VODAFONE
SUBMISSION TO THE
PRODUCTIVITY COMMISSION

Review of Telecommunications Specific Competition Regulation

11 August 2000

CONTENTS

1.	**INTRODUCTION**		**3**
	1.1	**Overview**	**3**
	1.2	**Structure of this Submission**	**5**
	1.3	**Supplementary Submission**	**5**
2.	**REGULATORY THEORY**		**6**
	2.1	**Rationale for Regulation**	**6**
	2.2	**Principles of Good Regulation**	**9**
	2.3	**Overseas Approach**	**11**
	2.4	**Specific Regulatory Arrangements**	**12**
	2.4.1	**Access Regimes**	**13**
	2.4.2	**Control of Anti-competitive Behaviour**	**13**
3.	**REGULATORY EVOLUTION IN AUSTRALIA**		**15**
	3.1	**Phased Introduction to Competition**	**15**
	3.1.1	**1989 Act**	**15**
	3.1.2	**1991 Act**	**16**
	3.1.3	**1997 Act**	**16**
	3.2	**Efficacy of 1997 Regime and Proposals for the Future**	**18**
4.	**COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY**		**19**
	4.1	**Competition in the Telecommunications Industry Since 1997**	**19**
	4.2	**Industry Developments over the Next Two to Seven Years**	**22**
5.	**PART XIB:- COMPETITION RULE/NOTICE REGIME**		**24**
	5.1	**Part XIB and the Competition Rule**	**24**
	5.2	**Vodafone View of the Functioning of Part XIB**	**26**
6.	**TPA PART XIC**		**28**
	6.1	**Access to Interconnected Networks**	**28**
	6.2	**Access to Provide Carriage Services**	**29**
	6.3	**Function of Part XIC**	**30**
	6.4	**Contrast with Other Access Regimes**	**30**

6.5 Declared Services 32

6.6 Service Declaration Process 34

6.7 Vodafone's View of the Functioning of Part XIC 35

7. CONCLUSIONS:- THE CASE FOR REGULATORY CHANGE 37

1. INTRODUCTION

1.1 Overview

Vodafone considers that the Productivity Commission review of the economic regulation of the telecommunications industry comes at a pivotal time in the development of that industry. The review is not merely a report card on the effectiveness of the Commonwealth's reform agenda to date. It has the potential to shape the future role of telecommunications in people's lives in a very significant way.

Accordingly, Vodafone's submission examines the principles underpinning economic regulation as well as analysing the effectiveness of the current regulatory arrangements and the scope for change. Having regard to, among other things, the increasing penetration of mobile telephony in Australia and the potential for substitution of mobile for fixed services, Vodafone has concluded that the path of regulatory evolution should be one of increasing forbearance and reliance on market forces to deliver the optimal benefits to end-users.

Over the last 11 years the Commonwealth has implemented a program of regulatory reform designed to promote the development of robust and sustainable competition in the delivery of telecommunications services in Australia. To this end the Government has used a variety of regulatory tools available to it, including:

- the controlled allocation of carrier and radiocommunications licences;
- initiatives designed to attract new players into the market and to assist their establishment on a sustainable basis; and
- measures to minimise the opportunity for Telstra to exploit its dominant market power derived from its former monopoly incumbent status.

The industry has now reached a point that, although there are industry elements that still warrant regulatory oversight, regulatory forbearance is needed to ensure that the industry develops in an optimum way. The nature of the industry is that it is complex, dynamic and growing at an exponential rate. This is particularly true in the mobile sector where the advent of third generation services will give rise to a rapid expansion in the type and range of services provided to customers and greatly enhanced customer access to those services.

The challenge for Government now is to find the right way to ensure that Australia can take maximum advantage of what has been achieved to date, using it as an effective springboard

for future growth. In this regard, Vodafone considers the industry is sufficiently mature to allow a winding back of regulation, particularly in those areas where the boundaries between mobile and fixed services are becoming more and more blurred.

Vodafone is pleased to contribute to the debate on regulatory reform. This submission is an initial contribution to the debate that is likely to engage the industry over at least the next 18 months.

While the telecommunications competition regime has delivered some beneficial results in the period since July 1997, Vodafone strongly believes that, going forward, the general competition law framework should apply in respect of the telecommunications industry unless there is a compelling basis for applying industry-specific regulation in relation to particular facilities or services. Regulation in only warranted in the event of durable market failure.

In Australia the general regulatory solution for durable market failure has been to:

- mandate access to services only where they are provided by means of facilities which are uneconomic to duplicate and access is necessary to promote upstream or down stream competition;

- require structural separation of natural monopoly and competitive business units.[1]

The 1997 telecommunications regime, and the Long Term Interests of End Users (LTIE) test in particular, departs from the generally accepted Australian response to durable market failure.

Changing economic conditions in the supply of telecommunications, and likely future developments in the industry over the next two to seven years, will increasingly challenge the need for and relevance of special regulatory rules, such as the LTIE test, for the telecommunications industry.

In Vodafone's view, the phased refinement of industry specific economic regulatory arrangements to reflect more general competition regulation will promote optimal development in the industry. The primary reforms Vodafone proposes are:

[1] See the *Report by the Independent Committee of Inquiry into National Competition Policy*, August 1993 **(Hilmer Report)**

- the regulation of access to services should revert to application of general access principles, that is services should only be declared where they are provided by means of facilities that are uneconomical to duplicate (that is, natural monopolies). No new services should be declared under the existing LTIE test, and all existing declarations should be subject to a sunset provision; and

- the rules governing anti-competitive conduct in the telecommunications industry should be aligned with general competition principles, except in cases of specific concern arising from the potential anti-competitive use of Telstra's substantial market power derived from its vertically integrated incumbent monopoly.

1.2 Structure of this Submission

In this submission to the Productivity Commission's review of the 1997 telecommunications specific competition regime, Vodafone:

- reviews the principles governing regulation generally and the objectives of telecommunications specific regulation;

- describes the telecommunications reforms to date;

- outlines the current state of competition in the industry;

- forecasts some of the likely changes in the telecommunications industry over the next two to seven years;

- reviews the operation and performance of the 1997 competition regime to date; and

- outlines suggested principles which Vodafone believes should govern reform of the 1997 competition regime.

1.3 Supplementary Submission

Vodafone welcomes the opportunity to contribute to the debate on regulatory reform and intends to participate fully in the review process. While Vodafone has sought to raise only issues of principle in this submission, it will continue to participate in the review process, providing more detailed proposals over the course of time. Vodafone recognises that the issues involved are complex, and views are likely to vary widely. Accordingly, Vodafone presently intends to put further submissions to the Productivity Commission to clarify or expand on its ideas or to respond to issues raised by others.

2. REGULATORY THEORY

In this chapter Vodafone briefly reviews the rationale for regulation generally and in the telecommunications sector in particular. This rationale is principally some form of durable market failure. Vodafone also comments on the potential failure of regulation. Some of the regulatory tools available to address market failure are reviewed. In the concluding remarks in chapter 7 Vodafone comments on the extent to which industry specific regulation in the telecommunications industry continues and is likely to continue to be necessary in light of the generally accepted rationale for regulation.

