Response to the ACCC Information Paper on Bundling in the Telecommunications market

February 2002

Introduction and Summary

Comindico is a privately owned telecommunications company, created in 2000. The company has constructed a national telecommunications network capable of carrying voice and data traffic across a single network architecture. The Comindico network is exclusive based on IP (Internet Protocol) technology; a technology that is capable of carrying services such video, messaging, voice and video conferencing or any other form of digital data. It is the only national 100 percent IP based network capable of carrying carrier grade voice services.

Comindico submits that there are a number of issues that the Commission should have take into account when accessing the anti-competitive implications of particular activities.

In summary, Comindico submits that, in addition to those issues discussed in the ACCC's paper, it is important that there be a clear understanding of the different situations that give rise to bundling and the different markets in which it occurs. Comindico believes the ACCC must be aware and take account of the range of ways where bundling might be used as an illegitimate tactic to reduce addressable markets or create price squeeze situations.

Specifically, Comindico is of the view that service bundling that is the consequence of different upstream technologies, for example, converged networks, is fundamentally different to bundles that are simply aggregated bills. Discounts attached to bundles of services need to be assessed first and foremost with a view to these upstream technologies as they indicate whether pricing can be sustained and on what basis.

Further, Comindico submits that an examination of bundling must look at both retail and wholesale markets. Wholesale bundling is of particular concerns because of the potential to leverage infrastructure bottlenecks across all competitive markets.

Finally, Comindico submits that is it entirely appropriate and indeed necessary that Telstra, as the incumbent and the owner of bottleneck infrastructure, be offered far less freedom to bundle and, in some cases, prohibited from bundling. To this extent, recent decisions to afford Telstra with more freedom have indicated that regulatory thinking is headed in the wrong direction.

Retail Bundling

Comindico submits that the first point that needs to be made is that the concept of bundling that underlies most discussions relates to activities in a pre-convergence technological environment and/or the combination of inter-modal services. It is important that discussions about bundling activities are informed by technological advances of recent years.

Retail bundling needs to be finely defined to distinguish between bundles that are a consequence of activities made possible by the technology employed and those bundles that are purely pricing mechanisms. The latter are marketing devices that have a place in a robust and flourishing market, but are qualitatively different from technology-based bundles where pricing opportunities arise as a consequence of new ways of providing services.

This means, in effect, that the bundle of services can be priced at a lower cost than would be viable if it were sold as separate elements, because the fixed cost of managing the customer is spread greater revenue. This bundle can theoretically be offered at a lower retail price compared to alternatives in the market using older technologies, but minimum prices to consumers can only be achieved if customers cannot unpick the bundles and complicate the cost base. This "Hobson's Choice" marketing model is proving extremely attractive and effective in the US cities where it has been offered to the SME market by Cbeyond, which similarly uses a pure IP network.

In these circumstances, to prohibit bundling would be against the interests of consumers and least-cost based competition to prohibit bundling.

Bundling that is simply bill aggregation is a different order of arrangement. It is motivated not by supply side cost saving, but by marketing opportunism appealing to consumers' desire for simplicity in bill management, and, increasingly, "sweetened" with a discount.

Bundling of this nature is inherently risky to the operation of fair market forces if it is not possible to penetrate the upstream costs to determine where cost savings and/or margin sacrifices are being made. It is reasonable for service providers to offer some form of volume discounts, but this should not be allowed to be used as a camouflage for predatory pricing.

Corporate Market Bundles and Transparency Issues

Although bundling in the residential retail market has received the most attention in recent months, activity in the corporate retail market provides the most direct evidence of the ways in which bundling might be being used anti-competitively.

Comindico has found that there appears to be confusion among retail corporate customers of Telstra as to when and whether they are actually buying bundled services – confusion that serves to entrench Telstra's incumbency.

Comindico submits that bundling cannot be a retrospective reinterpretation of a commercial relationship, and that, in the absence of documented evidence, any case where a discount is claimed to be contingent on the acquisition of a separate service is not bundling but a misuse of market power.

Retail Bundles and Wholesale Pricing Disconnects

Comindico has previously raised with the ACCC its concerns about what it believes is a price squeeze in the ADSL market through the discount Telstra offers on bundled price for long distance telephony and residential ADSL.

Comindico submits that the bundled price points have the effect of leaving no realistic margin between Telstra's wholesale and retail prices in Regional 2 markets, which has the effect of locking competitors out of those markets unless and until they are able to reach such a scale in metropolitan markets so as to be able to subsidise the regions.

Comindico submits that this instance points to the potential for bundling to be used as a guise under which price squeeze strategies can be employed on a selective geographic basis.

Conclusion: Comindico's position

In principle, bundling is a legitimate form of behaviour both in retail and wholesale markets as a competitive response to strong price pressures and demands for more convenience service delivery in the market.

However, it is crucial that there are distinctions made between bundling that represents the leveraging of a technological capability and bundling that is simply billing aggregation. The former implies genuine upstream cost saving, the latter can imply quite the opposite. Without this distinction being drawn, it is difficult to identify the difference between fair competition and predatory pricing.

Of greatest concern is the ability of Telstra to effect the market by bundling. By virtue of the combination of its incumbency and its internationally incomparable vertical integration across wholesale, retail and delivery modes, Telstra is in a position where it could, through bundling, manipulate the market for every service in the telecommunications segment.

In the absence of a structural remedy to this issue of industry organization, it is entirely appropriate that a higher standard of control be exerted over the behaviour of Telstra and its ability to bundle than that exerted over other industry participants.

In short, Telstra should be precluded from bundling where discounts for access to certain network elements are conditional on acceptance of such bundles. At the very minimum, it should be precluded from offering discounts in bundling packages where there is no clear and substantial cost saving resulting from the more efficient use of upstream technology in delivering the elements of the bundle.

Telstra should be precluded outright from bundling at a discount at the wholesale level to other carriers. Telstra's market power is simply too great to be adequately controlled in such circumstances. If it so chose, it could selectively wipe out a particular competitor through employing anti-competitive bundling as a strategy, even if the competitor successfully complained to the regulator that this was a case of the misuse of market power. The time taken to pursue such an action could be fatal to the alternative provider.

Only Telstra has the market power to be able to pursue such a strategy without fear of countervailing market action, and Comindico submits that this potential is cause enough in itself to preclude certain forms of behaviour from Telstra.

The corollary of these measures should be a prohibition on circumstances where Telstra would seek to deny access to unbundled network services or elements to competitors. It is an unacceptable use of market power by an integrated, dominant market participant to deny such access.

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