

Consumers' telecommunications network

Representing the Interests of Residential Consumers

Competition Policy Review

The Productivity Commission has released a draft report of its review of telecommunications-specific telecommunications regulation.

The review, to which CTN contributed a submission last year, includes a comprehensive survey of the current state of the telecommunications industry. The draft report is a mine of detailed and useful information for Australian consumers. It covers pricing regulation principles, actual call cost comparisons, details of infrastructure roll out, the progress of mobile number portability, the range of services and service providers, and the activities of the Australian Competition and Consumer Commission in attempting to ensure that competition develops in telecommunications networks.

There are two main ways that competition in telecommunications can be regulated. One is by issuing a 'competition notice' to constrain anti-competitive conduct by a dominant market player. The other is by 'declaration' of services. Declarations compel the owner of telecommunications infrastructure to make it available to its competitors.

The Productivity Commission has found that so far, despite a range of regulatory and self-regulatory initiatives, the current arrangements have deficiencies. These include:

- The declaration criteria are vague and provide excessive discretion to the regulator;
- Processes for determining conditions for access are slow and inefficient, reflecting the failure of undertakings as a mechanism and the predominance of lengthy bilateral arbitration's between conflicting parties;
- The risk of reduced investment in core telecommunications infrastructure, with long run consequences for consumers and for Australia's overall economic efficiency;
- The lack of legislated pricing principles to guide access seekers, providers and regulators;
- The failure of co-regulation in the access regime – through the Telecommunications; Access Forum (TAF) to achieve results, and
- Some inconsistency with the generic national access regime.

For residential consumers, some of these deficiencies are obvious. There is very little real competition in the local loop. Most of us have only one choice of provider for the copper wire to our homes – Telstra. There is only one other serious option – C&W Optus – which is not available in all areas. For people wanting to get high speed internet connections such as ADSL the lack of competition may be the cause of the limited availability and connection delays experienced by some consumers.

CTN welcomes the information provided by the Productivity Commission and in many respects tends to agree with its diagnosis. However, we would be cautious about some of the Commission's draft recommendations for reform.

The Productivity Commission has suggested, for example, that the principle of protecting the 'long term interests of end users' that must be considered by regulators be replaced with a more general objects clause:

"to enhance economic efficiency by promoting efficient use of and investment in telecommunications."

CTN views with concern this apparent dilution of commitment to protection of consumer interests.

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Representing the Interests of Residential Consumers

Cr Mike Woods
Presiding Commissioner, Productivity Commission
Locked Bag 2 Collins St East
Melbourne VIC 8003

16 May 2001

Dear Commissioner Woods,

Telecommunications Competition Regulation – Draft Report

Thank you for offering CTN the opportunity to comment on your draft report. As you may be aware, we represent the interests of residential consumers of telecommunications. We are a non-profit national network of community groups and individuals. Our members include individuals and groups representing Aboriginal and ethnic communities, older Australians, people with disabilities and people who live in rural and remote areas. Collectively we represent the full range of residential consumer interests. Our volunteer management and consumer representatives are supported by a small secretariat employing four people, funded by a grant from the Department of Communications, Information Technology and the Arts.

We are closely engaged with the telecommunications industry and the government in the development and implementation of telecommunications policy. We have historically had a close association with Telstra in its consumer consultative processes. We are active on the Board of the Australian Communications Industry Forum (ACIF) and many of its working committees, developing self-regulatory codes and standards. We are also active in a number of consultative forums conducted by the Australian Communications Authority (ACA).

Through our close engagement with industry and government organisations, we have negotiated over consumer issues connected to the implementation of privatisation, competition and deregulation policies. In these processes, we have maintained our particular interests in universal service, the standard telecommunications service, the customer service guarantee and disability entitlements.

CTN welcomes the information provided by the Productivity Commission and in many respects tends to agree with its diagnosis. However, we would be cautious about some of the Commission's draft recommendations for reform.

Our particular concerns for residential consumers are:

- The principle of the Long Term Interests of End-users
- The price of access for household fixed lines
- Promoting choice and variety of services delivered via the local loop

We note that in the Minister's speech to the ATUG conference on 9 May, he said:
"Self-regulation has achieved much... there is still a requirement for a strong access regime...
It is not the job of government to criticise people for legitimately using their legal rights but rather the job of government to protect the long term interests of end users."

We welcome this indication of the Government's policy direction and eagerly await the response to the Besley report. We might also add that we greatly appreciate the Customer Service Guarantee for voice-grade fixed lines and urge the Government to extend this form of regulatory protection to residential consumers of data services.

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Our comments on specific recommendations follow:

Draft recommendations

Draft recommendation 5.1

The Commission recommends that the anti-competitive conduct provisions of Part XIB of the *Trade Practices Act 1974* (TPA) be repealed. [chapter 5, page 5.42]

Comment: We do not believe that this would benefit residential consumers.

