Joint carrier submission to the Senate Environment, Communications, Information Technology and the Arts

Legislation Committee

on

Trade Practices Amendment (Telecommunications) Bill 2001

Optus

AAPT, Primus

& Macquarie Corporate Telecommunications

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Executive Summary

This paper is provided on behalf of a broad coalition of telecommunications carriers to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee on the Trade Practices Amendment (Telecommunications) Bill 2001.

This coalition includes Optus, AAPT, Primus, and Macquarie Corporate Telecommunications.

We make two fundamental and interrelated submissions in relation to the Bill:

(a) The price for PSTN interconnection through to 2002 should be either legislated in the Bill, or the Committee should recommend that the Minister issue such a pricing determination, based on the prices determined after extensive analysis by the ACCC.

(b) The current merits review of ACCC Part XIC arbitration decisions should be abolished.

The provisions of the Bill together with the improvements to ACCC processes and procedures will provide assistance in streamlining the provision of access to declared services and help solve some procedural problems under Part XIC which currently cause delay.

However, the benefits will be at the margins. The fundamentals of the regime remain. The complexity of the issues being considered, the importance of the determinations, and the resources at the disposal of many of the players (particularly the incumbent) mean that access and pricing disputes will continue to be determined in a combative, protracted, and litigious manner.

In particular, the strategy of the incumbent to delay final outcomes for as long as possible will continue.

The issue of delay, and associated uncertainty is the heart of the problem.

The issues are exemplified in the context of achieving a final determination on the price of originating and terminating PSTN access. Determining interconnect prices is the crucial first step on the road to a competitive market, yet in Australia, the price has not been finally set after 4 years, and may not be set for another 2 years.

The uncertainty this creates undermines competition, investment and consumer welfare.

In addition, should Telstra succeed in its claim to bring interconnect prices to above 1997 levels then the industry is likely to re-monopolise and the economic reforms made over this period will be reversed.

The situation has reached a point where specific intervention is required. To that end, the Minister or the Parliament through this Bill need to act to determine the originating and terminating PSTN price based on the ACCC's extensive consideration of the issue.

The broader policy question this raises is the appropriateness of appeals being provided from final determinations of the ACCC to the Australian Competition Tribunal (ACT).

The Bill seeks to provide a limitation on the evidence that can be adduced on appeal. This reform is of limited benefit because it is unlikely to achieve the desired aims as the parties will simply adduce every skerrick of evidence at the ACCC arbitration stage, slowing down the process at the front end. This has already occurred in the Local Carriage Service and Unbundled Local Loop arbitrations currently afoot.

The companies making this submission believe that appeals from ACCC final determinations on arbitrations should not be subject to review by the ACT, and this Bill should be amended accordingly. The process needs to deliver reasonably expeditious outcomes, which the current regime is not doing. The Bill will not substantially change this. The ACCC has demonstrated an ability to consider the various issues thoroughly and comprehensively. It is questionable that the ACT is better placed than the ACCC to determine access and pricing issues, and it is quite probably the case that it is less well equipped.

An examination of other access regimes in Australia, including gas, electricity, rail and the former telecommunications regime managed by Austel, finds there are no merits review rights of the decisions made by the initial regulatory authority. Hence the full merits review rights contained in the current telecommunications access regime is out of step with these other Australian access regimes.

Weighing up all these matters, merits review appeals to the ACT of ACCC final arbitration determinations should be removed.

These issues are elaborated in the submission under the following headings:

1. History and importance of interconnect pricing
2. Uncertainty caused by failure to have a final price determined
3. Impact on competition should Telstra's claim in the ACT succeed
4. Length and transparency of the process in the context of Australia's WTO obligations
5. Whether the ACT is best placed to reconsider ACCC telecommunications pricing and access determinations
6. Current amendments will not sufficiently speed up or reform the process

7. PSTN experience will be replicated with other important decisions that the ACCC will shortly make
8. Need for the Parliament or the Minister to act to set the price on PSTN, and to abolish appeals all together

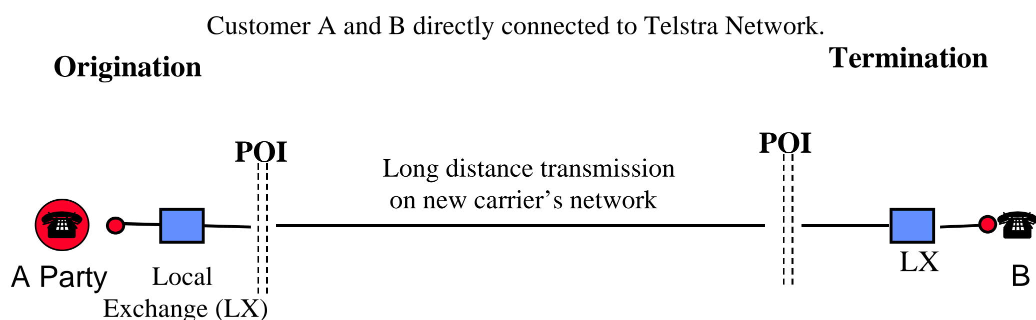
1. History and importance of interconnection pricing

