Inquiry into the Trade Practices Amendment (National Access Regime) Bill 2005

Telstra Submission to the Senate Economics Legislation Committee

5 August 2005

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1. BACKGROUND

1. The Senate Economics Legislation Committee has invited comment from interested parties on the *Trade Practices Amendment (National Access Regime) Bill 2005*, ('the Bill"). The Committee notes that the Bill makes amendments to the national access regime provisions of the *Trade Practices Act 1974* ("the Act") (Part IIIA) that aim to:

    - clarify the national access regime's objectives and scope
    - encourage efficient investment in new infrastructure
    - strengthen incentives for commercial negotiation
    - improve the certainty, transparency and accountability of regulatory processes.

2. Telstra supports these aims for the national access regime, and in this submission provides detailed comments on the proposed amendments to Part IIIA. However, Telstra's starting position is that, in due course, natural monopoly services of national significance should be regulated under a single national access regime. As such, alignment of Part IIIA and the telecommunications access regime specified in Part XIC (in accordance with the Government's recommendations for amending Part IIIA) should occur as an interim measure. Here the aim should be to minimise opportunities for divergence in the regulatory arrangements that apply to the telecommunications industry and other industries when there is no sound basis for different arrangements. The quality of regulation will be improved by applying the Part IIIA amendments that incorporate best practice regulation to other relevant areas in the TPA.

3. Accordingly this submission also includes recommended changes to more closely align Part XIC and the amended Part IIIA such as revisions to the primary objects clause, the insertion of explicit pricing principles, the addition of a materiality criterion for declaration and widening the scope for merits appeal. This submission also raises needed changes that have been omitted from the Part IIIA amendments such as safe harbour provisions for investment, greater recognition of the primacy of commercial negotiations and a requirement that undertakings be accepted if considered reasonable.

    More broadly, it is concluded that, contrary to the apparent intent of policy makers, Parts IIIA and XIC appear to be diverging rather than converging over time. Professor Hilmer, the original architect of Australia's competition policy framework, counselled against industry specific regulation. Reflecting that advice, recognition of the need for and desirability of consistency across access regimes has long been a stated objective of policy. Hence a closer alignment of Part IIIA and Part XIC is entirely consistent with the underlying policy principles, and ensures that the telecommunications industry is not subject to more stringent regulation and continues to attract efficient investment.

4. The remainder of Telstra's submission is structured as follows:

   - Section 2 discusses the relevance of Telstra's submission. The extensive experience with an access regime that is available from the telecommunications industry is pointed out, and the over-arching relevance of the national access regime (Part IIIA) to the telecommunications regime (Part XIC) noted.

   - Section 3 examines in some detail the proposed amendments to Part IIIA, indicating which recommendations are supported by experience in the telecommunications industry and which need to be modified to confidently represent good public policy. In particular, it is proposed that the element of the proposed access pricing principles that seeks to constrain access pricing by vertically integrated access providers be removed. The shortcomings of the telecommunications access regime in some of the areas recommended for amendment in the national access regime are noted.

   - Section 4 highlights other amendments required to Part IIIA (and in some cases also Part XIC), drawing on recommendations from both the Productivity Commission's review of the national access regime[1] and the Exports and Infrastructure Taskforce's consideration of export oriented infrastructure[2] that have not been included in the Bill.

   - Section 5 considers the implications of the proposed Part IIIA amendments, and Part IIIA provisions more generally, for possible reforms to Part XIC that would improve the function of the telecommunications access regime.

   - Section 6 summarises the main conclusions of the submission.

2. RELEVANCE OF TELSTRA SUBMISSION

5. The telecommunications industry in Australia has had an active access regime since July 1997, and more limited access provisions for the 5 years prior to 1997 (the latter accommodating the requirement for Optus and mobile operators to access Telstra's network). This has provided the industry with extensive experience that is relevant to the consideration of access arrangements more broadly, with many access seekers and vigorous ACCC involvement.

6. Furthermore, Telstra itself is uniquely placed to provide experience-based comment on access arrangements, being the largest single provider of third party access services in Australia, and the largest commercial entity subject to access regulation.

[1] Productivity Commission, Review of the National Access Code, Inquiry Report, Report No. 17, September 2001

[2] Exports and Infrastructure Taskforce, Australia's Export Infrastructure, Report to the Prime Minister, May 2005

7. However, not only is the experience of the telecommunications industry relevant to the consideration of amendments to the more general national access regime, but Part IIIA itself is relevant to the telecommunications industry, as it provides a guide to the appropriate operation of the telecommunications access regime (Part XIC). In this regard, existing Part IIIA provisions and the proposed amendments highlight a number of deficiencies with Part XIC. These deficiencies, which Telstra believes need to be addressed, are considered in this submission.

3. PROPOSED AMENDMENTS TO PART IIIA OF THE TPA

8. In this section a number of the proposed amendments to Part IIIA are reviewed, based on Telstra's experience with access regulation for the telecommunications industry. The need in several instances for similar changes to Part XIC is noted.

