

**Australian Competition & Consumer Commission**

Our Ref: MT97/16

14 October, 1998

Mr Tony O'Malley
Deputy General Counsel
Telstra
Level 38
242 Exhibition Street
Melbourne VIC 3000

BY HAND

Dear Mr O'Malley

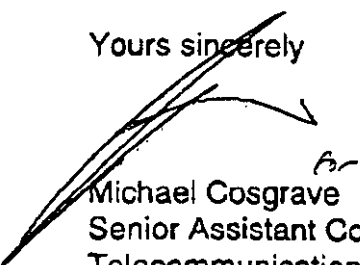
Revocation of Competition Notice and Issue of Further Notice

I wish to advise you that the Australian Competition and Consumer Commission today revoked the Competition Notice dated 10 August 1998 relating to the terms and conditions of Telstra's commercial churn service and issued a further Notice in respect of the terms and conditions of service in effect for the period of 17 July 1997 to 27 September 1998.

Enclosed with this letter is a copy of the Notice of revocation together with a copy of the further Notice.

Should you have any queries regarding the revocation Notice or the further Competition Notice please call Mr John Bradfield on 9290 1846.

Yours sincerely


Michael Cosgrave
Senior Assistant Commissioner
Telecommunications Group

GPO Box 520
Melbourne VIC 3001

Level 35 The Tower
Melbourne Central
360 Elizabeth Street
Melbourne VIC 3000

Ph (03) 9290 1800
Fax (03) 9663 3699



Competition Notice issued pursuant to section 151AL of the
Trade Practices Act 1974 ('the Act')

PREAMBLE

This Notice relates to the Service which came into operation on or about 4 August 1997, the terms and conditions of which were contained in Telstra's Transfer Conditions which were notified to CSPs on or about 17 July 1997 and which remained in effect until on or about 27 September 1998.

DEFINITIONS

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

- "AAPT" means AAPT Limited (ACN 052 082 416)
- "CSP" means a carriage service provider as defined by the *Telecommunications Act 1997* which carries on business in Australia as a supplier of fixed local telephony services
- "end-users" are customers using fixed local telephony services provided by CSPs
- "gaining lessee" means a CSP, other than Telstra, to which a fixed local telephony service of an end-user is to be transferred
- "Macquarie" means Macquarie Corporate Telecommunications Pty Ltd (ACN 082 930 916)
- "Optus" means Optus Communications Pty Limited (ACN 052 833 208) and/or Optus Networks Pty Limited (ACN 008 570 330)

- “PDS” means Partial Debt Severance as defined in Telstra’s Transfer Conditions
- “Switch” means Switch Telecommunications Pty Limited (ACN 073 878 716)
- “TDS” means Total Debt Severance as defined in Telstra’s Transfer Conditions
- “Telstra” means Telstra Corporation Limited (ACN 051 775 556), Principal Place of Business, Level 41, 242 Exhibition Street, Melbourne, Victoria 3000
- “Telstra’s Transfer Conditions” means the terms and conditions of the Service which were notified to CSPs on or about 17 July 1997 and which remained in effect until on or about 27 September 1998
- “the Service” means the Telstra service commonly known as the “Commercial Churn Service”, which came into operation on or about 4 August 1997, by means of which end-users wishing to change suppliers of telephony services were transferred from one CSP to another, the terms and conditions of which are set out in Telstra’s Transfer Conditions
- “transfer” means the transfer of an account or service for telephony services as described in Telstra’s Transfer Conditions.

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

1. Telstra has contravened the competition rule during the periods and in respect of the matters particularised below by:-
 - (a) from on or about 17 July 1997 to on or about 27 September 1998, requiring CSPs, namely, AAPT, Macquarie, Optus and Switch, wishing to be in a position to effect the transfer of end-users from Telstra to that CSP to enter into and continue to be bound by an agreement with Telstra containing terms and conditions, applicable to such transfers, namely clauses 2.6, 3.2, 3.9 and 4.4 of Telstra's Transfer Conditions, which were unreasonable;
 - (b) from on or about 4 August 1997 to on or about 27 September 1998, refusing to process and effect the transfer of end-users from Telstra to another CSP, namely AAPT, Macquarie, Optus and Switch:-
 - (i) unless that CSP abided by terms and conditions applicable to such transfers, namely clauses 2.6, 3.2, 3.9 and 4.4 of Telstra's Transfer Conditions, which were unreasonable; and
 - (ii) in a timely manner in respect of transfers on a TDS basis.

