GENERAL AND INDUSTRY SPECIFIC REGULATION OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

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I INTRODUCTION

With the enactment on 30 April 1997 of the *Trade Practices Amendment (Telecommunications) Act 1997*, competition in the Australian telecommunications industry is now governed by the specific regime set out in Part XIB of the *Trade Practices Act 1974*[1] in addition to the general provisions against restrictive trade practices in Part IV.

Part XIB, and the accompanying telecommunications access regime contained in Part XIC, represent the culmination of a reform process which began in 1995 with the announcement of the regulatory arrangements which were to apply from July 1997,[2] but which had its origins as far back as 1988.[3] The reforms were aimed at

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[1] Part XIB is entitled 'The Telecommunications Industry: Anticompetitive Conduct and Record Keeping Rules'.

[2] Although the reforms came into force in April 1997, they effectively only applied from 1 July of that year. See, for example, s 151AJ(8), which states that supplier of telecommunications services does not engage in 'anticompetitive conduct' if that conduct occurred before 1 July 1997; and s 151BK(10), which provides that a 'tariff filing direction' given before 1 July 1997 does not come into force until that date. Part XIB has since been amended by Schedule 1 of the *Telecommunications Legislation Amendment Act 1999*, with effect from July 1999.

[3] Geoff Taperell and Richard Dammery, 'Anticompetitive Conduct in Telecommunications: Are Supplementary Rules Required?' (1996) 4 *Competition & Consumer Law Journal* 1, trace the policy to the second reading speech of the *Telecommunications Bill 1991* (see Commonwealth, *Parliamentary Debates*, House of Representatives, 7 May 1991, 3093-3105; while the OECD Committee on Competition Law and Policy, *Competition in Telecommunications*, OECD Working Paper No. 62 (1996) 7 note that the reform process in Australia actually began in 1988 with the introduction of a range of accountability and management reforms designed to provide the State-owned monopoly operator with a more commercial focus, and the establishment of 'Austel', an industry specific regulatory body.

transforming the Australian telecommunications market from a regulated oligopoly to a state of full and open competition.[4] This transition mirrors developments in other countries where similar market liberalisations have taken place, albeit with different responses to the issue of government intervention and regulation.[5] Australia's reforms represent a 'melding' of the two extremes of sole reliance on a set of industry specific rules on one hand, and the use of general competition law as the main form of regulation on the other. These extremes are exemplified by telecommunications regulation in the United States and New Zealand respectively.[6]

This article first discusses the objectives and content of the 1997 amendments to the *Trade Practices Act*. The question of whether a competitive telecommunications market is best achieved via a regime including industry specific rules, such as Part XIB, or through reliance on general competition law, is then considered.

II OBJECTIVES OF THE REFORM

During the course of its review of telecommunications policy, the Government stated its intention to liberalise the existing regime, and that its preferred role would be limited to the protection of consumers and the facilitation of 'sustainable competition'.[7]

It has also been noted that the intention behind Part XIB is to give telecommunications service providers the flexibility required for 'normal competitive conduct' to occur, and that reliance only on the general prohibitions of Part IV might, in some cases, prove insufficient due to the still-developing state of competition in the industry.[8]

The need for rules to enforce competition in the telecommunications market arises primarily from the fact that Telstra Corp Ltd, the State-owned[9] former monopoly

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[4] Department of Communication and the Arts, *Australia's Open Telecommunications Market: the New Framework* (1997) 2 ('*The New Framework*').

[5] See Bryan Carsberg, 'Telecommunications Competition in the United Kingdom: A Regulatory Perspective' (1992) 37 *New York Law School Law Review* 285; Rex Ahdar, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23 *Australian Business Law Review* 77, 77-8; Colleen Flood, 'Regulation of Telecommunications in New Zealand—Faith in Competition Law and the Kiwi Share' (1995) 3 *Competition & Consumer Law Journal* 199; Milton Mueller, *Universal Service: Competition, Interconnection and Monopoly in the Making of the American Telephone System* (1997) 165-70; Kate Harrison and Brent Fisse, 'International Trends in Telecommunications Regulation: Moving Away from the New Zealand Model,' <http://www.gtlaw.com.au/pubs/index_telecoms.html> (January 1997); and OECD Committee on Competition Law and Policy, *Competition in Telecommunications*, OECD Working Paper No. 62 (1996).