2.1 Rationale for Regulation

The underlying rationale for any form of regulation is that the achievement of a particular public policy objective requires such regulation and that the chosen regulatory regime is the most efficient means of delivering that objective.[2]

Government's principal public policy objectives are:

- economic, namely ensuring the productive, dynamic and allocative efficient use of society's resources; and

- social, namely meeting basic community expectations for the distribution of resources, including the provision of basic services.[3]

In general, market forces are particularly effective in ensuring the efficient allocation of resources, since any firm that is capable of profitably providing a service at a lower price than the prevailing market price is likely to secure substantial share and make a profit. The threat of this entry, and the existence of competitors who have entered, gives firms the incentive to price as efficiently as they can in order to maximise profits.

Market forces can also be effective to meet many social public policy objectives, such as the availability of products and services at reasonably affordable prices, the widespread availability of particular products or services, and the advancement of minimum service

---

2 *A Guide to Regulation*, Productivity Commission, Second Edition (29 January 1999)

3 Given the focus of this review on the competition regulatory regime, social policy objectives have not been discussed in detail. However, the 1997 telecommunications regulatory regime was also designed to meet broader social policy objectives such as the equitable provision of basic services and the availability of a range of products and services to consumers at the lowest possible price. The social aspects of regulation and telecommunications in particular are discussed in chapter 3, Productivity Commission, *International Benchmarking of Australian Telecommunications Services*, March 1999.

levels. Market forces can even be used to deliver social policy objectives, eg competitive supply of USO services.

Regulation is only warranted in the case of a durable market failure that is likely to impede efficient economic performance. Durable market future can be defined as "a market characterised by conditions for commercial inputs which are significantly different from those which would prevail in a competitive market place and that is likely to continue indefinitely without regulatory intervention". (For example, this might only be expected to occur where the services are provided by means of facilities that are uneconomical to duplicate).

Even in the case of durable market failure, governments should be wary of regulating given the potential for regulatory failure discussed below. Further, in markets undergoing rapid change, the general presumption should be against regulatory intervention, that is, a presumption in favour of regulatory forbearance.

In the telecommunications sector, it has generally been considered that market failure may occur in the following circumstances:

- natural monopoly, where one producer can supply the entire demand at the lowest cost, ie declining average costs over the full range of demand. The local loop has long been considered to be a natural monopoly, although this may not be so in some geographic areas; and

- substantial market power held by a vertically and horizontally integrated incumbent monopolist, due to its historical position, high barriers to entry, and its ownership of the ubiquitous telecommunications network, including the local loop.

Another area of perceived market failure relevant to the telecommunications industry is the impact of network externalities, where a network becomes increasingly valuable to all users as more people use it.[4]

As discussed in chapter 3, the telecommunications-specific regulatory regime in Australia was designed to address those market failures or perceived market failures.[5] For example:

---

4 This is discussed at Appendix B to the Productivity Commission Study, *International Benchmarking of Australian Telecommunications Services*, March 1999.

5 In particular, the Productivity Commission attributes regulatory intervention to perceived barriers to entry, particularly where the *incumbent remains vertically integrated.* See chapter 4, *International Benchmarking of Australian Telecommunications Services.*

- Access regulation was introduced to address concerns regarding access to natural monopoly facilities. However, the access regime was also intended to address perceived network market failures, because of concerns that dominant network operators would refuse to permit interconnection with their networks and hence impede any to any connectivity.

- A specific competition conduct regime was introduced in light of the fact that Telstra was not to be vertically separated, to address its enduring substantial market power.[6]

However, following the initial licensing of a limited number of carriers, the 1997 telecommunications regime was also intended to promote greater competition through assisting market entry and adopting stronger forms of conduct regulation to discourage anti-competitive behaviour.

There are other perceived market failures and other policy measures reflected in the 1997 telecommunications regime, for example, supplier/customer information asymmetries.[7] However, in this submission Vodafone has concentrated on the issues of most relevance to the competition conduct provisions in Part XIB and the access regime in Part XIC.[8]

---

6 The Productivity Commission recognises that incumbent carriers (Telstra in Australia) still dominate the overall telecommunications market. See *International Benchmarking of Australian Telecommunications Services*, chapter 2.

7 Information asymmetries are not discussed in this submission, as they principally underpin the regulation of standard consumer contracts and other disclosure obligations which are either not part of this inquiry or are a subordinate issue.

8 The 1997 telecommunications regime also addresses market failure with regard to the achievement of the following specific social objectives:
- minimum service standards and service provision;
- consumer information and customer contracting;
- prices to retail customers.

2.2 Principles of Good Regulation

Because a regulatory regime interferes with the operation of markets, it can create substantial negative impacts in its own right. [9]

The telecommunications industry is highly dynamic with rapid rates of growth, technological innovation and changing consumer tastes. Networks have different technical and economic characteristics, not all are subject to significant economies of scale, scope and density, and network externalities may not be a significant constraint where there are many suppliers. These factors have broken down many areas of former or perceived market power and market failure and will continue to do so.

In dynamic markets where the bases for regulation have been eroded, continued regulation may distort market forces and the development of these and associated industries.

Regulatory arrangements tend to be static and can often be unresponsive to market change. Further, they can actually lock in uncompetitive market structures which have become dependent on regulatory outcomes, rather than encourage market developments which might resolve existing market failure.

One essential condition for desirable regulation often overlooked is whether regulation, or the particular form or regulation, can deliver effective outcomes more efficiently than other alternatives. This aspect of efficient regulation has been emphasised by the Productivity Commission in its Guide to Regulation.

Efficiency of regulation can be assessed in terms of the cost of delivering the desired outcomes. An equally important test of regulatory efficiency is how quickly it responds to dynamic market conditions. Changing market conditions can make existing levels and forms of regulation inefficient and costly.

Vodafone suggests that the following principles should guide regulation:[10]

---

[9] Some examples of regulatory failure include:
- eliminating or muting market signals, which would otherwise promote entry;
- free riding, regulatory gaming and rent seeking;
- distorting desirable build or buy decisions; and
- one size fits all regulation.

See Viscusi, Vernon & Harrington, *Economics of Regulation and Antitrust*, Second Edition. MIT Press, Cambridge: 1995, in particular "The Criteria Applied in the Oversight Process" and "The Impact of the Oversight Process" p 29 - 38.

[10] These principles draw on the market failure approach to regulation proposed by the Investors in Mobile group in their discussion paper *Securing our Mobile Future,* June 2000, a copy of

- In dynamic markets such as telecommunications, there should be a general principle of forbearance, that is a presumption against regulatory intervention rather than in favour of it.

- General competition regulation, such as competition conduct regulation in Part IV and access regulation in Part IIIA of the Trade Practices Act, should be the default position.

- There should not be industry specific regulation except to address industry specific market failures.

- Only durable market failures likely to undermine competition should be the subject of specific regulation arrangements directed to addressing that failure.

