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2 June 2000

The Commissioners
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Review of Telecommunications Specific Competition Regulation

Dear Sirs

Thank you for the opportunity to respond to the Inquiry, and the above-mentioned discussion paper.

Firstly, a brief overview of FlowCom. FlowCom is a vertically integrated facilities based telecommunications group with three operating divisions:

- Macrocom – a licenced carrier;
- Flow Communications – a carriage service provider of high speed Internet/data/multimedia services; and
- Transaction Network Services Australia – an applications provider of EFTPOS and transaction services.

FlowCom currently targets three distinct areas of the telecommunications market – bulk switched broadband services; high speed internet packet switched data and IP carriage services; and end-user applications.

FlowCom has been operational since 1998, and our network currently stretches through Sydney, Melbourne and Brisbane with Points of Presence in regional centres and plans for expansion to more than 30 locations by the end of 2000.

Yours sincerely,

Julie Stone
Regulatory Affairs
FlowCom Limited



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Submission to the Productivity Commission

Review of Telecommunications Specific Competition Regulation

10 August 2000

Introduction

The telecommunications market in Australia has come a long way since the days of the Telecom Australia monopoly; the legislative instruments and regulatory instruments that have been implemented since 1991 have been successful in opening competition. However there are still areas where competition could be improved - especially in areas that are outside the major traffic routes of the eastern seaboard. Most Australian companies of any size have branches or agents in all capital and regional cities. In order for Australian organisations to compete in both the domestic and global economies, there must be both a robust competitive and geographically widespread structure in the domestic market. To date this has not occurred.

According to the NBI¹ Australia is presented with both significant opportunity and threat in the current paradigm shift in telecommunications from a voice to a data environment.

"There are also some serious timing lags and discrepancies involved, country to country, between city and rural, and the technologically rich and poor. The US ascendancy in infrastructure investment, globalised e-commerce, content creation and its substantial time lead in the online world could have a major impact on the economic performance of other countries. In Australia's case, the US timing advantage has been estimated to be about one to two years. Given the exponential growth of, say, e-commerce in the US, this sort of lead means the absolute difference in performance is almost certain to widen rather than remain constant or decrease - particularly given that it has a tendency to draw new investment to the US rather than Australia. ...While Australia remains the *island continent* in geographical terms, it is important this does not also represent our economic, cultural and policy mind-set. ...What is at issue here is not whether we are part of a globalised economy and communications infrastructure but how quickly and effectively we respond to the threats and opportunities represented by this global environment in order to maximise the national benefits from participating in it."

The legislative mechanisms put in place to promote and enable competition should be such that organisations are ensured of a fast resolution of issues. As noted above, Australia is lagging by about one to two years behind the US, which is about the timeframe it is currently taking to move from a service declaration by the ACCC through the self-regulatory structures to market implementation.

¹ Australian Information Economy Advisory Council, Bandwidth - National Bandwidth Inquiry, Commonwealth of Australia, 1999. P. 23

Barriers to competition

One of the findings of the Bandwidth² report was that:

"Backbone bandwidth capacity ownership is highly concentrated. Outside the large markets of the eastern seaboard there are only two significant providers of bandwidth, and only one of them has true national coverage. This market concentration may limit the amount of capacity that is actually supplied to the market through active or passive 'rationing' of that capacity by its owners."

The oversupply of bandwidth in Australia, combined with the concentration of that supply in the hands of a small number of carriers and a restricted geographical distribution has significant impact on the nature of competition in Australia, as well as the cost structure under which that bandwidth is supplied. At one end of the scale are the high demand routes – ie. intra- and inter-capital routes which have excess capacity (which is not necessarily available to end customers), to the rural and remote routes where there is in some cases insufficient capacity to meet current demand. This can be partially attributed to the effects of lack of competition in rural and remote areas. The report notes that the disparities between the price of (wholesale) bandwidth on high and low traffic routes is expected to increase with rural and remote areas being disadvantaged while competition is constrained³. In practice the impact of this may be a heightened gap between rural and city, and the lessening of opportunity to build alternative economies in rural areas.

It is worth considering incentive structures to encourage more efficient use of bandwidth and greater competition in its supply in non-high use or geographically remote areas.

Existing telecommunications-specific competition regulation

Part IIIA

In relation to Part IIIA, there is no evidence that the access declarations under this part of the TPA will work, and it is therefore, at this stage, not reasonable to suggest that this is a viable alternative to Part XIC. FlowCom does not consider that the general test in Part III would adequately address issues that arise in relation to telecommunications interconnection (particularly any-to-any connectivity). On a practical level, FlowCom does not consider there would be any benefits of a move to Part III which would justify the substantial cost of dismantling and rebuilding the regulatory structures which have been developed to address telecommunications issues

² *ibid*

³ *ibid*, p. 100

Part XIC

Part XIC recognizes the unique requirements of the telecommunications industry and is an essential tool for the industry, however it should only be used where commercial negotiations and competitive pressures do not achieve the desired result. In addition, declarations should not continue in perpetuity - in market segments where competition has developed, declarations should be subject to review and lifted as required.

