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Government's new Bill to re-regulate Telecommunications

In March, Ros Kelly, assisting the Minister for Transport and Communications, Ralph Willis released a draft of the long-awaited Telecommunications Bill for public comment. The Bill follows the Minister's policy statement last May, which announced the government's intention to re-regulate the telecommunications market.

The new Bill also provides a prescription for "reserved services" within which Telecom will enjoy a monopoly, and a licensing regime for value added services and private networks.

While the industry generally welcomed the Government's May 1988 policy initiatives, many now regard the draft Bill as a disappointing effort, because of substantial concessions made to Telecom.

Stephen Menzies of Allen, Allen & Hemsley summarises the Bill then discusses in detail the all-important "reserved services" provision as defined in the new Bill.

There is considerable criticism by the industry of the terms of the new Telecommunications Bill. It is understood that both ATUG and AIIA will be putting submissions to the Department in respect of a number of provisions in the Bill.

The key features of the Bill are:

Establishment of AUSTEL

AUSTEL is established with three members, a chairperson and two others, with provision for the Minister to appoint further associate members.

AUSTEL is empowered to perform the following functions:

- establish a class licence system for value added services and private network services;
- authorise interconnection and the availability of facilities between authorised carriers (Telecom, OTC and AUSSAT);
- administer the boundaries between "reserved services" and competitively provided services;
- regulate competition between the carriers; and
- protect against unfair practices by carriers.

AUSTEL is subject to direction by the Minister.

Definition of reserved services

The Bill establishes a definition of "reserved services", being a service for "primary communications carriage between two or more cadastrally separated places or persons". The concept of a "cadastrally separated" place is one situated in premises owned or occupied by different persons, or if owner occupied by the same persons, that have different titles at law.

The term "primary communications carriage" is of crucial importance. This term means any service so far as it consists only of the functions necessary:

(a) to "arrange, operate and manage connectivity" across the network; and

(b) to "carry communications across the network" (with provision that once delivery standards are adopted by AUSTEL, that such carriage does not result in standards being exceeded in the supply of the service).

Provision of value added services

It is intended that value added services would be provided in a competitive environment.

However, the Bill proceeds to establish a "class licence" system, under which the benefits of competition will truly be available only upon the establishment of a class licence.

The provider of a value added service can elect to register with AUSTEL. Registration gives two benefits:

(a) The service is deemed to be within the class licence, providing some protection to action by Telecom for infringement of its monopoly; and

(b) AUSTEL cannot declare the service to be an unlicensed service, removing the

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service provider's rights and benefits under the class licence.

However, contrary to the hopes of industry, the registration procedures for registration under a class licence appear cumbersome, because AUSTEL must satisfy itself that the application relates to services falling within the description of the class.

Procedures of AUSTEL

All AUSTEL procedures will be conducted by paper, with applications supported by statutory declaration.

There is no procedure for appeal against various decisions of AUSTEL, other than those described in Clauses 436 and 580. Crucial decisions of AUSTEL are not subject to appeal eg failure to establish a new class licence.

AUSTEL has no power to conduct hearings. AUSTEL will simply issue a statement of reasons, which must then be challenged in the AAT, where permitted.

New board for CAMLA

A new board of directors was elected at the fourth annual general meeting of CAMLA in February. They are:

Mark Armstrong	**President**
Stephen Menzies	**Vice-President**
Alec Shand	**Vice-President**
Victoria Rubensohn	**Secretary**
Des Foster	**Treasurer**

Directors:

Ian Angus	Malcolm Long
Martin Cooper	John Morgan
Graham Dethridge	Terry O'Connor
Adrian Deamer	Richard Phillipps
Gareth Evans	Jonquil Ritter
Dominique Fisher	Joanna Simpson
Kate Harrison	Janet Strickland
Peter Hohnen	Doug Spence
Brian Hogben	Den Taylor
Paddy Jones	David Watts
Hugh Keller	Julia Wilkinson
Peter Leonard	

Constitutional changes

The following special resolutions were also passed at the annual general meeting:

That the merger of the Media Law Association of Australasia with the Australian Communications Law Association pursuant to the merger agreement be approved.

That the Articles of Association of the Media Law Association of Australasia be amended as follows:

By deleting the words in article 31 after the word 'of' in the first line and replacing them with the following:

Five office-bearers, being a president, secretary, treasurer and two vice-presidents, each of whom shall be a member of the committee:

By deleting all of article 32 and inserting a new article 32 as follows:

'Solicitors, or barristers who are in private practice at the time of the election, shall not exceed two-thirds of the total membership of the committee.'

