

Regulating Telecommunications Trade Practices Overkill

JIM HOGGETT

LORD Kelvin described the telephone as 'the wonder of wonders' when it was first exhibited in 1876. Despite contemporary cynicism, we still marvel at the endlessly creative wonders of telecommunications.

Telecommunications have progressed from one experimental phone to a range of services and technologies that pervade our lives. The market for telecommunications services is rapidly evolving, complex, vigorously contested, heavily regulated and, for all these reasons, imperfect.

Imperfect markets may need monitoring and intervention to correct abuses of monopoly power and to protect consumers from unscrupulous operators. The *Trade Practices Act* exists to do both.

But you can have too much of a good thing. The regulation applied to the telecommunications market has shown the same rate of growth as the industry itself. We can see this not only in the size of the rule book, but also in the propensities of the principal regulator, the Australian Consumer and Competition Commission (ACCC).

REGULATION BREEDS MORE REGULATION

Good regulation should result in its own demise. In the case of telecommunications, regulation has only bred more regulation and has not bred competition in some crucial markets.

To induce and sustain new competitors, the regulator must restrain the full competitive power of the incumbent(s). In other words, the regulator hopes to encourage long-term competition by limiting competition now. With telecommunications,

the privilege to new entrants has extended beyond this competition 'holiday'. The ACCC also arranges for access to the incumbent's network at a controlled price. The danger is that the regulator may end up building permanent shelters for the (not so) new entrants and discourage them from using or building their own facilities. It is similar to the 'infant industry' case beloved of protectionists. The 'infants' never grow up. As time goes on, more regulation is required to sustain the infants.

Such seems to be the case in telecommunications. Most of the new entrants don't want to be exposed to full competition yet. The building and use of new facilities, particularly new networks, has fallen far short of what was hoped. There seems little prospect that this situation will change. The present structure of regulation is failing in its task.

THE REGULATION IS OVERKILL

The attitude of government towards the telecommunications industry hovers between a fear of its fertile and uncontrollable ingenuity and a determination to exploit it politically.

In the early 1990s, when the telecommunications market was opened to competition, industry-specific provisions were included in the *Trade Practices Act* to provide for access to essential facilities (mainly the Telstra network) and to restrain the abuse of market power. This was in addition to regulations prescribing price control, the imposition of several community service obligations on Telstra, and a long list of licence conditions.

It is doubtful whether the specific provisions were necessary in the first

place. There are similar general competition provisions in Part IV of the *Trade Practices Act*. The action was no doubt dictated by prudence. This is understandable in a country where communications are so important and our embrace of market solutions so timorous. ▶

The Productivity Commission Report

The Productivity Commission (PC) recently reviewed the competition provisions for the telecommunications industry in the *Trade Practices Act*.

The PC looked closely at Parts XIB and XIC of the Act, which specifically regulate competition in the industry and the access to vital facilities, mainly the Telstra cable network.

In its Draft Report, the PC took a relatively robust view and raised the possibility of repeal of Part XIB. The IPA had argued for even more extensive rollback of legislation, given the strong general provisions of the Act, which deal with both anti-competitive behaviour and access.

In the event, the PC took a much more cautious, even timid approach and advocated only a few, mainly procedural, changes to the industry-specific provisions of the Act. This is disappointing as this was an opportunity to deregulate which occurs only once in a decade.

The Report also gave the Government room to do little, which it has proceeded to do. So this informative and interesting report is likely to have minimal impact.

What transpired was not what was intended by those who set the industry on the road to liberalization. Regulation now covers pricing, access, connectivity, pre-selection, number portability, record-keeping, technical standards, service standards, and universal service obligations as well as competition regulation. There are at least seven regulatory entities.

The result is exemplified in the area of price-setting. Eight of the main services provided by Telstra are included in a global price control. Then there are numerous price sub-caps and other price conditions. Then there are controls on prices for access to the Telstra network.

