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DEVELOPMENTS IN TELECOMMUNICATIONS: AN UPDATE

-- Australia --

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DEVELOPMENTS IN TELECOMMUNICATIONS: AN UPDATE

-- Australia --

Background to the New Reforms

1. Since the roundtable discussion on telecommunications, held on 7 November 1995, a package of legislation has been passed by the Australian Parliament (in March 1997) providing a role for the Australian Competition and Commission (ACCC) in, amongst other things, regulating access within, and enforcing competitive safeguards in, the Australian telecommunications industry. The package of legislation includes telecommunications specific amendments to the *Trade Practices Act 1974* (TPA), provision for transitional arrangements from the previous regulatory regime existing under the *Telecommunications Act 1991*, a revised *Telecommunications Act 1997* and amendments to the *Radiocommunications Act 1992*.

2. It is the broad policy intention of the legislation that as from 1 July 1997, open market access is established to both telecommunications infrastructure and service provision. Restrictions on the installation of telecommunications infrastructure have been removed and carrier licences will now be issued to any person wishing to use infrastructure to provide services to the public, subject to having in place an approved industry development plan. Provision of carriage services by carriers and non-carriers is regulated by legislated service provider rules.

3. Technical regulation and licensing will come within the jurisdiction of a new body called the Australian Communications Authority (ACA). The ACA will be formed through the merger of the previous telecommunications regulator, AUSTEL, with the Spectrum Management Agency. Those parts of AUSTEL which were involved in regulating access and enforcing competitive safeguards were transferred to the ACCC on 30 June 1997. From 1 July 1997, competition regulation of the telecommunications industry is in the hands of the ACCC, as the national general competition regulator, in place of AUSTEL.

4. Since the above amendments came into force on 1 July 1997, the ACCC has made a number of regulatory decisions providing for a transition to an open telecommunications environment, and Australian industry has witnessed an expansion in the number of telecommunications carriers, with plans to develop new infrastructure to introduce a broader range of services to the Australian public.

The New Trade Practices Act Regulatory Regime

5. Amendments to Australia's general competition legislation, the TPA, introduce two new Parts, one dealing with anti-competitive conduct in the telecommunications industry (Part XIB), and the other setting out the rules and procedures for guaranteeing access to network services, for the purposes of interconnectivity and interoperability between carriers and service providers (Part XIC). These parts will apply in addition to other parts of the TPA, which regulate restrictive trade practices and unfair practices in general. The new legislative framework is summarised below.

Anti-competitive Conduct

6. Part XIB is a telecommunications specific regime which aims to prevent carriers and carriage service providers with a substantial degree of market power in a telecommunications market from engaging in anti-competitive conduct. Under Part XIB carriers and carriage service providers will be prohibited from engaging in anti-competitive conduct as defined in the Part and this will be known as the 'competition rule'. Anti-competitive conduct in Part XIB is defined in two ways.

7. Firstly, a carrier or carriage service provider with substantial market power (in a telecommunications market) engages in anti-competitive conduct if it takes advantage of its market power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market.

8. Secondly, a carrier or carriage service provider will be taken to engage in anti-competitive conduct if it engages in conduct relating to a telecommunications market which contravenes most of the existing general restrictive trade practices provisions (in Part IV) of the TPA, ie those dealing with contracts, arrangements covenants or understandings that restrict dealings or affect competition, misuse of market power for the purpose of undermining competition, anti-competitive exclusive dealing and resale price maintenance.

9. On identifying anti-competitive conduct in breach of the competition rule, the ACCC will be able to issue a 'competition notice', which states that the carrier or service provider has contravened or is contravening the competition rule. The competition notice will be prima facie evidence of the matters in the notice and if the carrier or carriage service provider continues with the conduct which is the subject of the notice, the ACCC will be able to seek remedy (eg injunction) and pecuniary penalty (up to \$10 million in fines for each breach) through an order of the Federal Court. Once a notice has been issued, private parties may seek injunctions or other orders for breaches of the competition rule.

Guidelines

10. The ACCC must have regard to guidelines (which it is required to produce) in the process of deciding whether to issue a competition notice. The guideline only addresses the last stage in the ACCC's decision making process after it has taken the view that there is anti-competitive conduct. The ACCC has a discretion to decide whether it should issue a competition notice or not, having considered whether there may be other more appropriate means in which to address anti-competitive conduct.

