The competition notices

Since telecommunications deregulation, the ACCC has issued Telstra with several "competition notices" alleging anti-competitive conduct. Daniel Abrahams of Clayton Utz examines the history and current state of play

The 1997 *Telecommunications Act* introduced a mechanism by which the Australian Consumer and Competition Commission (ACCC) could address anti-competitive behaviour in the teelecommunications industry. Several of these "Competition Notices" have since been handed out by the ACCC and the government has recently amended legislation in an attempt to improve the effectiveness of the regime.

On August 4, 1997, soon after the introduction of open competition in Australian telecommunications, Telstra introduced a new customer transfer process for local call customers (Telstra's commercial churn service). The ACCC subsequently received complaints from industry about the transfer terms and conditions imposed by Telstra on carriage service providers and Telstra's refusal to negotiate those conditions. Of greatest concern to carriage service providers were the transfer fees and conditions regarding pre-transfer debt. On February 26, 1998 the ACCC announced it was investigating Telstra's commercial churn service and that it had particularly asked Telstra to explain the fees for the service, along with reasons for the use of complex forms and processing delays.

First Competition Notice

On August 10, 1998, having conducted an investigation involving market analysis and industry interviews, the ACCC issued a competition notice against Telstra stating that Telstra was engaging in anti-competitive conduct by reason of the transfer conditions imposed on gaining carriage service providers under Telstra's commercial churn service. These conditions, said the ACCC, were substantially hindering the development of local call competition and the further development of long distance competition. The notice was expressed to not come into force until September 30, 1998, the intention being to give Telstra an opportunity to cease its conduct.

Second Notice

In response to the first competition notice, Telstra made a number of changes to its processes, such as lowering its transfer fees. The ACCC was not satisfied with these changes nor with the fact that they had been made without industry consultation and, on October 14, 1998, it issued a fresh notice against Telstra. According to the ACCC, the first notice was effectively replaced by the second notice. The second notice covered similar conduct complained of in the first notice.

Third, Fourth and Fifth Notices

On December 2, 1998 the ACCC issued three further competition notices against Telstra alleging:

- that the use of a process that requires carriers to be Telstra's debt collector imposes costs on those carriers collecting monies and substantially hinders the ability of carriers to compete with Telstra in the local telephony market;
- that the imposition of a $15 fee per line with no quantity discount for transfers of services comprising a number of lines substantially hinders the ability of carriers to compete with Telstra in the local telephony market; and
- that the requirement that other carriers wanting to transfer customers from Telstra use a manual process that is slow, inefficient and cumbersome substantially hinders the ability of carriers to compete with Telstra in the local telephony market.

The third and fourth notices were expressed to come into force on December 9, 1998. The fifth competition notice was expressed to come into force on January 25, 1999. It is understood that the third, fourth and fifth notices replaced the second notice. Certainly mention is not made of the second notice and the third, fourth and fifth notices are referred to by the ACCC as the first, second and third notices respectively.

Proceedings Commenced

On December 24, 1998, being of the view that Telstra had not modified the conduct described in the two notices that had come into force on December 9, 1998, the ACCC instituted proceedings against Telstra in the Federal Court. It alleged that Telstra's conduct in relation to its commercial churn service as set out in the two competition notices is anti-competitive.

Fourth Competition Notice

On April 13, 1999 the ACCC issued a further competition notice alleging that Telstra's continuing conduct in relation to its commercial churn service together with the price charged by it for churn was cumulatively a breach of the competition rule. In its press release in relation to the issue of this notice, the ACCC referred to it as the fourth notice and threatened to commence further proceedings against Telstra if its conduct did not cease.

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Progress of Litigation

On April 28, 1999 the ACCC filed proceedings in the Federal Court based on the third and fourth competition notices. The two sets of proceedings brought by the ACCC are being dealt with concurrently by Justice Hill. On April 28, 1999 Justice Hill made directions for the discovery and inspection of documents by the parties and apparently this stage of the case is now well advanced. Further directions made on August 18, 1999 require witness statements to be filed and served by late November 1999. The next directions hearing is scheduled for a date in December 1999. The matter has been set down for trial in March 2000.

Internet Services

The only other competition notice issued to date by the ACCC, and indeed the first such notice issued, was issued on May 28, 1998 against Telstra. The notice alleged that Telstra had engaged in anti-competitive conduct by charging its Internet service provider competitors for services provided to them while refusing to pay for similar services it received from the same competitors. This notice was first suspended, then withdrawn while Telstra engaged in negotiations with its relevant competitors. A new notice was issued and Telstra commenced proceedings seeking an injunction in relation to the notice. Ultimately the second notice was withdrawn after Telstra entered into a number of peering agreements with its Internet competitors.

New Guidelines

On August 5, 1999 the ACCC issued new competition notice guidelines to which the ACCC must have regard when deciding whether to issue a competition notice in response to anti-competitive conduct in the telecommunications industry. The new Guidelines are very similar to the ACCC's previous Guidelines which were issued prior to July 1, 1997 and which they replace. The new Guidelines were issued following the recent passage of amendments to Part XIB of the *Trade Practices Act*. The new guidelines are accompanied by an Information Paper on anti-competitive conduct in the telecommunications markets which explains the role of the Guidelines in the process of issuing competition notices.

More information can be found on the ACCC website, http://www.accc.gov.au/contact/fs-telecom.htm <

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From The Archives

Radio into the 90s: uncertain future

At what point, if any, do excellence and efficiency decline as competition increases? Would greater and greater competition only force some broadcasters out of the game? And would this be a good or bad thing? Could this lead to the entry of new players attempting to develop and serve niche markets currently not catered for?

This series of rhetorical questions, posed by Minister Ralph Willis, neatly encapsulates the key issues which preoccupied participants in the Communications Law Centre conference, *Radio Law and Policy: Into The 90s*, held in early August.

The conference took place soon after the release of the DTC discussion paper on broadcasting regulation and the auction in late July of six capital city FM licences (excluding Sydney where licences will be offered later), a process which netted the government a total of $105 million.

The implications of these developments for the radio industry as a whole provided a strong background motif for the conference. A significant contradiction is apparent between the claims of current big players in the industry that profits are shrinking and that many smaller players will be forced out of the game or into networking, and, on the other hand, their willingness to pay very high prices to enter the FM field. This was reflected in industry concern about the possibility, foreshadowed in the DTC review and reiterated by Willis, that the commercial viability criterion might be dropped from the licensing criteria in the *Broadcasting Act*.

The bids for FM licences were much higher than expected; industry observers had estimated a top price of $20 million in Melbourne (it proved to be $31.5 million), ranging down to $5 million in Perth (in fact, $16.8 million)...

...Later in the day, a stockmarket representative speaking from the floor said that the prices paid for FM licences had been excessive and investors, who were also nervous about the prospect of deregulation, would not invest equity capital in radio.

As a counter to the gloomy financial picture being painted by the radio industry, Tribunal member Sue Brooks produced some expanded versions of the Tribunal's consolidated figures on commercial radio financial results, which had been criticised by the industry as giving an unrealistically favourable view. For instance, FARB claims that more than 40 stations are for sale and many are operating at a loss. Brooks said that trends in profitability had developed over a long period and were probably a good indication of the future of the industry. <

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