Adding value to Telecommunications

With certain reservations, the industry has welcomed the policy initiatives of the government, as set out in the Policy Statement of 25 May, 1988. That Policy Statement established three important philosophies, which underpin a number of specific recommendations:

Value added services will be opened to full competition.

The government's statement placed considerable importance on the potential for value added services in economic growth and to foster Australian participation in the wider information economy.

In the light of this policy, the Policy Statement contemplated full competition for value added services and specifically that:

(a) any new regulatory framework would minimise the necessary regulation of value added services and clarify the application of any remaining regulations, to ensure the competition is both permitted and encouraged within the boundary of the regulatory arrangements and to safeguard against misuse of Telecom market power (par 4.29); and

(b) any telecommunications service not explicitly reserved to Telecom, OTC or AUSSAT will be opened to competitive provision (par 4.37), with the legislation and regulations setting out those network services that are reserved, on the basis that all others are opened to general competitive entry (par 6.37).

Telecom's monopoly will be preserved for services necessary to sustain its universal service objective, but with regulation against predatory or anti-competitive conduct.

The Policy Statement described at length the need to maintain some limited monopoly for Telecom and elected to restrict that monopoly to the "reserved services", subject to a number of initiatives to restrain an abuse of monopolist power. Telecom was to be under supervision by the Australian Telecommunications Authority (AUSTEL) and to be subject to the Trade Practices Act.

In the Policy Statement, the government stated that its approach to redefining the scope of Telecom's monopoly was based on two considerations:

(a) the need to maintain and extend universal services by maintaining Telecom's ability to provide access to standard telephone services through costs averaging and cross-subsidy; and

(b) the need to secure the orderly and efficient development of the basic network by enabling the fullest exploitation of efficiency arising from economy of scale and scope, and by avoiding costly and uneconomic duplication of facilities (par 3.50).

The government considered that "reserved services" would comprise the basic terrestrial network, as a facility, and basic switched voice services, together with services which are directly substitutable for voice services. In addition, the category of "reserved services" was expanded to include certain "established services currently provided" by Telecom and OTC on the basis of traditional trafficking principles that derived from the public switched network: these services included DATEL and AUSTPAC and public switched ISDN.

Having determined the boundary of the "reserved services" which are specified in the Policy Statement, the government stated that regulations would define those boundaries. AUSTEL was charged with the duty of administering that legislation and, as technological changes took place, to make recommendations concerning any change to the boundaries of monopoly, when reporting on the efficiency and adequacy with which Telecom fulfilled its service obligations (par 3.101).

As a consequence of this policy, Telecom was to be organised as a more commercial organisation. Telecom was to be permitted to participate, through subsidiary companies, in the provision of value added services on terms competitive with other service providers.

Telecom was to act as a true common carrier.

A common carrier is one which provides access to the telecommunications system without discrimination. Telecom has

not always acted as a common carrier.

The Policy Statement provided for the worthwhile policy of a new supervisory agency, AUSTEL, which would police any intrusion on Telecom's monopoly, but also ensure that the monopoly carrier acted fairly and without discrimination. For example, when AUSTEL licensed their value added service through a private network, the Policy Statement provided that the licensee would have an automatic right of access to the Telecom public network and Telecom could not discriminate on the terms on which that access was provided (par 4.38).

Subsequent to the publication of the Policy Statement, the Department has circulated draft guidelines for industry comment. These guidelines have concerned three areas:

- Standards for Customer Premises Equipment (CPE);
- Licensing of private networks, and
- Class licences for value added services.

Considerable debate arose in connection with those guidelines and the future rights and role of Telecom, once AUSTEL was established. The following issues have emerged:

Should Telecom be able to review or approve AUSTEL applications?

One issue which has been very contentious is whether Telecom should have a role in reviewing or approving applications to AUSTEL for value added services or private networks. The Policy Statement contemplated that there may be challenge to an application, but did not specify how this would operate in practice.

The principal thrust of the Policy Statement was that there would be full competition in all areas of telecommunication, other than "reserved services". The onus was to be on Telecom to justify the boundary of these "reserved services".

Telecom should not, however, be able to review all proposals for value added services in any application to AUSTEL prior to approval and dispute the proposed approval of any new service, involving lengthy delays or litigation. Telecom must not be able unilaterally to withhold interconnection to the public network whenever it believes that the licensed service infringes its monopoly.

