Deregulation and its Effect on the Market

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Telecom Industry Event
8 April 1997

Today I wish to focus on the new telecommunications regime and the Commission's role and approach in regulation of telecommunications after 1 July.

Let me begin by touching briefly on the Government's policy and objectives for the telecommunications industry. Following which, I will outline the main new regulatory responsibilities of the Commission.

The Government's policy is to introduce full and open competition to the telecommunications industry from 1 July 1997, reinforce consumer protection and reform technical regulation. The objective is that the new regulatory framework is to:

- promote the long term interests of end users of carriage services or services provided by means of carriage services (eg content services);
- promote the efficiency and international competitiveness of the Australian telecommunications industry.

In this way the regulatory framework is intended to facilitate the development of:

- world class infrastructure using the latest market driven technology
- a large number of service providers (including carriers) offering diverse and innovative services
- contestable market strategies which reduce prices and increase the quality of services.

The Government's package of legislation, which has recently been passed by Parliament, involves a new Telecommunications Act and amendments to other legislation, particularly the Trade Practices Act ("TPA"). The package aims to establish new economic regulation and competition rules for the industry that will help achieve the above objectives.

New Regulatory Responsibilities

Before discussing the Commission's specific responsibilities, let me first turn to some of the key components of the new regulatory arrangements.

- the new regulatory arrangements for the telecommunications industry are premised on a process of commercial negotiation as the industry moves forward from what has effectively been a duopoly arrangement to more open competition but with regulatory safeguards including arbitration by the ACCC where necessary.

- there is a clear move towards general competition law, but with strong regulatory safeguards to address particular concerns in this industry given Telstra's strong monopoly endowments
- In particular, the Commission will have a few "big sticks" to deal with potential problems. It can issue competition notices if it finds anti-competitive behaviour, with fines of $10 million plus $1 million per day for continuing breaches if upheld by the Federal Court.
- the new regime is focussed on delivering benefits to end-users but also taking account the underlying health of the industry to ensure efficient competition is sustainable. In this sense, competition should be seen as one important way of delivering benefits but is not an end in itself
- are new access regime has been introduced which is designed to encourage participants in the industry to utilise existing infrastructure efficiently and to encourage efficient investment

The Commission will assume the primary role for competition and economic regulation of telecommunications services from 1 July 1997.

The Commission's new responsibilities are primarily centred on:

- new enhanced competition powers under Part XIB of the TPA, and
- new access provisions specific to telecommunications under Part XIC of the TPA.

Both these provisions go somewhat further than the existing competition and access provisions in the Trade Practices Act.

Part XIB - New Competition/Conduct Provisions

Anti-competitive conduct

It will be a legislative requirement that carriers and service providers do not engage in anti-competitive conduct and that this will be known as a ***competition rule***. There will be two circumstances in which a carrier or carriage service provider will be said to engage in anti-competitive conduct.

- where a carrier or service provider with substantial degree of power in a telecommunications market takes advantage of the power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market; or
- engages in conduct in contravention of section 45, 45B, 46, 47 or 48 of the TPA and the conduct relates to a telecommunications market.

Telecommunications market is defined as the supply or acquisition of carriage services, goods or services used in connection with a carriage service or access to facilities.

Issue of a Competition Notice

If the Commission considers there has been a breach of the competition rule, it may issue a ***competition notice*** and the competition notice will be prima facie evidence of the matters in the notice. If the Federal Court is satisfied that a person has contravened the competition rule, it may make orders including pecuniary penalty of up to $10 million in fines plus $1 million per day for continuing breaches following issue of the competition notice. As well, once a notice has been issued, private parties may seek injunctions or other orders for breaches of the competition rule.

Competition Notice Guidelines

In deciding whether to issue a competition notice the Commission must have regard to ***competition guidelines*** which under the legislation it is required to formulate.

Exemption Orders

Applications for ***exemption orders*** can be also made to the Commission to exempt carriers and carriage service providers from the scope of the anti-competitive conduct provision and the competition rule.