3.1. OBJECTS CLAUSE

9. The proposed amendments will insert an 'objects clause' into Part IIIA to encourage greater certainty and direction within the access scheme. Specifically, the proposed new section provides that the object of Part IIIA is to:

> *(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*
>
> *(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*[3]

10. The draft legislation further requires that this provision be taken into account in regulatory decisions on access service declarations, undertakings and arbitrations by the relevant bodies and individuals - the National Competition council (NCC), the Minister, the Australian Competition and Consumer Commission (ACCC) and the Australian Competition Tribunal (ACT).[4]

11. In Telstra's view, it has become increasingly apparent that ensuring efficient investment in infrastructure of national significance should be a primary goal of public policy. Obstacles to that investment, such as insufficient returns on investment due to regulated access prices set below cost and ineffective safe harbour provisions, have the potential to reduce economic growth, both by creating bottlenecks to the very wide range of activities that rely on infrastructure services through the postponement of infrastructure upgrades, and by slowing the introduction of new technologies.

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3 The Bill, s44AA.

4 See for example s44F(2)(b), s44G(3)(a) and s44H(1) of the Bill

12. ***Telstra therefore fully supports the introduction of the proposed objects clause***, which in effect mandates that the regulatory decision making bodies give primacy to efficient investment in and the use and operation of infrastructure as the key means of promoting competition in both upstream and downstream markets.

13. Similar clarity through the introduction of an identical objects clause should be brought to Part XIC, which currently pursues the inherently vague primary object of promoting the "long term interests of end users (LTIE)" (see s152AB(1) of the Act). Part XIC does in fact go on to indicate that in considering the LTIE, regard must be had to the extent to which three underlying objectives are likely to be achieved, including "encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are provided"[5]. However, the regulatory bodies taking their guidance from these provisions (primarily the ACCC), are given no indication as to the relative weight that should be placed on each of the three, sometimes conflicting, considerations underlying the LTIE. This leaves them with the scope to give little weight to the critical issue of ensuring efficient infrastructure investment and use issue. This is reflected in a number of ACCC decisions on the declaration and subsequent pricing of various telecommunications access services[6].

14. In Telstra's view and experience, this lack of clear guidance imposes substantial costs on the Australian community in the form of lower economic growth caused by distorted investment in and use of infrastructure. Investment in telecommunications infrastructure provides a crucial basis for Australia's ability to compete internationally. Assuring our global competitiveness requires that regulators focus on providing appropriate conditions for that investment, rather than on providing short term gains to access seekers. Clearer guidance to regulators as to the priorities they are to pursue is therefore of great value.

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5 See (s152AB(2) of the Act, which indicates that in determining " …. whether a particular thing promotes the long-term interest of end-users … regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

(c) the objective of promoting competition in markets for listed services;

(d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied."

6 See Paragraph 20 in Section 3.2 of this submission for further detail on this issue.

3.2. "MATERIAL INCREASE IN COMPETITION" CRITERION FOR DECLARATION

15. Currently, in considering the declaration of a service, the NCC must be satisfied that "access to the service would promote competition". The proposed change would insert a materiality provision into this phrase as follows: "access to the service would promote *a material increase in* competition" (see s44G(2)(a) in the Bill).

16. ***Telstra supports this change***, as it would help ensure that only services that are likely to make a significant contribution to competition are declared.

17. Telstra, and access providers in other industries, currently incur substantial costs because of declarations put in place for services that are never, or very rarely, demanded by access seekers. Despite minimal third party use, the access provider, once a service is declared, must as a practical matter put in place the mechanisms, including those for service definition and charging, that would allow third party use, should that use eventuate.[7] This is compounded by the fact that the ACCC usually takes a considerable time to revoke declarations notwithstanding unequivocal evidence of existing significant and sustainable competition.[8] The proposed amendment would help reduce the costs the community now bears as a result of these unnecessary declarations.

18. Limiting the services that are declared would not only contribute to administrative ease (from potentially fewer service declarations), but on the basis of experience in the telecommunications industry, could also make a significant contribution to economic efficiency by avoiding overlapping declarations that can result in inefficient arbitrage opportunities and distortions.

19. Unlike Part XIC, Part IIIA (s.44G(2)(a)) already requires that competition be promoted in a separate market to the service in issue. However in practice, this has sometimes resulted in the NCC or the ACT focussing on narrow functional markets[9] rather than the broader issue of significantly increasing the level of competition. The proposed amendment would help address this inappropriate outcome.

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7 Shorter time frames for regulatory decisions, though themselves desirable, will accentuate this effect, as they imply that an access provider may have less time in which to put in place the systems needed for third party access.

8 For example, in the cases of LCS, DDAS and ISDN, the ACCC delayed the relaxation of these declarations despite obsolescence, the existence of substitutability and evidence of significant and sustainable competition.

9 For example, in Sydney International Airport [2000] ACompT 1 (1 March 2000), the Australian Competition Tribunal defined the relevant markets narrowly as the ramp handling market and the cargo terminal operator services market (at para.90-98).

