

**Productivity Commission Review of the
Radiocommunications Acts and the Role of the Australian
Communications Authority**

**Submission from the Australian Competition and
Consumer Commission**

April 2002

The purpose of this submission is to provide the Australian Competition and Consumer Commission's (ACCC) response to some of the issues raised in the Productivity Commission's Radiocommunications Draft Report.

The role of competition limits

The ACCC notes that recommendation 6.2 of the Draft Report advocates that those parts of sections 60 and 106 of the Radiocommunications Act 1992 ("RCA") that impose competition limits should be repealed. The ACCC does not support this recommendation because it believes there are good policy reasons for maintaining competition limits.

As mentioned in its previous submission to the Productivity Commission the ACCC views its consultative role and its role in applying section 50 of the *Trade Practices Act 1974* ("TPA") as being important in ensuring the promotion of competition in the spectrum allocation process. The ACCC considers that the current consultation process operates efficiently and effectively and that it should continue to be closely consulted by DCITA and the ACA in the same manner in the future. The ACCC believes that this process has performed an important role in informing DCITA's final recommendations on appropriate competition limits to the Minister, who makes the final decision.

As mentioned previously, competition limits act as an important supplement to general powers under the TPA to promote competitive outcomes and the ACCC considers that the current arrangements work well.

On occasion, and where required, competition limits may be employed to assist in controlling market dominance, increasing competition and bringing about pro-competitive spectrum allocations that might not otherwise be achieved under the TPA. Since Section 50 of the TPA requires that the acquisition must not have the effect, or be likely to have the effect, of *substantially lessening competition* in a substantial market for goods or services, competition limits supplement the operation of section 50 by facilitating pro-competitive outcomes. For example, this can arise where it may be desirable to facilitate efficient market entry and the entry of new operators and/or the introduction of new technologies. Hence, competition limits available under the RCA play an important role in providing for enhanced competition.

Given the nature of spectrum as a finite resource and an operational prerequisite, the ACCC considers spectrum to be a natural barrier to market entry. Concentration of ownership of spectrum has considerable potential to encourage anti-competitive behaviour and produce undesirable outcomes. Existing market players may be in a good position and have the incentive to outbid potential new entrants in an auction situation.

The application of competition limits can encourage further competition and ensure that markets are not foreclosed and future competition not prevented or hindered. The ACCC has supported the application of competition limits for a number of auctions (eg. the 3.4GHz and 1800 MHz auctions) and on other occasions, has considered the application of competition limits as not being required (eg. 27GHz band). The ACCC believes that the adoption of competition limits in a number of auctions has achieved the relevant desired effect of increased competition and the entry of new participants in Australian telecommunications markets. An example of this is as a result of the competition limits set for the 3.4 GHz auction. A new competitor in the form of Unwired has entered the market and is intending on

rolling out a network which is expected to provide facilities-based competition to Telstra's local loop.

On occasion, the entry of new market participants may be desirable to address market dominance by a current market participant, facilitate innovation, foster increased choice and diversity and to promote facilities-based competition. It is well established that incumbent suppliers will delay introducing services which threaten their existing market power.

Reliance on section 50 solely is unlikely to provide opportunity for market entry by new operators. The protection of current market power and monopoly rents may provide incentive for incumbents to purchase spectrum even over a more efficient competitor. The importance of facilities-based competition has been recognised as an important policy tool. For example, a recent OECD report concluded that the most fundamental policy available to governments to boost broadband access is infrastructure based competition.¹ Competition limits are a means to facilitate such outcomes.

Application of section 50 by itself is predominantly a corrective measure and not a preventative measure. Should the competition limits be removed, the ACCC considers reliance on section 50 alone could substantially raise the risk of unsatisfactory outcomes.

- It would introduce uncertainty into the auction process as bidders would not know how much spectrum they could acquire without potentially breaching section 50. The ACCC may be required to rely on its section 50 powers, either during the auction process or more likely following the determination of the successful bidders (including powers of authorisation, injunction and divestiture). The threat of ACCC intervention may increase risks for bidders.
- There is the potential for extensive delays to be encountered in the allocation process if the ACCC needs to assess the results of auction processes under section 50. In the event that one player did purchase too much spectrum, action under section 50 may delay the allocation of spectrum licences whilst the ACCC conducts market inquiries and undertakes its analysis. Furthermore, should the ACCC consider the allocation constitutes a breach of section 50 there would likely be a need to conduct the auction a second time.
- Action under section 50 is unlikely to prevent existing market participants from purchasing all of the available spectrum between them during the bidding process, whether by collusion or otherwise. Furthermore, during an incremental bidding process it may be difficult to identify a specific individual transaction/acquisition that resulted in a *substantial* lessening of competition and yet the overall outcome may be undesirable and contrary to the general thrust of section 50.

Therefore, the ACCC supports maintenance of those parts of sections 60 and 106 of the RCA that allow for the imposition of competition limits as they assist the Government in achieving competitive outcomes. In particular they provide a means of preventing one party from becoming dominant and using its position to manipulate prices or to exclude competitors. They also provide opportunities for new operators to enter the telecommunications market and compete with existing operators in relation to choice of products, service, quality and price.

¹ OECD Working Party on Telecommunication and Information Services Policies, *The Development of broadband Access in OECD Countries*, <http://www.oecd.org/pdf/M00020000/M00020255.pdf>.

Rather than advocating the repealing of those parts of section 60 and 106 of the RCA that impose competition limits, the ACCC urges the Productivity Commission to encourage the maintenance of those provisions.

Merger guidelines

The ACCC notes that recommendation 6.4 of the Draft Report advocates that the ACCC consider amending its merger guidelines to address specifically how the acquisition of radiocommunications licences would be addressed under section 50 of the TPA.

The ACCC does not support recommendation 6.4 as its acceptance presumes agreement with draft recommendation 6.2 of the Productivity Commission's draft report advocating that sections 60 and 106 of the RCA (imposing competition limits) should be repealed. As the ACCC does not support recommendation 6.2, it considers it unnecessary to amend the merger guidelines.

In any case, the ACCC considers amending the merger guidelines would serve no practical purpose.

The ACCC does not include advice in its mergers guidelines which is of an industry-specific, or transaction-specific, nature. The ACCC assesses each "merger" on a case by case basis. As noted in the Guidelines, it is not possible to set out a prescriptive response to particular mergers - this requires analysis of the specific market characteristics and their interaction. The purpose of the guidelines is to outline in general the ACCC's approach when considering mergers and acquisitions and the types of information which are relevant. They merely provide summary information to give a range of interested parties (who may come from a wide range of industries and represent varying interest groups) the basic information they may need. Moreover, because they avoid legal language wherever possible there may be some generalisations about the application of the Act. The Guidelines are not meant to be a substitute for professional advice.

Security of tenure – spectrum licences

In its Draft Report the Productivity Commission expresses the view that the current maximum term of 15 years for spectrum licences should not be increased at this stage.

The reason given is that spectrum licence terms were increased from 10 to 15 years in 1997 and that secondary markets in spectrum licences are still relatively immature.

The ACCC supports the Productivity Commission's view and reasoning.