



Asia-Pacific
Economic Cooperation

APECTEL REGULATORY TRAINING PROGRAM

Program Resource

MODULE SEVEN

ENFORCEMENT

APEC Telecommunications & Information Working Group

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MODULE SPECIFICATIONS

MODULE CODE AND TITLE

07 Enforcement

Module Description

This module will provide an introduction to the principles and procedures for those economies wishing to establish an effective telecommunications regulator enforcement program.

Module Objectives

For participants to be able to:

Objective 1 – Recall and explain the principles of managing a robust enforcement system

Objective 2 – Describe applications of enforcement practices in a national telecommunications regulation system.

Objective 3 – Recommend enforcement methods to resolve compliance issues.

PRE-REQUISITES

Introduction Module 01.

SUGGESTED REFERENCES

The Sixth APEC Ministerial Meeting on the Telecommunications and Information Industry (TELMIN 6) 1-3 June 2005 Lima, Peru, LIMA DECLARATION, Annex C.

APEC TEL Compliance and Enforcement Principles; *APEC Telecommunications and Information Working Group*, 30th Meeting 19-24 September 2004 Singapore

Effective Compliance and Enforcement Guidelines and Practices; *APEC Telecommunications and Information Working Group*, 31st Meeting 3-8 April 2005 Bangkok, Thailand

Australian Communication Authority, *Consumer codes – Compliance and Enforcement October 2003 at*

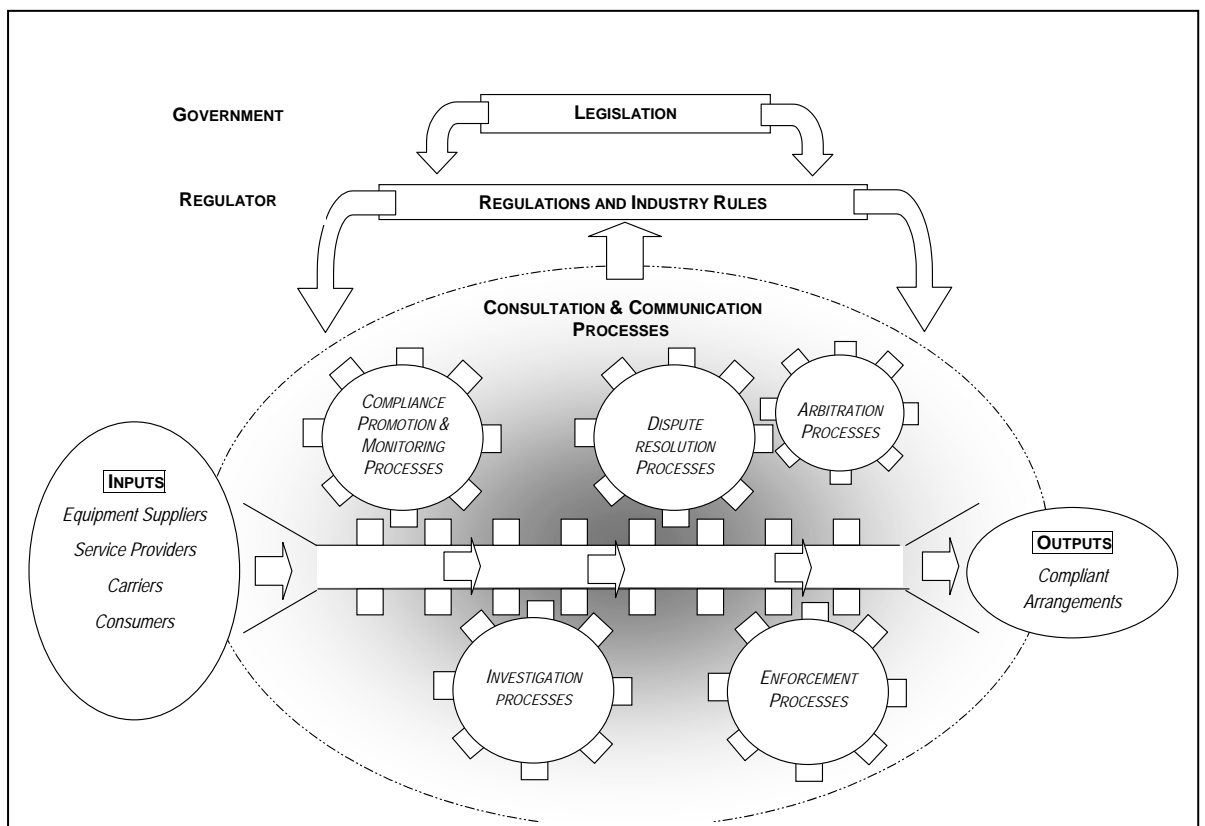
http://internet.aca.gov.au/ACAINTER.131180:STANDARD:1068536023:pc=PC_2526

The Australian Telecommunications Industry Ombudsman at <http://www.tio.com.au/>

Using this Guide

The presenters, facilitator or workshop coordinator will present and discuss most of the content in this module. They will also advise you on the learning activities to undertake.

You will have this guide as a reference over the duration of the workshop and when you have completed the workshop. There are some built in guidelines to help you use this resource after the completion of the workshop.



MODULE OVERVIEW

Introduction

This module will provide an introduction to the principles and procedures for those economies wishing to establish an effective enforcement regime.

TOPIC 1 – PRINCIPLES AND PROCEDURES TO ENSURE A QUALITY ENFORCEMENT REGIME

This topic reviews the principles and procedures for economies who may wish to establish an effective enforcement regime in the transition from wholly government owned monopoly to a free market competitive system. It reviews some of the issues that emerge and can be addressed through enforcement practices.

TOPIC 2 –APPLYING ENFORCEMENT PROCEDURES

This topic provides a framework for managing alleged violations of regulations/rules/laws that come to a regulators attention. It will cover the three types of complaint which may come to the regulator and some suggested approaches for regulators to manage these.

