

# GOVERNMENT RESPONSE TO PRODUCTIVITY COMMISSION REPORT ON THE REVIEW OF TELECOMMUNICATIONS COMPETITION REGULATION

## Overview

The Australian telecommunications industry is a key sector of the economy and a major input to all other sectors. It is important that telecommunications competition regulation provides timely, efficient and transparent outcomes. The Government's policy is to introduce measures to deliver these benefits and provide a boost to investment and competition during a period when external factors, such as access to capital, are providing new challenges for the telecommunications industry.

In 1997, the Government introduced open competition into the telecommunications industry. The telecommunications regulatory regime that was introduced in 1997 consists of the *Telecommunications Act 1997* and the telecommunications specific competition provisions in the *Trade Practices Act 1974* (the TPA). The broad objectives of the telecommunications regulatory regime (the regime) are to promote the long-term interests of telecommunications users and to encourage further efficiency and competition in the Australian telecommunications industry. Since 1997, the Government has made a number of amendments to the regime to ensure that consumers continue to enjoy lower prices and improved services from a competitive telecommunications industry.

The telecommunications competition provisions in the TPA are contained in Part XIB (anti-competitive conduct) and Part XIC (access regime). The 1997 legislation provided for a review of the anti-competitive conduct provisions. The Government broadened the scope of this review to cover other aspects of the regime including the telecommunications access regime and associated provisions of the *Telecommunications Act 1997*, to provide for a comprehensive assessment. As requested by the Government, the Productivity Commission (the Commission) has reviewed the regime. The Commission supports the retention of telecommunications competition regulation and has made fifty-eight recommendations to improve its operation. The report was released on 21 September 2001 and is available on the Commission's web site at <http://www.pc.gov.au>.

The Commission made a number of recommendations that the Government is pleased to accept. The recommendations can generally be characterised as moving towards light touch regulation. However, industry developments that have largely emerged since the report was finalised indicate that, to some extent, the industry is undergoing consolidation and that effective competition in the sector is not yet well entrenched. The Government is therefore not prepared to accept all of the Commission's recommendations at this time.

The Government agrees that the telecommunications-specific aspects of the regime need to be retained, particularly given recent market consolidation. The Government also agrees that scope exists for improvements to the operation of the regime. This includes making changes that facilitate efficient investment in infrastructure, provide greater certainty and more timely access to interconnect services, improve the operation of the anti-competitive conduct provisions and provide a more transparent regulatory environment.

The Government has introduced a package of measures in the *Telecommunications Competition Act 2002*, consistent with the direction of existing regulation, that deal with current concerns within the industry. Key measures in the Act include:

- facilitating further investment in the telecommunications infrastructure required for broadband and other key communication services, by enabling potential investors to obtain up-front certainty, through undertakings to the Australian Competition and Consumer Commission (the ACCC) about access prices and terms and conditions that will apply to their future investments;
- providing greater certainty and more timely access for access seekers through strengthening measures with wide application, such as undertakings, removing merits review of ACCC arbitrations, requiring the ACCC to produce model terms and conditions for 'core' telecommunications service, encouraging voluntary undertakings and ensuring the effective operation of the standard access obligations;
- recognising the industry-wide benefits of undertakings by allowing the ACCC to defer consideration of an access dispute in order to consider an access undertaking received by the ACCC that relates to the matter that is subject to the access dispute;
- improving the operation of the anti-competitive conduct regime by enabling the ACCC to issue advisory notices before a competition notice is issued and requiring the ACCC to consult with affected parties before issuing a competition notice; and
- a mechanism to require the preparation of regulatory accounts providing greater transparency of Telstra's wholesale and retail operations, particularly in relation to the core interconnection services provided over Telstra's network.

The above measures, which have been developed in close consultation with key stakeholders, including carriers, service providers and representatives of telecommunications users, following the release of the Commission's report are broadly supported by participants in the telecommunications industry. The Government is confident that this package will sustain the development of competition within the Australian telecommunications industry.

Against this background, the Government's final response to the Commission's recommendations is set out below.

## **Report Recommendation and Response**

### **Anti-competitive conduct**

#### ***Recommendation 5.1***

***The Commission recommends that the anti-competitive provisions of Part XIB of the TPA be retained, subject to the introduction of an appeal mechanism such as that proposed in recommendation 5.2.***

#### **Government response**

The Government agrees with this recommendation except in relation to the proposal to introduce an appeal mechanism (see response to recommendation 5.2). The recent market consolidation that has occurred since the completion of the report provides clear justification for retaining the anti-competitive provisions of Part XIB of the *Trade Practices Act 1974* (the TPA). These provisions are essential as they act as a deterrent against carriers and carriage service providers with substantial market power engaging in conduct to substantially lessen competition.