[6] See Michel Kerf and Damien Geradin, 'Controlling Market Power in Telecommunications: Antitrust v Sector Specific Regulation. An Assessment of the United States, New Zealand and Australian Experiences' (1999) 14 *Berkeley Technology Law Journal* 919.

[7] Commonwealth, *Beyond the Duopoly: Australian Telecommunications Policy and Regulation* (1994) Terms of Reference, [6].

[8] *The New Framework*, above n 4, 28.

[9] As at 26 August 1999, the Commonwealth held a 67% shareholding in Telstra. However, the *Telstra (Further Dilution of Public Ownership) Act 1999* (Cth) permitted the Commonwealth to sell a further

supplier, is overwhelmingly the dominant firm in the market. It enjoys dominance in terms of: its established market share, both overall and in individual market segments, resulting in lower marketing costs; its control over the fixed customer access and mobile networks; its ability to achieve significant economies of scale and scope; and its well established infrastructure, resulting in lower capital costs. This dominance, it is argued by Telstra's major competitor, Optus Communications, will, if unchecked, allow Telstra to delay and overcharge for interconnection and access, and to leverage its relationship with customers and other industry participants.[10] Geoff Taperell agrees, concluding that despite the enactment of Part XIB, Telstra will continue to enjoy competitive advantages over its actual and potential rivals, and that it may be able to use these advantages to prevent or hinder competition.[11]

Particular features of the telecommunications market which have the potential to affect competition include the need for significant investment in 'sunk costs'—those that cannot be recovered if entry is unsuccessful; and other barriers to entry such as the economies of scope and scale available to the incumbent supplier, potentially resulting in a 'natural monopoly' situation.[12] Successful entry into such a market is very difficult, and competitive pressures are therefore limited. This is in contrast to the situation in markets with low entry barriers, even very concentrated ones, where the threat of competition should be sufficient to impact on the incumbent's conduct and the prices charged to consumers.[13]

As with competition law in general, regulation of the telecommunications industry is aimed at preventing the use of market power to support anticompetitive behaviour, and at limiting the barriers to entry which exist in the industry.[14]

As noted by Deane J in *Queensland Wire Industries Ltd v Broken Hill Pty Ltd*,[15] the 'essential notions' and objectives of competition law

> are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct by precluding advantage being taken of 'a substantial degree of power in a market'.[16]

16.6% of Telstra's shares, a process which commenced in the first half of 2000: see Telstra's *Annual Review 1999*, <http://www.telstra.com.au/ar99/finstat.htm>.

[10] See Optus Communications Submission to *Beyond the Duopoloy*, above n 7, 9-13.

[11] Geoff Taperell, 'Competitive Conduct Rules for Telecommunications after 1997: Will National Competition Law Suffice?' (1995) 3 *Competition & Consumer Law Journal* 165, 169.

[12] See Lynden Griggs, 'Has Competition Policy Been Watered Down?' (1999) 7 *Trade Practices Law Journal* 152, 154-5.

[13] Flood, above n 5, 8. See also *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 189: '[I]t is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.'

[14] *The New Framework*, above n 4, 28.

[15] (1989) 167 CLR 177 ('*Queensland Mines*').

[16] Ibid 194.

In the opinion of Mason CJ and Wilson J in the same case, the object is to protect the interests of consumers by preventing conduct that threatens or undermines competition, rather than the economic well-being of individual competitors.[17]

The concept of market power was referred to in the *Queensland Wire* case as:

> the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time ... A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.[18]

The objects of regulation are thus not concerned with market concentration (even to the extent of monopolisation) per se, but rather on its anticompetitive effects. A certain degree of market concentration is inevitable in a relatively small economy like Australia if efficiency, perhaps the ultimate goal of competition law,[19] is to be achieved.[20]

III THE PART XIB REGIME[21]

Part XIB provides that 'carriers and carriage service providers'[22] may not 'engage in anticompetitive conduct', as defined in s 151AJ, in relation to a 'telecommunications market'.[23] The Australian Competition and Consumer Commission is empow-

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[17] Ibid 191. See also the decision of the United States Supreme Court in *Brown Shoe Co v United States* 370 US 294, 320 (1962), where Warren CJ referred to the 'congressional concern with the protection of competition, not competitors', and its desire to restrain conduct only to the extent that it may tend to lessen competition. This was described as 'axiomatic' by Kennedy J in *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209, 224 (1993).

