Post July 1997 - ATUG's Views on the New Legislative Regime

Jane Forster outlines the views of the Australian Telecommunications Users Group (ATUG) on the new telecommunications regulatory framework.

Introduction

The new framework for open competition in telecommunications from 1 July 1997 was passed by the Australian Parliament on 26 March 1997.

Prior to the enactment of the legislation, the Senate held an inquiry to examine the 11 Bills consituting the new framework. The Senate Committee tabled its report on 5 March, the Bills were debated in Parliament and subsequently passed with the Senate 's recommended amendments substantially accepted.

ATUG participated in the Senate inquiry making contributions which were singularly focused on benefiting end users of telecommunications services - the primary objective of the legislation. ATUG's contribution focused on issues which would directly or indirectly benefit end users.

ATUG drew to the Senate Committee's attention a number of significant issues concerning:

- access
- the regulation of anti-competitive conduct
- spectrum re-allocation conditions
- untimed local calls
- transitional arrangements for service providers

This article discusses these issues. To the extent that the new legislation does not incorporate ATUG's recommendations, the issues remain matters of concern in the new regime.

Access

ATUG is in agreement with the widely held view that the access arrangements which are put into place under the new legislation will determine the success of the new regime.

ATUG believes that four aspects of access are critical:

- The cost of obtaining access

A monopoly or participant with a significant degree of power can quash competition by providing access at a cost which means that its competitors are unable to compete.

- Unbundling

The cost of access to a service can be increased by bundling together with the service that the access seeker requires, services that the access seeker does not require.

- Co-location

The cost of access can be decreased by co-location arrangements which overcome the need for the access seeker to rent its own premises, build its own towers, etc.

Access arrangements are covered by Part XIC of the *Trade Practices Amendment (Telecommunications) Act 1997* ('the Act'). Access is required to be given to declared services and access providers and access seekers are required to reach agreement on the terms and conditions on which access will be given, failing which, the ACCC is empowered to determine the terms and conditions of access following arbitration. There is also provision for the making of Ministerial Pricing Principles with which any agreement determined by the ACCC must be consistent.

The ACCC is responsible for the declaration of services, either on the recommendation of the Telecommunications Access Forum ("the TAF") or following an inquiry. A person may request the ACCC to hold an inquiry into whether a service should be declared.

ATUG believes that the Act contains the mechanisms to enable the ACCC and the Government to set rules for access in a manner that will promote competition and the long term interests of end users.

However, ATUG's basic concern is that the principles contained in the legislation provide insufficient guidance as to the way in which the ACCC will regulate access and that this will result in uncertainty for new entrants as to what rights of access they will have. ATUG informed the Senate Committee that it believed two additional principles should be expressed in the legislation:

> **1.** where an access provider has a substantial degree of power in a market for the supply or acquisition of a declared telecommunications service, supply of that service should be on terms and conditions, including price, which are no less favourable than those on which the access provider provides the service to itself;
>
> **2.** access to a telecommunications service should be provided at the closest technically and functionally feasible point of connection to a customer.

To support its concerns about the importance of effective pricing negotiations to the success of the new access regime, ATUG together with SPAN and AIIA commissioned Professor Peter Gerrand and Dr Roger Buckeridge to undertake a demand side pricing principles study. Their report proposed some 15 pricing principles together with lists of services to which access should be possible at particular times in the future. The report provides a way forward in considerable detail by addressing ATUG's primary concern.

Furthermore, at the end of February the ACCC issued a draft guide to the access pricing principles and rules it will apply when considering access pricing issues under Part XIC of the Act. The guide has removed some of ATUG's concern: the first rule identified by the ACCC is to more or less the same effect as ATUG's first principle set out above.

The major principle identified by the ACCC is that access prices (for declared services which have a high degree of bottleneck power and which are not highly contestable) should be cost based. The first rule is that for these services access prices available to competitors must not be greater that the access provider's best price to its own vertically-integrated operations (unless cost justification is provided).

The ACCC's guide, dealing as it does with pricing principles, does not address the second principle identified by ATUG above nor the bundling, points of interconnect and co-location concerns covered by this principle. ATUG would like to see the ACCC issue a guide to the principles and rules it will apply when it has to decide whether to declare a service.

The regulation of anti-competitive conduct

The regulation of anti-competitive conduct by carriers and carriage service provides is covered by Part XIB of the *Trade Practices Amendment (Telecommunications) Act 1997*. An industry specific rule to govern anti-competitive conduct is laid down together with remedies to apply for breach of the rule and the ACCC is given the power to require carriers and carriage services providers to provide information about charges for specified goods and services and to require the keeping of certain records.

