POWERTEL LIMITED

Submission to Productivity Commission

Review of Telecommunications Competition Regulation –

Response to Draft Report

1. Introduction

1.1 PowerTel has already made a number of submissions to the Productivity Commission in response to its inquiry and has participated in the public hearings. PowerTel now welcomes the opportunity to provide its final submission in response to the Productivity Commission's Draft Report of the Review of Telecommunications Competition Legislation ("Draft Report").

1.2 In this submission, PowerTel:

- offers its general comments and states its position in relation to the Draft Report and in relation to the current state of telecommunications regulation; and
- offers particular comments in relation to certain of the Productivity Commission's draft recommendations.

1.3 Rather than repeating the contents of its earlier submissions, PowerTel, in this submission provides a distillation of its views and responds to certain particular matters raised in the recent public hearings. In order to put these views in context, PowerTel refers the Productivity Commission back to the numerous earlier submissions lodged by PowerTel.

2. Overview

2.1 Whilst PowerTel agrees with many aspects of the Draft Report, it finds itself at odds with the recommendation that Part XIB be repealed and has particular concerns with certain recommendations made in relation to Part XIC.

2.2 In the Draft Report, the Productivity Commission recognises that telecommunications specific regulation dealing with access terms and conditions is still required, at least in the medium term. However, the Productivity Commission also expressed the view that the current telecommunications specific provisions dealing with anti-competitive conduct set out in Part XIB of the Trade Practices Act **("TPA")** are no longer warranted and should be repealed. More particularly, it was concluded in the Draft Report that the provisions of Part XIB risk regulatory error and over-reach and the general anti-competitive provisions in Part IV of the TPA are adequate for dealing with anti-competitive conduct. A number of specific recommendations consistent with these two main conclusions have been identified in the Productivity Commission's Report. In addition, a number of additional recommendations are made by the Productivity Commission that are not directly related to the principal conclusions relating to Parts XIC and XIB. In this submission, PowerTel concentrates on the principal conclusions of the Productivity Commission set out in the Draft Report and deals with less central recommendations in the table annexed to this submission.

3. Current state of competition – Role of regulatory framework

3.1 PowerTel has previously made the point that the Draft Report should not be considered in theoretical isolation but should be read in light of the commercial experience of industry participants and the practical workings of the industry within the wider economy. Obviously, any legislative reform that may emanate from the

Productivity Commission's recommendations will need to recognise the role that the regulatory framework should deliver to stakeholders and the wider economy.

3.2 PowerTel wishes to highlight this view and affirm its position that upon an application of proper indices, telecommunications competition, particularly facilities based competition, is still immature and care should be taken not to confuse the number of new entrants or a reduction in the price of certain services as a reliable demonstration of strong competition. EBITDA analyses, share price performance, internal rates of return and market penetration are more reliable indices than the mere number of new entrants. Telstra remains overwhelmingly ahead of the rest of the industry when measured against these indices and the role played by the regulatory framework in producing this result should be recognised.

3.3 PowerTel considers that telecommunication specific regulation should be maintained. Telecommunications networks are by definition interconnected and every element of those networks has a role to play in delivering efficient outcomes. Whilst it may be a desirable aim to move towards more common or generic infrastructure regulation, it is premature to adopt this position as this stage. It is notable that most other network-dependent industries – for example, electricity, gas, rail, transport, airports – maintain certain industry-specific regulations, including particular access regimes and at least some degree of specific ex-ante price regulation. There are numerous examples to be found in the various gas and electricity codes, airport undertakings and rail access regimes which are built around the particularities of each industry.

3.4 It is also apparent that the state of the industry is somewhat uncertain and corporate control of major telecommunications carriers is in a state of flux as is the prognosis for future investment and entry into the Australian market. The industry has gone through a cycle of rapid change in the preceding decade and is now likely to be characterised by consolidation and rationalisation. The regulatory framework will be an important influence on the future outlook and viability of the industry.