Tariff Filing Requirements

Telstra will be required to file with the Commission all its charges for basic carriage services. The Commission will be able to exempt Telstra from this obligation in relation to specified charges or services. As well, the Commission will be able to issue ***tariff filing directions*** requiring carriers or service providers to provide information to the Commission with regard to present and future tariffs for any service, whether a basic or more enhanced service.

Record-Keeping Rules

The Commission can also make ***record keeping rules*** specifying the manner in which specified carriers or service providers are to keep and retain records relevant to, amongst other things, the exercise of Commission powers in regard to the competition rule and ensuring access to competing carriers' services.

Commission's Approach to Competition Provisions

It is important to note that the legal concepts to be used in ensuring open and competitive telecommunications markets are little different to the concepts in use now through administration of the general provisions of the TPA.

The Minister's Second Reading Speech, introducing the Trade Practices Amendment (Telecommunications) Bill, makes the point that the legislative package will bring the regulation of competition in the telecommunications industry more closely into line with general trade practices law.

This is consistent with the signing of the Competition Principles Agreement by the Council of Australian Governments (COAG) where it was agreed to expose previously exempted industries and trading bodies to general competition law. It would be inconsistent with this approach for the Commonwealth to isolate a

significant part of the Australian economy from the rules that are to be applied to the rest of the economy. The same applies in a general sense to the manner in which the Commission will need to administer competition rules in the telecommunications industry.

Of course, there are some special rules in the legislative package which attempt to limit their application to telecommunications markets, and overcome transitional difficulties in introducing competition to areas which have not yet fully developed. These rules are largely aimed at countering the monopoly endowments which the incumbent brings to this newly deregulated industry.

Generally, for those seeking guidance as to how the Commission will administer the new provisions, a starting point needs to be what the Commission has done and said in the past when applying general competition law provisions to other similar industries.

Of course, the ultimate decision making body in relation to the new telecommunications rules will be the courts and there is a right of private action under the telecommunications provisions, in addition to the existing general competition law provisions.

In making its decisions on whether and how to use the new competition/conduct provisions, it is more certain than not that the Commission will be paying attention to the manner in which the courts have approached general competition law concepts such as market definition, market power and substantial lessening of competition that are important under Part XIB.

As I have already noted, the Commission is required by law to publish competition notice guidelines. The Commission is currently in the process of considering what form and content the proposed guidelines should take. The legislation requires the Commission to take all reasonable steps to ensure this instrument is made before 1 July 1997.

Another issue is whether the Commission will take a proactive or reactive role in the industry. It should be noted that the nature of the new regulatory regime has changed. There is now a reliance on self regulation and a movement towards general competition law, as distinct from guidance provided by an industry specific regulator.

As such, the Commission's opportunity to be proactive will be limited to some extent by the provisions available to it. Proactive opportunities do exist in terms of the issuing of tariff filing directions, the making of record keeping rules and through the Commission's role in the access provisions (for example, declaring a service after calling a public inquiry). The issue of competition notices on the other hand will in most cases arise from complaints from competitors.

It will be a priority for the Commission to constantly monitor developments in the industry to assess the need for intervention, not only under Parts XIB and XIC but other provisions of the Trade Practices Act. For example, in terms of structural changes to market players (eg joint ventures and mergers).

Part XIC - Access Provisions

By far the most important competition issue at stake is ensuring that there is effective regulation of access by new entrants to the incumbent's network. In the telecommunications industry the incumbent has substantial advantage over new entrants by:

- controlling access to key network elements
- having asymmetrical network and market information.

Denying or impeding access to key network elements (such as the customer access network) can be a barrier to entry and efficient competition in dependent markets (such as long-distance telephony services).

Part XIC of the Trade Practices Act establishes the access regime for telecommunications. The access regime establishes the rights and obligations of parties in obtaining and negotiating access to the services of telecommunications infrastructure. The access provisions in Part XIC are derived in large part from Part IIIA of the TPA.

The primary object of Part XIC is to establish an access regime that promotes the long-term interests of end-users. The legislation is quite specific what is meant by the long-term interests of end-users. This includes:

- promoting competition in telecommunications markets;
- any-to-any connectivity (users of different networks can communicate);
- economic efficient use of, and investment in, infrastructure.

