assist in placing the competition, any-to-any connectivity and efficiency objectives within the context of the overall long-term interests of end-users objective.

The analytical process used by the Commission generally involves three steps.

- **First**, the Commission considers the likely result of declaration in terms of each secondary objective.
- **Second**, the Commission considers whether the likely result of declaration on each secondary objective will promote the long-term interests of end-users.
- **Third**, the Commission must make an overall assessment of whether, having regard to the cumulative results of declaration on the secondary objectives, declaration will promote the long-term interests of end-users.

In some cases, this three stage analysis may be undertaken as discrete steps whereas in other cases it may be appropriate to undertake the analysis simultaneously. For instance, in considering the likely result of declaration on competition, it may be useful to consider the impact in terms of price, quality and diversity of services supplied to end-users.

To consider the likely result of declaration on a secondary objective, the Commission finds it helpful to use a 'with and without test'. That is, the Commission considers the future without declaration and compares this to the future with declaration. This 'with and without test' is not a test in its own right but is used to isolate the effects which are likely to occur as a result of declaration. Moreover, given that many aspects of the future will be speculative, the Commission may not be able to describe the future in a high degree of detail, or determine the full range of possible scenarios. The Commission will seek to examine those aspects of the future (primarily competition and efficiency considerations) which have a direct bearing on the issues before it.

For instance, in the domestic intercarrier roaming inquiry⁵⁰, the Commission considered that roaming was important for entry and competition in the mobile market. In examining

50 Australian Competition and Consumer Commission, *Inquiry into domestic intercarrier roaming declaration*, March 1998.



the future, the Commission was of the view that roaming arrangements were likely to be negotiated commercially without declaration and that commercial processes are likely to yield outcomes superior to a regulated approach. Accordingly, the Commission was not able to conclude that declaration would promote competition. Moreover, the Commission was of the view that declaration could have an adverse impact on investment incentives which would not occur in the absence of declaration. Thus the Commission was of the view that declaration of roaming services would not promote the long-term interests of end-users.

Where declaration is likely to have mixed effects in terms of one or more objectives, the Commission will seek to form a view about the net impact upon end-users. For instance, in some situations, the Commission may need to consider whether benefits to end-users through increased competition are likely to be short-lived and outweighed by losses due to reduced innovation and investment by service providers. In other situations, the Commission may need to consider whether benefits to one group of end-users are likely to be outweighed by harm to another group of end-users (see below).

Forming a view about the net impact on end-users is likely to be a qualitative assessment involving judgments about the benefits and costs arising from declaration, and the spread of those costs and benefits. While this is an inherently difficult exercise, the Commission will use available information to assist in making a decision on these matters.

Must the interests of all end-users be promoted?

As competition continues to develop in the telecommunications industry, end-users may be affected in different ways. By way of example, the UK telecommunications regulator (OfTel) reports that increased competition in the UK telecommunications industry has led to price reductions in real terms.⁵¹ However, the reductions have not been evenly spread across customers.⁵² This has been due to price 'rebalancing' flowing from the removal of cross-subsidies between business and residential users, and between call and rental charges.⁵³

In the Commission's view, to be satisfied that declaration will promote the long-term interests of end-users, it need not be satisfied that **all** end-users will benefit. In some instances, the benefits may be confined to a group of end-users, while in other instances some end-users may be adversely affected. The Commission's approach will be to consider the flow of benefits and costs, and determine the net or overall benefit to end-users.⁵⁴ Where the impact of declaration on some end-users is likely to differ from the impact on others, it may be appropriate to identify and group the end-users for the purpose of analysing the impacts.

51 OfTel, *Towards better telecoms for customers — A review of progress in the UK*, <http://www.oftel.gov.uk/consumer/towards.htm>.

52 For example, OfTel reports that between 1991 and 1997, the average BT bill for residential users fell by 26 per cent in real terms, whilst the average BT bill for business users fell by 38 percent.

53 This rebalancing facilitates the more efficient deployment of resources and enables social programs to be made more transparent. To minimise the impact of rebalancing on the bottom 20 per cent of customers, BT was required to introduce a 'Light User Scheme'.

54 This approach is similar to the Commission's approach in deciding whether anti-competitive conduct should be authorised on public benefit grounds. See, for instance, *Re Queensland Independent Wholesalers Limited* at p. 40,928.

Promoting competition

Sub-section 152AB(2) of the Act requires the Commission to consider whether declaration is likely to promote competition in markets for particular services; namely, markets for carriage services and services supplied by means of carriage services.

As stated by the Trade Practices Tribunal (now the Australian Competition Tribunal) in *Re Queensland Co-operative Milling Association Ltd and Defiance Holding Ltd*⁵⁵

... In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless whether firms compete is very much a matter of the structure of the markets in which they operate. ...

Declaration of an eligible service is likely to promote competition where the following conditions are present:⁵⁶

- the eligible service is an input that is used, or that could be used, to supply carriage services or services provided by means of carriage services (often referred to as 'downstream services'); and
- competition in the market for the supply of the eligible service is unlikely to be effective in the future and this is likely to have a detrimental impact on competition in markets for downstream services.

Where competition in the market for the supply of the eligible service is already effective (and is likely to remain effective), then declaration of the eligible service is unlikely

55 (1976) ATPR ¶40-012, at p. 17, 246.