FlowCom believes that Part XIC disputes can be classified into two areas:

1. General access disputes in which industry-wide arrangements are required in areas where a dominant position is held by a single Access Provider. In these disputes FlowCom considers that at a minimum, transparency of disputes would considerably speed up competitive processes. In this instance, where initial investigation by the ACCC shows there is reason to support such a dispute, submissions could be sought from all Access Seekers on the substance of the dispute.
2. Individual disputes where the access undertaking should be unique to the Access Seeker based on traffic undertakings and conditions of use. The current Interim Determination system works effectively, however it needs to be strengthened, and have process that engenders faster resolution of disputes. This may be facilitated through the use of hearings as well as submissions.

Part XIB

Many of the reasons for the original implementation of industry-specific anti-competitive legislation still hold, and are perhaps even more important now because of the rapidly changing environment and convergence between the IT, telecommunications and broadcasting/media industries.

The unusual characteristics of telecommunications industries also means barriers to entry remain high. The combination of significant economies of scale and scope and, in addition, the presence of “network externalities” in many telecommunications markets creates further difficulties for new entrants in establishing a presence.

The dynamic nature of the telecommunications industry also creates a need for industry-specific regulations. As noted by the then Minister for Communications:

"Total reliance on Part IV of the TPA to constrain anti-competitive conduct might, in some cases, prove ineffective given the still developing state of competition in the telecommunications industry. The fast pace of change and complex nature of

horizontal and vertical arrangements of firms operating in this industry mean that any anti-competitive behaviour could cause rapid damage to the competition that has already developed and severely hamper new entry."⁴

In the local telephony market, network ownership and control remains basically with the incumbent carrier (Telstra still retains direct connection to between 97-99% of lines). In the mobile market the situation is changing with new networks emerging this year – one of these networks will also provide competition in the local telephony space. These emerging networks represent a threat to the current incumbents in both markets, and during this most vulnerable period, government intervention is still required to ensure that competition continues relatively unhindered.

The continuing dominance Telstra and the high degree of vertical integration generally mean that it will be necessary to retain the current “effects-based” test in Part XIB at least for the foreseeable future.

Number portability

As noted earlier, if Australia is to improve its competitive position in the global marketplace, then the processes that are put in place to promote competition in the domestic market must be capable to reacting quickly to changing market needs. The current processes appear to encourage long delays between the initial investigation, the declaration process and the final implementation of a commercial product. Portability is a good example:

- Prior to 1997, (in about 1995) discussions on the need for portability, and its implications on networks were commenced – some of the outcomes of these discussions were incorporated into the Telecommunications Act, 1997;
- In September 1997 the ACCC declared local number and local rate and freephone number portability;
- Bilateral implementation of local number portability between Cable & Wireless Optus in May 1998;
- Full industry implementation of local number portability in Jan. 1999
- In November 1998, local rate and freephone portability implementation delayed until November 2000;
- Mobile number portability declared in December 1999;
- The ACA announced a preliminary implementation date of March 2001 for MNP;
- Final implementation date for mobile number portability moved to September 2001

⁴ Trade Practices Amendment (Telecommunications) Bill 1996, Second Reading Speech

This is a time lag of 5-6 years before a commercial product is available to the general public, and portability is seen as essential to competition in telecommunications.

It is also noteworthy that public awareness fairly low and these initiatives do not necessarily meet their objectives. Public awareness is an essential element of competition, and it may be that one of the existing industry bodies (such as ACIF or TAF) should also be responsible for promoting ongoing public awareness campaigns for these initiatives.

Recommendations

On the whole FlowCom would recommend that the current telecommunications specific competition regulatory structure be strengthened and that processes be improved to ensure faster resolution of disputes and improved time to market.

- FlowCom does not consider that the general test in Part III would adequately address issues that arise in relation to telecommunications interconnection (particularly any-to-any connectivity).
- The processes for resolution of disputes under Part XIC needs to be strengthened and made faster. FlowCom believes that this can be achieved through the classification of these disputes in to general (affecting multiple Access Seekers) and individual disputes. In the case of general disputes, a more transparent process would ensure faster resolution, and in the case of individual disputes, the use of hearings may facilitate faster resolution of these matters.
- The characteristics of the telecommunications industry, and in particular the requirement for any-to-any connectivity, the continuing dominance Telstra and the high degree of vertical integration generally mean that it will be necessary to retain the current “effects-based” test in Part XIB at least for the foreseeable future.
- In general, FlowCom would comment that the industry self-regulation processes need to be focused and improved such that the period between service declaration and commercial implementation of a product or service is shortened. This is essential if Australia is to compete successfully on both the domestic and global markets.