3.5 PowerTel notes the recent package of reforms identified in the Minister's recent press release and outline of legislative changes. Many of these reforms appear to reflect industry concerns and PowerTel is in general agreement with their introduction

4. PowerTel's vision for the Industry

4.1 PowerTel's vision for the future of the telecommunications industry involves the following elements:

(a) an interconnected national system of networks owned or operated by a sustainable number of independent enterprises each of which delivers an efficient service to users;

(b) the interconnection arrangements between the operators of these networks would encourage both services and facilities based competition and the charges associated with the provision of such services would be primarily based on an efficient economic basis;

(c) an increasingly diverse range of service offerings that take advantage of technological innovation and convergence and which provide niche opportunities to participants with efficient businesses;

(d) the emerging data and IP networks require a new approach to access regulation and pricing. Difficulties with reaching agreement on wholesale optic interconnection standards, network to network interfacing and other frame-type services demonstrate the need for a fresh approach *(see PowerTel's earlier submissions)*;

(e) if full structural separation of Telstra is seen as unworkable, some lesser form of business separation and transparency is required if facilities based competition is to be encouraged and new entrants are to challenge the incumbent;

(f) a telecommunications-specific access regime should be retained and this regime should encourage facilities based competition but also recognise the inherent economic undesirability and low likelihood of duplicating certain fixed infrastructure;

(g) an anti-competitive conduct regime that is particular to the telecommunications industry should be retained. Although Part XIB is far from ideal, its fundamental structure remains valid and any amendment should be primarily directed towards procedural and administrative issues rather than the principles underpinning Part XIB;

(h) PowerTel's vision also contemplates a significant reduction in disputation between participants by bringing a greater degree of transparency to bear on interconnection arrangements and involves implementing "posted prices" for like-services. If the declaration criteria is to be amended with the result that fewer services (new or existing) are de-declared or not declared then some appropriate regulatory safety net is required to ensure that any to any connectivity is promoted and access disputes are able to be resolved efficiently. If symmetrical regulation is to be promoted in relation to access to services then procedural safeguards which may be discriminatory in their effect will need to be enhanced.

5. Draft Recommendation 5.1 – Repeal of Part XIB of the TPA

5.1 The Draft Report recommends that Part XIB be repealed. The Productivity Commission advanced a number arguments in support of this recommendation, including:

(a) action under Part XIB has been shown to be slow and complex to administer;

(b) there is sufficient regulatory protection provided by Part IV or Part XIC;

(c) there have been very few anti-competitive conduct cases brought under Part XIB since its introduction and this pattern has continued since the 1999 amendment;

6. PowerTel's Response

6.1 PowerTel argues strongly for the maintenance of Part XIB but suggests that certain amendments may be desirable. In its early submissions, PowerTel provided detailed reasons for the retention of Part XIB and does not resile from any of these reasons notwithstanding the terms of the Draft Report.

6.2 In the course of the recent public hearings and in its prior submissions, PowerTel made the following comments in relation to Part XIB:

(a) Part XIB provides a useful set of remedies and a discipline on negotiations between parties with unequal bargaining power. The fact that very few competition notices have been issued does not mean that the implicit threat presented by Part XIB and its often invisible effects on negotiations and commercial disputes is not an important one;

(b) There were very few proponents for the abolition of Part XIB and the overwhelming majority of submitters argued strongly for its retention and enhancement rather than a diminution of the ACCC's powers. The chief critic of Part XIB was Telstra who, notably, is also the chief recipient of action under Part XIB;

(c) There is no evidence that Part XIB operates to inhibit investment or that the cost of compliance is overly burdensome. PowerTel notes there are assertions made to this effect but PowerTel has not seen any empirical evidence to support these assertions *(also see below on this issue)*;

(d) Part IV in its present form is an inadequate substitute for Part XIB. Part IV came into effect in 1974 and is not sufficiently particular to the telecommunications industry. The provisions of Part IV also suffer from certain practical and legal problems which militate against its viability in the context of telecommunications related anti-competitive conduct;

(e) The rationale for the 1997 amendments remains. Until the market is capable of producing rational economic outcomes without anti-competitive conduct regulation, or unless Part XIB is shown to be fundamentally deficient rather than practically problematic, it should not be repealed;

(f) Certain forms of anti-competitive conduct relevant to telecommunications, for example, bundling or price squeezing would be difficult to prove under a purpose based test. Further, the criticisms of Part XIB in terms of speed of outcome and administrative complexity also equally characterise Part IV;

(g) Part XIB would be improved by implementing stricter time line procedures, sunset provisions and tighter procedural rules. Consideration should also be given to imbuing the ACCC with broader powers and strengthening the record keeping and tariff filing rules to address the information asymmetry that characterises present disputes and arbitrations;

(h) If Part XIC were amended in the way proposed there would remain a strong need to maintain Part XIB in its present form.

