

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

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

December 2001

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

Submission from the Australian Competition and Consumer Commission

The purpose of this submission is to outline the Australian Competition and Consumer Commission's (ACCC) current role in the allocation of spectrum and to express a preliminary view on ensuring competition in the spectrum allocation process into the future. This submission briefly addresses some of the questions raised in the Productivity Commission's Issues Paper. The ACCC will decide whether to make a more detailed submission after considering the Productivity Commission's draft report when it is released.

ACCC's role in the auction process

The ACCC currently performs two functions in relation to spectrum allocations. The first is consultative in that the Department of Communications, Information Technology and the Arts (DCITA) and the Australian Communications Authority (ACA) confer with the ACCC concerning competition limits when spectrum is to be auctioned. The second is the ACCC's role in the application of section 50 of the Trade Practices Act (TPA) to subsequent acquisitions of spectrum licences.

The ACCC's consultative role and its role in applying section 50 of the TPA is important in ensuring the promotion of competition in the spectrum allocation process. The ACCC considers that the current consultation process is operating effectively and that it should continue to be closely consulted by DCITA and the ACA in the same manner in the future.

Competition limits have acted as a supplement to general powers under the TPA to promote competition. The ACCC assesses whether the sale of spectrum might raise issues under section 50 of the TPA prior to considering whether it should express a view on the desirability or otherwise of the application of competition limits to promote competition.

The ACCC, in conjunction with DCITA, consults with industry participants to determine the likely use of spectrum and to gauge market sentiment about whether any potential bidders should be limited in their participation in an auction. The ACCC uses this information, and other information available to it, to determine whether there are any potential concerns pursuant to section 50. The ACCC considers that the current arrangements work well.

The information gathering powers which enable the ACA to gather information on behalf of the ACCC, help to ensure that the ACCC has access to the information it requires to administer its role in the spectrum allocation process.¹

Where the ACCC identifies any potential section 50 concerns, DCITA is advised accordingly. Consideration is then given to whether pursuing action under section 50 is the most efficient and effective approach. If not, the ACCC will suggest competition limits addressing the section 50 concerns to achieve the desired outcome. Ultimately, DCITA makes the final recommendation to the Minister on appropriate competition limits and is under no obligation to recommend the limits suggested by the ACCC.

Is the Radiocommunications Act (RCA) effective in controlling market dominance and increasing 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 outcomes.

The controlling of market dominance and increasing of competition are not explicitly identified as specific objectives of the RCA. Nevertheless, provisions enabling the Minister for Communications, Information Technology and the Arts to limit the amount of spectrum that can be allocated to a person provide the Minister with an important tool for bringing about pro-competitive spectrum allocations that might not otherwise be achieved under the TPA.² These powers apply at the time of allocation only, with subsequent transfers of spectrum or licence being subject to the TPA. As mentioned above, the competition limits act as an important supplement to the general powers under the TPA aimed at promoting competitive outcomes.

As a general rule the ACCC considers the promotion of competition is best dealt with at the level of general trade practices legislation given its principal objective to enhance the welfare of Australians through the promotion of competition and fair trading and providing for consumer protection. 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, in circumstances 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.

It should also be noted that relevant provisions in the RCA are important in having extended the scope of the TPA by deeming the allocation of new spectrum and apparatus licences to be acquisitions for the purposes of section 50 and ss81(1), 88(9), 89(5A) and 90(9) of the TPA.³ These sections of the TPA are also deemed to apply to

¹ See sections 60 and 106 of the Radiocommunications Act 1992 (Cth).

² Ibid.

³ See sections 71A and 106A of the Radiocommunications Act 1992 (Cth).

situations where a third party is authorised to operate a radiocommunications device under spectrum or apparatus licences.⁴

Competition limits have also been adopted to provide certainty for participants during the auction process. Participants can be confident when bidding that the auction process will not be subjected to disruptive action (either during the auction process or following the determination of the successful bidders), which may have been the case if section 50 were relied upon alone. The possibility of injunctive action would not only increase the risks and raise uncertainty for bidders but could result in subsequent delays with the allocation of spectrum.

Furthermore, in a number of cases with the auction of spectrum the Government may wish to pursue pro-competitive outcomes. Reliance on section 50 solely is unlikely to provide opportunity for market entry by new operators. The application of competition limits can encourage further competition and ensure that markets are not foreclosed and future competition not prevented or hindered.

The competition implications are assessed for each separate auction on a case-by-case basis, taking into account the particular characteristics and uses for the spectrum and the relevant market conditions and dynamics. 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 desired effect of increased competition and the entry of new participants in Australian telecommunications markets. For example, 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.

The ACCC supports maintenance of provisions in the RCA which enable the Government to seek to achieve competitive outcomes. In particular it provides a means of preventing one party from becoming dominant and using its position to manipulate prices or to exclude competitors. It also provides opportunities for new operators to enter the telecommunications market and compete with existing operators in relation to choice of products, service, quality and price.

Secondary trading of licences

In general the ACCC supports a system which facilitates the re-allocation of spectrum to new and valued uses and technological developments, and which encourages competition in a market. Accordingly, the ACCC is unlikely to have concerns where secondary trading results in pro-competitive outcomes and the use of spectrum that may not otherwise have occurred. The ACCC has concerns, however, about the effect on competition of acquisitions of spectrum in secondary trading that are not in accord with competition limits set at the time of spectrum allocation and are unlikely to result in pro-competitive outcomes.

⁴ See sections 68A and s114A of Radiocommunications Act 1992 (Cth).

The ACCC considers that section 50 of the TPA does, and should continue to, have an important role to play in ensuring that any secondary trading will not result in anti-competitive outcomes. However there appears to be merit in extending competition limits to secondary trading, particularly where bidders with substantial market power are involved.

Extending competition limits to secondary trading would assist in achieving pro-competitive outcomes through the promotion of facilities based competition.