Exemption Orders

11. Applications for exemption orders can also be made to the ACCC to exempt carriers and service providers from the scope of the anti-competitive conduct provisions. The order does not exempt the parties from breaching any of the general restrictive trade practices provisions contained in Part IV of the TPA, but only prevents the ACCC from issuing a competition notice under Part XIB of the Act.

Tariff Filing Directions

12. The legislation also provides that in some circumstances carriers or carriage service providers will be required to provide information to the ACCC relating to charges they impose for telecommunications goods and services.

13. Information can be made available in two ways.

14. Firstly, Telstra, the previous incumbent monopolist, is required to provide the Commission with a written statement setting out information about its intentions in relation to charges for those basic carriage services which were in force before 1 July 1997. The ACCC will have the power to exempt a charge for a specified carriage service from the scope of this requirement.

15. Secondly, the ACCC will have a general power to issue Tariff Filing Directions to any carrier or carriage service provider which has substantial market power, requiring it to provide the ACCC with information on charges for telecommunications goods or services. The information can be required in a number of ways:

- general information on charges;
- notice of their intentions to impose a new charge, vary a charge, or cease to impose a charge; or
- information about the imposition, variation or cessation of a charge after the event.

16. Tariff information filed with the ACCC is not automatically made available to the public. If the ACCC decides to make the information public, that decision is reviewable by the Australian Competition Tribunal, an arm of the Federal Court, on application by the carrier providing the information.

Record Keeping Rules

17. In addition, the ACCC will be able to make rules specifying the manner in which specified carriers or service providers must keep and retain records relevant to, amongst other things, the exercise of ACCC powers relating to the competition rule and ensuring access to competing carriers' services. Information kept under the record keeping rules are subject to the general information gathering powers the ACCC has under section 155 of the TPA.

Access

18. The new Part XIC establishes an industry-specific regime for regulated access to carriage services, and reflects policy interests in promoting any-to-any connectivity and reliance on commercial resolution of issues as far as possible. This is similar to the general access provisions found in Part IIIA of the TPA where certain facilities of national significance may be declared by the relevant Minister, based on recommendations made by the National Competition Council, and thereby made subject to regulated access, or the owners of the facilities may file access undertakings with the ACCC.

19. However, access to telecommunications services under Part XIC will be achieved through the declaration of eligible services by the ACCC, either in consultation with an appointed industry self regulatory body made up of carriers and carriage service providers, or by the Commission through declaring access services itself after a public inquiry. The industry body (known as the Telecommunications Access Forum - the 'TAF') will also be encouraged to draft an industry code, setting out the terms and conditions for providing access to carrier and carriage service provider members. The ACCC will have the function of approving the TAF access code and if the industry code is unsuitable, the ACCC will be able to apply its own. Carriers and carriage service providers will be able to give undertakings on access and/or register agreements thereby enabling the ACCC to exercise arbitration powers in respect of access disputes.

20. The ACCC has produced a document on access pricing principles which it will apply in arbitrating access disputes and a statement deeming certain telecommunications services which existed

prior to 1 July 1997 to be declared access services and thereby subject to the new access regime. An online version of this publication is available on the ACCC's Internet homepage: <http://www.accc.gov.au>.

21. This deeming provision has enabled the Commission to allow for the seamless acquisition of access services which were available to carriers and carriage service providers under the restricted access regime prior to the enactment of Part XIC. A key objective to which the Commission must have regard in making access decisions is whether the matter being considered is in the long term interests of end users.

General Industry Specific Legislation

22. There is industry specific legislation embodied in the *Telecommunication Act 1997* (Telecommunications Act) which has a number of specific functions and powers for the ACCC in addition to the other bodies involved in regulating the industry, ie the ACA and the Telecommunications Industry Ombudsman ('TIO').

The Australian Communications Authority (ACA)

23. The ACA's obligations under the Telecommunication Act primarily relate to:

- issuing carrier and cabling licences;
- administration of consumer safeguard provisions (eg. the universal service arrangements, privacy protection and customer service guarantees);
- technical regulation;
- administration of the Numbering Plan; and
- monitoring the performance of carriers and carriage service providers.