7. Matters arising during public hearings – Part XIB

7.1 During PowerTel's participation in the public hearings, the Productivity Commission raised a number of specific issues in relation to PowerTel's position on Part XIB. These issues were:

(a) how can the effectiveness of Part XIB be measured and what evidence would be relevant to this assessment; and

(b) does the possibility for regulatory error under Part XIB create a tendency for resources to be allocated away from high risk investments *(transcript 15/5/01 pages 164 and 165)*?

7.2 PowerTel concedes that given the opaque nature of investment decision making processes within telecommunications companies, it is difficult to determine the extent to which the costs and risks associated with the current regulatory framework informs investment decisions. Confronted with these difficulties, PowerTel suggests that historical EBITDA comparisons amongst the major carriers, return on shareholders equity and other objective criteria would be relevant. It is obviously difficult to form any firm conclusions from this data and PowerTel recognises that the data may support competing hypotheses. As Telstra has been the principal figure in Part XIB regulation and given its relatively superior performance on these criteria, PowerTel submits that an inference can be drawn that Part XIB does not operate to impede investment decisions and risk taking. Recent experience also shows that enterprises other than Telstra that are prepared to invest in expensive networks find real difficulties in funding the ongoing operations of those networks and obtaining a competitive return on equity.

7.3 Recent developments in the law concerning Part IV of the TPA, particularly section 46 (which prohibits misuse of market power), do not alleviate the need for Part XIB noting these provisions require improvement if they are to be more effective **(see Appendix 2)**.

8. Part XIC

8.1 The Draft Report makes a number of recommendations in relation to Part XIC. The chief recommendations are dealt with below. The balance are referred to briefly in the attached table at **Appendix 1**.

9. Draft recommendations 8.1 and 8.2– Adoption of New Objects Clause

9.1 The Productivity Commission recommends that the current objects clause (LTIE) be broadened to one involving overall economic efficiency. This test would bring the regime more into line with Part IIIA, the generic access regime.

9.2 PowerTel is opposed to proposed changes. They are unlikely to bring any additional clarity. PowerTel considers that the current LTIE test with its focus on end-users as the ultimate beneficiary of the access regime is appropriate. This test is now well understood by industry participants and provides a "touchstone" for investment making decisions that may involve regulatory intervention.

9.3 The introduction of a general public benefit test would involve a less specific and more theoretical economic concept and runs the risk of eliminating considerations that are specific to telecommunications such as the requirement for any-to-any connectivity and the long term aspect of investment decisions. The industry is familiar with the present and to adopt a new test would simply result in uncertainty and confusion test.

9.4 For the same reasons as outlined above, PowerTel considers that the proposed consequential amendments to Part XIC involving the substitution of the broader objects clause instead of the current LTIE test should *not* be adopted.

10. Draft Recommendations 8.3 and 9.1 – The adoption of new declaration criteria

10.1 The Draft Report recommends that in order for a telecommunications service to be declared, it must meet new declaration criteria. This new criteria essentially follows Part IIIA and introduces general principles, including significance to the national economy, the unavailability of substitute services and an absence of competition in downstream markets.

10.2 PowerTel considers that the proposed amended criteria are unsuitable and refers the Productivity Commission to detailed observations in relation to Part IIIA made in PowerTel's earlier submissions. The key points made in those earlier submissions relate to the unique characteristics of the telecommunications industry, including:

(a) the uneven or "lumpy" nature of investments;

(b) the ambiguity and vagueness inherent in the Part IIIA declaration criteria;

(c) the rapid pace of technological change and development.

10.3 The specific requirement for any-to-any connectivity also highlights the importance of a specific regime which promotes access on reasonable terms and conditions. If access regulation is too generic in nature, there will be inevitable delays and difficulties in access providers and access seekers reaching terms. This difficulty is compounded by the vertically integrated and dominant nature of Telstra's businesses and ownership of key bottleneck facilities.

10.4 Telecommunications infrastructure is unique in the prominence of "network-effects" (two way access pricing requirements and heterogenous nature of services) and the speed of technological change. These unique features should be reflected in appropriate declaration criteria. It is unclear whether any currently declared services would not be declared under the proposed new tests. PowerTel considers that the Productivity Commission should provide some guidance as to how it sees the proposed new test operating in practice. PowerTel also wishes to point out that there is a trend towards de-declaration of services and this suggests that the current regime is not overly proscriptive or burdensome. Nor is there any obvious tendency towards declaration of services that should not, on a general economic efficiency basis be declared.