However, the Government recognises that there is scope to improve the accountability and transparency of the regulatory process. The Government has implemented measures in the *Telecommunications Competition Act 2002* to address industry concerns regarding the lack of certainty as to the circumstances and the process by which a competition notice will be issued. For example, the proposed amendments will enable the ACCC to issue an advisory notice that will outline the action a party should take to ensure that it does not engage, or does not continue to engage, in anti-competitive conduct.

#### ***Recommendation 5.2***

***The Commission recommends that Part XIB of the TPA be amended to allow for appeal against the merits of a competition notice, even after its withdrawal.***

#### **Government response**

The Government does not agree with this recommendation. The Commission's proposal is inconsistent with measures to promote timely action by the ACCC to curtail anti-competitive behaviour. The Government is concerned to avoid introducing regulatory gaming and potential to increase delays in the operation of the regime.

### ***Recommendation 5.3***

***The Commission recommends that Part XIB of the TPA be amended so that a Part B competition notice no longer constitutes prima facie evidence of the matters set out in the notice.***

#### **Government response**

The Government does not agree with this recommendation. The Government considers that the reversal of the onus of proof is necessary, given the extent of information asymmetry that often exists between the ACCC and the carrier or carriage service provider that is being investigated. The Commission's proposal would be likely to delay the ACCC's investigation of anti-competitive conduct and frustrate its ability to prosecute breaches of Part XIB.

### ***Recommendation 5.4***

***The Commission recommends that the ACCC be required to issue a public report for all allegations of anti-competitive conduct that proceed beyond the 'reason to suspect' phase into the investigative phase. Each report should include a justification of the use of Part XIB in preference to other possible regulatory mechanisms such as Part XIC.***

#### **Government response**

The Government does not agree with this recommendation. The Government considers that the publication of all allegations, especially where not proven, has the potential to damage the reputation and consequently the market value of the carrier or carriage service provider concerned.

The Government, however, recognises that there is scope to improve the accountability and transparency of the regulatory process and supports a modified approach (see response to recommendation 5.6).

### ***Recommendation 5.5***

***The Commission recommends that the ACCC be required to develop and publish, after public consultation, guidelines for deciding which regulatory mechanism is most appropriate in particular cases.***

#### **Government response**

The Government agrees with this recommendation. The Government considers that the publication of guidelines by the ACCC will improve the accountability and transparency of the regulatory process. These guidelines will better inform the market by outlining the circumstances in which the ACCC will issue a competition notice as opposed to taking other action under the anti-competitive conduct provisions. The Minister has sought the assistance of the ACCC in implementing this measure on an administrative basis.

### ***Recommendation 5.6***

***The Commission recommends that the ACCC include a much greater range of information about activity under Part XIB in its annual publication on ‘Telecommunications competitive safeguards’ or, at least annually, in some other suitable public document.***

#### **Government response**

The Government agrees with this recommendation. The Government supports the publication of additional information regarding anti-competitive conduct with the intention to improve the accountability and transparency of the regulatory process. The Government will shortly request the ACCC to enhance its reporting to cover this recommendation.

### ***Recommendation 5.7***

***The Commission recommends that Part XIB of the TPA be amended so that damages are not restricted to conduct that occurs while a competition notice is in force and that action for damages is allowed irrespective of whether a competition notice is in force.***

#### **Government response**

The Government does not agree with this recommendation. The Government considers that the restriction on damages reflects the lower threshold in the industry-specific prohibitions in Part XIB and accordingly some restriction is appropriate. The Government will continue to monitor the operation of Part XIB to ensure that it provides timely, efficient and transparent outcomes. Under Part IV of the TPA, a claimant must demonstrate both purpose and effect but under Part XIB the lower threshold of the effects-only test applies.

### ***Recommendation 5.8***

***The Commission recommends that the maximum penalty for delay in providing information under section 155 of the TPA be increased substantially.***

#### **Government response**

The Government agrees with this recommendation in principle. However, the Government considers that it would be more appropriate to consider this matter in the context of the broader review of the TPA.

### ***Recommendation 5.9***

***The Commission recommends that the anti-competitive conduct provisions of Part XIB of the TPA be reviewed within a timeframe of three to five years.***

#### **Government response**

The Government agrees with the recommendation and will conduct a review in 2007. This future review will provide a timely opportunity to reassess the extent to which the telecommunications competition regulation provides timely, efficient and transparent outcomes for all involved, given developments in the market.

