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 groundrules, 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-

viders of infrastructure may reasonably point to broad licensing discretions conferred in an Act and ask what guarantees they have that those discretions will not be exercised differently (and commercially less favourably) under a new government, or even the same government faced with unforeseen pressure to which it is politically vulnerable.

Inevitably, a government will ask itself: what can we do to reduce the fears of potential investors that we will change our own minds, or that our political enemies will, by a few simple administrative decisions, throw our policy regime out the window if they win government?

One topical approach to this problem is provided by the Telecommunications Act 1991. On its face the 1991 Act provided for a telecommunications regime in which an unspecified number of general telecommunications carriers might be licensed to provide basic telecommunications infrastructure and services in competition with one another. One can scour the Act in vain to find any mention of a 'duopoly' of any kind contained in that regime, although it had been adopted as a major plank of Labor Government telecommunications policy in November 1990 in a detailed statement by the then Minister for Transport and Communications, Kim Beazley. This is not in itself unusual or evidence of any sinister intent. The absence of a legislative licensing policy in an Act like this does not prevent Governments from following a policy course in which limits are set upon the number of licences which might be granted. Successive governments over many years maintained a broadcasting licensing regime which implicitly involved the creation and entrenchment of three national networks without any specific legislative mention being made of them or even of 'networking'.

What was different about the course adopted in the Telecommunications Act was that the legislation not only conferred certain broad licensing powers upon the Executive, but also gave the Executive in section 70 the additional capacity to bind itself by contract to exercise (or not exercise) those powers in a certain way (that way being not contained in the legislation itself), with what amounts to a financial penalty being imposed in the event that the powers were exercised in contravention of the contract.

Cash-strapped governments are looking for large-scale business investment rather than taxpayers' dollars to deliver on major infrastructure policy commitments.

In order to find the 'duopoly' of general telecommunications carriers one has to look in the Agreement made under section 70 on 31 January 1992 between the Commonwealth (represented by Graham Richardson) and AUSSAT Pty Ltd (subequently acquired by Optus). What guarantees the duopoly for the time being is that the Commonwealth agreed that it would not grant any further general telecommunications licences (except to AOTC, as Telstra then was) until 30 June 1997: cl. 2.

But there is more to that Agreement than the preservation of the duopoly until 1997. The period of the Agreement extends to 31 December 2015: cl.5.1. Even after the nominal expiry of the duopoly, the Agreement limits the capacity of the Commonwealth (through the Minister) to alter Optus's existing licence conditions or impose new conditions on Optus, whether or not the same conditions are imposed on Telstra (or any new carrier after 1997): see cl.3.

In particular, the Commonwealth may not impose or vary any general or specific condition if in the Minister's opinion it would cause Optus 'significant economic detriment or otherwise unduly reduce the practical utility of [Optus's] rights pursuant to the Act and the licence', except in certain limited categories. A breach of this agreement would result in the Commonwealth being liable to pay to Optus an amount that is the 'sum of all and any losses (including without limitation loss of profits, Australian business opportunities and diminution of the value of the licence, damages, costs and expenses) which arise out of the contravention, whether the losses are direct, indirect, consequential or otherwise, and wether foreseeable or not, which are suffered or incurred by Optus Group': cl.6.2.

The current debate about overhead cabling illustrates the point. Any condition that the Minister imposed on Optus that purported to require it to lay cable only in underground conduits (be they Telstra's or new conduits belonging to Optus) would raise a serious question about whether the Agreement had been breached. That in turn would raise the nightmarish issue of how one would calculate the financial compensation that might be payable by the Commonwealth.

In his address to ATUG, the Minister did not mention the possible effects of the Agreement entered into under the previous Government, or the limitations it places on any possible action, or the possible financial costs of any breach of it. Whether he did not consider it, or whether he thought it best to let sleeping dogs lie is not clear.

If no co-operative solution to overhead cabling can be found, and public reaction to it increases to a level where the Government is under severe pressure to take some action to end it, the Minister may find to his chagrin that, notwithstanding the broad discretions conferred on him by the Telecommunications Act, his policy options have been effectively snookered by those now sitting on the Opposition benches. ❑

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