Executive Summary

PowerTel welcomes the opportunity to make this further submission to the Productivity Commission Inquiry into Telecommunications Specific Competition Regulation. A summary of the submission follows:

1. Introduction

2. General overview of supplementary submission

- The reasons for the introduction of telecommunications industry specific regulation in 1997 still apply today.
- The Australian telecommunications market is not yet sufficiently competitive to justify the abolition of industry specific regulation.
- The comparatively moderate rate and extent of decline in overall Australian prices since February 1998 is not of itself indicative of any significant level of competition across telecommunications markets. Even this moderate reduction in prices is unlikely to have occurred in the absence of industry specific legislation.
- Telstra continues to enjoy significant market power as a result of its ownership and control of bottleneck facilities which entrants depend on to provide their services, Telstra's significant profitability in comparison to the majority of entrants and the head start Telstra has enjoyed in many telecommunication markets by virtue of its previous monopoly status.
- Convergence, even when it does occur will not operate to make the industry more competitive in the absence of facilities based competition.
- Characteristics specific to the telecommunications industry such as the fast moving pace of technological change and the need to provide any-to-any connectivity are not sufficiently catered for by the general provisions of the Act.
- Any cost advantages new entrants might have are offset by the economies of scale, scope and density and the profitability enjoyed by the incumbent.

- The ability of the incumbent to delay processes, for example, by use of information asymmetry and near infinite resources can seriously damage an entrant because of the fast pace of technological change in the industry.

- PowerTel strongly favours the retention of Part XIB and Part XIC, and considers that a number of modifications could be made to these Parts to render them more effective.

3. Participants' views on Part XIB and XIC

- The majority of participants and PowerTel favour the retention of Parts XIB and XIC in substantially their current forms.

- Telstra's arguments for the abolition of industry specific regulation fail to recognise the significant inequality of bargaining power between the incumbent and the entrants, information asymmetry, the objectives of avoiding inefficient duplication of fixed infrastructure, deterring misuse of market power and preventing anti-competitive conduct.

4. Part XIB should be retained

Competitive Market Justification

- Fixed infrastructure or facilities based competition is not yet significant outside three of Australia's major capital cities. Most new entrants are financially vulnerable and are limited in terms of their geographical coverage and product offerings. Competition has not reached a level where entrants and market forces alone can constrain the incumbent.

Part XIB – Inappropriate or unnecessary?

- Part XIB should be retained for the following reasons:

    - the possibility of the ACCC issuing a Competition Notice is a disincentive to anti-competitive behaviour;

- Telstra remains dominant in most markets, and entrants rely on access to Telstra's infrastructure to provide services;
- Part XIB has practical, procedural and legal advantages over Part IV.

Part XIB can be improved

- Current problems with the operation of Part XIB include: the slow process for issuing a Competition Notice, the high cost of bringing proceedings, information asymmetry and lack of cost transparency in favour of the recipient of a Competition Notice.
- These difficulties could be reduced by:
  - implementing timeline procedures;
  - providing the ACCC with the power to issue interim stop orders;
  - enhancing the ACCC's powers to obtain information quickly;
  - strengthening record keeping rules and tariff filing obligations;
  - relieving all applicants for injunctions from the requirement to give undertakings as to damages; and
  - implementing transparency in pricing and cost allocation.

5. Part XIC should be retained

- Part XIC should be retained for the following reasons:
  - Part IIIA is not sufficient to achieve the objects of promoting the long term interests of end users, facilitating any-to-any connectivity, encouraging the efficient use of and investment in infrastructure, and promoting competition in markets for telecommunications services;

- unique physical characteristics and historical origins of telecommunications networks make them unsuitable to regulation under Part IIIA;
- imbalances of bargaining power inhibit access to telecommunications infrastructure on commercial terms;
- it has more flexible criteria for declaration than Part IIIA; and
- it is more appropriate to the unique nature of the telecommunications industry than Part IIIA.

Part IIIA is ineffective

- Part IIIA is not an appropriate regulatory regime for telecommunications because:
  - it is too slow and cumbersome for the telecommunications industry;
  - there are difficulties with market definition under Part IIIA;
  - there is a requirement to establish national significance and inability to duplicate infrastructure economically under Part IIIA; and
  - the process of declaration under Part IIIA is politicised and requires co-operation of States and Territories.

Part XIC can be improved

- Problems associated with the operation of Part XIC include:
  - unnecessary duplication of arbitrations of substantially similar issues;
  - slow declaration process;
  - inadequate restraints on "price squeezing" and "bundling";

- inadequate to prevent an access seeker from refusing to provision it's network, and restricting access to an access provider's network;
- information asymmetry; and
- inadequate and unsatisfactory role of TAF.

- These problems could be reduced by:
  - allowing the ACCCC to issue benchmark determinations following arbitrations;
  - making ACCC arbitrations public;
  - giving the ACCC power to draft and accept access undertakings;
  - allowing information provided under Part XIC to be used for other purposes under Part XIC;
  - enabling the ACCC to declare services on an interim basis;
  - imposing an obligation on access seekers to do all that is necessary to connect their facilities with those of an access provider;
  - introducing a "reciprocity of charges" principal for termination rates;
  - introducing anti-bundling provisions;
  - clarifying the declaration process; and
  - introducing an interim discovery/interrogatory process.

