

Competition notice issued pursuant to section 151AL of the

*Trade Practices Act 1974 ('the Act')*

**DEFINITIONS**

The following terms used in this Notice have the following meanings:-

- Access Provider Services are Internet backbone services provided by means of high speed broadband telecommunications networks, (comprising points of interconnection in all of the major capital cities of mainland Australia ("nodes"), the links between the nodes and connections to international capacity) which enable the transmission of Internet protocol-based data between local and regional communication networks in Australia.
- Internet Access Providers are carriage service providers which provide Access Provider Services.

**STATEMENT (as required by s.151AL(1)(a))**

1. Telstra Corporation Limited ACN 051 775 556, Principal Place of Business, Level 41, 242 Exhibition Street, Melbourne, Victoria 3000 ('Telstra') has contravened, and is contravening, the competition rule during the periods and in respect of the Internet Access Providers particularised below by charging for Access Provider Services provided to those Internet Access Providers while at the same time not paying for or

otherwise compensating those Internet Access Providers for Access Provider Services it receives from those Internet Access Providers, namely:-

- connect.com.au Pty Ltd - 1 July 1997 to 5 June 1998; and
- Optus Communications Pty Ltd - 1 July 1997 to the present time.

**PARTICULARS (as required by s.151AL(1)(b))**

*Telstra is a carrier*

2. Telstra is and was at all material times a corporation within the meaning of the Act, duly incorporated pursuant to the laws of the Australian Capital Territory.
3. Telstra does and did at all material times hold a carrier licence issued on 1 July 1997 pursuant to s.56(1) of the Telecommunications Act 1997.
4. By reason of the matters set out in paragraphs 2 and 3, Telstra is and was at all material times a 'carrier' as defined in s.151AB of the Act.

*Telecommunications Market: Market for Access Provider Services*

5. By reason of the following matters there is and was at all material times a market in Australia for Access Provider Services ('Access Provider Market'):-

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- (a) The Internet consists of local and regional communication networks in Australia and in other countries which communicate with one another, for the purpose of:-
- i) enabling access by end users to content stored on sites forming part of a network; and
  - ii) enabling communication between end users.
- (b) The individual communication networks in Australia (these being either local or regional), from which end users and content providers access other networks, are operated by Internet Service Providers ('ISPs'). There are between approximately 500 and 800 entities which operate as ISP's in Australia with the entities having the major ISP operations being:-
- i) Telstra;
  - ii) OzEmail Limited;
  - iii) Compuserve International Pty Ltd; and
  - iv) Microplex Pty Ltd.
- (c) The individual communication networks are interconnected by high speed broadband telecommunication networks, also known as 'backbones', which are operated by Internet Access Providers ('IAPs'), mainly using

telecommunication facilities owned by Telstra. The IAPs currently carrying on business in Australia are:-

- i) Telstra;
  - ii) connect.com.au Pty Ltd;
  - iii) OzEmail Limited; and
  - iv) Optus Communications Pty Ltd.
- (d) There is a substantial demand by IAPs for the supply of Access Provider Services by other IAPs and a substantial demand by ISPs for the supply of such Access Provider Services by IAPs.
- (e) There are no services which are reasonably substitutable for, or in close competition with, Access Provider Services supplied by IAPs.
- (f) If an end user contacts his ISP (via "dial up" or permanent connection using a personal computer, modem and the public switched telecommunications network - PSTN) seeking access to a website outside the ISP's local or regional network, the ISP can, in the vast majority of cases, only provide that access by means of Access Provider Services supplied by IAPs.

- (g) Interconnection between different IAPs is essential for end users to obtain complete global access to all content providers and other end users. Hence, such interconnection is fundamental to the effective operation of the Internet.
- (h) The terms and conditions upon which interconnection, and the exchange of Internet protocol-based data, between different IAPs is arranged will also affect the terms and conditions upon which IAPs are able to provide Access Provider Services to ISPs.
6. The Access Provider Services by which the transmission of Internet protocol-based data is effected (as referred to in paragraph 5 above) are carriage services within the meaning of s.151AF(a) of the Act.
7. By reason of the matters set out in paragraphs 5 and 6 above, the Access Provider Market is and was at all material times a telecommunications market as defined in s.151AF of the Act.

