The ACCC Approach to Telstra Broadband Pricing – The Industry Asks Why?

Angus Henderson and Michelle Rowland look at the ACCC's recent decision to settle its action against Telstra on broadband pricing and some alternative approaches it might have taken

Immediately following the ACCC's settlement with Telstra on broadband pricing, many industry participants and observers were asking – Why? The settlement and Protocol clearly surprised most industry participants.

The Chairman of the ACCC described the result as 70-80% satisfactory. The ACCC's failure to engage the industry in the development of the Protocol may give rise to problems in the Protocol's practical effectiveness in the future. In this article, we examine the more effective alternatives that would have been available to the ACCC in settling the matter and the practical limitations of the Protocol.

Background

The ACCC has recently published the Notification Protocol for Broadband Pricing Changes with Telstra (**Protocol**). The Protocol took effect from 21 February 2005 and was made following the settlement of action by the ACCC against Telstra for breach of the competition rule in relation to broadband pricing price squeeze conduct which occurred in February 2005. The ACCC issued advisory and competition notices in relation to the conduct but never formally commenced legal proceedings against Telstra to enforce the competition notice.

The Protocol was privately negotiated between the ACCC and Telstra, with no input from Telstra's competitors. It is not derived from any of the ACCC's formal competition powers under the telecommunications specific competition regime in Australia (Part XIB of the *Trade Practices Act 1974* (**TPA**)).

In addition to the Protocol, as part of the legal settlement between the ACCC and Telstra, Telstra was required to pay to its wholesale customers a total of $6.5 million. The ACCC has agreed not to pursue any further action in relation to the competition notice.

Although the competition notice has now been withdrawn and a settlement entered into between the ACCC and Telstra, private parties may commence legal proceedings for damages for the period during which the competition notice was on foot (ie approximately 12 months). No such action appears likely, however.

Pricing Notification Protocol

The pricing notification process under the Protocol is:

- Telstra gives advance notice of ADSL pricing changes, together with supporting information;
- The ACCC expresses a preliminary view on whether the proposed pricing is likely to constitute anti-competitive conduct, by providing notice to Telstra before the pricing becomes effective; and
- There is no requirement on Telstra to withdraw the pricing if the ACCC expresses concerns about it. Presumably, however, if Telstra proceeds with the offending pricing offer, then the ACCC will move quickly to issue advisory and competition notices. It should be noted, in any case, that advisory and competition notices do not stop Telstra from engaging in the offending conduct. They only serve as a 'gateway' which must be passed through and which warn Telstra of potential anti-competitive conduct, further investigation by the ACCC and potential legal action.

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Notification Process

Telstra must notify the ACCC of the following price changes and the ACCC may respond as follows: (see table on Page 18).

The ACCC expressly states that, in the absence of market enquiries, it is unable to express a final view on whether the proposed pricing is anti-competitive or not.

Supporting Information and Impact on Wholesale

The supporting information Telstra must provide to support a price change particularly relates to impact on wholesale customers, including notification of relevant wholesale price reductions and imputation testing. Telstra's rationale for introducing the new pricing scheme and comparisons with competitor pricing is also required to be provided to the ACCC.

The ACCC has also stated that it and Telstra, using independent expert advice,

Broadband Product	Notice Period	Information Required	ACCC Response
BigPond ADSL list price reductions	15 working days prior notice	Supporting information required (see below)	ACCC will express a preliminary view no later than 5 working days prior to proposed public announcement
BigPond market-wide specials of more than 2 months duration	15 working days prior notice	Supporting information required	ACCC will express a preliminary view no later than 5 working days prior to proposed public announcement
BigPond market-wide specials of more than 2 months duration	5 working days prior notice	Supporting information required	No time limit on ACCC to express a view
Extending a BigPond special beyond 2 months duration	10 working days prior notice	Reasons for extension and, if applicable, updated imputation testing	ACCC will express a preliminary view no later than 5 working days prior to proposed public announcement

are engaging in a process for deciding the appropriate retail and wholesale relativities.