6. PowerTel's experience in relation to Parts XIB and XIC

- To date, Part XIB has not promoted sufficiently quick outcomes or had a sufficient effect on Telstra's conduct in disputes with PowerTel.

- Part XIC has not been a quick or effective mechanism to resolve access disputes.

- Notwithstanding this, PowerTel's position would have been worse if it had not had recourse to Parts XIB and XIC.

- Many of the problems experienced by PowerTel with the operation of Parts XIB and XIC could be redressed by the modifications suggested in this submission.

7. Record keeping rules and tariff filing obligations

- The record keeping rules and tariff filing obligations should be retained.

- The record keeping rules should be modified so that:

    - the extent of information a participant is required to disclose is proportionate to that participant's market power; and

    - a broader range of information can be obtained.

8. Telecommunications Act

- Part 17, Division 5 of Part 21, Part 22, Division 3 of Part 25, and Parts 2, 3, 4 and 5 of Schedule 1 of the *Telecommunication Act* should be retained in their current form.

9. Other issues of concern to PowerTel

- Telstra's current ability to determine the mode of interconnect between its network and PowerTel's network.

- Failure of the TAF to function in its current form.

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Supplementary Submission by PowerTel Limited to Productivity Commission Review of Telecommunication Specific Competition Regulation ("Review")

1. Introduction

PowerTel's supplementary submission:

(a) responds to arguments that have been raised by certain participants in the Review in support of the repeal and/or modification of Parts XIB and XIC of the *Trade Practices Act* 1974 (Cth) (the "Act");

(b) identifies certain issues arising out of the Review which are of particular concern to PowerTel; and

(c) confirms PowerTel's position as stated in its initial submission on the continuing need for industry specific competition regulation.

2. General overview of supplementary submission

2.1 Many of the participants, in their primary submissions, referred to Parliament's Second Reading Speech accompanying the introduction of the 1997 amendments, in which the reasons for the introduction of industry-specific legislation were stated. [1] Those reasons have not lost their currency and are as applicable today as they were in 1997. The promotion of competition in telecommunications markets remains a legitimate and necessary objective, and whilst some progress towards these aims has been achieved, competition in these markets is not yet sufficient to justify dispensing with industry-specific legislation.

2.2 PowerTel remains of the view that there is a continuing need for telecommunication specific competition regulation. The telecommunications industry has not reached a sufficient stage of competitive maturity to justify the abandonment of specific regulation. New entrants have the potential to be efficient and valuable participants, but need to attain an adequate level of market share to achieve this. Moreover, to the limited extent that competition does exist in the market, it is somewhat illusory

[1] **See Appendix 1 for elaboration of these reasons as tabled in the Commonwealth Parliamentary Debates, Trade Practices Amendment (Telecommunications) Bill 1996, Second Reading Speech, Senate 25 February 1997, 945.**

with the majority of new entrants competing on the periphery, or only in particular telephony markets that continue to rely heavily on the use of Telstra's fixed network. In addition, the financial performance of many new entrants has been poor by measurement of the usual indices. The effort and resources most new entrants expend on pricing, access and regulatory issues is out of proportion to their revenues and represents a serious impediment to profitable operation However, these costs would be even greater if new entrants did not have recourse to the industry specific provisions of Parts XIB and XIC. Lastly, interconnection and end-user or consumer prices and service levels for a number of services are still unsatisfactory by world benchmark standards.

2.3 The Productivity Commission study undertaken in December 1999 which benchmarked Australian prices and price changes against those of a number of other OECD countries has demonstrated that, at June 1999, Australian residential and business prices were between 20% and 50% higher than those of the best performing countries.[2] Australian prices were in the middle of the range of countries benchmarked. Similarly, the fall in total service price in Australia since February 1998 (about 8%) was in the middle of the range of price changes across the benchmarked countries. Long distance prices declined more rapidly than local prices. This is partly due to barriers to entry in the long distance market being lower than in local call markets, changes in cost structures, rebalancing of price structures and different competitive conditions.[3] Australian mobile prices have fallen less than the other countries, since February 1998 and were higher than most other countries in June 1999.

2.4 This comparatively moderate decline in overall prices is unlikely to have occurred in the absence of the regulatory framework of Parts XIB and XIC. This decline in prices should not, however, be taken as indicative of any significant level of competition in the Australian telecommunications market. At best it indicates that end-user prices in some segments and for some services have declined to no greater extent than the average of the benchmarked OECD countries. In addition the profitability of the entrants is equally relevant to the competitive state of the market

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[2] **Productivity Commission 1999, *International Benchmarking of Telecommunications Prices and Price Changes*, Research Report, AusInfo, Melbourne, December, pp. XXII, XXIV**

[3] **Ibid at p. XXIX**

and the prices of a significant number of telecommunications services remain high by world standards.