ARTICULARS (as required by s.151AL(1)(b))*Telstra is and was 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.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 Markets**Market for fixed local telephony services*

5. By reason of the following matters there is and was at all material times a market in Australia for fixed local telephony services (the "fixed local telephony market"):-
 - (a) there is and was at all material times a substantial demand in Australia by end-users for fixed local telephony services, being services comprising:-
 - (i) a physical connection from an end-user's telephone or other terminal device to a public switched telephone network;
 - (ii) the provision of a dial tone; and

- (iii) the carriage over that network of communications between one end-user and another end-user located within the same or an adjacent local call charging area;
- (b) fixed local telephony services in Australia are and were at all material times almost entirely provided by means of Telstra's telecommunications network infrastructure and where such services are and were provided by other CSPs including AAPT, Macquarie, Optus and Switch, they are and were predominantly provided by means of fixed local telephony services acquired from Telstra for resale;
- (c) fixed local telephony services supplied within Australia are and have at all material times been supplied for a price which is untimed, in that the price for a fixed local telephone call is not determined by reference to the duration of that call;
- (d) end-users of fixed local telephony services cannot choose their CSPs on a call-by-call basis;
- (e) there are and were no services which are and were reasonably substitutable for, or in close competition with, fixed local telephony services in Australia; and
- (f) significant numbers of telephone customers in Australia willingly subscribe to both fixed local telephony services and mobile telephony services, indicating that they are considered as complementary services rather than as substitutes.

The fixed local telephony services supplied by CSPs to end-users (as referred to in paragraph 5 above) are and were carriage services within the meaning of paragraph 151AF(a) of the Act.

7. By reason of the matters set out in paragraphs 5 and 6 above, the fixed local telephony market is and was at all material times a telecommunications market as defined in s.151AF of the Act.

Market for fixed long distance telephony services

8. By reason of the following matters there is and was at all material times a market in Australia for fixed long distance telephony services (the "fixed long distance telephony market"):-
- (a) there is and was at all material times a substantial demand in Australia by end-users for the supply of fixed long distance (i.e. national and international) telephony services;
 - (b) fixed long distance telephony services in Australia are and were at all material times provided by some CSPs by means of their own infrastructure and by other CSPs including Macquarie and Switch by means of fixed long distance telephony services acquired from other CSPs for resale;
 - (c) fixed long distance telephony services supplied within Australia are and have at all material times been almost entirely supplied for a price which is timed, in that the price for a fixed long distance telephone call is determined by reference to the duration of that call;

- (d) pre-selection and over-ride dial codes for fixed long distance telephony services mean that end-users can choose their CSPs for fixed long distance telephone calls on a call-by-call basis;
 - (e) there are and were no services which are and were reasonably substitutable for, or in close competition with, fixed long distance telephony services in Australia; and
 - (f) significant numbers of telephone customers in Australia willingly subscribe to both fixed long distance telephony services and mobile telephony services, indicating that they are considered as complementary services rather than as substitutes.
9. The fixed long distance telephony services supplied by CSPs (as referred to in paragraph 8 above) are and were carriage services within the meaning of paragraph 151AF(a) of the Act.
10. By reason of the matters set out in paragraphs 8 and 9 above, the fixed long distance telephony market is and was at all material times a telecommunications market as defined in s.151AF of the Act.

The transfer of end-users from one CSP to another CSP

11. At all material times, a CSP, other than Telstra, who wished to arrange for an end-user customer of Telstra to be transferred to the telephony service of that CSP as a customer ("the gaining lessee") could not arrange the transfer without requesting Telstra to process and effect that transfer.
12. At all material times, in order for a CSP other than Telstra to be able to compete effectively in the fixed local telephony market and/or in the fixed long distance telephony market, it was essential for that CSP to be in a position

to be able to arrange the transfer of end-user customers of Telstra to the telephony service of that CSP on reasonable terms.

Telstra's Conduct

13. On about 17 July 1997, Telstra sent CSPs a letter which:
- (a) enclosed a document entitled "*TERMS AND CONDITIONS FOR THE COMMERCIAL CHURN SERVICE OFFERED BY TELSTRA CORPORATION LIMITED*" and which contained Telstra's Transfer Conditions;
 - (b) advised that Telstra's Transfer Conditions would become effective on and from 4 August 1997; and
 - (c) stated that:

"... If you want to receive transfers for Services or Accounts after 4 August 1997 you must complete and return the Election Form (document (iii)) to before 5.00pm on Friday, 1 August 1997.