TOPIC 3 – APPEAL PROCEDURES AND PROCESSES

This topic looks at the processes and issues in the establishment of an effective appeals mechanism. It will review processes for appeals and alternative dispute resolution mechanisms and other aggravating and mitigating circumstance that the regulator needs to be conscious of.

This module will require 4 to 6 hours to complete.

TOPIC 1 – PRICIPLES AND PROCEDURES FOR A QUALITY ENFORCEMENT REGIME

Introduction

APEC economies agreed that effective compliance and enforcement regimes are essential to enhancing the information and communication technology regulatory, investment and user environment in any economy. Effective enforcement of laws and rules is important to ensure that trade commitments are honoured.

It was agreed that work would be undertaken to help economies create regulatory compliance and enforcement regimes to create positive environments for investor and consumer confidence. This topic draws from the APEC Compliance Monitoring & Enforcement Guidelines & Practices Guide (under development and consideration by APEC TEL).

As an introduction to this training we will begin by considering a number of *critical questions* in determining the need and type of enforcement regime which may be required in your telecommunications environment.

CRITICAL QUESTIONS

1. WHAT IS ENFORCEMENT IN THE CONTEXT OF A DEREGULATED TELECOMMUNICATIONS REGIME?

- Process or system of ensuring compliance with the law, and the terms and conditions of authorizations or licenses or rules using investigations, complaints, and penalties.
- The regulator's primary goals in enforcement should be to bring industry participants, licensees, carriers, service providers, equipment suppliers and others into compliance with the law and rules, and impose penalties where appropriate.
- Where the regulator acts when an alleged violation is brought to their attention.

2. WHY IS AN ENFORCEMENT REGIME NEEDED?

- To ensure compliance when other processes have failed;
 - To make the move away from monopoly systems to more competition successful;
 - To ensure competition creates opportunities for more parties in the market
 - Recognition that more parties mean greater opportunity for conflict
 - To keep former monopolists from using their market power to hinder competition
 - To complement deregulation
 - A key to aiding growth in competition.
-

3. WHAT ARE THE FEATURES OF AN EFFECTIVE ENFORCEMENT REGIME?

- Fast, timely with swift decisions
 - Firm
 - Fair
 - Flexible
 - Transparent with published processes and procedures
 - An independent regulator with the power to enforce rules
 - A convenient complaints mechanism
 - Skilled staff to investigate complaints
 - Takes account of a country's judicial system
-

DISCUSSION POINT

Review the features in question 3 above and list below the features that are present in an economy you are familiar with.

• .
• .
• .
• .
• .
• .
• .
• .

Enforcement principles

Let us review some of those principles in detail and assess these against experience in your economy.

From experience of many economies in the evolution of their telecommunications industry over the years, following are the 4 key underpinning principles of a robust enforcement system.

However for these principles to be effective it is critical that the Independent Regulator has the power and authority to apply these principles of enforcement.

FAIR

A system that is **perceived as fair** encourages compliance with the regulator's decisions.

A system that is **perceived as unfair** creates uncertainty, may be counter productive and lead to reduced investment.

Transparency creates certainty with known procedures.

Commercial confidentiality is essential.

FAST

Prompt decisions allow companies to continue with their business plans.

Swift decisions and timely penalties deter future violations.

Pre- established deadlines keep the process moving.

FIRM

Regulator needs **adequate sanction** authority to give companies incentives to follow the rules.

Penalties must be **severe** enough to deter violations.

FLEXIBLE

Regulator needs a **range of tools** to undertake enforcement.

Purpose is to ensure Compliance not punishment

SIGNIFICANCE OF THE INDEPENDENT REGULATOR

It is essential in a deregulated telecommunications environment that the independent regulator is able to act on these principles. The regulator requires the following

- **The power** to investigate the actions and records of all telecommunications providers/suppliers.
- **The authority** to seek or impose sanctions and penalties for violation of regulations with authority based in law.

Enforcement procedures

These principles need to be supported by procedures established in an economy that take account of the following,

- The principles of fast, fair, firm and flexible
- Fit the economy's legal system to make the process familiar and to facilitate the appeals process
- Ensure procedures are clear and well defined
- That each step in the process has a clear timeline

Despite how an economy sets up its enforcement regime it is essential that there is provision for the following.

1. REGULATOR-INITIATED INVESTIGATION

Where the regulator has complete control over the investigation – the regulator initiates the investigation, proceeds with and ends according to publicly available and published processes.

2. CONSUMER COMPLAINTS

To facilitate this, the process should be simple, but the regulator should take it as seriously as any other complaint.

3. CARRIER COMPLAINTS AGAINST OTHER CARRIERS

This is a useful tool for companies that want to take another party to court, but would like the expertise of the regulator. These complaints would have detailed filing requirements; much as a judge in a courtroom, the regulator simply acts as an adjudicator.

4. A MECHANISM FOR THE OUTCOME TO BE APPEALED.

The key to the appeals process is being able to take your case to the next level in the hierarchy, whether within the regulatory body, or to the court system.

5. ALTERNATIVE DISPUTE RESOLUTION OPTIONS

The regulator should try to facilitate private settlements between the parties since business solutions arrived at by the parties without

litigation are more efficient, and save time and resources for everybody involved, including the regulator.

DISCUSSION POINT

Compare and contrast the enforcement principles and procedures in an economy you know with the principles and procedures outlined above.

List the features that are present and not present.

Features that are present in an economy you know	Features which are not present
<ul style="list-style-type: none"> • . • . • . • . 	<ul style="list-style-type: none"> • . • . • . • .

In your group share and discuss three features that are working well in that economy and three that are not working so well.

Working well	Needing improvement
<ol style="list-style-type: none"> 1. 2. 3. 	<ol style="list-style-type: none"> 1. 2. 3.

Discuss strategies to improve these feature that do you believe could be improved.