### **Information provisions and reporting requirements**

#### ***Recommendation 6.1***

***The Commission recommends that the information provision and reporting requirements of Part XIB of the TPA be reviewed in association with the review of anti-competitive conduct requirements of Part XIB proposed in Recommendation 5.9.***

#### **Government response**

The Government agrees with the recommendation to conduct a review of the information provision and reporting requirements of the regime in conjunction with the review of the anti-competitive conduct provisions (see response to recommendation 5.9). This future review will provide a timely opportunity to reassess the extent to which the regime provides timely, efficient and transparent outcomes for all involved, given developments in the market.

## **Telecommunication access regime and Part IIIA**

### ***Recommendation 8.1***

***The Commission recommends the retention of provisions for a telecommunications-specific access regime. However, its objectives, principles and processes should adopt those in Part IIIA wherever possible.***

#### **Government response**

The Government agrees with this recommendation except in relation to the proposal to align the objectives, principles and processes of the telecommunications-specific access regime with the general access regime. The market consolidation that occurred after the release of the report indicates that competition in the market has not sufficiently developed. It also highlights the importance of retaining an industry-specific regime that contains tailored measures to foster the development of sustainable, effective competition in the telecommunications market.

The Government, however, acknowledges that the medium to long-term objective is to align the industry-specific regime with the general access regime when the requisite competitive conditions exist.

#### **Scope of the access regime**

### ***Recommendation 9.1***

***The Commission recommends that:***

- ***the objects clause in section 152AB(1) of Part XIC of the TPA be changed from the long-term interests of end-users to ‘The object of this Part is to promote economically efficient use of, and investment in, telecommunications services’;***  
***and***
- ***the relevant sections of the Telecommunications Act 1997 be amended so as to adopt the new objects clause in Part XIC.***

#### **Government response**

The Government does not agree with this recommendation. The current objective of the telecommunications access regime is to promote the long-term interests of end users by promoting competition, achieving any-to-any connectivity as well as encouraging economically efficient use of and investment in infrastructure. The Government does not support proposals to exclusively focus on infrastructure at this time, given the current state of competition in the market. Adoption of this proposal could shift the focus to the interests of the carriers, rather than business and residential consumers and deletion of any-to-any connectivity may impact on impending transition from voice to data networks.

The Government recognises there is scope to amend the regime to promote investment and the *Telecommunications Competition Act 2002* contains measures to encourage investment in telecommunications infrastructure, such as enabling the ACCC to grant ex-ante exemptions and undertakings.

### ***Recommendation 9.2***

***The Commission recommends that Part XIC should be amended so that where a non-dominant network sets an ‘unreasonable’ terminating charge, the provider of a declared service can charge a fee to the terminating party for terminating on that party’s network, with that fee subject to arbitration by the ACCC.***

### **Government response**

The Government does not agree with this recommendation. The Commission’s proposal relates to the connection of data networks, including internet service providers, to dominant networks. The proposal shifts the onus to the dominant network provider to demonstrate whether prices are ‘reasonable’ which may distort the operation of the regime. In any case, the issue will be subject to ongoing consideration in the context of future interconnection arrangements to ensure the current regime is suitable for emerging business and technological trends, such as voice to data transition and next generation networks.

### ***Recommendation 9.3***

***The Commission recommends the adoption of stringent new declaration criteria, crafted to achieve the following intention:***

***The ACCC may not declare the telecommunications services of a carrier or carriage service provider unless it is satisfied of all of the following matters:***

- (a) that access (or increased access) to the service would promote a substantial increase in competition in at least one telecommunications service;***
- (b) that there is enduring market power in the service;***
- (c) that the service is of national significance, having regard to:***
  - (i) the consideration that provision of a similar service in a number of smaller areas can be jointly described as a ‘service’;***
  - (ii) the importance of the service to the national economy;***
- (d) that access to the service can be provided without undue risk to human health or safety; and***
- (e) that access (or increased access) to the service would not be contrary to the public interest.***

## **Government response**

The Government does not agree with this recommendation. The Government considers that the narrower criteria would reduce the effectiveness of the regime. The Government's view is that declarations to date have been appropriate for the current stage of the market's development. In cases where markets have developed, the regulator has undertaken assessments and revoked declarations.

### ***Recommendation 9.4***

***The Commission recommends that section 152AB(4) be amended to provide more explicit guidance to the ACCC to the matters to which it should have regard when making an assessment of competition and market power in a declaration inquiry.***

## **Government response**

The Commission's proposal is unnecessary. There is no evidence that the current legislative provisions provide insufficient guidance to the ACCC in exercising its powers relating to the telecommunications access regime.

