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Kiss goodbye to the duopoly

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Just before rushing out the door to begin campaigning in his electorate, the Minister for Communications and the Arts, Michael Lee, released a draft of the new telecommunications legislation. Communications policy is not bipartisan, particularly on the future of Telstra. No doubt the Opposition if they win the election will not be able to resist the temptation to rework some of the policy and Telstra will have added leverage in obtaining concessions to maximise its sales value by minimising constraints on it.

Back to scratch

A reform of the current regulatory regime of the scope set out in the draft legislation was not required to farewell the wireline duopoly and the mobile triopoly. Section 57 of the current Act already entitles the Minister in his or her 'absolute discretion' to grant carrier licences without any restriction on the number. The restrictions on the numbers of general carrier and mobile carrier licences are set out in the contractual arrangements the Government has with Optus and Vodafone under section 70 of the Act. The Government could have simply waited until expiry in 1997 of these contractual obligations to Optus and Vodafone in June 1997, and issued more licences at that date within the current regulatory framework. In other words, the current legislation could have rolled on beyond the duopoly without any changes, and this minimalist approach appears to have been what was intended when the 1991 legislation was drafted.

Instead, the Government has taken the opportunity presented by the end of

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the duopoly to completely review the current industry structure, and to change the regulatory regime from top to bottom. The current Act will have lasted only six years (much less time if the formal and informal transitional process to the post 1997 environment already underway is taken into account). The previous Act also lasted less than three years. This all goes to show, to trot out some truisms, that the rapid pace of technology and evolving market conditions mean that telecommunications legislation can have a short life span. Therefore, one prediction which can be confidently made about the new telecommunications legislation is that it too will be lucky to last much beyond the turn of the century.

A strong motivator in the complete revision of the current regime was the Government's concern to make the new telecommunications regime look as close as possible to the Hilmer Access regime (the new Part IIIA of the Trade Practices Act). The Hilmer Committee Report recommended against the continuation of industry specific regulation and specialist regulators, such as AUSTEL, because specialist regulators were at risk of industry capture (both Telstra and Optus probably have thought at times that the other has captured AUSTEL!) and specialist regulators can produce decisions and outcomes which are inconsistent between different industry sectors and with competition law principles (but who says consistency is to be valued above all else and perhaps inconsistency only proves that different industries need different solutions). While there may be genuine debate about the virtues of specialist and generalist regulation which some of us feel was not given an adequate consideration in the Hilmer inquiry, the politics of the situation meant that nothing was going to stand in the way of the unstoppable engine of the Hilmer reforms. The Federal Government has convinced the States and Territories to throw their utilities (eg. gas and water) into the ACCC pot. There was an obvious political imperative for the Federal Government to be seen to follow suit with its major utility, telecommunications.

This suited Telstra fine, because for its own reasons it wanted to get the monkey of industry specific regulation off its back and to live in the wide flat land of general competition regulation. The new carriers saw the writing on the wall, and were prepared to accept the ACCC taking over many AUSTEL functions. However, they still wanted recognition of the special problems of telecommunications within the framework of a Hilmer regime. The pull between the imperative for "Hilmer familiar" provisions and telecommunications specific measures is evident in the draft legislation. The access and interconnection provisions build on the new access regime set out in the new Part IIIA of the Trade

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Practices Act, but are more detailed and potentially more extensive. The new retail pricing rules are similarly based on the existing Part IV of the Trade Practices Act, including principally section 46 which deals with behaviour which substantially lessens competition in a market. However, recognizing the continued nascent state of competition with Telstra's ongoing power, the competition tests have been toughened and the ACCC has been given "rapid response" powers not found under the general TPA.

The battle over the draft legislation largely will be over whether it should look more like the general law or more like the kind of industry specific legislation found in the current Telecommunications Act. The desire to straddle both the industry specific model, with the continuation of AUSTEL to perform some functions, and the general regulation model, with the ACCC taking over responsibility for competition issues in the industry, has produced a regulatory structure which would challenge Heath Robinson, as depicted in the diagram from the explanatory notes accompanying the draft legislation.