56 In saying this, the Commission is not intending to limit the situations in which declaration is likely to promote competition but to provide an example of situations in which declaration would be expected to promote competition.

to lead to any significant changes in quantity, price and other terms and conditions of the supply of the eligible service. On the other hand, if competition in the market for the supply of the eligible service is ineffective (and is likely to remain ineffective), then declaration of the eligible service could lead to changes in the quantity, price and other terms and conditions of the supply of the eligible service. This in turn could lead to increased competition in markets for downstream services. For instance, where the eligible service was not supplied, or was available only at a very high price, declaration could lead to improved access to the eligible service and enable more efficient competitors to enter the downstream markets, and thereby promote competition in those markets.

The Act directs the Commission's attention to **the market(s) in which competition may be promoted**. In most cases, this is likely to be the market(s) for downstream services rather than the market in which the eligible service is supplied (where these markets are separate). That said, the Act does not prohibit the Commission considering the market in which the service is supplied where this will assist in examining the impact of declaration on competition in the relevant (e.g. downstream) markets.

Accordingly, to examine whether declaration would be likely to promote competition, the Commission may consider both:

- the market in which the eligible service is or would be supplied; and
- the market or markets in which competition may be promoted (where these are separate markets).⁵⁷

Given that the inquiry is concerned with the market(s) in which competition may be promoted as a result of declaration, the Commission may not always consider the market for the eligible service. In some situations, the Commission may consider only the downstream markets. For instance, if the Commission considers that competition

57 Unlike Part IIIA of the Act, paragraph 152AB(2)(c) does not require the market in which competition is promoted to be separate from the market for the service.

in the downstream market is already effective (and is likely to remain effective), it may not examine the market for the eligible service.

Identifying the relevant markets

Identification of the relevant markets provides the Commission with a field within which it can meaningfully analyse the effectiveness of competition with and without declaration.

Section 4E of the Act provides that the term ‘market’:

... means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

Applying this definition, the Trade Practices Tribunal (now Australian Competition Tribunal) has said:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So the market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.⁵⁸

The process of market definition involves identifying the sellers and buyers which effectively constrain the price and output decisions of firms supplying the service(s) under consideration. As noted by the High Court:

... The process of defining the market by substitution involves both including products which compete with the defendant's and excluding those which because of differentiating characteristics do not compete.⁵⁹

Markets involve four dimensions — product, geographic, function and time. The Commission's publication,

58 *Re Queensland Cooperative Milling Association* at p. 17, 247, cited with approval by the High Court in *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Limited* (1989) ATPR  40-925.

59 *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) ATPR  40-925 at p. 50,008 per Mason CJ and Wilson J.

Anti-competitive conduct in telecommunications markets — An information paper, explains how these dimensions should be determined.

In identifying relevant markets, Part XIC of the Act does not require the Commission to take a definitive stance on market definition. Furthermore, over time, declaration itself might affect the dimensions of these markets, particularly in relation to the functional dimension. Accordingly, market analysis under Part XIC should be seen in the context of shedding light on how declaration would promote competition rather than in the context of developing ‘all purpose’ market definitions.

Market in which the eligible service is supplied

To define the market in which the eligible service is or would be supplied, the Commission begins with the service in question. The service is likely to be an input (i.e. wholesale) service. It is described in terms of likely uses and area of supply in order to identify services which are close substitutes. The market is then defined to include the service and all those sources, and potential sources, of close substitutes which effectively constrain the price and output decisions of the supplier (or suppliers) of the eligible service.

Where the eligible service is not being supplied to third parties, the Commission may view the market as a potential market. Relevant issues in this regard are set out in the Commission’s publication, *Anti-competitive conduct in telecommunications markets — An information paper*.

Market(s) in which declaration may promote competition

Often the market (or markets) in which competition is likely to be promoted as a result of declaration of the eligible service will be downstream markets. In general, the Commission will be concerned to identify only those markets for downstream services in which declaration of the eligible service is likely to have a material effect. Where there are several markets that could be affected by declaration, it may be sufficient for the Commission to focus

its attention only on the main or major markets in which declaration may promote competition.

To identify the downstream markets, it will often be useful to examine how the eligible service is being (and will be) used in the absence of declaration, and what is likely to happen if the eligible service is declared. For example, declaration may change the terms and conditions in which access to the eligible service is being provided, and this in turn may encourage new entry in downstream markets. Alternatively, declaration may lead to the development of new downstream services.

For instance, in the public inquiry into the Declaration of Local Telecommunications Services⁶⁰, the Commission received information indicating that the unconditioned local loop service⁶¹, if declared, will be used by service providers as a component for the supply of high speed carriage services using xDSL technology. This led the Commission to propose a market in which those services would be supplied as being a relevant market for competition analysis. The Commission also received information indicating that local PSTN originating and terminating services, if declared, would be used to provide long distance telephony services; there was doubt as to the extent to which the services could be used to supply local telephony services in the absence of a pre-selection determination of the Australian Communications Authority. Accordingly, the Commission focused on the market for long distance telephony services as the relevant market for competition analysis.

Starting with each of the downstream services, the relevant downstream markets are then defined to include the downstream service and all those sources, and potential sources, of close substitutes which effectively constrain the price and output decisions of the supplier (or suppliers) of the eligible service.