### ***Recommendation 9.5***

***The Commission recommends that there be scope in Part XIC for the ACCC to issue a binding ruling that the services provided by a prospective investment would not meet the declaration criteria. In that instance, the services concerned would be exempt from declaration.***

***A telecommunications infrastructure provider should have rights of appeal to the Australian Competition Tribunal against a determination by the ACCC.***

***A ruling should apply in perpetuity unless the ACCC could demonstrate that circumstances had materially changed. Such revocation should be appealable to the Australian Competition Tribunal.***

## **Government response**

The Government agrees with the intention of this recommendation and has introduced a package of measures aimed at encouraging further investment in telecommunications infrastructure. The *Telecommunications Competition Act 2002* provides for the extension of existing measures to grant exemptions to services that are not declared or supplied. Decisions pertaining to these proposals are subject to review by the Australian Competition Tribunal.

The Government considers that the adoption of these measures will create a higher degree of certainty for investors in telecommunication facilities, particularly given the large capital costs associated with such investments. The reforms will also contribute to the broader objective of increased competition in the provision of telecommunications infrastructure.

### ***Recommendation 9.6***

***The Commission recommends that, on completion of a declaration or revocation inquiry, the ACCC may use formal price monitoring for a fixed period as an alternative to existing regulatory options.***

#### **Government response**

The Government agrees with the intention of this recommendation. The ACCC's existing powers to undertake price monitoring are sufficient to achieve this objective. The Minister has sought the assistance of the ACCC in implementing this measure on an administrative basis.

### ***Recommendation 9.7***

***The Commission considers that section 152AS(4) and section 152AT(4) should be amended so that the ACCC must grant an exemption to a carrier from declaration unless it is satisfied that the declaration criteria are met for the services subject to the exemption request.***

#### **Government response**

The Government does not agree with this recommendation. The Government considers that the current onus of proof remains appropriate as the carrier seeking exemption should be required to make the case, given the potentially significant effects of granting an exemption on other parties. Further, the *Telecommunications Competition Act 2002* introduces timing measures whereby applications for exemptions are deemed to be accepted if the ACCC has not made a decision within the six-month period.

### ***Recommendation 9.8***

***In addition to the existing revocation mechanisms under section 152AO, the Commission recommends that Part XIC of the TPA should include an explicit provision for sunseting declarations. The maximum life of any given declaration should not exceed five years unless a further inquiry recommends its extension, but there should be scope for earlier sunseting based on:***

- ***A shorter pre-specified period; or***
- ***The achievement of pre-specified observable conditions based on the declaration criteria.***

***Six months prior to the sunsetted expiry of a declaration, the ACCC could seek public comment on whether re-declaration may be required and conduct a new declaration inquiry.***

***If no inquiry takes place or the inquiry concluded against declaration, than at the sunset date, the declaration would automatically lapse.***

### **Government response**

The Government agrees with this recommendation subject to the inclusion of minor modifications. The Commission's proposal will impose an effective discipline on the ACCC to ensure that declarations remain relevant and appropriate to market conditions. However, the proposal may impose a significant burden on the resources of the ACCC, given the large number of declarations deemed in the 1997 legislative reforms. The Government included measures for transitional arrangements in the *Telecommunications Competition Act 2002* to allow the ACCC to manage reviews of existing declarations over a period. Non-Government amendments have also been implemented in the *Telecommunications Competition Act 2002* requiring the ACCC to hold a public inquiry before a declaration expires.

### ***Recommendation 9.9***

***The Commission recommends that where a service has expired or becomes of residual importance, declaration may be revoked by the ACCC without a full public inquiry.***

### **Government response**

Non-Government amendments have been implemented in the *Telecommunications Competition Act 2002* requiring the ACCC to hold a public inquiry before a declaration expires.

## **Telecommunications access: evaluating institutions and processes**

### ***Recommendation 10.1***

***The Commission recommends the retention of one regulator to conduct declaration inquiries and oversee arbitration under Part XIC.***

#### **Government response**

The Government agrees with this recommendation.

### ***Recommendation 10.2***

***The Commission recommends that the ACCC remains the appropriate body to oversee telecommunications-specific competition regulation under Parts XIB and XIC of the TPA.***

#### **Government response**

The Government agrees with this recommendation. There is little evidence that supports one form of regulation over another, however, generic regulators are able to bring advantages such as lower fixed costs, the capacity to deal with converging sectors, while being free from having a vested interest in industry-specific regulation.

