Introduction

One.Tel Limited ("**One.Tel**") welcomes the opportunity to make this initial submission to the Productivity Commission's Review. One.Tel intends to lodge a more detailed submission in September. This preliminary submission outlines One.Tel's key concerns in three main areas:

- the state of competition in Australian telecommunications markets;
- the adequacy of existing competition and telecommunications legislation; and
- possible solutions.

Structure of this Submission

This submission comprises two parts:

1. One.Tel's discussion of the substantive issues of concern to the Productivity Commission Inquiry; and
2. three "case studies" outlining One.Tel's experience with aspects of the regulatory framework governing the telecommunications industry.

One.Tel has used the case studies to illustrate its particular concerns as a new entrant in the Australian telecommunications markets.

Due to the commercial nature of the "case studies", and in order to be as frank in its submission as possible to assist the Commission, One.Tel provides the "case studies" on a confidential basis.

Executive Summary

The current legislative framework has was introduced in 1997 to fulfill the Government's objective of creating and fostering competition in the telecommunications industry in Australia. One.Tel accepts the principles implicit in the policy: that the means of meeting the long term interests of end

users in relation to the quality, technology, service and price in telecommunications markets are best met by competition.

While the current legislative framework has gone some way towards introducing competition to the Australian telecommunications industry, there is some way to go before world's best practice is achieved across all sections of the industry.

It is clear that imbalances continue to exist in the market, with Telstra continuing to exhibit characteristics of a natural monopoly in some markets.

Accordingly, One.Tel is concerned that the Commission should not view the current inquiry as an opportunity to recommend a relaxation of the regulatory framework, but rather should consider how the current legislative scheme can be improved to further the accepted policy objectives.

One.Tel Overview

One.Tel commenced operations in 1995 as a reseller of Cable & Wireless Optus' GSM mobile services.

One.Tel has since expanded its service provider operations to include internet service provider (ISP), fixed wire long distance and international voice call services, local call resale, and pre-paid fixed wire phone card services. One.Tel has also commenced service provider operations in locations throughout Europe and Asia.

Since 1998, One.Tel has committed to building its own GSM mobile infrastructure in Australia, using the 1800MHz radio spectrum. One.Tel was a vigorous participant in the recent 1800MHz spectrum auctions, and has committed significant funds to its network build. In May 2000, One.Tel

launched its Next Generation Mobile Network in Sydney, with other Australian cities to follow.

In October 1999 One.Tel commenced reselling Telstra's local call service, bundled with its long distance, international and fixed to mobile offering (Switch). One.Tel's aggressive marketing and price competition have seen it gain a significant number of customers to this service in a short time.

During this year, One.Tel plans to offer fixed wire voice and data services using the newly declared Unconditioned Local Loop service. This will require significant investment in fixed wire infrastructure.

PART ONE

One.Tel's Submission

The current legislative framework has been in place for just over three years following a five-year period of "managed competition". The legislation in place during the five-year period to July 1997 granted important exclusive rights and privileges to the two fixed wire licensed carriers and three mobile network operators, including extensive powers and immunities in relation to construction of network infrastructure.

Since July 1997, the legislative restraints on competition have been removed and replaced with a regime designed to promote competition while giving consideration to the special features of telecommunications markets. It was recognised that telecommunications specific regulation was required due to the unique features of telecommunications markets, which are a consequence of more than a century of monopoly control over the provision of telecommunications infrastructure and services, and the essential requirement for interconnection of telecommunications networks. In One.Tel's view, these features of the telecommunications market continue to exist, and continue to require specific regulatory treatment.

While the existing regime was designed to achieve the policy objectives of promoting the long term interests of end users by being "pro-competitive", market-driven, technology- neutral and essentially self-regulatory, it has not yet achieved its aim of delivering true competition in all telecommunications markets.

While One.Tel accepts the need for the Commission to revisit the underlying questions regarding telecommunications regulation in its review, it submits the Commission should take into account the exhaustive review that led to the enactment of the 1997 legislation and how early into its effective life the review

is occurring. In many important markets little has changed in the last three years. The factors underlying the need for a pro competitive regime are just as compelling today as they were in 1997.

The State of Competition in Australian Telecommunications Markets

There are many factors that must be taken into account in judging the state of competition in Australian telecommunications markets.

Firstly, it is important to note that there is not one, but many telecommunications markets in Australia. While we do not propose to undertake an economic or legal analysis to attempt an exhaustive definition of those telecommunications markets, it may be helpful to acknowledge such basic distinctions as fixed wire and mobile markets, local call and long distance markets, business and residential markets, and wholesale and retail markets, and to acknowledge that competition has been achieved unevenly across the various telecommunications markets.

