Submission by Telstra Corporation Limited on the Productivity Commission's Position Paper on the National Access Regime

June 2001

Telstra Corporation Limited welcomes this opportunity to contribute to the Productivity Commission's ("Commission") Review of the National Access Regime. This submission addresses one of the many issues that are being considered by the Commission in the Review: the certification of Commonwealth access regimes.

In its Position Paper on the National Access Regime, the Commission stated that it considered it desirable for the industry-specific access regimes to be tested against the framework in Part IIIA of the Trade Practices Act 1974 (Cth) ("Act") through the certification mechanism. The Commission also stated that it would be concerned if a family of Commonwealth access regimes were to emerge, which diverged from the general regime in Part IIIA and the Competition Principles Agreement.

In sum, Telstra agrees with the Commission's views.

More specifically, Telstra believes that the absence of a mechanism for certifying Commonwealth access regimes amounts to a substantial failing in the national competition policy arrangements. Parliament has not provided for certification of Commonwealth access regimes, nor required that Commonwealth regimes conform to the principles in Clause 6 of the Competition Principles Agreement in the manner in which State and Territory regimes must conform before they may gain protection from declaration applications.

In Telstra's view, apart from the requirement of any to any connectivity – a feature that possibly distinguishes telecommunications from other industries – many of the contentious issues that arise in telecommunications are entirely common to other industry sectors. This, in itself, suggests that the provisions in Part XIC (the telecommunications access regime) should be brought into closer alignment with Part IIIA of the Act. If this occurred, then it would allow the learning in other industry sectors to flow to telecommunications; and vice versa. Moreover, it would ensure that precedents could more readily applied across the different sectors.

Telstra's experience under Part XIC demonstrates that the absence of a certification mechanism has allowed a more intrusive regime to evolve than can be justified

according to principles of good policy or economic efficiency. Since the introduction of Part XIC in July 1997, a wide range of services has been declared. Several of these services were, however, even at the time of their declaration, competitively supplied.

Telstra believes that, in part, the growth of this regime is attributable to the lack of discipline placed on the telecommunications access regime by the principles in Part IIIA. There are five specific reasons as to why this has occurred.

First, under Part XIC, there is a much lower threshold for regulating services than under Part IIIA. There are fewer criteria to be satisfied under Part XIC; and unlike Part IIIA, these criteria do not need to be cumulatively satisfied. Instead, under Part XIC, the ACCC is able to choose between the (only) three limbs of the declaration criteria, giving whatever weight to each criterion that it chooses to, and without there being any requirement that all the criteria be satisfied in a given case. In exercising these powers, the ACCC has invariably focussed on only one element of the criteria - promotion of competition - as a justification for declaring services, without any detailed consideration of the other key criterion, the effect of such decisions on investment in telecommunications infrastructure.

Second, in contrast to the decisions of the National Competition Council ("NCC") under Part IIIA of the Act, declaration decisions of the ACCC under Part XIC are not subject to review on the merits. As a result, the ACCC faces considerably less discipline than the NCC in relation to its declarations. To some extent, this explains the proliferation of declarations under Part XIC. With virtually no discipline on its declaration decisions, the ACCC is able to declare services with little regard to the long-term economic efficiency implications of its decisions.

Third, unlike Part XIC, Part IIIA allows for a separation of functions and powers as between the declaration and adjudication phases. Under Part IIIA, declaration is a power vested in the NCC, while the adjudication of disputes rests with the ACCC. In Telstra's view, this avoids the perceived conflict of interest that arises when the entity that will have powers to shape an activity also has the power to determine whether it should or should not be placed in a position where it can do so. The fact

that declarations under Part IIIA rest on an objective test, and are subject to full review by the Australian Competition Tribunal, further limits the risk of "regulatory creep".

Fourth, Part IIIA declarations must include an end date after which a review is required. Under Part XIC, there is no requirement for a declaration, once made, to be reviewed after a given period of time has elapsed or after a new service has been declared. The ACCC is simply afforded a revocation power that may be used at its discretion following a further public inquiry either on its own initiative or after a recommendation from the Telecommunications Access Forum.

Finally, under Part XIC, in contrast to Part IIIA, a carrier may only lodge an Undertaking with the regulator *after* a service is declared – there is no scope to do so before declaration. That is, under Part XIC an access provider cannot avoid a regulated outcome by lodging an Undertaking, for, by definition, to lodge an Undertaking, the service must *already* be regulated. This anomaly, coupled with Telstra's own experience in relation to its PSTN Undertaking, diminishes the incentives for an access provider to lodge an Undertaking under the telecommunications access regime. It is partly for this reason that, as indicated in its submissions to the telecommunications inquiry, Telstra supports the introduction of regulatory contracts and evidentiary notes, in order to generate greater certainty *ex ante* in relation to access regulation and access pricing issues.

It follows that Telstra supports the Commission's recommendation to require certification of Commonwealth regimes. However, without greater convergence in relation to objectives and thresholds as between Part XIC and Part IIIA (as has been recommended in draft by the Commission in its telecommunications inquiry), a requirement that Part XIC be certified may be a hollow remedy in respect of services that are already declared, that would not satisfy the conditions for declaration in Part IIIA. Accordingly, Telstra also supports the Commission's draft recommendation to converge the provisions in Part XIC and Part IIIA.

Telstra believes that, in addition to requiring certification of Commonwealth access regimes, legal instruments should be introduced that limit the extent which all

governments can introduce access regimes that are more onerous than Part IIIA. In this respect, Telstra believes that at a minimum all governments should be required to provide the detailed reasoning behind any decision to diverge from Part IIIA and a specific timetable on when convergence will occur. This will help set up an expectation that all access regimes – state and federal – must eventually accord with the Part IIIA template.

Telstra also believes that regulated firms should be given the opportunity to unilaterally move themselves within the confines of Part IIIA as a means of protecting themselves from more onerous access provisions contained in uncertified regimes. For example, an access provider should be able to lodge an undertaking under Part IIIA, which if accepted would operate to protect the firm from alternative access mechanisms.

Introducing mechanisms such as these, and thus ensuring that other regimes are subject to assessment under the Part IIIA criteria, would ensure that there is a consistent application of access regulatory policy in Australia. These arrangements would not, however, prevent debate over (and possibly approval of) regimes that diverge from Part IIIA. Additionally, assessments could more easily be made over time, of the continued justification for such different treatment.