



'Anti-competitive conduct'

The cornerstone of telecommunications after 1997 is competition. But how competitive will it have to be?

Andrew Simpson from Gilbert and Tobin, asks whether the proposed test of anti-competitive conduct will be enough.

Controls on anti-competitive conduct are important to the maintenance of competitive markets. They assume particular importance in industries in which competition is not mature but merely developing. This is still the case in the Australian telecommunications industry.

One of the more important principles in the recent statement, *Telecommunications Policy Principles: Post 1997*, is a general prohibition against anti-competitive conduct. Principle 24 states that the new Australian Competition and Consumer Commission (ACCC) should have a power to direct a carrier to cease or not to engage in conduct that the ACCC has concluded is in breach of the following policy principle:

'A carrier that has substantial market power in a market may not take advantage of that power by conduct that has the purpose of, or that does or would likely effect, a substantial lessening or inhibiting of competition in that market or in a related market.'

A number of issues arise.

First, it is unclear why the principle refers to 'carriers' only and not to service providers. The Principles make it clear that for most purposes carriers and service providers are to be treated alike. Secondly, anti-competitive discriminatory practices, such as selective deep discounting in favour of targeted high-value customer groups, must be addressed by effective regulation.

In the litigation between Optus and Telstra, settled in May, Optus alleged that Telstra was in a position of market dominance and discrimi-

nated between customers by offering services to certain groups on more favourable terms. Broad prohibitions, such as the *Trade Practices Act 1974* s 46 prohibition against misuse of market power, are incapable of dealing effectively with conduct of this kind. One difficulty is distinguishing predatory pricing from legitimate price competition. Specific prohibitions such as those under ss 183, 184 and 185 of the *Telecommunications Act 1991* are designed to overcome that difficulty. Principle 24, by contrast, is general and uncertain and seems an inadequate solution.

Thirdly, although correct definition of relevant markets would be crucial to the operation of Principle 24, the Principles do not adequately address the problems of market definition. In general competition law, markets are defined on the basis of the degree to which buyers and sellers regard the products in question as 'substitutable' in various respects. However, substitutability analysis is difficult to apply to telecommunications services and incorrect market definition leads to exaggeration or understatement of a firm's market power. A carrier that is dominant in an overall 'public switched telephone services' market might not be dominant in a market that was defined in terms of country-pairs or city pairs. A swift and reliable approach to market definition is required to allow the regulator to intervene quickly to address abuses of power.

Prospective market definition was adopted by AUSTEL in its *Decision-Making Framework* (DMF), in which AUSTEL set out markets it regards as relevant for tariff review. It may be

queried whether the prospective definition of markets will be accepted by the ACCC as suitable for its consideration of carrier conduct. If so, are AUSTEL's market definitions correctly drawn for the ACCC's purposes? The ACCC might prospectively define a different set of markets as relevant when determining whether a carrier should be directed to cease or not to engage in an anti-competitive form of conduct. Prospectively defined markets might apply presumptively only or might be subject to review on a timetabled basis or upon the occurrence of predetermined 'trigger' events.

Fourthly, once the relevant market has been defined, Principle 24 looks for 'substantial lessening or inhibiting of competition', although in some markets a low degree of competition may exist. Correspondingly, the ACCC is given a restraining power, rather than a power to encourage and shape competition pro-actively. Rules oriented to ensure the development of competition, rather than to restrain harm to such competition as exists, would better suit a market in which competition is still developing.

While the statement of policy principles at an early stage is valuable, industry participants and observers alike will await more detailed exposition of the regulatory controls to apply after June 1997. □

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