The most recent and best opportunity for radical reform has been a disappointment (see Box). The ACCC had also recommended the removal of most of the price sub-caps. The Government has responded by announcing its intention to extend the regulatory régime, including price regulation.

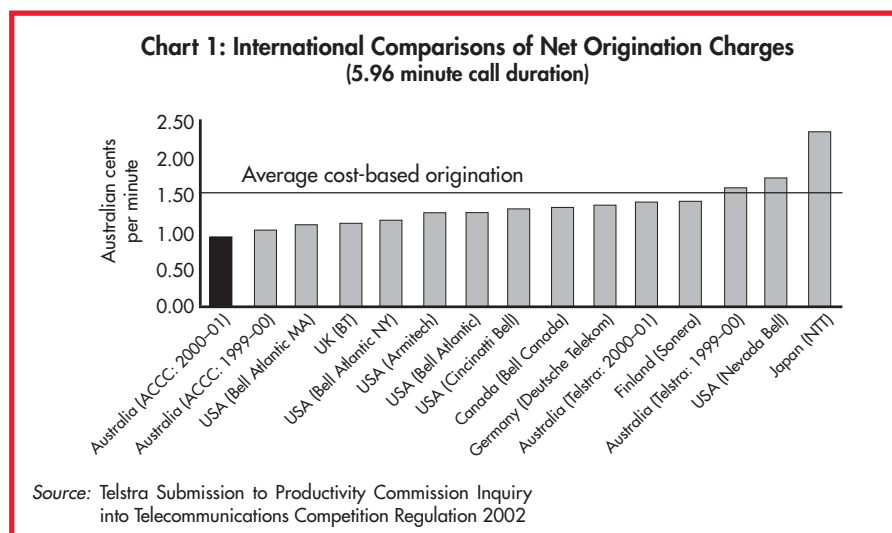
What we now have is a structure of regulation described by the Opposition Shadow Minister for Communications, Lindsay Tanner, as 'so complicated that it is virtually impossible to judge whether an appropriate balance between the interests of the incumbent former monopolist [Telstra] and the interests of competitors seeking access has been achieved'. One might add, 'let alone the consumer'.

Yet, as we tie ourselves into regulatory knots, we look for relief in more of the same.

THE ACCC IS IN OVERKILL MODE

The ACCC is charged with administering much of the regulation and thus it effectively controls many of the crucial retail prices, sets access conditions (wholesale prices) and sets service standards (product quality).

It is a fact that the ACCC now exercises far greater market power in the telecommunications market than any other entity, and it does so with the backing of the law and without any penalty for errors or excessive zeal.



If a government delegates power to an agency in this way, it also abrogates a great deal of its responsibility. In such a case, there is an almost inevitable temptation for the regulator to see itself as able to produce results superior to those that might come about from a free interaction in the market. This leads it progressively to exercise its powers to the full and to restrict avenues of appeal against its decisions.

This has happened. More and more detailed intervention in the telecommunications market has been the feature of the past decade. There are now 32 different steps on multiple alternative pathways to arrive at settlement of access terms and conditions in any given case.

Such detailed regulation inevitably leads to delays, often extreme delays, which are costly to business and slow down or stifle innovation. For example, local call resale prices took more than two years to settle. Products have even been declared under the Act before they get launched or where no disputes exist. Delays can be made worse by regulatory gaming on both sides, an inevitable accompaniment of over-prescriptive regulation.

Besides the inefficiencies they generate, the regulations stumble into inequity:

- Poor people in cities subsidize well-off people in the regions.
- Small business battlers subsidize wealthy residential users.

- Poor users pay while the better-off use their business phone.

The propensity to overkill is exacerbated by the dual role of the ACCC as the consumer and competition watchdog. It has to weigh the demands of consumers against the needs of industry. Consumers are more numerous and politically significant, so the pressure to favour them is strong. For example, the ACCC recommended PSTN (local copperwire network) conveyancing charges for Telstra that were the lowest among benchmarked international prices, including the USA, Canada, the UK and Germany (see Chart).