1.1 This section discusses the importance to the competitive process of setting fair prices for interconnection to Telstra's Public Switched Telephone Network (PSTN)[1]. It examines the rigorous and time-consuming process the ACCC undertook to set the PSTN interconnect price.

The importance of interconnect

1.2 PSTN interconnect is the basic building block input required by competitors to provide most telephony calls. The following diagram shows how interconnection works for the case of a long-distance call.

What is interconnect?



The competive carrier performs long-distance or international transmission, retailing, billing and customer service.

The competitive carriers requires access to Telstra network to originate and or complete calls.

POI = Point of interconnection where the competing carrier connects its network with the Telstra network.

1.3 Customer A and B are connected to Telstra's copper network, and competitors purchase interconnection to these originating and terminating services on Telstra's network to enable the provision of end to end telephony calls to customers.

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[1] The PSTN is the fixed copper wire network, owned by Telstra, that connects all homes and businesses to the telecommunications network. Competitors require interconnection access to this PSTN to be able to start and complete telephone calls.

1.4 In the context of the argument presented here, it is critically important to understand that Telstra's local loop still effectively remains a monopoly and exhibits significant bottleneck characteristics. To that extent it is not economically efficient for all competitors to replicate this network and therefore interconnection becomes essential.

1.5 Competitors require timely access to this interconnection service at fair and reasonable prices to be able to provide:

(a) Long-distance calling;
(b) International calling;
(c) Calls to and from mobiles.

1.6 This key building block currently comprises between 30% to 40% of competitors' total costs in providing these calls. For example, the ACCC has estimated the interconnect price it has determined to be approximately:

(a) 40 per cent of the retail price of national long distance and international telephony, and
(b) around 30 per cent of the retail price of fixed-to-mobile telephony. [2]

1.7 Telstra controls 95% of the market for this interconnection service because it owns the copper wires connecting home and businesses throughout Australia to the telecommunications network.

1.8 Absent government wholesale price regulation, Telstra could set the price of interconnection at monopoly levels or higher, thereby driving-out competition. Hence certainty and timeliness in the setting of a reasonable price for the interconnection service is critical to the competitive process in telecommunications.

ACCC followed a rigorous process in setting the interconnect price

1.9 The following outlines the history of the rigorous, detailed and lengthy process followed by the ACCC in determining the price of interconnect in Australia.

1.10 In November 1997 Telstra lodged an Interconnect "Undertaking" with the ACCC offering a price for PSTN interconnect of 4.7 cents per minute. At this time interconnection prices in the market were approximately 3.2 cents per minute. If the Undertaking had been accepted by the ACCC this would have set the

[2] ACCC "Final decision rejecting Telstra's Undertaking" report of July 2000 at pg 34.

benchmark for commercially negotiated interconnect rates going forward. Hence Telstra sought through the Undertaking process to raise interconnection charges by over 20%.

1.11 The ACCC began its analysis of Telstra's First Undertaking in November 1997. The ACCC employed several consultants including:

(a) Ovum to do an International benchmarking. Ovum produced draft and final reports over the 1998 period which found Telstra's proposed prices were the highest of the benchmarked countries over 100% higher than average prices, and three to four times higher than international best practice.

(b) N/E/R/A to build a bottom up cost model. N/E/R/A produced draft and final reports over the period 1998 to January 1999. The prices contended by Telstra's Undertaking were over 100% higher than the costs of interconnection produced by the ACCC using the N/E/R/A model.

In addition, there has been extensive carrier involvment, including Telstra, on the modelling. The ACCC had multiple expert economist staff members working on the Undertaking project full time over the 1997-99 period, and sought other specialist advice within and outside the organisation.

1.12 The ACCC rejected Telstra's Undertaking in a draft decision in January 1999. The ACCC suggested Telstra's proposed prices were at least 100% too high, and a reasonable price for interconnect in FY 1999 was 2 cents per minute.

1.13 Following detailed submissions from carriers, including Telstra and further evidence, the ACCC affirmed this decision in its Final Report of July 1999.