Strategies for improvement

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

TOPIC 2 – APPLYING ENFORCEMENT PROCEDURES

Introduction

This topic provides a framework for managing alleged violations of rules/laws that come to a regulator's attention.

Initially the telecommunications industry has an interest in demonstrating compliance with Industry Rules to the consumers, the regulator and the government in order to demonstrate the benefits of self regulation.

Compliance achieved through encouragement and persuasion is more resource efficient than enforcement through legal processes.

Formal enforcement steps should only be taken where actions to bring about compliance have failed.

This topic will cover the 3 types of complaint which may come to the regulator and some suggested approaches for regulators to manage these. We will also look at the range of penalties available to the regulator to ensure the punishment fits the violation.

There will be an opportunity to compare and contrast these approaches in your economy and to review current practice.

There are three types of complaint which may come to the regulator and these are:

- Regulator Initiated Investigations
 - Consumer Complaints
 - Carrier to carrier Complaints
-

Regulator initiated investigations

The Regulator has a range of tools at their disposal to undertake an investigation. These tools are relevant to all types of complaint.

TOOLS FOR GATHERING INFORMATION

1. LETTER OF INQUIRY

To get information from a licensee or other relevant entity. To initiate an investigation.

To determine whether to continue a proceeding beyond a preliminary stage or gather more information.

Recipient is given a specific time to respond

Regulator rules should prohibit misrepresentations or wilful material submissions.

Based on response Regulator may end the investigation, request more information or take enforcement action.

2. INSPECTIONS

Conducted in response to complaint, Regulators own action, or as part of license requirement.

This may reveal violations of rules such as operation with excessive power or with an expired license.

Based on information gathered during an inspection, the Regulator may end the investigation, request more information or take enforcement action.

3. LEGAL ORDER

A legal order or subpoena would require the recipient to release all information related to a particular matter.

The regulator could have the authority to issue legal orders to obtain information necessary to complete an investigation.

Information obtained through a legal order can be used as a basis for further enforcement action or referral to the Ministry that handles criminal matters.

DISCUSSION POINT

Which of the above tools are used most frequently in an telecommunication environment that you are familiar with?

What % of investigations do you think are resolved at each stage in that economy?

<i>Letter of Enquiry</i>	...%
<i>Inspections</i>	...%
<i>Legal Order</i>	...%

Penalties

A regulator needs many forms of sanctions so it has the flexibility to ensure the punishment fits the violation. We will discuss seven penalties that can be applied.

Each penalty represents an escalation in punishment; however regulators need to be conscious of the cost of escalation in terms of resources applied and time taken.

This is demonstrated in the diagram that follows.

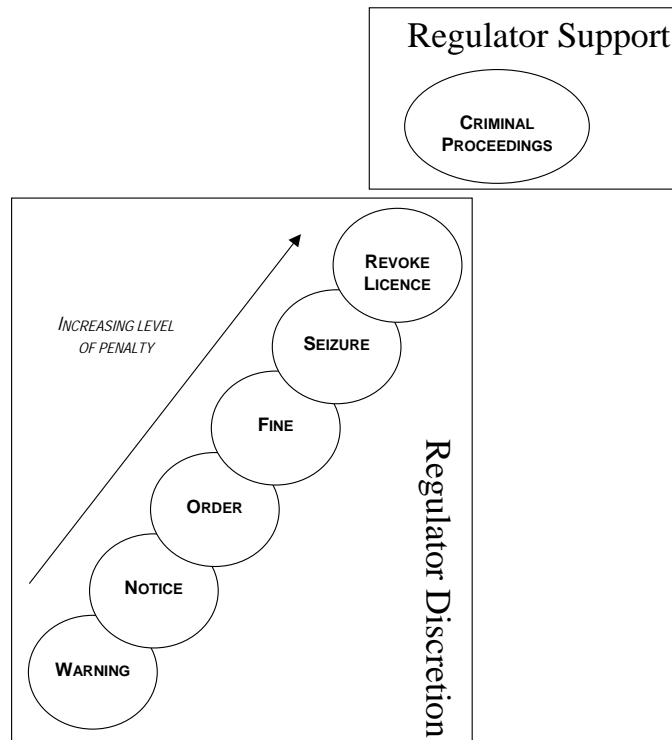


Figure 1 Scale of Penalties

1. WARNINGS

PURPOSE

Informs the subject that its actions violate rules/law and

Warns the subject to take steps to ensure compliance with the rule in the future.

Issuance of the warning letter may officially conclude the matter. The regulator may choose to monitor the subject or inspect the subject’s licensed facilities at a later date to ensure compliance is occurring.

Failure to comply with a rule after issuance of a warning can lead to more severe enforcement action.



2. VIOLATION NOTICE

PURPOSE

Informs the subject that its conduct violates the rules, except the subject is now required to submit an explanation of its actions in response to a violation notice.

A deadline for the response should be made clear.

Response to a violation notice may close the matter or lead to further investigation or more serious enforcement action.

3. ORDER TO CEASE NON-COMPLIANCE

PURPOSE

Prior to issuing the order, regulator would issue a document directing the subject to show cause why such an order should not be issued.

Subject should also have an opportunity for hearing prior to issuance of the order to cease non-compliance.

4. FINES

PURPOSE

Before seeking or imposing a fine the regulator should first issue a document that informs the subject that:

- the regulator believes that it has violated a specific provision of the law and/or the rules; and
- the regulator believes that a certain monetary value fine is appropriate.

The party may either pay or file a response explaining why the fine should either be reduced or cancelled.

After review, if the regulator determines that the forfeiture remains warranted, it will issue an order. In issuing the forfeiture order, the

regulator can assess the fine in either the same or a lesser amount than originally proposed.

There should be a clear deadline for payment of the fine.

The regulator could make public a scale of fines for common violations.

5. SEIZURE

PURPOSE

The regulator could have the legal authority (likely in coordination with the criminal justice authorities) to seize equipment that is manufactured, sold, rented, or used in violation of the rules or law.

