



Australian Competition and Consumer Commission

**Submission to the Senate Environment,
Communications, Information Technology and the
Arts Committee Inquiry into the Australian
Communications and Media Authority**

3 February 2005

The terms of reference for the Inquiry focus on the provisions of the Australian Communications and Media Authority Bill 2004 and the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004. The Australian Competition and Consumer Commission (ACCC) does not wish to comment directly on the specific details of these Bills as they do not directly impact on the ACCC's existing structure, function and powers.

More broadly, the ACCC notes that the Bills do not contemplate changes to its existing responsibility for the economic and competition regulation of the communications sector. The ACCC considers that this is appropriate and consistent with findings of the Productivity Commission's 2001 Review of Telecommunications Competition Regulation.¹

Rather, this submission comments on those terms of reference relating to the powers of the ACCC. In this regard, it is important to note that regulatory powers are dependent on the nature of the regulatory problem that they are seeking to address. This, in turn, depends on a range of issues including the presence of market power, the existence of natural monopoly and the incentives of an incumbent firm to hinder access and restrict competition.

In the telecommunications context, the ACCC has previously commented on the degree of industry integration in its *Emerging Market Structures Report*². More recently, the Productivity Commission has commented on structural issues in the draft report of its review of the National Competition Arrangements³. The ACCC does not intend to respond to these issues again in this submission. Instead, given the existing industry structure, the ACCC intends to comment on the current regulatory arrangements.

The current regulatory regime was introduced with the deregulation of the telecommunications sector in 1997. Changes to the *Trade Practices Act 1974* (TPA) saw the introduction of the telecommunications-specific access regime (Part XIC) and anti-competitive conduct provisions (Part XIB). These provisions apply in addition to the general access and competition provisions that apply to the economy more broadly, as contained in Parts IIIA and IV of the TPA respectively.

Access arrangements are one of the cornerstones of telecommunications regulation in Australia. They provide a mechanism by which competitors can use bottleneck infrastructure inputs controlled or supplied by another provider when it is uneconomic for these inputs to be duplicated, so that they can supply their own services in downstream markets. Declarations for access to wholesale telecommunications

¹ Productivity Commission, *Telecommunications Competition Regulation*, Inquiry Report No. 16, Ausinfo, 2001, p. 308. 'Recommendation 10.2: The Commission recommends that the ACCC remains the appropriate body to oversee the telecommunications-specific competition regulation under Parts XIB and XIC of the TPA.'

² The ACCC *Emerging Market Structures Report* (2003) is available online at www.accc.gov.au.

³ The draft report of the Productivity Commission Review of National Competition Arrangements is available online at www.pc.gov.au.

services have permitted a range of carriers and carriage service providers to use Telstra's infrastructure to provide their own retail services. This has been one of the main ways of introducing competition across a range of telecommunications services and has led to associated price, variety and service quality gains to consumers.

Part XIB of the TPA provides mechanisms to address breaches of the telecommunications-specific 'competition rule'. Under the rule, a carrier or carriage service provider must not engage in anti-competitive conduct. A carrier or carriage service provider is said to have engaged in anti-competitive conduct if it has a substantial degree of market power in a telecommunications market and takes advantage of that power with the *effect*, or *likely effect*, of substantially lessening competition. In comparison, the general anti-competitive provisions in Part IV of the TPA have a higher *purpose* threshold.

In introducing the telecommunications-specific regime, the Government considered that total reliance on the general provisions in Parts IIIA and IV of the TPA would not achieve its objectives as, among other things⁴:

- telecommunications is a complex, horizontally and vertically integrated industry;
- anti-competitive cross-subsidies by the incumbent from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment;
- due to the fast pace of change in the industry and the volatile state of the industry, anti-competitive behaviour can cause particularly rapid damage to competition; and
- there is considerable scope for the incumbent to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbent.

The ACCC is of the view that the significance of these factors has not diminished over the time that the telecommunications-specific regime has been in place.

There has been recent interest in the potential impact of new technologies, most notably voice over internet protocol (VoIP), wireless local loop and, to a lesser extent, fibre to the home, to break the dominance of the incumbent fixed-line network and lead to more sustainable competition. The ACCC takes the view that, while there may be potential for greater competition as a result of these services, their impact has not yet been demonstrated. In such a setting, it is premature to suggest that there is a reduction in the need for regulatory oversight.

⁴ For full details, refer Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p 6.

Since 1997, various measures have been adopted to strengthen the access regime to improve its effectiveness. Most recently, new measures have included removing a second layer of merit review for ACCC arbitration determinations, publishing indicative prices for Telstra's copper access network services and the enhanced accounting separation of Telstra's wholesale and retail operations.

As a result of these processes, there is now an extensive suite of regulatory arrangements in place. Importantly, these arrangements provide a flexible framework that is capable of effectively dealing with new and emerging challenges in the sector. The ACCC has a central role in administering these arrangements and remains committed to rigorously doing so. Further, in light of the degree of integration within the sector, the ACCC considers that it is appropriate for this full suite of powers to be retained.

These comments regarding the general effectiveness of the regulatory regime notwithstanding, the ACCC has previously noted some specific concerns regarding the effectiveness of the current enhanced accounting separation arrangements. In particular, the highly aggregated nature of the reports provided by Telstra under the regime may serve to mask specific instances of anti-competitive conduct that may require investigation and more detailed analysis⁵. It is also noteworthy that the ACCC has only relied on the existing accounting separation arrangements to a very limited extent in relation to its imputation testing analysis of specific cases.

More specifically, the current accounting separation is nominal in that it only requires Telstra to collect and report information. It does not require the carrier to reorganise its internal affairs and operate as if it were running two or more discrete businesses.

A further development of the current accounting separation arrangements along these lines would offer a superior means of both identifying and rectifying discriminatory and other types of anti-competitive behaviour. Enhancement of the accounting separation arrangements could serve to further strengthen the ACCC's ability to administer the existing suite of telecommunications-specific access and anti-competitive conduct provisions.

⁵ For discussion refer: *Imputation and non-price terms and conditions reports relating to the accounting separation of Telstra for the December quarter 2002*, ACCC, April 2004.