2.5 Unlike many other deregulated industries where the incumbent monopolist has been structurally separated, (for example, energy and transport), structural separation has not occurred in the telecommunications industry. The telecommunications industry and, and many of the competition issues arising from it, are therefore somewhat unique in that Telstra is a vertically integrated enterprise which has survived deregulation in a substantially unaltered form, at least in terms of its areas of business and structure. Indeed, many of the ongoing competition issues in the industry have a structural source, and more particularly, relate to the existence of bottleneck facilities including, leased line tails, inter-city rural links and mobile networks and the consequences of vertical integration.

2.6 In these circumstances, there is a continuing need for industry specific regulation if open competition and consumer benefits, in accordance with the National Competition Policy Principles, is to be achieved. This is particularly the case given the unlikely short term structural separation of Telstra. Even if Telstra was notionally structurally separated, unless its assets were vested in a different entity which was not controlled by Telstra, industry specific regulation would still be necessary because Telstra would continue to control access to the local loop. Further, Telstra's retail unit prices would need to be transparent to the industry before the abolition of industry specific regulation would be able to be justified.

2.7 It has been suggested that convergence would remove these structural competition problems and operate to reduce barriers to entry and diminish the dominance of the incumbent. This prognosis has proved incorrect, and new and even established competitors continue to rely heavily on Telstra's fixed networks. For example, while convergence of technologies such as Internet and telephony has increased competition and reduced Telstra's monopoly status in these derivative and convergent markets, competitors are still dependant on access to Telstra's local loop to provide these derivative services. Widespread convergence, even when it does occur, will therefore not overcome the structural advantages enjoyed by the incumbent. This is because the profitability of these derivative offerings will continue to depend on the price paid for upstream access to necessary facilities.

The benefits of convergence should not be overstated. Further, it is important not to confuse competition in the market for content and other derivative markets with facilities based competition which govern the price for essential upstream inputs into these derivative markets. The ACCC's correct analysis of the proposed Telstra/Ozemail merger highlights this confusion on the part of some industry participants.

2.8 These structural features provide the incumbent with economies of scale, scope, and density. Therefore, although new entrants may be technically more efficient, given their small initial customer base, unit costs will be considerably higher than for the incumbent which spreads its costs over a much larger customer base resulting in much lower unit costs. As a consequence, any cost advantage new entrants might have are offset by these economies..

2.9 Given these structural conditions, if competition regulation is to be effective in constraining the incumbent, **it is not appropriate to treat the incumbent and the entrants in a similar manner.** In this respect any pricing principles should be consistently applied so as to ensure that Telstra do not receive a "free ride" on the more efficient technology of new entrants.

2.10 In a market where product offerings and technology are changing rapidly, if the incumbent is able to delay processes required for the provision of access or the deterrence of anti-competitive conduct, then by the time the matter has been resolved, the industry will have moved on. Information asymmetry in favour of the incumbent is one factor which the incumbent can use delay these processes. Both the new entrants and the regulator are disadvantaged, and can be delayed for lengthy periods, as a consequence of information asymmetry.

2.11 As one would expect, the submissions lodged by most of the participants in the Review reflect positions of self interest. Notwithstanding this, it is apparent that numerous cogent arguments have been raised by the majority of participants supporting the proposition that telecommunication specific regulation remains necessary for rational market outcomes to be achieved and should be retained. It is also apparent that the majority of participants are of the view that the benefits associated with the continuation of the existing regime far outweigh the detriment

that would be caused to the industry, and the economy as a whole, if the present regulatory framework was dismantled.

2.12 PowerTel considers the critical question is therefore, not whether the existing legislative framework should be abandoned, but rather what precise form it should take and, in particular, whether any modifications need to be made to Parts XIB and XIC and to the approach taken by the bodies responsible for the administration and enforcement of these Parts.

2.13 PowerTel considers that there is no justification for the repeal of Part XIB of the Act. Notwithstanding this position, PowerTel considers that there are a number of procedural and practical difficulties associated with its administration and enforcement and recommends a number of modifications in order to provide more practical utility.

2.14 PowerTel similarly considers that Part XIC should be retained, but that its effectiveness can be enhanced significantly by implementing certain modifications and by the ACCC taking a more vigorous approach to its enforcement and administration.

3. Participants' Views on Part XIB and XIC

3.1 A number of the primary submissions lodged by participants provide detailed comments on the legislative origins and policy justifications for the enactment of these provisions. PowerTel does not propose to revisit these matters other than to affirm the terms of its initial submission, and to state that it agrees generally with the analysis of these issues as set out in the ACCC's primary submission.

3.2 Telstra, in its submission, suggest that without the alleged negative effects of the existing regulatory framework:

(a) pricing and access outcomes would reflect the interaction of supply and demand as they would in a competitive market where the participants have equal bargaining power; and

(b) investment and resource allocation decisions would be made in a more rational and efficient manner.