*Methods by which Access Provider Services supplied by IAPs are charged*

8. The usual means by which IAPs (other than Telstra) agree to charge and be charged for Access Provider Services to enable access to and transmission of each other's traffic is by way of a reciprocal financial arrangement negotiated with that other IAP.

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A reciprocal financial arrangement is an arrangement between IAPs for charging for Access Provider Services to enable access to and transmission of the other's traffic in one of the following ways:-

- a) 'Sender Keep All' (SKA) where the interconnecting parties agree that exchanged traffic volumes are nearly balanced and it is more cost efficient to exchange traffic at nil cost to either party;
- b) Bilateral Peering where interconnecting parties agree on a price for the exchanged traffic, measure the imbalance in exchanged traffic, and pay for the netted volume; and
- c) Multilateral Peering where interconnecting parties fund the creation of an exchange point, pay their own costs in linking to the point, and exchange traffic on a SKA or Bilateral Peering settlement based arrangement.

9. In respect of:-

- connect.com.au Pty Ltd during the period 1 July 1997 to 5 June 1998,

Telstra charged, and in respect of:-

- Optus Communication Pty Ltd,

Telstra charged and charges, for Access Provider Services provided to the other Internet Access Provider while at the same time not paying for or otherwise compensating that other Internet Access Provider for Access Provider Services it

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received and/or receives from that other Internet Access Provider. Telstra has a settlement credit plan which provides for discounts to IAP's for Internet traffic from Telstra to that IAP but does not provide for any discount or other compensation for Internet traffic from that other IAP to Telstra.

*Telstra has a substantial degree of power in the Access Provider Market*

10. By reason of the matters in paragraphs 11 to 19 below, Telstra has, and has had at all material times, a substantial degree of market power in the Access Provider Market, a telecommunications market.
11. Telstra is the largest IAP in Australia having the approximate share of the measures listed below (Telstra's market share is in brackets):-
  - (a) number of downstream ISPs using Internet backbones in Australia (72%);
  - (b) volume of traffic delivered between IAPs (76%); and
  - (c) total domestic bandwidth capacity comprised by each Internet backbone in Australia (44%).
12. Telstra has an Internet communications network which is substantially larger than those of other IAPs in Australia in terms of:-
  - (a) geographic spread;
  - (b) capacity; and

(c) downstream ISPs, the content they host and the number of end users they serve.

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13. Telstra is the third largest company in Australia overall and the leading telecommunications company in Australia as evidenced by Telstra's:-

(a) vertical integration, operating in all or virtually all telecommunication markets or levels of production; and

(b) scope, offering a full complement of telecommunication products and services.

14. The larger the amount of content, number of end users, and downstream ISPs located on an IAP's backbone communications network:-

(a) the less likely each of its end user customers will generate traffic external to its IAP network; and

(b) the greater the degree to which other IAPs will require access to its network to carry on a viable business.

15. The amount of content, number of end users, and downstream ISPs located on Telstra's backbone communications network is substantially greater than on the networks of other IAPs, which means:-

(a) Telstra has a substantial competitive advantage over other IAPs in Australia through the scale and scope of its Internet operations and its telecommunications operations generally.



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- (b) Telstra is the only IAP which can charge other IAPs for Access Provider Services while not paying or crediting those other IAPs for Access Provider Services supplied to Telstra. (The conduct of Optus Communications Pty Ltd in charging OzEmail Ltd an amount less than 19 cents per megabyte for Access Provider Services during the period 1 January 1998 to the present time does not invalidate the proposition because Optus was providing such services at a loss by reason of Optus acquiring those services from Telstra at 19 cents per megabyte and on-selling those services to OzEmail at the lesser amount.)
- (c) IAPs other than Telstra believe they are unable to force Telstra to pay, or enter into reciprocal financial arrangements for, the supply of Access Provider Services supplied by these other IAPs by refusing to pay for or credit such services because Telstra has more popular Australian content accessible through its backbone network than any other IAP.
- (d) IAPs other than Telstra believe they are unable to provide Access Provider Services unless they are interconnected with Telstra.
16. There are and were at all material times high barriers to enter or expand within the Access Provider Market by reason of the following:-
- (a) the likelihood that Telstra would refuse to pay for, or only agree under regulatory pressure to pay for, the traffic of other IAPs;

