

Australian Competition and Consumer Commission

**Submission to
Productivity Commission Inquiry
on
Cost Recovery**

30 November 2000

Cost Recovery

Introduction

The Australian Competition and Consumer Commission (ACCC) submits this paper to the Productivity Commission Inquiry into cost recovery arrangements of Commonwealth government regulatory, administrative and information agencies – including fees charged under the *Trade Practices Act 1974* (TPA).

1. Current cost recovery arrangements

Fees and charges

Attachment A outlines the current fees and charges imposed by the ACCC, including the legal authority for these fees and charges and the amount of costs recovered during the last financial year.

For the last fiscal year, the amount of funds generated through fees and charges (excluding penalties and costs awarded by the courts and funds provided by other government agencies for work the ACCC performed at their request) was \$1,226,877, or approximately two per cent of the total ACCC budget. Of this amount, \$682,018 or 1% of total ACCC budget is retained by the ACCC, while the remaining amount is paid into the consolidated revenue fund.

Telecommunications levy

The recovery of costs for the ACCC's telecommunications functions differs from the fees and charges allowed by TPA.

Part 3 Division 3 of the *Telecommunications Act 1997* and Part 3 of the *Telecommunications (Carrier Licence Charges Act) 1997* requires carriers to pay an annual charge determined by the Australian Communications Authority (ACA). The total annual charge for all carriers must not exceed the sum of a number of things listed in subsection 15(1) of the *Telecommunications (Carrier Licence Charges Act) 1997*. One component is the amount determined by the ACCC to be the proportion of the ACCC's costs for the immediately preceding financial year that is attributable to the ACCC's telecommunications functions. Broadly, each carrier pays an annual licence charge that is the same proportion of the total annual charge as that carriers eligible revenue as a proportion of the total eligible revenue for all carriers.

The annual licence charges are paid into the consolidated revenue fund. The mechanism allows the government to collect from a section of industry (the carriers) sufficient money to cover the total cost of performing the ACCC's telecommunications functions. These costs are calculated in accordance with accrual accounting principles.

The ACCC understands that the Government chose to recover the costs of regulating the telecommunications industry direct from industry because regulation was seen as a general benefit to industry. It is noted that this method of general recovery co-exists with the fees and charges levied on particular industry participants for the provision of services by the ACCC. For instance, the fee for the notification of an access dispute is \$2,750.

The total value of the ACCC portion of the levy for 1999/2000 is \$3,990,833.

Basis for fees and charges and identification of the beneficiaries

The following table sets out the five categories listed in Attached A. The second column describes the basis for the charges. The third column describes the beneficiaries of each of these categories.

<i>Function</i>	<i>Basis for fees and charges</i>	<i>Beneficiaries</i>
Arbitration functions	Based on lowest expected cost of the function.	Parties subject to the arbitration activity.
Charges for the provision of a discretionary service eg providing a speaker or providing copies of published material	Based on costs of providing goods and services – refer “guidelines currently used” below.	Parties requesting the goods and services.
Fees payable for application or notices	Based on lowest expected cost of the function.	Parties lodging the application or notice but also the public generally.
Fees payable for various applications under Part X	Based on lowest expected cost of the function.	Predominantly parties lodging the application but also the public generally.
Fees for obtaining copies of documents etc.	Based on lowest expected cost of the function.	Parties requesting the copies.

Fees for services are an efficient method of recovering costs where the beneficiaries of regulation can be easily identified. If the beneficiaries are a specific section of consumers, it may be efficient to charge the suppliers who pass the costs on to the consumers. Alternatively, if the beneficiaries are consumers generally, it may be more efficient to raise the revenue through existing taxes and fund the regulator from consolidated revenue.

There is a continuum between services that benefit the public and those where the benefit is private. As will be seen from the above table, the functions to which fees and charges apply all have a significant private element. Although there is an element of public benefit in the ACCC assessing authorisation applications to ensure the public detriment does not outweigh the public benefit, there is also a significant private benefit in that authorisation protects the applicant from prosecution for authorised conduct.