60 op cit.

61 The unconditioned local loop service involves the use of unconditioned copper pairs between the network boundary at end-users' premises and a point at which the copper terminates.

The relevant downstream markets will often be retail markets — i.e. markets in which the downstream services are acquired by end-users rather than service providers. The benefits of increased competition in these markets will flow directly to end-users. The Commission will also consider the effect of declaration on competition in wholesale markets — i.e. markets in which the downstream services are acquired by service providers. The Commission considers that the benefits of increased competition at the wholesale level can be expected to be passed on to end-users in the long run.

State of competition in the relevant markets

To assess the impact of declaration on competition, the Commission will generally examine the effectiveness of competition in the future without declaration. This provides the foundation for analysing the likely impact of declaration.

If competition in the relevant markets is already effective, then declaration of the eligible service is not likely to have much effect in terms of promoting further competition. In this regard, the explanatory memorandum states:

... It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services. In considering whether a thing will promote competition, consideration will need to be given to the existing levels of competition in the markets to which the thing relates.⁶²

Assessing the effectiveness of competition is not, however, a static analysis limited to a description of current conditions and behaviour. It is a dynamic analysis concerned with features affecting the competitive supply of services in the future. Nevertheless, current conditions will, in general, provide a starting point from which to consider the future effectiveness of competition.

When assessing the effectiveness of competition, the Commission will tend to examine concentration levels, barriers to entry, the linkage between supply of the eligible

62 Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 — item 6, proposed s. 152AB.

service and the supply of downstream services, and relevant behavioural features (e.g. price changes over time, service differentiation).

Concentration level is an indicator of the level of competition. High concentration levels increase the scope for co-ordinated conduct, including both overt and tacit collusion. In some situations where one firm has a large market share, price leadership may be present. In other situations, a firm which supplies a sufficiently large percentage of a market may be in a position to engage in unilateral exercise of market power such that it can profitably 'give less and charge more' without being threatened by competing suppliers.

However, high concentration levels do not necessarily mean that competition is ineffective. Where the market is characterised by low barriers to entry, incumbent firms may be constrained by the threat of potential competition to behave in a manner consistent with competitive market outcomes. However, if there are significant barriers to the entry of new suppliers to the market and concentration levels are high, then this may indicate that competition is unlikely to be effective.

Barriers to entry can be any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms. They may be due to sunk costs, economies of scale and scope, legal or regulatory barriers, product differentiation and brand loyalty, and the threat of retaliatory action by incumbents.

Sunk costs are costs that are irrecoverable on exit, and thus create a risk for entry; their extent depends on factors such as capital specificity, and requirements for investment in advertising and promotion.

Economies of scale arise from a production process in which the average (or per unit) cost of production decreases as the firm's output increases. Economies of scope arise from a production process in which it is less costly in total for one firm to produce two (or more) products than it is for two (or more) firms to each produce separate products. They may inhibit entry depending on expected post-entry

prices, which in turn will depend on factors such as the minimum efficient scale of entry, cost penalties associated with sub-optimal plant utilisation, price elasticity of demand and market growth. Where the economies of scale in a market are such that the minimum size for an efficient firm is very large relative to the size of the market, it may be that potential competitors will be dissuaded from entering the market by the apprehension that only one firm will survive.

Legal or regulatory barriers such as licensing requirements, planning or environmental controls or industry standards, may directly limit the number of competitors in a market, or affect the ability of entrants to deploy infrastructure.

Product differentiation and brand loyalty may affect both the level and elasticity of demand faced by a new entrant compared to an incumbent firm and add to the sunk cost requirements of entry in the form of advertising and promotion costs.

The threat of retaliatory action by incumbents may also create a barrier to entry. Potential entrants may anticipate predatory behaviour by incumbent firms on the basis of past behaviour in this or other markets. Such threats may pose an effective deterrent, even in markets which may otherwise appear to have relatively low barriers to entry.

In examining the significance of barriers to entry, the Commission will generally consider the extent to which the barriers are likely to deter effective entry. The Commission considers that effective entry is that which is likely to have a market impact within a two year period, by constraining incumbents to behave competitively. In some markets the threat of entry is sufficient to constrain firm conduct. In others, actual entry will be required. The latter would require entry on a sufficient scale and which offered a product sufficiently attractive to consumers to be effective.

Examining the linkage between supply of the eligible service and the supply of downstream services will often help to identify any relationship between the effectiveness of competition for supply of the eligible service and the effectiveness of competition in downstream markets.

The Commission may consider the following.

- **Vertical relationships.** If the provider of the eligible service is also a competitor in the downstream market, this is likely to create incentives for the provider of the eligible service to affect competition in the downstream market.
- **Importance of the eligible service.** If the downstream service in which the eligible service is an input also competes with other services in the downstream market (which do not use the eligible service as an input), this may constrain the ability of the provider of the eligible service to affect competition in the downstream market. Also, if the eligible service accounts for a low percentage of the cost of providing the downstream service, the ability of the supplier of the eligible service to affect competition in the downstream market may be limited.