The access regime does not apply to all telecommunications services. It will only apply to ***declared services***. Declared services will usually be those that are considered important for competition to develop in related markets or for any-to-any connectivity.

There are three methods by which a service can be declared:

- by the ACCC if the service is currently included in an access agreement between carriers;
- through the recommendation of the Telecommunications Access Forum (TAF) which is an industry representative body;
- through a public inquiry held by the ACCC.

Once a service is declared the provider must make the service available to requesting access seekers on terms and conditions that are reasonable. The legislation envisages the primary methods by which terms and conditions of access are to be determined are through commercial negotiation or through the access provider specifying the terms and conditions in an undertaking.

The ACCC will act as a safeguard in this process by:

- approving or otherwise undertakings made by access providers; and

- arbitrating disputes over the terms and conditions of declared services.

What is the Commission's approach to access issues?

Industry Self-regulation

One of the important evolutions as the industry matures and becomes more multi-faceted and pluralistic (in terms of number and type networks and facilities) is the increasing reliance on self-regulation. This applies in a variety of areas including consumer and technical codes of practice and access. In a complex and technically detailed network industry as this, it is desirable to encourage participants to establish multilateral forums by which standard terms and conditions can be developed and applied. The legislation attempts to achieve this through the establishment of the TAF.

From the outset we have been encouraging the industry to develop such mechanisms and in particular have suggested that the TAF make an early start to the drafting of an access code with a view to it being ready and in operation by 1 July 1997. The access code will model the terms and conditions to be adopted in undertakings by individual carriers or carriage service providers. In this respect, we have been assisting the TAF address governance and other issues relating to authorisation in order to expedite its formal operation and so it can get on with its main job of drafting access codes and recommendations for service declarations.

I note also from the Government's statements upon introduction of the bills to Parliament, that the legislation provides a framework for the industry to take responsibility for key areas of regulation over and above the (necessary) legislative guarantees provided. This means that while the legislation provides important safeguards, which is a form of insurance if things go wrong, it is incumbent on the industry to attempt to craft its own approach which is more likely to work and be accepted than some alternative which is imposed by the regulator.

ACCC Roles and Responsibilities

Nevertheless the Government recognises there are limits to industry self-regulation and the need for regulatory safeguards. In some cases intervention is required to safeguard against the use of market power to deny or restrict access.

In its administration of its access responsibilities the Commission will have regard to the principles and legislative provisions contained in Part XIC which establishes the criteria under which we will declare services, approve access codes, determine exemptions from standard access obligations, approve undertakings and arbitrate on access disputes.

The Commission, as part of its transitional work, is undertaking a number of tasks to inform industry of its approach to its function under Part XIC.

Deeming of Declared Services

To achieve a smooth introduction of the new telecommunications regime, as a transitional measure, the Commission will deem certain services for access which are

at present covered by existing access agreements between Telstra, Optus and Vodafone. This will establish a starting point for all new entrants prior to 1 July and provide a basis for declaration of other services under the standard declaration provisions after 1 July.

The Commission is at present considering what services should be deemed, having regard to the basic long-term interests of end user criteria previously identified. There are some issues about how such criteria should be interpreted, and which will also influence the Commission's deliberations down the track in declaring services, For example, whether existing access services should be available in a more unbundled form as some in the industry are demanding.

Access Pricing Principles

The Commission is currently developing its approach to access pricing and has recently issued draft guidelines of access pricing principles it will follow when assessing undertakings and conducting arbitrations. These draft guidelines have been issued for public comment. Further guidelines will be issued following that process.

The pricing principles are intended to guide the parties in their access negotiations. To this end the Commission has specified broad pricing principles and pricing rules in the draft guidelines. The Commission considers that in the usual case access prices should be consistent with these principles and rules. These principles and rules set limits on the pricing behaviour of access providers who could otherwise use their market power to set anti-competitive prices.

Nevertheless, in an arbitration the Commission will be required to determine a price.