The consumer remit also encourages the use of the media to attack companies. The pressure on the ACCC to be seen to be active is intense, but public comment should be scrupulously fair and be backed by more than the complaints of one or a few individuals. Business is as entitled to a presumption of innocence as individuals. Similarly, attacks on the parties to out-of-court settlements, as occurred in the PSTN case, only serve to inflame disputes.

THE RESULT IS REGULATION-INDUCED CONFUSION AND INVESTMENT UNCERTAINTY

When government intervention in an industry is so pervasive, it is a form of state planning, with the usual result.

Because all regulation is distorting, the pinning down of one price or one corner of the market inevitably leads to a distortion elsewhere and the need for further regulation.

Continual intervention today also suffocates the technologies of tomorrow. The innovators and their backers should find, develop and utilize new technologies that will offer more and cost less. Government wants our industry to take a lead in this.

But if companies know that there is a permanent prescriptive mindset, then they cannot undertake research and development with confidence. They know that the rewards from their risk-taking and expenditure will be regulated away by controls. So they won't innovate here. They will do it in more friendly jurisdictions. Australia will be a residual and late beneficiary rather than a creative leader.

ONLY DEREGULATION WILL HELP

At present we have a severe attitudinal problem among the regulators. It is a propensity to control this highly creative sector in detail and to limit the reward for effort or creativity, rather than let the market sort out the inefficiencies.

The Government is doing nothing to correct this. Indeed, government both reinforces the attitude and itself uses telecommunications as a social policy tool at the expense of the industry and its customers. Telecommunications is a performing milch-cow.

A lighter hand on the tiller, directed at real abuses, would allow more and faster industry development and elimination of activities lurking inefficiently in regulatory shelters. A return to the generic competition provisions of the *Trade Practices Act* would simplify the régime and provide sufficient protection against abuses.

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IPA

Food Police Are At It Again in Victoria

STEVE CLANCY

VICTORIAN roadside food sellers and fruit and vegetable markets will soon be squeezed further by ever-increasing regulation. The Victorian Department of Human Services (DHS) is spearheading an initiative requiring all food businesses to submit a detailed Food Safety Programme (FSP) annually. The regulation is similar to voluntary quality standards such as ISO9000 and FQS2000. The detailed FSP must be lodged with local Government on the next annual food business registration. Further to this, the business must submit to an annual audit by a third party or local council.

Easy enough, until one actually sits down and reads an 'official template' of the FSP. The DHS has produced an 81-page document which goes to absurd lengths to regulate businesses into operating 'the proper way'. All measuring devices are to be calibrated annually, and mid-year testing (including buckets of ice and pots of boiling water) is described for the benefit of the reader. A detailed log must be kept whenever a business decides to thaw out sauce. The business should keep a thermometer at hand to go inspecting the insides of delivery trucks and delivered packages (keep it logged, remember). The enterprise must also keep a detailed log of when every piece of 'high risk' food has passed through

a 'danger zone'—right before they throw the food away (log that too).

The onerous new requirements will be policed by the municipality in which the business resides. Ballarat City Council, for example, will be charging an annual registration fee of \$275 for lodging and maintaining the required FSP, although the fee may vary from shire to shire. Possible penalties for not complying are substantial: \$5,000 for the first offence, and \$10,000 for each subsequent breach of the regulations. This sort of heavy-handed approach, while typical of an over-active bureaucracy, is daunting for most small food businesses.

The reasons for the drastic new requirement are almost non-existent. The DHS could only point to the much-publicized Kraft Peanut Butter and Garibaldi food contamination cases. Yet these businesses already had food safety programmes in place that paralleled the DHS plans. Victorian Farmers Federation Horticulture President, Terry Burgi, 'does not know of any major health scares from roadside sellers'. Mr Burgi fully supports safety, but questions the risks associated with roadside seller and growers. He feels that the DHS may be targeting fresh food markets, while the other States are sitting on their hands waiting to see the mess Victoria gets into.

When pushed as to why the regulations were being imposed