- The least costly[11] and interventionist approach capable of addressing the specific problem should be adopted. The costs of regulation should be explicitly considered.[12] The proposed regulatory intervention should be proportionate to the market failure.

---

which has been provided with this submission. This paper proposes that specific regulation should only be imposed if the following questions are answered in the affirmative:
- Is there a demonstrable market failure?
- Is this market failure unlikely to be removed by market action?
- Is competition law unable to deal with the removal of this market failure?
- Is the proposed intervention proportionate to the nature of the failure?
- Is the proposed intervention removable once it has solved the failure?

11 Some of the costs of regulation include:
- distorted investment incentives;
- distorted commercial objectives;
- delay; and
- resourcing the costs of operating in the regulatory environment.

Costs of regulation are discussed in the Industry Commission Information Paper Implementing the National Completion Policy: Access and Price Regulation, November 1995 at p13.

12 There are a range of regulatory control options available to Governments to meet their objectives in the telecommunications industry. These range from the full command model of a publicly owned monopoly provider through to open competition subject only to general competition law. Some options include:
- licensing conditions;
- retail price regulation;
- access regulation;
- vertical separation;
- ring fencing;
- information disclosure; and

- The regulatory regime should be responsive to changing conditions, particularly changing market conditions. The proposed regulatory intervention should be readily removable once the market failure has been resolved

2.3 Overseas Approach

This approach is demonstrated in similar reforms taking place in the United Kingdom and Europe. For example, OFTEL's July 2000 report on *Communications Regulation in the UK* states:

> "*Sectoral regulation of the communications markets should be administered with an understanding of its impact upon investment, innovation and enterprise. Regulatory rules and actions need to be focussed, proportionate and objectively justifiable. Co-regulation and self-regulation should be developed. When effective competition exists, rules should be reviewed and removed.*…
>
> *Because regulation, where it is not warranted, can distort and undermine competition, and can also deter investment and stifle innovation, the application of sectoral regulation should be used in a focussed manner only in circumstances where competition law would not achieve the same results and within a reasonable timescale."*

Oftel accordingly recommends that network owners be required to provide access only in limited situations: that is, where the network owner has market power, where the benefits exceed the costs of access, and where access is effective and proportionate.

Similarly, in its draft Directive, the European Commission notes:[13]

> *"Ex ante regulatory obligations designed to ensure effective competition are justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for construction of network infrastructure, or which are vertically integrated entities owning or operating network infrastructure for delivery*

- control of specific anti-competitive behaviour, eg inefficient price discrimination.

See Viscusi, Vernon & Harrington, *Economics of Regulation and Antitrust,* Second Edition. MIT Press, Cambridge: 1995, in particular chapter 1.

[13] Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services,* 12 July 2000.

> *of services to customers and also providing services over that infrastructure, to which their competitors necessarily require access…*
>
> *It is essential that such regulatory obligations should only be imposed where there is not effective competition and where national and Community competition law remedies are not sufficient to address the problem."*

Specifically in relation to access, the European Commission notes in the explanatory memorandum to its proposed directive: [14]

> *"The Directive builds on the premise that competition rules will be the prime vehicle for regulating the electronic communications market once the market becomes effectively competitive. However some sector specific ex-ante rules will continue to be appropriate during the transitional phase, in particular where former monopoly operators continue to benefit from inherited market power, such as in local access networks, or where firms are vertically integrated.*
>
> *In such cases, the regulatory response should be specific to the problem, proportionate and maintained only for as long as necessary."*

Both Oftel and the European Commission therefore recommend limiting the application of telecommunications industry specific legislation to specific situations in which a departure from the general competition law is justified. Both bodies accept that the need for specific regulation may be quite limited in the telecommunications industry.

Regulatory arrangements in these and other countries are discussed in chapter 4 of the Productivity Commission's report on *International Benchmarking of Australian Telecommunications Services* in March 1999. These arrangements are characterised by a progressive deregulation of telecommunications services as they become or are seen to be competitive. Access to the incumbent's carriage services and interconnection (including unbundling the local loop) are identified as the most crucial issues internationally.

2.4 Specific Regulatory Arrangements

The two principal forms of competition regulation adopted in Australia are access regulation, whereby access seekers can gain a right to the services provided by means of another person's facilities, and general competition conduct regulation, whereby certain forms of

---

[14] Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities,* 12 July 2000.

anti-competitive conduct are prohibited. These two forms of competition regulation form the basis of the 1997 competition regime and are discussed in general below.

2.4.1 Access Regimes

Access regimes are intended to provide a right for a third party (the access seeker) to gain access to services provided by means of significant facilities. The underlying rationale for access regulation is that access is required in order to permit competition in markets upstream or downstream to the facility.

Access is a highly intrusive form of regulation, interfering with private property rights, is costly to administer for both the regulator and industry and has a tendency to distort investment decisions. For that reason, access regulation is generally only seen to be appropriate where the facilities are uneconomic to duplicate and are a key input for competition in other markets. Vertical separation, ring fencing and information disclosure rules can be complements or potential substitutes for access regulation.

Access regulation is not simply intended to be a form of price regulation over "monopoly" assets. However, it does serve that function where monopoly pricing of natural monopoly services would impede competition in upstream or downstream markets. It is only likely to be in relatively rare situations that an owner of a facility would not want to maximise the efficient use of that facility. This situation arises where the owner of the facility does not face competition or potential competition from other facilities. Infrastructure services and facilities such as the local loop have generally been considered to be natural monopolies.

The 1997 competition regime also reflects the view that access to services may be necessary, whether provided by means of facilities which are uneconomic to duplicate or not, in order to promote competition and achieve any-to-any connectivity. Vodafone questions whether these remain legitimate separate concerns.

2.4.2 Control of Anti-competitive Behaviour

Anti-competitive behaviour is regulated under general competition law, particularly Part IV of the *Trade Practices Act 1974*.[15] The ACCC can prosecute breaches of Part IV and private parties can also take court action in relation to breaches of Part IV.

---

[15] Part IV prohibits certain forms of conduct, namely:

- contracts, arrangements and understandings that have the purpose or effect of substantially lessening competition in any market;
- primary and secondary boycotts;
- price-fixing arrangements;

The characteristics of certain industries, or certain firms, may be considered to require industry-specific regulation to control anti-competitive behaviour. This is typically where there is a high degree of vertical integration coupled with historical monopoly control of essential infrastructure.

The anti-competitive behaviour to be controlled may include predatory pricing, inefficient price discrimination, leveraging existing power into other markets or impeding effective access. The dynamic or other characteristics of an industry may require different procedural mechanisms for the successful control of anti-competitive behaviour, or particular powers vested in industry-specific regulators.

In some circumstances there may be specific conduct restraints, such as prohibitions against discriminatory pricing, however in general there are relatively few examples of industry specific competition conduct regulation in Australia aside from telecommunications.[16] The general approach to concerns regarding the special market power of vertically integrated owners of national monopoly facilities which are essential for competition in dependent markets has been to recommend vertical separation or some form of ring fencing. [17] The provisions of Part XIB were, in effect, an alternative to the structural separation of Telstra.