3.3 This view belies the underlying reality, in particular, the inequality of bargaining power that presently exists in the market between the incumbent and new entrants, the information asymmetry that continues to characterise the industry, and the immaturity of the market. This inequality of bargaining power and information asymmetry originate from the pre-deregulated state of the industry and legislative and regulatory mechanisms are still required to redress them. Telstra's argument also ignores several of the principal objectives of this legislation, namely, to avoid the inefficient duplication of fixed infrastructure, to act as a deterrent to misuse of market power, and to prevent anti-competitive conduct.

3.4 Telstra also argues for the repeal of Part XIB (it is alone in this argument) and the modification of Part XIC on various bases, including:

(a) Part IIIA and IV provide sufficient regulatory disciplines;

(b) Part XIB is "not working" and is not now, and never has been, necessary.

3.5 Telstra attacks the efficacy and effectiveness of Part XIB by pointing to alleged instances of regulatory failure, delays, the high cost of compliance and other factors. **These arguments serve only to diagnose the symptoms and not examine their causes.** PowerTel considers that the retention of Parts XIB and XIC is essential but that there are certain obvious deficiencies in these provisions that need to be examined. PowerTel also considers that it is in the manner of enforcement of these provisions that many of the current problems lie.

3.6 A number of other participants have argued for the scope of Parts XIB and XIC to be curtailed, strengthened or for other significant modifications to be made. However, these participants all argue for the retention of these provisions. PowerTel does not consider that any radical amendment is required, but that some modifications are necessary, and that the ACCC should be more vigorous in its enforcement activities.

3.7 There have been arguments raised for Part XIC to be amended to adopt substantially the same form as Part IIIA which regulates access to non-telecommunications infrastructure. Some participants have also argued that Part IIIA is sufficient to deal with access to fixed telecommunications infrastructure and

that Part XIC can be phased out. PowerTel does not believe that Part IIIA is sufficient or appropriate to regulate access to telecommunications infrastructure. PowerTel considers that the provisions of Part IIIA are visited with a number of fundamental structural deficiencies. There are also certain practical difficulties in enforcement of its associated remedies, including the role of the National Competition Council and the relevant Minister, which make it wholly unsuitable for the regulation of access to telecommunications infrastructure. It is also noteworthy that Part IIIA is itself the subject of review. PowerTel accordingly argues for the retention of Part XIC, but considers that, like Part XIB, its provisions should be modified to make it a more effective access regime.

3.8 PowerTel's views on Parts XIB and XIC are set out in more detail below.

4. Part XIB should be retained

4.1 Part XIB was enacted to ensure that anti-competitive conduct in telecommunications markets can be dealt with quickly and effectively.

4.2 Its repeal is only justified if it can be demonstrated that:

(a) competition in the telecommunications industry and its various markets has developed to a sufficient level to ensure that there is no present or continuing scope for a participant to engage in anti-competitive behaviour ***(competitive market justification)***; *or*

(b) there are adequate remedies available elsewhere that are equally effective to those available under Part XIB ***(inappropriate or unnecessary regulation justification)***.

Telstra, in its submission, rely on both the competitive market justification and the inappropriate or unnecessary regulation justification.

Competitive Market Justification

4.3 The competitive market justification is not applicable in the present circumstances. Telstra remains overwhelmingly dominant in most regions, markets and sectors. Despite the apparent success of a number of new entrants in particular defined

markets, fixed infrastructure or facilities-based competition has not yet developed and new entrants remain reliant on access to bottleneck facilities to provide their services. In addition, most new entrants have experienced only modest financial performance and return on shareholders' equity. The robustness and effectiveness of competition should not be judged merely by the numbers of new entrants – it is clear that there are many. The appropriate measure of competition is the extent to which the new entrants constrain the incumbent so that it no longer has a substantial degree of market power. This is not yet the position. Most new entrants are limited in terms of their geographic coverage and product offerings. They also remain financially vulnerable and have significant start-up costs and low levels of working capital. Further, they can only operate profitably, if they are able to secure reasonable access to upstream inputs in the form of access to essential network facilities.

4.4 It is also patently obvious that the Australian telecommunications market is an immature one, and is still in a transition phase following the 1997 legislative amendments. The evolving state of competition and dynamic characteristics of the telecommunications market has been dealt with extensively in a number of primary submissions lodged by participants in the review. The overwhelming view emerging from those submissions is that the market cannot yet be properly regarded as sufficiently open and competitive. This is also PowerTel's view. If this proposition is accepted then the subsidiary question is whether the present form of regulation is appropriate.

Part XIB – Inappropriate or unnecessary?

4.5 PowerTel maintains the view that Part XIB should be retained. A number of the arguments in support of the maintenance of Part XIB have been raised in a great level of detail in primary submissions lodged by a number of participants in the review. PowerTel also argues for the maintenance of Part XIB and considers that there are certain refinements or modifications that would enhance its efficacy. These are dealt with in more detail below. The principal reasons why Part XIB should be retained are:

(a) the power of the ACCC to issue a Competition Notice and the potential escalating penalties for subsequent anti-competitive conduct operate as a significant disincentive, or competitive discipline, to Telstra behaving anti-competitively;

(b) given Telstra's dominance in most telecommunications markets and its ownership of essential infrastructure, competitors continue to rely on securing access on fair commercial terms to Telstra's infrastructure in order to provide economical downstream services to their own customers and end-users;

(c) there are numerous practical, procedural and legal advantages associated with the remedies available under Part XIB that would otherwise not be available under alternative competition law remedies, including Part IV.