20. A similar change could usefully be made to Part XIC, under which a number of access services of doubtful relevance to materially increasing competition have been declared.[10] Furthermore, overlapping and intersecting declarations have harmed the development of efficient competition – particularly where the regulator has used differing and inconsistent approaches to pricing declared services.

21. Where access regulation applies to several services which are substitutes for each other, access seekers will naturally choose to use whichever of these services minimises their costs. This has the important consequence that if a regulator prices one service, out of a group of substitutable services, at less than cost and it is the cheapest service, then the access provider will find all of demand shifting to the service that is priced below cost. In turn, this means that the greater the number of substitutable services that are declared, the greater is the risk that the access supplier will be forced to provide service at less than cost, with all the inefficiencies that implies.[11]

22. Telstra has extensive experience of this occurring. For example, the declaration under Part XIC of both local carriage service (essentially the resale of local calls) and PSTN originating and terminating access (the carriage of traffic to and from an access seeker's network to the end customer over Telstra's customer access network) using different pricing approaches for each access service[12] has resulted in an inefficient, cherry-picking, approach to the use of declared services by access seekers in providing local calls to their end customers[13]. Economic theory and sound public policy would suggest that when services are being priced for the same purpose and they are substitutes, the same methodological approach should be applied. To do differently distorts the operation of the market, resulting in inefficient resource allocation, which ultimately lowers economic growth to the detriment of consumers and the Australian economy. The problems have since been compounded by the addition to the list of declared services of unbundled local loop and of spectrum sharing, which are substitutes for each other and for other declared services.

10 For example, resale of local calls (LCS), analogue Pay TV and conditioned local loop.

11 For example, even if the regulator has an 80% chance of pricing any service at (or above) cost, then the probability that the access provider will be forced to provide the service at less than cost rises from 20% when a single service is declared, to close to 50% when three substitutable services are declared.

12 The ACCC has taken the approach of pricing wholesale local calls (local carriage service) on the basis of the retail price for local calls less the marketing and other costs that are avoided by not retailing this service, while PSTN originating and terminating access is priced on the basis of long-run, forward-looking efficient costs.

13 A number of access seekers have used the (untimed) local carriage service to provide local calls to customers characterised by long duration calls (e.g. households using dial-up internet access) and (timed) PSTN origination and terminating access for customers who typically have short duration local calls (e.g. business customers). This has resulted in Telstra being unable to recover the full cost of providing this service.

23. Finally, as noted in Paragraph 19 above, in contrast to Part IIIA, Part XIC does not require that competition be promoted in a separate market. As result, under Part XIC the ACCC may declare a service even if competition will be promoted only in relation to that service itself e.g., competition in the local calls market promoted by declaration of LCS (wholesale local calls for resale); and even if that competition is only short-term. There is no sound policy basis for this inconsistency. Hence Part XIC should be further amended to include a requirement for a material increase in competition in a separate market.

3.3. Pricing Principles

24. Currently, Part IIIA of the Act contains broad criteria that the ACCC must consider when assessing conditions of access, including price. These include the legitimate business interests of the access service provider and its investment in the facility, the public interest (including the public interest in having competition in markets), the interests of access seekers, the direct cost of providing the service, the economically efficient operation of the facility, and any other matters the ACCC thinks are relevant (see section 44X and subsection 44ZZA(3) of the Act).

25. The proposed amendments described in the Bill would require the ACCC to consider specific pricing principles when arbitrating access disputes and considering access undertakings. Furthermore, it is proposed that these specific pricing principles would be introduced through a disallowable legislative instrument, rather than the alternative approach of having them directly written into Part IIIA legislation.

26. It is generally anticipated[14] that these principles will be the same as the pricing principles supported in the Government's response to the Productivity Commission Report, as follows:

> *"The Australian Competition and Consumer Commission (ACCC) must have regards to the following principles:*
>
> *(a) That regulated access prices should:*
>
> *(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and*
>
> (ii) *include a return on investment commensurate with the regulatory and commercial risks involved.*
>
> *(b) That the access price structures should:*

14 See for example Department of Parliamentary Services, Bills Digest, Trade Practices Amendment (National Access Regime) Bill 2005, page 11: "It is expected that they [the pricing principles to be adopted] will be the same as the principles set out in the Government's response to the Productivity Commission Report …. ".

(iii) *allow multi-part pricing and price discrimination when it aids efficiency; and*

(iv) *not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.*

(c) That the access pricing regimes should provide incentives to reduce costs or otherwise improve productivity"[15]

27. ***Telstra wholeheartedly supports the introduction of a requirement for the ACCC to consider specific pricing principles*** that appropriately address the important commercial considerations for access providers of investing in infrastructure and operating it efficiently. Experience to date with the telecommunications access regime, for which specific pricing principles are also absent, is that reliance on the general objects clause for Part XIC has given the ACCC little guidance on what the access price should be or how it should be determined, and accordingly has afforded the ACCC substantial discretion in its approach to pricing. As it stands, there is no requirement under Part XIC to set prices to recover efficiently incurred costs, no requirement for consistent application of pricing methodology, and no guidance regarding the weight to be placed on different legislative criteria.