[18] *Queensland Wire* (1989) 167 CLR 177, 188, 200 (citing Kaysen and Turner, *Antitrust Policy* (1959) 75. See also *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169; *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109; *QIW Retailers Ltd v David's Holdings Pty Ltd* (1994) 49 FCR 211; and Trade Practices Commission, *Misuse of Market Power Background Paper* (1990), [15], where the Commission defined market power as 'the ability to be able to act with some degree of freedom from competitive restraints, exerted by its actual or potential competitors, suppliers and customers.'

[19] The goal of efficiency has particularly been stressed in New Zealand. See *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, 358, where Richardson J said that competition is 'based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources'; and *Re Fisher & Paykel Ltd [No. 2]* (1989) 2 NZBLC 104,377, 104,455, where the 'enhancement of overall economic efficiency and, ultimately, consumer welfare' was described as 'the primary benefit that the law aims to promote.' Taperell, above n 11, 177 also notes that 'competition is not an end in itself but a means of enhancing economic efficiency and thereby maximising community welfare'.

[20] See Matthew Berkahn, 'Shared Monopolies and Tacit Collusion: Applying Competition Law in the Petrol Industry' (1998) 4 *New Zealand Business Law Quarterly* 87, 95-7.

[21] See s 151AA for a 'simplified outline' of Part XIB.

[22] Section 151AB provides that these terms have the meanings given in the *Telecommunications Act 1997*, namely the owners of communications networks who have been issued 'carrier licences' under that Act; and others who use such networks to supply telecommunications services to the public, respectively.

[23] The so-called 'competition rule': s 151AK.

ered to combat breaches of this competition rule by issuing 'competition notices'[24] stating that specified breaches have occurred.

The key concepts of Part XIB, namely what constitutes a telecommunications market, when a supplier's conduct will be considered anticompetitive and the issuing of competition notices, are considered in the following three sections.

A *Telecommunications Markets*

As competition policy is primarily concerned with the misuse of market power or, put another way, with instances of market failure, the obvious starting point for any investigation into anticompetitive conduct is to identify the market in question.[25]

For the purposes of Part XIB, 'telecommunications market' is defined in section 151AF as:

> a market in which any of the following goods or services are supplied or acquired:
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> (a) carriage services;
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> (b) goods or services for use in connection with a carriage service;
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> (c) access to facilities.

The effect of this provision is to narrow the definition of 'market' in Part IV to cover only those markets which are relevant to the telecommunications industry. Its wording has been criticised, for example by Richard Dammery, who claims that it could preclude reference to established market determinants such as those referred to in section 4E of the Act and in *Re Queensland Co-operative Milling Association Ltd*, and result in the interpretation of paragraphs (a), (b) and (c) as creating separate, legislatively defined, markets.[26]

This concern has not, however, been borne out in section 151AF as finally enacted. The section concludes with a note referring the reader to section 4E, and the Explanatory Memorandum clearly states that a telecommunications market will be a market, within the meaning of the Act.[27]

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[24] Section 151AKA and Division 3, Subdivision A of Part XIB. At the time of writing, the Commission had issued several competition notices, alleging anticompetitive conduct, to Telstra. However, substantive proceedings on the Commission's allegations have not occurred yet. The only reported judgment on Part XIB to date, *Australian Competition and Consumer Commission v Telstra Corp Ltd* (2000) ATPR ¶41-748, dealt with an application by Telstra to be granted access to witnesses' statements filed by the Commission as part of its case.

[25] Stephen Corones, *Restrictive Trade Practices Law* (1994) 82, states that market definition provides 'a context within which competition is to be analysed'. See also Geoff Taperell, Robert Vermeesch and David Harland, *Trade Practices and Consumer Protection* (3rd ed, 1983) 145.

[26] Richard Dammery, 'Developments and Events: Exposure Draft Telecommunications Legislation' (1996) 4 *Competition & Consumer Law Journal* 5, referring to the Exposure Draft.

[27] Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, commentary on s 151AF.