1.14 Following changes to Retail Price Controls from July 1999, the ACCC released a further paper in October 1999 suggesting reasonable prices for FY 2000 were between 1.4-1.8 cents per minute.

1.15 Telstra lodged a further Undertaking with the ACCC in October 1999 offering prices for interconnect at 2.3 cents per minute for FY 2000 and 2 cents per minute for FY 2001.

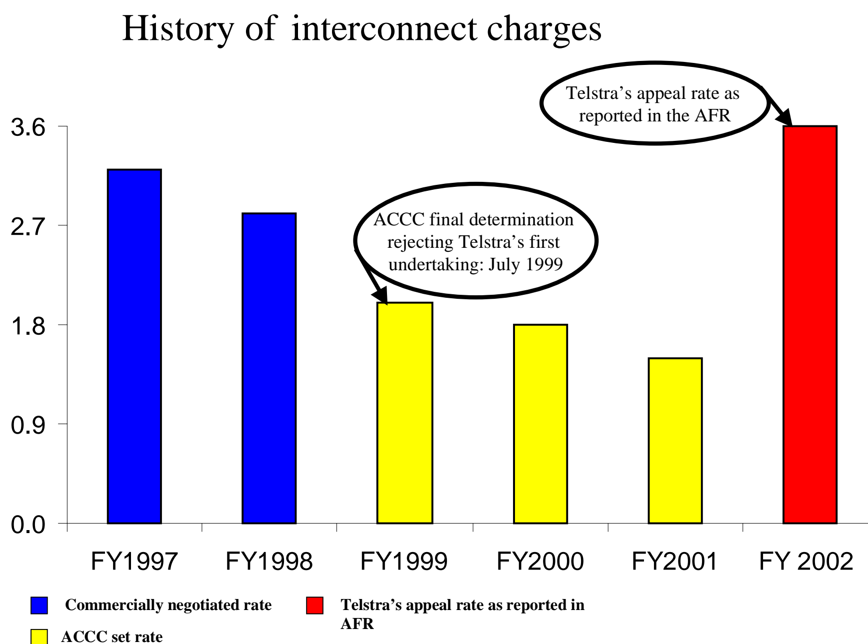
1.16 The ACCC deployed further consultants and economic analysis to consider this second Undertaking.

1.17 In April 2000, the ACCC draft report rejected Telstra's second Undertaking, suggesting Telstra's proposed interconnect prices were still, at least, 20% too high. The ACCC said a reasonable price for interconnect for FY 2000 would be 1.8 cents per minute, and 1.5 cents per minute in FY 2001

1.18 The ACCC affirmed this decision and these prices in its Final Undertaking Report in July 2000. The ACCC subsequently set these prices for PSTN interconnect in August 2000 in arbitrations that had been lodged by AAPT and Primus in 1998 and 1999.

1.19 Telstra appealed, to the ACT, the prices set by these ACCC arbitration determinations in September 2000. Telstra has sought to increase the ACCC rates by 200%, to 3.6 cents per minute.[3]

1.20 The following diagram captures the history of interconnect prices over the relevant period FY 1998 to 2001, with extrapolation of the rates that would apply if Telstra's ACT appeal claim is successful.



1.21 In May 2001 the ACCC determined the PSTN interconnect rate to be 1.3 cents per minute for FY 2002. The ACCC noted it would be unable to set this interconnect rate with certainty for FY 2002 because its determination would be subject to re-determination by the current ACT appeal process.

1.22 The ACCC has followed a thorough, rigorous and exhaustive process in determining the PSTN interconnect rates over the FY 1998-2002 period.

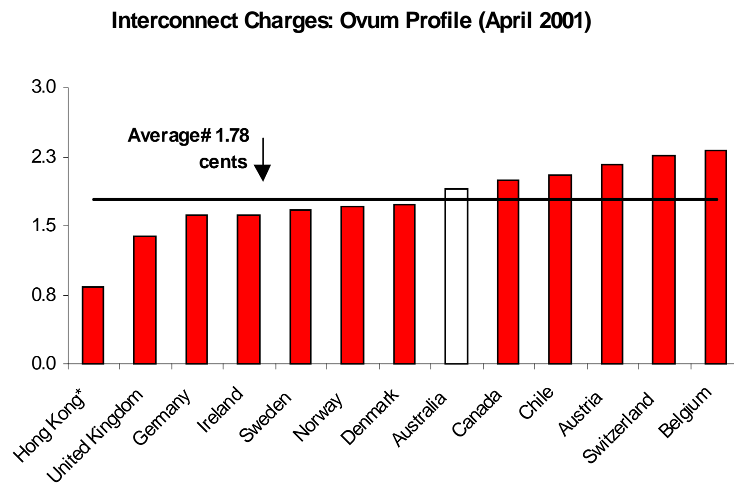
[3] As reported in the Australian Financial Review.