Licensing system should not be bureaucratic and cumbersome

The Policy Statement contemplated that AUSTEL would introduce an efficient regime for licensing value added services, which was inducive to a competitive environment. That system would proceed on a "class licence", under which, it seemed, that there would be minimum regulation. Except in the case of services which may offend the monopoly conferred on Telecom for "reserved services", a licence was to proceed automatically by notification.

The UK system of class licences has not proved successful and, it is understood, the Department does not intend to follow that system. Rather, it is hoped that AUSTEL will establish at an early stage various classes of licences which replicate all of the current services which Telecom has approved, both in its "readily approved category" and approvals issued on a case by case analysis, in accordance with its current Value Added Services Policy.

The debate over "reserved services"

It is necessary to consider an appropriate definition of "reserved services", for incorporation in the new Australian Telecommunications Authority Bill, due for release in April 1989.

The Ministerial Statement of 25th May 1988 provides a number of guidelines as to how "reserved services" should be defined. The most important policies enunciated in the Ministerial Statement which bear upon a definition of "reserved services" were:

(1) any telecommunication service not explicitly reserved to Telecom, OTC or AUSSAT would be open to competitive provision (par 4.37 of the Ministerial Statement): that is, the definition should be so cast as to be exclusive, rather that inclusive,

(2) the definition of "reserved services" would be made by the government, and not AUSTEL: AUSTEL would merely give effect to the government's policy in that definition: that is, before the establishment of AUSTEL, it is important that the government prescribe a definition of "reserved services" which is not descriptive of particular services, but rather represents the policy; and

(3) the basic monopoly of Telecom is to be the provision of "basic switched voice" services (para 3.52), with that monopoly extended only to additional services which are provided jointly with public switched voice services (ISDN) or as a direct substitute for those services, eg leased lines, or have derived from voice services, eg public switched data, (par 3.57).

Essential features of "reserved services"

The definition of "reserved services" should confer on the common carriers, Telecom and OTC, a right in relation to services which fulfil these policy aims of the government. There are four essential requirements of any "reserved service":

(1) the service must be a basic voice or data service: the definition should exclude from "reserved services" any service component which is "value added";

(2) "reserved services" must be "public switched" services or a direct substitute therefore: a switched service is one where an interconnection is provided on demand, ie it is not a "dedicated" service;

(3) any "reserved service" must be "public" switched: the term "public switched" is one of common industry usage and refers to a service made available to any member of the public on a non-discriminatory basis, where connection from one subscriber, being a member of the public, to another subscriber is available on demand at a common tariff and on common terms; and

(4) any "reserved service" must be provided by the carrier as a common carrier. This fourth characteristic is implicit both in the Ministerial Statement and in Telecom's own description of what is a public switched service. Telecom, in its Interconnection Policy of January 1988, defines "public switched network" to be the exchanges, lines and circuits controlled by Telecom for the provision of telecommunication services between customers in its role as **national common carriers.**

The Ministerial Statement suggests that the definition of "reserved services" serves a twofold purpose: firstly, it defines the area within which Telecom has a monopoly, and secondly, it prescribes the area of conduct within which the carriers may act as monopolist, and so be protected from the provisions of the Trade Practices Act. The definition of "reserved services" is crucial not only for the defence of the carriers, but also for the promotion of competition **outside the role of common carrier.** One can compare this policy with that which has emerged in the United States where government policy has conferred limited monopolies on carriers, but only to the extent that they "common carriers". A body of law has emerged to define the characteristics of a "common carrier" which is entirely consistent with the regulatory environment contemplated by the Ministerial Statement.

Telecom, OTC, ATUG and AIIA have, it is understood, each provided comprehensive statements as to how reserved services should be defined. The issues

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which have emerged from these submissions are as follows:

Descriptive or prescriptive

Should the definition be prescriptive or descriptive? The advocates of a prescriptive definition rely upon the fact that the Minister only reserves to Telecom specific services and are concerned that any descriptive definition may, with technological change, bring other services within the "reserved services" in an unintended manner. On the other hand, the proponents of a prescriptive definition are concerned that the Minister was not focusing on particular services but on the realm and nature of competition.

Function or technology

Should the definition be based on the functionality of services or on some technological basis? Proponents of the former argue for a distinction between "basic" services and "enhanced" or "value added" services, where the "basic" service would be any service which provided for the transmission of a signal from point to point without change in the nature of the information conveyed and without any delay in transmission. On the other hand, proponents of a technological definition point to the difficulties encountered in other jurisdictions in defining what is a "basic" conveyance and seek to import technical models, and in particular the OSI model.