28. This has resulted in a wide range of disparate pricing approaches being used, some of which have demonstrably not covered the efficient costs of service provision.[16] As well as causing the inefficiencies associated with below-cost pricing, the ACCC's wide discretion has accentuated regulatory risk, raising the cost of capital and deterring otherwise efficient investment.

29. Telstra, while supporting the broad proposal, is of the view that the mechanism proposed for introducing the pricing principles (namely via a disallowable legislative instrument) is not the most appropriate manner for achieving the policy objective. Rather, Telstra believes the pricing principles should be directly written into Part IIIA of the Act, for the following reasons.

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15 Government response to the Productivity Commission Review of the National Access Regime, February 2004.

16 See for example to pricing approach used by the ACCC for the declared local carriage service. The ACCC has readily acknowledged that this pricing approach has not covered the efficient costs of service provision, for example in its reports *Final determination for Model Price Terms and Conditions of the PSTN, ULLS and LCS Services,* October 2003 and *Assessment of Telstra's Undertakings for PSTN, ULLS and LCS – Final Decision*, December 2004. In the latter report, the ACCC goes on to say that "there is no apparent reason why a TSLRIC [i.e. cost-based] approach should not be examined further once a robust cost model is developed and the economic cost (plus retail cost) of a local call falls below 20 cents", indicating it would only be willing to accept a cost based price for the local carriage service if these costs of provision fell below what it believed to be the "appropriate" level.

30. First, there is no certainty at this time as to the exact pricing principles that would be introduced at some point in the future through a legislative instrument, despite expectations that they would be the same as those proposed by the Productivity Commission. Telstra believes that the Government, and ultimately the Parliament, should at this point and as part of the current package of Part IIIA reforms, commit to the particular pricing principles carefully constructed by the Productivity Commission (with one exception – see below).

31. Second, maximum certainty as to the pricing principles would be achieved by enshrining them in Part IIIA rather than a legislative instrument. While clearly the provisions of legislation can be changed at future times, this can only occur after being subjected to full parliamentary scrutiny and the associated checks and balances that are afforded to legislative changes. Provisions introduced through a legislative instrument, on the other hand, are generally set for a limited term only (e.g. up to 3 years for the telecommunications retail price controls), and in practice are not subject to the same rigorous process of public scrutiny and full parliamentary consideration. As a result, Telstra believes that pricing principles introduced through a disallowable legislative instrument, rather than enshrined in legislation, would be more susceptible to being changed by future governments. This creates additional and unnecessary regulatory risk, quite contrary to the policy goal being pursued.

32. Third, being a set of ***principles*** (rather than specific directives or quantums), the pricing principles advocated by the Productivity Commission ("PC") "fit the mould" of material typically enshrined in legislation. Furthermore, the principles proposed are based on what is now significant experience and in that sense are not "experimental" and are unlikely to need continual fine-tuning for a period. In keeping with the purpose of Part IIIA, they are naturally adapted to defining a common framework across a range of industries, and can thereby promote consistency and predictability of regulation. Finally, even if written directly into legislation, the pricing principles can, of course, be amended in the future should the full parliament consider that change is required.

33. Regarding the specific principles that should be directly written into Part IIIA, Telstra does not agree with the amendment (as recommended by the PC) " … that the access pricing structures should not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher".

34. In taking this view, Telstra notes that due to inherent ambiguities in what it actually means for a vertically integrated access provider to "set [access price] terms and conditions that discriminate in favour of its downstream operations", and accordingly how its presence would be assessed in considering proposed access prices, the inclusion of this provision would give the ACCC undue discretion to provide its own interpretation in considering access undertakings and arbitrating in access price disputes. This in turn would add to, rather than diminish, uncertainty regarding access prices.

35. Such a requirement would also be economically inefficient. From an economic perspective, and as the PC itself recognises, differentiation in access prices is not intended to merely reflect differences in costs. Rather, an important function of differentiating access prices is to encourage the pursuit of more elastic (that is, price sensitive) demand, while securing coverage of fixed costs from those consumers whose demand is least price elastic. This tends to increase output and especially, consumer benefit. Reflecting this, and as a matter of commercial reality, Telstra does offer lower access prices to access seekers who can best assist in growing the market, yielding gains to Telstra, the industry generally and consumers.

36. The requirement proposed by the PC would prevent Telstra acting towards its own retailing operation in the same way as it deals with third party access seekers. This is both inconsistent with Telstra's commercial interests and inefficient.

37. In effect, the requirement would remove any incentive Telstra (or other vertically integrated access providers) might have to provide discounts on access charges related to demand, rather than cost, conditions. This is quite simply because Telstra, when it provided such discounts, could only weaken its retail arm – as it would be barred from offering those terms and conditions to its own retail operations. Inevitably, vertically integrated access providers would withdraw these discounts, imposing costs on consumers and on economic efficiency.