Telstra, through its appeal to the ACT, seeks to over-turn the ACCC decision, including extensive public and industry consultation and four years of analysis since November 1997. Telstra is seeking to increase prices to levels that are higher than the commercial prices that it negotiated when it lodged its first Undertaking with the ACCC in November 1997.

1.23 The prices Telstra is seeking to charge through the ACT appeal process are also higher than pre-July 1997 when the government liberalised the market via introduction of the Part XIC Telecommunications Access Regime. This Access Regime established broad rights for all carriers to interconnect to Telstra's network on reasonable commercial terms. The regime established the rights of competitive carriers to have the price of access to Telstra's network determined by the ACCC in the event of a commercial dispute over reasonable terms and condition of access.

1.24 Comparing ACCC prices to those that have been set internationally, Australia is about average when compared to the range of prices that have been determined internationally. Australia is still considerably behind world's best practice, as illustrated in the following table.

ACCC rate is still behind worlds best practice rate



2. Uncertainty caused by failure to have a final price determined

2.1 Telstra lodged its ACT appeal on interconnect rates for the period 1998-2001 in September 2000. The first hearings of actual evidence before the Tribunal are scheduled for February-March 2002. The ACT process will have gone 1.5 years by the time the first oral evidence concerning the merits of the case is heard. The Tribunal is not expected to deliver a final decision until at least 2003.

2.2 This means decisions on the pricing of interconnect for the years 1998 to 2001 will not be determined until 2003 at the earliest. In other words, it will take at least **five** years to determine the price of interconnect. Following the ACT decision, Telstra will still have appeal rights to the Federal Court and the High Court on points of law in the event its current claims are unsuccessful.

2.3 Telstra is also seeking to backdate charges previously paid by some carriers to the rates contended by Telstra before the ACT. This means that if Telstra's claim succeeds some competitive carriers face potential back-payments to Telstra of millions of dollars.

2.4 In addition, competitive carriers do not know whether they will pay approximately 1.5-1.8 cents per minute for interconnect over the relevant period as determined by the ACCC, or 3.6 cents per minute or more over the period as contended by Telstra to the ACT.[4]

2.5 Interconnection charges paid to Telstra are between 30% to 40% of competitive carrier costs of providing telephony services. Hence it is near impossible for competitive carriers to properly plan their pricing, investment decisions and business operations in an environment where they do not know if such essential input costs may be 200% higher over up to a five year period, with retrospective impact.

[4] These rates are as reported in the AFR.

3 Impact on competition should Telstra's claim in the ACT succeed

3.1 The consequences for the industry should Telstra succeed in its appeal are dire.

Prices will rise

3.2 It has been reported in the media that Telstra is seeking an interconnect rate in the ACT appeal of 3.6 cents per minute. That would make interconnect levels higher than they were in 1997 when the industry was fully liberalised (see diagram at para 1.20).

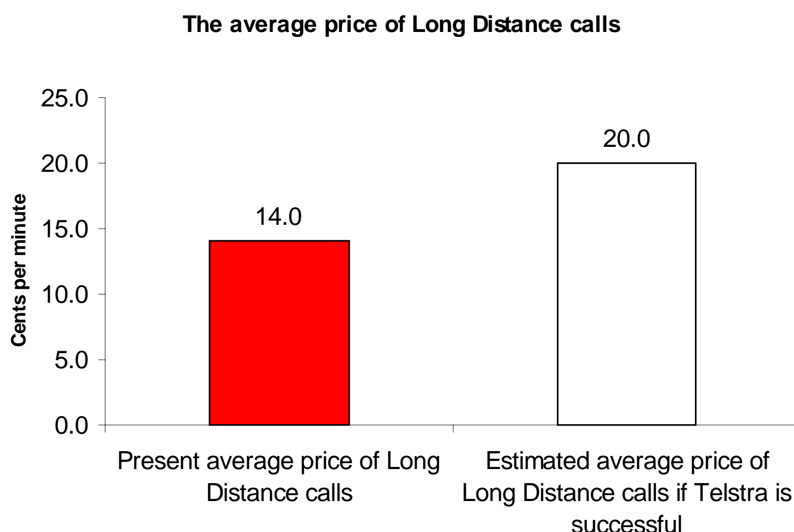
3.3 The substantial price reductions in long distance and international call rates have arisen because of the reduction in interconnect prices. This has reduced the input cost base of competitive carriers, enabling them to pass through such reductions in costs to end user prices. Telstra has been required to respond with its own price reductions. Over the period 1996/97 to 1999/2000 there have been reductions in:

(a) international telephony of 53%
(b) national long distance of 23%; and
(c) fixed to mobile of 8%.