- exclusive dealing, including third line forcing;
- resale price maintenance;
- misuse of market power; and
- anti-competitive mergers.

16 One example is the natural gas industry in Victoria, which is subject to a specific competition law regime.

17 This was the recommendation in the Hilmer Report.

3. REGULATORY EVOLUTION IN AUSTRALIA

In this chapter, Vodafone reviews the legislative arrangements for telecommunications in Australia, particularly in relation to the introduction of competition. The 1997 telecommunications legislative reforms sought to actively promote competition and new entry in the telecommunications industry, through rights of access to declared services and strong anti-competitive conduct rules. As discussed in chapter 4, the objectives of the 1997 reforms have been largely met. In later chapters Vodafone submits that future telecommunications regulatory regimes should adopt principles of forbearance and follow a more neutral general competition law approach to access and conduct rules, with residual areas of significant concern addressed specifically.

3.1 Phased Introduction to Competition

Historically, Telstra and its predecessors were the only licensed telecommunications carriers in Australia. Telstra, with its Government mandate as a monopoly provider, had established the fully integrated telecommunications network over which all Australian telecommunications were carried, the public switched telephone network (**PSTN**) which includes the integrated subscriber digital network (**ISDN**).

The recent history of telecommunications regulation in Australia has seen a phased introduction to competition through the following legislative regimes.

3.1.1 1989 Act

The *Telecommunications Act 1989* (**1989 Act**) was enacted to ensure the efficient and economic operation of the public switched telephone system by Telstra (then Telecom), maximise the efficiency of all carriers (limited to Telstra, OTC and Aussat) and achieve optimal rates of expansion and modernisation for the telecommunications infrastructure.

The 1989 Act established Austel as the industry-specific telecommunications regulator charged with protection of consumers and competitors, economic and technical regulation, and giving advice and assistance to the industry.

The 1989 Act gave exclusive rights to Telstra, OTC and Aussat to operate domestic, international and satellite-based telecommunications services, but contemplated that these exclusive rights might not last beyond 1991. It also gave other parties the right to provide value-added and private services, subject to licensing requirements.

3.1.2 1991 Act

In 1991 the Commonwealth Government established a new regulatory regime through the enactment of the *Telecommunications Act 1991* (**1991 Act**) to introduce competition into the telecommunications industry in Australia.

Following those reforms, in 1992 the Commonwealth Government licensed one new fixed carrier, Optus, and two new mobile carriers, Optus and Vodafone. The 1991 Act specifically provided a framework in which the new carriers, Vodafone and Optus, could obtain access to Telstra's network.

3.1.3 1997 Act

In 1997, the Commonwealth Government further reformed the telecommunications industry to permit any company to operate a network (that is, to be a carrier) and to provide carriage or content services through the passage of a package of legislation including the *Telecommunications Act 1997* (**1997 Act**) and the *Trade Practices Amendment (Telecommunications) Act 1997* (**TPA (Telecommunications) Act**).

As part of these reforms, regulatory barriers to entry into the telecommunications industry were removed. For regulatory purposes, the 1997 Act separately identified persons who control telecommunications network infrastructure (**carriers**) and those persons who provide carriage or content services to the public by using that infrastructure (**service providers**). Carriers provide the basic transmission infrastructure on which the supply of carriage and content services to the public relies.

In order to allow infrastructure providers the flexibility to meet the demands of the Australian community by whatever technology they considered most appropriate, the Government removed the existing regulatory distinction between carriers on the basis of the technology they used. The licensing provisions of the 1997 Act do not impose regulatory barriers on carriers' choices in regard to delivery technology.

The 1997 Act distinguishes between carriage service providers (who supply carriage services to the public) and content service providers (such as the providers of broadcasting and on-line services). Carriers are also treated as service providers when they provide carriage or content services.

The primary basis for competition regulation in this package of industry-specific legislation was contained in the TPA (Telecommunications) Act. However, a number of competition-

directed obligations were imposed under the 1997 Act to promote competition in the industry, including the following:

- existing pre-selection rights were extended to all carriage service providers supplying the standard telephone service, with additional mechanisms for extension to other services; and

- carrier licence conditions established obligations in regard to providing access by other carriers to certain facilities and network information.

The TPA (Telecommunications) Act contains key competition-related provisions to complement the broader regulatory arrangements contained in the 1997 Act. The TPA (Telecommunications) Act was intended to bring the regulation of competition in the telecommunications industry more closely into line with general trade practices law and incorporate telecommunications industry-specific rules on competition into the *Trade Practices Act 1974* (**TPA**). The Australian Competition and Consumer Commission (**ACCC**) is responsible for administering these rules.

While the 1997 telecommunications legislative package removed regulatory barriers to market entry, the Government considered there were good reasons to continue industry-specific competition regulation for telecommunications, namely that:

- the removal of regulatory barriers to entry did not automatically result in the appearance of normal competitive market structures;

- Telstra continued to wield significant market power derived primarily from its historical monopoly position;

- there was also potential scope for incumbent operators generally to engage in anti-competitive conduct because competitors in downstream markets might depend on access to the carriage services controlled by them;

- there was the possibility, for example, of incumbents engaging in anti-competitive cross-subsidy practices which could threaten the further development of a competitive environment; and

- because many communications services require “any-to-any” connectivity (the ability for any end-user of the service to contact any other end-user, regardless of who the suppliers are or on what network they are connected), competitors necessarily require access to each other’s networks. (This “any-to-any” feature was

considered to require an access regime that included additional features to those contained in the general access regime in Part IIIA of the TPA.) [18]

In order to facilitate the smooth introduction of the new access regime, it was also considered necessary to implement transitional arrangements, contained in the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, to retain existing access rights for carriers and extend those rights to new service providers. [19]

Further amendments to the regime were introduced in 1999 to make the provisions of Part XIB and XIC more streamlined and efficient.[20] The most notable amendments introduced at this time was the granting of the power for the ACCC to make interim determinations in relation to access arbitrations and the introduction of Part A competition notices. Both these changes are discussed in more detail later in the paper.

3.2 Efficacy of 1997 Regime and Proposals for the Future

In the following chapters of this paper Vodafone discusses the efficacy of the 1997 competition regime and examines the ways in which the telecommunications industry has evolved in the period since that legislation was enacted. Vodafone believes that, in the same way that amendments were required to the telecommunications regulatory regime in 1989, 1991 and 1997 (with further minor amendments in 1999), it is appropriate that this current review should attempt to adjust the regulatory regime to more accurately correspond to the state of the industry going forward.

---

18 Second Reading Speech for the *Trade Practices (Telecommunications) Amendment Bill*, Senate Hansard, 25 February 1997.

19 Second Reading Speech for the *Telecommunications (Transitional Provisions and Consequential Amendments) Bill*, Senate Hansard, 25 February 1997.

20 Second Reading Speech for the *Telecommunications Legislation Amendment Bill*, Senate Hansard, 30 November 1998.

4. COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

In this chapter, Vodafone reviews the current state of competition in the telecommunications industry and the likely state of future competition, particularly facilities-based network competition, over the next 2 to 7 years.