There are no charges imposed in relation to Commission functions that have a predominantly public benefit, such as declaration of eligible telecommunications services under Part XIC. As noted in Section 2 below, there are also no charges in relation to the assessment of undertakings under Part IIIA or XIC. Both are examples of functions with a mixed private and public benefit.

While many of the ACCC's activities generate both public and private benefits, differentiating between the two is a highly subjective area. While it is difficult to be precise in quantifying the two elements, reasonable approximations can be based on such criteria as:

- the extent to which individuals can be excluded from a good or service for which they have not paid;
- the extent to which charging will influence demand for a good or service;
- the extent to which a mandatory service confers direct benefits with respect to marketability, reduced liability through the mitigation of risks that would otherwise be created, or a levelling of the 'playing field'.

Impact of current charges

There is a risk that small third parties may be discouraged from notifying a dispute because of the increase in their operating costs from paying flat fees for notification and arbitration of a dispute. The ACCC is not aware that these disincentive effects are significant.

Since the other fees and charges imposed by the ACCC are set at the minimum expected cost of performing the service they are not very large and in many instances do not cover the ACCC's costs of performing the function. It is therefore unlikely that these fees and charges would have an adverse impact on the parties paying the charge or on economic activity generally.

Since the telecommunications levy varies with the carrier's revenue, the charges would not pose a barrier to small participants seeking to enter the market. It is important in this instance, however, that the complete class of carriers is identified for charging the levy.

There is no quantitative evidence that the introduction of charges since 1993 has had an impact on the demand for services and products of the ACCC. There are anecdotal observations that the quality of authorisations and notifications improved after the introduction of a fee.

Costing Issues

The fees and charges set out in the Act and Regulations are based on the lowest expected cost of performing the service. To that extent they do not reflect actual costs. None of these fees have been increased since their insertion into the legislation.

The telecommunications levy recovers all operating costs including: salaries, administration costs, rents and depreciation. Capital is not recovered as this is not classified as cost, instead the ACCC recovers the depreciation.

For functions incurring a discretionary charge, the ACCC engaged KPMG to conduct a pricing review and propose a pricing model. A copy of the KPMG review is attached.

This model is used in conjunction with the Department of Finance and Administration handbook on running costs arrangements.

Accrual accounting has improved the ability of the ACCC to identify and measure costs.

2. Potential changes to the current cost recovery arrangements

Are there other functions that cost recovery could apply to? What are the implementation issues associated with these options?

1 Fees under Part IIIA

While the ACCC's costs related to telecommunications access functions are recovered via the carrier licensing arrangements in the telecommunications arena, there is no similar mechanism to recover such costs under Part IIIA of the TPA.

In relation to regulatory functions under Parts IIIA and XIC of the TPA, the ACCC can charge a fee for registration of an access contract and conduct of an arbitration. Both these functions have a significant element of private benefit. The ACCC cannot charge a fee for conducting a declaration inquiry (Part XIC only) or the assessment of an undertaking. While these functions have a more public character, they also provide a private benefit of certainty to the access provider. It would be inappropriate if the fee for assessment of an undertaking was seen as a disincentive to lodging an undertaking.

It would also be inappropriate if access undertakings lodged with the ACCC attracted a fee but declaration applications lodged with the National Competition Council did not. Such a situation could distort a service provider's decision whether to lodge an undertaking or risk its services being declared.

In imposing access undertaking lodgement fees it would be appropriate to distinguish between access undertakings that are in accordance with an access code and those that are not. The assessment of undertakings in accordance with an access code is a relatively minor function and should attract a lesser charge compared to the assessment of an undertaking that is not in accordance with an access code. The initial assessment of an access code is however a large task and should also attract a fee.