The rising star of resellers

Probably the most dramatic change is the improved regulatory position of service providers or resellers. The current Act creates, some would say artificially, an industry divided into a vertical structure of carriers, which are exclusively entitled to provide infrastructure, and service providers, which are free to provide any services but must use the carrier infrastructure. In return for the substantial sums they paid for their licences (other than Telstra) and their obligations to roll-out network and to achieve service coverage (universally in Telstra's case), the carriers got a bundle of rights, including a preferential right to interconnect with each other and a right to exploit the economies of scale and scope derived from their infrastructure. Service providers have few regulatory obligations and limited regulatory rights. They operate under a class licence with minimal restrictions, but are essentially, for regulatory purposes, no different to any other customer, except that they have the benefit of a prohibition on carriers discriminating against them because they are competing with the carrier and a limited right of connection to carrier networks.

Telstra basically lobbied for abolition of any regulatory distinctions between carriers and service providers, and for all players in the industry to have the same regulatory rights and obligations (and those rights would be the same as under the general Hilmer reforms). Some may have uncharitably described Telstra's objective as ensuring that it would be the "giant in a field of midgets".

Optus argued for retention of an industry structure similar to the current act, including basically the same allocation of rights and obligations between carriers and service providers, but with a substantial expansion in the members of the carrier class and some enhanced rights for service providers. Others might have uncharitably described Optus as clinging onto its "Linus blanket" of regulation and being reluctant to face up to competition in the big world.

In deciding on the future regulatory structure of the industry, the Government instead seems to have taken most to heart the service providers' complaints that they were being treated as second class citizens in respect of services and facilities provided by carriers. As a result, Telstra has got its desired removal of the distinction between carriers and service providers, but with a (potentially) more rigorous interconnection regime than it intended, and Optus has kept hold of industry specific interconnect rules, but it now has to share those rights with everyone else.

Separate carrier and service provider status has been retained in the draft legislation, but carrier status now carries mainly obligations and very few rights. The Government recognized that there would continue to be owners of infrastructure and providers which mainly relied on that infrastructure to provide their services (although they might have a limited amount of infrastructure of their own). The owners of network facilities needed to be subject to a higher level of regulation than providers without facilities to ensure that "any to any" interconnection and competition continued to function effectively in relation to core telephony (including ISDN). The Government has retained the designation of carrier as the means of identifying and imposing interconnect obligations on owners of significant networks. All other suppliers of telecommunications services, whether carriers themselves or providers without facilities, have the same entitlements to access the facilities and services of a carrier. Rather than being a 'ticket' to special privileges, a carrier licence is a 'target ' which attracts special obligations.

So, why choose to be a carrier if similar rights are available as a service provider? The answer is that there is no choice. If an operator controls a network to which others require access in order to compete, that operator is deemed to be a carrier and has to apply for a licence. This can best be described as the "if it waddles like a duck and quacks like duck it is a duck" test. The ACCC is responsible for identifying persons who should be treated as a carrier or groups of persons who should be treated as a carrier group (a gaggle of related ducks). A carrier or carrier group are those who:

- control a telecommunications network (after the experience of the carrier associate structures, the Government has shied away from the current concepts of install, maintain, own or operate); and
- the network is wholly within Australia or at least one member of the group carries on a telecommunications business in Australia and at least one component of the network is used to provide carriage services between tow points in Australia

or a point within Australia and a point outside Australia (establishing the jurisdictional ties with Australia); and

- the ACCC determines that the person or group should be treated as a carrier or carrier group having regard to a wide range of factors, including the extent to which the network is used to communicate with points outside the network (ie the degree of interconnection with the PSTN), the general policy objective of ensuring "any-to-any connectivity" and whether it is in the public interest for other providers to have access to the network so they can provide services.

Clearly, Telstra, Optus and Vodafone will be carriers. It is also likely that the carrier offspring, Optus Vision and Telstra Multimedia, will be carriers as well, or part of the Optus and Telstra carrier groups. Foxtel, depending on the level of control it exercises over the Telstra Multimedia network, may also be a carrier.

