



**Productivity Commission's Review of Telecommunications
Specific Regulation additional Terms of Reference**

Submission by Austar United Communications Limited

February 2001

Austar United Communications Limited (AUSTAR) made a written submission to the Productivity Commission's Inquiry into Telecommunications Specific Competition Regulation in August 2000. This additional submission focuses on the additional Terms of Reference announced in January 2001, relating to competition in regional markets, and pay TV programming arrangements.

COMPETITION IN REGIONAL MARKETS

Background

AUSTAR commenced operations in 1995. Its principal services include pay TV and interactive TV, narrowband dial-up internet services, broadband internet services, and mobile telephony resale.

AUSTAR provides pay television in all of the Northern Territory and Tasmania and in the regional areas of Queensland, New South Wales, South Australia and Victoria. The pay TV service currently passes around 2.1m homes.

AUSTAR utilises three kinds of technology to transmit its pay TV service, namely:

- (a) satellite;
- (b) MMDS radiocommunications, or 'wireless cable'; and
- (c) A hybrid fibre coaxial cable in Darwin.

AUSTAR has commenced broadband internet services in 28 regional areas and offers narrowband internet services in over 40 regional and capital city markets.

AUSTAR's future plans may include:

- (a) Two-way MMDS broadband internet services (where both data paths are via the MMDS spectrum). A technical trial of the service has commenced in Newcastle;
- (b) IP telephony services over the MMDS spectrum; and

- (c) an upgrade of the Darwin cable system to support broadband internet services and IP telephony.

Telecommunications specific and regional specific regulation

As expressed in AUSTAR's previous submission, it remains our view that, while ideally telecommunications would be regulated only by the general provisions in Part IIIA and Pt IV of the *Trade Practices Act* and not by industry-specific regulation, the market is not yet mature enough to justify a 'winding-back' of the existing industry specific framework.

We have no doubt that Telstra's dominance would be a barrier to effective competition if the telecommunications specific regulation were repealed or substantially relaxed in the near future.

Notwithstanding this view, we do not think that it is necessary or appropriate to regulate competition in regional areas differently from other areas of the country.

AUSTAR is a new player in the Australian media and yet has managed to roll out its infrastructure in regional Australia to the value of between \$800m and \$1 billion without experiencing significant facilities access problems.

Whilst we recognise that some regional areas are not well serviced with telecommunications services and infrastructure, in our view this is not because of anti-competitive structures or behaviour but a question of the market still developing and the current economies of providing that service. It is submitted that if a regime were established that in any way embodied a lower threshold for declaration and price regulation, this would threaten important investment in these regions by companies other than those with market power, including by companies like AUSTAR.

Although robust facilities based competition in the regions is not as fully developed as in the major metropolitan regions, in our view any relaxation of the regulatory regime in regional Australia aimed at encouraging access based competition would disincite facilities investment in those areas.

Innovative facilities investment in the regions is extremely important - developments in wireless and satellite technology will ultimately provide cheaper and more widely available telecommunications services in sparsely populated regional areas than can be provided using the copper network and xDSL technology.

Investments in new technology, and particularly wireless technology, are threatened if access is widely granted out of a desire to promote access based competition. Our view is that continued investment in facilities would be best achieved under the current regulatory regime.

PAY TV AND REGIONAL COMMUNICATIONS

Current Pay TV programming arrangements

AUSTAR currently provides 34 pay TV channels (not including the interactive games channel), with plans to add at least a further 3 channels during 2001.

Of these 34 channels AUSTAR has exclusive rights to only 9, and any exclusivity rights that AUSTAR has acquired are technology- specific, and relate only to MMDS and satellite transmission.

Vertical integration

AUSTAR has ownership interests in three content providers.

The Weather Channel Austaralia Pty Ltd, which provides one channel to AUSTAR, is a wholly owned subsidiary.

