

# **Draft Report by the Productivity Commission into Telecommunications Competition Regulation in Australia (the "Report")**

## **Summary Response to Report by PowerTel Ltd**

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The thrust of a number of the major recommendations made by the Report appears to aim primarily at a facilities based competitive regime. This is in contrast to the current emphasis on a facilities *and* services based regime. Whilst PowerTel does not necessarily have a problem with either of these options, we nevertheless consider that the ultimate aim of the regulatory regime ought to be clear to all since it provides a basis from which it is possible to understand the details of each proposal.

That said, the Report, particularly in relation to the declaration of services, suggests a regime applied uniformly irrespective of the power or dominance of the network owner or operator. We consider that this is not appropriate when consideration is given to the *real* state of competition in the market and the current position and economic power of the new entrants. Moreover it also acts as a disincentive to facilities-based investment by new entrants.

### **1. Symmetric industry-wide regulation is *not* appropriate.**

Placing the emphasis of regulation (and in particular access regulation) on the entire industry rather than on dominant carriers is said, by the Report, to be justified on the basis that exemptions may be made available to non-dominant carriers, and that there are "dangers" to asymmetric regulation of the incumbent and of non-dominant participants because of the market power which new entrants have over their own networks.

In PowerTel's view this reasoning is flawed – and it tends to support increased, rather than reduced regulation. Whilst it is, of course, correct to say that even non-dominant operators have market power over their own networks, they nevertheless remain completely reliant on connection to the incumbent's network for the provision of services. This means that there is a less intrusive way of regulating them – based on the precedent of the EU model. That is simply to *require* them to offer access on reasonable terms. If they fail to do so then, in case of disagreement as to reasonableness, under the scheme PowerTel proposes the dispute would be referred for resolution to the regulator

Under PowerTel's proposal, *all* operators would have an obligation to offer access on reasonable terms, but only dominant operators would have the extra obligations of transparency, cost-orientation and non-discrimination. We consider that this is consistent with the Commission's often-expressed desire to ensure that the scope of regulation should be limited to the core areas where the case for intervention is strong.

### **2. Part XIB should not be repealed.**

The Report argues that Part XIB should be repealed on the basis that Part IV offers a suitable alternative. It appears to argue both that XIB has been ineffective in moderating behaviour but also that its penalties are potentially so severe that worthwhile investment might be discouraged.

PowerTel does not agree. Whilst Part XIB is certainly problematic, the principle that there should be a set of industry-specific *ex ante* competition rules is sound. The fact that Part XIB

has not been used much in practice does not go to show that it is not useful in bringing about agreements which would not otherwise be reached. This is because the possibility of exercising it will be known to both sides. Without it, the generic rules of Part IV do not represent an immediate-enough prospect of action.

Moreover, we see no evidence for the assertion that Part XIB is so draconian as to have a negative impact on investment. On the contrary, it seems that Telstra has one of the highest EBITDA, as a percentage of revenue, levels of any telecommunications operator.

### **3. Part XIC - Retention of telecommunications specific regime, but tightening of the criteria for declaration of new services**

The Commission proposes the retention of a telecommunications specific access regime, but expresses concern that such a regime would adopt principles and processes not consistent with Part IIIA. Telecommunications infrastructure, though, is unique in its reliance on interconnected elements. Network effects are far more extensive than they are in other industries. Thus considerations which are relevant to a generic regime are often unsuitable to telecommunications industry and it may be perfectly appropriate for different principles to apply. The Report notes that new services are unlikely to be declared anyway, but goes on to propose additional tests (such as the significance to the national economy test). We consider that the inclusion of such additional criteria would make an access regime unworkable in practice, since the broad “macro” tests would prove to be unworkable when an attempt is made to apply them to any one “micro” telecommunications service.

### **4. Access prices should be based on TSLRIC costs and should not permit discrimination.**

Again, PowerTel considers that detailed price controls should apply only to dominant operators. There is no need to regulate non-dominant operators beyond the imposition on them of an obligation to be reasonable since that will be sufficient to ensure they cannot abuse their position. The imposition of non-discrimination obligations on a non-dominant operator would be entirely counter-productive since it would interfere in their legitimate business decisions and require costly compliance procedures without any material benefit being derived.

As regards dominant operators, PowerTel strongly endorses price regulation and the imposition of non-discrimination obligations in order to eliminate abuses such as a price squeeze. Regulated prices should be based on true TSLRIC principles – that is to say, it should be clear that the TSLRIC price is based on the costs which a notional efficient operator would incur in providing a given service, and only that service. TSLRIC prices are *not* based on any one operator's actual network architecture.

Clarification on this point would assist greatly in ensuring prompt agreements between the dominant operator and others – since the regulated prices would become a “benchmark” around which all industry prices would be based. It would also ensure that efficient operators would not be penalised by being blocked from charging the same access prices as the less efficient operators – on the contrary they would be rewarded by being able to make a higher return.

### **5. Publication of Reference Prices**

PowerTel's first submission proposed this approach, and we endorse it again here. We re-iterate, though, that in our opinion the best solution would be publication not just of prices

but of a full "reference interconnection offer" by the dominant operators. This prevents discrimination by the dominant operator in areas other than price.

## **6. Two-Way Access Arrangements**

As we have already suggested, we consider that the simplest and most effective way to deal with two-way access disputes is to oblige non-dominant carriers only to offer access on reasonable terms. Dominant carriers would have the further obligation to offer access at a cost-based price and on non-discriminatory terms, but would not have to offer interconnection (that is, mutual access) unless the other operator had made a reasonable offer for access to its own network. Thus non-dominant operators could not abuse their position because if they tried to do so they would risk losing their access to the dominant networks.

In practice, the end-result is that similar networks end-up with very similar, if not identical, termination (or access) charges but, where there is a real cost difference (as with mobile networks) then termination charges may be higher. The main advantage is that it avoids a large amount of unnecessary and cumbersome regulation on non-dominant operators, and that non-dominant operators are more able to innovate in their service offerings because their networks are not pigeon-holed into a "fixed" category (with one set access price) and a "mobile" category (with another).