It has also been suggested that the three product types listed in section 151AF are too narrow, and risk being overtaken as non-carriage providers, with market power which is not derived from a 'telecommunications market' as presently defined, move into competition with traditional telecommunications carriers.[28]

This concern also appears to be exaggerated. The Explanatory Memorandum notes that paragraph (b) of the definition in particular is intended to be read expansively,[29] and that the traditional substitutability test[30] should be used to assess the boundaries of the market in question.

B *Anticompetitive Conduct*

The competition rule of section 151AK prohibits anticompetitive conduct by telecommunications suppliers. As noted in the Explanatory Memorandum, the definition in Part XIB is in wider terms than under the general Part IV provisions.[31] Section 151AJ(2) and (3) provide that a carrier or carriage service provider engages in anticompetitive conduct if it:

- has substantial market power, and takes advantage of it with the effect or likely effect of substantially lessening competition in that or any other telecommunications market; or
- contravenes sections 45, 45b, 46, 47 or 48 of the Act[32] by means of conduct which relates to a telecommunications market.

In contrast to the purpose-based test of the corresponding general provision of Part IV,[33] section 151AJ(2) employs an effects-based test which requires no examination of the purpose for which the conduct is being engaged in.[34] According to the Explanatory Memorandum, this test was included in recognition of the fact that competition may be lessened regardless of the purpose behind the impugned conduct. Proof of purpose is a subjective matter that requires a motive for the conduct in question to be established, and therefore reliance on a purpose-based test may result in a shift of focus from the economic effect of the conduct to its perceived moral-

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[28] See Dammery, above n 27, 6; Taperell and Dammery, above n 3, 57.

[29] Including printed telephone directories, fax machines, pay television receivers, billing services and directory assistance services: Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, commentary on s 151AF. 'Carriage service' is defined sufficiently widely in s 7 of the *Telecommunications Act 1997* to include all technologies capable of use in telecommunications.

[30] See, for example, *Re Tooth & Co Ltd* (1979) ATPR ¶40-113, 18,196; and *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) ATPR ¶40-809, 48,797.

[31] Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, commentary on s 151AJ.

[32] These sections prohibit 'contracts, arrangements or understandings' and covenants pertaining to land which affect competition; the misuse of market power; exclusive dealing; and resale price maintenance.

[33] Section 46 (Misuse of Market Power) prohibits the taking advantage of market power for the purpose of eliminating or substantially damaging a competitor; preventing entry into the market; or deterring or preventing competitive conduct.

[34] See Australian Competition and Consumer Commission, *Anticompetitive Conduct in Telecommunications Markets: An Information Paper* (1999) 33.

ity.[35] The test also appears to be designed to alter the evidentiary burden imposed by section 46, removing the need to directly prove or infer an anticompetitive purpose.[36]

The concept of 'taking advantage' of market power does not necessarily include 'any notion of hostile or predatory intent'.[37] It simply refers to the use of that power in a manner which would not be rational in a competitive market, to produce a discernible effect or likely effect on competition.[38] In deciding whether the effect of such a use of market power has been, or is likely to be, a 'substantial lessening of competition', the Commission has stated that it will be guided by the principles already developed by the courts when dealing with the general provisions of Part IV.[39] In *Re Queensland Co-operative Milling Association Ltd*,[40] for example, the Trade Practices Commission described competition as the 'antithesis of ... undue market power, in the sense of the power to raise prices and exclude entry'. In the Commission's view,

> effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service package offered to consumers and customers.[41]

As to whether the effect of conduct upon competition is 'substantial', the courts have generally defined this term to mean 'real or of substance' in relative terms, rather than considerable or large in an absolute sense.[42] In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd*[43] Lockhart J said that

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[35] See Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, commentary on s 151AJ.

[36] Under s 46, a court may infer a proscribed purpose from the nature of the conduct, the circumstances in which it occurred, and its effects or likely effects, rather than necessarily relying on direct proof of purpose: see *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109; *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385.

[37] See *Queensland Wire* (1989) 167 CLR 177, 188-190.

[38] This issue was considered by the Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385, 403, where it was held that 'it cannot be said that a person in a dominant market position "uses" that position ... [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.' See Yvonne van Roy, 'The Privy Council Decision in *Telecom v Clear*: Narrowing the Application of s 36 of the *Commerce Act 1986*' [1995] *New Zealand Law Journal* 54, 55-6. In a similar vein, in *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) ATPR ¶41-196, 40,644, French J noted that taking advantage of market power will be indicated where a firm has engaged in conduct which would not be profit maximising in a market where competitive sanctions applied.