XYZ Entertainment is 50% owned by AUSTAR and 50% by Foxtel. It provides 5 channels to AUSTAR and Foxtel, namely Arena, Discovery, Nickelodeon, [V] Channel and Lifestyle Channel, with Music Max, a 6th channel planned to go on air on AUSTAR in March.

Main Event Television Pty Ltd is 33% owned by each of AUSTAR, Foxtel and Cable & Wireless Optus. It provides the Adults Only and Main Event channels.

Effect of the current arrangements on competition in regional Australia

AUSTAR's capacity to invest in infrastructure and in research and development for services like broadband internet, interactive services and, in the future, telephony services, is largely dependant on its ability to attract a critical mass of subscribers to its pay TV service. The ability to 'bundle' pay TV with other services, and the ability to offer more than one service over the same medium, is crucial to AUSTAR's strategy and on-going business performance.

The programming distribution rights that AUSTAR has for the MMDS and satellite services is crucial to our ability to attract a critical mass of subscribers, and therefore to offer these new services.

It is noted that the Besley inquiry recommended that the Productivity Commission examine whether access to broadband cable in the regions is limited because of vertical integration and exclusive programming rights. In response to this specific issue, it is submitted that

removing a company's rights, like AUSTAR's rights to any exclusive programming will not lead to better broadband cable services for regional Australia. Exclusivity is an important tool that allows companies without market power to compete, by providing appropriate incentives to invest in infrastructure and to innovate. Unless a company has market power, exclusivity should not be a concern of competition laws. In any event, as set out above, AUSTAR does not itself have exclusive programming rights to any channels for cable transmission or for other delivery mediums like LMDS.

Pay TV programming, transmission and infrastructure costs are very high for all participants in the market and this may be a barrier to new entrants. A premium is also paid for exclusivity. These facts should not be confused for anti-competitive behaviour.

Proposed special access regime

We have considered the special access regime proposed by the ACCC.

In our view the general competition law provisions contained in the *Trade Practices Act* more than adequately regulate competition in this industry. If the requisite degree of market power has not been found to exist in order to intervene under those provisions, then in our view there is no justification for regulatory intervention in the market. We note that the ACCC indicate in their submission to the Besley Inquiry that the requisite degree of market power is not evident. The ACCC was not able to identify any other competition law or regulatory reason for changing the broadly based and sector-neutral competition rules.

The model proposed by the ACCC is based on the US experience which in our view is not appropriate for Australia. Australia has a different regulatory environment, population base and industries. It also has a completely different economic and social profile.

In addition, in the United States vertical integration of programming suppliers appears to be far more prevalent than in Australia and their regime must be analysed in that context. For example, section 628(c)(2) of the *Cable Television Consumer Protection & Competition Act* 1992 (the relevant US Regulation) deals with their key concern, namely, upstream content owners/controllers unduly or improperly influencing the decisions downstream. It is submitted that the regime is inappropriate for a market structure that is not characterised by extensive vertical integration, as is the case in Australia.

The Productivity Commission should also not assume that the objectives of US antitrust law or telecommunications regulations are consistent with Australian competition law or Australian telecommunications regulation. The US antitrust laws have, over the 110 years that they have existed, had many objectives, including many non-competition objectives and objectives inconsistent with efficiency arguments.

US antitrust analysis is also markedly different in its approach to the analysis of efficiencies and public benefits - allowing a more integrated approach to this question. In Australia this is dealt with in the authorisation process - one which is time consuming and, if companies are forced to undergo it, is likely to lead to delays in investment and innovation.

The regime proposed by the ACCC would also be likely to have anti-competitive effects if it is applied in a uniform manner to all operators, regardless of whether or not they have market power. A formally "neutral" regime, which fails to distinguish those operators with market power from those without, in fact prefers the larger pay TV operators. The advantages of exclusivity which are available to smaller operators are removed, their long term prosperity injured and long term competition is hindered.

For the above reasons, we submit that the regime is neither appropriate nor desirable.