Your completion and return of the Election Form will be your acceptance of the terms and conditions of the Commercial Churn Service".

14. On or about 1 August 1997, Optus, under protest and/or with reservations, completed the Election Form and returned it to Telstra.
15. On or about 4 August 1997, Switch, under protest and/or with reservations, notified acceptance of Telstra's Transfer Conditions.
16. On or about 5 August 1997, Macquarie, under protest and/or with reservations, completed the Election Form and returned it to Telstra.

17. On or about 11 May 1998, AAPT, under protest and/or with reservations, completed the Election Form and returned it to Telstra.
18. From on or about 17 July 1997 to on or about 27 September 1998, Telstra required CSPs, namely, AAPT, Macquarie, Optus and Switch, wishing to be in a position to effect the transfer of end-users from Telstra to that CSP, to enter into and continue to be bound by Telstra's Transfer Conditions, which contained terms and conditions which were unreasonable in the following respects:-
- (a) the requirement, pursuant to clause 2.6, that in respect of each transfer of an end-user's service or account from Telstra to a CSP on a PDS basis, the CSP is liable for payment of charges incurred by the end-user and not billed by Telstra prior to the date of transfer from Telstra to the CSP;
 - (b) the requirement, pursuant to clause 2.6, that CSPs pay Telstra a fee of \$30.00 for each service of an end-user that is transferred from Telstra to a CSP on a TDS basis, in circumstances where the costs of processing each such transfer request were substantially less than \$30.00 by reason of the fact that the transfer fee included Telstra's costs relating to the closing of an existing end-user account or service, creation (in some cases) of a new Telstra account for the end-user and the processing and issuing of a final bill to that end-user for services supplied up to the date of the transfer;
 - (c) the requirement, pursuant to clause 3.2, that CSPs (in relation to Optus, from 4 August 1997 to 18 April 1998) use a standard transfer authority form provided by Telstra to transfer end-users from Telstra to CSPs, which was unreasonably complex;

- (d) the requirement, pursuant to clause 3.9, that CSPs warrant that all information on the standard transfer authority form is correct; and
- (e) Telstra's entitlement, pursuant to clause 4.4, to reject a transfer and to charge a CSP a fee of \$7.00 each time Telstra rejected a transfer in circumstances where the costs of processing each such rejected transfer were substantially less than \$7.00.

19. From on or about the dates specified below (and in relation to AAPT, from on or about 11 May 1998) to on or about 27 September 1998, Telstra refused to process and effect the transfer of end-users from Telstra to another CSP, namely AAPT, Macquarie, Optus and Switch, unless that CSP abided by Telstra's Transfer Conditions which contained terms and conditions which were unreasonable in the following respects:-

- (a) from 4 August 1997 the requirement, pursuant to clause 2.6, that in respect of each transfer of an end-user's service or account from Telstra to a CSP on a PDS basis, the CSP is liable for payment of charges incurred by the end-user and not billed by Telstra prior to the date of transfer from Telstra to the CSP;
- (b) from on or about 1 October 1997 the requirement, pursuant to clause 2.6, that CSPs pay Telstra a fee of \$30.00 for each service of an end-user that is transferred from Telstra to a CSP on a TDS basis, in circumstances where the costs of processing each such transfer request were substantially less than \$30.00 by reason of the fact that the transfer fee included Telstra's costs relating to the closing of an existing end-user account or service, creation (in some cases) of a new Telstra account for the end-user and the processing and issuing of a

final bill to that end-user for services supplied up to the date of the transfer;

- (c) from 4 August 1997 (in relation to Optus, from 4 August 1997 to 18 April 1998), the requirement, pursuant to clause 3.2, that CSPs use a standard transfer authority form provided by Telstra to transfer end-users from Telstra to CSPs, which was unreasonably complex;
- (d) from 4 August 1997 the requirement, pursuant to clause 3.9, that CSPs warrant that all information on the standard transfer authority form is correct; and
- (e) from 15 October 1997 the requirement, pursuant to clause 4.4, that CSPs paid Telstra a fee of \$7.00 each time Telstra rejected a transfer in circumstances where the costs of processing each such rejected transfer were substantially less than \$7.00,

and from 4 August 1997 Telstra refused to process and effect such transfers in a timely manner in respect of transfers on a TDS basis.