Draft recommendation 8.1

The Commission recommends that the objects clause in s. 152AB(l) of Part XIC of the TPA be broadened from the long-term interests of end-users (LTIE) to the following:

The object of this Part is to enhance overall economic efficiency by promoting efficient use of, and investment in, telecommunications services. [chapter 8, page 8.7]

Comment: We view with great concern the proposed removal of the objective of serving the long-term interests of end-users. A policy of economic efficiency without a specific objective that is inclusive of the needs of residential consumers may lead to the introduction of policies that do not ensure that smaller customers get access to affordable services. Economic efficiency is not necessarily the same as overall social benefit.

Draft recommendation 8.2

The Commission recommends that s. 152CR of Part XIC and s. 3, s. 389, s. 384(5) and s. 485(5) of the *Telecommunications Act 1997* be amended so that references to the LTIE test are to the broader objects clause in Part XLC of the TPA. [chapter 8, page 8.7]

Comment: Consistency in approach is desirable. However, we would prefer the broader objects to retain the concept of the long term interests of end users and that this principle be applied in all relevant decisionmaking.

Draft recommendation 8.3

The Commission recommends that for a telecommunications service to be declared it must meet all of the following criteria:

- (a) the telecommunications service is of significance to the national economy and
 - 1) for a service used for originating and terminating calls, there are substantial entry barriers to new entrants arising from network effects or large sunk costs; or

- 2) for a service not used for originating and terminating calls, entry to the market of a second provider of the service would not be economically feasible;
 - (b) no substitute service is available under reasonable conditions that could be used by an access seeker;
 - (c) competition in downstream markets is insufficient to prevent the provider of the service from exercising substantial market power;
 - (d) addressing the denial of access, or the terms and conditions of access, to the service concerned is likely to improve economic efficiency significantly; and
 - (e) access (or increased access) to the service would not be contrary to the public interest.
- [chapter 8, page 8.24]

Comment: Declaration, in principle, is a desirable mechanism to enable competition in service provision to occur without costly and unnecessary duplication of infrastructure. We agree that such a power should be exercised with caution to avoid causing a disincentive to invest. However, many residential consumers are not, individually, economically attractive enough to reasonably expect to be able to afford, or to justify the cost of, infrastructure duplication, and so rely on declaration as a way of achieving competitive supply of services to the household.

Our experience in industry self-regulatory forums is that there are substantial competitive impediments to voluntary co-operation between networks to bring competitive supply of services to households and that without the use of a declaration power residential consumers would be unlikely to experience the benefits of competition.

We have no objection to the proposed criteria but would be concerned if the application of the ‘significance to the national economy’ criteria did not include consideration of benefits to residential consumers.

Draft recommendation 8.4

In addition to the existing revocation mechanism under s. 152A0, the Commission recommends that Part XIC of the TPA should include an explicit provision for sunseting declarations, with a reasonable sunset period to be set at the time of declaration. [chapter 8, page 8.31]

Comment: We have no objection to this recommendation provided that the ‘sunset’ provision does not in itself become a trigger for unnecessary litigation.

Draft recommendation 8.5

The Commission recommends that where a service has expired or is of residual importance, declaration may be revoked by the ACCC without a full public inquiry. [chapter 8, page 8.31]

Comment: We have no objection to this recommendation.

Draft recommendation 9.1

The Commission recommends the retention of provisions for a telecommunications-specific access regime. However, it should be governed by objectives and principles convergent with those of Part IIIA. [chapter 9, page 9.10]

Comment: We have no objection to this, bearing in mind our comments in relation to the principles that should be applied and the need to include the interests of residential consumers in those principles.

Draft recommendation 9.2

The Commission recommends that the ACCC remains the appropriate body to oversee telecommunications-specific competition regulation. [chapter 9, page 9.12]

Comment: We agree with this recommendation. However, we would welcome more efficient regulatory and consultative processes for co-operation between the ACCC and other regulatory agencies such as the ACA, the Department, Fair Trading regulators complaints handling agencies.

Draft recommendation 9.3

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. [chapter 9, page 9.16]

Comment: We do not believe that residential consumers would benefit from the removal of the discretion. We agree that the publication of reasons for decisions should be required.

Draft recommendation 9.4

The Commission is inclined to recommend the abolition of the Telecommunications Access Forum, but invites comments on its possible future value. [chapter 9, page 9.18]

Comment: We do not believe that the TAF has been effective.

Draft recommendation 9.5

The Commission recommends that s. 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. [chapter 9, page 9.20]

Comment: We have no objection to this recommendation.

Draft recommendation 9.6

The Commission recommends that s. 152CN(l) 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. [chapter 9, page 9.22]

Comment: We have no comment.

Draft recommendation 9.7

The Commission recommends that there should be the capacity for a group of access seekers to lodge a joint notification of dispute and proceed to class arbitration rather than a series of bilateral negotiations. [chapter 9, page 9.29]

Comment: We have no objection to this recommendation.

Draft recommendation 9.8

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 it have regard to the material's potential commercial sensitivity. [chapter 9, page 9.33]

Comment: We have no objection to this recommendation.