Should interconnect prices rise, then the gains of the last 4 years will be undone.

3.4 By way of example should Telstra succeed in the present ACT appeal, and if the increase in interconnect prices is passed through, we estimate that the average price of long distance calls would increase from 14 cents per minute to 20 cents per minute.

The average price for long distance calls will increase



<u>Carriers and service providers will go out of business</u>

3.5 As previously indicated, the interconnect charge determined by the ACCC is approximately:

(a) 40% of the retail price of national long distance telephony, and
(b) around 30% of the retail price of fixed-to-mobile telephony[5]

3.6 Telstra is seeking to raise interconnect charges by a reported 200%. If successful, the interconnect charge would then be:

(a) 67% of the retail price of national long distance telephony, and
(b) around 57% of the retail price of fixed-to-mobile telephony.

3.7 However, because carriers are constrained by Telstra's retail pricing from fully passing on the increase, interconnect prices could be as much as 90% or more of current retail prices. In such a case, competitive carriers could not recover their costs and would go out of business.

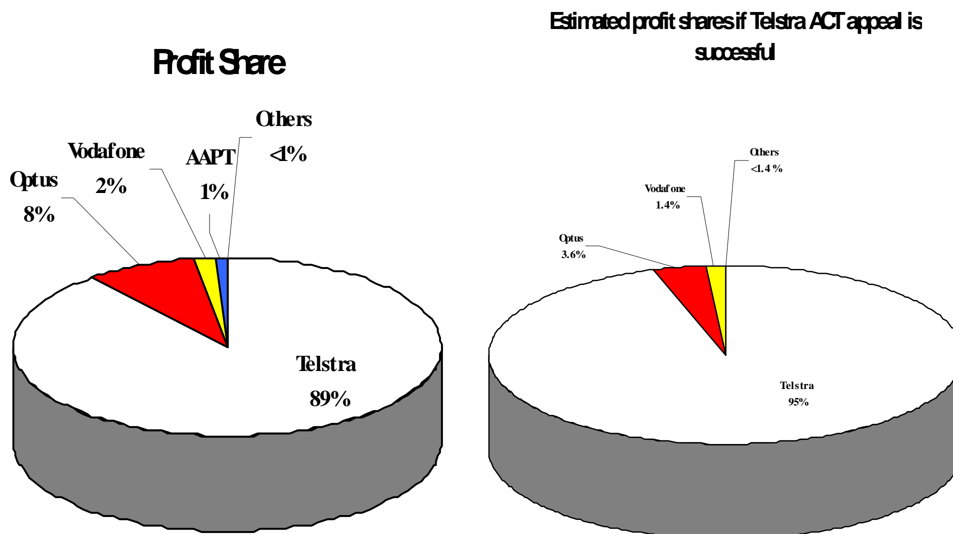
3.8 Much of the industry is emerging and fragile. The increase in interconnect costs would go straight to the bottom line. Many carries are not EBITA positive. If Telstra's claim succeeded, their resultant losses would put their future viability at critical risk.

[5] p34 of ACCC "Final decision rejecting Telstra's Undertaking" report of July 2000

3.9 In terms of share of industry profits, if Telstra's appeal is successful Telstra would increase its relative share of industry profits from 89% to over 95%.

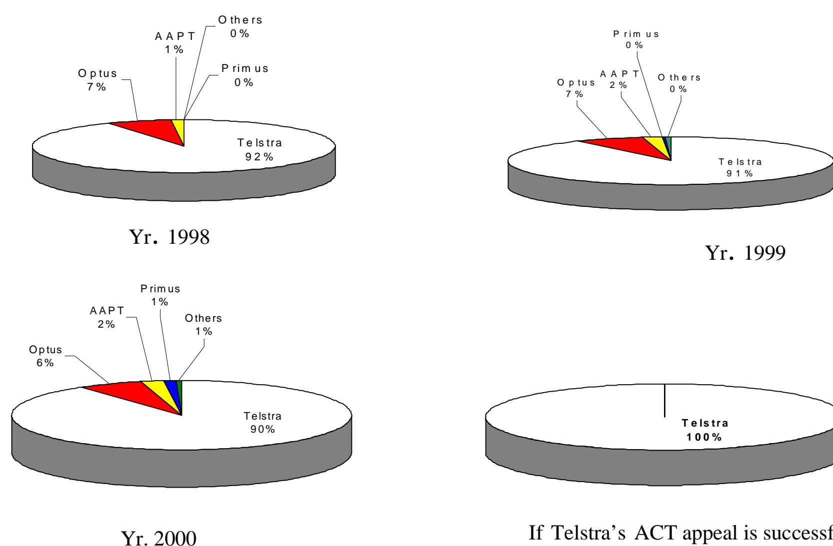
Re-monopolisation…..