2. Regulation of electricity and gas transmission businesses

The option of an industry levy to recover the ACCC's costs as regulator of gas and electricity transmission businesses (for instance one based on transported volumes) has been rejected because it is likely that it would be constitutionally invalid. This arises because the ACCC is not the electricity and gas transmission regulator in all States, and therefore an industry levy, which would be a form of excise, would apply in some states and not others. Section 51(ii) of the Constitution gives the Commonwealth the power to make laws with respect to taxation, provided that they do not discriminate between States or parts of States.

Another option is for the ACCC to impose fees for service on gas and electricity transmission businesses regulated by it. Again, the constitution (section 99) would prevent imposition of a fee by a Commonwealth law in a manner that gives preference to a State or part of a State. It may be possible, if the fee was imposed by a State law that it would not be a preference contrary to section 99 of the Constitution. Although as noted below it is difficult to design a fee that would not be found to be a tax with certainty.

While a fee for service may be constitutionally valid, there are also the following limitations:

- fees could not recover all of the ACCC's costs (such as costs associated with developmental or policy work);
- it is difficult to design a fee so that it isn't declared a tax. The exact line between a fee and a tax remains uncertain even after the Monarch Airlines case (refer below);
- a fee may impose a larger burden on owners of small transmission gas pipelines or electricity networks than a levy based on throughput; and
- there may be a conflict in imposing fees on the ACCC's electricity and gas regulatory work and not other areas, eg airports and other services covered by Part IIIA.

Further, the ACCC would need statutory authority in order to be able to levy fees for performing its statutory functions. The Commission's power to regulate gas and electricity transmission businesses arises from different sections of Part IIIA of the TPA. For regulating gas transmission businesses the power arises from s.44ZZM of the TPA and the gas code. For regulating electricity transmission businesses the power arises from s.44ZZA and the national electricity code. It is not clear whether these sections of the TPA would allow the Commission to charge fees for performing functions conferred upon it.

3. Prices surveillance/ monitoring work

The ACCC has no capacity to recover costs of assessing price notifications under the *Prices Surveillance Act 1983*. This is arguably a function that can be characterised as having a public benefit. On the one hand, price notifications represent a private benefit to the notifier (declared person), in that price rises for notified goods and services require approval by the ACCC under section 22. On the other hand, goods and services are only notified if there is a public interest in 'regulating' the price, usually because supply is controlled by a firm with monopoly characteristics.

Could charges be imposed differently

Most of the administrative costs involved in processing applications or conducting arbitrations and conferences are the same regardless of the content of the application. Some of the processes are set down in the TPA, particularly the public register process and some decision making processes. However, the assessment of applications may result in different degrees of research, consultation and analysis. The complexity of the

market, the number of market players and in the case of adjudication matters the issues associated with balancing the public benefit/anti-competitive effect will impact on the costs of the case.

Up-front assessment of the amount of effort and associated costs to adjudicate an application could be difficult as often it is not until some analysis is performed that the real extent of the matter becomes apparent. Charging could be calculated on an hourly basis at the end of the process but other jurisdictions have found the preference is for a fixed fee rather than an hourly rate (eg Competition Bureau, Canada). Also there is an issue of timing of a fee after the event: should it be before or after the Commission decision? As well, systems would have to be introduced to collect the fee if the applicant failed to pay it after a decision was made.

Another alternative could be to base the fees on the value of the transactions in the application. A similar alternative could be to base the fee as a percentage of the turnover of the organisations in the application. Both these alternatives have problems; one being that the size of the transaction or business activity may bear no relationship with the costs of dealing with the application or notification.

Recent High Court decisions distinguishing taxes from fees and charges

There are constitutional limitations upon the recovery of costs through the imposition of fees and charges. Essentially, there must be a nexus between the cost of providing the service and fee or charge imposed. The recent cases of *Airservices Australia v Canadian Airlines International Ltd*, *Airservices Australia v Monarch Airlines Ltd*, and *Airservices Australia v Polaris Holdings Company*¹ appear to indicate that the High Court may interpret this requirement with some flexibility.