Since 1997, the telecommunications industry has been characterised by:

- a rapid increase in the number of carriers and service providers;
- a substantial reduction in real prices for many services;
- a rapid increase in the range and quality of services offered; and
- an increase in the range of delivery mechanisms available.

The mobile sector in particular has demonstrated strong competition, growth and innovation, with substantial improvements in price and service performance. (A separate more detailed review of the mobile sector will be provided shortly) Indeed, this competition in the mobile sector demonstrates the dynamic nature of the overall industry, the risk of unnecessary or inappropriate regulation and the potential for future network based competition.

4.1 Competition in the Telecommunications Industry Since 1997

Since July 1997, the telecommunications industry in Australia has been open to full competition as a result of the deregulation by the Australian Government. At that time, the industry consisted of two fixed carriers, Optus and Telstra, which also operated mobile networks, and a dedicated mobile operator, Vodafone, as well as a small number of resellers and niche operators.

Since that time there has been an enormous expansion in the number of participants in the telecommunications industry. There are over 40 carrier licences on issue and more than 1,000 service providers registered with the Telecommunications Industry Ombudsman Scheme. These operators range from specialised resellers targeting a narrow class of customers to full service facilities based operators.

Telstra remains dominant in many areas of the telecommunications industry, particularly in traditional “bottleneck” services such as those involving the fixed line customer access network. Telstra retains:

- more than 95% of ISDN access;
- 80% of local call services at a retail level (in excess of 95% of local call services are provided to Telstra on either a wholesale or retail level);
- 100% of wholesale unbundled local loop access; and
- more than 95% of public switched telephone network originating and terminating access;
- 75% of wholesale Internet services and 60% of all Internet Network traffic.[21]

Telstra still retains a unique position, which gives it a very high degree of market power in the fixed services market. Telstra retains control of the only ubiquitous fixed line network in Australia. That network (or system of networks) remains vitally important for the delivery of a range of voice and data communications services, and it is unlikely that it will be economic to fully duplicate this network in the foreseeable future. Accordingly, some form of ongoing regulation to ensure that access is provided to such facilities may be required.

In contrast to this, the mobile sector has experienced substantial competition since shortly after services were introduced. This is reflected in the proliferation of mobile services and the rapid pace of technological innovation as well as in declining prices. In Vodafone's experience in the period 1993-1999, as detailed in the annexed report on the mobile sector (to be provided shortly), there has been:

- a substantial expansion in the range of mobile services available;
- a dramatic improvement in the quality of mobile services;
- increased availability of radiocommunications spectrum; and
- a very substantial decline in mobile prices.

In parallel with the increasing number of participants in the industry generally, there has been a corresponding increase in the diversity of telecommunications services which are offered.

The last three years have seen the continued rapid expansion of the significance of the Internet, both in terms of the content which is delivered via the Internet and in relation to the

---

[21] Paul Budde Communication Pty Ltd, Australia – *Internet Wholesale Market*, 16 December 1999.

importance of Internet access as a commercial service. Demand for access to Internet services is also driving or contributing to a number of new developments in the telecommunications industry. These include mobile access to data, and voice to text and text to voice messaging services.

In addition, the Internet itself is being used as a mechanism for delivering an increasing range of services, such as video and audio streaming and voice telephony.

The continuing rise of the importance of the Internet has been matched by a general growth in the significance of data communications in relation to voice. The delivery of a wide range of data communications services is increasingly becoming the focus of new developments in the telecommunications industry and is also contributing strongly to the drive to develop and enhance delivery mechanisms for telecommunications services.

In the past several years, mobile telecommunications services have been transformed from a premium, voice only service, to a near ubiquitous means of delivery of telecommunications services. Mobile is no longer seen as a premium service, but is increasingly becoming accepted as a first choice viable alternative for a significant portion of voice communications. In addition, mobile networks are developing rapidly as an alternate mechanism for the delivery of a range of data and messaging services.

In the period since July 1997, the telecommunications industry has seen a rapid development and evolution of delivery mechanisms. At the beginning of this period, Telstra's copper pair customer access network was the overwhelmingly dominant delivery mechanism for telecommunications services. However, since that time, there has been a significant transformation in the use and availability of alternative delivery mechanisms. As noted above, cellular mobile telecommunications have become increasingly accepted as a viable and attractive mechanism for delivery of a significant portion of voice telephony traffic and are growing in importance in the delivery of data communications. Other developments in relation to delivery systems include the following:[22]

- broadband networks, originally deployed for pay television, have become increasingly important for delivery of other telecommunications services including telephony and Internet access;[23]

---

[22] These trends are discussed in chapter 2, Productivity Commission, *International Benchmarking of Australian Telecommunications Services,* March 1999

[23] See Telstra Big Pond's service at www.bigpond.com/advance and Optus@Home's service at www.optushome.com.au.

- alternative fixed line networks have been deployed by a number of operators, particularly in the CBD areas;[24]

- alternative mobile technologies such as CDMA and fixed wireless technologies such as LMDS have become available;

- satellite-based mobile telecommunications systems, such as the Vodafone Globalstar network, have become readily available;[25] and

- the Internet has become increasingly important as a delivery mechanism. This can be seen in relation to the increasingly widespread use of email as a method of delivering data and the use of the Internet to provide a bundle of telecommunications services, including voice over IP.

- In time, establishment of the networks is likely to reduce the substantial market power Telstra derives from its fixed line customer access network. Until then, however, there is the prospect of a durable market future that may require regulatory intervention.

4.2 Industry Developments over the Next Two to Seven Years

The telecommunications industry is likely to be characterised by the following trends and developments over the next two to seven years:

- the delivery of products over an increasing range of customer access platforms, including:

- the increased exploitation of broadband cable networks initially used for pay television;

- satellite networks covering both voice and data applications;

- a range of access options employing the unconditioned local loop together with digital subscriber loop technologies; and

---

[24] PowerTel 1998 Annual Report and information at www.williams.com; MCI Worldcom information at www.wcom.com; "Primus to go 'head to 'head' with Telstra in local call market", *Exchange*, 15 January 1999; "United Energy completes Sydney CBD loop", *Exchange*, 26 February 1999; Macquarie information at mtc.com.au.

[25] See www.globalstar.com.au.

- increasing substitution of wireless services for fixed line services as new mobile technology increases wireless data speeds,

  combined with continued reliance on the natural monopoly copper wire network as an associated platform for delivery into these services or in isolation as the most efficient delivery platform for many applications;

- convergence between voice, data and multimedia applications, including voice and streaming audio and video such as over Internet Protocol;

- the deployment of new wireless networks using newly available bands of the radiofrequency spectrum and new communications technology;

- the deployment of limited wireline networks in high-value and high-concentration areas such as the central business districts of major cities;

- increased activity by international telecommunications service providers in new and increasingly interconnected markets; and

- the expansion of other utilities such as electricity providers and media channels into the telecommunications industry.

These developments will significantly increase the range of services available to customers and the competition between providers of those services. However, in the next two to seven years, as indeed in the foreseeable future, the ubiquitous networks owned by Telstra may remain crucial for many customers and many applications with no alternatives able to be economically duplicated.