Other features that the Commission may consider include the regulatory environment and dynamic characteristics of the market (including growth, innovation and product differentiation). Existing regulation (e.g. retail price regulation) may constrain the exercise of market power in downstream markets or may have an impact on barriers to entry (e.g. regulation of number portability and pre-selection). Markets that are growing rapidly are more likely to see new entry and the erosion of market shares over time. Markets that are characterised by rapid product innovation may see market leaders rapidly replaced.

In examining the effectiveness of competition, the Commission often will be concerned to consider whether those conditions create the potential for:

- the unilateral exercise of market power by a firm in relation to the eligible service; or
- the coordinated exercise of market power among firms in relation to the eligible service.

In these situations, competition is unlikely to be effective. The unilateral exercise of market power requires that a firm have sufficient control of a market, such that it can

profitably 'give less and charge more' without being threatened by competing suppliers. For undifferentiated products, this normally requires that a firm controls a substantial portion of capacity. For differentiated products, brand loyalty and related factors may further inhibit smaller rivals from successfully preventing the unilateral exercise of market power. The coordinated exercise of market power depends on the cooperative or accommodating actions of other market participants. This is normally possible only with a small number of firms operating in the market (i.e. market concentration is high) and the prospect of new entry is low. In this environment, it is easier to reach agreement on the terms of coordination, to signal intentions to other market participants and to monitor behaviour.

Impact of declaration on competition

Once the Commission has formed a view about the effectiveness of competition without declaration it is able to form a view about the competitive impact of declaration. In doing so, it will be conscious of not only considering the future with declaration but also comparing it to the future without declaration. This enables the Commission to form a view about the likelihood that declaration will promote competition in markets for carriage services or services provided by means of carriage services.

That said, the Commission's task is to determine the extent to which declaration is likely to **promote** competition. The question whether competition will **actually** improve or increase will be highly relevant but is not determinative of this issue. The key issue is whether declaration will assist in establishing conditions by which such improvement will be more likely to occur.

Factors relevant to examining the effectiveness of competition without declaration are also likely to be relevant to forming a view about the impact of declaration. Particular factors may include these.

- **Effectiveness of competition in relation to the supply of the eligible service.** Because declaration constrains the conduct of suppliers of the eligible service, it is expected that declaration is more likely to promote

competition in situations where competition for supply of the eligible service is not effective.

- **Supply of the eligible service or a similar service.** Declaration may be expected to have a greater impact on competition in circumstances where the eligible service would not be supplied in the absence of declaration. This is not to suggest, however, that the supply of an eligible service negates the case for declaration; even where the service would be supplied, declaration may promote competition, for example where the supply is at a price significantly above total service long run incremental cost.
- **Importance of the eligible service to downstream competition.** If, for instance, the eligible service is an input that must be used by competitors and it represents a major component of competitors' costs, then declaration may be expected to promote competition to a greater extent than in other circumstances.
- **Sufficiency of existing regulation.** If existing regulation (for example, declaration of a similar service) is sufficient to constrain the conduct of supplier(s) of the eligible service, then declaration may be unlikely to deliver any further benefits to end-users.
- **Competitive dimensions.** Declaration of a service that provides scope for the introduction of new and innovative services may be expected to promote competition to a greater extent than declaration of a service that leads to competitors supplying substantially identical services and competing mainly on price.

In forming a view about the likely impact of declaration on competition, the Commission must consider not only whether declaration would be likely to promote competition but also 'the extent' to which this would be likely to occur.⁶³ This suggests that the Commission ought

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to give greater weight to a situation where the likely effect of declaration on competition is substantial than where the effect is minor.

Competition is a process of rivalry and accordingly, it may be difficult to describe (in qualitative terms) the extent to which declaration would be likely to promote competition through simply examining its impact on that process. In many cases, it will be more instructive to examine the extent to which declaration promotes competition from the perspective of end-users; i.e. to have regard to the likely results from increased competition in terms of price, quality and service diversity. This is consistent with the objective of Part XIC, and ensures that the Commission relates the competitive impact back to the test for declaration (i.e. promoting the long-term interests of end-users).

In determining the extent to which declaration is likely to promote competition, the Act provides that:

... regard must be had to the extent to which the thing will remove obstacles to end-users of listed service gaining access to listed services.⁶⁴

The explanatory memorandum for this provision adds:

... it is intended that particular regard be had to the extent to which the particular thing would enable end-users to gain access to an increased range or choice of services.⁶⁵

Where, for example, declaration is likely to result in increased service diversity, this will enable end-users to gain access to an increased range or choice of services. In such a situation, declaration may be expected to promote competition to a greater extent than where it is likely to lead to an increase in the number of suppliers, but with all suppliers essentially offering the same service at the same price.

64 Subs. 152AB(4).

65 Explanatory memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 — item 6, proposed s. 152AB.

Facilities-based and service-based competition

The nature of competition likely to flow from declaration will be influenced by the scope of the eligible service specification. Where the eligible service is not an end-to-end service (for example, originating and terminating access services), at least some competitors will need to establish their own network elements in order to supply an end-to-end service in competition with the incumbent. On the other hand, where an end-to-end service is declared, then competitors could engage in competition by resupplying the entire service.⁶⁶ For this reason, specification of the eligible service is sometimes seen as involving a choice between facilities-based competition and service-based competition.

