Communications Update

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Gaping Hole in Regulation

Telecom's controversial involvement in the allocation of its cable capacity has brought into sharp focus the existence of a regulatory vacuum which is becoming increasingly obvious as the broadcasting and telecommunications industries converge.

Of a total of 67 channels, 20 are said to have already been allocated to Cable Television Services (CTS) and it is reported that Telecom itself wants 10 channels.

The question being asked in the media and elsewhere is where does this place Telecom, as both the supplier of the cable capacity and as the allocator of the channels, particularly taking into consideration its own commercial interests?

Telecom's membership of the so-called PMT consortium (comprising News Ltd interests and two commercial networks, the Ten Network having recently dropped out) has raised concerns that its ability to allocate the channels fairly and equitably is compromised, and there is a view that this task should be undertaken by an independent agency.

And it's not only in cable that Telecom faces potential conflicts of interest in its commercial operations. For example, Telecom's 10 per cent shareholding interest in the Seven Network gives it direct access to developments in interactive communications through the Seven Network's agreement with Interactive Television Australia. Neither the Nine nor Ten Networks have agreed to sign up for this technology.

One solution which has been put forward is greater structural separation within Telecom to deal with its competing (and sometimes conflicting) business interests and obligations as a general telecommunications carrier. This issue is reported to have been the subject of recent discussions involving AUSTEL, the ABA and the Trade Practices Commission (TPC).

But structural separation is a political minefield. While the Government is strenuously denying any plans to privatise Telecom - at least in the short term - debate continues about the desirability or otherwise of breaking Telecom up into smaller parts that would be subject to intense competition. While this might make competition easier to implement, it might also mean that 'bigger' structures would be the winners, especially in the dynamic environment of convergence and the information superhighway.

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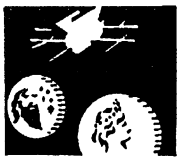

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Telecom acknowledges that demand for cable channels greatly outstrips supply. In fact, the ABA has so far allocated 203 broadcasting licences for cable services under s. 96 of the Broadcasting Services Act to 12 separate companies. (These licences carry no obligations in terms of being used at any point in time; they have no licence period.)

The demand for cable channels is not surprising given that cable is a viable option to corner valuable parts of the pay TV market right now - that is, before satellite and MDS pay TV services begin. There is no legislative prohibition against a cable-delivered pay TV service (as opposed to a pay TV service that is delivered either wholly or in part via MDS) starting up before one of the satellite pay TV services. Under the Broadcasting Services Act, MDS-delivered services are barred until after the commencement of a service under satellite Licence A, B or C **or** before 31 December 1994, whichever happens first. Until then, the ABA is prohibited from allocating even a 'paper' licence under s.96 of the Act for an MDS-delivered service.

Cable has the greatest immediate potential in that it could provide as many as 67 services. Satellite is limited at this stage to a total of 10 services Australia-wide, offered by three operators using Optus transponder capacity. While Australia has adopted digital technology as its standard for the future, it will be some time before we see the benefits of this in terms of a significant increase in the number of services available to consumers. The provision of other pay TV services delivered by satellite is prohibited until 1 July 1997.

While licensed Australian satellite-delivered pay TV services are presently limited to 10 in total, it is possible to receive many other overseas signals from satellites whose footprints cover parts of Australia. These services are not licensed under the Broadcasting Services Act, but neither is the reception of these signal prohibited under the Radiocommunications Act (see also page 5). As for MDS, there is a finite number of licences available in any one area; MDS also has technical limitations.

Telecom has recently undertaken to spend up to $1 billion rolling out its nationwide cable network, starting with high density suburbs in Sydney, Melbourne, Brisbane and the Gold Coast, with the aim of overcoming the current supply problem. Telecom is planning to upgrade its hybrid coaxial and optical fibre cable system to enable the carrier to multiply the capacity on the original 67-channel system.

With few limitations on their start-up date and with the right programming package, cable pay TV services may be able to corner the more lucrative parts of the pay TV sector well in advance of the commencement of competing services delivered via satellite and MDS.

Fair Allocation

In such a potentially lucrative environment, what happens to the cable channels which are now available? How can they be fairly allocated when the supplier, Telecom, is also a potential service provider and, as the dominant supplier in this market, is prohibited from discriminating in access to the network?

The Telecommunications Act does not provide for the allocation of a scarce resource when demand for that resource exceeds supply. The Act only provides that the general telecommunications carrier must provide certain rights of access to both other carriers (s.137) and to other service providers (s.234). On request to the carrier for access to the network, the carrier must connect the service, subject to some qualifying criteria.

As a result of increasing demand for access to the cable network, the rights of access under s.234 are under debate. Telecom's initial proposal to allocate the channels was reported to be on a selective commercial basis, as neither the Telecommunications Act nor the Broadcasting Services Act requires otherwise. The criteria to be used by Telecom in making its decisions were said to include such matters as the nature of the proposed services and plans for program development.

Given its own commercial interests and ambitions, it is difficult to see how Telecom could have fairly and equitably allocated the available channel capacity using such a subjective and qualitative assessment of other intending service providers.