[39] Australian Competition and Consumer Commission, above n 34, 35.

[40] (1976) 25 FLR 169 ('*QCMA*').

[41] Ibid 188-9.

[42] Taperell, Vermeesch and Harland, above n 25, 216, note that '[w]hat is "substantial" cannot be decided simply by looking at the number of dollars involved'. Corones, above n 25, 117, states that 'two different meanings have been ascribed to the word "substantially": first, real or of substance, and secondly, large or weighty'. However, the cases generally cited in support of the latter view all appear to be somewhat equivocal on this point. See, for example, *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260 (Smithers J); and *Dowling v Dalgety Australia Limited* (1992) 34 FCR 109, where Lockhart J at 135 said that 'the substantial lessening of competition of the kind to which s 45 is

> In the context of s 45, ['Contracts, Arrangements or Understandings Restricting Dealings or Affecting Competition'] the word 'substantial' is used in a relative sense. The very notion of competition imports relativity. One needs to know something of the businesses carried on in the relevant market and the nature and extent of the market before one can say that any particular lessening of competition is substantial.[44]

Thus, it appears that a breach of the competition rule of Part XIB will occur if the anticompetitive effect of the conduct in question is relatively significant in the context of the telecommunications industry. Both the Explanatory Memorandum and the Commission have suggested some examples of conduct which may meet this threshold. These are summarised below. Each would have to be considered in the light of the particular market structure pertaining to telecommunications, and other variables such as technological factors:

> **Predatory pricing**, ie where a telecommunications supplier sacrifices short term profits by reducing, or threatening to reduce, prices with the effect of eliminating or deterring competition by forcing the exit of a competitor or deterring new entrants. A reduction to below cost has been held to be a necessary element of predatory pricing.[45] It has also been held in the United States that a firm must have a reasonable prospect of recouping its short term losses in order for its behaviour to be considered predatory.[46] However, neither of these is included on the list of factors which the Commission considers to be primarily relevant in assessing whether the competition rule has been breached through predatory pricing.[47] This list suggests that a wider view of what is 'predatory' will be taken by the Commission under Part XIB, focusing on the effect of the pricing policy rather than on the mind of the supplier;
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> **Mobility restraints**, ie arrangements which inhibit customers from moving to an alternative supplier. Examples of this include long term supply agreements which apply exit penalties to customers who choose a competing supplier, or which require pre-payment for services not yet supplied;

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directed means substantial in the sense of "considerable"', but then went on to approve his own statement in the *Radio 2UE* case (below n 43) to the effect that 'in s 45 the word used was plainly in a relative sense' (at 138).

[43] (1982) 62 FLR 437 ('*Radio 2UE*').

[44] Ibid 444. See also *Tillemanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) ATPR ¶40-138, 18,500; *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731, 758-9; and *Commerce Commission v Port Nelson Ltd* (1995) 6 Trade and Comptetition Law Reports 406, 433-4.

[45] See *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385, 410. The purpose of the price reduction was also stressed in this case, an issue which is not relevant for the purposes of Part XIB.

[46] See *Matsushita Electric Industrial Co v Zenith Radio Corp.* 475 US 574, 585 (1986); *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209, 222-3 (1993).

[47] See Australian Competition and Consumer Commission, above n 34, 37.

With the rapid pace of change in telecommunications, and the probability that new related or derivative markets will continue to arise, another type of potentially anticompetitive conduct is **vertical foreclosure**—the use by a dominant firm of market power in one market to acquire an advantage in another, related, market;[48]

Refusals to supply goods or services which are vital to a competitor's ability to effectively compete, either outright or through pricing these inputs at levels which make the competitor's product commercially non-viable;[49]

Bundling or tying of a service, in relation to which the supplier holds significant market power, with others for which it lacks market power, eg. making access to a network conditional upon the purchase of equipment or other services from the supplier. The Commission has stated that in such cases it will take into account the technical and economic feasibility of unbundling;[50] and

Collusion between two or more telecommunications suppliers by way of consciously parallel pricing or other devices to maintain or inflate prices, or to deny supplies to a competitor.[51]

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[48] See Roger Noll, 'The Role of Antitrust in Telecommunications' (1995) 40 *Antitrust Bulletin* 501, 506; Taperell, above n 11, 169. An example of this which could arise in Australia is the possibility of cross-subsidisation of Telstra's activities in areas where it faces competition (such as the long distance, international and mobile markets) with excess profits gained in safely monopolised areas (such as the customer access network).

