

Review of access to significant infrastructure facilities provided for in Part IIIA of the Trade Practices Act 1974 and clause 6 of the Competition Principles Agreement

Submission by PowerTel Limited

PowerTel welcomes the opportunity to make a submission to the Productivity Commission's review of Part IIIA of the Trade Practices Act 1974 ("Act") and clause 6 of the Competition Principles Agreement 1995. This submission is made in response to the issues paper circulated in October 2000.

PowerTel – General Overview

PowerTel, as it now is, officially came into existence on 14 August 1998. It is listed on the Australian Stock Exchange (code: PWT). A consortium of 3 energy companies in Australia owns the largest shareholding, namely EnergyAustralia (NSW), CityPower (VIC) and Energex (QLD). The US based energy and telecommunications multi-national Williams Group, and a public shareholding as listed on the Australian Stock Exchange own the remaining shares. Williams was the first company to offer a number of important breakthrough technologies and services, including ATM and Frame Relay, helping businesses work faster and more efficiently.

In terms of infrastructure deployed, PowerTel is now the third largest fixed network telecommunications carrier in Australia. The Brisbane to Melbourne fibre backbone build, and initial CBD networks in Sydney, Melbourne and Brisbane have been completed. PowerTel's goal is to have 325 buildings with equipment installed by the end of 2000. PowerTel has formed strong strategic partnerships with some of the worlds most successful and experienced technology providers – namely, Cisco Systems, Nortel Networks and Oracle.

PowerTel offers voice (managed and standard), data (leased lines, frame relay, ATM and managed solutions) and internet (IP\VPN, telehousing, dial up and dedicated) services.

PowerTel is a telecommunications carrier and is accordingly regulated by Part XIB and XIC of the Act.

Part IIIA and Specific Telecommunications Regulation

PowerTel made two submissions into the recent Productivity Commission's Review of Telecommunications Specific Regulation. Those submissions were principally directed towards the maintenance of telecommunications specific competition regulation and, in particular, the maintenance of Parts XIB and XIC of the Act. As part of those submissions PowerTel argued that Part IIIA of the Act was not an appropriate regulatory regime for telecommunication services. PowerTel refers to and repeats those submissions, in particular paragraph 5 of PowerTel's Supplementary Submission dated 17 October 2000.

Purpose of this Submission

The purpose of this submission is to confirm PowerTel's view that it is not appropriate to repeal Part XI of the Act or to incorporate the telecommunications specific regulation provided for in Part XIC into Part IIIA. PowerTel notes that certain telecommunication carriers, namely Telstra and Vodafone, in their submissions to the Productivity Commission's Review of Telecommunication Specific Regulation, expressed the view that access to telecommunications infrastructure should be regulated by Part IIIA of the Act like other forms of fixed infrastructure and network-based facilities.

PowerTel rejects that view and considers that a telecommunication specific access regime should be maintained.

More specifically, Part IIIA in its existing form represents an inappropriate regulatory framework for telecommunications regulation. PowerTel holds this view 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 very different physical characteristics and historical origins than other network based facilities such as those used in transport and energy;

- (b) the specific and prescriptive elements of Part XIC provide numerous advantages over the more general regime provided for in Part IIIA;
- (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 which is characterised by rapid technological change and dynamic market characteristics.

Part IIIA is ineffective

In the event that the Productivity Commission thought it appropriate to recommend that telecommunications infrastructure be regulated by Part IIIA and that Part XIC should be repealed or modified then PowerTel would urge a number of very substantial amendments be made to the current form of Part IIIA in order to render it suitable for a telecommunications infrastructure.

Leaving aside this issue, PowerTel considers that there are a number of structural, procedural and practical problems associated with the current operation of Part IIIA that are unconnected to its appropriateness to telecommunications infrastructure. These problems include:

- (a) difficulties of 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, amongst other things, national significance and an inability to duplicate the facility economically;
- (c) the declaration process has the potential to become politicised and, unlike Part XIC, suffers from state/federal issues because, the relevant minister, which may be the Federal Treasurer or the Premier of a state or the Chief Minister of a Territory is required to declare the service on the advice of the National Competition Council. To date, with one exception, the declaration recommendations have been allowed to lapse;

- (d) the processes involved in Part IIIA are even slower than those in Parts IV and XIC. The Sydney Airport's declaration took 5 years to come into effects 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;
- (e) there are a number of quite complex definitional issues associated with Part IIIA including the distinction between the "facility" and the service provided by means of the "facility"; precisely what is meant by a "service" within the meaning of the relevant provisions and the meaning of the expression "provider".

The difficulties referred to above present significant problems in the context of the present scope of Part IIIA. Should Part IIIA be extended to cover telecommunications infrastructure, those problems would be rendered more obvious and complex.

Conclusion

In summary, PowerTel considers that Part IIIA is visited with a number of difficulties both in terms of its practical operation and in relation to its form or structure. Should the Productivity Commission subscribe to the view expressed by two telecommunications carriers that telecommunications infrastructure should be regulated by Part IIIA like other forms of infrastructure, PowerTel would argue that:

- (a) the current legislative application is wholly inappropriate; and
- (b) Part IIIA would need to be radically amended so as to properly regulate telecommunications based infrastructure. Those amendments would need to incorporate almost all of the provisions of Part XIC of the Act. However those provisions should preferably be amended along the lines of the suggestions made in PowerTel's submissions to the Productivity Commission Inquiry into Telecommunication Specific Regulation.