38. Finally, such a provision is unnecessary as reliance on the economy-wide provisions of Part IV of the Act is sufficient to permit the timely and effective resolution of any issues that might arise with respect to conduct that can be anti-competitive. Attempting to also cover this in Part IIIA is likely to lead to overlapping and conflicting approaches, i.e. poor regulation.

39. Accordingly a blanket prohibition of the kind proposed by the PC is unwarranted, unnecessary and undesirable. This prohibition should therefore not form part of any pricing principles enacted into Part IIIA.

40. Telstra is of the strong view that identical pricing principles to those proposed above (adjusted as indicated) should similarly be written into Part XIC, to address the ambiguity, uncertainty and arbitrariness engendered by the current provisions. At present, the only guidance given to the ACCC in access pricing is through the LTIE objects clause, and from this the ACCC itself is given scope to determine pricing principles (under Section 152AQA). As indicated earlier in this submission, this has resulted in a variety of inconsistent and damaging approaches to access pricing being taken by the ACCC.

41. Furthermore, the pricing principles added to Part XIC should include consideration of the requirement for Telstra (and other access providers) to recover the costs of providing unfunded (or under-funded) government-imposed social obligations when considering the cost of providing access services. Insufficient funding or cost recovery through appropriately set access prices will ultimately result in sub-optimal investment levels, to the detriments of all users of telecommunications infrastructure.

3.4. DECISION TIMEFRAMES

42. Specific decision timeframes are included in the proposed amendments to part IIIA, ranging from 60 days for the Minister to revoke a declaration to 6 months for the ACCC to assess new access undertaking or code (under current Part IIIA provisions, there are no mandated timeframes for regulatory decisions). These decision timeframes can be extended by the regulatory decision makers by further specified periods, provided reasons for the extension are given and a notice is published in a national newspaper.[17] Under the proposed changes for consideration of undertakings, for example, the ACCC could notionally extend the timeframe indefinitely, although the requirement to publish a notice of extension is intended to eliminate or moderate this possibility.[18]

43. ***Telstra fully supports the introduction of decision timeframes into Part IIIA***, as this can bring appropriate expedition to regulatory processes. Experience in the telecommunications industry strongly suggests that without this discipline being applied, the time taken for regulatory decisions can seriously blow out, to the detriment of all commercial parties involved. For example, early in the life of the telecommunications access regime and before timeframe disciplines were introduced, the ACCC took almost two years to consider the first PSTN originating and terminating access undertaking lodged by Telstra in 1997[19] – leading to the introduction of timeframe limitations in 2002. However, the measures proposed for Part IIIA do not have the rigor of these timeframe measures now in Part XIC – namely limits on the extension period - and could usefully be tightened in line with the telecommunications access arrangements. There is no clear reason to have different time limits on extension periods across industries. In this case Part XIC is more rigorous and imposes a lower financial burden on business and therefore should be the standard to apply to Part IIIA.

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17 See proposed sections 44GA, 44JA, 44NC, 44ND, 44PD, 44XA, 44ZZBC and 44ZZO in the Bill.

18 The Explanatory Memoranda (at 5.27) states, with respect to the time-limits on the ACCC's assessment of access undertakings, that 'while there is no limit on the number of times the Commission may extend the time limit, the requirement that the decision maker publish notification of any extension beyond the target time limit provides for regulatory transparency and flexibility for decision makers, thereby increasing incentives for timely decision-making.'

19 This meant that, by the time the final assessment was released, the terms and conditions of the undertaking had elapsed. Similarly, for Telstra's second PSTN undertaking, the first year of the proposed terms and conditions had elapsed by the time the Commission finalised its assessment.

44. The introduction of timeframes for ACCC and ACT decisions on telecommunications access matters has resulted in some improvement in timeliness. However, Telstra's experience is that even with mandated timeframes, the use of the "stop the clock" provisions by regulators that exist for Part XIC (but are not proposed for Part IIIA) can result in regulatory decision timeframes that are substantially longer than the notional 6 (or, with extension, up to 9) month periods. For example, Telstra lodged its core service undertakings with the ACCC in January 2003. In October 2003, the ACCC released model terms and conditions for these core service undertakings. In November 2003, Telstra provided revised undertakings (replacing those lodged in January 2003), which mirrored the ACCC's recommended prices. Despite the alignment of Telstra's undertaking prices with the ACCC's recommended rates, however, it was not until almost a year later (October 2004) that the ACCC released its draft decision on the undertakings, with its final decision another two months later in December 2004. Accordingly, Telstra is of the view that it is appropriate that "stop the clock" provisions not be included in the proposed Part IIIA amendments.

3.5. APPEAL AVENUES FOR ACESS UNDERTAKINGS

45. Current Part IIIA provisions do not allow for ACCC, NCC and Ministerial decisions on access undertakings, access codes and what constitutes an effective access regime to be appealed on merit to the ACT. The proposed amendments expand the right to appeal to the ACT these regulatory decisions.