4.6 The removal of Part XIB would mean reliance on Part IV (specifically s.46) to deal with anti-competitive conduct on the part of the incumbent. There are several disadvantages to this approach compared with the present industry specific approach.

4.7 Part IV places much more emphasis on market definition than does Part XIB. As has been shown in the pay TV merger matters examined by the ACCC, market definition is often very difficult in industries where there is rapid technological change, product development and convergence.

4.8 For s.46 to apply it is necessary to establish, not only that the firm whose conduct is at issue has market power, but that it used that market power to undertake the conduct at issue. This has proven notoriously difficult in cases brought under this section (see for example *ACCC v Boral*). In particular it would be possible for Telstra to argue that its conduct was based on it having "deep pockets", and the courts have rejected the argument that using those deep pockets, of itself, constitutes a misuse of market power.

4.9 To establish a case under s.46 requires proof of a proscribed anti-competitive purpose. Establishing intent is extremely difficult. This is particularly the case in view of information asymmetry and the opaque nature of cost and price

information. In an industry with an entrenched player such as Telstra, where the aim is to foster competition, if the effect of conduct is anti-competitive, even if the purpose was not, it is a matter of concern from both a competition perspective and from a public policy perspective.

4.10 Further, the delays in getting a case to court are even greater than the delays experienced in relation to the current industry-specific regulation. This would cause significant detriment to new entrants because timing and market dynamics are critical factors affecting the development of competition in the telecommunications industry.

Part XIB can be improved

4.11 Notwithstanding the benefits of Part XIB, there are certain problems associated with its use and enforcement, including:

(a) it is often a slow and cumbersome process for a complainant to cause the ACCC to issue a Competition Notice;

(b) there is a significant information asymmetry operating in favour of the recipient of the Competition Notice and against the complainant and the ACCC;

(c) the potency of the remedies available under Part XIB are diminished by the fast moving nature of the telecommunications market as compared with the slow progress and high cost of proceedings brought under these provisions; and

(d) the threat of a Competition Notice has not, to date, operated as an immediate or effective disincentive to anti-competitive conduct.

4.12 PowerTel considers that these difficulties may be ameliorated by implementing the following modifications:

(a) implementation of timeline procedures, including "milestones", "sunset" provisions or timelines in relation to the issuing of Competition Notices and subsequent procedural steps;

(b) providing the ACCC with power to issue interim "stop orders" or "cease and desist orders" where there is reason to believe anti-competitive behaviour is occurring while it considers whether or not to issue a Competition Notice;

(c) providing the ACCC with more clear-cut and more immediate powers to obtain information from Telstra in a timely fashion;

(d) strengthening the record keeping and tariff filing rules;

(e) permitting applicants other than the ACCC to more easily seek injunctions, including by relieving an applicant of any requirement to give undertakings as to damages; and

(f) redressing information asymmetry by implementing transparency in pricing and cost allocation.

5. Part XIC should be retained

5.1 The objects of Part XIC include:

(a) to promote the long term interests of end users;

(b) to facilitate any-to-any connectivity;

(c) to encourage economically efficient use of, and investment in, infrastructure; and

(d) to promote competition in markets for telecommunication services.

5.2 Whilst the majority of primary submissions advocate retaining Part XIC, Telstra and Vodafone contend that Part XIC should be amended to bring it in line with Part IIIA. Telstra argues that Part XIC stifles investment activity, and that constraints should be imposed on the ACCC's current level of discretion in its enforcement activities.

5.3 Telstra's argument in relation to skewed investment decisions misses one of the main objects of Part XIC, namely, to avoid the unnecessary duplication and inefficient use of expensive infrastructure, such as the local loop. This is clearly a valid objective. The reliance of new entrants on access to Telstra's existing

infrastructure for the delivery of their services, makes new entrants vulnerable to Telstra extracting monopoly rents from fixed networks. This is clearly not an appropriate economic outcome in a deregulated industry.

5.4 PowerTel considers that an access regime that is telecommunication specific continues to be required in order to achieve the objectives set out in paragraph 5.1 above. Like many other participants in the Review, PowerTel considers that the general access provisions of Part IIIA are inappropriate and insufficient to deal with matters relating to telecommunications infrastructure.

5.5 Further, amending Part XIC to bring it into line with Part IIIA, or the repeal of Part XIC, is wholly inappropriate for the following reasons:

(a) although Part IIIA is designed to facilitate access on commercial terms to essential infrastructure, it is not appropriate to telecommunications networks which have different physical characteristics and historical origins than other network based facilities such as those used in transport and energy;

(b) the current levels of competition and imbalance of bargaining power inhibit the provision of access to fixed telecommunication infrastructure on fair commercial terms; and

(c) Part IIIA is itself visited with a number of difficulties and the process for declaration, negotiation and arbitration is too slow and cumbersome for the telecommunications industry.