### ***Recommendation 10.3***

***The Commission recommends the removal of the discretion for Ministerial pricing determinations under Division 6 of Part XIC of the TPA. If this is not accepted, published reasons for any Ministerial pricing decisions should be required.***

#### **Government response**

The Government does not agree with this recommendation. The Government considers that the Ministerial pricing power is an important reserve power for the Government and a significant regulatory safeguard for end users of telecommunications services.

### ***Recommendation 10.4***

***The Commission recommends the abolition of the Telecommunications Access Forum (TAF).***

#### **Government response**

The Government agrees with this recommendation and has implemented this measure in the *Telecommunications Competition Act 2002*.

### ***Recommendation 10.5***

***The Commission recommends that section 152CPA(3) of Part XIC of the TPA – which does not permit the ACCC to make an interim determination if an access seeker objects to it – be repealed.***

#### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*.

### ***Recommendation 10.6***

***The Commission recommends that section 152CN of Part XIC of the TPA be modified to allow notifications by an access provider or seeker to be withdrawn only with the joint consent of the access provider and seeker.***

#### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*.

### ***Recommendation 10.7***

***The Commission recommends amendment of the appeals process for undertakings (section 152CE of Part XIC of the TPA) so that it mirrors the appeals process for final determinations (section 152DO of Part XIC of the TPA).***

#### **Government response**

The Government has reviewed the operation of merits review mechanisms in Part XIB and XIC of the TPA and the *Telecommunications Competition Act 2002* contains measures to clarify the powers of the Australian Competition Tribunal.

### ***Recommendation 10.8***

***The Commission recommends that there should be the capacity under Part XIC of the TPA for class arbitration for bilateral disputes that have a sufficient degree of commonality.***

#### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*.

### ***Recommendation 10.9***

***The Commission recommends that:***

- 1. The ACCC must make an interim determination within four months of the date of the notification of the dispute; and that section 152CPA(5) of Part XIC of the TPA be amended so that:***
  - (a) interim determinations remain in force for no longer than six months; and***
  - (b) this period can only be extended if a public request stating reasons is agreed to by the relevant Minister.***
- 2. Section 152DO should be amended so that the ACT has a four month target time limit for completion of an appeal of a final determination after lodgement of an appeal. If the tribunal wishes to extend a target limit in a particular case, it should be required to publish notification to that effect in a national newspaper with reasons.***

### **Government response**

The Government has decided to require time limits for decisions by the ACCC (and the Australian Competition Tribunal if there is an appeal against the ACCC decision) on undertakings and exemptions and has implemented these measures in the *Telecommunications Competition Act 2002*. This reflects greater priority of undertakings that have industry wide application compared to arbitrations, which apply bilaterally. The Government considers that the imposition of time limits on individual arbitrations may be inconsistent with this emphasis.

### ***Recommendation 10.10***

***The Commission recommends that the ACCC should exercise its discretion in allowing the arbitrator to use and disseminate to contesting parties in an arbitration relevant material submitted in other telecommunications access arbitrations, subject to the requirement that the ACCC have regard to the material's potential commercial sensitivity.***

### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*.

### ***Recommendation 10.11***

***The Commission recommends that there be provision for the ACCC to publish an indicative price range that reflects outcomes of an interim or final determination, so that other parties are in a better position to negotiate commercially.***

#### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*. In addition, the *Telecommunications Competition Act 2002* contains measures to require that the ACCC produce model terms and conditions for ‘core’ telecommunications services covering:

- Domestic Public Switched Telephone Network (Originating and Terminating) Services;
- Unconditioned Local Loop Service; and
- Local Carriage Service.

### ***Recommendation 10.12***

***The Commission recommends that merit review of final determinations by the Australian Competition Tribunal be retained, but that provision for backdating of an appeal determination should be clarified by cross-referencing to the Commission’s proposed amendment to section 152DNA of Part XIC.***

#### **Government response**

The Government does not agree with this recommendation.

The Government considers that there is a clear need to promote certainty and timeliness of access. This outweighs the risk of regulatory error, particularly given the exhaustive examination of issues in the initial decision making process. The *Telecommunications Competition Act 2002* contains measures to remove merits review by the Australian Competition Tribunal in relation to individual access disputes under Part XIC. However, the Government’s reforms will not affect the ability of a party to seek merits review of decisions of the ACCC in relation to an application for an exemption order or an access undertaking, nor the ability to seek judicial review of a final ACCC determination. The reforms will also preserve rights where an application for appeal has been lodged, or where parties have a right of appeal at the time the reforms are introduced.