6. LICENCE REVOCATION

PURPOSE

The regulator needs the ability to commence proceedings to revoke a party's license.

Generally reserved for the most serious cases -- for example, if the licensee has misrepresented material facts to the regulator, or if the party continues to violate the rules despite warnings or other types of enforcement action.

Prior to revoking a party's license, the regulator should issue a document directing the party to show cause why its license should not be revoked. The party should have an opportunity for hearing prior to issuance of the revocation order.

All of these steps should have clear deadlines.

7. CRIMINAL PROCEEDINGS

PURPOSE

In addition to other available penalties, any knowing violation of the law could result in a criminal fine and/or imprisonment, usually sought through the justice system.

DISCUSSION POINT

List the three most used penalties applying in a telecommunications environment you are familiar with and discuss their effectiveness.

- 1.
- 2.
- 3.

In your group:

Describe one example where inadequate/inappropriate penalties were applied to a case that you are aware of.

Share and discuss these cases.

Case study of regulator initiated investigation

A CASE STUDY FROM AUSTRALIA: ANTI-COMPETITIVE CONDUCT IN THE SUPPLY OF WHOLESAL ADSL SERVICES

Review this case and answer the following:

How effective the ACCC was in applying the principles of fast, firmness, fairness and flexibility in its enforcement approach?

Did the actions taken matched the violation?

List two suggestions to improve the ACCC approach.

This case study is from the Australian Competition and Consumer Commission (ACCC). The ACCC is responsible for enforcing the Trade Practices Act 1974 (the Act), which promotes competition and fair trade in the market place, and also regulates national infrastructure services. The company in question is Telstra Corporation Pty Ltd (Telstra), the former incumbent telecommunications provider in Australia. Telstra continues to be the major wholesale and retail supplier of telecommunications services in Australia.

Telstra's Alleged Conduct

In September 2001, the ACCC alleged that Telstra was engaging in anti-competitive conduct in the provision of broadband ADSL¹ services to its competitors. The alleged anti-competitive conduct of concern was Telstra's supply of wholesale ADSL high speed Internet services at prices whereby its competitors buying the wholesale services were unable to compete with Telstra's own retail prices. It was further alleged that Telstra structured its wholesale ADSL service in a manner that prevented its competitors from offering services substantially different from those that Telstra offered its residential and small business customers.

The ACCC took the view that Telstra was taking advantage of its ownership of the customer access network, its copper network that connects virtually all Australian households and businesses to the telephone network. It was claimed that Telstra was not offering a true wholesale ADSL service but merely 're-badging' its retail ADSL products and selling them to competitors at uncompetitive prices. Investigations of

¹ ADSL stands for Asymmetrical Digital Subscriber Line. It is a technology that uses the copper wire network to enable a broadband service to be delivered via a dedicated line from the customer home to a telephone exchange. ADSL is a high bandwidth downstream service, coupled with a lower bandwidth upstream service.

numerous complaints from Telstra's competitors indicated that Telstra's actions were having the effect of restricting the choice of service providers in residential areas to only one service provider – Telstra. This effectively limited the choice that residential customers had in accessing broadband.

ACCC Response

In September 2001, the ACCC issued Telstra with a Competition Notice², setting out the particulars of the alleged anti-competitive conduct. The practical effect of a Competition Notice is to call upon the recipient to cease its allegedly anti-competitive conduct or else face the prospect of proceedings for penalties and damages in relation to that conduct.

The Competition Notice gave Telstra 12 weeks to change its conduct, and allowed parties such as internet service providers (ISPs) and carriers to take court actions to seek damages against Telstra. The Competition Notice also permitted the ACCC to seek potential penalties of up to \$10 million and a further \$1 million for each day that the conduct continued.

The Competition Notice issued to Telstra resulted in significant price reductions of more than 30 per cent for some acquirers of Telstra's wholesale broadband ADSL services. Subsequent to these price reductions, the ACCC decided not to revoke the Competition Notice but rather extend the time available for Telstra to amend its conduct before potentially being exposed to significant penalties. The Competition Notice was not revoked due to concerns that further reductions may still be required in order to overcome the price squeeze between Telstra's wholesale and retail prices.

In March 2002, the ACCC determined that although Telstra had reduced the wholesale price for ADSL services, it had not adequately addressed the architecture issues outlined in the notice. Hence, the Competition Notice came into effect. This allowed competitors to seek damages from Telstra, and exposed Telstra to possible ACCC action by way of Federal Court proceedings with a view to obtaining substantial penalties.

The ACCC was concerned that Telstra had still not offered the particular ADSL broadband technology that was requested by wholesale customers for over a year, particularly in light of the fact that Telstra retail had recently been availing itself of this technology. The ACCC took the view that Telstra was favouring its own retail business while continuing to delay services needed by its wholesale customers to enable them to compete with Telstra's retail business.

In May 2002, the ACCC revoked the Competition Notice issued to Telstra. The notice was revoked in response to significant improvements to Telstra's wholesale broadband ADSL services. These improvements comprised price reductions of up to 25 per cent in

² If the ACCC has reason to believe that a carrier or carriage service provider with a substantial degree of power in a telecommunications market has engaged or is engaging in anti-competitive conduct, it may issue a Competition Notice under section 151AKA of the Act.

Telstra's wholesale price and changes to the architecture of the wholesale service which allow wholesale customers to compete against Telstra retail ADSL services.

Outcome

Before the issue of the Competition Notice most residential and small business customers had little choice of broadband internet service provider. In issuing the Competition Notice, the ACCC had found that Telstra's conduct in relation to its wholesale and retail ADSL services was holding back competition in the provision of broadband services to these customers. Shortly after the Competition Notice came into force, and exposed Telstra to potential penalties, Telstra offered its wholesale customers the service that they had been requesting. The improvements driven by the Competition Notice resulted in consumers and small businesses having a wider choice of service providers for high speed Internet access, in competition with Telstra.

