

**Hutchison Telecommunications
(Australia) Limited**

Productivity Commission

**Review of Telecommunications
Specific Competition Regulation**

7 August 2000

1. Introduction

Hutchison Telecommunications (Australia) Limited (“Hutchison”) is pleased to participate in the Productivity Commission’s Review of Telecommunications Specific Competition Regulation. Hutchison welcomes the Review as a valuable opportunity for an objective review of aspects of the performance of Australia’s regulatory framework against the policy objectives it was designed to meet, including that of encouraging efficient and effective facilities-based competition.

Hutchison considers that its:

- size and positioning in the market;
- large commitment to investment in infrastructure (for example, through spectrum acquisition) and service innovation; and
- focus on commercial, rather than regulatory process-derived outcomes,

places it in a unique position compared with other carriers and enables it to contribute a different perspective to the debate.

1.1 Scope of submission

In Hutchison’s view, much of the substance of the regulatory framework appears generally to operate in a satisfactory fashion although Hutchison’s commercial experience to date has been variable in terms of achieving timely, cost-effective and efficient outcomes.

The experience of three years of more open competition has highlighted certain issues of strategic commercial importance that Hutchison considers should be addressed in any outcomes flowing from this Review. Key developing themes in this context are the timeliness and pricing of access, with a common theme to both being dispute resolution processes.

Hutchison notes that the Commission’s terms of reference are very broad ranging. Hutchison’s approach has been to focus on those issues it considers of prime commercial importance, rather than addressing a broad range of regulatory issues.

Hutchison intends that this first submission will provide an overview of Hutchison’s concerns and that subsequent submissions will be made which address these issues in further detail and seek to identify appropriate regulatory responses or changes that might address those concerns.

1.2 Structure of submission

The structure of this submission is as follows:

- Parts 2 and 3 provide an overview of Hutchison and the services it offers or plans to offer by way of background for the Commission;
- Part 4 considers some of the key market drivers which impact on Hutchison and other mobile network operators; and
- Parts 5 and 6 consider issues of relevance to this Review from Hutchison’s perspective; and

- Part 7 concludes this submission.

2. Company overview

Hutchison has been an active and significant participant in the Australian telecommunications industry for over 10 years, through the provision of paging and messaging services, then through the resale of both C&W Optus Telstra mobile phone services, and now with its own cellular network.

Hutchison is committed to becoming a significant participant in that industry through the provision of competitive and innovative new products and services. Hutchison intends to be a leading provider of quality wirefree services through its investment in specialised networks targeting specific customer groups.

In 1999, Hutchison commenced building a CDMA network in and around the key markets of Sydney and Melbourne to address demand for additional phone services in the home by offering a highly differentiated product. This service, known as “Orange One”, was launched in July 2000. This product enable customers to use the one phone at home at landline rates and away from home at mobile rates, using pioneering LocalZone technology. The development of LocalZone technology is a world first.

Hutchison purchased 1800 MHz spectrum licences in the 2000 spectrum auctions and intends to use these spectrum licences to construct a high-speed network specifically for wirefree data services.

3. Product and Service Overview

3.1. Current Products and Services

To date, the majority of Hutchison products have relied on the coverage of Telstra (fixed line and CDMA mobile) and Optus (GSM mobile) networks based on resale services.

The product exceptions are:

- Orange One – Hutchison’s CDMA network in Sydney and Melbourne only
- Orange Paging

The following table details the products and services currently offered by Hutchison and the underlying infrastructure used for the supply of those products and services:

Product /Service	Infrastructure Basis
Orange One	Hutchison CDMA mobile network infrastructure
Orange paging	Hutchison infrastructure
Orange GSM	Optus GSM mobile network
Orange CDMA	Telstra CDMA mobile network
Orange Long Distance	Telstra fixed network using preselection to Optus (Hutchison is a switchless reseller)
Portable Financial Information Services	Hutchison paging network infrastructure
Call Centres	Hutchison infrastructure
Orange Internet	Dial up access to Hutchison web server in Sydney, Melbourne, Adelaide, Brisbane & Perth