24. The ACA is also responsible for managing the radiofrequency spectrum in accordance with the *Radiocommunications Act 1992*.

The Telecommunications Industry Ombudsman (TIO)

25. Carriers and carriage service providers are, unless otherwise exempted by the ACA, required to enter into and comply with the Telecommunications Industry Ombudsman Scheme. This scheme provides for the TIO to investigate and make determinations relating to complaints about carriage services by end-users of those services. The complaints may for example, concern billing, or the manner of charging for the supply of carriage services. The TIO, however, is not empowered to investigate complaints about the level of tariffs, the content of content services, or matters falling within the ACCC's jurisdiction.

The Australian Competition & Consumer Commission (ACCC)

26. As distinct from the ACA and TIO, the Commission's main powers under the Telecommunications Act relate to telecommunications competition matters coming within that legislation. Various provisions under the Telecommunications Act enable the ACCC to have a role beyond that which is found in the TPA. This involves administering rules of conduct which apply to international telecommunications operators, issuing directions to the ACA on competition related matters, providing advice to the ACA on industry codes of conduct, issuing declarations to a 'declared manager of electronic addressing' and arbitrating disputes on a range of issues.

27. A brief description of the Commission's functions and powers under the Telecommunications Act follows.

International rules of conduct

28. In introducing open competition in the Australian telecommunications industry the Federal Government sought to minimise the potential for abuse by international telecommunications operators outside Australia. There was concern that international telecommunications operators outside Australia could use market power derived from operations in another country to the detriment of telecommunications operators in Australia.

29. Part 20 of the Telecommunications Act provides a mechanism by which the Government can deal with what is termed 'unacceptable conduct' engaged in by international operators, through empowering the Minister to make *Rules of Conduct* directed at regulating carriers and carriage service providers in their dealings with International telecommunications operators. The ACCC has general administration of the Rules of Conduct, which authorise it to make determinations of a legislative nature, issue directions and make information available to the public. Under the Telecommunications Act, an international telecommunications operator engages in unacceptable conduct if it uses power in a market, or any legal rights or legal status, or engages in any other conduct, in a manner that is, or is likely to be, contrary to Australia's national interest.

30. The Minister has made Rules of Conduct to prevent, mitigate or remedy any unacceptable conduct by an international telecommunications operator, by:

- authorising the Commission to make determinations of a legislative nature imposing requirements, prohibitions or restrictions on carriers or carriage service providers;
- authorising the Commission to give directions to carriers or carriage service providers of an administrative nature which impose requirements, prohibitions or restrictions;
- requiring carriers and carriage service provider to comply with ACCC determinations and administrative directions; and
- authorising the Commission to make information available to the public, a specified class of persons or a specified person.

ACCC directions to the ACA on number portability

31. In administering the Numbering Plan under the Telecommunications Act, the ACA cannot include rules about number portability unless directed to do so by the ACCC, and any rules the ACA puts in the Plan regarding number portability must be consistent with any directions by the ACCC.

ACCC directions in regards to electronic addressing

32. Division 3 of the Telecommunications Act provides for the regulation of electronic addressing by empowering the ACA to determine that a specified person or association is the *declared manager of electronic addressing* in relation to a specified kind of listed carriage service.

33. The ACA must not make such a determination unless the ACA is directed to do so by the ACCC; or the ACA is of the opinion that the person or association is not managing electronic addressing in accordance with generally accepted principles and standards.

34. The ACCC must not give a direction to the ACA unless, in the ACCC's opinion, compliance with the direction is likely to have a bearing on competition, and the ACA must consult with the ACCC before it gives a direction. The ACA and the ACCC may only give directions to a declared manager of electronic addressing so long as the electronic addressing is of public importance. In determining whether the electronic addressing is of public importance, regard must be had to the extent to which the addressing is of significant social and/or economic importance to service providers and end-users of carriage services.

ACCC directions on technical standards

35. The ACA may make a technical standard relating to the interconnection of facilities, but must not do so unless directed to do so by the Commission. A direction by the Commission must not be given unless it is necessary to promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services; or reduce or eliminate the likelihood of hindrance to the provision of access to declared services.