Part IIIA is ineffective

5.6 Part IIIA has generally been regarded as an ineffectual regime for regulating access to essential infrastructure. There are several reasons for this. Some are structural or legislative problems and some are procedural or practical. The main problems are:

(a) difficulties with market definition – it requires establishment of a market in which competition will be promoted other than the one in which the service is supplied. This means establishing a separate functional market

and functional market definition is a much more difficult process than defining product markets;

(b) it is necessary to establish, among other things, national significance and inability to duplicate economically;

(c) the process is highly politicised and, unlike Part XIC suffers from State/Federal issues because, the relevant minister, which may be the Federal Treasurer, or may be the Premier of a State or the Chief Minister of a Territory is required to declare the service on the advice of the NCC. To date, with one exception, the recommendations have been allowed to lapse;

(d) regulation under Part IIIA will result in an overlap with the Competition Policy Reform (NSW) Act;

(e) amending Part IIIA to encompass the telecommunications infrastructure would be a cumbersome and lengthy process. It would require the re-declaration of facilities that have already been declared under Part XIC. It would also require transitional legislation to be implemented, or for Part XIC to remain in force until Part IIIA is fully operational in relation to telecommunications infrastructure; and

(f) the processes involved in Part IIIA are even slower than those in Part IV and in XIC. The Sydney Airports Declaration took five years to come into effect and even then the parties were still only at the stage of negotiating terms and conditions of access. Such a timeframe renders the process wholly ineffective in a fast moving industry such as telecommunications.

5.7 PowerTel maintains its view that Part XIC should be retained but considers that a number of amendments could be made to Part XIC to enable it to operate more effectively and have greater practical utility.

5.8 The principle reasons why Part XIC should be retained are as follows:

(a) the criteria for declaration under Part XIC is more flexible, and allows the ACCC more discretion than Part IIIA. This greater flexibility is essential to the "long term interests of end users" because of the fast pace of technological change in the industry;

(b) reliable access to infrastructure on commercial terms is essential to investment in new technologies and infrastructure; and

(c) the objective under Part XIC of encouraging economically efficient use of, and investment in, infrastructure is more appropriate to the telecommunications industry than the criteria under Part IIIA of whether it would be economical for anyone to develop another facility merely preventing uneconomic duplication of infrastructure.

Part XIC can be improved

5.9 Despite the considerable benefits of Part XIC, there are certain problems associated with its operation, including:

(a) the unnecessary duplication of arbitration of issues relating to the same declared services is costly and time consuming to the parties involved, and is an inefficient use of the ACCC's resources;

(b) the declaration process is too slow, which often undermines the effect of eventual declaration;

(c) the current provisions are inadequate to prevent "price squeezing" "bundling" and cross-subsidisation practices;

(d) the current provisions are also inadequate to prevent Telstra from refusing to provision, or adequately provision, it's network, restricting access for Telstra's customers to an access provider's network. The recent switchports dispute is a case in point;

(e) the current provisions do not address the comparatively high pricing of fixed to mobile termination rates, as opposed to mobile to mobile rates. This enables the two dominant mobile operators to offer total pricing

packages (both origination and termination) to retail customers which are significantly lower than the wholesale fixed to mobile termination rates which some of the smaller operators are required to pay;

(f) the current provisions do not prevent mobile operators transferring price internally and bundling fixed and mobile services in a way which inhibits services based competition in fixed to mobile, or "whole of service" offerings;

(g) there is a significant information asymmetry preventing quick and open arbitration processes; and

(h) the role played by industry bodies such as TAF in the declaration process is generally unsupportive of prompt commercial outcomes and retards the declaration process.

5.10 PowerTel considers that these difficulties could be redressed by implementing the following modifications to Part XIC:

(a) providing the ACCC with the power to issue a "benchmark determination", with a ceiling following an arbitration in relation to a particular declared service;

(b) making ACCC arbitrations public. Parties who do not wish their arbitrations to be public would still have recourse to private non-ACCC arbitration processes;

(c) providing the ACCC with the power to require a carrier to submit an access undertaking in relation to a declared service where it is in the long term interests of end users, and if the carrier fails to comply with the direction, or the ACCC rejects the undertaking, for the ACCC to have the power to draft and publish an access undertaking, with which the carrier must comply, after a public consultation process;

(d) allowing information provided under Part XIC to be used for other purposes within the ambit of Part XIC;

(e) providing the ACCC with the power to declare services on an interim basis pending, a final determination;

(f) broadening Section 152AR in accordance with the ACCC's suggestion, to require access seekers to "do all that is necessary to interconnect their facilities with those of an access provider so that there is no impediment to the access provider providing the service". This would assist in closing the gap in the Act which currently exists in relation to disputes in which the access provider, rather than the access seeker, is unable to reach agreement in relation to terms of access;