Telstra had a substantial degree of power in the fixed local telephony market

- 20. By reason of the matters in paragraphs 21 to 30 below, Telstra has, and has had at all material times, a substantial degree of market power in the fixed local telephony market, a telecommunications market.
- 21. Telstra owns the infrastructure known as the "Customer Access Network" (CAN), which is the physical infrastructure from an end-user's telephone or other terminal device to a public switched telephone network. The CAN constitutes approximately 99% of the physical infrastructure used by Telstra and other CSPs in providing fixed local telephony services in Australia. The

- remaining infrastructure is constituted principally by the Optus broadband cable network.
22. The approximate market shares of the suppliers of fixed local telephony services in the fixed local telephony market are as follows:-
- (a) Telstra - 99%
 - (b) AAPT, Optus, Macquarie, Switch and other CSPs - 1%.
23. Entry barriers to the fixed local telephony market are high due to the sunk nature of the costs of telephony infrastructure and to the savings which arise from Telstra's economies of scale.
24. Telstra possesses unique information about the identity, the telecommunications usage types and quantities, and the choice of telecommunications supplier, of virtually every person within Australia who acquires telecommunications services.
25. End-users in Australia prefer to deal with a single CSP for both fixed local and fixed long distance telephony services and Telstra is the only or practically the only CSP able to provide both fixed local and fixed long distance telephony services to the overwhelming majority of end-users.
26. A significant number of customers do not accept the inconvenience of two bills for fixed local and fixed long distance telephony charges and will remain customers of Telstra for that reason.
27. Telstra's telecommunications network is substantially larger than those of other CSPs in Australia in terms of:-
- (a) geographic spread;

- (b) capacity; and
 - (c) number of end-users.
28. 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 telecommunications markets or levels of production; and
 - (b) scope, offering a full complement of telecommunications products and services.
29. There is and was at all material times no other CSP in Australia which is and was able to supply as wide a range of telecommunications services as Telstra.
30. At no material time was the conduct of Telstra in the fixed local telephony market constrained, or constrained to any significant extent, by:-
- (a) any competitor or likely competitor in that market; nor by
 - (b) any person to whom Telstra supplied fixed local telephony services.

Telstra has taken advantage of its substantial market power in the fixed local telephony market

31. By engaging in the conduct set out in paragraphs 13 and 18 above ("the Requiring Conduct"), Telstra has at all material times taken advantage of its substantial degree of market power in the fixed local telephony market, in that in the absence of such market power, Telstra could not engage in the said Requiring Conduct.

32. By engaging in the conduct set out in paragraph 19 above ("the Refusing Conduct"), Telstra has at all material times taken advantage of its substantial degree of market power in the fixed local telephony market, in that in the absence of such market power, Telstra could not engage in the said Refusing Conduct.

Telstra engaging in the Requiring Conduct and the Refusing Conduct has had the effect, or likely effect, of substantially lessening, preventing or hindering competition in the fixed local telephony market

33. The effects or likely effects of the Requiring Conduct on competition in the fixed local telephony market were:-

- (a) the costs of CSPs competing with Telstra were substantially increased, thereby substantially hindering the ability of those CSPs to compete with Telstra in the fixed local telephony market;
- (b) the transfer of end-users from Telstra to other CSPs was discouraged thereby substantially hindering the ability of those CSPs to generate additional revenue and to compete with Telstra in the fixed local telephony market; and
- (c) substantially increasing the barrier preventing or discouraging potential competitors and competitors of Telstra from entering into or expanding within the fixed local telephony market.

34. The effects or likely effects set out in paragraph 33 above constituted the effect or likely effect of substantially preventing, hindering or lessening competition in the fixed local telephony market.

- By reason of the matters referred to in paragraphs 2-13, 18, 20-31, 33 and 34 above, Telstra engaged in anti-competitive conduct within the meaning of section 151AJ(2) of the Act.
36. Accordingly, the Commission's view is that Telstra, by the Requiring Conduct, in relation to the fixed local telephony market, has contravened the competition rule in contravention of section 151AK(1) of the Act.
37. The effects or likely effects of the Refusing Conduct on competition in the fixed local telephony market were:-
- (a) the costs of CSPs competing with Telstra were substantially increased, thereby substantially hindering the ability of those CSPs to compete with Telstra in the fixed local telephony market;
 - (b) the transfer of end-users from Telstra to other CSPs was discouraged thereby substantially hindering the ability of those CSPs to generate additional revenue and to compete with Telstra in the fixed local telephony market; and
 - (c) substantially increasing the barrier preventing or discouraging potential competitors and competitors of Telstra from entering into or expanding within the fixed local telephony market.
38. The effects or likely effects set out in paragraph 37 above constituted the effect or likely effect of substantially preventing, hindering or lessening competition in the fixed local telephony market.
39. By reason of the matters referred to in paragraphs 2-12, 19-30, 32, 37 and 38 above, Telstra engaged in anti-competitive conduct within the meaning of section 151AJ(2) of the Act.