In such a case the Commission has identified that it will use long-run incremental cost as the basis upon which it will determine price. This is the cost the access provider would avoid if it did not provide the service.

While the Commission will obviously make every effort at achieving economic and efficient access prices, the availability of adequate costing information to maximise a regulatory outcome could be problematic. Access decisions will be based on costing information provided by the incumbent which may bear little relationship with economic costs - the costs of an efficient network operator.

The Commission is currently looking at the application of record keeping rules which are intended to reduce some of the information asymmetry that would otherwise exist.

The competition and access provisions should not be seen as completely separate approaches to addressing market concerns, but rather as complementary tools that can act to reinforce the Commission's powers. In addition to these safeguards, the government has recognised that there may still be opportunity for an incumbent to bypass the safeguards inherent in the access provisions, which provide a form of control at the "wholesale" level, by engaging in anti-competitive pricing behaviour at the "retail" level. In such cases the anti-competitive provisions in XIB can be used to deal with such behaviour, in an expeditious way.

However, in an open market where bundled service offerings will undoubtedly be made, with market derived retail prices, there will always be the risk that an incumbent could successfully engage in price squeezing to either defeat new entry or deter subsequent attempts at competition. Where such behaviour is occurring, the Commission will attempt to use all the powers under its arsenal, including Part IV, Part XIC and Part XIB to rectify the problem as expeditiously as possible.

Transitional Work

The Commission, as part of its transitional work to facilitate the effective operation of the new legislation from 1 July is, together with AUSTEL, working on a number of tasks, such as:

- issued a draft statement of principles for determining access prices for public comment
- preparing and issuing guidelines on administration of competition notice powers
- preparing a statement of services covered by existing access agreements that will be deemed as declared services as from 1 July
- approving or declaring the TAF and providing an authorisation under Part VII of the TPA as appropriate
- developing approaches to assessing an industry proposed access code or developing an alternative

ACCC Code if an acceptable industry code is not forthcoming

- developing arbitration guidelines
- developing record keeping rules under which carriers and service providers will be required to maintain and provide information to the Commission to assist with fulfilling its economic, competition and pricing responsibilities
- looking at where and in what form tariff filling directions are needed given current and prospective market conduct from incumbent carriers.

This work is in hand and we anticipate that we will progressively go out to industry with exposure drafts of our work for feedback and comments. We encourage the industry to participate fully in this consultation process since its views and comments and suggestions for improvement will be critical to the successful operation of the new regime.

Concluding Comments

Let me now conclude by reiterating some of the points I made at the outset:

- the new regulatory arrangements for the telecommunications industry are premised on a process of commercial negotiation as the industry moves forward from what has effectively been a duopoly arrangement to more open competition but with regulatory safeguards including arbitration by the ACCC where necessary.

- there is a clear move towards general competition law, but with strong regulatory safeguards to address particular concerns in this industry given Telstra's strong monopoly endowments
- In particular, the Commission will have a few "big sticks" to deal with potential problems. It can issue competition notices if it found anti-competitive behaviour, with fines of $10 million plus $1 million per day for continuing breaches if upheld by the Federal Court.
- the new regime is focussed on delivering benefits to end-users but also taking account the underlying health of the industry to ensure efficient competition is sustainable. In this sense, competition should be seen as one important way of delivering benefits but is not an end in itself
- the access regime is designed to utilise infrastructure efficiently and encourage efficient investment

  - infrastructure duplication is essentially an industry decision; the role of regulation is to ensure that industry's decision about whether to roll out a new network is not distorted by access conditions being too lax (leading to inefficient use of existing facilities) or too harsh (leading to either a lessening in competition or wasteful duplication). The aim therefore is to ensure that decisions are consistent with maximising benefits to end users

  - access prices should be primarily determined through commercial negotiation, with regulation acting as a safeguard

  - access provides the opportunity to service providers to offer a greater and more sophisticated array of products and services which are more likely to meet the increasingly diverse needs of business and households

- ACCC is preparing for the new regime by issuing discussion papers, draft guidelines etc and is looking for industry input into this process to ensure it is as effective, efficient and workable as possible.