[49] This occurred in *Queensland Wire* (1989) 167 CLR 177. An obvious example of this in the telecommunications industry is the potential for Telstra to restrict access to its customer access network, which is necessary if there is to be competition in the market for telephone services.

[50] Australian Competition and Consumer Commission, above n 35, 39-40. This approach takes account of the fact that bundling is often the most rational course of action. For example, in the recent *Microsoft* case, the United States Court of Appeals suggested that tying of products together would not fall foul of antitrust law if there was 'some technological value to integration'. This would exclude cases where the manufacturer 'has done nothing more than metaphorically "bolt" two products together': *United States v Microsoft Corp* 147 F3d 935 (1998). However, see also the related judgment of Jackson DJ (unreported, United States District Court for the District of Columbia; No. 98-1232, 3 April 2000), where his Honour noted that the weight given by the Court of Appeals to the technological aspects of the bundling 'dispenses with a balancing of the hypothetical advantages against any anticompetitive effects'. He held that the Court of Appeals' approach was inconsistent with the relevant law, set out in cases like *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 (1992), and declined to follow it.

[51] This is also subject to s 45. It should be noted that, although the Commission has stated that 'determining whether collusion has occurred will rely on either direct evidence of a contract, arrangement or understanding, or by implication supported by relevant facts', it has proven very difficult to establish collusion under general competition law provisions without evidence of actual communication between the parties: See, for example, *Trade Practices Commission v Email Ltd* (1980) ATPR ¶40-172; and Richard Miller and David Round, 'Price Fixing, Price Leadership or "Ordinary Commercial Considerations": Guilt under section 45 of the *Trade Practices Act*' (1982) 10 *Australian Business Law Review* 251.

C *Issuing Competition Notices*

Part XIB empowers the Commission to issue two types of 'competition notice', stating that the competition rule is being, or has been, breached. Guidelines for these notices may be formulated by the Commission under section 151AP.[52]

Section 151AKA provides for the issuing of 'Part A competition notices'. These state that a recipient has engaged or is engaging in a specified instance of anticompetitive conduct or in at least one instance of the kind of conduct described in the notice. Part A notices are designed to allow the Commission to quickly identify conduct it considers anticompetitive and warn the recipient to cease that conduct. The notice need not include detailed particulars of the alleged breach.[53]

'Part B competition notices', issued under s 151AL, are more detailed. As well as stating that a contravention has occurred or is occurring, Part B notices set out particulars of that contravention.[54] Also, unlike Part A notices, Part B notices are prima facie evidence that a contravention of the competition rule has taken place for the purposes of any proceedings brought under Part XIB.[55]

Before issuing a notice of either type, the Commission must have 'reason to believe' that a breach has occurred or is occurring.[56] This requires an actual, honest belief, on reasonable grounds.[57]

The form originally envisaged for the competition notice was a cease and desist order, giving the Commission the power to prohibit conduct if it was satisfied that it was anticompetitive. This was criticised as being a departure from one of the Act's fundamental principles, namely that those forms of conduct considered to be anticompetitive should be specified and prohibited in the Act, and that these prohibitions should be enforceable only in the courts.[58]

Although the final form of the competition notice does not in itself prohibit conduct, and allows for enforcement proceedings to be brought before the court rather than through the exercise of an administrative discretion,[59] a Part B notice does effectively shift the burden of proof in any such proceedings by being deemed to constitute prima facie evidence of a contravention by section 151AN.

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[52] See Australian Competition and Consumer Commission, 'Competition Notice Guideline issued pursuant to section 151AP of the *Trade Practices Act 1974*', <http://www.accc.gov.au/pubs/catalog.htm> (27 June 1997). In addition to issuing a competition notice, the Commission may make orders exempting specified conduct from the purview of 'anticompetitive conduct' (Division 3, Subdivision B); require telecommunications suppliers to file with the Commission information regarding their charges for specified goods or services, by means of a 'tariff filing direction' (Divisions 4 and 5); and formulate record keeping rules and disclosure directions for telecommunications suppliers (Division 6).

