PRODUCTIVITY COMMISSION INQUIRY INTO TELECOMMUNICATIONS SPECIFIC COMPETITION REGULATION

SUBMISSION BY AUSTAR UNITED COMMUNICATIONS LIMITED GROUP ("AUSTAR")

Competition in telecommunications and convergent services should ideally be regulated as all other industries are regulated without special treatment. However as the telecommunications industry is still dominated by Telstra for both network and service access there is a need for specific competition regulation for this industry for a further period of time until competition matures.

Since its inception in 1995, Austar has been a major provider of pay tv services to rural and regional Australia. However, Austar is currently in the process of expanding the range of services that it provides together with assessing an expansion of its service area to include the capital cities. Austar now provides a range of services – pay tv, narrowband internet, broadband internet, interactive television and will commence the resale of mobile telephony services later this year. Austar has to date had limited exposure to the competition regulation regime specific to telecommunications due to its past focus on broadcasting. However, as Austar ventures further into the supply of services that are more traditional "telecommunications" types of services, and as communications and entertainment services converge, the regulation of competition in telecommunications will continually increase in its relevance to Austar. This will be primarily due to the need for Austar to interconnect into other networks in order to provide those services, as well as because Austar will rollout and develop its own networks and services.

Austar has been in a unique position in relation to the introduction of the *Telecommunications Act 1997* and the de-regulation of the telecommunications industry that it introduced. Austar as one of the first holders of a carrier licence did not actually provide a "telecommunications service" only pay tv, but owned a cable network in Darwin that was within the definition of a "network unit" even though it was only technically configured to provide one way pay tv services. This meant that Austar had to own a carrier licence even though Austar did not technically provide what are traditionally recognized as "telecommunications" services.

This anomaly has meant that Austar's view of the whole regime and that of the regulation of competition in the self regulated regime has been, until the recent launch of Austar's internet services and soon to be launched mobile resale services, that of a broadcaster

caught on the periphery of the telecommunications world. It has been an uncomfortable experience, of which competition regulation has been only a part.

For the purpose of this submission please note that as yet Austar has had no direct experience of Part XIB or IIIA, only of Part XIC and the general provisions in Part IV.

Parts XIB and XIC

In Austar's view, competition in telecommunications and convergent services should ideally be regulated as all other industries are regulated without special treatment, but in Austar's view the deregulated environment is not yet mature enough to justify a change to the existing mechanisms.

While Telstra both controls the main infrastructure and is a dominant service provider, there is a need for a counterbalancing regulatory framework to encourage access to infrastructure and services such as Part XIC. However, Austar is not convinced of the need for this industry specific regulation of competition in telecommunications in the future when the dominance of Telstra has indeed been properly been counterbalanced by other industry participants, but believes that there is value in a focused framework at present.

In relation to access to infrastructure for the provision of specific services, Austar believes that it is only fair that parties who invest the time, money and other resources in rolling out networks should be given a window of "opportunity" of a period of time for their sole use if they so elect for a period commensurate with the cost of rollout and development of technology of those networks – meaning years not weeks or months. Otherwise there is no incentive for developing these systems, particularly if the terms of access can be on terms that would not fairly compensate for incurring the risk involved in being the "first mover", over and above the capital investment and the need for an actual return on that investment.

However, Austar believes that there is an important distinction between Telstra as the incumbent and only recently ex-monopoly provider which has had years to set up its networks with government funding to reach every home and business in Australia, and other new providers. To a large extent Telstra's costs are sunk. New providers are undertaking a very capital intensive exercise to provide new services up against a very large and strong incumbent operator without having the benefit of ubiquitous coverage or a customer database anywhere near the size of Telstra's. Austar submits that any competition regulation regime should distinguish between access to new infrastructure and new services from new providers, as against access for services from Telstra, in that access should be more warily given to third parties to new infrastructure for new services for new parties.

Further, the differences between different services could also be more readily accommodated by the legislative criteria used for determining whether to declare a service. Providing direct access to a pay tv set top box in a consumer's home which has a

long developmental lead up time and cost, contains proprietary software is owned by the operator as opposed to by the consumer and is not an "off the shelf product", is in Austar's view a very different issue from, as an extreme example, providing access to a landline phone and a handset. Austar submits that access should be given warily as it creates a huge potential disincentive for the operator to invest in new technologies and that any regulatory system should recognise that.