Liberalisation in the telecommunications industry under the previous regime was characterised by an emphasis on developing facilities-based competition. In part, this was orchestrated through providing the new carriers (Optus and Vodafone) with more favourable access rights than were available to other service providers.⁶⁷ Nevertheless, a degree of service-based competition was also involved in the sense that the new carriers still used components of the incumbent's services in order to supply customers with an end-to-end service.

When introducing legislation for the current regime, the Government indicated that the reforms would give service providers the freedom to pursue the business strategy they choose and remove the 'blanket distinctions between the access rights of carriers and service providers'.⁶⁸ This reflected its underlying approach of applying competition policy principles to telecommunications regulation.

While facilities-based competition is important in that it may increase the market dimensions on which service providers can compete, competition at the retail service

66 There are various types of resale, ranging from 'simple resale' where the service provider essentially re-bills the network services, to situations where there is significant value adding by the service provider.

67 In this regard, see Austel, *Resale — Report to the Minister for Transport and Communications*, December 1990, pp. 9 and 33.

68 *Hansard* Parliamentary Debates, Senate, Tuesday 25 February 1997 at pp. 894-895.



level is also an important element of the liberalised environment. Furthermore, there are likely to be cases which do not involve a choice between service-based competition and facilities-based competition. For instance, it may be that competition through declaration of an end-to-end service will not only facilitate competition at the retail service level but also facilitate the development of alternative networks through reducing the risks associated with investment.

Accordingly, the Commission does not view facilities-based competition and service-based competition as mutually exclusive. In deciding whether to declare an eligible service, the Commission will adopt a balanced approach where each case will be evaluated on its merits without reference to any presumption for, or against, a particular type of competition.

Achieving any-to-any connectivity

The Act provides a definition as to how this objective is achieved. Subsection 152AB(8) states:

... the objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.

The explanatory memorandum for this provision adds:

... Reference to similar services is intended to enable consideration of the need for any-to-any connectivity between end-users of services which have similar, but not identical, functional characteristics, such as end-users of a fixed voice telephony service and end-users or a mobile voice telephony service, or end-users of internet services which have differing characteristics.⁶⁹

This objective will be relevant only when considering services which involve communications between end-users. When considering other types of services (for example, carriage services which are an input to an end-to-end service or a distributive service such as the carriage of pay television) it will be given 'little, if any, weight'.⁷⁰

In considering whether declaration is likely to achieve this objective, generally the Commission will wish to examine whether any-to-any connectivity will be agreed between service providers in the absence of declaration. This might also involve considering the length of time and costs which may be associated with negotiating any-to-any connectivity arrangements. Where the arrangements are expected to involve negotiations between multiple parties, declaration may enable these arrangements to be settled in a more

69 Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 — item 6, proposed s. 152AB.

70 Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 — item 6, proposed s. 152AB.



timely and efficient manner through application of the standard access obligations.

Achieving any-to-any connectivity may involve costs in terms of investment to enable the connection of calls to and from other networks as well as potential risks to network integrity. These matters will need to be considered in the context of the efficiency objective (i.e. whether declaration will promote the efficient use of infrastructure) and balanced against the likely benefits to end-users in determining whether declaration will, over-all, promote their long-term interests.

Encouraging efficiency

In considering whether declaration will promote the long-term interests of end-users, paragraph 152AB(2)(e) requires the Commission to have regard to the extent to which declaration is likely to encourage the economically efficient use of, and the economically efficient investment in, infrastructure.

In the Commission's view, the phrase 'economically efficient use of, and economically efficient investment in, ... infrastructure' refers to the economic concept of efficiency. The concept of 'efficiency' consists of three components.

- **Productive efficiency.** This is achieved where individual firms produce the goods and services that they offer to consumers at least cost.
- **Allocative efficiency.** This is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs).
- **Dynamic efficiency.** This reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

The ultimate question, in the context of this objective, is the extent to which declaration is likely to **encourage** efficiency. Whether such efficiencies will be improved is highly relevant to, but not determinative of, this issue. The key issue is whether declaration will create an environment whereby the participants have increased incentives to undertake efficient use of, and efficient investment in, infrastructure.

It may not be always possible to promote one component of efficiency without reducing another. For instance, regulatory intervention to promote allocative efficiency may have negative implications for productive and dynamic efficiency.

Competition and efficiency

Reflecting a strong relationship between competition and efficiency, the Commission's analysis of the likely impact of declaration on competition will inform the Commission's analysis of impact on efficiency.

For instance, if the Commission is of the view that supply of the eligible service is not subject to effective competition, then the Commission could conclude that declaration would be likely to result in:

- the eligible service being supplied to service providers at a price which is closer to underlying costs, resulting in a more efficient allocation of resources; and
- prevention of inefficient duplication of infrastructure used to supply the eligible service.

Declaration is, however, likely to have other impacts on efficiency, both positive and negative. For instance, while declaration may promote efficient investment in downstream markets, it may also result in costs as potential access providers comply with the standard access obligations, or discourage efficient investment in infrastructure used to supply the eligible service.

Accordingly, the Commission views the efficiency objective as requiring a specific focus on the likely impact of declaration on efficiency, with a view to examining how this is likely to affect the long-term interests of end-users.