3.2. Planned Developments

Wirefree data services present the next major opportunity for growth in Australian telecommunications, based on the ability to capitalise on the growth in both mobile services and Internet usage. Hutchison's commitment to positioning its business to be a leading provider of products and services in this area is illustrated by its recent acquisition of licences to use 1800 MHz spectrum in Sydney, Melbourne, Brisbane, Adelaide and Perth. The spectrum becomes available in January 2002.

Hutchison plans to build a wirefree network to support advanced data services catering to the data needs of customer groups in the major capital cities of Sydney, Melbourne, Brisbane, Adelaide and Perth. Voice services will also be supported through the network.

Subject to availability of technology to launch an appropriate network, Hutchison expects to launch the 1800 MHz network in the first half of 2002. Hutchison expects its network will initially deliver data at speeds of up to 115 kbps and will enable "always on" connectivity, eliminating the need to dial up services. As more advanced technology becomes available, it is expected that the network will be able to deliver data at speeds of up to 384 kbps.

At high speeds, the 1800 MHz network will not only support communication via phones, but also communication via computers and portable devices like PDAs. It is also likely that an increasing percentage of traffic will flow directly between devices without any human intervention.

4. Key Market Drivers

Competitive Environment

Competition in mobile services is increasing. Hutchison, AAPT and One.Tel are building infrastructure to compete with Telstra, C&W Optus and Vodafone. Telstra launched its national CDMA network in 1999 to replace its analogue network, which will be completely shut down at the end of 2000.

Telstra, C&W Optus and Vodafone operate GSM networks using 900 MHz spectrum and 1800 MHz spectrum. In addition, One.Tel holds 1800 MHz spectrum licences and has commenced development of a GSM network. Hutchison has recently acquired 1800MHz spectrum licences. Telstra and Hutchison are using the 800 MHz spectrum, previously occupied by the analogue network, to operate CDMA networks. AAPT also holds 800 MHz spectrum licences and plans to launch a CDMA network later in 2000.

While all networks currently operating in Australia are primarily voice networks, it is expected that technology will soon be available for high speed data networks using 800MHz and 1800MHz spectrum.

An overview of the 800 MHz, 900 MHz and 1800 MHz spectrum licence allocations (after the auction of 1800MHz licences in first quarter 2000) in Australia's major capital cities is provided in the chart below.

Area	800 MHz (number of 5 MHz paired spectrum bands)	900 MHz (number of 8.3 MHz paired spectrum bands)	1800 MHz (number of 2.5 MHz paired spectrum bands)
Sydney (Pop: 4.3 million*)	Hutchison (2), Telstra (2)	Telstra (1), C&W Optus (1), Vodafone (1)	Telstra (6), C&W Optus (6), Vodafone (6), Hutchison (6), One.Tel (6)
Melbourne (Pop: 3.2 million)	Hutchison (2), Telstra (2)	Telstra (1), C&W Optus (1), Vodafone (1)	Telstra (6), C&W Optus (6), Vodafone (6), Hutchison (6), One.Tel (6)
Brisbane (Pop: 1.8 million)	[AAPT (2)], Telstra (2)	Telstra (1), C&W Optus (1), Vodafone (1)	Telstra (8), C&W Optus (6), Vodafone (6), Hutchison (4), One.Tel (6)
Perth (Pop: 1.2 million)	[AAPT (2)], Telstra (2)	Telstra (1), C&W Optus (1), Vodafone (1)	Telstra (8), C&W Optus (6), Vodafone (6), Hutchison (4), One.Tel (6)
Adelaide (Pop: 1.1 million)	AAPT (2), Telstra (2)	Telstra (1), C&W Optus (1), Vodafone (1)	Telstra (8), C&W Optus (6), Vodafone (6), Hutchison (4), One.Tel (6)