Likely affect of Telstra's ACT appeal on industry profit share



3.10 Should Telstra succeed there could well be a move to re-monopolisation of the copper network, with the potential for withdrawal by competitors from markets which require access to the local loop to provide end to end telephony calls. These markets include local calling, national long distance, international and

Share of revenues for calls using Telstra's copper network



fixed-to-mobile calls. Competition can only be guaranteed for those residential customers connected to Optus' hybrid fibre coaxial (HFC) cable, and business customers who are directly connected to the few carriers which have network infrastructure, essentially in metropolitan CBD's.

4 Length and transparency of the process in the context of Australia's WTO obligations

4.1 The World Trade Organisation (WTO) agreement has defined the key rules of interconnection. This agreement requires member countries to implement the following framework in relation to interconnection to incumbent carrier networks:

(a) **Transparency:** Agreements or major supplier interconnection offers must be made public; and

(b) **Dispute resolution**: an independent entity must be available to resolve interconnection disputes **within a reasonable timeframe**.

4.2 Current interconnection outcomes in Australia are inconsistent with both these rules. In particular the current process is not transparent, and dispute resolution has not occurred within a reasonable timeframe. These issues are now discussed.

Transparency

4.3 Telstra has not made public the rates it contends to the ACT. It has bound participants to the process in confidentiality arrangements which are vigilantly enforced. Telstra has shrouded in secrecy their ACT claims and arguments, preventing other carriers and the general public accessing their arguments and documents in support of their contentions.

Reasonable time frame to determine interconnect

4.4 A reasonable timeframe for resolving interconnection disputes is generally regarded as no greater than 1 to 2 years.

4.5 The ACCC has been considering interconnect pricing since November 1997. The ACT process is expected to last at least another 1.5 years. This means interconnection rates going back to at least 1998 will not be determined until the end of the ACT process, which is unlikely to finish until 2003. All up, the process has already taken 4 years, and could take at least 6 years from start to finish.

5. Whether the ACT is best placed to reconsider ACCC telecommunications pricing and access determinations

5.1 The setting of interconnect prices is a complex, resource intensive, and highly specialised area. The ACCC has built up considerable expertise in this area.

5.2 The ACT in hearing the matter de novo is undertaking the ACCC's function afresh. It is important to emphasise that the ACT does not review the ACCC's decision, it makes its own decision, rather than simply reviewing the original decision for errors of fact and/or law.

5.3 Given the role of the ACT, it is not clear that it is better placed to determine the issues at stake than the ACCC. The ACT is constituted by a Federal Court judge, as a presiding member, and two senior members, who are drawn from a number of senior members who are appointed by the Government, generally on the basis of their expertise in competition matters generally.

5.4 The members of the ACT do not need to have, and are not likely to have, a specific expertise in telecommunications access pricing issues. Further, the ACT has no institutionalised knowledge to draw on, unlike the ACCC. There is no secretariat to draw on or established resources from which to draw advice and assistance.

5.5 In the case of the Telstra PSTN appeal, it will be the first time the ACT has considered telecommunications pricing of access decisions. None of the members of the ACT have, therefore, considered a matter of this nature before, and there are no prior decisions of the Tribunal to assist in determining the way to proceed or the principles to apply.

5.6 We do not believe that the ACT is as well equipped as the ACCC to consider the issues. The ACCC has greater expertise. If that is the case the decision on review has a greater risk of error than that of the ACCC. That leads to a questioning of the benefits of the ACT review, if a decision by an expert body is being replaced by another decision by a less expert body.

5.7 Leaving aside the relative expertise of the bodies, the question is raised as to the point of having two bodies undertaking identical tasks, when those tasks are complex and lengthy, in a regulatory environment where relatively quick decisions are required. This leads to the question of whether full merits review is appropriate. This is further dealt with in section 8.

6 Current amendments will not sufficiently speed up or reform the process

6.1 The provisions of the Bill together with the improvements to ACCC processes and procedures will provide some assistance in streamlining the provision of access to declared services and help solve some procedural problems under Part XIC which currently cause delay.