Confidentiality and Access

The ACCC is required to treat all information provided by Telstra under the Protocol as confidential and is not permitted to disclose any materials provided by Telstra under the Protocol (except as required by law). This contrasts with the ACCC's ability to publicly disclose tariff information under the telecommunications specific sections of Australian competition law if the public benefit exceeds the public detriment in doing so (see discussion below).

Commentary

The settlement and Protocol immediately raises a number of questions:

- Why didn't the ACCC exercise its powers under its tariff filing powers, instead of entering into a commercial agreement with unclear enforceability?
- How will the Protocol work in practice to identify and stop anti-competitive conduct?
- Does the settlement kill off the issue?

As to the first question, under Part XIB of the TPA the ACCC can issue tariff filing directions to any carrier or carriage service provider with a substantial degree of power in a telecommunications market. The notification effect of such a tariff filing direction is very similar to the Protocol, in that the relevant carrier or carriage service provider must notify the ACCC of its pricing conduct as described in the tariff filing direction.

We would argue, however, that issuing a tariff filing direction would have been a more appropriate regulatory response to the problem in this case. The ACCC had already found that Telstra had market power in the wholesale broadband market, thus allowing the ACCC to issue a tariff filing direction to Telstra. In this way it could have gathered the same level of information it is proposing to gather under the Protocol.

Importantly, a tariff filing direction would have provided two important additional benefits to the ACCC and the industry:

- It would have allowed the ACCC to disclose information collected from Telstra if the public benefit in doing so had outweighed the public detriment.

  This contrasts with the Protocol, which prohibits disclosure of information collected from Telstra. Such a restriction raises the clear question of how the ACCC can assess anti-competitiveness without making enquiries of Telstra's competitors
- Part XIB has an enforcement mechanism for tariff filing directions, whereas the enforcement mechanism for a breach by Telstra of the Protocol is unclear.

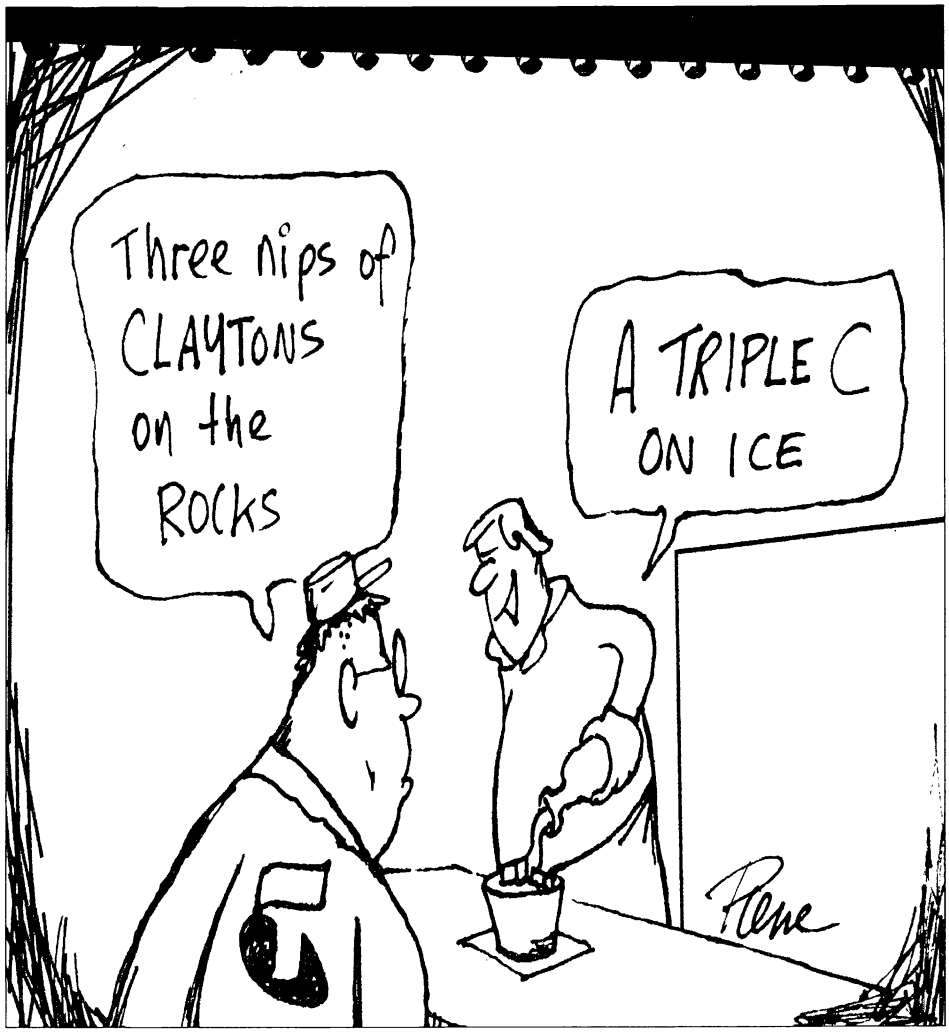
Furthermore, the precise head of power with which the ACCC negotiated and pronounced the Protocol is questionable. The very term "Protocol" has no