Those cases confirm that fees for services must be in respect of services and that their relationship with costs is an important, but not the exclusive factor in their characterisation as fees for services. In those cases, the court held that it was possible to consider the cost of processing not merely the particular application, but the cost across a group of users of the service. The court also held that a profit component did not necessarily prevent the charges from being characterised as fees for services.

However, the facts of the cases in question were that the fees were imposed by a public authority which has been charged to deliver services on a commercial basis. Consideration should be given to the application of these provisions to organisations such as the Commission that are independent statutory authorities with no commercial focus.

Conclusion

The above paragraphs raise the difficulties in distinguishing between public benefit and private benefit in areas of work associated with access regulation functions. The focus of these paragraphs are the gas and electricity industries that are currently undergoing deregulation. They are contrasted with the levy system imposed on the Telecommunications industry.

¹ 167 ALR 392

In addition to the difficulties of identifying the public and private beneficiaries other constraints impact on the ability to recover costs of the access functions. These are due to the limitations imposed by the constitution and the need for statutory authority to levy fees on the gas and electricity industries. Thus, the fees that are required by law to be charge are minimal and are below the costs of performing the access functions.

3. Impact of changes in technology

The ACCC addresses its strategy for online service delivery in its Online Action Plan which is available at http://www.accc.gov.au/resources/action_plan.htm.

Public Registers

Already ten sets of contemporary public registers material (statutory and voluntary) are available free of charge on the Internet. Should someone require a copy of part of a public register over the counter, a charge for photocopying is incurred in accordance with the regulations. Whatever way one looks at it transaction costs are incurred in accessing information from a public register, online or on paper

There are costs to the ACCC in making that information available via the Internet and these costs are considerable. Presently, no charge is made for extracting a copy of a public register document via the Internet. Any decision to charge for this material via the Internet would need to ensure that it would not hinder access to this information. Public register material is essential for showing accountability, transparency and predictability in the ACCC's decision-making. To recover technology costs equivalent to the type currently being recovered for paper-based transactions could probably be achieved in a cost effective way once systems are set up. However, the current paper-based system allows for discretion in charging where the person would be disadvantage by the charge (eg students). An electronic system, such as the Internet, makes it difficult for such discretion to be made.

Public register material that is not of a contemporary nature and thus not available on the Internet can now be made available on CD Rom or e-mail. There are consumable and processing costs associated with the transference of the material into digital form, the production of the CD Rom and postage. A charge for this material would be similar to a charge for paper copies to prevent excessive requests. The KMPG pricing model is used to calculate this charge.

Applications and Notifications

The ACCC can envisage a time when most applications for authorisation, notification, registration of a conference agreement etc. could occur via electronic lodgement over the Internet. To enable this to occur security and accessibility issues would need to be resolved first. Along with the electronic lodgement would be the electronic payment and receipting of fees and charges.

The benefits to the public from electronic lodgement and payment would arise from time saving and reduced costs of consumables (eg paper and postage). The public

would have extra time for preparing the application and responding to submissions of other parties by reducing the time needed for postage.

The greatest concerns of the public would be in the areas of privacy and security of the document and payment. To ensure that the application in its entirety could not be changed in any way and that unauthorised parties are prevented from accessing the material would be of particular concern to the individual and to the ACCC.

Publications

Free publications are available on the Internet. Free publications are those which the ACCC consider are of benefit to the public generally eg consumers or large groups of people such as small business. Some free publications are also offered where the ACCC has received specific funding from Government for information programs in a particular area such as 'country of origin'. Publications that are sold are ordered at the moment in the traditional way but could be ordered and paid for directly over the Internet in the future. Currently, the amount charged for publications is calculated to cover some of the publishing costs. In the future the charge could also include the costs of making the publication available electronically.