Telecom's current position is that, in accordance with s.190 of the Telecommunications Act, it will soon file a basic carriage service tariff with AUSTEL, which will be subject to the regulator's scrutiny. This tariff includes terms and conditions aimed at establishing the bona fides of applicants prepared to comply with the conditions. Conditions are reported to include a substantial up-front payment that is refundable only if the participant reaches a certain level of business in terms of usage and numbers of customers for the service. Telecom may also withdraw the channels if the operator has insufficient programming to fill its allocated channels, and if the operator does not achieve a minimum audience.

The combination of a tariff and qualifying conditions is expected to result in the currently available cable channel capacity being enough to meet at least the short-term demand for these services. If there are still more applicants than capacity (and this is always likely given the state of play in the pay TV market) they could perhaps be allocated on a first-in first-served basis. However, this type of allocation system is not always the best when there is demand for a potentially valuable resource. An alternative allocation scheme, such as a price-based process, may be more appropriate - as long as such a process is not in itself discriminatory. Again, similar conditions would apply to licensees in order to ensure that warehousing does not occur.

Recently, scarcity has provided a rationale for allocation systems devised to overcome excessive demand for radiofrequency spectrum. Examples are the price-based allocation system used by the ABA to allocate the temporarily-vacant high power AM

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radio frequencies for use by open narrowcasting services; and the Spectrum Management Agency's price-based allocation of MDS licences.

The integrity of these price-based systems has yet to be thoroughly tested. However, the main advantage of this approach is that it does not usually include the application of subjective qualitative criteria, or administrative assessments.

Roles of Regulators

What potential jurisdiction do AUSTEL, the ABA and the Trade Practices Commission have in the Telecom-cable matter? Basically, AUSTEL is concerned only with issues of carriage, the ABA with issues of content, and the TPC with anti-competitive behaviour.

AUSTEL's roles in the resolution of the cable allocation debate are found in its overall responsibilities and its function to promote competition. AUSTEL will be able to decide if Telecom is acting fairly, and if competition is alive and well, when it considers Telecom's basic carriage service tariff.

The TPC does not have any immediate role to play. Instead, AUSTEL and the TPC have established and agreed on work procedures to keep each other informed of their respective activities (s.340 of the Telecommunications Act). Every two months, AUSTEL provides the TPC with a list of principal issues under its consideration, and the TPC provides AUSTEL with its monthly Telecommunications Work Report. Every two months officers of both the TPC and AUSTEL meet to discuss matters of mutual interest identified in these reports.

The ABA's only requirement in relation to cable used for the delivery of a pay TV service is to allocate the broadcasting licence (with relevant conditions) under s.96 of the Broadcasting Services Act. The ABA has no part in the decision-making process about who gets access to the cable network to deliver a service pursuant to the s.96 licence.

Where To From Here?

Politically, the Government cannot afford any more embarrassment after the MDS and satellite pay TV episodes of 1993. It needs to handle this potential conflict of interest differently, to ensure independence and objectivity in allocation procedures and not cloud them with subjective assessments.

But at the same time, what if the Government has underestimated the threat that a cable system may pose to the viability of a satellite delivered service? It would be political suicide to attempt to embargo the commencement of cable services as it did with MDS.

All of this debate about allocation is of little concern to the average person contemplating the advent of pay TV. Ultimately, the success of any system will come down to basics: the cost to the consumer in both equipment and monthly fees, and the programs being offered.❑

Sue Ferguson

Cover Prices: The Latest

The Assistant Treasurer, George Gear, says that while an inquiry into newspaper cover prices may be justified, the Prices Surveillance Authority is too busy for him to order it to inquire.

Gear was replying to a request by the Communications Law Centre for an inquiry into prima facie evidence of abuse of market power by the major publishers, after new research by the Centre had shown steep increases in cover prices over the period 1984-94.

Gear's letter of 7 July says: 'As your letter noted, the newspaper industry is highly concentrated and newspaper cover prices have increased at a faster rate than inflation. These factors suggest that there may be some justification for a PSA style inquiry'.

'That said, the PSA currently has a significant amount of work on its plate in the lead up to establishing the new Australian Competition Commission. In particular it is conducting a thorough review of all existing declarations under the Prices Surveillance Act 1983. Therefore, the question of an examination of newspaper prices is something that would need to be considered after this review is concluded'.

'Thank you again for bringing your concerns to the Government's attention.'

Under the PS Act, about 50 companies are declared, meaning they operate in substantial markets with limited competition and must justify price increases to the PSA. The review of declarations is a two-year task begun early this year.

Ironically, the newspaper publishers would seem to be prime candidates for declaration if only Gear would order the PSA to conduct an initial inquiry. It is, of course, entirely within the Minister's power to give the PSA sufficient resources so that it can conduct the review *and* examine the cover prices of a product of which, on average, 18.8 million are bought each week by Australian consumers. A PSA inquiry into newspaper cover prices was precisely what George Gear, as an ambitious backbencher, was calling for in 1990. ❑

Paul Chadwick