DISCUSSION POINT

1. How effective was the ACCCs in applying the principles of fast, firmness, fairness and flexibility in its enforcement approach?

2. Did the actions taken match the violation?

3. List two suggestions to improve the ACCC approach.

1.

2.

Managing customer complaints

KEEP IT SIMPLE

To help protect consumers, the regulator may develop a mechanism to allow consumers to make their complaints known. This mechanism is another avenue for consumers if complaints have not been resolved directly with their supplier.

Allowing consumers to file complaints – in a process that is designed for ease and simplicity – is a good tool for consumer protection. However, the regulator would take these complaints as seriously as any other kind of complaint.

In some economies there are other avenues for consumers outside of the Independent Regulator. For example in Australia, The Telecommunications Industry Ombudsman (TIO), is a free and independent alternative dispute resolution scheme for small business and residential consumers in Australia who have a complaint about their telephone or Internet service.

The TIO aims to settle disputes quickly in a fair, objective and non-bureaucratic way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances.

The TIO is “an office of last resort”. This means that in the interests of fairness the service provider must be given a reasonable opportunity to settle a complaint with a customer before the TIO will become involved.

PROCESS FOR MANAGING CUSTOMER COMPLAINTS

1. A consumer may initiate a complaint *by writing a letter to the regulator* about a specific carrier stating facts showing that a carrier violated the law/rules, and including the name, address and telephone number of the complaining party.
2. The *regulator would then send the contents of the letter to the carrier* in question, and the carrier would be asked to respond within a certain period of time.
3. To resolve such a complaint, no judgment or ruling is ordinarily rendered. *Voluntary “satisfaction” by the carrier is most*

common -- the carrier usually proposes a remedy to the complainant. If this is unsatisfactory, the complainant may pursue the matter by filing a formal complaint with the regulator.

4. ***A carrier would not be inclined to ignore a consumer complaint, knowing that the regulator is able to pursue the matter on its own motion.***

FEATURES OF AN EFFICIENT CUSTOMER COMPLAINTS PROCESS

- Generally **resolved quickly**.
- Are relatively **simple and inexpensive** to execute.
- Do **not require the services of any attorney** either by the complainant or the processing staff.
- The regulator would find it useful to **keep statistics** on the number of informal complaints it receives. If a pattern is identified, the regulator may want to begin an investigation.
- Another option to help consumers with their complaints is an **Ombudsman**. An Ombudsman can provide a free, quick way for customers to have their complaints dealt with, and can investigate complaints about service providers, and where necessary can make a binding determination on the provider to compensate a customer.
- The Telecommunications Ombudsman in Australia has also adopted a proactive systemic approach to impact the behaviour of parties and minimise customer complaints. For example during 2004 18 investigations of systemic problems were undertaken Several

involved behaviour that could mislead consumers including,

- unclear pricing information posted on the provider's website;
 - information leading consumers to believe that they had won a phone and on the basis of that entering into a mobile phone contract
 - information about unlimited internet plans;
 - information about handset upgrades.
- The TIO was established under Telecommunications Act, is funded by industry, is independent of government, regulator and industry operators, receives customer complaints that are not satisfactorily resolved between a supplier and customer. To provide some idea about the scale of the TIO the following information is provided from the 2003/2004 annual report. The budget was \$A 6.6m, there were 1043 members in the scheme (including telecommunications operators and internet service providers). The TIO has 65 staff, received 76,000 complaints. The customer base for complaints is 10m fixed line, 16 m mobile and 6m internet customers; less than one quarter of a percent.

DISCUSSION POINT

Reflect on the process used to manage customer complaints in another economy against the above process and list where you believe the process works well for customers and where it doesn't and identify two features of a current enforcement regime which could be improved for customers.

Share the above in small groups and consolidate a list of the 4 most common customer issues from your group.

Works well	Needs improvement

Issues from your group

- 1.
- 2.
- 3.
- 4.

Case study of customer complaint

In light of the above features for managing customer complaints review the following typical example of a complaint and comment on the following:

- *The adequacy of the response*
- *The outcome. Was this outcome reasonable for the customer in this instance?*

INTERMITTENT FAULTS

The complaint: A complainant in rural setting said her line had been regularly dropping out since mid-2003. The problem became worse when it rained.

TIO RESPONSE:

When the Carrier responded to the formal investigation it provided fault reports that indicated that the complainant had first reported the fault in late 2003. However, from late November 2003 to February 2004 the complainant had made numerous complaints about repeated dropouts and having no dial tone. This only ceased once the Carrier carried out major works on its network. The service provider claimed that each fault reported was caused by a different problem with the network, and the faults were therefore unrelated, for the purposes of the Customer Service Guarantee (CSG). The Carrier claimed that it had rectified most of the faults within the required timeframes. The Carrier agreed to pay an amount under the CSG for one period of delay, but denied liability for the four-month period.

THE OUTCOME:

While the Independent Investigator was not convinced that the faults were separate in nature, it declined further investigation of this complaint because the calling-pattern analysis of the period before and after the fault showed no major difference in call numbers and durations. It would therefore be extremely difficult to argue that the service had been rendered wholly or partly unworkable for the purpose of CSG rebates. Additionally, the Carrier had provided other credits in response to the complaints, and the Investigator therefore believed that the outcome was reasonable.

DISCUSSION POINT

Review the case on comment on whether you believe the Investigator's response was reasonable. If not what do you think the Investigator's response should be.

Comment on whether the outcome matched the complaint. If not what suggestions would you make for another outcome in this case?

Carrier to carrier complaints

GENERAL “FORMAL “COMPLAINTS

These complaints are similar to a lawsuit in the information they require, as well as the fact that it allows a party to pursue individual relief, often in the form of monetary damages (not possible in an investigation).

This kind of case may be handled by the courts, but the regulator may be in the best position to adjudicate the matter as the subject matter expert. Therefore, it benefits the market when the regulator has a process for adjudicating these disputes.