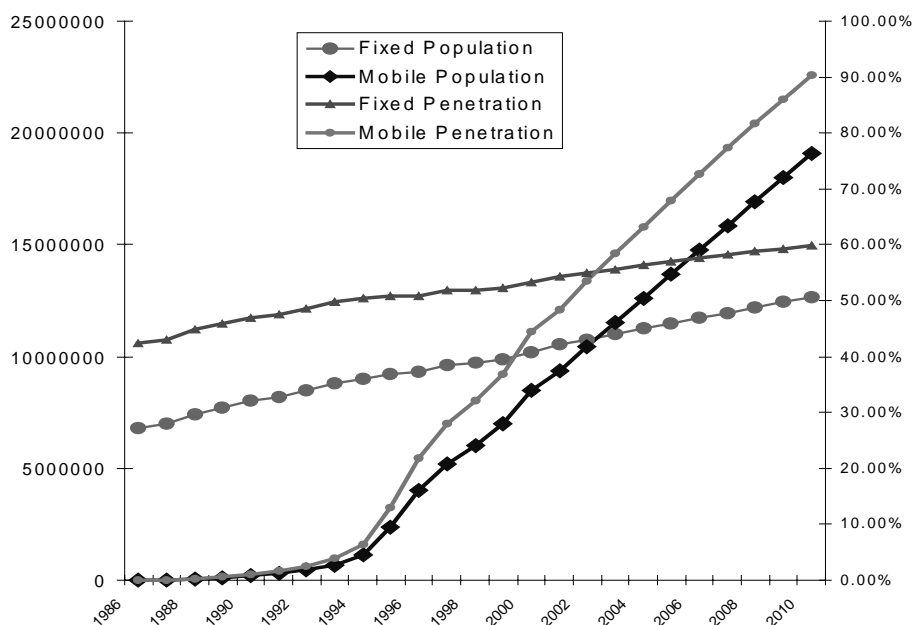
Technology

Telecommunications remains one of the fastest growing industries in Australia with a compound annual growth rate of over 9% from 1993 to 1998. It is characterised by strong growth in Internet and mobile phone services.

Around 21% of Australian households already have Internet access and over 30% of people claim to use the Internet either at home or at work. This places Australia amongst the top 4 nations for take up of Internet services.

In 1999 alone, mobile penetration grew from 31% to 40% resulting in around 7.5 million subscribers at year end.

The potential for wirefree data services to capitalise on the growth in both Internet usage and mobile services has been recognised by the industry in Australia and overseas.



All of the major network operators have either introduced or plan to introduce WAP platforms, which allow mobile phone users to access data contained on Internet sites. Publicly available information, such as that on the Internet, is a major source of content for data services. In addition, numerous commercial operations such as banks, ticketing agencies and information providers are enabling their content to be delivered over wirefree platforms.

Australia's existing wirefree networks are based on GSM and CDMA technologies. Both technologies are being developed to a third generation (3G) standard, which will enable speeds of up to 2 mbps. As part of this transition, GPRS technology is currently being trialed in Australia and overseas and EDGE is expected to be available later in 2000. CDMA2000 phase 1 technology is also in trial overseas.

5. Timeliness of access

The current regulatory regime allows for a new market entrant to pursue one or more of four routes to market entry (the following are not necessarily mutually exclusive):

- mandatory facilities access;
- commercial negotiation of access to services;
- regulated access to services; and
- greenfields network build.

Hutchison has approached its market entry strategy utilising a combination of the above mechanisms (as described in section 3 above). For example, it has:

- sought to co-locate part of its infrastructure build on other carriers' mobile towers and sites;
- negotiated commercial arrangements for roaming in respect of CDMA coverage in those geographic areas outside of its spectrum licences coverage;
- negotiated commercial GSM and CDMA resale agreements;
- negotiated commercial arrangements for originating and terminating access, as well as transmission services; and
- built network infrastructure in those areas covered by its spectrum licences.

