10 Effects of regulation on telecommunications competition

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10.1 Introduction

The telecommunications industry is slowly being been opened up to competition and struggling towards deregulation. However, the industry still has a long way to go. The incumbent, Telstra, remains majority owned by the Commonwealth Government, and this continues to have a significant effect on the regulatory environment in which the industry competes.

The telecommunications industry has seen a major shift in its regulation/ competition model over the past eight years. Between 1991 and 1997, regulation determined the scope and intensity of competition in the industry, but since July 1997, the situation has reversed and competition (or arguably the lack of it) is driving the rate at which deregulation is occurring.

In the following comments I will attempt to explain this reversal. First, I provide a brief overview of the process by which we arrived at the current regulatory environment.

10.2 Historical overview

From a shaky beginning in 1988 under the then Communications Minister, Senator Gareth Evans, competition in telecommunications has made giant strides. It is sometimes easy to forget that it is less than a decade since Telstra (then Telecom Australia) OTC and AUSSAT were the only providers of telecommunications services to the Australian community.

From 1984, my company, then called AAP Reuters Communications, attempted to provide competition to the three Government owned carriers as a provider of leased lines to business, using its own earth stations and leased AUSSAT transponder

capacity. To say it enjoyed limited success is probably overstating its achievements. Competition was very limited before 1991.

10.3 *Telecommunications Act 1991*

The 1991 telecommunications legislation heralded the beginning of less limited competition in Australia, with two fixed networks, three mobile carriers and an unlimited number of service providers.

It was a 'carriers' world' under this Act. Service providers were seen as only resellers of carriers' services; they were not expected, or encouraged, to establish their own networks in competition with the two fixed network carriers. Consequently, service providers faced huge obstacles in establishing themselves as switched network operators. Obtaining interconnection at all, much less at a reasonable price, was a daunting task.

Despite these obstacles, switched service providers emerged and provided some competition to Telecom and Optus. The Government was unprepared for (although I believe quite pleased with) wider competition from 'switched' service providers.

AAP Reuters Communications metamorphosed into AAPT in 1991, and established itself as the first switched service provider in the country and the first competitor to Telecom. As a service provider, AAPT had little assistance from the 1991 legislation in establishing itself as an alternative operator to the duopolists, Telecom and Optus, despite establishing a network comparable with that of Optus. Being a service provider under the 1991 Act was a very different matter from being a carriage service provider under the 1997 legislation.

10.4 *Telecommunications Act 1997*

This Act heralded the introduction of open competition in Australia. However, one of the myths about the 1997 regime was that the Government intented to deregulate the industry. The industry was significantly reregulated because the Government's objective was to increase competition.

The success of the liberalisation program is evidenced by the current existence of around 30 carriers, 120 carriage service providers and around 750 internet service providers — a major change in the scope, but not necessarily the intensity, of competition in less than ten years.

It is unfortunate that the level of competition, despite a considerable increase in the number of operators in the industry, has not increased proportionately. There are many reasons for this, but primarily the 1997 Act has not enabled the Australian Competition and Consumer Commission (ACCC) to support competition as the Government intended.

In the 1997 legislation the Government set out to ensure that the new telecommunications regulator, the ACCC, had the powers to undertake two main functions:

- ensure that anticompetitive behaviour, especially by the incumbent, was dealt with expeditiously; and
- ensure that new carriers and carriage service providers would be able to access the encumbent's infrastructure, networks and services expeditiously and at reasonable cost.

The result was two major additions to the *Trade Practices Act 1974*. I will first focus on these telecommunications specific additions to the Trade Practices Act (parts XIB and XIC) and discuss how they have affected competition in the industry.

10.5 Part XIB of the Trade Practices Act

The addition of part XIB to the Trade Practices Act was designed to enable the ACCC to act 'expeditiously' to control anticompetitive behaviour. Unsurprisingly, part XIB has not achieved its purpose. It has lowered the threshold for determining anticompetitive behaviour but there is little evidence that anticompetitive behaviour is under control. While the ACCC has the powers to determine what is anticompetitive behaviour, unfortunately the legal process involved in curbing such behaviour (the issuing of competition notices) is slow and ineffective.

Currently the ACCC has four notices against Telstra in relation to its processes and charges for transferring customers between carriage service providers. AAPT made the original complaint in August 1997. Notices were issued in September 1998, and reissued in December 1998. The matter is still before the courts and the behaviour in question continues despite the high penalties the court may ultimately award.

The Government has recognised the problem with the administration of part XIB and recently amended the Act in two ways.

- There is now a private right of action; it is no longer necessary to wait on the issue of a competition notice by the ACCC before private litigation can commence.
- The competition notice regime has been altered to allow two types of notice to be issued — part A and part B.
  - Part A notices, which have no evidentiary standing, are designed to be issued as soon as the ACCC has 'reason to believe' that a carrier or carrier service provider is engaging in anticompetitive behaviour.
  - Part B notices, which are prima facie evidence of anticompetitive behaviour, are expected to take rather longer to be issued (similar to the current notices).