(g) introducing a "reciprocity of charges" principle to create greater parity between Telstra's charges for termination of competitors' traffic on its network, and charges Telstra is prepared to pay to competitors for termination of Telstra's calls on competitors' non-dominant networks. To date Telstra has exhibited a low preparedness to offer commercially acceptable termination rates to owners of non-dominant networks citing their lower network costs as supporting these low offers. These provisions could take the form of imposing a floor on the lowest price which can be paid for traffic terminating on a non-dominant network, or could prescribe a common methodology for setting the price of terminating calls on Telstra's and non-dominant networks;

(h) If TSLRIC methodology is adopted for determining tariffs it should be adopted in a consistent manner. In determining tariffs by reference to TSLRIC regard should be had to the physical characteristics and location of the network providing the relevant service *not* to the identity of the owner of the network. In this way, pricing outcomes would be more consistent and produce like-for-like tariffs for owners of dominant and non-dominant networks providing like services. There is no rational economic reason (indeed it is inconsistent with TSLRIC being a forward looking model) why, for example, a CBD network owned by a non-dominant carrier should be treated differently to that owned by the incumbent merely because the incumbent may employ less efficient technology or own fixed networks in other locations that are used to

provide different services. An application of TSLRIC in this way distorts its intention and produces unfair outcomes for owners of non-dominant networks;

(i) introducing "anti-bundling" provisions to prevent Telstra from offering discounts and prices which its competitors are unable to match by subsidising a newer or less profitable service with the profits of a more established or profitable service. The ability of Telstra to engage in these practices would be significantly reduced if it had fully transparent costs or was obliged to charge the same prices to its competitors as the transfer-prices it provides to its retail operations;

(j) clarify the declaration process, along the lines suggested by the ACCC; and

(k) introduce an interim discovery/interrogatory process in an effort to overcome information asymmetry.

6. PowerTel's experience in relation to Parts XIB and XIC

6.1 PowerTel's experiences in relation to Parts XIB and XIC have not been altogether satisfactory. In its commercial dealings with Telstra (and to a lesser extent with other mobile network operators) it has found that the disciplinary effects of Part XIB have not figured prominently or promoted sufficiently quick outcomes. Further, Part XIC has not presented a sufficiently quick or effective mechanism to resolve access disputes in relation to declared services.

6.2 Notwithstanding these limitations, PowerTel considers that its position in those dealings would have been further compromised by the absence of the threat of these telecommunications specific remedies. In some cases the problem has not been the result of the lack of an available remedy but the costs and delays associated with PowerTel seeking to avail itself of the remedy. In other cases there has been a gap in the relevant legislation which has made it difficult to identify a readily available remedy.

6.3 PowerTel considers that the deficiencies it has experienced in the operation of Parts XIB and XIC could be easily remedied by appropriate amendment, including some

of the modifications suggested above. On the other hand, redressing the power imbalance between new entrants and the incumbent is a more difficult task as it requires the introduction of mechanisms to address the information asymmetry, the inequality of resources and bargaining power and the finite capacity of the ACCC to assist in the resolution of all inter-carrier disputes.

6.4 Causing the ACCC to issue a Competition Notice involves the complainant in a lengthy and expensive process and, as one would expect, the ACCC is reluctant to take direct enforcement action without a high level of comfort being reached in relation to the conduct which is the subject of the complaint. For this reason, the utility of a Competition Notice to relieve the effects of anti-competitive conduct in a short timeframe is diminished. Further, instituting arbitration proceedings under Part XIC, where the conduct relates to a declared service, is also expensive and time consuming and the decision to commence an arbitration is influenced by a number of factors, including timing issues, costs, the ultimate utility of the arbitration and the likelihood of a positive result. Although these issues are confronted by all litigants or disputants, their effects are magnified in this industry because of the fast pace of technological change and diverse product offerings and commercial dynamics.

6.5 A review of the Part XIC arbitrations to date only tells part of the story. First there is little public information known about the costs and outcome of these arbitrations. Secondly, it is not clear whether the commencement of the arbitration precipitated a commercial negotiation of the dispute. Thus, the consequential benefits to the industry from these arbitrations are difficult to ascertain. It would be of benefit to the industry if there could be more transparency in the process whilst still recognising the importance of maintaining commercial confidentiality for the parties in dispute.

7. Record keeping rules and tariff filing obligations

7.1 Efficient, record keeping rules are essential to redress information asymmetry and for the ACCC to identify anti-competitive conduct and administer Parts XIB and XIC of the Act.

7.2 The record keeping rules facilitate access by the ACCC to an ongoing stream of information.

7.3 These rules are not particularly visible, and little is known about their efficacy, as use of them to date has been minimal. If arbitrations were made public this would facilitate greater access to information which may reduce the need for these rules.

7.4 The power of the ACCC to issue a notice under section 155, reversing the onus of proof and requiring the recipient of the notice to show that its conduct does not have an anti-competitive effect, is also a useful mechanism to ensure that participants keep adequate records.

