Australia and the UK: following and leading

Australia's experience is becoming a benchmark overseas for telecommunications liberalisation

Australia drew extensively on the experience of telecommunications liberalisation in other countries when it began the process of liberalisation in 1991. It sought to avoid the problems caused in New Zealand by the absence of any sector-specific regulation, and those encountered in the U.S. by the institutionalisation and entrenchment of regulation. The middle path adopted in the U.K., of transitional sector-specific regulation was used as the model for Australian regulation, and regulatory developments in Australia from 1991 to 1996 largely mirrored the broad pattern of development in the U.K. from 1984 to 1996.

This all changed with the enactment of the new regulatory regime in Australia in 1997 whereby the process of deregulation has been taken to its logical conclusion by dismantling industry-specific regulation and devolving economic regulatory functions in telecommunications to the national competition regulator. The U.K. is headed in the same general direction but it will be years before it reaches the same stage of development. The Australian regime has become a model for the U.K. regime it was based on.

1997 regime

Using the U.K. regime as a model enabled Australia to learn from the experience of liberalisation in the U.K. - which began seven years before liberalisation in Australia - and to adopt a planned approach to the introduction of competition. The plan was for progressive introduction of competition between 1991 and 1996 and for opening of the market to full competition in 1997.

The main features of the new regime introduced in 1997 were:

- Dismantling of some industry-specific regulation;
- Replacement of one sector-specific regulator, AUSTEL, by the Australian Communications Authority which is responsible for licensing and technical issues;
- Devolution of economic regulatory functions in telecommunications to the national competition regulator, the ACCC;
- Enactment of a new Telecommunications Act 1997;
- Removal of prescriptive regulatory controls in favour of general competition law with additional legislative safeguards in the form of Parts XIB (anti-competitive behaviour) and Part XIC (access) of the Trade Practices Act 1974; and
- Increased reliance on industry self-regulation and increased emphasis on industry codes developed through industry forums.

These reforms have resulted in a largely deregulated telecommunications market in Australia, condensing some 14 years of incremental reform in the U.K. into seven years of planned reform in Australia. The result is one of the most open and liberalised telecommunications markets in the world.

U.K. developments

An analysis of recent developments in the U.K. shows that it is headed in the same general direction as Australia but because the U.K. continues to follow an incremental approach to reform, it is likely to be many years before it reaches the same stage of development.

The most significant recent changes in UK regulation have been:

Deregulation. OFTEL has pursued a clear deregulatory agenda over the past four years. It has withdrawn from detailed regulation as competition has established itself in various sectors of the market and assumed the role of an industry specific competition authority. OFTEL anticipates that there will eventually be no need for sector specific regulation at all and that general competition law can take over. This is consistent with the Hilmer principle of applying general competition law to all sectors of the economy. But the incremental approach to deregulation in the U.K. means that OFTEL will remain a feature of the regulatory landscape for some time.

Control of anti-competitive behaviour. OFTEL's ability to act against anti-competitive behaviour depended, until recently, on whether the behaviour offended one of a large number of highly prescriptive licence conditions. If it did not, OFTEL was powerless to act, and had to modify licences to cover that form of anti-competitive behaviour. Introduction of the effects-based Fair Trading

... continued next page

Australia and the UK

... continued from previous page

Condition (FTC), modelled on Articles 85 and 86 of the Treaty of Rome, has mitigated this problem by giving the regulator power to act against any behaviour that is anti-competitive in effect, regardless of its commercial or legal form. The FTC is expected to be a key tool in the transition to an open market regulated by general competition law. Australia never experienced a similar problem because unlike the U.K., the regulator always had recourse to the effects-based restrictive trade practices provisions of the *Trade Practices Act 1974*.

Reform of competition law. U.K. competition law has always been handicapped by the absence of purpose and effects-based tests of the type familiar in Australia. The new Labour Government has therefore introduced a competition bill, enacting domestic equivalents of Articles 85 and 86 of the Treaty of Rome, which it hopes to have in force by the middle of 1998. This will further improve the position for OFTEL because, although the FTC has mitigated problems caused by lack of an effects-based test in the licensing regime, it did not improve the enforcement powers at OFTEL's disposal. Enforcement powers under the FTC remained tied to the limited powers available under the Telecommunications Act 1984. But under the competition bill OFTEL would have strong investigatory powers, interim order making powers and the ability to impose a fine of up to 10 per cent of the U.K. turnover of the group to which the licensee belongs. Effects-based provisions, and enforcement powers similar to those proposed in the U.K., are central to the Australian telecommunications regime and have always been a central component of Australian competition law. Australia will be a useful case-study as OFTEL and the U.K. regulatory authorities generally learn to deal with these new provisions and powers.

Regulatory structure. The U.K. government has indicated that it intends to overhaul the structure of communications regulation. The basic idea is to disentangle existing structures by having one body, an office of communications (OFCOM), to deal with economic regulation of the wider communications market and another body, the Independent Television Commission or its successor, to deal with content issues. The U.K. therefore seems likely to adopt a transitional phase of general communications regulation along the path to total deregulation of the market. Australia bypassed this stage and moved straight to deregulation. It is doubtful that a transitional stage is necessary or desirable. It is unnecessary because convergence is unlikely to increase the regulatory burden such as to require the creation of a general communications regulator. The regulatory burden is likely to remain constant and then diminish over time. It is undesirable because it will perpetuate government intervention and could impede eventual deregulation of the market. A regulator whose function is to administer transitional regulatory rules and resolve competition disputes will always be necessary because, even after the need for transitional regulatory rules has gone, there will always be disputes requiring resolution. It was therefore clearly preferable for Australia to proceed directly to deregulation.

Licensing. OFTEL has adapted the licensing framework as far as possible within current constraints more adequately to address the needs of an increasingly competitive industry. OFTEL has been reviewing restrictions and privileges in the U.K. licensing regime with a view to removing those that are no longer justified or necessary. All licences are being reviewed to bring them more into line with the regulatory principles underlying "slim line" PTO licences. The industry is being encouraged to take on more responsibility for itself through an increased self-regulation. Increasing use is being made of class licences, guidelines and industry codes of practice in all areas of the regulatory framework. It seems increasingly likely that, in due course, there could be a single standard licence for different areas of activity, with different regulatory obligations being triggered by the acquisition of different degrees of market power. The key components of the Australian regime have always been contained in legislation, rather than licences, and new legislation has been introduced at each stage of the reform process. The U.K. is only just beginning the process of moving away from a licence-based regime.

These developments are driving the U.K. regime in the direction of eventual deregulation and abolition of sector-specific regulation. But reform continues to be incremental, and there is likely to be a period under a general communications regulator. Accordingly, it will probably be some time before deregulation is achieved to the same extent as in Australia. So, it is likely that the Australian regime will serve as a useful model as the U.K. continues the transition to a fully deregulated market.

Tristan Gilbertson, Senior Solicitor, Competition Law Group, Mallesons Stephen Jaques, Sydney