To do this, the Commission's general approach will be to separately analyse the impact of declaration on:

- the economically efficient use of infrastructure used to supply carriage services and services provided by means of carriage services; and

- the economically efficient investment in infrastructure used to supply carriage services and services provided by means of carriage services.

Economically efficient use of infrastructure

Where declaration is likely to promote competition in markets for carriage services or services provided by means of carriage services, then the Commission's competition analysis will generally enable it to form a view about the impact of declaration on allocative efficiency. For instance, if declaration is likely to lead to lower prices for the eligible service, then it will be expected to improve allocative efficiency in the market in which the eligible service is supplied. In the language of paragraph 152AB(2)(e), declaration will be expected to result in the more efficient use of infrastructure used to supply the eligible service.

There are likely to be costs associated with the supply of an eligible service (e.g. configuring the network, or installing systems to provide billing information to access seekers) and accordingly, these costs need to be considered in deciding whether to declare the eligible service.

The Act requires the Commission to consider whether it is 'technically feasible' to supply and charge for the services. In particular, the Commission must have regard to the following matters:

- whether supplying, and charging for, the services is feasible in an engineering sense (i.e. having regard to the technology that is in use or available);
- the costs involved in supplying, and charging for the services, and whether these costs are reasonable; and
- the effects or likely effects that supplying, and charging for, the services would have on the operation or performance of telecommunications networks.

In the declaration context, the Commission interprets this requirement as applying to the eligible services under consideration.

Where the Commission determines that it is 'technically feasible' to supply and charge for the eligible service, and it

is of the view that declaration will promote competition, it will generally consider that declaration is likely to encourage the efficient use of the infrastructure used to supply the service unless this would discourage efficient investment.

Technology in use or available

The Commission must have regard to whether the technology that is in use or available makes it feasible to supply and charge for the eligible service. In many cases, this may be clear, particularly where there is a history of providing third party access. The question may be more difficult where there is no prior third party access, or where the service under consideration differs from that previously supplied.

Where it is not technically possible to supply and charge for the eligible service, the Commission would expect the potential access provider to demonstrate why this is the case. In considering the merits of the access provider's case, the Commission may examine experiences in other jurisdictions, taking account of relevant differences in technology or network configuration, and seek independent expert technical advice. Where the access provider claims that capacity constraints would inhibit its ability to supply and charge for the service, then the Commission may consider whether capacity can be increased.⁷¹

Supply costs

Once a service is declared, those supplying the service (i.e. access providers) are subject to standard access obligations. These obligations impose 'compliance' costs on access providers. For example, the obligation to permit interconnection of networks may involve a cost to the access provider in configuring its network and in developing 'support interfaces' which provide information

71 It should be noted that the Commission may declare a service which is subject to capacity constraints where it is possible for capacity to be increased. Under its arbitration powers, the Commission can require the extension or enhancement of network capability where the access seeker bears the costs — see paragraph 152CQ(1)(f).

to access seekers while maintaining the integrity of the provider's own systems and addressing privacy issues. Accordingly, the Commission is required to consider costs involved in supplying and charging for the services.

In identifying costs involved in supplying and charging for a particular eligible service, the Commission is cognisant that the Part XIC framework enacted by Parliament provides for a staged approach to access regulation. The process commences with declaration. Following declaration, terms and conditions of supply are established, either through commercial negotiation, or through Part XIC processes such as the submission of an access undertaking or the arbitration of an access dispute.

Cost issues are relevant to both the question whether to declare and to the establishment of terms and conditions of supply. However, the fact that Parliament has chosen to separate declaration from determination of the terms and conditions of supply indicates that the evaluation of particular costs (for example, the ongoing costs of supply) should be left for consideration within the context of an undertaking or arbitration. That is, it was not intended that all costs involved in supplying and charging for declared services should be considered at the declaration stage. Rather, at the declaration stage, the Commission should be concerned with the costs flowing directly from the decision to declare; for example, unbundling costs.

Accordingly, in the declaration context, the Commission will take account of the direct costs necessary to comply with the standard access obligations. It will not, however, take account of consequential or indirect costs that the access provider may incur, such as those resulting from increased competition in the markets in which it competes. As with issues about the feasibility of supply, the Commission would expect the potential access provider to provide the Commission with information enabling it to identify (and where appropriate, quantify) the relevant costs. In addition, the Commission may seek to obtain independent expert advice and/ or examine experiences in other jurisdictions.

Once the Commission has identified and, as far as possible, quantified the costs involved in supplying and charging for the eligible service, it is necessary to consider whether they are 'reasonable'. In the Commission's view, 'reasonableness' should be evaluated from a commercial perspective.

The term 'reasonableness' is a relative concept and accordingly, whether expected costs are 'reasonable' will depend on all the circumstances of each particular case.

Based on its experience to date, the Commission suggests the following. Costs are likely to be regarded as reasonable where they are not so high as to be unreasonable. They are likely to be unreasonable if there is no prospect of the costs being recovered (for example, from access seekers as part of the terms and conditions of access). In considering whether there is any prospect of costs being recovered, it may be appropriate to consider the likely demand for the service.

The Commission notes that reasonableness is just one of the objectives to which it must have regard. While highly relevant, a conclusion that the costs involved in supplying and charging for the eligible service are not reasonable does not seem to prevent the Commission declaring the service where it is of the view that there are likely to be (other) countervailing benefits in terms of efficiency and/or competition.

