

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

By: Robert Baxt
 Arthur Robinson & Hedderwicks
 Melbourne, Australia and
 Hank R. Spier
 Australian Competition and Consumer
 Commission
 Belconnen, Australia

Telecommunications - New Regulatory Framework - Role of the Australian Competition and Consumer Commission

The Australian Government's policy is to introduce full and open competition to the telecommunications industry from July 1, 1997 and reinforce consumer protection and reform of 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; and
- 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; and
- contestable market strategies which reduce prices and increase quality of service.

The Government's package of legislation involves a new Telecommunications Bill and amendments to other legislation, particularly the *Trade Practices Act* (the "TPA"), aims to establish new economic and competition rules for the industry and is intended to help achieve the above aims. In particular, the Australian Competition and Consumer Commission (the "ACCC") will assume the primary role for competition and economic regulation of telecommunications services from July 1, 1997.

CANADIAN COMPETITION RECORD

How the Commission will Administer the Provisions

It is important to note that the legal concepts to be used in ensuring open and competitive telecommunications markets are largely the same as 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 (the "COAG") where it was agreed to subject previously exempted industries and trading bodies to general competition law. It would be inconsistent with this approach for the Australian Government 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 ACCC will need to administer competition rules in the telecommunications industry.

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 an incumbent monopolist brings to a newly deregulated industry.

The ACCC will be required by law to publish guidelines for the purpose of deciding whether to issue a competition notice one of the new powers which the ACCC will have available to it. Generally, for those seeking guidance as to how the ACCC will administer the new provisions, a starting point needs to be what the ACCC 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 the same way that the ACCC has published other guidelines and information papers on various aspects of general competition law, it will no doubt over time be doing the same in relation to the telecommunications specific provisions.

Another issue is whether the ACCC will take a proactive or reactive role in the industry as 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 ACCC'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 ACCC'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.

CANADIAN COMPETITION RECORD

Market Definition

Because of open entry, convergence and the rapid evolution of telecommunications goods and services, market dynamics will change after July 1, 1997. It follows that market assessment in this new environment will be different from currently existing market conditions. These reflect somewhat the static conditions inherent in a regulated oligopoly and the administrative processes found in the *Telecommunications Act*. Any demand by industry for certainty as to how the ACCC will approach market definition when considering its various interventionist powers cannot be met in explicitly categorizing markets through an *ex ante* process. This is not to say, however, that the ACCC will not be attempting to define relevant markets in the process of ongoing monitoring activities and the gathering of marketplace intelligence as it considers how it might need to intervene in markets by using its various powers under Part XIB, Part XIC and section 50.

Ensuring Effective Access - Balancing the Power of Incumbents with Needs of New Entrants

By far the most important competitive issue at stake is ensuring that there is effective regulation of access by new entrants to an incumbent's network. Economic theory would have it that an effective access regime must ease concerns about anti-competitive conduct. The principle being that anti-competitive conduct is less likely to occur, or if it occurs, succeed, where a firm is not in a position to durably exclude new entry, since it could not then recoup the costs which the conduct had entailed.

The access provisions in Part XIC, derived in large part from the existing Part IIIA of the TPA, are an attempt to overcome the imbalance of power between an incumbent monopolist and new entrants. Such sources of power would include:

- the control of access to key network elements; and
- asymmetrical network and market information.

In addition to these safeguards, the government has recognized that there may still be an 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.

The ACCC has issued draft access pricing principles and is looking at the application of record keeping rules which are intended to reduce some of the information asymmetry that would otherwise exist. The principles are intended to guide the parties in their access negotiations and do not attempt to specify an actual price based on some all-encompassing costing principle. The approach rather is to set certain limits on pricing behaviour by incumbent access providers, through specific anti-discrimination and competitive parity rules, and to investigate cases more closely where clear breaches of the rules are evident.

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

CANADIAN COMPETITION RECORD

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 XI, to rectify the problem as expeditiously as possible.

Industry Self-regulation and Transitional Work

One of the important evolutions as the telecommunications 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 to a variety of codes such as consumer and technical codes of practice but is no less important in relation to access. In a complex and technically detailed network industry as this, it is desirable to encourage participants who have superior knowledge on such detailed matters to establish multilateral forums by which standard terms and conditions can be developed and applied. This is the purpose of the access code provisions which allow model terms and conditions to be adopted in undertakings by individual carriers or carriage service providers.

Upon the introduction of the new Bills to Parliament, the Government stated 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.

In its administration of its access responsibilities, the ACCC will have regard to the principles and legislative provisions contained in the Trade Practices Amendment (Telecommunications) Bill, particularly the new section 152AB 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.