Accordingly, the Commission's view is that Telstra, by the Refusing Conduct, in relation to the fixed local telephony market, has contravened the competition rule in contravention of section 151AK(1) of the Act.

Telstra engaging in the Requiring Conduct and the Refusing Conduct has had the effect, or likely effect, of substantially lessening, preventing, or hindering competition in the fixed long distance telephony market

41. The effects or likely effects of the Requiring Conduct on competition in the fixed long distance telephony market were:-
- (a) the costs of CSPs competing with Telstra were substantially increased, thereby substantially hindering the ability of those CSPs to compete with Telstra in the fixed long distance telephony market;
 - (b) the transfer of end-users from Telstra to other CSPs was discouraged thereby substantially hindering the ability of those CSPs to generate additional revenue and to compete with Telstra in the fixed long distance telephony market;
 - (c) substantially increasing the barrier preventing or discouraging potential competitors and competitors of Telstra from entering into or expanding within the fixed long distance telephony market; and
 - (d) the ability of CSPs to effect the transfer of end-users from Telstra to that CSP was diminished, which thereby hindered the ability of that CSP to compete with Telstra in the fixed long distance telephony market, having regard to the significant number of customers using fixed long distance telephony services who prefer to purchase their fixed local telephony services from the same CSP that provides their fixed long distance telephony services.

2. The effects or likely effects set out in paragraph 41 above constituted the effect or likely effect of substantially preventing, hindering or lessening competition in the fixed long distance telephony market.
43. By reason of the matters referred to in paragraphs 2-13, 18, 20-31, 41 and 42 above, Telstra engaged in anti-competitive conduct within the meaning of section 151AJ(2) of the Act.
44. Accordingly, the Commission's view is that Telstra, by the Requiring Conduct, in relation to the fixed long distance telephony market, has contravened the competition rule in contravention of section 151AK(1) of the Act.
45. The effects or likely effects of the Refusing Conduct on competition in the fixed long distance telephony market were:-
- (a) the costs of CSPs competing with Telstra were substantially increased, thereby substantially hindering the ability of those CSPs to compete with Telstra in the fixed long distance telephony market;
 - (b) the transfer of end-users from Telstra to other CSPs was discouraged thereby substantially hindering the ability of those CSPs to generate additional revenue and to compete with Telstra in the fixed long distance telephony market;
 - (c) substantially increasing the barrier preventing or discouraging potential competitors and competitors of Telstra from entering into or expanding within the fixed long distance telephony market; and
 - (d) the ability of CSPs to effect the transfer of end-users from Telstra to that CSP was diminished, which thereby hindered the ability of that

CSP to compete with Telstra in the fixed long distance telephony market, having regard to the significant number of customers using fixed long distance telephony services who prefer to purchase their fixed local telephony services from the same CSP that provides their fixed long distance telephony services.

46. The effects or likely effects set out in paragraph 45 above constituted the effect or likely effect of substantially preventing, hindering or lessening competition in the fixed long distance telephony market.
47. By reason of the matters referred to in paragraphs 2-12, 19-30, 32, 45 and 46 above, Telstra engaged in anti-competitive conduct within the meaning of section 151AJ(2) of the Act.
48. Accordingly, the Commission's view is that Telstra, by the Refusing Conduct, in relation to the fixed long distance telephony market, has contravened the competition rule in contravention of section 151AK(1) of the Act.

DURATION OF COMPETITION NOTICE (see s.151AO)

49. This notice comes into force on Wednesday, 14 October 1998, immediately following the revocation of the Competition Notice dated Monday, 10 August 1998 issued by the Commission in respect of Telstra.
50. This notice remains in force until 13 October 1999.

DATED: Wednesday, 14 October 1998.



Professor Allan Fels
Chairperson
Australian Competition and Consumer
Commission



FILE CREATION REQUEST FORM

New File

New Part

File No	Date	Officer	Branch	X Reference
CE 98/5	1/3/99	Ken Willis	Telco.	

TITLE

Telecommunication Notice Issued Pursuant to
 S. 151AR 14 October 1998 - Commercial
 Churn.

Staff may suggest a file title. Final construction and arrangement is the responsibility of the RMU personnel.

ADDITIONAL KEYWORDS Suggest by project staff

ADDITIONAL KEYWORDS (do not include words which have been used in the file title)