However, given the significant obligations (and next to zero rights) which follow, it can be expected that when the ACCC goes hunting for ducks, many facilities owners will be running for cover, or at least to their lawyers, to challenge the ACCC determination. It is not clear yet whether the appeal against the decision of the ACCC will be only under the ADJR legislation or as a full merits-based review.

How big a network must be before it raises to the level of 'carrier network' is very unclear. A network limited to a particular town or city probably would be a carrier network, such as a combination pay TV and telephony network in a Queensland provincial town. A network connecting up houses in a subdivision could even qualify as a carrier network, particularly if that network is the exclusive means of reaching the homes in that subdivision and competing providers could not supply services other than over the network. There are also some potentially significant carve-outs for Federal, State and local government networks, and communications between government departments and instrumentalities connected to the network are not considered to be "outside the immediate circle" of the network controller.

Once the ACCC issues a carrier determination, the carrier or the carrier group has to apply for a licence to AUSTEL within 14 days, otherwise it commits an offence in operating the network attracting hefty penalties. The issue of the licence by AUSTEL should be a fairly automatic process, the cost of licences should be limited (eg $500) and the conditions of the licence should be short and simple. There are certain mandatory terms, such as participation in the consumer codes of practice, joining the carrier forum which establishes the access codes, filing an access undertaking with the ACCC and complying with nominated directive powers of the ACCC. AUSTEL retains a general discretion to add more licence terms, but is subject to direction from the ACCC concerning terms which have a 'bearing on competition', whatever that means. This provides an avenue for AUSTEL to ramp up the level of regulation if problems are encountered, such as with numbering.

Access? What access?

Another article in this issue outlines the new interconnection, or 'access', regime. However, a couple of general comments can be made. First, the focus is mainly on establishing the process for determining the access which is to be provided. Many of the guideposts in the current regime to the nature, quality, level of access and cost which was to be expected (mainly of Telstra) are replaced with more ambiguous standards. The current carrier licences required "equal access" and service quality, delivery and functionality which is equivalent to what the carrier provides itself. Section 136 required that interconnection permit carriers to compete on an equal footing and that barriers to customers having equal access to customers be removed.

Under the proposed regime, the carrier forum, the TAF (or if they cannot agree, the ACCC) are to pour content into the largely empty vessel of access. The base requirement is that access meet the requirement of "any-to-any" connectivity but only for voice and ISDN services. (The Minister has power to make regulations to subject other services in the any to any principle and the ACCC could still require access in the public interest to services not expressly covered by the principle). The access must be efficient and the broad public interest considerations be met, including competition. This does not necessarily mean that the current interconnect arrangements will not survive, though encased in different regulatory and legal instruments and shared by more than just the current carriers. However, there is considerable room for argy-bargy and Telstra, not happy with many aspects of interconnection which it regards as part of the most tilted playing field in the world, may push to rework the current arrangements.

Second, the draft legislation has not defined what 'access' means, because the Government is concerned that any definition would be impossible given the broad range of services and facilities to which the legislation permits access. However, it is clear from the expansive definition of these 'components' of the network that a high level of unbundling seems likely, including to the features, functions and systems which are currently off-limits to service providers because they fall within the ambit of the current definition of basic carriage services and underlying resources identified by AUSTEL in its BCS Opinion. Components of a network include any part of the infrastructure of the network, any system (whether software based or otherwise), any billing system and billing information, any database containing customer information, common signaling systems (CCS7 signaling, the "holy grail" of service providers) and intelligent network functionality and platforms.