PROCESS FOR MANAGING CARRIER TO CARRIER COMPLAINTS

1. Upon receipt of a complaint, the regulator would examine it to determine whether it **complies with the filing rules**.
 - Then the regulator would prepare an official document to notify the parties that a complaint has been filed and is under review.
 - This document would set forth the parties’ duties, set a date for the first status conference, and outline what can be discussed at the conference, including settlement prospects, factual and legal issues in dispute, schedules, and the creation of a joint statement of stipulated facts, disputed facts, and key legal issues.
2. If the complaint complies with the filing rules, the **complaint is forwarded to the carrier, who must file an answer**.
 - The complaint would include at a minimum certification that the complainant discussed, or attempted to discuss, in good faith, the possibility of settlement prior to the filing of the complaint; full statement of facts and supporting documentation; and proposed finding of fact, conclusions of law, and legal analysis.
3. The defendant is **permitted to file an answer** responding to the allegations in the complaint.

- The rules for filing an answer would be similar to those for filing a complaint. Complainants should then be allowed to file replies, and finally the defendant be allowed to file reply comments.

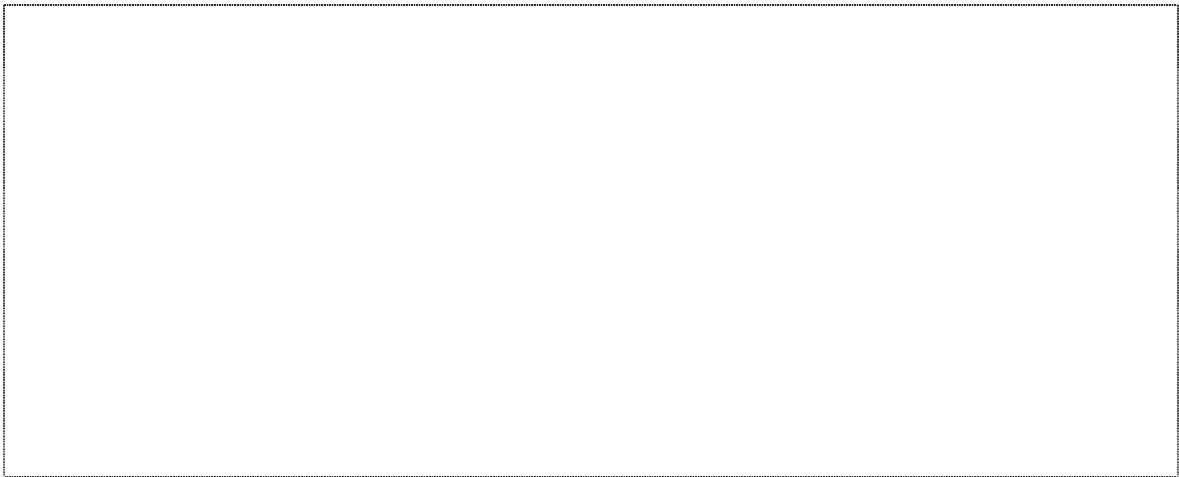
FEATURES OF AN EFFICIENT CARRIER TO CARRIER COMPLAINTS PROCESS

- For carrier-to-carrier complaints, ***detailed rules and timelines help*** the case to move forward rapidly.
- The ***complaint should fully inform the regulator of the provisions of the law or rules that have been allegedly violated*** and the facts claimed to constitute such violation.
- The ***complainant needs to establish with evidence*** that the defendant has violated the law or rules. It is up to the complainant to make a convincing argument and present all relevant evidence.
- ***The regulator does not gather any information; it is just an adjudicator.*** While it is possible that in some systems the regulator may intervene in the complaint process to gather information, there is value in the regulator not doing so. As an independent adjudicator, the ***regulator can “stay above the fray”*** and make an unbiased judgment for the two parties, as a judge would in court.
- A problem with these complaints is that they ***consume resources*** to pursue the case, and can take a great deal of time before case is finally resolved because of appeals.
- The advantage is that such a complaint would obtain a definitive regulator decision on sometimes ambiguous issues. The ***decision would serve as precedent***, and provide guidance for other carriers; therefore, the decision should be detailed enough for other carriers to benefit.

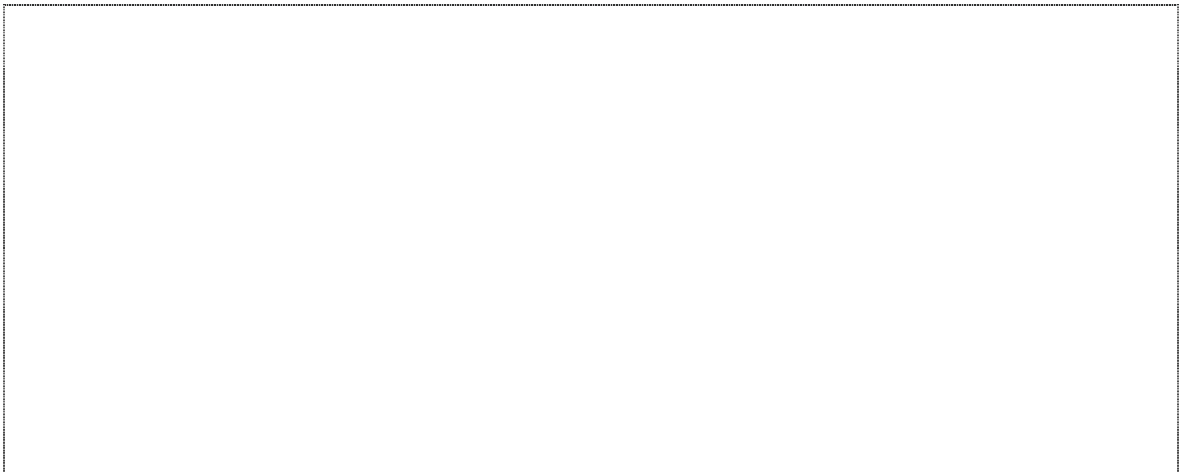
DISCUSSION POINT

Reflect on the process used to manage carrier to carrier complaints in an economy against the above process and features and list where you believe the process works well for carriers and where it doesn't and identify 2 features of a current enforcement regime which could be improved for carriers.