The issue

Hutchison's access experience over the last two years as a licensed carrier has varied from being reasonably commercially successful to being refused access. Its experience so far has been that the access outcome is not linked to the identity of the specific relevant access provider; that is, it has had variable success with each of the major players.

Hutchison's experience has further been that the length of time from commencing commercial negotiations to reaching a satisfactory outcome or a refusal to supply a particular service (or, constructively, access to a particular facility) has been considerable. In at least one case, for example, Hutchison has been engaged in negotiations to obtain

access to facilities (which, as the Commission is aware, are subject to a mandatory access regime) for 12 months.

Hutchison's experience should be considered in the context that Hutchison has, as a matter of commercial principle, not sought to engage in formal dispute resolution processes in relation to its concerns or negotiations. Instead, it has entirely focused on resolving issues at the negotiating table or moving away entirely from the negotiation process and endeavouring to resolve the problem unilaterally (for example, by building infrastructure rather than negotiating colocation). Were Hutchison to adopt a different approach and seek arbitrated or litigated outcomes, then the experience of other carriers strongly suggests that these timing issues would be greatly exacerbated.

In Hutchison's view, the length of time to reach negotiated outcomes is the most significant issue for the viability of the business case for market entry. Where the parties fail to reach a negotiated outcome, and Hutchison is compelled to shift to provide a unilateral solution, this further increases the adverse impacts on the relevant business case. If Hutchison were to engage in the existing formal dispute resolution processes, the experience of other carriers strongly suggests that the adverse impacts would not be avoided and may even be increased.

Resolving the issue

The resolution of the issue of gaining timely access could be addressed in a number of ways, including for example:

- in relevant cases, tightening the facilities access regime to include, for example:
 - a concept of constructive refusal to supply;
 - greater clarification of the status of a carrier's own network planning requirements (in terms of how the level of those requirements is assessed, the requirement of reasonableness and the balance between those requirements and an access seeker's requirements in the sense of timing and queuing policy); and
 - a requirement to have available at all times, on request, core information about a carrier's facilities which fall within the facilities access regime (perhaps derived in part from the ACCC's Facilities Access Code requirements);
- where the access issue relates to a service, one of the remedial options for a carrier is to seek declaration of the service. The timeframes allowed by the ACCC in relation to the declaration process, as well as the practice that has developed of the ACCC seeking pro and con views from the Telecommunications Access Forum (the members of which then re-present those views within the declaration inquiry process in any event), combine to unnecessarily lengthen this process. Given that the ACCC now has considerably more experience in the telecommunications sector, it should be in a position to consider the declaration issues on a more timely basis and without duplication of consultation; and
- where arbitration is sought to resolve a failure to achieve a negotiated outcome, the difficulty presents in ensuring that the ACCC conducts the arbitration fairly and with due regard for all the issues. As such, Hutchison recognises that it is difficult to pre-determine timeframes for arbitrations, however it may be that a valid distinction could be drawn between arbitrations as to questions of access *per se* as distinct from

access pricing questions. It may be appropriate to consider more restrictive timetables where the former question is at issue.

Hutchison's view is that it is essential to afford new market entrants a commercially-viable resolution of those issues affecting the viability of the business case for market entry. If such resolution does not lie within the existing regulatory devices of mandatory facilities access, declaration and arbitration, then one logical recourse would appear to be to allow network construction on a more favourable commercial basis than presently exists. This would strongly suggest a significant reform of the current system of powers and immunities and restrictions on network build. Whilst "options" such as network build are theoretically available, quite often this option is not commercially or technologically feasible (that is, it is not simply a case of increasing carriers' powers and immunities).