5. PART XIB:- COMPETITION RULE/NOTICE REGIME

In this chapter, Vodafone reviews the reasons for the inclusion of the competition rule/notice regime in Part XIB[26] and its operation to date.

The competition rule/notice regime was introduced to address concerns that an integrated incumbent monopoly network and service provider, ie Telstra, would be able to engage in a range of conduct that would substantially lessen, prevent or hinder competition. It was designed to address concerns about the timeliness and effectiveness of traditional court enforcement of general competition conduct rules in responding to potential conduct of Telstra. It has had some limited success in relation to Telstra.

However, Part XIB when introduced applied to all telecommunications service providers. Vodafone submits that there is no reason why all telecommunications companies should be subject to additional and different competition conduct rules to those applying in other industries.

5.1 Part XIB and the Competition Rule

Part XIB was introduced because of the continued market power of Telstra as the incumbent, vertically integrated and dominant or monopoly provider of almost all telecommunications services.[27] This market power arises particularly in the context of Telstra's control of the natural monopoly fixed line customer access network and ubiquitous fixed line network generally.

This market power was seen to be an issue requiring specific regulatory responses beyond the general competition law. Rather than structurally separate Telstra's competitive and monopoly components, the Government sought to rely on an enhanced prohibition against use of market power, whereby any use of substantial market power which was anti-competitive was made illegal irrespective of the purpose of the conduct.

It was seen to be necessary that this non-structural, conduct approach to Telstra's market power be supported by remedies which were quickly available and would provide sufficient

---

[26] In this submission Vodafone will focus on the competition rule/notice regime. If appropriate it will comment on the other aspects of Part XIB, in particular tariff filing directions and record keeping rules, in a later submission.

[27] Second Reading Speech for the *Trade Practices (Telecommunications) Amendment Bill*, Senate Hansard, 25 February 1997. Although the speech also refers to incumbents generally, its principal concern is Telstra's specific market power. The fact that Part XIB has not been invoked in relation to any former "incumbent" other than Telstra demonstrates the focus of this concern.

incentives for Telstra to comply with its obligations not to use its market power inappropriately.

However, the competition rule is currently neutral on its face and is therefore capable of being applied against all carriers and carriage service providers, provided only that they have a substantial degree of power in any telecommunications market.

Part XIB of the Trade Practices Act 1974 provides that a carrier or carriage service provider with a substantial degree of power in a telecommunications market must not take advantage of that power with the effect, or likely effect, of substantially lessening competition in that or another telecommunications market (**competition rule**). The competition rule is different to the usual prohibition on misuse of market power, in that it is directed to the anti-competitive *effect* of conduct not the *purpose* of the conduct.

The ACCC is entitled to issue a Part A competition notice if it has reason to believe a carrier or carriage service provider has contravened the competition rule. A Part A competition notice does not of itself require the carrier or carriage service provider to cease engaging in the conduct but if, after the competition notice has been issued, the carrier or carriage service provider continues to engage in the conduct, the ACCC may bring proceedings in the Federal Court and seek civil penalties.

Another person affected may also bring proceedings to recover loss suffered as a result of the breach of the competition rule. A Part B competition notice sets out detailed particulars of the contravention, which are prima facie evidence of the matters set out in the notice in proceedings relating to the alleged contravention of the competition rule. The notice in effect reverses the onus of proof, at least at a threshold level.

A competition notice is prima facie evidence in court proceedings that the competition rule has been contravened. Fines for breach of the competition rule are up to $10 million and a further $1 million for each day the contravention continues. The ACCC has published guidelines to which the ACCC must have regard when deciding whether to issue a Part A or Part B competition notice.

To date, competition notices have been issued in relation to:

- Telstra's conduct in providing interconnection for other Internet access providers on what was considered to be a non-reciprocal basis;[28] and

[28] ACCC press release, "ACCC issues Internet competition notice to Telstra", 28 May 1998. Available at www.accc.gov.au.

- Telstra's conduct in transferring retail customer accounts to competitors, or "commercial churn".[29]

In both cases, it is doubtful whether a purpose test would have been satisfied. Further, in both cases Telstra significantly altered its conduct in the course of the ACCC investigation or in response to the issue of the notice. While both investigations took some time, the regime does appear to have had produced more beneficial outcomes than would have been available with mere reliance on s 46 of the Trade Practices Act. In fact, as the competition rule/notice regime is in addition to s 46, it would appear likely that the outcomes would not have been achieved without the competition rule/notice regime.

Prior to the 1999 amendments, the competition notice procedure was found to be extremely protracted and where competition notices were issued they were subject to the threat of challenge by Telstra on both procedural and substantive grounds. However, in both the Internet peering and commercial churn matters, the prospect of a competition notice and subsequent ACCC court action does appear to have resulted in Telstra altering its conduct to conform with more equitable commercial arrangements.

In July 1999, amendments were made to Part XIB which were designed to create a more streamlined and flexible competition notice mechanism. Notwithstanding these amendments, the ACCC has issued guidelines "*Anti-competitive Conduct in a Telecommunications Markets - an Information Paper - August 1999*" which set out an indicative timetable of 6 months for the issue of the new "fast track" part A competition notice.[30]

Given the fact that the telecommunications industry is changing and evolving with remarkable rapidity, a time delay of 6 months between the occurrence or commencement of potential anti-competitive conduct and the issue of a part A competition notice may be considered to render such a measure less than fully effective.

5.2 Vodafone View of the Functioning of Part XIB

Part XIB was intended to constrain the anti-competitive use of market power by Telstra. Although it is difficult to assess how Telstra might have behaved without these provisions, in the commercial churn and Internet peering matters Part XIB does appear to have been successful, if somewhat slower than might have been expected.

---

29 ACCC press releases, "Telstra faces $10 million plus penalty over customer transfer procedures", 10 August 1998; "More ACCC Action on Telstra 'Commercial Churn', 13 April 1999. Available at www.accc.gov.au.

30 Available at www.accc.gov.au.

However, Part XIB by its terms can apply to any carrier or carriage service provider. There does not appear to be any good basis for the stronger competition conduct regime in Part XIB, with the consequent risks and costs, to apply to firms simply because they are in the telecommunications industry.

Vodafone submits that Part XIB should be limited to dealing specifically with the conduct of Telstra, the dominant incumbent market participant, and should not apply generally to parties who acquire market power as in other industries without the unique history of the telecommunications industry.

6. TPA PART XIC

A new Part XIC was inserted into the TPA by the TPA (Telecommunications) Act 1997. Part XIC was designed to provide access to certain services within the telecommunications industry.

The provisions of Part XIC were fundamentally designed to ensure that other operators were able to obtain access to Telstra's fixed network, that network being uneconomic to duplicate. Such a regime was made necessary by the fact that Telstra, being vertically integrated and overwhelmingly dominant at a retail level, had little or no incentive to offer access to potential competitors on reasonable terms.