Draft recommendation 9.9

The Commission recommends that merit appeals not be extended to declarations or interim determinations, with the exception of the case where the ACCC rejects a declaration and a party wishes to contest that rejection. [chapter 9, page 9.39]

Comment: We have no objection to this recommendation.

Draft recommendation 9.10

The Commission recommends that:

- the ACCC produce a published method for calculating any backpayment under s. 152DNA of Part MC of the TPA, which should include the provision for payment of interest and indicate how the appropriate time period for backpayment should be gauged; and
- s. 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. [chapter 9, page 9.45]

Comment: We have no comment.

Draft recommendation 10.1

The Commission recommends that the following principles be legislated for telecommunications. Access prices should:

- generate revenue across a facility's regulated services as a whole that is at least sufficient to meet the efficient long-run costs of providing access to these services, including a return on investment commensurate with the risks involved;
- not be so far above costs as to detract significantly from efficient use of services and investment in related markets;
- encourage multi-part tariffs and allow price discrimination when it aids efficiency; and
- not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, unless the cost of providing access to other operators is higher. [chapter 10, pages 10.23—4]

Comment: We have no objection to this recommendation.

Draft recommendation 10.2

The Commission recommends that the retail price controls that lead to the access deficit be removed. [chapter 10, page 10.37]

Comment: We strongly disagree with this recommendation. We are not convinced that the 'access deficit' exists. We note that the telecommunications industry is strong, growing and profitable. We believe that without price controls (and recently, even despite price controls) the cost of residential household access has increased. In view of the growing diversity of products and services available for or with local access, we do not believe that it is necessary to impose any additional impediment on household connection to the network.

We believe that the so-called 'deficit' only appears when traffic generated *from* an individual householder's line is compared with the actual cost of provisioning the 'last mile' of the local loop. This view does not take into account:

- Several generations of household-taxpayers investment in developing the network when it was a public utility (for which we might expect to share in the current profitability of the enterprise)
- The value of traffic *to* the individual householder that is enabled by the householder's decision to invest in a telephone line. A highly desirable business service may only be of value to that business if it enables its customers to contact it. How would, for example, takeaway pizzas prosper if households had no phone to order on?

- The non-financial social benefits of universal service, such as reduced costs of crime and illness due to the availability of emergency calls.

Below a certain call volume, there is little or no benefit in cheaper per call costs if the non-discretionary component of the phone bill increases. To generate and foster a more competitive consumer market for telecommunications, the aim should be to increase the discretionary expenditure for the consumer, enabling greater ‘shopping around’ taking advantage of spot specials and changing when a new competitor offers a more attractive deal. With a major component of household telecommunications expenditure committed to fixed fees payable in advance there is less opportunity to shop around and hence a disincentive to take advantage of competition and to foster growth and diversity in the residential market. An ideal alternative would be an ‘always on’ voice and data grade line to every home for which payment was due only on a per use basis – rather like a public road which could be available for a variety of traffic choices (public bus, private vehicle, towing business etc) but which requires no fixed monthly ‘rental’ from non-users.

There are many consumer services which require up –front investment that must be recouped on a per use basis that do not appear to require a fixed ‘rental’ from customers in order to prosper. In this rapidly advancing world of telecommunication technology that benefits greatly from the existence of a publicly funded sturdy fixed line household connectivity, the time has come to consider abandoning rental fees altogether and even to consider other pricing options such as bit-rate rather than per call charging.

Despite the fact that access rates have increased, there is no sign that this has led to greater competition in the local loop and little evidence of overall decreases in household telecommunications expenditure despite price falls in certain call types.

Without a more creative alternative, allowing access prices to increase for residential consumers will only harm the growth and development of telecommunications and associated services.

Draft recommendation 10.3

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. [chapter 10, page 10.42]

Comment: We have no objection to this recommendation.

Draft recommendation 11.1

The Commission recommends that the legislative requirement for Industry Development Plans should be repealed. Existing plans should also cease. [chapter 11, page 11.7]

Comment: We have no objection to this recommendation.

Draft recommendation 11.2

The Commission recommends that the facilities access regimes under Parts 3 and 5 of Schedule 1 of the *Telecommunications Act 1997* should be consolidated into Part XIC of the TPA. [chapter 11, page 11.19]

Comment: No comment.

Draft recommendation 11.3

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. [chapter 11, page 11.23]

Comment: We have no objection to this recommendation.

Draft recommendation 11.4

The Commission recommends that the mandatory network information provisions under Part 4 become a standard under Division 5 of Part 21 of the *Telecommunications Act 1997*. [chapter 11, page 11.24]

Comment: No comment.

Draft recommendation 17.1

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. [chapter 17, ~ page 17.17]

Comment: We have no objection to this recommendation.

Thank you for your attention. We may also seek the opportunity to comment further when the Government's response to the Besley Report is revealed.

Yours sincerely,

Helen Campbell,
CTN Executive Officer.