processes on carriers. The Code requires carriers to notify and consult with councils before installing network infrastructure. Optus had engaged in a process of lengthy consultation with the councils at an early stage in its design process, so that any comments or suggestions they made could be taken into account in finalising network designs. Justice Dunford held, however, that the consultation process should not have begun until after the design was finalised. He said that until the council was in receipt of final designs, it was not in a position to make informed comments. Further, Justice Dunford held that that formal, written consultation is required by the Code, and Optus' less formal approach, by way of meetings and presentations, was insufficient.

The judgment gives rise to a difficult situation for both carriers and councils. Carriers will now be forced to change their design and environmental impact assessment processes so that these are finalised before consultation commences. For councils, on the other hand, their input into and influence over network design is reduced, because their opportunity to comment does not arise until after the design is complete. The judgment will challenge the negotiation skills of carriers and councils as they try to deal with this difficult legal dichotomy.

One final legal challenge remains. Seven Victorian councils have sought to re-open the question of whether the exemption from planning and environmental laws is valid. They have commenced proceedings in the High Court alleging that the exemption is unconstitutional. A hearing date has not yet been fixed. If the councils succeed, an important aspect of the scheme of telecommunications deregulation could still be at risk. ❑

Steven Glass is a Solicitor at Gilbert & Tobin. Gilbert & Tobin acted for Optus in each of the disputes with local councils.

What the Minister says...

In his address to the ATUG Conference on 30 April, the Minister for Communications and the Arts, **Senator Richard Alston**, had this to say about overhead cabling

'One of the most significant developments in the industry in recent times has been the construction of competing broadband cable networks by Telstra, Optus and their joint venture partners. It has certainly attracted the most comment.

Recent public comment has focussed on the vexed question of overhead cabling, which figures in the plans of both carriers but principally Optus.

It needs to be recognised that the carriers have been proceeding apace with their rollouts in line with business plans, cash flow predictions and equipment supply contracts based on a regime introduced by the previous government more than five years ago. Indeed it was a former communications minister and now the leader of the opposition who inserted the current carriers' powers and immunities into the Telecommunications Act.

The cable rollout has now progressed to a considerable extent and the bulk of the $7 billion devoted to the competitive rollout has already been spent.

In these circumstances it would be like moving the goal posts at three quarter time (or twenty minutes into the second half if you don't speak my language), to now unilaterally intervene and require the carriers to dramatically reconfigure their network rollouts.

Australia will be a major beneficiary of a world class mix of telephony broadband interactive and pay television services and there is no doubt that the consumer takeup for these services will be in line with Australia's long standing record of early enthusiasm for colour television, VCRs, faxes and mobile phones.

It would be like moving the goal posts at three quarter time .... to now unilaterally intervene and require the carriers to dramatically reconfigure their network rollouts.

But whilst we are firmly committed to a competitive rollout we must also continue to explore the possibilities for minimising duplications of ducting facilities particularly in non metropolitan areas where the possibility of installing single facilities on an open access basis or a competitive tender basis must be very seriously examined.

In metropolitan areas the recent report by Austel [at the time of publication, this report had not been made public] makes it clear that there are major logistical difficulties and commercial imperatives which militate against compulsory undergrounding. We will introduce a new Telecommunications National Code from 1 July 1996, which will hopefully endure well beyond 1997. We are committed to ongoing consultation with local government associations in or-

der to pursue a comprehensive solution on a national basis rather than a piecemeal series of local squabbles.

The NSW Supreme Court has already made it clear that the terms of the code must be strictly followed. However, we propose to tighten the code to ensure that more extensive and effective community consultation occurs. The carriers also need to be more sensitive and responsive to community concerns. They should go underground wherever possible. In areas of high visibility such as intersections, serious consideration should be given to undergrounding even after the event. Repeater boxes could be attached to poles rather than hanging from cables. Cables can be painted so as to blend into the surrounding environment wherever possible and trees should not be cut without proper consultation.

We propose to tighten the code to ensure that more extensive and effective community consultation occurs. The carriers also need to be more sensitive and responsive to community concerns.

The revised code will provide for the expedited resolution of disputes. It will do so in a way which does not distort competition in the market, including as between carriers, while allowing community concerns to be given their fair and due weight.

In some areas it may well be that ratepayers will place such a significant premium on the aesthetics of the streetscape that they will wish to contribute to the cost of placing all cables including electric power cables underground. Several state governments already have matching schemes and I would also expect the telecommunications carriers to make a proportional contribution.' ❑

The hand beyond the grave

Leo Grey looks at commercial certainty, fettered discretions and section 70 of the Telecommunications Act

In his ATUG address Senator Alston referred to the fact that the carriers had been proceeding apace with their system roll-outs in line with plans put into place under a regime introduced by the previous Government more than five years ago. It would be like 'moving the goalposts at three-quarter time' to unilaterally intervene at this stage, the Minister said. It is always a dilemma for an incoming Government as to how much it can change existing ground-rules, but this comment appeared to suggest that the difficulty he faced was no more than a simple matter of fairness in policy-making. In fact, there is a whole other dimension to the issue that is worth examining.

First, some basics. The nature of a Parliamentary democracy such as ours is that laws are made by the elected Parliament, but government is by the Executive. Commonly, the Executive implements its policies through broad administrative discretions conferred upon the Executive in laws made by the Parliament. This is especially true in the area of communications licensing. It goes without saying that a democratic regime such as this had three inherent characteristics. First, policies change as governments change. Second, administrative discretions conferred by Acts of Parliament are exercised differently depending on the political flavour of the governing party. Third, administrative discretions are exercised differently even by the same government as it perceives public opinion shifting.

One's natural inclination is to feel that this is as it should be. One of the principles of democracy is that government reflects the will of the people, and the people are entitled to change their collective mind by voting out one government, and voting in another with a different policy and legislative agenda, or by simply making clear to an existing government that a change of direction is necessary. The power of the people to choose a new direction should not be fettered in a true democracy.

Or should it?

In the mega-corporate privatised world of the late twentieth century, cash-strapped Governments are looking for large-scale business investment rather than taxpayers dollars to deliver on major infrastructure policy commitments. To secure that investment, there is always a price that Government is asked to pay. That price is an assurance of stability and certainty for investors in Government policy. Without it, the investment and commitment to long-term involvement in particular industry will not be forthcoming. As Government looks to privatised industries to meet ever more of the basic infrastructure needs to society, so the potential for tension becomes ever greater between the manner in which the captains of industry fulfil their responsibilities to their shareholders, and the manner in which the captains of Government fulfil their responsibilities to their electors. In particular, companies being asked to make a large long-term investment as licensed pro-