Third, it is unclear whether the guts of the interconnection arrangements will be in the access code developed by the TAF, the access undertaking approved by the ACCC or in the contractual arrangements (or ACCC arbitration in the absence of an agreement). The draft legislation leaves this largely open, although the inclusion of the 'terms of access', including the price or methodology to calculate price, is permitted but not required in the access code. It is likely that different players, depending on their own perspectives and interests, will have quite different views on this issue. If the TAF produced a very detailed code, access undertakings and individual contracts would have a more subsidiary place. On the other hand, the TAF code may be fairly general, and the individual carrier may choose to include the detailed conditions of access in the access undertaking, with a result that it operates much like a tariff. This would leave very little scope for individual negotiation. However, if the carrier wanted to maintain maximum flexibility for commercial negotiations with individual carriers and service providers, it may file a fairly spartan access undertaking and negotiate off-tariff.

Keeping Telstra on the leash

The dominant power and tariffing regime has also been junked. Under the current Act, each carrier must file a tariff for its basic carriage services. A carrier may not charge in excess of its tariff, and Telstra as the dominant carrier is required to charge in accordance with its tariff. Optus, as a non-dominant carrier, may charge off-tariff. Telstra is also prohibited from discriminating between customers other than where cost justified or in accordance with certain other limited exemptions under AUSTEL oversight.

Under the new regime, there will be no automatic requirement for carriers to file tariffs. However, the customer codes of practice can deal with procedures or requirements for customers to be informed of charges.

As to competition regulation of retail pricing, this is now built around the test of whether a party has "substantial market power", modeled after section 46 and Part IV generally of the TPA. The concept of 'dominance' is generally regarded as requiring greater degree of market power than the concept of 'substantial market power'. For example, while Telstra may be regarded as being dominant at 80% of the market, it may not be regarded as being dominant at 60% (market shares, of course, are not the sole determinant). This could mean that the price competition safeguards continue longer under the new legislation than would have been the case under the current Act. Under the current Act, retail price regulation would have fallen off the cliff once Telstra lost dominance, but now Telstra may continue to be subject to added regulation on top of the general TPA provisions for a longer period of time. While it is difficult to have more than one dominant player in a market (although on some theories not impossible), it is easier to find that there is more than one player with substantial market power. This may open the possibility for other operators besides Telstra being found to have substantial market power.

While the continuation of special retail pricing regulation represents something of a victory for Telstra's competitors, the fixed or per se rules of the current Act (eg Telstra must charge on tariff and not discriminate) are replaced with discretionary powers of the ACCC. Also, in an apparent effort to mollify Telstra, the Government noted in the explanatory notes that the telecommunications specific price regulation 'is not intended to be permanent' and at some unspecified date 'should be aligned with general competition policy'.

The price competition safeguards apply to both carriers and carriage service providers (i.e. non-facilities based resellers of carriage). The explanatory notes state that this has two purposes: first, unless carriage service providers were caught, a carrier could hive off its retail operations into a separate company to avoid the price regulation, and second, even though a service provider may not have a network, it still may have financial clout which gives it market power.

The biggest problem with competition safeguards can be for the aggrieved party to have them enforced quickly and the conduct stopped before real damage is done. Complex legal questions are involved in deciding what is the market, and then measuring power and the impact of the conduct. The can take a significant amount of time, plus the laborious process of litigation. Meanwhile, unless an injunction is granted, the alleged anti-competitive conduct continues. Recognizing these problems, the Government has given the ACCC power to take interim, even preventative, action to stop an anti-competitive situation emerging, rather than just reacting once it has occurred.

The ACCC could issue a 'competition direction' to a carrier or carriage service provider engaged in anti-competitive conduct, i.e. having 'a substantial degree of power in a telecommunications market' and 'tak[ing] advantage of that power' for a proscribed purpose or with an actual or likely anti-competitive effect. The test is broader than that under TPA s46 insofar as it includes among the proscribed purposes 'hindering' market entry. A competition direction may require the person concerned to desist from conduct or to do something to rectify the effect of the conduct. An ACCC 'exemption order' will exclude specified conduct from this process. The ACCC may issue an interim order which operates for a maximum of 90 days while it investigates whether a continuing direction should be made.