Effect on telecommunications networks

In addition to the costs involved in supplying and charging for the eligible service, there may be spillover costs in terms of network integrity. Accordingly, the Commission is required to consider the effects (or likely effects) of third party access on the operation or performance of telecommunications networks. Again, the Commission would expect the potential access provider to provide information in relation to this matter to the Commission, identifying the spillover costs. In considering the merits of the access provider's case, the Commission may seek independent expert technical advice and also consider options which could minimise those costs.

Economically efficient investment in infrastructure

Efficient infrastructure investment makes an important contribution to the promotion of the long-term interests of end-users. It can lead to more efficient methods of production, fostering increased competition and lower prices, as well as enhancing the level of diversity in the goods and services available to end-users.

Declaration under Part XIC over-rides property rights of network owners which entitle them to exclusive use of their investments. Given the significance of property rights to the efficient functioning of the economy, this has led to suggestions that access regimes should have a limited field of application.⁷² Also, the Australian Competition Tribunal has noted, in considering whether to revoke authorisation for a long-term exclusive dealing arrangement:

... Our treatment of contractual commitments will affect the investment decisions of the future and the reliance that may be placed upon long-term commitments.⁷³

The Commission is cognisant of these concerns and, in deciding whether declaration will promote the long-term interests of end-users, will give particular consideration to the risks to efficient investment flowing from declaration. It may, however, also be relevant to also consider the risks to efficient investment from not declaring. In this regard, the Act requires the Commission to consider whether declaration will encourage economically efficient investment in the infrastructure used to supply carriage services, and services provided by means of carriage services.

In considering likely impacts of declaration on investment, and the extent of those impacts, the Commission is mindful that impacts may differ depending on the type of investment

72 See, for example, the Industry Commission, *Industry Commission Submission to the National Competition Council on the National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act*, January 1997 which suggests that Part IIIA of the Act should apply only to infrastructure with natural monopoly characteristics.

73 *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR ¶41-593 at p. 44, 216.

in question. For instance, the declaration of originating access is likely to affect investment in local loop networks (used to supply the declared service) and in long distance transmission networks (used with the declared service to supply services to end-users). Declaration may reduce the incentives to invest in alternative local loop networks, but may improve incentives to invest in long distance transmission networks.

Accordingly, in examining the likely impacts of declaration on economically efficient investment, and their extent, the Commission will generally examine the likely impact of declaration on economically efficient investment in:

- infrastructure by which the eligible service is supplied; and
- infrastructure by which other carriage services, and services supplied by means of carriage services, are supplied.

Infrastructure used to supply the eligible service

To examine the likely impact of declaration on the economically efficient investment in infrastructure by which the eligible service is supplied, the Commission will consider the impact of declaration on the:

- legitimate commercial interests of the access provider;
- incentives for investment in the existing infrastructure used to supply the eligible service; and
- incentives for investment in new infrastructure which could be used to supply the eligible services.

The legitimate commercial interests of the access provider

The Act requires the Commission to consider the legitimate interests of potential access providers. In this regard, the Commission will be concerned to examine whether access can be provided while maintaining the legitimate commercial interests of the access provider. Where this is not possible, declaration is likely to have an adverse impact

on incentives for economically efficient investment in infrastructure.

The legitimate commercial interests of access providers include their ability to exploit economies of scale and scope.⁷⁴ Economies of scale arise from a production process in which the average (or per unit) cost of production decreases as the firm's output increases. Economies of scope arise from a production process in which it is less costly in total for one firm to produce two (or more) products than it is for two (or more) firms to each produce separate products.

The concept 'legitimate commercial interests' of the access provider has a number of dimensions. For instance, it covers the provider's interest in earning a commercial return on its investment, its interest in maintaining contractual commitments and its interest in using the network for future requirements.

To an extent, the Act protects the access provider's legitimate commercial interests. Paragraph 152AR(4)(b) provides that the access provider is not required to supply the eligible service if to do so would prevent the access provider from obtaining a sufficient amount of the service to meet its reasonably anticipated requirements. In addition, the Commission, through its publication *Access Pricing Principles: Telecommunications – a guide*, has signalled its intent to include a commercial return on investment in arbitrated access prices.

Incentives for investment in existing infrastructure

The Act requires the Commission to consider the impact of declaration on the incentives for investment in 'the infrastructure by which the services are supplied'.⁷⁵ While declaration will not have an impact on the initial investment in the infrastructure, it may distort the access provider's maintenance, improvement and expansion decisions leading to inefficient investment that harms the long-term

74 Paragraph 152AB(6)(b) of the Act.

75 Paragraph 152AB(6)(c) of the Act.

interests of end-users. For instance, if the access price were to be based on a provider's actual costs, then declaration might lead to the access provider over-investing in the existing network in order to raise the access price. In other situations, the access provider might have an incentive to under-invest in order to limit the scope for third party access to its network.

Incentives for investment in new infrastructure

In addition to considering the impact of declaration on incentives for investment in the infrastructure by which the eligible services are supplied, the Commission will also consider the impact of declaration on investment in new infrastructure that could be used to supply the eligible services.