ACCC advice on industry codes of conduct

36. The Telecommunications Act provides for industry self regulation of a wide range of telecommunications activities by means of industry developed codes of conduct which may be registered by the ACA. While the regime gives the industry scope to develop its own codes of conduct, the legislation also provides that the ACA may intervene and establish its own requirements, should the industry fail, by declaring an industry standard. However, before the ACA registers an industry code it must be satisfied that the ACCC has been consulted about the development of the code, and it must not declare or vary an industry standard before it has consulted with the ACCC.

ACCC arbitration responsibilities under the Telecommunications Act

37. Under various provisions in the Telecommunications Act the Commission may become involved in the arbitration of disputes in relation to a number of matters, including provision of carrier access to telecommunications transmission towers or underground facilities, information relating to the operation of telecommunications networks, operator services to end-users of standard telephone services, directory assistance services, provision of number portability, pre-selection, facilities for the purpose of emergency call services, and specified defence services.

38. The conduct of an arbitration by the Commission in relation to any of these issues, will only occur where the parties cannot agree upon the terms and conditions of access, compliance or provision of services and where the parties cannot agree upon a private arbitrator.

Access to the Radiocommunications Spectrum

39. The government has also amended legislation governing the administration of the radiocommunications spectrum (the Radiocommunications Act) to introduce provisions which deem the allocation of licences to use spectrum, as an acquisition of an asset for the purposes of the general provision in the TPA which prohibits acquisitions of assets that have the effect or likely effect of substantially lessening competition in a market.

40. Prior to the amendments, the TPA was limited in its scope because it applied only to the transfer of existing licences between persons (where it could be characterised as the acquisition of an asset) and not to the initial allocation of a licence by a Government agency. The recent amendments to the

Radiocommunications Act, by deeming an allocation to be an acquisition for the purposes of the TPA, thereby brings the allocation within the provisions of the TPA which provide for persons, including the ACCC, to take action in the courts seeking divestiture of those assets. Authorisation is available for acquisitions which may have the effect of substantially lessening competition if the party seeking to acquire access to the spectrum can satisfy the ACCC that in all circumstances the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

41. Consequently, the ACCC has the primary responsibility for ensuring that the allocation of new spectrum and apparatus licences by the ACA (and third party authorisations by the holders of spectrum and apparatus licences) do not result in a substantial lessening of competition in a market.

42. In addition to the above, the Minister for Communications and the Arts also has the power to implement procedures the ACA must follow in the allocation of new spectrum and apparatus licences to a person. For example, a power to impose limits on the allocation of licences to any person, and to require the ACA to give specified information to the Commission.

43. The Radiocommunications Act (and related legislation) was recently referred to a task force of officials for review by 30 June 1998. The review is to evaluate the appropriateness, effectiveness and efficiency of spectrum management provided for in the Act. This review forms part of the Government's commitment to review, by the year 2000, all legislation that restricts competition or imposes costs on business. The review will provide an opportunity to establish the case for retaining, modifying or reforming current regulatory arrangements. The guiding principle of the legislation review process is that legislation should not restrict competition or impose costs on business unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition.

Competition in the Local Loop and Long Distance Markets

44. Prior to 1 July 1997, infrastructure for local and long distance services could be provided solely by the two holders of general telecommunications carrier licences, Optus Communications and Telstra Corporation (the latter being the previous government owned incumbent monopolist). Optus began offering a local call service, at 20% below that offered by Telstra, utilising a hybrid fibre coaxial network in selected metropolitan areas. However, technical difficulties with its ATM network have apparently been responsible for a slow start to the local call service. As at the middle of 1996 it had approximately 20,000 locally connected subscribers and has been slowly increasing that number as it continues to offer more services to its approximate 200,000 pay television customers, offered by Optus Vision, its loss making pay television arm. Notwithstanding the losses incurred by Optus Vision, Optus' communications operation has experienced strong growth in its core business of fixed long distance and mobile, posting an operating profit of \$123 million for 1996/97, out of a net total revenue of \$1.9 billion. Analysts expect that Optus' revenue will continue to grow, reaching the \$4 - \$5 billion mark by 2005.

45. Continuing strong growth in the market has enabled Telstra to achieve an increase in revenue, despite a loss of market share from competition by other carriers and carriage service providers. Telstra's net total revenue for end of year 1996/97 was \$15.4 billion and the company posted a net profit of \$1.6 billion after substantial abnormal write downs of \$2.3 billion, in large part related to its investment in pay television.

