



Australian Competition & Consumer  
Commission  
Submission 52

**Responses to questions taken on notice by Australian Competition and Consumer Commission before the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into competition in broadband services, 5 February 2004**

In its appearance before the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into competition in broadband services ('Senate inquiry') on 5 February 2004, the Australian Competition and Consumer Commission ('the Commission') took the following questions on notice.

- (a) Whether or not the issues raised in bullet points on pages 3 and 4 of Primus's submission are within the Commission's mandate and, if so, what is the Commission's response? [see Senator Lundy's request on p.68 of Proof].
- (b) Whether or not the decisions by Telstra to roll-out miniMUXs into RIMS in order to provide competing services in a particular area can be more transparent to competitors. It has been suggested Telstra is rolling-out in a predatory way. Senator Lundy asked "How do you make it fairer?" [p.69 of Proof].
- (c) Comments on regression analysis undertaken by the Commission to evaluate outcomes in the NECG report [see Mr Willett's comments on p.71 of Proof].

The Commission provides a response to these questions on notice below.

- (a) **Whether or not the issues raised in bullet points on pages 3 and 4 of Primus's submission are within the Commission's mandate and, if so, what is the Commission's response?**

Primus contended in its submission to the Senate Committee that it does not receive the same service levels for information system services as Telstra provides its own retail business. It submitted that the differences, in relation to the provision of wholesale ADSL, extend to systems interfaces and availability, and ordering and provisioning timeframes. Primus also commented on potential misuse of its customer data by Telstra.

Primus had not complained to the Commission about these issues. After considering Primus' submission to the Senate Committee, the Commission has contacted Primus to discuss further its allegations. The Commission's particular concern is whether any differences in the provision of wholesale ADSL internally to Telstra and externally to wholesale ADSL customers are a contravention of the *Trade Practices Act 1974* ('the Act'), or otherwise of concern.

The wholesale ADSL service is not a declared service under Part XIC of the Act. Specific standard access obligations apply to declared services, which require amongst other things for an access provider to take all reasonable steps to ensure the technical and operational quality of the declared service supplied to wholesale customers is on equivalent terms to those which the access provider provides to itself.

However, under Part XIB, the Commission can investigate allegations that a carrier or carriage service provider with substantial market power (in a telecommunications market) is engaging in anti-competitive conduct by taking advantage of that power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market. Further, a carrier or carriage service provider is taken to have engaged in anti-competitive conduct if it engages in conduct relating to a telecommunications market which contravenes most of the general restrictive trade practices provisions in Part IV of the Act. These powers are not restricted in application to declared services.

Discriminatory treatment between internal and external retail supply could potentially contravene Part XIB of the Act, if it has the effect of substantially lessening competition. The Commission's investigation of Primus' allegations is ongoing.

- (b) Whether or not the decisions by Telstra to roll-out miniMUXs into RIMS in order to provide competing services in a particular area can be more transparent to competitors. It has been suggested Telstra is rolling-out in a predatory way. Senator Lundy asked "How do you make it fairer?"**

The Commission has not received any recent complaints from access seekers concerning their ability to gain access to information on Telstra's future deployment of miniMUXs<sup>1</sup> and RIMs<sup>2</sup>, nor that Telstra is rolling out miniMUXs and RIMs in a predatory way. Accordingly, the Commission would need further information in order to understand the validity of any such claims.

Having said that, the Commission can make the following comments.

Telstra and other carriers already face important requirements to provide information on network changes, under the *Telecommunications Act 1997*, and the Commission's model non-price terms and conditions of access.

Clause 23 of Schedule 1, Part 4 of the *Telecommunications Act 1997* provides for an access seeker to obtain information on network planning:

- (1) This clause applies to a carrier (the *first carrier*) if the first carrier supplies carriage services to another carrier (the *second carrier*).
- (2) The first carrier must, if requested to do so by the second carrier, provide the second carrier with timely and detailed telecommunications network planning information that is sufficient to enable the second carrier to undertake planning for the second carrier's own telecommunications network.

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<sup>1</sup> A miniMUX is a new form of multiplexing technology similar in function to a RIM – see below. This technology accommodates a miniature 'CMUX card' which allows xDSL services as well as voice to be provided to customers.

<sup>2</sup> A RIM (remote integrated multiplexer) is a device that consists of a protective housing, cable and optical fibre terminating strips, and multiplexing equipment, erected in street based housing. 'Integrated' means that the housing contains multiplexers that enable different services to be carried over the same transmission cable (i.e. special services, telephone services, public telephone services, and ISDN services are all carried over the same transmission cable/fibre). A RIM unit is not integrated with the telephone exchange switching software and performs a standard multiplexer function.