6.2 However, the benefits will only be seen at the margins. The fundamentals of the regime are not being changed. The complexity of the issues being considered, the importance of the determinations, and the resources at the disposable of many of the players (particularly the incumbent) mean that access and pricing disputes will continue to be determined in a combative, protracted, and litigious manner.

6.3 In particular, the strategy of the incumbent to delay final outcomes for as long as possible will continue.

6.4 The proposal in the current Bill to prevent new evidence being adduced at the ACT appeal stage will not in our view significantly expedite the process. It will just cause the parties to include every possible piece of information and evidence when the ACCC is considering the issue, thus slowing down the ACCC process.

6.5 This has already occurred in the context of the current ACCC arbitrations on Local Carriage Service and Unbundled Local Loop services. In these arbitrations, Telstra has more recently adduced at the ACCC arbitration stage all possible evidence it may wish to raise before the ACT. This means the current Bill will in no way constrain Telstra's ability to contend arguments to the ACT when it appeals these ACCC arbitration decisions on Local Carriage Services and Unbundled Local Loop services.

7. The PSTN experience will be replicated with other important decisions that the ACCC will shortly make

7.1 In the coming months, the ACCC will be making final determinations in two very important areas, the price of Local Carriage Service and the Unbundled Local Loop.

7.2 Local Carriage Service is the wholesale provision by Telstra of local call services to competitors. Local Carriage Service is necessary for Telstra's competitors to be able to provide customers with a one-stop-shop for all their telephony services on one bill, including local and long-distance calling. At present the price charged by Telstra for the wholesale Local Carriage Service does not make reselling these services a viable business proposition. In this instance, Telstra is currently seeking to charge more for its wholesale Local Carriage Service (27 cents per call) that it currently charges at the retail level (between 15 and 22 cents per call).

7.3 Settling the price of Local Carriage Services is vital to providing competition in the provision of local calls where Telstra currently has 90% of the market.

7.4 In the case of the Unbundled Local Loop, the ACCC's declaration of the local loop in August 1999 was a crucial step in opening up Telstra's local access network to competition. It allowed others to provide their services over Telstra's copper network, and to gain access to Testra's exchange. In particular, other players can offer broadband DSL services over the local loop and into the home. Opening up DSL services to competition is particularly important as Telstra itself would not otherwise have an incentive to deploy DSL services given their potential to cannibalise Telstra's existing ISDN services. Already the ACCC has made an assessment that reasonable prices are about 40% below Telstra's current commercial offer.

7.5 In relation to both Local Carriage Service and the Unbundled Local Loop Telstra will appeal these decisions to the ACT, resulting in years of delay before prices are settled in these two very important markets.

8. The need for the Parliament or the Minister to act to set the price on PSTN, and to abolish appeals

Set PSTN Interconnect Price

8.1 The issues raised in this submission demonstrate the pressing need for Government action to occur to provide certainty in relation to PSTN interconnect prices. In summary, those reasons are:

(a) to provide certainty for the industry
(b) to set the input cost which determines the economics of competitors entering the market
(c) the ACCC's determinations have been thorough and rigorous, and are consistent with the average charges set internationally
(d) the ACT is less well qualified than the ACCC to make decisions
(e) the current Bill will not address the fundamental concerns

8.2 The price should be set consistent with the ACCC's rates – which provide prices to the end of FY 2001/02. Those rates are as follows:

(a)	1999/2000	1.8 cents per minute
(b)	2000/2001	1.5 cents per minute
(c)	2001/2002	1.3 cents per minute

8.3 This price setting could occur in two ways. The Minister could set the price pursuant to his powers under section 152CH of the Trade Practices Act. Alternatively, the current Bill could be amended to set the rate.

8.4 If the former option is taken, the Minister's determination is a disallowable instrument and thus subject to Parliamentary review.

8.5 The fact that the power exists demonstrates Parliament's intention that the Minister should retain a degree of residual power in relation to pricing and access issues. In our submission, this is appropriate in order for determinations to be made in the broader public interest, in exceptional circumstances.

8.6 Such a point has been reached in relation to PSTN interconnect. The current process has essentially failed, judged against Parliament's original intentions. Without intervention, instability and uncertainty in the industry will continue, with consequent harm to consumer welfare.

8.7 This is not a power that has been exercised since the implementation of the 1997 regime and we accept it is not a power that should be exercised lightly, particularly where it would operate to impact on an existing process. However, the need to provide certainty for the fundamental cost input for competitors in the market, is vital to encouraging a competitive environment, and outweighs the harm caused by an intervention in existing processes.

