



Submission to the Trade Practices Act Review

October 2002

Introduction

Comindico welcomes the opportunity make this contribution to the review of the competition provisions of the Trade Practices Act.

Comindico is a privately owned telecommunications company, created in 2000. The company has constructed a national telecommunications network capable of carrying voice and data traffic across a single network architecture. The Comindico network is exclusive based on IP (Internet Protocol) technology; a technology that is capable of carrying services such video, messaging, voice and video conferencing or any other form of digital data. It is the only national 100 percent IP based network capable of carrying carrier grade voice services.

The Crucial Role of Competition in Telecommunications

Comindico believes that the ambition of the legislative and regulatory management of the telecommunications industry should be to deliver the best available range of telecommunications services to Australians, regardless of where they live. In an industry where the technological landscape changes as quickly and profoundly as it does in telecommunications, this implies that legislation and regulation should encourage new entrants and investment in new technologies.

A foundation principle to achieve this should be the maintenance of competitive pressures on all participants. Competition liberates investment in technological alternatives and refreshes the price and service options available to consumers.

Anti-competitive behaviour, on the other hand, suffocates investment and stops the deployment of new technologies.

This is especially true in industries with high capital entry costs, such as telecommunications.

Structural Market Failure in Telecommunications

The telecommunications industry in Australia has been bedevilled by continual disputes over issues such as the availability, terms and pricing of access to declared facilities, and by aggressively anti-competitive behaviour toward new entrants. The Federal Government has responded to these issues by strengthening the regulator's ability to deal with these issues as they have emerged.

At the core of these issues, however, is the domination of the industry by Telstra, which enjoys an estimated 75 percent of all revenues and 95 percent of industry profits. This situation is clearly not in the interest of consumers, other industry participants, or the economy generally. It also runs counter to the stated intention of

Federal Government policy in relation to the telecommunications industry and marketplace.

National Champions versus Domestic Competition Debate in the Telco Context

Comindico is aware of the tension between arguments that Australia needs to nurture national “champions” in certain industries to compete in the modern global economy, and counter arguments that rigorous domestic competition underpins international competitiveness.

In this context, Comindico observes that the experience of participants in the Australian telecommunications market has something to say to these competing perspectives.

Telstra is still overwhelmingly a domestically focus business and its dominance of profits in the Australian industry demonstrates the extent to which it has been able to leverage the size advantage bequeathed it when successive Federal Government’s corporatised and then privatised it in the deregulated market. Although Telstra has made some international forays, it cannot be seriously argued that there has been a “national champion” payoff to the economy to offset the cost of its dominance in the domestic telecommunications industry.

The corollary of this has been a well-documented and on-going pattern of concern at anti-competitive conduct by Telstra. The Government has responded to Telstra’s market place behaviour in the past decade with a series of amending legislation designed to stop anti-competitive conduct. The most recent of these Bills, the Telecommunications Competition Bill, was introduced as recently as September 2002.

The Fundamental Weakness in the Legislative and Regulatory Environment

Comindico believes that past experience suggests that legislation presently before the Federal Parliament to deal with anti-competitive behaviour in the industry, even if passed, will not prove sufficient to create genuine and enduring competition. This is because the legislative/regulatory approach has been essentially backward focused. That is, it relies on the tactics being employed by Telstra to delay or otherwise thwart competition eventually coming to the attention of regulators and legislators, who then act to close that avenue of behaviour to the company. There is no “forward facing” remedy that would act as a deterrent to anti-competitive actions.

The direct result of this operating environment is to deter investment in new telecommunications infrastructure in a global investment market that is already severely constrained globally. The impact of this is that new generation technologies that are more efficient and offer consumers access to a range of new services are not being deployed as widely as they might.

Nowhere is this felt more than in rural and regional areas where the fear of Telstra's ability to leverage its vertical market power against new entrants is having a powerful freezing effect.

These markets are competing in a global market for investment dollars, and the lack of market density already creates a very significant handicap to attempts to raise capital for new telecommunications investments. Telstra's ability to leverage vertical market power to aggressively undercut the market when new entrants do emerge adds a further hurdle that is near insurmountable to the promoters of regional telecommunications ventures.

A Forward-Focused Regulatory Regime

The Government has amended legislation managing the telecommunications market to deal with the problems as they emerge, but this is by its nature a backward-looking regulatory approach.

In Comindico's view, the telecommunications industry represents a clear example of a situation where a structural remedy to issues of anti-competitiveness is needed. Such a remedy would be forward-looking to the extent that all market participants would know that the intent of the legislation was to give the regulator power to respond to systemic anti-competitive behaviour by acting to restructure markets, and then withdrawing.

It is quite clear that if Telstra did not exist today, but its assets were held in two or more separate companies, the ACCC would apply very strict conditions and limits on any proposal to bring those assets together. The situation that exists today in telecommunications – a pre-existing anti-competitive industry structure cannot be restructured by the regulators, but new anti-competitive structures can be stopped from developing – is clearly a serious deterrent to investment.

While Comindico's comments clearly are based on experience with and have direct reference to the telecommunications industries, the absence of a divestiture power in the TPA creates a particular weakness in the Act as it relates to all industries where technology is evolving rapidly. This is because these are industries where monopolies can arise quickly through the leveraging of one area of market dominance into adjacent areas, sometimes called network effects. The high-profile actions by the FTC against Microsoft in the US were examples of the regulator there responding to just this phenomenon through the use of its divestiture powers.

The effective application of a compulsory divestiture remedy in relation to information and communication industries has been demonstrated in the US. In the 1980s, actions by the Federal Trade Commission led to the break-up of the AT&T assets into a series of regional businesses, a manufacturer and a long distance provider. Actions by the FTC more recently led to a set of undertakings by Microsoft under threat of a similar forced separation of that business.

The absence of this power in Australia quite clearly creates a significant weakness in the regulator's ability to deal with anti-competitive conduct.

Comindico believes that there is a particularly strong case for the extension of a divestiture text in the TPA similar to that in Section 81 for the management of competition the telecommunications industry. Comindico is conscious that direct discussion of Part XIB is expressly outside the terms of reference of the inquiry. However, one means by which the divestiture power could be extended to telecommunications exclusively would be the addition of such a power into that section of the Act.

Alternatively, such a test could be introduced without attempt to confine its impact to telecommunications by adding the divestiture remedy to cases under sections relating to the misuse of market power.

Conclusion

The absence of a divestiture remedy in cases of anti-competitive behaviour by dominant participants in a market has and continues to have a serious negative impact on both competitors and consumers in the Australian telecommunications market. None are more disadvantaged by this situation than people in regional, rural and outer metropolitan areas.

Comindico would be pleased to offer any further assistance to the review.

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