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- (b) the high level of sunk and fixed costs necessary to build and/or operate a telecommunications network capable of supplying Access Provider Services;
- and
- (c) economies of scale and scope in the supply of Access Provider Services.
17. At no material time was the conduct of Telstra as a supplier of Access Provider Services in the Access Provider Market constrained, or constrained to any significant extent, by:-
- (a) any competitor or likely competitor in that Access Provider Market; nor
- (b) any person to whom or from whom Telstra supplied or acquired services in that Access Provider Market.
18. Telstra, because of its market power, is able, if it chooses to do so, to charge other IAPs for the supply of Access Provider Services while not paying or otherwise compensating for Access Provider Services supplied by other IAPs.
19. If Telstra did not have a substantial degree of market power in the Access Provider Market, Telstra would either pay for Access Provider Services supplied to it by other IAPs or enter into reciprocal financial arrangements with other IAPs for Access Provider Services supplied to Telstra by those other IAPs.

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*Telstra has taken advantage of its substantial market power in the Access Provider Market*

20. Save as to an agreement with OzEmail Limited made on or about 22 May 1998, and to an agreement with connect.com.au Pty Ltd made on or about 5 June 1998 and notwithstanding Telstra's settlement credit plan referred to in paragraph 9 above, Telstra charges, and has charged at all material times, for Access Provider Services provided to other Internet Access Providers while at the same time not paying for or otherwise compensating other Internet Access Providers for Access Provider Services it receives from other Internet Access Providers ('Conduct').
21. By engaging in the Conduct, as set out in paragraph 20 above, Telstra has in respect of:-
- connect.com.au Pty Ltd during the period from 1 July 1997 to 15 June 1998, taken, and in respect of:-
  - Optus during the period from 1 July 1997 to the present time, taken and is taking, advantage of its substantial degree of market power in the Access Provider Market, in that in the absence of such market power Telstra could not engage in the said Conduct.

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*Telstra engaging in the Conduct has the effect, or likely effect, of substantially lessening, preventing, or hindering competition in the Access Provider Market*

22. The effects or likely effects of the Conduct on competition in the Access Provider Market are:-

- (a) By engaging in the Conduct, Telstra substantially raises the costs of rival IAPs;
- (b) The higher costs of rival IAPs substantially hinders their ability to attract ISPs, and therefore end users and content providers, to their networks, which further limits their ability to generate additional revenue and to compete with Telstra;
- (c) The Conduct threatens the viability of at least some IAPs;
- (d) The higher costs of rival IAPs are reflected in higher prices to ISPs and these higher prices are reflected in higher prices to end users and content providers than would exist in a competitive market; and
- (e) The likelihood of experiencing higher costs for the provision of Access Provider Services in Australia than would exist in a competitive market acts as a substantial disincentive for entry by potential entrants into the Access Provider Market.

23. The effects or likely effects referred to in paragraph 22 above constitute the effect or likely effect of substantially preventing, hindering, or lessening competition in the Access Provider Market.
24. By reason of the matters referred to in paragraphs 1 to 23 above, Telstra did engage and is engaging in anti-competitive conduct within the meaning of section 151AJ(2) of the Act.
25. Accordingly, the Commission's view is that Telstra has contravened, and is contravening, the competition rule in contravention of section 151AK(1) of the Act.

**DURATION OF COMPETITION NOTICE (see s.151AO)**

26. This notice comes into force on Friday, 26 June 1998.
27. This notice remains in force until 25 June 1999.

DATED: Wednesday, 17 June 1998.



Allan Asher  
Acting Chairperson  
Australian Competition and Consumer  
Commission