10.5 Lastly, any reference to national significance raises particular problems. Any particular element of infrastructure or particular service may not satisfy a national significance requirement but may, nonetheless, be seen as a key integer in

promoting any-to-any connectivity. The introduction of this added requirement would be counter-productive and out of line with the need for the telecommunications access regime to address regional as well as national issues.

10.6 PowerTel is concerned to ensure that disputes relating to access to services be capable of resolution in an efficient and prompt way. If there is a move towards benchmark or posted prices for services then one possible consequence would be a reduction in the volume of disputes. If such a proposal is not introduced and there is a "softening" of the declaration criteria then it is not apparent how access disputes will be resolved. This is particularly concerning in circumstances where the Productivity Commission has suggested the repeal of Part XIB and has not fully developed arguments in the Draft Report in relation to the development of pricing principles. The apparent theme underpinning a relaxation of access regulation is the suggestion that it is dampening new investment. PowerTel does not consider there is any evidence to support this view.

11. Draft recommendations 9.7 and 9.8 – Joint notification of disputes and group procedures; information disclosure

11.1 PowerTel agrees with these recommendations. PowerTel also suggests that close consideration be given to the proposal made by the ACCC for reference interconnection offers (in lieu of undertakings) under which operators should publish proposed terms of access as posted prices *(see further below).* Permitting joint dispute procedures would also help facilitate these processes.

11.2 The adoption of recommendations 9.7 and 9.8 would have the effect of reducing administrative costs and tying up ACCC resources incurred by the ACCC and industry participants. Further, issues of general principle and significance to all access seekers could be resolved more quickly and more transparently if arbitrations involving the same service could be conducted concurrently. There are other benefits associated with this recommendation, including consistency in the results which would eliminate gaming opportunities and other forms of "dispute arbitrage". Competition in downstream and derivative markets would also be promoted as relative inequalities in bargaining power amongst access seekers and access providers could not be relied upon to distort outcomes. Further, the cost of participating in a joint dispute would be considerably less for access seekers.

11.3 The information asymmetry and lack of transparency of information relevant to access arbitrations would also be addressed significantly by an adoption of draft recommendations 9.7 and 9.8. For these reasons, they are also supported by PowerTel.

12. Draft Recommendation 10.1 – Access Pricing; Request 9.36 – Reference Pricing

12.1 The Draft Report recommends that certain access pricing principles be introduced. The Productivity Commission considers that the enunciation of these principles will reduce uncertainty and provide a clearer framework. These principles include:

(a) cost-based access pricing;

(b) an alignment of risk and return in pricing principles;

(c) the use of multi-part tariffs and price discrimination;

(d) steps to prevent internal transfer pricing by vertically integrated operators.

12.2 PowerTel generally agrees with these recommendations but questions whether they should apply equally to access prices offered by all operators or whether there is a justification for an asymmetric application of these pricing principles to only apply in respect of certain services. To some extent, the prohibition on discrimination in favour of downstream operations already recognises the particular importance of applying the access pricing principles to the incumbents who enjoy vertical integration benefits. PowerTel also considers that operators who continue to rely on the incumbents for access to bottleneck facilities should be relieved from certain pricing constraints due to their inability to generate revenue across a wide range of facilities. Although the Productivity Commission has demonstrated a reluctance to embrace any difference in treatment between operators, PowerTel considers that at this stage of development, certain forms of procedural discrimination are warranted and notes that many jurisdictions, including the European Union have adopted a regime under which the "dominant" operator must transparently account separately for its wholesale and retail businesses. PowerTel advocates the adoption of measures designed to ensure greater transparency in access pricing for services provided by the incumbents or more powerful operators. In particular, where these are internal pricing arrangements involving wholesale and retail business of the one carrier, the prices charged should be transparent.