The question is whether part A notice provision will be sufficiently robust to withstand the inevitable legal challenge it will attract when applied.

10.6 Part XIC of the Trade Practices Act

A major concern of the Government in formulating the 1997 legislation was that Telstra, in particular, had demonstrated during 1991–97 that it would use its market power to deny competitors (especially smaller ones) access to its facilities and services. To address this problem the Government introduced a telecommunications specific access regime into the *Trade Practices Act 1974*, part XIC. This provided a process for access seekers to gain access to the facilities and services of access providers.

The procedure requires access seekers to attempt to negotiate commercially for access to the required facilities or services. If, after a reasonable time, access seekers are unsuccessful in achieving satisfactory results, they may request arbitration by the ACCC.

No arbitration has yet been completed. The longest running case — *AAPT versus Telstra in relation to PSTN interconnection* — has been ongoing for seven months and is only now nearing the draft determination stage. Final determination may take a further three months. If Telstra appeals to the Australian Competition Tribunal, final resolution may take a further 12 months, then there is the possibility of a legal appeal.

Currently the ACCC has 16 declared services under arbitration. I do not believe that the Government envisaged that the 'arbitration safety net' in the legislation would become the primary access resolution mechanism. Obviously something has gone wrong with commercial negotiations as the preferred access process. The probable

reason for the high level of disputation in the industry is that commercial negotiation is unlikely to be effective when one player has virtually all of the market power and information on costs and customers.

Fortunately, the Government has recognised that delays in granting access best serve the interests of the access provider, usually the incumbent, and has introduced the concept of an interim determination the ACCC may make at any time during arbitration proceedings. Interim determinations will reduce the incentive for an access provider to delay arbitration because little commercial advantage accrues. It may also result in access providers becoming amenable to commercial negotiations.

10.7 Access to information

In our experience, negotiations with Telstra in particular are dogged by a lack of information regarding its cost structure. Until recently, the ACCC suffered from the same problem but, as a consequence of a major research project, it is now in a better position to assess Telstra's costs of providing and operating its public switched telephone network. Telstra's competitors have yet to gain access to this information.

A recent amendment to the Trade Practices Act will hopefully address this information asymmetry and provide a more equitable database for access seekers to conduct negotiations with access providers. The approach preferred by many in the industry would be to 'ring fence' Telstra's upstream and downstream to provide greater visibility of its network costs and internal transfer pricing arrangements. Attempts to persuade the Government to adopt this form of financial separation of Telstra's businesses have been unsuccessful.

Status of competition

The Government launched the 1997 Act with a great deal of fanfare. It created high expectations in the industry and among users that the new regime would result in competition in all areas of the market — long distance, mobile and local service.

Unfortunately, many of these expectations have not been met. Despite strong competition in long distance rates (both national and international), mobile and local call prices have experienced almost no change in the two years since the introduction of the Act. Mobile call charges, in particular, are astronomical compared with equivalent fixed network charges. Today fixed network call charges to the United Kingdom or the United States are around 20 cents per minute, while calls to mobiles start at around 35 cents per minute for an equivalent local call and

at about 56 cents per minute for a long distance call. Obviously, something is wrong with competition in the mobile market and corrective action is needed.

Similarly, in the local call market, competition is in its infancy and prices will not fall until there is stronger competition. If, as expected, AAPT and other carriers enter the market using either Telstra's copper network (soon to be unbundled by the ACCC), or some of the new technologies now available (LMDS, CDMA and satellite), local call prices should fall rapidly, similar to what has occurred in long distance prices.

The current regulatory regime, while purporting to be supportive of competition, has not lived up to stakeholders' expectations. The recent changes to the Act have resulted from the Government's recognition of the high level of frustration and disappointment in the industry. The Government had expected that Telstra would bow to its intentions, but Telstra did not and still does not. Further, the Trade Practices Act has not proved to be sufficiently robust to ensure that the ACCC is able to control Telstra's market behaviour in the desired way.

The future of competition

The past two years have been extremely difficult for all of Telstra's competitors. Telstra has used every means to give itself competitive advantages, and has used its market power to prevent the growth of competition, especially for mobile and local services. Despite losing market share in long distance services, Telstra continues to post record profits.

There are indications that things will change for the better for consumers. Competition in calls to mobiles from the fixed network has just begun and competition in the local call market is scheduled to take off before the end of 1999. Thus, for the first time, competition will be present in all major markets in Australia.

Despite the many difficulties we have faced over the past two years, I am hopeful that the worst of our legislative problems are behind us. The Trade Practices Act has been strengthened considerably and we are now looking to the ACCC to create a fairer competitive environment. I believe it is willing and able to do this.

A reduced need for strong industry regulation is unlikely in the near future, and a strong regulatory regime will probably be needed for some years. This is not what the Government intended when it launched the 1997 Act, but it appears to have little choice if it wishes to promote stronger competition in all market segments.