Under the industry-specific rule, a carrier or carriage service provider with a substantial degree of market power must not engage in conduct which has the effect, or likely effect, of substantially lessening competition. This rule is aimed at prohibiting conduct which may not be caught by the general trade practices prohibition contained within section 46 of the *Trade Practices Act 1974* which prohibits conduct that has the purpose, rather than merely the effect, of substantially lessening competition.

Some of ATUG's concerns with the proposed regulation of anti-competitive conduct, which it identified to the Senate Committee, are as follows:

• Market Definition

The Act excludes from the application of the industry-specific competition rule both the conduct of carriers and service providers in markets for the supply or acquisition of content services and the conduct, in any market, of content service providers.

The Government has cited constitutional and policy reasons for these omissions.

ATUG proposed in its submissions to the Senate Committee that the definition of "telecommunications market" for the purpose of applying the industry-specific competition rule be extended to include a market for the supply of acquisition of content services using a listed carriage service.

• Competition notices - the rights of affected parties

With one exception, the right to take action against a person who has breached the industry specific anti-competitive conduct rule only arises if the ACCC has issued a competition notice stating that the rule has been breached. The one exception is that the ACCC can seek an injunction to prevent anti-competitive conduct even if it has not issued a competition notice. An affected person has no formal right to complain to the ACCC about conduct which it considers is in breach of the specific competition rule.

ATUG proposed to the Senate Committee that a procedure be included in the legislation for the making of complaints to the ACCC concerning apprehended contraventions of the competition rule. Upon receipt of a complaint the ACCC would have to make a decision either to issue a competition notice or to refuse to issue a competition notice. It is intended that this process would provide a person affected by alleged anti-competitive conduct an inexpensive right to have the conduct of others reviewed.

Optus, in its submissions to the Senate Committee, suggested an alternative approach - that of giving to persons affected by the alleged anti-competitive conduct of others a right to seek injunctive relief irrespective of whether or not a competition notice has been issued. Such a right would be significantly more expensive to exercise than the complaint making procedure by ATUG although it might be more effective. ATUG supported this proposal.

• Competition notices - procedure

The Act provides no guidance as to what rights by way of natural justice a person against whom the ACCC is considering issuing a competition notice should have. In the absence of specific provision, the Courts would ultimately decide what these rights are. ATUG, in its submissions to the Senate Committee, proposed that a short and expeditious period (of 7 days) be identified as satisfying an affected person's right to be heard in relation to the proposed issue of a competition notice. ATUG's concern was that the Courts might otherwise determine that a much longer period should be allowed thus extending the period over which anti-competitive conduct might continue before it can be prevented.

However, at the workshop organised by ATUG held on 5 February 1997, the Chairman of AUSTEL indicated, by reference to AUSTEL's experience, that the ACCC's ability to respond to anti-competitive conduct is unlikely to take it less than 3 months and, more likely, 12 months. This being the case, ATUG's major concern that the ACCC be able to act quickly to prevent anti-competitive conduct remains.

• Competition notices - guidelines

The Act does not identify the matters to which the ACCC must have regard when deciding whether to issue a competition notice. However, the legislation does provide that the ACCC must formulate such guidelines, if possible before 1 July.

ATUG proposed to the Senate Committee that the types of guidelines to be issued by the ACCC should include substantive as well as administrative matters such as the ACCC's views as to the existence of markets and any substantial power in identified markets. The importance of the guidelines in diminishing the time the ACCC might take in deciding whether to issue a competition notice should not be underrated.

At the hearings before the Senate Committee, the representatives of the ACCC indicated that they were in the process of preparing these guidelines and that substantial matters would be included. These guidelines are not yet available.

• Competition notices - damages for contravention

As presently drafted, damages for contravention of the special competition rule are available only if the conduct which caused the damage occurred after a competition notice was in force.

ATUG proposed to the Senate Committee that where conduct in contravention of the special competition rule continues after a competition notice is issued, damages for the contravention should lie in relation to the conduct both before and after the issue of the notice.

The majority of the Senate Committee recommended only one change to the provisions which will govern the regulation of anti-competitive conduct - a change to require Telstra to file tariffs with the ACCC until 30 June 1999 for those services for which it is currently required to file tariffs. It is not immediately clear how this requirement will operate in practice and what benefits will flow from this requirement.

The minority Opposition Senators' report supported the recommendation of

the majority and, in addition, recommended that persons who are subject to a competition notice should have a right to a review of the merits of the issue of the notice.