To an extent, Hutchison accepts that the complexity of the issues (particularly in relation to pricing) means that a realistic view must be taken about the commercial negotiation process and its ability to deliver timely results. However, the difficulties for a market entrant faced with a business case of diminishing viability due to delays in negotiation are significant, including:

- distinguishing between inherent delays in negotiation and intentional obfuscation of the processes (or other indicia of misuse of market power);
- finding the necessary evidentiary material to support an argument for a separate action under Parts IV or XIB of the Trade Practices Act 1974 (Cth)); and
- the length of time involved in, and costs associated with, the process of undertaking regulatory and dispute resolution processes.

6. Pricing dispute resolution

From Hutchison's point of view, there are 2 principal pricing dispute resolution issues at this time:

- more effective dispute resolution processes for pricing disputes in which the industry as a whole has an interest; and
- more effective dispute resolution processes for other pricing disputes.

Common interest disputes

There are a number of arbitrations currently on foot concerning access pricing issues in respect of certain declared services (some of which have been on foot for some time). Hutchison's view is that given:

- the limited resources of the ACCC;
- the commonality of issues concerning the relevant access providers' cost structures; and
- the general commonality of interests in respect of the subject matter of those arbitrations,

significant benefits and cost savings could flow to the industry as a whole, and to smaller carriers in particular, if these pricing issues were able to be resolved in tandem. Hutchison has noted, with great interest, recent press reports as to the utility of adopting a class-action

type system in relation to certain arbitrations under Part XIC of the Trade Practices Act. Hutchison considers that such an approach would warrant further consideration.

Other pricing disputes

Other pricing disputes would include disputes about pricing of access to non-declared services and pricing of access to facilities. A carrier presently has limited remedies:

- pay a price for access which may not be considered commercially feasible;
- have the service declared by the ACCC under Part XIC of the Trade Practices Act. This process involves considerable delay, cost and uncertainty;
- seek ACCC intervention under Parts IV or XIB of the Trade Practices Act (assuming there is sound evidentiary support as to the relevant type of market conduct). This process again involves considerable cost or delay; or
- undertake its own network build, the feasibility of which again raises questions.

In light of the costs and difficulties identified in the last three scenarios, it might be appropriate to consider, for example, whether:

- the tests for declaration of a service optimise the ability to resolve pricing issues (to the extent that such are the result of a market failure);
- the test under Part XIB of the Trade Practices Act should seek to delineate more explicitly those forms of conduct which raise a prima facie case to answer (recognising the difficulty of delineating such at the outset and avoiding an overly restrictive subsequent interpretation); and
- the powers and immunities issues should be revisited to allow carriers to circumvent sub-optimal pricing outcomes.

7. Conclusion

In summary, Hutchison's experience in operating under the current regime has been variable, from each of the perspectives of gaining access *per se* and negotiating commercially viable pricing outcomes. Hutchison's policy of avoiding the current statutory dispute resolution mechanisms where possible has been a consequence of its appreciation of the costs and delay of such mechanisms, in part evidenced by the current state of arbitrations and experience under Parts IV and XIB of the Trade Practices Act.

Hutchison's view over the longer term, however, is that the access issues in particular will only increase in number and importance. Consequently, the failures of the current regulated dispute resolution mechanisms will take on a similarly increasing importance and effect on competition in Australia.

In addressing the access and dispute resolution issues, Hutchison is concerned that the Commission neither:

- abandon the broad thrust of the framework currently in place; nor
- relax the key platforms affecting access issues.

Instead, Hutchison would prefer to see targeted measures to address the issues raised here, as well as obtaining a commitment to undertake a further similar review of the regulatory framework in another three years' time. At that point, it would be expected that the greater maturity of the industry and competition, as well as the ability to undertake more meaningful modelling of competitive outcomes, would lead more readily to the identification of an appropriate future regulatory environment.

Hutchison therefore urges the Commission to give particular consideration to these aspects of the regulatory regime and looks forward to addressing the issues and possible responses in further detail with the Commission over the coming months.