Indirectly, Part XIC was also designed to encourage other participants to enter the industry. As with other parts of the 1997 regime, however, even though it was principally designed to address the advantageous and near dominant position held by Telstra as a legacy of its historical monopoly position, the legislation is drafted in general terms.

In this section of the paper, Vodafone assesses the performance of the provisions of Part XIC and outlines the reasons for its belief that it is appropriate for the regime to be modified to bring it more into line with the telecommunications industry as it exists today and as it is likely to evolve over the coming years.

Vodafone believes that it is now appropriate that the test for declaration of telecommunications services reflect the generally accepted criteria, namely access is only available to services provided by means of those facilities which are not economic to duplicate and access to which is necessary to promote upstream or downstream competition. This would enable investors in telecommunications infrastructure to be placed on an equivalent footing with investors in other industries and would reduce the risk of distorting the decision to build or buy. It would also be consistent with a regulatory shift from a regime designed to actively encourage new participation in the industry to one focused on the prevention of anti-competitive outcomes within that industry.

6.1 Access to Interconnected Networks

One of the key features of the telecommunications industry is the need to establish interconnection and access arrangements for the supply of end to end carriage services. The establishment of interconnection arrangements is necessary wherever a communication needs to be carried from a point of origination on one network to a point of termination on another. This is not simply a competition or regulatory problem, but a fundamental commercial

imperative for the operator of any network whose customers wish to engage in communications involving other networks.

This is also a mutual concern, in that the operators of both the originating network and the terminating network have an interest in providing interconnection, so as to be able to maximise the value of their respective networks. Because both networks can benefit from interconnection, there will be a strong incentive to reach interconnection arrangements.

The need for regulatory intervention will only arise where the network configurations are such that the loss to one network operator from not being interconnected with the other network is more than offset by some other return, for example the reduced competition from the other network provider.

However, this incentive is eliminated once the other network reaches a critical threshold or is interconnected to *any* other network, since further networks can enter into transit arrangements for indirect connection. In the absence of a dominant network, even new network operators are likely to be able to obtain interconnection.

6.2 Access to Provide Carriage Services

In addition to the requirement for carriers to interconnect their networks and provide reciprocal access to originate and terminate communications on their respective networks, many telecommunications operators rely on obtaining access to the networks of carriers either to supplement their own network facilities or because they do not have any facilities of their own and rely entirely on acquiring network capacity from carriers.

This would include a range of operators, from those who simply resell carrier services or use carrier services to provide value added services, to those who use carrier services to supplement their own network facilities. Such arrangements are common and are entered into frequently as part of normal commercial dealings within the telecommunication industry.

In circumstances where a network has no competitive alternative, there may be scope for the exercise of market power in relation to the supply of access to the network. However, a network operator will generally have a commercial incentive to maximise traffic on its network and will require no regulatory obligation to enter into such agreements.

6.3 Function of Part XIC

Part XIC of the TPA establishes a regulated access regime to facilitate access by carriers and carriage service providers in order to promote the long term interests of end users through:

- promoting competition in markets for carriage services;
- achieving any-to-any connectivity in relation to carriage services that involve communications between end users; and
- encouraging the economically efficient use of, and the economically efficient investment in, carriage service infrastructure (ie communication networks).[31]

It does this by imposing standard access obligations on a provider of a declared service (**access provider**), which in effect oblige it to supply the declared service to another service provider who requests access to that service (**access seeker**).

The ACCC is responsible for determining whether a service should be declared. The ACCC must declare a service upon the recommendation of the Telecommunications Access Forum. Further, the ACCC can conduct its own inquiry into whether declaration would be in the long term interests of end users. Alternatively, an access provider can provide an access undertaking to the ACCC which, if accepted, sets out the terms and conditions upon which it is required to provide access to a declared service.

The ACCC has published pricing principles which it considers appropriate for supply of declared services. [32] The ACCC can arbitrate disputes between access seekers and access providers in relation to the terms and conditions of access to the declared services.

6.4 Contrast with Other Access Regimes

In contrast with the Part XIC regime outlined above, a service will only be declared under the general access regime of Part IIIA of the TPA if all of the following criteria are met:

- access will promote competition in another market;
- it would be uneconomical for another person to develop another facility to provide the service;

---

31 s. 152AB *Trade Practices Act* 1974

32 ACCC, *Access Pricing Principles -- Telecommunications*, July 1997. Available with principles applicable to specific services at www.accc.gov.au.

- the facility is of national significance;
- access can be provided without undue risk to health or safety;
- the service is not already subject to an effective access regime; and
- access would not be contrary to the public interest.

Relevantly, Part XIC does not require that a facility be uneconomic to duplicate. That is, a facility other than a natural monopoly may be the subject of a declared service.

In addition, Part XIC includes the promotion of competition as a positive factor to be taken into account in the decision to declare a service. By contrast, Part IIIA itself does not seek to *promote* competition but will not result in a declaration if to do so would have *no positive effect* on competition. Part IIIA is therefore more neutral.

Finally, Part XIC introduces an additional principle of *any-to-any connectivity.* This connectivity would be the natural result of an efficient access declaration and strictly should not be included "in the working". No comparable principle exists in Part IIIA.

Part XIC and Part IIIA both differ slightly from the Competition Principles Agreement on which Part IIIA was based[33]. Clause 6 of the Competition Principles Agreement requires the Commonwealth to enact legislation for access to services where:

- it would not be economically feasible to duplicate the facility;
- access to the service is necessary to permit effective competition in a downstream or upstream market;
- the facility is of national significance; and
- safe access can be provided.

This clause clearly demonstrates the intention of the Competition Principles Agreement to provide access only to natural monopolies and not to positively promote, but merely to permit, competition in markets. The language of Part IIIA of the TPA departs from these concepts to some extent, perhaps unintentionally. Part XIC resiles from them altogether.

---

33 This is discussed in the Industry Commission Information Paper, *Implementing the National Competition Policy: Access and Price Regulation*, November 1995 at pp19-22.

By contrast, section 192 of the *Airports Act 1996* provides for a specific access regime for airport services which are nonetheless limited to:

- services necessary to operate civil aviation services at an airport; and
- services provided by facilities that cannot be economically duplicated.

Importantly, the only facilities used for telecommunications services in Australia that may not be able to be economically duplicated currently or in the foreseeable future are Telstra's local customer access network and certain aspects of its transmission network.

6.5 Declared Services

A large number of telecommunication services were deemed to be declared at the commencement of the 1997 telecommunications specific competition regulatory regime in July 1997.[34] These included:

- PSTN origination and termination;
- AMPS origination and termination;
- GSM origination and termination;
- digital data access service; and
- transmission.

The deemed declaration of these services was a transitional arrangement reflecting the existing commercial access arrangements entered into under the 1991 telecommunications regime. There was not a particularly rigorous economic assessment of the need to declare these services in the context of the long term interest of end users.

Since that time, the ACCC has declared a number of other services and varied some previous declarations. The other declared services, or revised services, are:

- analogue subscription television broadcast carriage service;
- unconditioned local loop service;

[34] ACCC, *Deeming of Telecommunications Services*, 30 June 1997. See www.accc.gov.au.