status in Australia's telecommunications-specific competition law. This is probably the first time any industry participant, practitioner or commentator has heard the regulator use the term. There is no evidence of any legislative intention that encourages the ACCC to address anti-competitive conduct in the method or for the purpose set out in the Protocol.

It is curious that the ACCC has treated as a novelty an issue which could have been addressed through the application of its explicit powers, noted above. This irregularity is particularly noticeable since, in its submission to the Productivity Commission's review of telecommunications-specific competition regulation in 2000, the ACCC argued that just because the provision had thereto never been used, this was no reason to lessen its powers. It was important for regulators to have such statutory powers, which it described as "insurance" to assist efficient information-gathering and enforcement. In this case, the ACCC does not appear to want to rely on its "insurance" powers when it would have appeared appropriate to do so.

The Protocol also raises the following practical limitations:

- The Protocol only applies to 'list price reductions' and 'market-wide' specials. It does not apply to price reductions to a significant proportion of customers where there may be a price squeeze with significant anti-competitive consequences
- The Protocol only applies to BigPond ADSL pricing
- The ACCC has not extracted from the settlement the ability for it to stop Telstra from proceeding with pricing notwithstanding any ACCC view that the pricing is anti-competitive. The Protocol is only a notification device. Admittedly, an injunctive power would have gone beyond the powers the ACCC has under Part XIB, but given Telstra's conduct and the accruing potential penalties against it, it would have seemed within reach for the ACCC to obtain such a power in a settlement with Telstra. The ACCC will therefore need to rely on its ordinary powers to issue advisory and competition notices, thus vastly limiting the benefit the ACCC could otherwise obtain from the Protocol
- The ACCC's ability to determine whether conduct is anti-competitive would appear to be significantly constrained by its inability to test any of the information provided by Telstra under the Protocol with Telstra's competitors. Telstra's competitors have significant experience in matters such as imputation testing from which the ACCC could have benefited. This limitation would not have existed if the ACCC had issued a tariff filing direction.



The ACCC's settlement with Telstra effectively ends any action that is likely to follow on from the price squeeze of February 2004. While private parties may still bring proceedings for damages for the 12 month period during which the competition notice was on foot, such an outcome seems unlikely and of limited benefit. Not only would damages be difficult to prove, damages are not really what the industry wants.

The industry wants an effective mechanism to prevent Telstra from engaging in conduct which even it acknowledges "may have adversely affected the competitive position of its wholesale broadband customers". The Protocol does not appear to provide this effective mechanism.

Michelle Rowland is a Lawyer in the Sydney office of Gilbert + Tobin, where Angus Henderson is a Partner