8.8 It is also important to note that at the time of the institution of competition in 1997, Telstra was a wholly owned Government corporation. In the process of both the first and second sale of Telstra shares, the Government was very clear in the prospectus that it was continuing government policy to promote the development of competition in this market.[6] Consequently, there can be no question of an infringement of property rights (or of sovereign risk) if the Commonwealth makes legislative changes, including retrospective legislative changes, that are consistent with the original policy intent.

8.9 There is a precedent for the Government acting to set the price. When Telstra in 1999 made an ambit claim of $1.8 billion per annum for the cost of the Universal Service Obligation (USO), the Minister set the price at the previously determined Australian Communications Authority (ACA) rate ($256 million) for 3 years. The Minister then directed the ACA to do an in depth cost study to determine the veracity or otherwise of the Telstra claim. The final ACA determined figure for FY 1999 was $280 million, which was consistent with the $256 million determination, after adjusting for inflation.

Abolish Appeals to ACT

8.10 Consistent with the approach that needs to be taken on PSTN interconnect, the current Bill should be amended to abolish appeals to the ACT from ACCC final arbitration determinations.

8.11 The difficulties and delays experienced with the PSTN will simply be replicated for other important access pricing decisions, particularly relevant in relation to the decisions that the ACCC will shortly make on Local Carriage Services and the Unbundled Local Loop services, as discussed at section 7.

8.12 As discussed at section 5, it is questionable whether the ACT is better placed to perform the functions of the ACCC, and there is a real risk that its decisions will be inferior to those of the ACCC.

[6] "Telstra is currently regulated by the Commonwealth under a number of statutes including the Telstra Act, the Trade Practices Act and the 1997 Act…Like other regulatory regimes, the Government does not expect the current regime to remain static…The Government or any future Government, however, may change its policy as to the regulation of the telecommunications industry, which may adversely affect the competitive position or results of operation of the Company.", *Telstra Share Offer 1997*, page 113.

8.13 The fundamental policy question is the following: should there be two identical and duplicative tasks given to two different bodies to decide the same complex issues?

8.14 For competition to develop, access prices need to be determined reasonably quickly. A reasonable period is 1-2 years. This is consistent, with Australia's obligations under the WTO process, as discussed in section 4. It has taken longer than this for the PSTN rate to be determined by the ACCC alone. Duplicating the process duplicates the time. Extra time will be then consumed should an ACT decision be appealed on questions of law to the Federal Court, and then to the High Court.

8.15 An examination of other access regimes in Australia, including gas, electricity, rail and the former telecommunications regime managed by Austel, finds there are no merits review rights of the decisions made by the initial regulatory authority. Hence the full merits review rights contained in the current telecommunications access regime is out of step with these other Australian access regimes. This is shown in the following table:

Other access regimes do not have merits reviews

Access Regime	Appeal Rights
National	
National Gas Code	No merits review
National Electricity Code	No merits review
Austel, (Teleco regime 1991 -97)	No merits review
State based	
IPART (NSW electricity and rail)	No merits review
ICRC (Canberra)	No merits review
QCA (Queensland rail)	No merits review

8.16 The ACCC in its submission to the Productivity Commission's Draft Report on Telecommunications Competition Regulation has recommended that full merits review of final determinations do not justify the costs and delay involved. The ACCC has undertaken an analysis of the merits review of pricing decisions under access regimes in Australia and international jurisdictions. The ACCC

concludes that it is unusual for there to be provision for a full re-hearing on the merits by an appeals body of access pricing decisions.

8.17 If the decisions are to be made by a single body, the decision making process is still subject to scrutiny though judicial review which is available firstly to the Federal Court and then to the High Court. Judicial review is rigorous in ensuring that decisions are correctly reasoned, that all information is available to the decision maker, and that the parties potentially affected have been accorded natural justice. The scope of judicial review is becoming increasingly searching, and blurring the distinctions between fact and law.

8.18 It is the recommendation of the companies making this submission that there be one decision maker on these matters. That decision maker should be the ACCC, which has clearly demonstrated its ability to consider telecommunications access matters with thoroughness and rigour.[7] The Bill should therefore be amended to prevent a re-hearing of arbitration determinations of the ACCC by the ACT.

[7] If it was thought the ACT is superior to the ACCC in making decisions on access pricing matters, then Part XIC arbitrations should proceed immediately to be determined by the ACT, by-passing the ACCC altogether. That is, there is no need for two separate processes to make a decision on the same access pricing issue.