Key indicators of the state of competition include barriers to entry, market shares, price performance, the degree of technical and marketing innovation, levels of investment, efficiency of investment and operational efficiency. People untrained in economics often view the emergence of new entrants, increased retail price competition and high expenditure on advertising as signs of healthy competition. However, there is strong evidence leading to the conclusion that on many of the commonly accepted key performance indicators, the Australian telecommunications industry still has a long way to go before it achieves world's best practice.

It is true that many new entrants have emerged since 1997 and that some markets and sub-markets are arguably competitive. Examples of areas in which there is enhanced competition include the market(s) for international and some other long distance calls. One.Tel, as an aggressive participant in this market, was instrumental in driving national and international long distance call prices down. However competition in less competitive areas is dependent on continuing regulatory scrutiny and the threat of regulatory intervention. Without access and arbitration rights, the declaration of services, the competition rule, and the standard access obligations it is likely that competition in some telecommunications markets would be reversed, and new telecommunications markets would not be opened to competition.

The underlying market power of Telstra in many areas remains significantly unchanged. Even with the pro-active regulatory interventions that are in theory available under Parts XIB and XIC of the *Trade Practices Act 1974*, and under the *Telecommunications Act 1997*, Telstra's market shares and pricing have not been significantly affected, particularly in those markets where Telstra enjoys a natural monopoly.

The end result is that in key areas such as delivery of local call services, competition has not developed to a satisfactory level. The performance drivers in this market continue to be statutory price controls and minimum performance standards, rather than competition.

Adequacy of the Existing Legislation

The key legislative tools for the promotion of competition in the telecommunications industry are to be found in Parts XIB and XIC of the Trade Practices Act. The legislation provides a framework for participants to seek access to bottleneck services, and it provides a process for the Australian

Competition & Consumer Commission (ACCC) to make determinations that seek to resolve access issues in the long-term interests of end users.

Often this process has been at huge expense to the industry in terms of the time and cost to effect any significant changes. For example the local loop continues to be a bottleneck for the provision of contestable services in spite of massive regulatory efforts by the ACCC and many new entrants.

It would be premature to assume that the policy objectives of the 1997 legislative regime have already been achieved in all telecommunications markets and that it is now time for the relaxation of access and competition regulation.

While the access and conduct rules of the current legislation have been effective in achieving a degree of competition in some markets, the legislation does not fully address many issues that new entrants face, in particular, the timing of access to facilities and interconnection, problems of transparency of the incumbents' costs and the management of industry information. Inherent restrictions on information flows to access seekers and the ACCC have significant impacts on the ACCC's ability to exercise its powers under Parts XIB and XIC of the Trade Practices Act. The consequence is that it is extremely expensive and sometimes impossible for the ACCC and/or new entrants to challenge anti-competitive pricing or conduct.

Furthermore, the existing legislation envisages a wide range of negotiated outcomes in instances where there is a clear imbalance of negotiating power, and relies on market mechanisms where there is information asymmetry and other asymmetries of bargaining power. New entrants are at a clear disadvantage where such asymmetries exist, and the legislative scheme does not always provide adequate redress in these circumstances. In some instances, such a situation will act as a further barrier to entry to potential new entrants.

The statutory mechanisms for access under Part XIC tend to be slow to produce outcomes, a fact which is often exploited by the incumbents, allowing them first-mover and other advantages as a result.

In many telecommunications markets, the incumbent network operators with significant market power have little or no incentive, independent of the disincentives in Parts XIB and XIC of the Trade Practices Act, to provide existing and new competitors with opportunities to interconnect with and make use of the incumbents' networks and services.[1]

As the United States Federal Communications Commission has said:

> "Although the [relevant] Act requires incumbent [operators], for example, to provide interconnection and access to unbundled elements on rates, terms and conditions that are just, reasonable and non-discriminatory, incumbent [operators] have strong incentives to resist such obligations. The inequality of bargaining power between incumbents and new entrants militates in favour of rules [guiding negotiation] that have the effect of equalising bargaining power …"[2]

Similar asymmetries in the negotiating power between incumbents and new entrants have been and continue to be significant problems in arrangements for interconnection and access arrangements. It is striking that although the United States has a longer history of competition in telecommunications, the United States regulators consider that *more* enhanced interconnection safeguards and powers are required. The FCC has observed that the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets,

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[1] One.Tel uses the term "incumbent" to mean, in the market or markets for fixed line services, Telstra and Cable & Wireless Optus, and in the market or markets for mobile telecommunications services, Telstra, Cable & Wireless Optus and Vodafone.

