



is the only one of its kind serving a particular area might not be 'significant' when there are competitive facilities.

While escaping the straitjacket of the current technologically-specific definition, the new approach seems likely to be less certain in its practical application. Hence the proposed power for AUSTEL, acting on the advice of the ACCC, to give advisory opinions on whether someone is a carrier.

Telstra argued to the government's telecommunications review that the distinction between carriers and service providers is unsustainable. 'With developments such as intelligent network services, Personal Communications Services (PCS) and others such as callback...the person who bears responsibility for providing service to end customers may not be the person who provides underlying infrastructure for the service...[Further,] the public policy obligations run the risk of becoming unevenly distributed between facilities-based carriers and those non-carrier service providers who offer the same public switched services to customers.'

Optus argued that some form of distinction remains essential, although the basis for it might change. '[C]arrier interconnection rights and rates should only be available to carriers which have committed to substantial network and services rollout'.

This crucial commercial and policy battle - first played out in settling the definition of a carrier in the 1991 legislation, re-entered in drafting the 'carrier associates directive' after Optus Vision forced further thinking about carrier status and access - will now be fought in day-to-day regulatory skirmishes about who's carrying who. □

Jock Given

Regulating 'access'

Announcing the post-1997 reforms, Michael Lee said: 'The new regulatory regime will provide a seamless and fully-fledged open access regime. Interconnectivity over the public telecommunications network will be assured and service providers will be assured of access to carriage services'.

Jane Forster from Clayton Utz looks at how the laws about 'access' might work.

After July 1997, competition in the telecommunications industry will be regulated largely through two types of controls - control over access to infrastructure and control over the prices of certain services provided by carriers.

Although both these types of regulation exist now, the proposed arrangements seem likely to work very differently. These arrangements comprise both the Minister's telecommunications reform principles ('the reform principles') and the Trade Practices Act (TPA). Substantial amendments to that Act were recently passed by the Parliament, to implement the recommendations of the Hilmer report on competition policy. The amendments include the replacement of the TPA and the Prices Surveillance Authority with the Australian Competition and Consumer Commission (ACCC). The new organisation is likely to be operating from October.

The TPA is relevant to the post-1997 telecommunications regime both directly, because the government has decided to make it more applicable to telecommunications activities, and indirectly, because the telecommunications reform principles seek to 'align telecommunications-specific law [in the Telecommunications Act] with concepts embodied in the TPA to the maximum extent possible'. It's all part of the government's intention to facilitate 'a smooth transition to an eventual reliance on general competition law'.

Interconnection and access will be regulated, at least in part, by Part IIIA of the TPA. 'Communications services' are specifically covered by this Part and Principle 21 of the reform principles gives carriers and service providers 'full rights under Part IIIA...in respect of obtaining access to carrier and service provider services that are not the subject of a carrier access undertaking.'

However, it is likely that most of the regulation of access and interconnection will be addressed through industry-determined 'carrier access undertakings'.

Carriers will be required to make access undertakings in relation to carrier and service provider interconnection and access and arrangements for arbitration. The legislative framework for rights of interconnection and access will 'be based on the broad concepts behind Part IIIA of the TPA, with enhancements to enable industry codes of practice to be formally assessed and registered by the ACCC' (Principles 17 and 20). The industry will determine which services and facilities will be the subject of mandatory undertakings (Principle 18). The precise differences between the legislative treatment of telecommunications and that of other utilities in this area may be significant.

In those areas not covered by mandatory access undertakings and hence regulated by Part IIIA of the TPA, there will be two means by which interconnection and access may be addressed:

- 'Self-regulation' - Providers (own-



ers or operators of facilities which provide, inter alia, a communications service) can give written undertakings to the ACCC setting out the terms and conditions on which they will provide access to the service. Such undertakings are voluntary, unlike the mandatory undertakings which will be required of telecommunications carriers.

- 'Declaration' - An individual service (not a whole service industry) can be 'declared' by the ACCC. Once declared, a third party who is unable to agree with the provider on any aspect of access to the declared service, may notify the ACCC that an access dispute exists. Such disputes are settled through a process of arbitration or private agreement which, if registered, has the same effect as a determination made by the ACCC. It is not entirely clear from Part IIIA, or from the explanatory memorandum to the recent TPA amendments, what the content of a declaration might be. A declaration may do no more than provide the basis for negotiation of access.

Part IIIA does not contain any guidance for determining the price of access. If the declaration of a service does not contain rules about pricing, this matter will be left largely to be determined through submissions from industry participants, either at the time an undertaking is sought or at the time of an access dispute in relation to a declared service. The cost of interconnection and access to telecommunications services and facilities may be determined as part of the mandatory access undertakings procedure described in the reform principles.

It is not clear whether consumer interests could be represented at the proposed industry access forum at the time undertakings are accepted or when access to declared services is determined.

Principle 19 provides that carriers must interconnect all requesting serv-

ice providers (which includes providers of broadcasting services, information and interactive services) and act as 'common carriers'.

The distinguishing characteristic of a common carrier is that it is bound to carry, for reward and as a business, the goods of all people who send them to be carried, without discrimination, and so long as the carrier has room, at a reasonable price. A private carrier can reserve the right of accepting or rejecting offers for carriage.

This principle of common carriage, read in isolation, may be misleading in a number of respects.

First, Principle 23 provides that the general 'pay TV exemption made by the Telecommunications (Service Providers Class Licence) Direction No 1 of 1995, is likely to be continued until 30 June, 1999.

Under this direction, a company associated with a carrier (eg. Optus Vision, Foxtel) which operates cable installed by a carrier for the purpose of supplying pay TV services, can refuse to connect a telecommunications service or facility which is to be used to supply a competing pay TV service.

One assumes that the use of the term 'carrier associate' in the direction will require some reconsideration in light of the foreshadowed new definition of carrier. Any such carrier would certainly not be a 'common carrier' if they can refuse to carry competing pay TV services.

The opportunities offered by this exemption to avoid giving access to cable networks are already being exploited with Telstra recently announcing the creation of its new subsidiary, Telstra Multimedia Pty Ltd, which will own and operate the new cable network being rolled out across Australia.

Secondly, the government's intention for 'guaranteed access to equipment and subscriber management systems' (Principle 22) sits uneasily alongside the continued pay

TV exemption for carrier associates. Principle 22 requires carriers and service providers to use customer equipment which is accessible to other carriers and service providers. The example given is that there must be open access to carriers' and service providers' 'set top boxes'. Although the pay TV service providers can, in effect, monopolise the use of the cables they control, they must use set top boxes which will enable consumers to view not only their services but the services of others.

The accessibility promised 'by guaranteed access to equipment and subscriber management systems' is illusory. If the customer wishes to obtain the services of a competing cable pay operator, it will have to pay to have additional cable laid connecting it to its network.

Principle 26 states that the ACCC will have a power to require carriers with 'a substantial degree of power in a market' to file tariffs covering the terms and conditions, including price, on which particular services will be offered. This threshold of market power is lower than the 'dominance' which can currently trigger this power.

Such a power falls outside the traditional scope of the trade practices regulation although Principle 26 envisages the ACCC exercising this power.

It is understood that this regulatory mechanism will be contained in the telecommunications legislation rather than the TPA. However, the details of the scheme are not clear from the reform principles alone.

As a first step, the reform principles give some general idea about what is planned after 1997. However, they are far from comprehensive. It will not be until draft legislation is circulated that the industry will have an opportunity to assess the detail of what is intended and how it will be affected. □

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