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Telecommunications Inquiry reveals competition problems

Susan Lojkine outlines the findings of the New Zealand Commerce Commission

Three years after New Zealand's telecommunications were opened up to competition, new players have not had much help from the current regulatory regime in competing with Telecom New Zealand. In many important markets the inadequacy of the regime means that Telecom has become the de facto regulator as it controls the key players and makes the rules by which the others must play.

These are the key conclusions of the Commerce Commission's eight month long investigation into the industry. The Commission launched the inquiry last November after becoming concerned that competition had not developed as quickly as expected following deregulation in 1989.

A light-handed approach

In deregulating the industry, the Government opted for a "light handed" approach to ensure Telecom, as the dominant player, did not use its market power to frustrate competition. This relied on the *Commerce Act*, which sets out the rules of competition, and the *Telecommunications (Disclosure) Regulations 1990*, which require Telecom to disclose financial statements of its regional operating companies and prices, terms and conditions of certain of its services.

The Commission, which enforces the *Commerce Act*, wanted to determine how effective the Act and the Regulations were in removing the barriers facing new competitors. The Commission recognised that competition is underway in some markets, such as tolls, but found there were still significant areas where competition had yet to develop.

Of the 26 markets identified by the inquiry, competition had yet to develop in

six. These were markets where Telecom controlled the entry conditions and included 0800 and 0900 services, directory services and local telephone services.

The Commission found competition had developed in ten markets, including payphone services, customer premises equipment, facsimile services, alarm monitoring services and consultancy services and was developing in another six markets, including tolls, mobile radio, video conferencing services and voice mail. The inquiry also uncovered nine possible breaches of the *Commerce Act* which are now being investigated.

Barriers to competition

The inquiry identified eight significant barriers to competition which are frustrating the ability of competitors and potential competitors to gain a foothold in telecommunications markets. The obstacles all reflect Telecom's ability to be both a supplier of a product or service and to control the means for competition to develop. They include interconnection agreements and fees, the numbering plan, access codes, the bundling of services, the availability of dedicated circuits and the Kiwi Share.

The ability to negotiate interconnection agreements with Telecom has proved a significant barrier. To provide effective competition, a new competitor needs to reach a commercially realistic agreement with the incumbent operator about connecting to its network. However, negotiations with Telecom have proved to be a lengthy process for new competitors. This has slowed the development of competition in a number of important markets.

Interconnection fees are charged by the incumbent network operator for carrying traffic in its network. A new competitor may be disadvantaged if its customers must dial a greater number of digits than the incumbent's customers, or if the access code consists of inappropriate numbers, for example, where a local access code resembles a toll access code.

Where an incumbent operator offers many of the products and services available in the industry, a competitor offering a limited range of products or services may be disadvantaged by the incumbent bundling its product range. Bundling can give a competitive advantage unrelated to the efficiency of the operator, thereby locking out competitors.

To provide certain value-added services, suppliers must be able to lease sufficient circuits from the incumbent operator at a price which allows them to compete with it. This issue is the subject of the Commission's Megaplan case.

The Kiwi share

The rights attaching to the Government's "Kiwi Share" in Telecom place a ceiling upon the price of residential telephone

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services. The potential effect is to distort market pricing signals about this service. If competition in this segment is viable, then this distortion would interfere with competition.

The Commission found that the disclosure regulations are of virtually no assistance in helping competitors hurdle these obstacles. It is not so much information that is the problem, but rather such matters as terms and conditions of supply, which in turn are heavily influenced by the structure of the industry. Telecom owns or controls almost all the critical inputs; Telecom is competing against all the businesses to which it is also sole supplier of these critical inputs.

Disclosure requirements

The information disclosed under the Regulations is too broad and general to be used in leveraging entry by means of legal proceedings. While the *Commerce Act* may be of some help in resolving disputes, this can be a protracted, expensive and uncertain avenue not well suited to a fast moving industry. Only one provision, section 36, deals with abuse of market power, but this cannot provide remedies for denial of supply or impose competitive terms and conditions of supply, without requiring the Courts to stand in the shoes of business people and make business decisions.

Even with lay experts able to sit in the High Court, this is a formidable task, particularly when the issues in the industry are numerous and widespread. The Act's power to establish viable commercial agreements is still untested, making its usefulness uncertain.

The Commission is disappointed that many industry players are still facing significant barriers to competition, but it now fully understands the problems they face. This will allow the Commission to be more effective in resolving competition problems. It hopes the inquiry will also have served as a spur to all players to get on and make competition work.

Dr Susan Lojkin is Chairman of the New Zealand Commerce Commission.

Bruce Slane

Bruce Slane, the Bulletin's Associate Editor in New Zealand, was appointed recently as New Zealand's Privacy Commissioner. Bruce is a leading communications law practitioner in New Zealand and a former Chairman of the New Zealand Broadcasting Tribunal. We congratulate Bruce on his recent appointment.

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