- (3) The information is to include (but is not limited to) information relating to the following:
  - (a) the volume or characteristics of traffic being offered by the first carrier to a telecommunications network of the second carrier;
  - (b) the telecommunications network performance standards (if any) that have been set by the first carrier.
- (4) The first carrier is not required to comply with subclause (2) unless the second carrier's request is reasonable.
- (5) If information is requested by the second carrier under subclause (2), the first carrier must make the information available to the second carrier as soon as practicable after the request is made.

Clause 27 of Schedule 1, Part 4 specifies that the first carrier must comply with the requirement imposed in clause 23 on such terms that are either agreed between the first and second carrier or, failing agreement, determined by an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, the Commission is to be the arbitrator.<sup>3</sup>

Further, the Commission has specified timeframes for notification of relocation of facilities used for core services<sup>4</sup> in the model non-price terms and conditions for core telecommunications services.<sup>5</sup> These notification provisions are limited in application to the relocation of facilities which would or would be likely to affect the access seeker's network arrangements. However, they would presumably include roll-out of miniMUXs and RIMs, as these can impact on access seeker's use of the ULLS service.<sup>6</sup>

The model non-price terms and conditions stipulate that an access provider should provide an access seeker an equivalent period of notice to that which it provides itself. At a minimum, the notice period should be 60 business days and the matter should be subject to any dispute resolution procedure invoked by either party.<sup>7</sup>

These model terms and conditions are non-binding, however the Commission is obliged under section 152AQB(9) of the Act to have regard to these if required to arbitrate a dispute.

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<sup>3</sup> Clause 27(1), Schedule 1, Part 4 of the *Telecommunications Act 1997*.

<sup>4</sup> Under section 152AQB(1) of the Act, the core services are specified as follows:

- the Domestic Public Switched Telephone Network (PSTN) Originating Access Service (PSTN originating service);
- the Domestic Public Switched Telephone Network (PSTN) Terminating Access Service (PSTN terminating service);
- the Unconditioned Local Loop Service (ULLS);
- the Local Carriage Service (LCS); and
- any additional core service specified in regulations by the Minister.

<sup>5</sup> The model non-price terms and conditions are made pursuant to section 152AQB of the Act.

<sup>6</sup> The ULLS service is a core telecommunications service and therefore covered by the model terms and conditions – see section 152AQB(1)(c) of the Act.

<sup>7</sup> ACCC, *Final Determination – model non-price terms and conditions*, October 2003, p.36.

The Commission is not aware of problems with these provisions. However, if they were considered to provide inadequate transparency of Telstra's network changes, the Commission could consider changes to the model non-price terms and conditions. Further, clause 29A of Schedule 1, Part 4 of the *Telecommunications Act 1997* provides that the Commission also has the power to make codes in regards to clause 29, which can specify the manner and form in which consultation occurs. A supplementary or alternative option could be for industry to consider amending the relevant industry code (presumably ACIF code C569:2001 – ULLS Ordering, Provisioning and Customer Transfer<sup>8</sup>), or for industry to create a new code.

The Commission is also empowered under Part XIB of the Act to investigate allegations of anti-competitive conduct. The Commission has not had any cause to investigate the roll-out by Telstra of miniMUXs or RIMs for potential contravention of Part XIB of the Act.

**(c) Comments on regression analysis undertaken by the Commission to evaluate outcomes in the NECG report.**

The Commission has some preliminary concerns with NECG's report *Quantifying differences between broadband penetration rates for Australia and other countries (July 2003)* which was an attachment to Telstra's submission to the Senate Inquiry.

In particular, the Commission has identified a number of factors that may limit the explanatory power of the statistical model developed within this report, including that:

- as specified, it does not take account of the 'price', 'quality', 'competition' or 'computer use/penetration' as factors explaining broadband penetration across countries;
- it relied on some questionable assumptions regarding how the 'age of technology' variable is introduced into the analysis; and
- preliminary statistical testing suggests that it violates some of the fundamental assumptions of regression modelling.

The Commission is currently engaging a consultant to comment on the extent of these concerns and, more generally, to provide independent advice on the robustness of the statistical model developed by NECG. Once completed, the Commission will forward this advice to the Senate Committee.

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<sup>8</sup> This code has not been submitted by ACIF for registration by the ACA.