12.3 PowerTel also considers that there is the potential for difficulties to emerge in determining appropriate measures for efficient long run costs and in testing efficiency claims and doubts whether legislating for such principles would eliminate the inherent difficulties in developing acceptable models for assessing efficient long run costs across a wide range of services. For this reason, the development of pricing principles may not offer much assistance and further consideration should be given to introducing benchmark pricing *(see p 9.35 Draft Report).*

12.4 PowerTel also considers that the lack of transparency which characterises arbitrations in relation to declared services is a key issue deserving close consideration. Arbitrations are currently conducted bi-laterally and in a confidential setting. As the Draft Report notes, a number of submitters have recommended the introduction of multi-lateral arbitrations or that bi-lateral negotiations be transparent. PowerTel considers that such a proposal requires consideration. PowerTel also urges the introduction of "benchmark" or "posted prices". These could take the form of a ceiling and floor price which would provide access seekers seeking access to like-services to negotiate commercially with the access provider within these parameters. This has the added advantage of not divulging precise terms of the bi-lateral negotiations and conditions that emerge in arbitrations or commercial discussions but would provide reference pricing thus bringing greater transparency and certainty. Accordingly, PowerTel strongly supports the recommendation for reference prices to be published by the ACCC but considers that the publication of full reference interconnection offers or a "menu" outlining pricing for certain declared services similar to the method adopted in other jurisdictions, including the EU would be preferable.

13. Arbitrations – some specific concerns

13.1 Two way access disputes under Part XIC give rise to particular issues. In all instances, a dispute will arise because an access provider and access seeker cannot reach agreement on the terms and conditions to a declared service. However, in certain cases, a dispute arises not in relation to economic terms (ie. price) but in relation to the provision of transmission capacity and in particular in relation to facilitating the provision of services. PowerTel considers is a legislative gap in Part XIC in that section 152 AR(3) and 152 AR(5) do not appear to apply the situations where access to a service is unable to be provided because of a party's default in facilitating the provision of the service by failing to provide sufficient transmission or interconnection capacity. The effect of this is to deprive customers of any-to-any connectivity and the denial of a carriers own customers ability to access other networks disproportionately affects smaller carriers.

13.2 It is also important to note that in some instances, a dominant operator, as the *access seeker* to a declared service can frustrate a less powerful operator's competitive activity by refusing to agree on the terms of access for terminating services onto that smaller operator's network. This sort of dispute, in practical terms has a greater propensity to disadvantage the smaller operator rather than the dominant operator seeking to terminate on that operator's network given customer number disparities and other commercial factors.

13.3 Some further and more particular concerns that PowerTel has in relation to the arbitration process are set out in more detail in a **confidential appendix** to this submission. PowerTel considers that it is in the public interest for parties to arbitrations to be in a position to disclose to the Productivity Commission their experience in arbitrations. This position is consistent with PowerTel's views on greater transparency in arbitrations and in pricing determinations.

Appendix 1

PowerTel's response to recommendations and requests.

Recommendation or Request	Productivity Commission Rationale	PowerTel Response
Recommendations		
5.1 – Repeal of anti-competitive conduct provisions of Part XIB	Part XIC or suitable amendment to Part IV are an effective alternative. Difference between purpose and effects test is not great, purpose can be inferred from effect. Effects test may catch behaviour which appears to reduce competition but enhances efficiency. Penalties & reversal of onus of proof incentives behaviour modification even where "perpetrator" believes its actions are not anti-competitive.	See main body of submission.
8.1 –objects clause broadened from the "long term interests of end users" (LTIE) to a test of "enhancing overall economic efficiency".	End-users are a subset of the public. LTIE test may favour consumers at the expense of broader economic efficiency. It is more appropriate to seek the overall public benefit.	See main body of submission.
8.2 – Other sections to be amended to reflect the broader test as in 8.1 above.	As above.	See main body of submission.
8.3 – New, more specific, criteria before a service can be declared under Part XIC	The current wording is too vague and focuses wrongly on "competition" where it should focus on economic efficiency. It gives too much discretion to the regulator.	See main body of submission.
8.4 – Sunsetting of declarations.	Many of the justifications for a declaration are removed with time.	Agree, so long as there is a provision for re-considering declarations which are about to expire.
8.5 - minor revocations	A full inquiry is	This is fine only so long as affected