In some instances, economic efficiency may be best served by increasing the use of existing infrastructure to supply the eligible service, with duplication being inefficient and leading to higher costs for end-users. Under such circumstances, inefficient duplication could be avoided if the eligible service were declared.

In other situations, however, declaration could deter efficient investment. Deterring efficient investment could stifle the development of a more diverse range of goods and services, delay the deployment of new technology and prolong inefficient production processes. In a dynamic environment such as telecommunications, this is likely to cause significant harm to end-users.

While it is difficult definitively to distinguish efficient investment from inefficient investment, it is possible to gain insight from the cost structure associated with service delivery⁷⁶ and the innovation benefits likely to flow from additional investment. For instance, if the supply of the

76 In this regard, there is an emerging view that the local loop infrastructure in some areas does not have natural monopoly characteristics. See, for instance, Rosston GL and Teece DJ, Competition and 'Local' Communications: Innovation, Entry and Integration, *Industrial and Corporate Change*, 1995, Vol 4. no. 4, pp. 787-814; Baumol WJ and Sidak JG, *Toward Competition in Local Telephony*, MIT Press, 1994, p. 121; and Oftel, *UK Government Comments on Respondents' Comments to the FCC on the Merger of MCI Communications Corporation and British Telecommunications plc*, <http://www.oftel.gov.uk/mergers/fcc.htm>.

eligible service is characterised by increasing returns to scale then, in the absence of dynamic benefits, duplication may be inefficient (since it would cost less for the market to be served by a single supplier than by multiple suppliers). On the other hand, if scale economies are relatively small and the market demand can accommodate a number of suppliers of the eligible service, then investment by new entrants could be considered efficient.

Where additional investment is likely to be efficient, the Commission would be concerned if declaration were to deter that investment. In this regard, it could be expected that even if an access seeker could use a competitor's network, it might nevertheless construct its own network. This might be done to enable it to differentiate its products from other competitors, to gain greater control over its costs and quality of the end service, or to remove the need for it to provide a competitor with commercially sensitive information.

If, however, new networks used to supply the service will be subject to declaration, then the Commission will need to consider the impact of declaration on efficient investment in those networks. Correct application of the Commission's pricing principles should ensure that the access provider receives a normal commercial return.⁷⁷ Hence, declaration should not distort such investment decisions. Where, however, investors perceive there to be a risk that the access price will inappropriately reduce their revenues, then it is possible for declaration to distort investment incentives. As a consequence, in evaluating possible investment opportunities, investors either reduce their expected cash flows or increase the discount rate. This could discourage investment and in particular, investment that would promote the long-term interests of end-users.

In considering these matters the Commission notes that the exemption process in s. 152AT might be used to reduce this risk. Section 152AT confers power on the Commission, upon application, to make an order exempting a person

77 Australian Competition and Consumer Commission, *Access Pricing Principles: Telecommunications — a guide*, July 1997.

from one or more of the standard access obligations where it is satisfied that doing so will promote the long-term interests of end-users. The order can be unconditional or subject to conditions specified in the order (e.g. an expiry date).

Infrastructure used to supply other services

Declaration may also facilitate efficient investment in markets which were previously 'locked up', and thus promote the long-term interests of end-users. For instance, declaration of originating and terminating access services has facilitated investment in long distance transmission networks. Accordingly, it may be appropriate for the Commission to consider the impact of declaration on investment in infrastructure used to supply other carriage services, or services provided by means of carriage services. This analysis is likely to be informed by the Commission's views about the likely result of declaration on the promotion of competition.

While declaration can encourage efficient investment in infrastructure used to supply other services, it can also have a negative impact on this investment where there is concern that the Commission will declare services supplied using this infrastructure. In the Commission's view, transparency in the declaration process through public hearings and the publication of reasons for decisions should help to minimise this risk by enabling investors to appreciate the situations in which declaration is likely to be appropriate.

Reconsideration of declaration

A foundation principle of competition policy is the need to continually reconsider the case for regulation. This is particularly important in a dynamic environment such as telecommunications. It ensures that the regulation continues to achieve its goals and does not lock the industry into particular technologies or modes of operation that may result in higher costs to market participants and detriment to end-users.

In the context of Part IIIA of the Act, regular review is achieved through requiring each declaration made under that Part to specify an expiry date.⁷⁸ Should access seekers wish the declaration to continue beyond the expiry date, then a new application is required, thus triggering consideration of the relevant declaration criteria.

Part XIC on the other hand, does not provide for any explicit sunseting of declarations. The legislation does, however, confer on the Commission the power to vary or revoke declarations. Revocation or variation cannot occur unless the Commission has held a public inquiry (unless the variation is of a minor nature).⁷⁹ The Commission can revoke or vary a declaration where it is no longer satisfied that the existing declaration is in the long-term interests of end-users.

Recognising the importance of regulatory review, the Commission will consider the continued need for particular declarations. Requests for revocation or variation can be sought by any person at any time. If, and only if, it is considered that a particular declaration may be no longer serving its purpose, the Commission will initiate a public

78 See subs. 44H(8) of the Act.

79 Section 152AO of the Act.



inquiry to consider whether the revocation or variation of the declared service is warranted. At the time of making a decision to declare an eligible service, the Commission may also indicate a proposed date at which reconsideration would be appropriate.

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