In particular consider the role of the Regulator in an economy in resolving carrier to carrier complaints, how do they resolve these issues and retain their independence.



Share the above in small groups and consolidate a list of the 3 most common carrier to carrier issues which need improvement from your group.



TOPIC 3 – APPEAL PROCEDURES AND PROCESSES

Introduction

This topic will review the processes and issues in the establishment of an effective appeals mechanism and include a discussion on alternative dispute resolution ideas.

Whilst it is essential to have an appeals process which has an escalation process built in it is important to consider the costs of escalation in terms of time and resources in your economy.

There will be an opportunity to consider these issues against current practice in your economy.

APPEALS

The appeals process is one of the things that ensures an enforcement system is fair.

Features of an efficient process

The key feature of a robust appeals process is the ability to *escalate a case to the next level in the hierarchy*, whether within the regulatory body, or to the court system.

- The initial decision in an enforcement proceeding can be made by the regulator's staff (if the staff has delegated authority to make decisions), or by the head regulator. If the initial decision is made by staff, then *the decision could be appealed to the head regulator*.
- However, if the initial decision is made by the head regulator, *then the losing party can request the regulator to reconsider its decision*. In that case, the regulator may deny the request, grant the request and overturn the initial decision, or grant the request in part by modifying the initial decision.
- *Parties should not be able to raise new arguments* – otherwise the process would never end – so parties must explain why the initial decision was wrong.

- The next step in the appeals process after the regulatory body should be the *next level in the hierarchy – in some cases, it is court system, and in other cases, it is a Ministry.*
- This appeals process should *be consistent with an effective court system*: it should not multiply avenues for appeal.

DISCUSSION POINT

Review the appeals process and tick which features are present in a telecommunications environment you are familiar with.

Identify 2 aspects of the appeals process which could be improved and describe how you might achieve this.

Case study of appeal provisions

CASE STUDY: HONG KONG, CHINA

Review the following example of practice in Hong Kong China **and comment on the adequacy of the appeals provisions.**

The Telecommunications Ordinance (Chapter 106 of Hong Kong laws) and its subsidiary legislation provide for the regulation of telecommunications network, services and related matters. The Telecommunications Authority is appointed under the Telecommunications Ordinance.

Under the Ordinance, the Telecommunications Authority is empowered to, inter alia:

- issue, administer, suspend, cancel or withdraw telecommunications licences;
- enforce the anti-competitive provisions in the Ordinance;
- grant right of access to land to telecommunications operators;
- prescribe technical standards and specifications;

- administer the numbering plan;
- manage radio spectrum (including allocating frequency);
- establish a universal service regime;
- determine terms of interconnection;
- direct the sharing of use of facilities;
- issue directions to licensees or other persons for compliance with licence or the Ordinance, or for securing interconnection; and
- impose financial penalties on licensees for breach of licence condition, direction or the Ordinance.

The Telecommunications Authority is required in various provisions of the Telecommunications Ordinance to consult or seek and consider representations from the persons who may be affected before making certain major decisions, for example:

- issuing guidelines (section 6D);
- creating and varying a class licence (sections 7B and 7C);
- dividing the radio spectrum and specifying the general purpose of frequencies and channels, and designating the frequency bands to be subject to payment of spectrum utilization fee (sections 32G, 32H and 32I);
- prescribing standards and specifications. (section 32D);
- making a determination on interconnection (section 36A);
- issuing a Direction (section 36B);and
- imposing a financial penalty (section 36C)

Provision for Appeal

Persons aggrieved by an opinion, determination, direction or decision of the Telecommunications Authority relating to anti-competition provisions of the Telecommunications Ordinance or any licence condition relating to any such section, or by any sanction or remedy imposed or to be imposed under the Ordinance by the Telecommunications Authority in consequence of a breach of any such section or any such licence condition may appeal to the “Telecommunications (Competition Provision) Appeal Board” (sections 32L, 32M, 32N and 32O).

Persons aggrieved may also apply for judicial review.

DISCUSSION POINT

Comment on the adequacy of the appeals provisions in this example

Alternative Dispute Resolution

Effective enforcement also means exploring new and creative ways to solve problems. We will discuss and review other means of resolving problems. Some of these other means require regulators to use their personal skills of influencing and persuasion to get the parties to reach a solution.

1. PRIVATE SETTLEMENTS

The regulator may try to facilitate private settlements between the parties since business solutions arrived at by the parties without litigation are more efficient, and save time and resources for everybody.

2. MEDIATION

Mediation means active engagement of staff with the parties involved in the complaint. Regulator would facilitate communication and evaluate the parties' positions.

Participation would be voluntary, but parties have an interest in resolving their dispute without expense and time of litigation.

Mediations allow the parties to focus on a solution to their dispute, and not waste resources. Involvement of the regulator focuses the parties on resolving their dispute, and less on posturing.

FEATURES OF AN EFFECTIVE MEDIATION PROCESS

See Module 5 on knowledge and skills of effective mediations.

- ***Carriers exchange letters*** through the regulator summarizing their side of dispute. This is useful because the parties may not have communicated directly until mediation occurred. The regulator should be specific regarding the details to be included in the letters, including relevant documents and correspondence. If the letters are not made public, but only subject to disclosure if someone files formal request, then the companies are likely to be more forthcoming.
- After the exchange of letters, the ***regulator's staff meets with both sides***. Decision-makers from both sides should be present at any

mediation, in order to have immediate substantive feedback to settlement proposals.