[2] *First Report and Order* and *Second Report and Order* and *Memorandum Opinion and Order*, CC Docket No. 96-98

while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent operator's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.[3]

In other words, regulation is necessary to where there is asymmetric market power in a telecommunications market.

Solutions

There are a number of key areas of the operation of the current legislation that should be examined in order to ensure that it better achieves its original objectives.

One.Tel's main proposals are to:

- **Improve arbitration and complaint processes.** Increase the resources of the ACCC and the ACA to enable, where appropriate, arbitration and mediation functions could be outsourced to professional arbitrators and mediators, and to enable the appointment of external economic and legal experts by the ACCC and the ACA. Stricter rules and timeframes may need to be imposed in some cases to limit the length and number of submissions and replies.

- **Improve the speed of arbitration and complaint processes.** It remains to be seen whether most recent changes to Part XIC allowing interim determinations to be made by the ACCC, will be effective in improving the speed of the arbitration process.

[3] *First Report and Order*, pp. 10-11

- **Allow arbitrations to be conducted collectively.** Where industry has common concerns about the terms of access to a service, there should be an ability for the ACCC to hear a collective access dispute, and to enforce a resolution to apply to all interested parties.

- **Clarify and where necessary strengthen the ACCC's existing powers to act quickly to restrict specified anticompetitive conduct**. There needs to be "bright line" rules for dealing with conduct that is clearly antic-competitive. A power to issue interim "cease and desist" orders might assist the ACCC to nip such conduct in the bud.

- **Fast-track number portability.** Portability is the ability for customers to retain their telephone numbers when transferring between carriage service providers. Portability has been internationally recognised as fundamental to the existence of effective competition. Significant delays and obstruction by incumbent network operators have resulted in the introduction dates for number portability for free call numbers being 16 November 2000 and September 2001 for mobile numbers. The delays in implementing mobile number portability are outlined in Appendix 1 (case study 1).

- **Improve facilities access.** Regional and other telecommunications facilities need to be opened up to multiple network operators to allow service-based competition to develop and avoid inefficient duplication of infrastructure. The current facilities access regime is not effective as evidenced by the limited sharing of GSM transmission towers. This issue is discussed in detail below.

- **Give the ACCC unambiguous powers to require transparent and non-discriminatory wholesale pricing**. This would dramatically reduce arbitration and Part XIB complaints and reduce delays.

- **Abolish the TAF**. It is an incumbent dominated forum that is particularly ill suited to deciding or defining access issues.

- **Clearly define the roles and powers of the ACA, ACCC, TIO and ACIF.** In practice, the existing co-regulatory legislative structure creates ambiguities about the roles and powers of each of the regulators. While it is clear that the policy emphasis is on industry self-regulation, it is often not clear that the ACA, ACCC and TIO also have important and separate roles in ACIF and other industry processes, or what those roles are. The Telecommunications Act does not specifically refer to ACIF, yet that body has assumed enormous powers in a wide range of areas. Its code-making powers remain untested. ACIF should be given a clearly defined statutory basis, role and composition.

- **Remove the ambiguity of the Standard Access Obligations** enabling the ACCC to fix performance levels, and to require reporting from an operator as to how it has satisfied its standard access obligations where the ACCC deems necessary.

- **Implement structural separation of Telstra or some form of ring fencing.** One.Tel notes this is outside the Commission's terms of reference but strongly believes the Commission should recommend an extension of its terms of reference to encompass such a review, particularly if Telstra is to be fully privatised.

- **Introduce effective Record Keeping Rules**. The ACCC's efforts to date in this area are welcomed but its powers need some refining.

- **Revisit commercial churn processes**. Commercial churn has been the only major test of the Part XIB anti-competitive conduct provisions. Court proceedings against Telstra were commenced in 1997. The unworkable evidentiary requirements of Part XIB resulted in the proceedings being unsatisfactorily settled in February 2000. Significant problems continue to exist for One.Tel and other carriage service providers.

Facilities Access

One.Tel supports the principles underpinning the current facilities access regime and the emphasis on co-location. Co-location has the obvious benefits of reducing the overall costs of infrastructure rollout for all carriers and reduces the visual impact of telecommunications facilities in the community.

However at an operational level, the facilities access regime set out in the Parts 3 and 5 of Schedule 1 the Telecommunications Act 1997 and the ACCC's Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities, October 1999 (Facilities Access Code) is not operating as intended.