46. ***Telstra fully supports the proposed amendment expanding the appeal avenues open to commercial parties***. The right to appeal regulatory decisions on merit generally forms a critical part of the fabric making up the normal checks and balances on powers of official bodies, and affords all parties subject to regulatory decisions appropriate natural justice. As such, these arrangements should naturally apply to regulators making decisions on access matters. Furthermore, coupled with the proposed introduction of decision timeframes for the ACT (and other decision makers), concern that such a mechanism may be used to delay final regulatory decisions appears to be adequately addressed.

47. Telstra is very strongly of the view that urgent reform of the merit appeal arrangements under Part XIC is needed. While, somewhat paradoxically, Part XIC currently provides for appeal to the ACT by parties subject to ACCC decisions on telecommunications access undertakings, parallel appeal rights do not extend to ACCC arbitrations on access terms and conditions, nor to ACCC service declarations.[20] This matter is also raised in Section 5 below.

[20] A possible reason for merits review for ACCC declaration decisions being denied in 1997 was the view that the ACCC needed to quickly establish regulated access to key services while the telecommunications industry was in early transition to competition, and concerns that appeals on declarations could in some way hold up this process. Putting aside the validity or otherwise of this possible policy rationale, however, eight years on and in an environment where competition is undeniably strong, that rationale can no longer have validity. That is, the 'need for speed' can no longer be a plausible reason for continuing to deny merits review rights for declarations.

3.6. AVAILABILITY OF UNDERTAKING MECHANISM

48. In contrast to Part XIC, under current Part IIIA arrangements access providers are unable to lodge access undertakings for services that have been declared. By repealing Section 44ZZB of the Act, the Bill would allow service providers to lodge undertakings even if a service is declared, and the ACCC would have the power to extend access undertakings and access codes.

49. ***Telstra supports the proposed expansion of the scope for access undertakings to declared services***. Despite some timing delays mentioned above, this mechanism has tended to prove useful in clarifying ambiguity in the telecommunications market.

3.7. REPORTING ON ARBITRATION DETERMINATIONS

50. The Bill includes an amendment requiring the ACCC to prepare and publish a written report covering a number of aspects of any final arbitration determinations it makes. These matters include 'the methodologies the Commission applied in making the determination and the reasons for the choice of the asset valuation methodology' (s44ZNB(b)).

51. ***Telstra supports this amendment.*** In particular, the economic valuation of assets is critically important in establishing the efficient cost-recovery price for infrastructure access, with this price in turn having a very important impact on incentives for investment by both access providers and access seekers. Accordingly the benefits of scrutiny and associated accountability on this crucial aspect of ACCC pricing decisions should be availed through this amendment.

52. Similarly, there would be substantial benefit from a Part XIC requirement that the ACCC include certain matters in its reports on telecommunications arbitrations, including specifically the reasons for choice of asset valuation methodology.

3.8. ANNUAL REPORTING ON THE IMPACT OF REGULATION

53. Section 29O(2) of the Bill requires the NCC to report annually on the effects and operations of the national access regime, including evidence of benefits arising from arbitration determinations and evidence of associated costs (including evidence disincentives created for investment in infrastructure by which declared services are provided (subsection (e)).

54. ***Telstra supports this amendment.*** The ongoing transparency and an opportunity for assessment and review afforded by this amendment is an important part of the machinery of sound public policy, especially in areas such as infrastructure access regulation for which the cost of inappropriate settings and regulator decisions can be high, and circumstances (and hence the relevant regulatory settings) can change substantially over time.

55. While a similar need for transparency and assessment exists for telecommunications, the lack of involvement of the NCC in access regulation processes in this industry means this body may not be in the best position to provide such a report. Instead, for telecommunications this could usefully be made part of the ACCC's annual reporting requirements, possibly in conjunction with the requirement that it report on the state of competition in the telecommunications industry (Division12A of the Act).

4. OTHER AMENDMENTS NEEDED

56. While, in general, supporting the proposed amendments to Part IIIA of the Act (and the mirroring of many of these changes in amendments to the telecommunications access regime in Part XIC), Telstra is of the view that these amendments do not go far enough in terms of providing an effective and efficient general access regime.

57. There are, to begin with, a number of important reforms to Part IIIA recommended by the Productivity Commission that have not been embraced in the amendments proposed in the Bill. Of these, two in particular warrant attention: "investment safe harbour" requirements; and the need to ensure that commercial negotiations and agreements retain primacy in access arrangements.

58. Additionally, a number of the recommendations made by the Exports and Infrastructure Taskforce in its recent report to the Prime Minister[21] are also directly relevant in considering amendments to Part IIIA. In particular, regulatory reforms relating to the grounds on which regulators can reject a proposed undertaking, and the overarching structure of regulatory regimes and regulators, are of great importance to the Committee's current deliberations.

4.1. "INVESTMENT SAFE HARBOUR" PROVISIONS

59. In its review of the National Access Regime, the Productivity Commission recognised that uncertainty regarding access regulation requirements could be a significant deterrent to major infrastructure investments. Accordingly, it recommended that Part IIIA should make provision for the proponent of a proposed investment in an essential infrastructure facility to seek a binding ruling (in general applying in perpetuity, unless there was material change in circumstances) on whether the services provided by that facility would meet, or be exempt from the declaration criteria (Rec. 11.1). It also recommended that the Government should consider other mechanisms to address this uncertainty and thereby facilitate efficient investment, including fixed-term "access holidays" and the provision of a "truncation" premium to be added to the cost of capital (Rec. 11.3).