- The ***regulator would find areas of agreement***, narrow the disputed issues, and give each side an informal assessment of their arguments. It will likely take multiple meetings with the parties to reach settlement.
- ***Disputes are resolved quickly***, without delay and expense of litigation.
- Even when mediation is unsuccessful, ***it narrows the issues in dispute***.
- The disadvantage is that in ***some cases the result may reflect the unequal power of the parties***, and any result only applies to the negotiating parties even if there are similar disputes between other carriers.

DISCUSSION POINT

How often are alternative dispute resolution practices used in economies? Describe an instance when mediation was successful.

AGGRAVATING AND MITIGATING FACTORS

As a regulator is making decisions, imposing penalties, or mediating a dispute, it should keep in mind that situations that may seem similar can actually be quite different due to aggravating and mitigating factors.

Input from the targeted party, as mentioned previously, is key to uncovering all these factors. Considering such factors helps a regulator be firm and flexible, but also makes clear that it is fair.

CONSIDERATION OF AGGRAVATING AND MITIGATING FACTORS

- ***Penalties or judgments could be harsher*** if there are aggravating factors. Perhaps the violation was very severe, or took place repeatedly or for an extended duration.
- Another factor is whether the ***violation resulted in injury to persons, property, and/or business***. Perhaps the party acted knowingly, recklessly, or in a negligent manner.
- A ***previous history of violations*** by one party could also indicate the need for stiffer judgment. A serious consideration is whether the party made any effort to conceal the contravention.
- There can also be considerable mitigating factors in any situation. If the party ***discovered the violation before it was reported*** to the regulatory, perhaps it took prompt action to correct the situation.
- It is ***significant if the party voluntarily disclosed the contravention to the regulator***.

DISCUSSION POINT

Describe an instance where the Regulator in a telecommunications environment you are aware of has had to impose a harsher penalty and what were the circumstances?

EXAMPLES OF PRACTICE ACROSS APEC ECONOMIES

Following are some examples of practice in a number of APEC economies. Read through each example and identify the dispute resolution practices outlined.

In particular list the following,

1. **Identify the escalation process**
2. **The alternative dispute resolution processes.**

EXAMPLES OF PRACTICE BY APEC ECONOMIES:

Example 1: Japan

Where a telecommunications carrier, in spite of other telecommunications carrier's proposal to enter into an agreement on interconnection, does not accept entering into a consultation or where said consultation fails to come to an agreement, the Minister shall, upon petition of said telecommunications carrier who proposed said agreement, order said other telecommunications carrier to start or reopen the consultation.

Where a consultation between the parties concerned about the interconnections fail to come to an agreement with respect to such details as charges or other details including terms and conditions of interconnections, a telecommunications carrier who installs telecommunications facilities to be connected to said telecommunications facilities of the telecommunications carrier may apply for an award to the Minister.

In addition to these, when one party offers to enter into an agreement concerning interconnections but the other party does not accede to consult or said consultation fails to come to an agreement, or when the parties do not agree in consultation on charges or other details of agreement including terms and conditions of interconnections, a party may apply the Telecommunications Business Dispute Settlement Commission for mediation.

Example 2: United States

Once an interconnection agreement has been approved by a state regulator, any aggrieved party may file a complaint at the courts. Parties can (1) seek mediation at any point in the negotiations and (2) arbitration after 135 days from the original

request for negotiation. The states have initial responsibility to mediate and arbitrate these disputes but may choose to pass these responsibilities on to the Federal Communications Commission (FCC).

Example 3: Korea

Disputes among service suppliers related to interconnection can be settled at the KCC [Korean Communications Commission]. (Telecommunications Business Act, Article 35). The KCC shall make a decision within 60 days after the receipt of an application for a ruling.

Example 4: Singapore

Under Singapore's Telecom Competition Code (Section 5 –Interconnection with Dominant Licensee):

5.5.6 Agreements Arrived at Via the IDA [Infocomm Development Authority] Dispute Resolution Procedure

- IDA recognizes that, in many cases, the Dominant and Requesting Licensees will not voluntarily reach agreement regarding the Interconnection Agreement, and provided numerous provisions to address this situation.

In particular, the following Subsections in the code addressed the above concerns:

5.5.6.1 Petition for IDA Dispute Resolution

- If the Licensees fail to reach a voluntary Interconnection Agreement within 90 days either Licensee may file a petition for dispute resolution with IDA.

5.5.6.6.2 Timing of the Dispute Resolution Procedure

- IDA will seek to complete the Dispute Resolution Procedure, and issue a direction resolving each of the issues presented in the Petition and specifying any further actions that the Licensees must take, within 60 days from the day on which it receives the Petition. This period will be shortened to 30 days where one of the parties is a Services-based Licensee.

Example 5: Chinese Taipei

Article 28 of the Regulations Governing Network Interconnection among Telecommunications Enterprises mandates that upon request for interconnection from other parties, Type I carriers shall reach an agreement within three months from the negotiation commencement date. If no agreement is reached within the three-month period, any party to the negotiation shall be entitled to file a written application to the Directorate General of Telecommunications (DGT) for arbitration.

If the network interconnection agreement is not implemented between Type I telecommunications enterprises, either party may file a written application to the DGT for arbitration and a duplicate of the application shall be submitted to the other party concerned.

Among Type I telecommunications enterprises, an agreement not reached within three months from the date one party requested for network interconnection, the DGT may ex officio make investigation and make arbitration if, in its opinion, there is a likelihood that the case will be detrimental to the public interest.

The DGT shall complete the arbitral award within three months after it receives the arbitration application or from the date it initiates an ex officio investigation, and the duration may be extended for one month if necessary and all parties concerned shall be notified.

DISCUSSION POINT

Identify the escalation processes in the above economies.

List examples of the use of alternative dispute resolution practices

ECONOMY	ESCALATION PROCESS	ALTERNATIVE DISPUTE RESOLUTION
JAPAN		
USA		
KOREA		
SINGAPORE		
CHINESE TAIPEI		



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