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Recommendations		
of declarations can be permitted without a full public inquiry.	cumbersome and expensive.	parties are still given the opportunity to comment beforehand. To give discretion to the ACCC to revoke without any consultation at all would be wrong.
9.1 – retain telecoms specific access regime, but principles converge with Part IIIA.	A telecoms-specific regime overcomes obstacles & allows specificity. Risk that specific regime will adopt principles and processes not consistent with Part IIIA.	See main body of submission.
9.2 – ACCC remains the appropriate body to oversee telecoms specific competition regulation.	Administration of multiple industries will lead to a consistent approach.	Agree.
9.3 – removing Minister's discretion to set access prices.	This is unnecessary and wrongheaded anyway since it gives no criteria for exercise of the discretion.	The Minister's discretion should be limited to carriers with substantial market power.
9.4 – abolish the TAF.	TAF has not been effective. Stakeholders do not share sufficient common interest.	Agree – interests of participants probably too divergent for it to succeed. Suggest replacement with (non-statutory) advisory body.
9.5 – allow ACCC to make an interim determination even if the access seeker objects.	Ability of access seeker to veto an interim determination may encourage ACCC to favour access seeker on prices/conditions.	Any-to-any connectivity and the resolution of two-way access disputes require some discipline to be exerted on access seekers and to this extent, the recommendation makes sense, however, the interim determinations should in practical terms be more likely to be directed to the more powerful operators where a failure to reach terms as an access seeker disproportionately affects less powerful operators.
9.6 –allow notification by an access provider or seeker to be withdrawn only with the consent of both.	Current system allows access providers to delay by notifying an access dispute and then withdrawing notification prior to the final determination.	See 9.5 above.
9.7 – groups of access seekers should be able	Simultaneous determination of similar	See main body of submission.

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Recommendations		
to make joint notifications of disputes.	disputes is needlessly wasteful of resources and deprives the public of important information.	
9.8 – allowing the ACCC to disclose information obtained in one arbitration to the participants in other arbitrations.	It is hoped that this measure would help reduce delays obtaining arbitrations.	See main body of submission.
9.9 –merit appeals not extended, except where ACCC rejects a declaration and a party wishes to contest that rejection.	Merit appeals slow regulatory decisions and can be used as strategic delay.	Agree. However, this agreement would be conditional upon appropriate procedural safeguards being implemented to avoid abuses or deliberate delays.
9.10 – ACCC to publish a clear methodology for calculating backpayments.	Currently no criteria are specified - the ACCC has wide discretion in relation to whether to backdate, which features to backdate and the relevant period.	Seems sensible, though the methodology should allow the ACCC discretion in awarding backpayments depending on the circumstances of the dispute. This recommendation should be considered in tandem with the introduction of tighter timelines on arbitrations and "sunsets" or deadlines.
10.1 –Access Prices should at least meet long run costs and should not permit discrimination in favour of downstream operations.	Enunciating principles should reduce uncertainty and provide a clear framework – these principles mirror those proposed for Part IIIA.	See main body of submission.
10.2 – retail price controls leading to the access deficit to be removed.	Social regulations limiting line rental prices lead to the access deficit and are economically inefficient and distort competition significantly.	Agree.
10.3 – public disclosure of costing methodologies on which arbitrations are based.	This should help overcome some of the difficulties in resolving technical disputes	Agree – though, again, this *should* include publication of prices.
11.1 – Abolish Industry Development Plans as carrier licence preconditions.	IDP bring costs in terms of preparation, approval and reporting and no discernible benefit.	Agree.
11.2 – facilities access regimes under the	Potential for inconsistency and	Agree.

Recommendation or Request	Productivity Commission Rationale	PowerTel Response
Recommendations		
Telecoms Act to be consolidated into Part XIC.	overlap between the TPA and the additional telecoms specific access regimes in the Telecoms Act (carrier licensing & access to carrier facilities).	
11.3 –mandatory network information requirements to be aligned regardless of the type of information requested.	Current obligations differ depending on the type of information involved. No apparent justification for this.	Agree.
11.4 – the mandatory network information provisions under Part 4 become a standard under Division 5 of Part 21 of the Telecoms Act.	Record keeping rules provide information to the ACCC to facilitate enforcement, network information requirements are technical and facilitate service delivery. They are best provided on request, rather than periodically.	Agree.
17.1 – Power to determine USO levy should lie with the ACA.	No justification for giving this power to the Minister.	Agree.