Spectrum re-allocation conditions

The *Radiocommunications Amendment Act 1997* provides for the re-allocation of radio frequency spectrum where the spectrum is already occupied by another person and for the clearance of incumbents over a 2 year period.

ATUG supports the concept of re-allocating parts of the radio frequency spectrum from time to time for applications which make more efficient and appropriate use of spectrum. In the current context, it is proposed to clear the 1800 MHz band of existing services and to make it available for mobile services.

While this approach is reasonable from an overall community benefit perspective, hardship may well be inflicted on some existing users. A requirement to re-locate to another part of the spectrum may require the early retirement of existing equipment prior to it being fully amortised. It may also involve building a new system including new repeater stations. Many incumbents have invested considerable monies in building the infrastructure which allows them to use the spectrum in which they operate. The provisions for the re-allocation of spectrum do not provide for compensation to incumbents who will not have amortised their existing systems and will, in addition, have to bear the costs of re-location to another part of the spectrum.

ATUG, and many others including Telstra, made submissions to the Senate Committee proposing that existing licensees, required to vacate a portion of the spectrum in a relatively short timeframe, should receive financial assistance towards their re-location expenses from new licensees.

The Senate Committee recognised the problem but did not accept that the problem should be dealt with by way of amendments to the legislation. The Committee recommended that when making re-allocation declarations in relation to the 1800 MHz band, the Minister should consider the period required for clearance, the amount of spectrum allocated against that retained for continuing use of incumbents and the making available of other spectrum for incumbents.

Untimed local calls

The Telecommunications Act 1997 requires that untimed local calls must continue to be offered to customers: for voice and data to residential and charity customers; for voice only to business customers.

ATUG informed the Senate Committee that it does not support the present discrimination between residential/charity customers and business customers. It is often difficult and arbitrary to distinguish between domestic and business uses of a telephone service. Distinguishing between voice call and calls other than voice calls would require special equipment to be fitted to the 2 million business exchange lines. furthermore, separately identifying a fax call, currently accepted as a voice type call, from a data or modem call is impractical. In short, ATUG believes the discrimination concept adds unnecessary complication to network infrastructure and to the legislation and, insofar as it has the potential to impose a surcharge on certain uses of telephone services, there is every likelihood that this surcharge would be avoided by smart users.

The Committee did not deal with this issue in its report. It referred to submissions made by Telstra to the effect that the Minister should have a reserve power to declare that particular types of use of the untimed local call option should not be eligible calls even for residential customers, for example, calls to internet service providers. The Committee recommended that the Bill be amended to require the Minister to undertake a review of the issue over the next year and report to Parliament.

Only the minority report by Senator Allison (Australian Democrats) recommended that business should have the option of untimed local data calls, at least until such time as there is evidence to show that this is resulting in residential customers bearing a disproportionate share of the costs of network upgrades.

Transitional arrangements for service providers

The transitional arrangements in the *Telecommunications (Transitional Provisions and Consequential Amendments) Act* provide for:

- the services which are included in the existing access agreements between the current carriers to be treated, from 1 July 1997, as declared services for the purposes of the proposed new Part XIC of the Trade Practices Act ("the transitional declared services");

- these agreements to be treated as registered agreements for access to declared services under Part XIC ("the transitional access agreements").

Although the current service providers and new entrants will have an immediate legislative right of access to the transitional declared services, there will not be any terms and conditions to apply to that right of access and no practical right of access until terms and conditions are agreed or determined by arbitration. This process of agreement and/or arbitration might take 12 months or longer.

ATUG informed the Senate Committee of its view that safety net transitional access arrangements should be made to apply to all persons who will be access seekers as of 1 July. Without an amendment to achieve some form of parity, current service providers could be denied access to services that they currently resell for as long as it take the access providers to agree on terms and conditions or for such terms and conditions to be determined by arbitration.

The majority of the Senate Committee members concluded that it was inappropriate for the Parliament to set specific access terms and conditions as part of the transitional arrangements. It also concluded that the legislation establishes a framework which will enable existing service providers to establish access arrangements early in the operation of the new regime. The majority recommended that where any dispute concerning access is notified to the ACCC before 31 December 1997, any subsequent determination made by the ACCC should have retrospective effect to 1 July 1997.

The Opposition Senators', recommended that the legislation should be amended to ensure that existing service providers are guaranteed firm, transitional access prices from 1 July 1997 and to require the ACCC to deal promptly with unresolved access negotiations.

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