Technology Issues Generally

One of the biggest issues and costs associated with Internet delivery of material whether it be public registers, educative information, submissions etc. is the increase in quality control processes. Due to the immediate nature of the Internet any material posted to it can be instantly accessed by a wide range of people, many for whom the material was not intended. Should this cost be born by the public generally or by those who request the information?

Other costs include acquisition of hardware, software and skills (whether inhouse or outsourced), the continual maintenance of the site including security and the collection of money (such as via a bureau service).

The nature of the world wide web is sharing of information and with the concept of sharing is the notion of freeness. However, where practicable, the basic principles of cost recovery should still apply.

TRADE PRACTICES ACT TABLE OF FEES AND CHARGES

Arbitration functions

Notification of access dispute

	<i>Reg.</i>	<i>Description</i>	<i>Fee \$</i>	<i>1999/00 \$</i>	<i>CRF/ ACCC</i>
Section 44S	Reg 6C (2)	Notification of access dispute	2,750	35,750	CRF
Section 152CM	Reg 28T(2)	Notification of access dispute	2,750		CRF

Costs of an access arbitration

	<i>Reg.</i>	<i>Description</i>	<i>Fee \$</i>	<i>1999/00 \$</i>	<i>CRF/ ACCC</i>
Pt IIIA - Section 44ZN	Reg 6F(a)(i)	Pre-hearing fee – if an access dispute is in respect of a variation of an existing determination relating to access by the third party, or	2,170 incl gst	2,000	CRF
	Reg 6F(a)(ii)	Pre-hearing fee – in any other case and	10,850 incl gst	30,000	CRF
	Reg 6F(b)	A hearing fee for each day, or part of a day, of the arbitration hearing	4,340 incl gst	4,000	CRF
Pt XIC - Section 152DM					
	Reg 28W(2)(a) (i)	Pre-hearing fee if the access dispute is about a variation of an existing determination about access by the access seeker	2,170 incl gst	14,000	CRF
	Reg 28W(2)(a) (ii)	Pre-hearing fee for costs in conducting an arbitration of an access dispute	10,850 incl gst	80,000	CRF
	Reg 28W(2)(b)	A hearing fee for each day, or part of a day, of the arbitration hearing	4,340 incl gst	0	CRF

Charges by the Commission for provision of a discretionary service such – for example providing a speaker or providing copies of published material

Section 171A

<i>Section</i>	<i>Description</i>	<i>Fee \$</i>	<i>1999/00 \$</i>	<i>CRF/ ACCC</i>
171A(1)	Conducting workshops and seminars and training or supplying a person with material published by the Commission in the course of carrying out its functions or exercising its powers - refer to Reg 28A(1)	amount or rate determined by the Commission	519,613	ACCC
171A(3)	Providing a speaker or information for a workshop/seminar arranged by, or providing information to be included in publications produced by, someone other than the Commission or developing codes of practice – refer to Reg 28A(2)	“	162,405	ACCC

Revenue raised from these charges is retained by the ACCC in accordance with an agreement under section 31 of the *Financial Management and Accountability Act 1997*.

Fees payable to Commission for Applications or notices

Section 172(1)(d)