Conduct substantially lessening 'potential competition' will be caught. This represents a desirable extension on the tests in TPA ss 45 and 50, which look merely to 'competition'. It avoids the argument that conduct having no adverse effect in the market as it is

currently constituted, but which will likely adversely affect the market after it became more competitive, is not caught by the provision. However, establishing the tendency of conduct to substantially lessen potential competition may be difficult. The forward-looking concept of 'potential competition' should be apt to capture conduct which interferes with achievement of that potential, whereas 'lessening of competition' presupposes a state of competition currently existing in a market. It is regrettable that the provisions do not more closely follow TPP 24 which prescribes a rule addressing conduct effecting 'a substantial lessening or inhibiting of competition'.

A potentially very significant rapid response measure is the ACCC's power to issue a 'tariff filing direction' requiring a carrier or carriage service provider which has 'a substantial degree of power in a telecommunications market' to file tariffs where the ACCC considers disclosure of charges to be in the public interest or has reason to suspect anti-competitive conduct. As the explanatory notes say 'use of the word 'suspect' rather than a stronger word such as 'satisfied' is deliberate' to ensure that the ACCC has more scope to act on limited evidence. The draft Bill impliedly rather than explicitly implements the TPP 26 requirement that carriers charge in accordance with filed tariffs. The effectiveness of the tariff remedy would be substantially undermined if the ACCC had to go through the hoops of issuing a separate competition direction to force 'on-tariff' pricing, as a different, higher threshold applies to issuing a competition direction (i.e. higher than 'suspects' anti-competitive .

The enforcement provisions are modeled on ss 75B through 84 of the TPA. Pecuniary penalties will be available for breach of a competition direction or tariff filing direction. In addition, any person could obtain an injunction against a contravention or attempted contravention. Any person suffering loss or damage as a result of another person's contravention of a competition direction could recover the amount of that loss or damage. There is no provision for a private action for recovery of damages for breach of a tariff filing direction nor to give a private complainant the right to institute proceedings against a service provider that has engaged in anti-competitive conduct. This may be contrasted with the direct rights of action by private persons in support of provisions of the TPA such as s 46.

What about customers

There will be more consumer codes of practice than you can poke a stick at. There is to be a code of practice on privacy. Another code of practice will govern provision of information on services and prices. There will be a code of practice dealing with bonds, credit management and disconnection. The Telecommunication Industry Ombudsman will continue but apply to carriers and service providers, and there will be a code of practice dealing with complaint handling.

The universal service obligation scheme will be retained largely in its current form, with some changes. The contributions will be calculated not on the basis of timed traffic as currently occurs, but in proportion to each carrier's revenue from carrier businesses under its licences (this is meant to be simpler, but seems unlikely to be so). The definition of USO will be changed from ' Standard Telephone Servicing' to ' Standard Telecommunication Servicing', and an inquiry will be undertaken as to whether, given the growing sophistication of networks and services and the fabled information superhighway, the standard services which are to be available at a minimum to all Australian should be expanded beyond telephony (eg. in Germany, the Government is likely to require ISDN features to be made available on a USO basis).

Conclusion

The current Australian regulatory regime has been regarded around the world as state of the art in telecommunications deregulation, particularly in respect of interconnection. The radical changes proposed by the Government will keep Australia at the forefront of telecommunication deregulation. The trick will be to ensure that the new regulatory regime builds on the experience and knowledge which has been built up over the last five years, rather than serving as an excuse to revisit and rework these matters. In this age of convergence, the telecommunications reforms, of course, cannot be viewed in isolation from regulation of the different forms of broadcasting. The full picture of the post 1997 communications regime will not emerge until the Government completes its review of the Broadcasting Services Act, which is the next cab off the rank. Dealing with reform of the two pieces of legislation sequentially makes it more difficult to ensure the two pieces of legislation mesh. However, given the broad canvass which the new telecommunication legislation is intended to occupy, broadcasting legislation may become of much less significance, apart from the regulation of free to air services.

Peter Waters is a partner of Gilbert & Tobin. The views expressed in this article are not necessarily those of the firm or any client of the firm.