### ***Recommendation 10.13***

***The Commission recommends that declarations be subject to a merit appeal process, but the appeal should:***

- ***Be lodged within 21 days after the Commission has made its decision;***
- ***Be limited to four months; and***
- ***Not stay other processes under Part XIC, with the exception of the capacity of the ACCC to make a determination under an arbitration.***

### **Government response**

The Government does not agree with this recommendation. The Commission's proposal would provide a significant opportunity to delay new entrants to the market and to extend the period of uncertainty for smaller carriers.

### ***Recommendation 10.14***

***The Commission recommends that section 152CQ(1)(a) and (b) be amended so that the relevant time for assessing 'reasonably anticipated requirements' is the date at which the access request was made, as determined by the ACCC after consultation with the access seeker and provider.***

### **Government response**

The Government agrees with this recommendation and has implemented this measure in the *Telecommunications Competition Act 2002*.

### ***Recommendation 10.15***

***The Commission recommends that the words 'some or all of the costs' in section 152CQ(1)(f) be amended to 'an unreasonable amount of the costs'. In deciding what was 'unreasonable' the ACCC would consider whether:***

- ***It was inconsistent with the objects of Part XIC;***
- ***It was possible or efficient for the enhancements being sought by the access seeker to be owned by the access seeker;***
- ***Investment in the enhancements (by a party other than the access seeker) is economically efficient; and***
- ***The access provider would not be able to recover the full costs of enhancements it was required to make.***

### **Government response**

The Government agrees with this recommendation and has implemented this measure in the *Telecommunications Competition Act 2002*.

### ***Recommendation 10.16***

***The Commission recommends the repeal of section 152EF(1)(b).***

#### **Government response**

The Government agrees with the intention of this recommendation and has implemented measures in the *Telecommunications Competition Act 2002* to clarify section 152EF(1)(b).

### ***Recommendation 10.17***

***The Commission recommends that:***

- a) The ACCC produce a published method for calculating any backpayment under section 152DNA if Part XIC of the TPA, which should include provision for payment of interest and indicate how the appropriate time period for backpayment should be gauged:***
  - While, as now, limiting backpayment to a date no earlier than the date of notification of the access dispute concerned.***
- b) section 152DNA specify that an access price consistent with the published method should be backdated and that obligations to pay backpayments should not discriminate between access seekers and providers.***

#### **Government response**

The Government agrees with part (a) of the recommendation and the *Telecommunications Competition Act 2002* contains measures to require the ACCC make such guidelines. However, the Government considers that, in relation to part (b), the ACCC already has sufficient discretion on application of backdating and the necessary flexibility to manage this on a case by case basis.

## **Access pricing**

### ***Recommendation 11.1***

*The Commission recommends that a new section be included in Part XIC of the TPA.*

- 1. *The ACCC in seeking to reduce access prices that are inefficiently high, must also have regard to the following principles:***
  - (a) *That regulated prices should:***
    - (i) *be set so as to generate expected revenue across a facility's regulated services that is at least sufficient to meet the efficient long-run costs of providing access to those services;***
    - (ii) *include a return on investment commensurate with the regulatory and commercial risks involved;***
    - (iii) *generate revenue from each service that at least covers the directly attributable, or incremental, costs of providing the service; and***
    - (iv) *reflect any uncompensated costs associated with imposed community service obligations.***
  - (b) *That the access price structure should:***
    - (i) *allow multi-part tariffs and price discrimination when it aids efficiency; and***
    - (ii) *not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.***
  - (c) *That access pricing should provide incentives to reduce costs or otherwise improve productivity.***
- 2. *Where there is a conflict between any pricing principle and the objects clause, (section 152AB(1)), the objects clause has precedence.***

### **Government response**

The Government does not agree with this recommendation. The *Trade Practices Amendment (Telecommunications) Act 2001* requires the ACCC to publish pricing principles at the time it makes a decision on declaration. Furthermore, information relating to pricing is already in the market place for the major declared services. The Government also considers it more appropriate to require the ACCC to publish and have regard to model terms and conditions of access, covering the following 'core' interconnect services:

- Domestic Public Switched Telephone Network (Originating and Terminating) Service;
- Unconditional Local Loop Service;
- Local Carriage Service; and
- Any other declared service specified in the regulations.

The Government is of the view that such disclosure will better inform the market whilst retaining the current philosophy that prices should be established through commercial agreement.