<i>Reg</i>	<i>Description</i>	<i>Fee \$</i>	<i>1999/00 \$</i>	<i>CRF/ ACCC</i>
28(4): Sch 1A: items 1-5A	Application for an authorisation under s88 of anti-competitive conduct other than the acquisition of share or assets in accordance with sections 50 and 50A.	7,500	172,500	CRF
28(7): Sch 1B: items 1-5A	Additional applications for authorisation under sub-section 88 relating to an earlier application for an authorisation referred to above attracts a concessional fee	1,500		CRF
28(4): Sch 1A: item 6	Application for an authorisation under s88 of the Act of the acquisition of share or assets in accordance with sections 50 and 50A.	15,000		CRF
28(4): Sch 1A: item 7	Notification of exclusive dealing under sub-section 93(1) other than conduct referred to in subsections 47(6) or (7), or paragraphs 47(8)(c) or (9)(d) (a) if the conduct is of a kind referred to in sub-section 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a),(b) or (c), of the Act	2,500	198,350	CRF
28(4): Sch 1A: item 8	Notification under sub-section 93(1) of exclusive dealing conduct referred to in subsections 47(6) or (7), or paragraphs 47(8)(c) or (9)(d) by: (i) a natural person or proprietary company; (ii) in any other case.	(i) 100 (ii) 1,000		CRF
28(7): Sch 1B: item 6	An additional notification of exclusive dealing related to an earlier notification referred to immediately above attracts a concessional fee	500		CRF
28(7): Sch 1B: item 7	An additional notification of exclusive dealing lodged by a person other than a natural person or a proprietary company and related to an earlier notification referred to immediately above attracts a concessional fee	200		CRF
Reg 6G(2)	Registration of a contract under Pt IIIA - section 44ZW that	5,425 incl gst		CRF

	provides for access to a declared service			
28(2B)	An application under s151AT for an exemption order from a Part XIB competition notice	7,500		CRF
Reg 28X (3)	An application under Pt XIC section 152ED for registration of agreements for access	5,425 incl gst		CRF

Fees payable for various applications under Part X – International Liner Cargo Shipping

Section 10.90

<i>Reg 31: Sch 2 item</i>	<i>Description</i>	<i>Fee \$</i>	<i>1999/00 \$</i>	<i>CRF/ ACCC</i>
<i>Reg 31: Sch 2 item 1</i>	Application for a copy of a part of an entry in a register or a part of a conference agreement file	30		CRF
<i>Reg 31: Sch 2 item 2</i>	Application for a copy of the whole of an entry in a register or the whole of a conference agreement file	60		CRF
<i>Reg 31: Sch 2 item 3</i>	Application for provisional registration of a conference agreement	360		CRF
<i>Reg 31: Sch 2 item 4</i>	Application for final registration of a conference agreement	210		CRF
<i>Reg 31: Sch 2 item 5</i>	Application for registration of ocean carrier's agent or a change of agent, or a change of agent's details	50		CRF

Fees for obtaining copies of documents etc

Various sections of the Act require the Commission to hold certain information or create a public register. Persons may be entitled to obtain copies of that information ¹		<i>Description</i>	<i>Fee \$</i>	<i>1999/00 \$</i>	<i>CRF/ ACCC</i>
	Reg 28 (1)-(2C)	fee for obtaining a copy of a document	1 per page	8,259	CRF
	Reg 28 (2)-(2C)	fee for obtaining a certified copy of a document for the purposes of	10 plus \$1 per page		ACCC
Various sections of the Act require the Commission to hold certain information or create a public register. Persons may be entitled to obtain certified copies of that information [See also footnote 1].					

¹ Documents held by the Commission under the following sections may be copied:

- s44Q – register of Pt IIIA effective access regimes and declaration Ministerial decisions (refer to Reg 6H)
- s44ZW – register of Pt IIIA registered access agreements (refer to Reg 6H)
- s44ZZC – register of Pt IIIA access undertakings and codes (refer to Reg 6H)
- s44ZZL – register of Pt IIIA arbitration determinations (refer to Reg 6H)
- s151AR – register of competition notices
- s151BH – register of exemption (from competition notice) orders
- s152BQ – tariff information held by the Commission
- s151BR – tariff filing directions under Part XIB
- s152AQ – register of declared services under Part XIC
- s152BR – register of telecommunications access codes made under Part XIC
- s152CC – register of Part XIC access undertakings accepted
- s152CJ – register of Part XIC ministerial pricing determinations
- s152EA – register of Part XIC arbitration determinations
- s152AD – register of access registered Part XIC agreements
- s165 – register of authorisations and notifications