- local PSTN originating and terminating services;
- local carriage service;
- Integrated Services Digital Network originating and terminating services;
- revised domestic transmission capacity service; and
- digital data access service (revised).[35]

There has been no subsequent declaration in relation to mobile services. Indeed, following an inquiry the ACCC decided not to declare intercarrier roaming because it was satisfied that satisfactory commercial arrangements would be entered into.

The ACCC concluded:[36]

> *"If mobile networks do not have natural monopoly characteristics (meaning that networks are economic to duplicate), there is a risk that declaration would encourage free riding and discourage some investment by new entrants in rolling out their own networks. In such a case, declaration may not be in the LTIE, as it would not be likely to promote innovation, diversity in services and products, nor enhanced quality as facilities based competition would be expected to do so…"*

This view has been confirmed by recent industry developments which have seen One.Tel and Hutchison enter into commercial roaming agreements with Telstra.[37] It is also interesting to note, in the context of the declaration of originating and terminating services for analog and GSM mobile services, that operators have been able to successfully negotiate arrangements for access to Telstra and Hutchison's CDMA networks without the need for regulatory intervention.

No declaration has been made for CDMA access services and the success of commercial negotiations indicates that no declaration is likely. In fact, the absence of any CDMA

---

35 See the ACCC's Register of Declared Services at www.accc.gov.au.

36 ACCC, *Public Inquiry into Declaration of Domestic Intercarrier Roaming under Part XIC of the Trade Practices Act 1974,* March 1997. Available at www.accc.gov.au.

37 One.Tel press release, "One.Tel Signs National Roaming Agreement with Telstra for GSM 1800 Mobile Network", 16 December 1999, available at www.onetel.com.au; Hutchison press release, "Hutchison and Telstra in Australia's First Integrated CDMA Roaming and Resale Agreement", 4 November 1999, available at www.hutchison.com.au.

declaration where there is a GSM declaration demonstrates the potential for the access regime to embed competitive distortions.

The ACCC also conducted an inquiry into whether to declare a long-distance mobile originating service, to allow service providers to supply the long-distance component of calls from mobile phones. The ACCC was not satisfied that such a declaration would promote competition in mobile telephony.[38]

Despite the fact that the same considerations apply to AMPS and GSM originating and terminating access, the deemed declaration of these access services remains on foot. The continued declaration of services with strong mutual incentives for commercial negotiation indicates the inflexibility of the declaration process and its failure to remove declaration from services where declaration becomes or proves to be inappropriate. This imposes a cost further described below.

6.6 Service Declaration Process

Vodafone believes that it is appropriate that as part of its review, the Commission give close consideration to the analysis of the costs and benefits of particular regulatory measures, in particular, the costs and relative benefits of service declarations. The declaration of a service imposes significant cost burdens on industry participants and these burdens must be weighed against the benefit, if any, which flows to end users and to the industry from the imposition of such regulation.[39]

One of the most significant costs of declaration is the exposure to access arbitration. Experience has suggested that access arbitrations have been more costly and taken significantly longer than anticipated. It is difficult to assess the merits of the outcomes achieved as a result of the right to notify an access dispute, but it is clear that the cost has been significant. This should be explicitly considered at the time of declaration.

In theory, regulation aims to achieve the outcome that would be achieved by market forces if the market were subject to competitive pressures. However, the economic models used by regulators to mimic this outcome are inevitably simplifications that are inadequate to predict real-world outcomes in complex markets in which many firms and products interact.

Any difference between the regulated outcome and the outcome that would have been achieved by competitive market forces is an economic cost of regulation, reflected in sub-

---

38 ACCC, *Competition for Long Distance Mobile Telecommunications Services -- Final Report,* January 2000. Available at www.accc.gov.au.

39 See *Implementing the National Competition Policy Access and Price Regulation* pp12-14.

optimal investment decisions by access providers and pricing decisions by access seekers. The increased delay represented by a regulated rather than market-driven outcome represents a further cost of regulation.

Another cost of the declaration process arises because once a service is declared, there is little imperative to review that declaration and, if it is reviewed, the question becomes practically one of whether the declaration should be *rescinded* and not whether it should be continued. Under section 152AO, a public consultation is required before a declaration can be revoked.

This approach tends to make the declaration process inefficient in the context of responding to market changes, a problem which is likely to be more significant over the coming years.

Vodafone believes that in relation to the range of services which are currently declared, a full review is required in order to determine which remain essential in light of the evolution which has occurred in the telecommunications industry since 1997. Vodafone believes that such a review would result in the removal of a number of the service declarations which are currently in force, including the GSM and AMPS declarations, and that this would have a number of flow-on benefits to the telecommunications industry and would be to the ultimate benefit of end users. The standard according to which this review should be conducted is discussed in section 6.8 below.

6.7 Vodafone's View of the Functioning of Part XIC

Overall, Vodafone considers that, while the telecommunications access regime set out in Part XIC of the *Trade Practices Act* 1974 may have fulfilled a useful role in the period since 1997, it is now time to refine Part XIC to be more aligned with general access principles.

Accordingly, Vodafone considers that the LTIE test should be replaced with the usual test for mandatory access to services, namely only those services:

- which are provided by means of facilities which are uneconomic to duplicate;
- which will facilitate upstream or downstream competition,

should be declared.

Further, Vodafone is concerned that once a service is declared, there are impediments to removing that declaration when appropriate. In some cases services which have been declared are now subject to sufficient competition that their declaration is no longer

necessary. These include GSM and AMPS originating and terminating access and some transmission services.

Accordingly, Vodafone considers that all existing declared services should be legislatively "undeclared" within a certain time frame and any existing declared service should only be redeclared where it has gone through a full review process under the general test.

Further, in this process, there should be explicit consideration of the regulatory costs of declaration of the service.

7. CONCLUSIONS:- THE CASE FOR REGULATORY CHANGE

In chapter 2, Vodafone suggested certain principles for regulation. Applying those principles, Vodafone's suggested reforms are set out below.

- General competition regulation, such as competition conduct regulation in Part IV and access regulation in Part IIIA of the Trade Practices Act, should be the default position.

Vodafone submits that the general principles governing access to facilities set out in the Competition Principles Agreement and reflected in Part IIIA are now appropriate for the telecommunications industry, namely that a service should only be declared if it is provided by means of a facility that is uneconomic to duplicate and that access to it is necessary to promote competition in an upstream or downstream market.

- There should not be industry specific regulation except to address industry specific durable market failures.

In relation to the general competition conduct rules, Vodafone submits that there is no general case for a more stringent additional competition conduct rule to apply to telecommunications carriers or carriage service providers than that which applies to Australian industry generally.

There is no case of industry specific market failure in the telecommunications industry other than that which arises as a result of Telstra's incumbent dominant market position. Part XIB should apply only in this special case.

- The regulatory regime should be responsive to changing conditions, particularly changing market conditions.

Vodafone recommends that all existing service declarations be subject to a sunset termination provision and a service only be redeclared if it meets the new test for declaration of services.