[21] Exports and Infrastructure Taskforce, *Australia's Export Infrastructure: Report to the Prime Minister*, May 2005

60. Despite the continued relevance of this issue, it has not been reflected in the proposed amendments to Part IIIA. As one of the largest commercial investors in essential infrastructure in Australia, Telstra believes that this is a serious gap in the amendments included in the Bill. While not necessarily supporting the specific "investment safe harbour" mechanisms proposed by the Productivity Commission, Telstra is of the view that the Committee should give this matter its most serious consideration. In this regard, the Committee should note that Parliament considered it appropriate to bring into legislative effect investment safe harbour provisions in the telecommunications access regime in 2002.

61. The Committee should also note that while Telstra fully supports the principle of having investment safe harbour provisions in Part XIC, the current provisions have proved ineffectual on a number of bases, including:

   - The current anticipatory exemption requests and special access undertaking mechanisms have proved capable of being overturned after investments have been made, as demonstrated in the recent Foxtel HFC digitisation case. This means that this mechanism does not provide credible regulatory protection for investors in new technologies. There is a need for a transparent procedure for revocation of safe harbour decisions, including decisions being overturned in merits review.

   - The current provisions are designed to provide certainty with regard to access arrangements for specified *services* provided over the facility in which investment is being considered, rather than certainty of return on the infrastructure investment itself. This limitation will be particularly important, and potentially harmful, where the services that might be provided by a facility in the future are not known – a very important issue for next generation access infrastructure in telecommunications and possibly for essential facilities in other industries.

   - The current provisions effectively limit the application of safe harbour protection to discrete "one-off" investments, while in practice many infrastructure investments are made on an incremental basis that would not attract statutory protection. Safe-harbour arrangements should allow for applications that cover classes of investments.

62. Besides believing that the Committee needs to consider these practical issues in addressing the need for investment safe harbour provisions in Part IIIA, Telstra is of the view that these shortcomings need to be addressed in Part XIC. Adjusting the relevant provisions would better give effect to the intent of Parliament when it enshrined the investment safe harbour provisions in the telecommunications access regime in 2002.

4.2. PRIMACY OF COMMERCIAL NEGOTIATIONS AND AGREEMENTS

63. Reflecting support for the primacy of commercial negotiations, the Productivity Commission recommended that the ACCC, in general, confine the exercise of its arbitral role to matters in contention between commercial parties (Rec. 8.2). This recommendation has not been adopted in the Bill. Telstra is of the view that the Committee should seriously consider recommending that provisions to address this matter be included in amendments to Part IIIA. Regulatory intervention in matters where parties are in agreement delays the settlement process unnecessarily, interferes in the competitive operation of the market rather than promotes competition, and is unlikely to be in the interests of either party. Where ACCC (interim or final) determinations do alter existing commercial arrangements, regulators should be required to provide reasons for the changes.

64. Furthermore, Telstra is of the view that amendments aimed at promoting the primacy of commercial negotiations should in fact go further than this, and include provisions that ensure that:

    - Where an access dispute has arisen, there is a statutory presumption that (perhaps expired) commercial arrangements or average market rates are to be maintained (e.g. through ACCC interim determinations) until the ACCC makes a final determination.

    - Where an access undertaking is under consideration, there should be a statutory presumption that a final arbitration decision is to be delayed pending an ACCC decision, or ACT review of an ACCC decision, on acceptance or rejection of that undertaking.

65. These provisions are important to preventing regulatory over-reach. Absent a clear presumption in respect of any interim terms, the regulator has the scope to impose conditions that may change market circumstances without any thorough and reviewable examination of the matters in dispute. Equally, the scope to impose a final arbitration decision when consideration of an undertaking is still underway undermines the integrity and effectiveness of the undertaking mechanism.

66. Telstra is also of the view that similar measures to ensure the primacy of commercial negotiations for telecommunications access would enhance the effectiveness and efficiency of the current regime. In addition, as provisions exist in Part XIC that require the ACCC to publish model access terms and conditions, Telstra is of the view that amendments should be made that would require that model terms and conditions only be published where no undertaking prices have been accepted or are under consideration.

4.3. GROUNDS ON WHICH UNDERTAKINGS SHOULD BE CONSIDERED

67. The Export and Infrastructure Committee Taskforce recommended to the Prime Minister that the relevant test to be applied by regulators in assessing access undertakings should be simplified by basing it on whether what has been proposed by the infrastructure owner is reasonable (i.e. falls within a reasonable range) in the commercial circumstances and in light of the statutory objectives (see Recommendation 3 of the Taskforce report). Telstra supports this approach for Part IIIA for the reasons outlined in the Taskforce report and based on its own experience, and suggests the Committee recommend it be included in the current round of amendments to the national access regime. Telstra also supports a similar approach being taken for Part XIC.