### ***Recommendation 11.2***

***The Commission recommends that the ACCC commence a revocation inquiry for GSM services once the Commission's new declaration criteria are in place. The declaration of CDMA services should be postponed until the completion of the GSM revocation inquiry.***

#### **Government response**

The Government does not agree with this recommendation. The Government has agreed that all existing declarations be reviewed within five years and has implemented this requirement in the *Telecommunications Competition Act 2002*.

### ***Recommendation 11.3***

***The Commission recommends that in its inquiry report into declaration the ACCC indicate the broad pricing method that will apply to a service.***

#### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*.

### ***Recommendation 11.4***

***The Commission recommends that there be public disclosure by the ACCC of the costing methodologies on which arbitrations are based and the justification for the approach adopted. This need not include publication of the prices associated with particular arbitrations or of particular commercial-in-confidence cost parameters.***

#### **Government response**

The Government implemented this recommendation in the *Trade Practices Amendment (Telecommunications) Act 2001*.

### ***Recommendation 11.5***

***While recognising the need to address any consequent social issues, the Commission recommends that the telephone line rental sub-cap that leads to the access deficit be removed.***

#### **Government response**

Following the recent review of the previous price control arrangements, the controls on line rentals have been simplified. Under the revised arrangements (effective from 1 July 2002 to 30 June 2005), price caps have been introduced whereby Telstra has the scope to increase line rentals towards the true cost of providing access, although these increases are constrained by the upper limit imposed by the Government. Telstra will also be able to increase the average price of a basket of business and residential line rentals by up to four per cent each year, in real terms, in order to remove the access deficit over a period of four years.

### **Carrier licence conditions**

#### ***Recommendation 12.1***

***The Commission recommends that the legislative requirement for Industry Development Plans (IDPs) should be repealed. Existing plans should cease.***

#### **Government response**

Non-Government amendments have been implemented in the *Telecommunications Competition Act 2002* retaining the obligation for carriers to lodge IDPs. The Government has introduced a further amendment to allow the Australian Communications Authority (ACA) to exempt certain specified kinds of carriers from the obligation to lodge IDPs to improve the exemption and verification process.

#### ***Recommendation 12.2***

***While there are some inconsistencies between access to facilities under the Telecommunications Act 1997 and Part XIC of the TPA, the Commission recommends the continuation of Parts 3 and 5 of the Telecommunications Act on pragmatic grounds, subject to a re-assessment of their need and scope in 2005.***

#### **Government response**

The Government agrees with the intention of this recommendation but considers it more appropriate for a re-assessment to take place in 2007, in the context of the further review of the competition regulation arrangements for telecommunications.

### ***Recommendation 12.3***

***The Commission recommends that the ACCC monitor whether inefficient access pricing by power utilities to their poles is frustrating the rollout of new broadband networks.***

#### **Government response**

The Government agrees with this recommendation. The Minister has sought the assistance of the ACCC in implementing this measure on an administrative basis.

### ***Recommendation 12.4***

***The Commission recommends that the procedures and obligations under the mandatory network information requirement should be aligned, regardless of the type of information being requested.***

#### **Government response**

The Government agrees with this recommendation and has implemented these measures in the *Telecommunications Competition Act 2002*.

### ***Recommendation 12.5***

***The Commission recommends that the Ministerial pricing power under Part 3 and Part 4 of the Telecommunications Act 1997 be abolished.***

#### **Government response**

The Government does not agree with this recommendation. The Government considers that the Ministerial pricing power is an important reserve power for the Government and a significant regulatory safeguard for end users of telecommunications services.

## **Number portability**

### ***Recommendation 14.1***

***The Commission recommends that the ACA should determine the criteria for when a pre-porting study is required.***

### **Government response**

The Government does not agree with this recommendation. The Australian Communications Industry Forum is currently reviewing an industry code in consultation with the ACCC and the ACA. The Government considers this is consistent with the philosophy of the regime to facilitate industry self-regulation, where possible. The Government also notes that this does not preclude the ACA from later considering determining criteria but is of the strong view that industry processes should be given the opportunity to run their course.

### ***Recommendation 14.2***

***The Commission recommends that timeframes for complex ports be revised after 2002 and that carriers regularly provide the ACA with data on the time taken to process ports so that the ACA can monitor the timeliness of porting processes.***

### **Government response**

The Government agrees with this recommendation. The Minister has sought the assistance of the ACA in implementing this measure on an administrative basis.