One.Tel also supports the Department of Communications, Information Technology and the Arts' consultation with industry on the Facilities Access Code, aimed at clarifying the grounds on which carriers are able to deny access to their facilities. All carriers need certainty and need to be able to access their

own infrastructure. However this should not be used to deny access to new and potential carriers.

As a new entrant, One.Tel has faced and continues to face considerable problems in co-locating with the incumbent carriers under the current regime. These problems include:

- **Processing delays**

  Carriers are not compelled to comply with realistic processing timeframes under either the Telecommunications Act or the Facilities Access Code. Under the Facilities Access Code a carrier does not need to comply with the specified timeframes if it considers that it would not be reasonably practicable for it to comply. Carriers must then agree to amended timeframes. This, in practice, enables the access provider to unreasonably delay the process, with no recourse available to the access seeker. While carriers can use the dispute resolution process to resolve disputes about delays, there is still no penalty or compensation for the delay.

  Typically the bargaining power of new entrants is weak, given that they do not have a comparable volume of infrastructure to offer to share with the incumbent carriers. As a result new entrants are often forced to contract with the incumbent carriers on a “take it or leave it” basis or face a long and protracted arbitration by the ACCC. This results in agreements that impose no sanctions on access providers who fail to comply with the set timeframes for processing co-location applications. For example, One.Tel has faced delays with one carrier of up to eight months for a single application. These applications could reasonably be processed within considerably shorter timeframes.

The consequence is that new carriers are either forced to cut back or delay their network rollout plans or seek alternative solutions. Typically these alternative solutions involve the installation of separate towers or low-impact facilities on rooftops.

Proposed solution: The industry with the assistance of the ACA and, if necessary, Government, should create a binding code of conduct, under which carriers would have to adhere to set processing timeframes and processes. One.Tel tentatively supports the process of self-regulation in this area, provided that the carriers are able to reach an agreement within a reasonable time. Failing agreement, the ACA should intervene to ensure an efficient outcome that addresses environmental and other concerns.

- **Costs**

As an access seeker, One.Tel is often advised by existing carriers that the relevant tower on which it wishes to co-locate facilities is not structurally able to hold its proposed equipment. In that case if it wishes to proceed with the co-location, One.Tel is forced to replace the existing tower with a new, stronger tower. As a result, it is forced to pay not only a fixed tower sharing fee (typically in excess of $85,000), but also the cost of the replacement tower and its installation. Therefore the installation of the facility costs significantly more than had it installed the tower at a greenfield location.

In addition, some carriers require that their contractors perform such replacement work at a considerably inflated cost. There may be little scope for incoming carriers to arrange alternate contractors to keep the costs down to a reasonable level.

Proposed solution: Where an incoming carrier is forced to replace existing infrastructure, the costs charged to that carrier should only reflect the actual costs of construction. These costs claims should not be used to recoup capital expenditure associated with the pre-existing infrastructure, nor should an additional tower access charge be levied.

In addition a scale of construction and make ready work fees should be agreed between the carriers, at an industry level, to prevent excessive charging. Failing agreement, the ACA should intervene to mediate charging disputes.

- **Government infrastructure**

In order to encourage greater co-location and reduce the duplication of infrastructure, the Government should consider extending co-location obligations to other infrastructure owners, particularly governments and their departments and agencies.

In areas where there are no opportunities to co-locate with other carriers One.Tel has often sought to utilise existing towers and structures owned by State and federal governments. In some cases these requests for co-location have been refused and One.Tel has had to install “low-impact” facilities on rooftops. These refusals on occasion have been made because of a general policy against telecommunications facilities (particularly towers) and not due to any structural limitation of the facilities. In other cases the terms of access proposed by the government body have been so unreasonable as to place an unacceptable level of commercial risk on the incoming carrier. For example, One.Tel has been asked to bear the risk of emissions not only from its own equipment, but also from the equipment of the government body.

Proposed solution: Extend co-location requirements to government infrastructure wherever practicable.

- **Leased lines not available**

One.Tel links its base stations using microwave links. Microwave antennas need to be located within line-of-sight of the connecting antenna and usually need to be mounted in a relatively high place. The need for these antennas could be eliminated if leased lines from other carriers could be accessed to provide transmission. However, in practice these links have not been utilised in One.Tel's network infrastructure rollout because it takes up to 12 months for Telstra to provide the necessary links and they also cost considerably more than microwave links. If the incumbent carriers were required to provide timely and cost-effective access to leased lines, the need to deploy microwave antennas would be greatly reduced.