4.4. OVERARCHING STRUCTURE OF REGULATORY REGIMES AND REGULATORS

68. The Export and Infrastructure Committee Taskforce recommended "that the Council of Australian Governments (COAG) consider whether the multiplicity of regulators and the fragmentation of the regulatory system is in Australia's long run interest and examine the scope for establishing a single national regulator or, in other ways, reducing the number of regulators affecting Australia's export oriented infrastructure."[22]

69. Telstra does not have a view on the appropriate division of institutional responsibilities as between the Commonwealth and the States. That said, Telstra believes that there is great value in seeking to ensure consistency of regulation between jurisdictions and between industries. The current fragmentation of the regulatory system is inconsistent with the objectives of national competition policy and creates distortions to resource allocation. In Telstra's view, unifying the currently fragmented regimes onto a basis that is neutral both in terms of geography and also in terms of industry should be a matter of national priority.

5. IMPLICATIONS FOR THE TELECOMMUNICATIONS ACCESS REGIME (PART XIC OF THE TPA)

70. In addressing the proposed changes to the national access regime contained in the Bill, a number of areas where similar reforms to the telecommunications access regime would be desirable have been identified:

    - the introduction of an objects clause that gives primacy to efficient investment in and use and operation of infrastructure as the key means of promoting competition in both upstream and downstream markets;

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- a requirement that the regulator be satisfied that declaration of an access service would promote a *material increase* in competition;
- the requirement for the regulator to consider specific pricing principles as laid out by the Productivity Commission (minus the clause relating to pricing to favour downstream arms of a vertically integrated access provider), with these pricing principles directly written into Part IIIA rather than introduced through a disallowable legislative instrument;
- that the avenues for appeal on merit of regulator decisions be widened, to afford parties the normal checks and balances on official decisions characteristic of the Westminster system of government, and to afford all parties appropriate natural justice;
- ACCC reporting on arbitration decisions to include reasons for choice of the asset valuation methodology; and
- Annual reporting by the ACCC on the impact of access regulation (declarations).

71. Beyond this, there is benefit in the current context in comparing key features of Part IIIA and Part XIC. When the 1997 amendments were made to the Act bringing into force a telecommunication-specific competition regime (Parts XIB and XIC), it was envisaged that Parts XIC and IIIA would converge over time. This sentiment has continued to be echoed at the political and bureaucratic level in the ensuing period. In Telstra's view, however, the reality is more akin to a growing divergence of the national and telecommunications access regimes in a number of important areas. The gap will be further widened if the proposed changes are adopted for Part IIIA but are not reflected in Part XIC. This would be inconsistent with the stated policy intent. Additionally, it would result in telecommunications, which is becoming ever more competitive, being subjected to more stringent regulation than other sectors where competitive forces are weaker if not entirely absent.

72. It is, in this regard, especially concerning that for Part XIC (and in contrast to Part IIIA) more power has been invested in a sole regulator, the ACCC, without addressing the need to control that body's discretionary powers and reduce the disincentive to efficient investment that regulatory risk creates. This is demonstrated in the following table, which shows that the checks and balances on agency powers which are widely recognised as desirable are remarkably absent from Part XIC:

Table 1: Comparison of Part IIA (with proposed amendments) and Part XIC

	Pt IIIA	**Pt XIC**
<u>Declaration</u>		
Initiative to consider declaration	Access Seeker (Denied access)	ACCC
Consideration of declaration	NCC	ACCC

vis-à-vis TPA provisions		
Decision whether to declare	Minister	ACCC
"Appeal" against declaration	ACT	No merit appeal rights
Revocation	NCC, Minister, ACT - NCC can recommend revocation to Minister, Minister makes decision, decision can be appealed to ACT	ACCC
Arbitrations		
Decision Body	ACCC	ACCC
"Appeal" Decision	ACT	No merit appeal rights

73. As well as enjoying greater discretion in the approach to regulation, the ACCC, under the current provisions of Part XIC, faces a much lower hurdle in declaring services – that is, in bringing services within the scope of regulatory controls. As a result, there have been far more access services declared under Part XIC than under Part IIIA, despite the latter applying to a wide range of industries. Thus, while there are only two declarations in effect under Part IIIA[23], over 20 telecommunications services have been declared, with a number of these declared services virtually unused and others creating significant inefficiencies through overlap and associated arbitrage opportunities.

6. CONCLUSIONS

74. Telstra in general supports the proposed amendments to the national access regime (Part IIIA of the PTA), although with some modifications to the provisions as described in the Bill.

75. Furthermore, Telstra is of the view that these amendments could in large part very usefully be made to the telecommunications access regime. This would be a significant step in beginning to redress the divergence apparent between Part IIIA and Part XIC, which is inconsistent with the original and subsequent policy intent of convergence over time of the national and telecommunications access regimes.

23 In making this point, it is acknowledged that there are more services regulated under Part IIIA than are "declared". Declaration is just one form of regulation under Part IIIA, with a number of services regulated by state and territory access regimes and by the Gas Code.