### ***Recommendation 14.3***

***The Commission recommends that the relevant test for deciding whether to introduce number portability for a given service is whether the economy-wide benefits to the community of requiring the service outweigh the economy-wide costs. Further, the Commission considers the ACCC should have regard to both the objects clause and the declaration criteria when deciding whether to 'declare' a service portable .***

### **Government response**

The Government does not agree with this recommendation. The Commission's proposal follows on from previous recommendations to amend the object of the regime that have not been accepted by Government (see response to Recommendation 9.1). The current objective of the telecommunications access regime is to promote the long-term interests of end users with regard to promoting competition, achieving any-to-any connectivity as well as encouraging economically efficient use of and investment in infrastructure.

#### ***Recommendation 14.4***

***The Commission recommends that the ACCC inform parties of the pricing principles it is inclined to apply, if required to arbitrate over terms and conditions, at the same time that it informs parties of their obligation to provide portability for a given service.***

#### **Government response**

The Government agrees with this recommendation subject to the inclusion of a minor modification. The Government considers that this proposal should be made consistent, to the extent possible, with the approach on telecommunications access pricing principles. To ensure this degree of consistency, the ACCC is to publish pricing principles, as soon as practicable, and with regard to the technical aspects of the proposed mechanisms to enable porting after a decision to require portability. The ACCC is also to have regard to these principles in settling any dispute. The Government considers that pricing principles will provide guidance to pricing decisions and contribute to consistent and transparent regulatory outcomes over time. The Minister has sought the assistance of the ACCC in implementing this measure on an administrative basis.

#### ***Recommendation 14.5***

***The Commission recommends that any future decision to require portability for a given service, and the associated pricing principles, should be subject to merits review by the Australian Competition Tribunal.***

#### **Government response**

The Government does not agree with this recommendation. The Commission's proposal would provide a significant opportunity to delay new entrants to the market and to extend the period of uncertainty for smaller carriers.

#### **Carrier pre-selection**

#### ***Recommendation 15.1***

***The Commission recommends that the ACCC be responsible for determining which services should be subject to pre-selection requirements, consulting with the ACA on technical matters.***

#### **Government response**

The Government agrees with this recommendation and has implemented these measures in the *Telecommunications Competition Act 2002*.

## ***Recommendation 15.2***

***The Commission recommends that pre-selection as a service be subject to the new declaration criteria and therefore the requirement to provide pre-selection should not be applied to new entrants that do not have market power.***

### **Government response**

The Government does not agree with this recommendation. The Commission's proposal follows on from previous recommendations that have not been accepted by the Government (see response to Recommendation 9.3)

## **Pay TV and regional communications**

### ***Recommendation 17.1***

***The Commission recommends that the ACCC be required to:***

- ***Report publicly and annually to the Government on the state of competition in the pay TV and related telecommunications markets; and***
- ***Investigate and report on instances where it is aware that proposed or new networks are having difficulty accessing content or pay TV services.***

### **Government response**

On 13 November, the ACCC announced that it would accept undertakings from parties to the Foxtel/Optus content sharing agreement, in order to mitigate concerns that it may lead to a substantial lessening of competition in a number of markets.

At the time these arrangements were first announced, the Government asked the ACCC to provide separate advice on the competition implications of emerging industry structures in the subscription broadcasting sector. The ACCC is expected to finalise this advice in the near future. The Government will give close consideration to its findings.

### ***Recommendation 17.2***

***The Commission recommends that the Government signal a clear intent to legislate if there is evidence from the ACCC's reports of a sustained threat to effective competition in either the pay TV or a related telecommunications market as a result of the control of pay TV content.***

### **Government response**

On 13 November, the ACCC announced that it would accept undertakings from parties to the Foxtel/Optus content sharing agreement, in order to mitigate concerns that it may lead to a substantial lessening of competition in a number of markets.

At the time these arrangements were first announced, the Government asked the ACCC to provide separate advice on the competition implications of emerging industry structures in the subscription broadcasting sector. The ACCC is expected to finalise this advice in the near future. The Government will give close consideration to its findings.

## **Universal Service arrangements**

### ***Recommendation 18.1***

***The Commission recommends that the evaluation of the contestability pilot program be based on the criteria of efficiency and competitive neutrality. As part of the evaluation, consideration should be given to the possible advantages and disadvantages, and the practicality, of a market-based tendering process for encouraging efficient competition in the provision of universal service.***

### **Government response**

The Government proposes to consider the practicality of this recommendation in the context of the review process for the 2003-04 subsidy that will consider the full range of feasible options.

### ***Recommendation 18.2***

***The Commission recommends that power to determine the aggregate universal service levy lie with the ACA, rather than the Minister, with provision made for full merit review of determinations by the Australian Competition Tribunal.***

### **Government response**

The Government proposes to consider the practicality of this recommendation in the context of the review process for the 2003-04 subsidy that will consider the full range of feasible options.