



Post 1997: competition rules

Juliette Oriti, Solicitor, Clayton Utz, outlines the competition aspects of the telecommunications draft legislation

On 13 September 1996, the federal government released a further package of draft legislation that is intended to implement Australia's new telecommunications regime from 1 July 1997. The package contains further drafts of the Telecommunications Bill 1996 (Telecomms Bill) and the Trade Practices Amendment (Telecommunications) Bill 1996 (TPAT Bill).

As previously envisaged, the Telecomms Bill will replace the existing Telecommunications Act and the draft TPAT Bill will insert Parts XIB and XIC into the Trade Practices Act (TPA). Part XIB will provide for telecommunications industry-specific regulation of anti-competitive conduct and Part XIC will provide for a self-regulated telecommunications access regime.

Industry-specific regulation

Part XIB will provide industry-specific regulation of competition in the telecommunications industry. Although a discussion as to whether telecommunications should be subject to industry-specific regulation of competition is beyond the scope of this article, it is worth noting the relevant comments in the commentary released with the draft legislation:

'Part XIB aims to facilitate vigorous competition in the telecommunications industry...Total reliance on the court-based processes of Part IV of the [TPA] to constrain such anti-competitive conduct might, in some cases, prove ineffective because of the fast pace of change in this

industry...Against this background, Part IV is likely to prove insufficient to deal with anti-competitive behaviour in telecommunications at this time'.

Once it commences, Part XIB will:

- define anti-competitive conduct in relation to the telecommunications industry;
- enable the ACCC to issue competition notices to carriers and carriage service providers not to engage in anti-competitive conduct;
- enable carriers and carriage service providers to apply to the ACCC for an exemption order in respect of conduct in which they propose to engage;
- allow the ACCC to require carriers and carriage service providers to file tariffs or provide other information if it suspects that they are engaging in anti-competitive conduct.

These features were also found in the exposure draft legislation released by the former Labor Government in December 1995, although they have now been somewhat adapted and refined. As previously envisaged, the Australian Competition and Consumer Commission (ACCC) will take over the competition functions of the existing industry regulator, AUSTEL, to regulate competition in the industry.

Anti-competitive conduct

Part XIB will provide that a carrier or carriage service provider must not engage in anti-competitive conduct. This will be known as the competition rule. A carrier or carriage service provider will be engaging in anti-

competitive conduct if:

- it has a substantial degree of market power and takes advantage of that power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market; or
- it engages conduct which contravenes section 45, 45B, 46, 47 or 48 of the TPA in relation to a telecommunications market.

The first limb of this test does not require that the conduct be entered into for the purpose of substantially lessening competition. It will be sufficient if the conduct will have the effect or likely effect of lessening competition. This limb differs from section 46 of the TPA, which relies on a purpose test. Here, the use of an effects test will clearly widen the scope of the conduct which is prohibited. A carrier or carriage service provider need not intend to substantially lessen competition - the fact that competition is lessened or is likely to be lessened as an intended or unintended result of that conduct will be sufficient for the competition rule to be breached.

The second limb of this test applies to telecommunications markets, general prohibitions which are already contained in the TPA:

- section 45 prohibits contracts, arrangements or understandings which contain exclusionary provisions or have the purpose or the effect or likely effect of substantially lessening competition
- section 45B prohibits the giving of covenants which have the effect or likely effect of substantially lessening competition and pro-



vides that covenants which have the effect or likely effect of substantially lessening competition are unenforceable

- section 46 prohibits the use of substantial market power for the purpose of eliminating or damaging competitors, preventing the entry of a person into any market, or deterring or preventing a person from engaging in competitive conduct
- section 47 prohibits exclusive dealings - if the conduct amounts to second and third line forcing it is prohibited, but other forms of exclusive dealing are only prohibited if they have the effect or likely effect of substantially lessening competition
- section 48 prohibits resale price maintenance

Competition notices

The ACCC will have the power to issue a competition notice to a carrier or carriage service provider which, in the ACCC's opinion, has breached the competition rule. A carrier or carriage service provider that becomes the subject of a competition notice can be prohibited from engaging in the conduct which is the subject of the notice for up to 12 months. Prior to 31 July 1997 the ACCC will be required to develop a set of guidelines which it will use to consider whether a competition notice should be issued.

Exemption orders

A carrier or carriage service provider will be able to seek an exemption order from the ACCC in relation to specific conduct. The ACCC will be able to make an exemption order if it is satisfied the proposed conduct is not anti-competitive or, even if it is anti-competitive, will result in a net benefit to the public. A non-exhaustive list of matters to which the ACCC may have regard when considering if

there will be a public benefit as a result of the conduct is set out in the draft TPAT Bill.

Once an exemption order is given, that conduct cannot become the subject of a competition notice. Similarly, an exemption order cannot be granted for conduct that is the subject of a competition notice.

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This procedure is similar to the current authorisation procedure available under section 88 of the TPA, which permits the ACCC to authorise conduct which would otherwise be in breach of various sections of the TPA.

Tariff filing directions

The ACCC will have the power to direct carriers and carriage service providers to file tariff information if it is satisfied that they have a substantial degree of market power and *suspects* that they have engaged, are engaging or propose to engage in anti-competitive conduct. The tariff information will only be made publicly available if the ACCC is satisfied that it could result in a net public benefit. The ACCC will have additional information-gathering powers as well.

Enforcement

Carriers will be obliged to comply with the competition rule and any applicable tariff-filing directions, as such compliance will be a condition

of a carrier licence. Service providers will be obliged to comply with service provider rules contained in the Telecomms Bill. Part XIB provides that a carriage service provider must comply with the competition rule and any tariff-filing directions, and that this is a service provider rule for the purpose of the Telecomms Bill.

Under Part 20 of the Telecomms Bill, the ACCC will be entitled to bring proceedings in the Federal Court to obtain an injunction to prevent anti-competitive conduct. An action for breach of a competition notice will also be available to the ACCC. Penalties for such a breach will be up to \$10 million for each contravention and up to \$1 million for each day the contravention continues. The ACCC will also be able to apply to the Federal Court for an order requiring the disclosure of information or the publication of advertisements if a carrier or carriage service provider engages in conduct which is in breach of the competition rule and a competition notice.

A person who suffers loss or damage as a result of a breach of the competition rule and a breach of a competition notice can bring proceedings to recover the amount of that loss. Although there had been earlier discussion of additional powers for the ACCC, such as the power to compel a carrier or carriage service provider to take certain action, no such powers are contained in the draft legislation. Accordingly, the ACCC will need to bring legal proceedings to obtain an injunction if a carrier or a carriage service provider engages in conduct in breach of a competition notice. □