Recommendation or Request	Productivity Commission Rationale	Suggested PowerTel Response
Specific Requests		
8.24 Is the "substantial entry barriers" test for declaration of terminating & originating services is too broad?	This is a deliberately lower bar than the "not economically feasible" test so as to ensure that the local loop throughout Australia is declared – ensuring any-to-any connectivity.	The proposed test is suitable and appropriate. It ought, in fact, to apply to *all* telecommunications markets since the "not economically feasible" test may be too high a threshold where there is a single dominant, participant in the market.
8.27 Are "access holidays" – immunities granted to new facilities from declaration – a good idea?	This will allow investments which would not otherwise occur.	The current proposal puts the focus on regulatory decision-making on the (commercial) question of whether or not an investment would be made anyway instead of the more appropriate focus on the (economic) questions of identifying the relevant market and dominance of that market. Failing that, though, access holidays are sensible. Guidelines should indicate that, under most circumstances, the ACCC would expect to grant an access holiday in respect of investments made by non-dominant operators.
8.28 Price monitoring as an alternative to declaration?	Price monitoring is a light-handed alternative.	Disagree. We suggest that all prices offered by a dominant operator should be public.
8.32 Consider risks associated with narrowing and re-defining the declaration criteria.	Modifications would introduce more consistency between XIC and IIIA while retaining telecoms-specific differences.	See main body of submission.
9.25 Should undertakings (other than access holidays) follow the Part IIIA protocol or some other hybrid between the two existing approaches?	Under Part XIC, a CSP can only submit an undertaking *after* declaration of service. Under IIIA, undertakings can only be lodged *prior* to declaration, allowing an owner/operator to immunise its services from declaration and from price arbitration.	As above, we suggest compulsory publication of an even broader "reference interconnection offer" by all operators with market power.
9.26 Greater clarity about the scope of reviews of undertakings?	Current provisions for review are ambiguous and unclear.	Agree. More certainty, as for appeals on final determinations, may lead to more undertakings being lodged.

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Specific Requests		
9.32 Would non-binding indicative time limits for arbitrations be useful & if so should they also apply to undertakings?	Part XIC is slow in application. Binding time limits could lead to hasty and incorrect decisions.	They would be useful.
9.33 "Glidepath" for automatic updating of determinations over time.	This allows automatic changes to account for expected changes in costs without a whole new consultation.	Glidepaths are a good idea – though they would be better if based on an estimate of total factor productivity than if based on international benchmarks. Perhaps introduce an automatic review of the path after 3-5 years.
9.36 Publication of references prices by ACCC.	Greater transparency without revealing confidential information.	See main body of submission.
9.48 Alternative approaches to encourage commercial negotiations & yield workable efficient outcomes?	Current incentives include backdating provisions. Introduce final offer arbitrations. Make public full outcomes of Arbitrations. Downside is access seeker may want confidentiality.	See main body of submission.
10.33 Specific requests re telecommunications pricing approaches,	These are areas of concern where it may be that there has been an underestimate of TSLRIC costs. See Appendix D.	See main body of submission.
10.34. Price monitoring not price control to deal with mobile markets, or, if there is price control, then different path for retail prices?	Based on benchmarking, price monitoring is easy to administer and helps prevent abuse of the mobile operators' bottleneck control over their customers.	No. A mobile operator might be dominant too – and dominant operators should be subject to controls. Different path for retail prices could, though, be appropriate.
10.35 Workable principles to deal with terminating charges in two-way access contexts.	Concern that non-dominant operators might be able to raise their own terminating prices unless there is some control.	Leave unregulated except make clear that non-dominant operators must be reasonable – Telstra (or other dominant operators) won't be penalised for refusing to connect to a network whose terminating charges are unreasonable – disputes would be referred to the ACCC. Also use *ex post* competition rules (Part XIB or Part IV) against unreasonable behaviour by smaller operators

Recommendation or Request	Productivity Commission Rationale	Suggested PowerTel Response
Specific Requests		
		controlling bottlenecks. A scheme like this works well throughout the European Union, and elsewhere. It has the advantage over a "reciprocity" scheme that it does not encourage the pigeon-holing of networks into only one or two categories, and thus does not discourage innovation.
10.40. How to deal with uncertainty of estimates of efficient prices?	Cost estimates are not precise and uncertainty itself has an adverse impact on investment decisions.	In practice a thorough analysis is carried out using the services of independent experts (eg the ACCC took two years in its latest such exercise). This produces a workable estimate.
10.43 Appropriate mechanisms to resolve technical issues affecting access pricing?	ACCC engages experts on technical matters such as NERA and Ovum. Could also set up, with other international regulators, an independent expert group to devise methodologies for specific questions. Could contract out specialist research to experts with peer review of the published research.	Agree, but only if the expert's report is advisory, not binding.
13.20 System to transfer ownership of telephone numbers?	Allocating numbers to the customers themselves, not to the networks, is the best way to achieve number portability.	PowerTel opposes the allocation of numbers to individuals rather than to operators – they are just network addresses and allocating them to individuals would add complexity to transmission and switching mechanisms.
13.22 Determinations on number portability terms under the Telecoms Act to be subject to merits review?	Arbitration determinations by ACCC relating to number portability are not reviewable to the Australian Competition Tribunal on their merits (unlike access arbitrations).	Agree – all determinations / arbitrations should be treated alike.
14.7 Give the ACCC responsibility for determining which services are subject to pre-selection?	ACA currently sets requirements for pre-selection. Decisions regarding pre-selection have competitive implications. Giving	Agree. Pre-selection requirements are likely to be quicker and cheaper than other mechanisms under the TPA.