[53] See Australian Competition and Consumer Commission, above n 34, 5.

[54] Section 151AL(1)(b).

[55] Section 151AN.

[56] Sections 151AKA(7) and (8), and 151AL(3).

[57] *TNT Australia Pty Ltd v Fels* (1992) ATPR ¶41-190, 40,598.

[58] See Taperell and Dammery, above n 3, 64.

[59] Part XIB, Division 7.

IV INDUSTRY SPECIFIC REGIMES: THE BEST WAY?

The current Australian framework has only been in place for a limited period, and thus any attempt to judge its effectiveness must be based on how it is *likely* to work, rather than how it has worked in practice. As noted above,[60] Telstra is likely to remain the dominant supplier of telecommunications services in Australia for the foreseeable future, despite the reforms imposed by Part XIB. The lack of structural reform, to accompany the new competition rules, has been criticised in some quarters.[61] However, the objective of the law is not necessarily to impose a competitive market *structure* on the industry, but rather to prevent the 'use' of a firm's market power with anticompetitive results. Although Telstra's market power remains high, the company's ability to use it to charge higher than competitive prices appears to have lessened even with the limited competition which has been extant since 1992. Between 1992 and 1993 Telstra's prices in the long distance and international call markets fell by 4% and 11.6% respectively, followed by 5.5% and 8.7% reductions the following year. Market efficiency also appears to be improving—the OECD Committee on Competition Law and Policy reports that Telstra has responded to the entry of Optus into the industry with 'substantial reductions in underlying costs' as well as real reductions in prices.[62] This can only improve with the additional discipline imposed by Part XIB and associated measures.[63]

It has, however, been contended that Australia should follow the New Zealand model, and abandon special competition rules for telecommunications.[64] New Zealand appears to be the only country which has not appointed a specialist regulatory authority, or enacted an industry specific regulatory regime, to oversee competition in the telecommunications industry. Rather, it relies primarily on general competition laws, enforced through the courts.[65]

Taperell and Dammery claim that anything other than the universal application of the same competition rules to all business activity is likely to constrain conduct, and thereby produce market behaviour and performance which is not consistent with a

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[60] See text accompanying n 9-13 above.

[61] See Henry Ergas, 'Telecommunications Across the Tasman: A Comparison of Economic Approaches and Economic Outcomes in Australia and New Zealand', paper prepared for the International Institute of Communications (May 1996), 3-5; and Peter Walters, 'The Mystery of the Missing Ring Fences: Regulation of Vertically Integrated Telecommunications Operators', <http://www.gtlaw.com.au/pubs-/index_telecoms.html> (April 1998).

[62] *Competition in Telecommunications*, OECD Working Paper No. 62 (1996), 9.

[63] Michael Sainsbury, 'Alston Keeps the Lid on Telstra Prices', Computer Reseller News <http://www.itnews.com.au/crn/news/022_1506j.htm> (15 June 1999) notes that, although competition in the telecommunications sector 'is not what it could be', it is 'considerably more competitive' now than it was three years ago when the reforms were introduced.

[64] Another suggestion is that, rather than placing the telecommunications rules in the *Trade Practices Act*, they should appear in a self-contained *Telecommunications Act*: see Warren Pengilley, 'Volume of Trade Practices Law Expands Exponentially' (1997) 13 *Trade Practices Law Bulletin* 17, 28.

[65] Noted by the High Court of New Zealand in *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1992) 5 Trade and Competition Law Reports 166, 218. See also Ahdar, above n 5; Flood, above n 5, 2; Harrison and Fisse, above n 5; and Kerf and Geradin, above n 6.

freely competitive market.[66] They argue that the existing Part IV regime is sufficient to ensure workable competition in telecommunications, and that if a broader approach is adopted for that industry than for others,[67] this may simply deter 'desirable pro-competitive conduct'.[68]