46. A third mobile carrier, Vodafone, has been operating since October 1993. A number of (mainly switched) service providers, reselling fixed long distance and mobile, shared in the remainder of total telecommunications revenue in Australia of an estimated total \$25.3 billion (including equipment supply).

Broadband Cable Competition

47. Broadband cable networks have now been installed by Optus Communications (initially through its partner Optus Vision) and Telstra, in the major Australian cities of Sydney, Melbourne, Adelaide and Brisbane which pass around 2.5 million homes each. The two cable networks, which it is planned will be used to deliver telephony on-line services and pay television, are around 80% to 90% duplicated.

48. Optus Vision was by acquired by Optus Communications in March 1997, following substantial losses incurred by Optus Vision through a combination of both low take up of its pay television services and initial problems in providing a bundled communications service (including local telephony) to its subscribers. Telstra has experienced similar losses, incurred through the substantial infrastructure costs and low take up of its pay television service, operated in conjunction with Foxtel, a subsidiary of News Corporation.

49. The combination of poor free to air television reception in regional Australia and experience in the United States which indicates that in cities with 10,000 plus population, cable television can be deployed in an economically viable way has led to some development of broadband infrastructure in regional Australia. Northgate Communications Australia, a subsidiary of a US parent company, appears to be the most active market participant, commencing with the construction of a cable television network in regional Victoria (Ballarat) and plans for another forty or more in other regional centres around Australia.

50. Developments in the immediate future will most likely involve joint venture operations between established and recent entrants in telecommunications services with electricity distributors, through the utilisation of existing electricity distribution infrastructure.

Competition in Mobile Telephony

51. Prior to 1 July 1997 there were three licensed mobile phone operators. The Australian market, in the new liberalised environment, has yet to see the emergence of any new operators. Mobile telephony is one of the high growth areas in the Australian market. An analysis of the mobile services market in Australia revealed that in 1997 there were 1.8 million new mobile phone users, bringing the total number of users as at 30 June 1997, to 4.9 million, of which 45% are connected to digital services.

52. Analysts considering market share in mobile services estimate that Telstra has an approximate gross revenue market share of 74% (including analogue), Optus 16% and Vodafone and other resellers make up the rest of the market.

ACCC Approach

53. In this short period since 1 July 1997, the Commission has already made some significant decisions aimed at facilitating effective competition within the telecommunications industry:

- On 24 June 1997 the Commission issued a statement which determined the terms and conditions on which carriers and service providers could gain access from 1 July 1997. The determination effectively reduced the price new carriers are required to pay for interconnection with Telstra's network through National Access. The determination provides an environment for new players to compete with Telstra and Optus on fair and reasonable terms and is an important step away from the duopoly arrangements. However, from 1 January 1998 charges will be subject to commercial negotiation between Telstra and industry players.
- On 30 June 1997 the Commission issued a statement listing telecommunications services to which carriers and service providers will have access from 1 July 1997. The deemed services were originally covered in access agreements between Telstra, Optus and Vodafone. The deeming of specific services established a starting point for all new entrants prior to 1 July and continues to provide a basis for declaration of other services under the standard declaration provisions of the new legislation.
- On 9 September 1997 the Commission issued draft directions to the ACA pertaining to number portability in accordance with the statutory requirements of the revised Telecommunications Act. The draft directions deal with portability by service type and relate to:
 - local number portability;
 - freephone and local rate number portability; and
 - universal personal telephone (UPT) number portability.

54. In addition, on 23 September 1997 the Australian Government decided to impose interim licence conditions on Telstra, requiring it to provide local number portability to Optus by 1 May 1998. In due course, local number portability will extend beyond Optus and Telstra to encompass all carriers and carriage service providers.

55. Number portability is relevant to effective competition, and the Commission's draft directions to the ACA are designed to promote the long term interests of end-users and to achieve effective competition in telecommunications markets.

Conclusion

56. The reaction of the industry and public to the new arrangements has been favourable, with wide acceptance that they provide a balanced approach to the introduction of open competition. With the new regime in place, rapid development of the telecommunications market, the introduction of a range of new services offering substantial increases in functionality and real price reductions are anticipated.