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Specific Requests		
	responsibility for pre-selection to the ACCC may make pre-selection just one of a wider range of regulatory options considered.	
14.13 Costs and benefits of multi-basket pre-selection?	Allows an end-user to pre-select a different provider for different pre-selectable services. Industry participants would be able to operate in niche markets.	Agree. End-users will benefit as they will be better able to tailor services to their individual usage patterns.
14.14 Implications of restricting pre-selection requirements to Telstra alone?	Regulated price of Telstra's originating service would, in practice, act as a ceiling to what other operators could charge anyway. Disincentive to further investment by new entrants where the obligations applies to all.	Agree. Cheaper and more effective than provisions for exemption from declaration and access holidays. Incentive to invest is more dependant on level of regulated access price than pre-selection. Preselection should be restricted to dominant carriers rather than to "Telstra" - Telstra may be displaced in some areas or markets.
All at Chapter 16 re: Pay TV	Not relevant to PowerTel	Not relevant to PowerTel
17.16 Suggestion of market-based tendering process for USO.	Series of periodic tenders would ensure that USO was provided at least cost and would enhance competition.	Agree but no strong view on the details of how this should be implemented.

Appendix 2

Recent judicial consideration of section 46 of the Act: *Boral*[1] and *Melway*[2]

During the course of the Productivity Commission's inquiry, two judgments examining the interpretation of section 46 were handed down. PowerTel submit that neither the Boral nor the Melway decision significantly affect the interpretation of section 46 as relates the effects test contained in Part XIB.

Boral

In March 1998 the Australian Competition and Consumer Commission instituted proceedings alleging that both Boral and Boral Besser Masonry Limited had taken advantage of their substantial degree of power in the market for concrete masonry products in the Melbourne metropolitan area between April 1994 and October 1996, driving prices below manufacturing costs to deter or prevent competitive conduct in the market.

On 27 February 2001 the Federal Court handed down its landmark decision in which it held that the possibility of 'recoupment' does not constitute an essential element of the test for predatory pricing.

While Boral has significant implications concerning the scope of application of section 46 to future predatory pricing cases and market definition, it does not offer any significant elaborations concerning the 'purpose' element of section 46, which would be of more direct importance in relation to the Review.

An application for special leave to appeal to the High Court of Australia has been filed.

Melway

On 15 March 2001, the High Court of Australia delivered its decision in Melway Publishing Pty Ltd v Robert Hicks Pty Ltd. In determining the matter, the High Court focused on whether Melway Publishing Pty Ltd, which used an exclusive distribution arrangement, refused to fill a former distributor's order for street directories constituted taking advantage of their market power for a prescribed purpose.

By a majority of 4:1 the High Court rejected Robert Hick's submission that in refusing to supply street directories Melway had taken advantage of its market power. The Court held this proposition to be contrary to Queensland Wire Industries, as it implied that taking advantage could be considered without regard to how a corporation would have behaved if it had not had market power.

The Australian Competition and Consumer Commission intervened submitting that 'there would be a breach of section 46 if the market power which a corporation had, made it easier to act for a proscribed purpose than otherwise would be the case'. This submission was accepted to the extent that where a party with market power does something that is materially

[1] **Australian Competition and Consumer Commission v Boral Ltd [2001]FCA 30**
[2] **Melway Publishing Pty Ltd v Hicks (t/a Auto Fashions Australia)**

facilitated by the existence of the market power even though that may not have been absolutely impossible without the market power.[3]

The Court's main focus in Melway was on the 'taking advantage' element of section 46. This does not have direct bearing on the questions at issue before the Commission.

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[3] **ibid at para. 51**