Austar does recognize that there is a need to balance this need to incent new providers with the public interest not to have unnecessary duplication of infrastructure. The current declaration process does have a framework to allow these issues to be aired, although in Austar's view it is weighted too heavily in favour of providing access over the interests of the owner and provider for new services and new networks. Austar believes that additional recognition should be given to the party who has taken the investment risk, including consideration expressly of them having created the market for other parties to then try and obtain access to. It is not commercially fair in all cases for a party to spend the time, money and physical resources in developing technologies and networks for new services and to then be forced to provide access to that to their competitors at artificially calculated rates that can possibly never fairly compensate for the loss of the opportunity to fully capitalize on the market that the party has created.

When access is to be given to third parties to new services or new networks under an artificial access regime, it should only be required to be given where there has been full consideration of clear criteria relevant to the particular service including: the owner does not want to use those services or networks for their own purposes; the network is of a certain age and the key components of that network are of a certain age; the owner can charge a commercially realistic reasonable rate that includes the recovery of costs for the capital investment; that covers the actual costs of operation, and covers the costs of employing and training the additional resources required and the use of their time when it was planned to be engaged on other matters central to the owner's own operations, that compensates for the loss of opportunity to the owner's market and which allows a decent profit margin and like considerations. While there are general principles in the legislation Austar submits that there could be further clarity to ensure that parties are not unfairly forced to provide access, particularly new parties for new services as referred to above.

The other area of concern is that the regulatory declared service framework relies on "service descriptions" and the concept of "end to end" services will not fit with the multitude of services that will be offered in the future. Legislation should not try to pre-empt technology.

Regulatory Agency

Any framework for the regulation of competition administering such sensitive matters as access to infrastructure and services needs to be administered by an agency who has sufficient industry knowledge and who will take a very commercial view of their regulatory role, as they are delving into the heart of commercial practice and to take a legalistic or overly academic role will result in unfair outcomes. The ACCC does seem

to be the most appropriate regulator for competition in the industry, and further development of its commercial outlook should be encouraged.

In addition, consideration should be given as whether there is to be a distinction between which regulatory agency regulates the provision of telecommunications services, and which regulates content. There is the potential for example for pay tv providers as either carriers or carriage service providers to be within the scope of the ACA, TIO and the ABA and to be subject to conflicting Codes.

Further there is the issue of industry self regulation – and what constitutes the industry – can one industry body have the requisite knowledge base for the broad range of services that will be provided in the future in order to have input into the declaration process. The ACCC declaration of analogue cable access is an example. In that instance, submissions were made by individual operators and not through the TAF as it had no background in pay TV, but also not through the pay TV industry body, ASTRA, due to the fact that ASTRA had no background in dealing with telecommunications regulation – it is an industry body that has traditionally focused solely on broadcasting regulation.

The only issue here is that by creating a requirement for a "TAF" in the existing legislation it is potentially limiting how the industry must shape itself in order to have input into the process.

Industry Development Plan

Due to its broadcasting background Austar has found the industry development Plan requirement challenging as the legislative requirements did not fit the Austar business model of a broadcaster caught on the periphery of telecommunications regulation.

Austar will source from anywhere in the world the relevant technology to ensure that it is getting the technology that is best suited to its business, including local development if that is the best solution. This should be encouraged so that consumers get the best solution.

However, as Austar operates in Australia all technology no matter where it is sourced will need to be implemented locally and customized to Australian conditions and requirements, so there is an unavoidable exchange of knowledge and technology to Australians, and investment in Australia.

Austar submits that the requirement for an industry development Plan is artificial, and that there should not be an obligation to have a Plan.

However, if there is to be a requirement for a Plan then there is no need for changes to the current requirements.

Access to facilities

Austar has not relied on this area of regulation for the roll out of its 40 pay tv wireless cable head-end sites and cable network and does not see any need to do so in the future – it will only be considered and used by Austar at the instigation of other parties. Austar finds that the introduction of these provisions have only created another level of regulation prompting 100 page documents instead of 10 to 20 page documents and complicating what was previously a relatively straight forward area of commerce.

Other legislation

The Broadcasting Services Act (BSA) and the role of the ABA in the provision of services in this new convergent world should be addressed and reviewed.

The overlap between licence conditions that are imposed on pay tv providers under section 100 of the BSA and the access regime in Part XIC should be removed. Access issues and issues in relation to service provision should be clearly laid at the door of the regulatory agency that is going to regulate "convergent" service provision, as opposed to the content of convergent services – be it the ABA, ACA or ACCC. In relation to the analysis of the economic questions surrounding access, the ACCC has now built up the relevant expertise and so access issues should be squarely within its area of responsibility and not within the scope of any other agency. . Section 100 (3), (4), (5) and (6) of the BSA should be repealed.