Such an argument fails to take account of the unique features of the telecommunications industry. Few, if any, other sectors of the economy include a participant as dominant as Telstra and, in the absence of radical action such as structural separation, workable competition can only be realistically achieved by industry specific rules.[69] In addition, it has been suggested that the general courts lack the expertise, as well as the legal basis, to satisfactorily deal with the complex issues involved in such an inherently dysfunctional market.[70] In the New Zealand context, the protracted litigation between the former monopoly supplier, Telecom, and new market entrant Clear Communications over the terms of Clear's connection to Telecom's network, provides evidence of this. The case has proved extremely costly yet ultimately inconclusive.[71]

In general, the light handed New Zealand model has been denounced by most except 'market theoreticians fascinated with its unalloyed application of market principles' and the former monopoly suppliers themselves, who are accused of merely seeking external justification for their strategic attempts to be freed from regulatory constraints.[72]

New Zealand's Commerce Commission, charged with administering competition law under the *Commerce Act 1986* (NZ), has also concluded that sole reliance on that Act is 'of some help—but of a protracted, expensive and uncertain kind, and

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[66] Taperell and Dammery, above n 3, 7-9. See also Taperell, above n 11, 181.

[67] As appears to be the intention with regard to conduct such as predatory pricing and collusion: see above.

[68] Taperell, above n 11, 194. Taperell states that 'the dividing line between desirable competition and anti-competitive misuse of market power is difficult to draw', and that a broad prohibition will only serve to discourage normal competitive behaviour, for fear it will be considered likely to substantially lessen competition.

[69] See Brent Fisse, Liza Carver and Andrew Simpson, 'The Need for Competition Direction Making Power in Australian Telecommunications', Gilbert and Tobin Publications <http://www.gtlaw.com.au> (August 1996).

[70] See Fisse, Carver and Simpson, above n 72. See also James Farmer, 'Transition from Protected Monopoly to Competition: The New Zealand Experiment' (1993) 1 *Competition & Consumer Law Journal* 1; and Warren Pengilley, 'Determining Interconnection Prices in Telecommunications: New Zealand Lessons on the Role of a Regulator' (1993) 1 *Competition & Consumer Law Journal* 147.

[71] See Ahdar, above n 5, 115. See *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385, 408-09.

[72] Harrison and Fisse, above n 5. It may be relevant to note that Taperell and Dammery's 1996 article in support of a light handed approach (above n 3) was prepared on behalf of Telstra. Richard Dammery was at that time Telstra's manager of Regulatory Policy, and has since been appointed Corporate Counsel at Telecom New Zealand.

with definite limitations in its scope';[73] and a number of New Zealand and overseas commentators have reached similar conclusions.[74]

V CONCLUSION

Whether Part XIB will achieve its objectives—increased competition, and efficiency, through the restriction of the use of market power and the lowering of barriers to entry—remains to be clearly seen. It is clear that opening up telecommunications to competition will enhance consumer welfare, at least in the short term, whether that competition is specifically regulated or regulation is left to general competition law provisions.[75] However, in the longer term, it appears that the very high level of market power held by Telstra may necessitate tighter regulation, of the sort contained in Part XIB, at least until Australian telecommunications markets are reasonably contestable.[76]

Taperell and Dammery recommend that, before different rules are imposed specifically on the telecommunications industry, the long term implications, including the costs and benefits to the community as a whole, should be carefully considered.[77] Judging from the New Zealand experience, the cost of *not* having industry specific regulation may well include substantial litigation costs—incurred by new and prospective market entrants, and ultimately passed on to customers.[78]

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[73] Commerce Commission, *Telecommunications Industry Inquiry Report* (1992) [238].

[74] See, for example, Pengilley, above n 70, 163; and Hudson Janisch, 'From Monopoly Towards Competition in Telecommunications: What Role for Competition Law?' (1994) 23 *Canadian Business Law Journal* 239, 274.

[75] Flood, above n 5, 220, notes that 'in the short term, New Zealand's bold, unique and radical approach to regulation of its telecommunications sector has resulted in efficiency gains'; and Ahdar, above n 5, 116, refers to the 'vigorous competition between Clear and Telecom resulting in greatly reduced prices'.

[76] This could occur either through the increased ability of rivals such as Optus to effectively compete with Telstra, or through technological innovations, which may in the medium to long term decrease reliance on Telstra for telecommunications services.

[77] Taperell and Dammery, above n 3, 95.

[78] See Flood, above n 5, 65.