7.5 Tariff filing obligations provide speedy access to ongoing information about Telstra's prices and services.

7.6 PowerTel is strongly in favour of retaining the record keeping rules and tariff filing obligations, however it believes that the record keeping rules could be enhanced by modifications along the following lines:

(a) the extent of information required to be disclosed by a participant should be closely related to the degree of market power the participant enjoys; and

(b) a broader range of information should be able to be obtained including information relating to internal costs, for example, the accounting treatment given to these costs.

8. Telecommunications Act

8.1 PowerTel is of the view that the following provisions of the Telecommunications Act generally function well and should be retained in their present form:

(a) Part 17 relating to preselection in favour of carriage service providers;

(b) Division 5 of Part 21 relating to technical standards relating to the interconnection of facilities;

(c) Part 22 relating to number portability;

(d) Division 3 of Part 25 relating to ACCC inquiries, particularly into the declaration of services under XIC; and

(e) Parts 2, 3, 4 and 5 of Schedule 1 dealing with various access matters.

9. Other issues of concern to PowerTel

9.1 Telstra currently determines the method of interconnect between its network and PowerTel's network. Telstra uses the electrical interconnect method which is more expensive, less flexible, requires more time to establish, more project management, and has less capacity than PowerTel's preferred method of optical interconnect. See Appendix 2 for further discussion on electrical versus optical interconnect.

9.2 TAF is not currently functioning to facilitate self regulation of access to declared services. The TAF's potential usefulness has been stymied by Telstra's dominance in this forum. Measures need to be taken to ensure that TAF is more representative of the interests and views of the full range of participants.

Appendix 1

1. Experts from Trade Practices Amendment Bill (Telecommunications) Bill 1996, Second Reading Speech, tabled, 25 February 1997 supporting the introduction of industry specific competition regulation

1.1 "Telstra continues to wield significant market power derived primarily from its historical monopoly position. There is also scope for incumbent operators generally to engage in anti-competitive conduct because competitors in downstream markets depend on access to the carriage services controlled by them. The possibility, for example, of incumbents engaging in anti-competitive cross-subsidy practices could threaten the further development of a competitive environment."

1.2 "Total reliance on Part IV of the TPA to constrain anti-competitive conduct might, in some cases, prove ineffective given the still developing state of competition in the telecommunications industry. The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in this industry mean that any anti-competitive behaviour could cause rapid damage to the competition that has already developed and severely hamper new entry."

1.3 "…The amendments made by this bill will supplement Part IV by increasing the ability of the ACCC to respond quickly where anti-competitive conduct is evident."

1.4 "…Many communications services (for example telephone calls) 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. This "any – to – any" feature – and the governments commitment to promote the diversity of carriage and content services available to end-users requires an access regime that includes additional features to those contained in the general access regime in Part IIIA of *The Trade Practices Act*."

Appendix 2

Modes of interconnection

1. The dominant incumbent currently determines the method of interconnection between its network and the access seeker's network.

2. There are 2 main possible types of interconnection technology:

   (a) Electrical interconnection

   (b) Optical interconnection

3. Telstra uses, and requires access seekers to use, the electrical interconnection method. This method is slower to establish, more costly, has less capacity, and places more reliance on Telstra for timely access to its facilities than the optical interconnection method. Forcing access seekers to use the electrical method allows Telstra to control the rate of change to arrangements with Telstra.

Electrical Interconnection

4. Electrical interconnection requires both parties to install expensive, high cost multiplexers at the agreed interconnect premises, because electrical interfaces only work over short distances and require more equipment

5. The access seeker's network uses the multiplexer to convert the optical signal into an electrical signal which is then de-multiplexed back to an optical signal where it enters the access provider's network

Optical Interconnection

6. Optical interconnection requires the access seeker to only install a low cost Optical Distribution Frame at the access provider's premises, as well as on its own premises. An optical signal passes to the access provider's network from the access seeker's ODF. Therefore, there is no need for additional equipment for unnecessary conversion from optical to electrical and vice versa.

Comments

7. Both the electrical and optical interconnection models depend on the access seeker installing equipment at the access provider's premises, however, the equipment which must be installed for optical interconnection is minimal compared to the equipment which must be installed for electrical interconnection.

8. The access seeker's ability to establish interconnection quickly is dependent on the timely delivery of the access provider's facilities. Because the electrical model requires more facilities and is more complex there is more scope for delay by the access provider in allowing the access seeker access to install its equipment at the access provider's premises.

9. Some of the particular benefits of Optical Interconnection include:

- the optical network is less complex than the electrical model;
- there are fewer network elements, so establishment lead times are shorter the cost per unit of interconnected data is lower;
- the capacity of optical interconnect is 63 times greater than the capacity of electrical interconnect, further reducing the cost; and

- optical interconnect is quicker to establish and the access seeker has more control over responsibilities and timeframes in establishing the interconnection.

10. Optical interconnect is therefore cheaper, more flexible, and equitable between the parties, and better reflects the state of the technology than electrical interconnect.

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