Scope of network boundary

How should the definition define the network boundary in relation to reserved services? On the one hand reserved services could extend well beyond the terrestrial network operated by Telecom, eg mobile cellular phones, whereas proponents of competition contend that the network boundary should be at the outer premises of any customer premises and never extend to any signal not conveyed by line, ie exclude microwave links, etc which are regulated under the Radio Communications Act.

Public switched

What is the concept of "public switched" communication, as referred to in the Policy Statement? Is it intended to limit the concept of "reserved services" to services provided to the general public by switched exchange, or is it intended to apply to any service which may be offered between any two persons who are members of the public, ie, any group of people outside the "common interest group" as now proved by Telecom?

Protocol conversion

In what manner should one treat network protocols which "enhance" services offered by the network, but are essentially related to the carriage of information? On the one hand, Telecom seeks to reserve to itself all packetised information services, such as AUSTPAC, whereas proponents of competition say that no protocol conversion should be considered within the concept of a "basic" conveyance.

The Bill

Clause 52 of the new Bill provides a definition of "reserved service" as follows:

"A telecommunications service is a reserved service if it is a service for primary communications carriage between two or more cadastrally separated places or persons."

This definition relies on two key concepts:

"Cadastrally separated"

For the purposes of the Bill, places or persons are taken to be "cadastrally separated" where places or persons are situated in areas of land or premises that are owned or occupied by different persons or, if the areas are owned and occupied by the same person, there are different titles in relation to those areas.

"Primary communication carriage"

The term "primary communications carriage" refers to a telecommunications service so far as it consists only of the functions necessary:

(a) to arrange, operate and manage connectivity across the telecommunications network; and

(b) to carry communications across the network or, if service delivery standards are prescribed by regulation, to carry communications in a manner that does not result in the service delivery standards being exceeded.

Objections to definitions

(1) "Reserved services" should not include services between two or more cadastrally separated places: communication between one "person", ie employees of the same company, who are located at separate places will fall within the definition of "reserved services". Clause 7 provides a meaning of "cadastral separation" which has the effect that even where two lots of land are owned or occupied by the one person (ie the employer), but there are different titles to those two areas, such land will be deemed to be cadastrally separated. These provisions substantially narrow the "own premises" exemption, now contained in Clause 39. Clause 39 restricts the operation of the monopoly conferred by Clause 37 on Telecom, but the prohibition on the provision of reserved services (Clause 56) is not subject to Clause 39.

(2) A "reserved service" is any service for "primary communications carriage". That term has been expanded substantially since earlier drafts of the Bill. "Primary communications carriage" is now defined to consist of functions necessary to "arrange, operate and manage come activity" and to "carry communications" unless and until standards are adopted in respect of the service.

(3) The concept of "primary communications carriage" is sufficiently broad to include all telecommunications carriage, within all seven layers of the OSI model. This is made absolutely clear by the notes on the clause, which state that paragraph (a) is **"intended to encompass"** all switching, control and operational functions internal to the network and **associated with provision of the service**. These functions expressly include billing systems, network traffic management, handling of customer request, directory maintenance and "a range of higher functions internal to the network such as those associated with a provision of intelligent networks and enhanced features of the ISDN reserved service".

Primary communication carriage should **not** include functions necessary to "manage connectivity", nor functions to "carry communications". The expert consultants to the Department recommended that primary communication carriage would only include the bottom three layers of the OSI model, to the extent necessary to establish call set-up and tear down and to "provide for" transmission, with a provision that such transmission was in as delay-free and transparent manner as possible. This concept has been totally abandoned by the Department.

(4) It is unnecessary for "service delivery standards" to be provided for under the regulations (Clause 54). Until such standards are prescribed, there is no limitation upon the functions which are included in "primary communications carriage" by para 53(b). The section should provide an automatic test, imposing accepted standards and including in the concept of "primary communications carriage" only carriage under which transmission is in a delay-free and transparent manner.

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The content has often suffered.

The highly ambivalent attitude of the Tribunal to the use of lawyers and to the scope of their activities in the enquiry process has not only lead to much uncertainty but has multiplied the wasteful work which has had to be undertaken by applicants.

Some applicants have used lawyers to actually present material to the Tribunal whereas others have kept their lawyers very much in the background. Some lawyers have approached the application process as a highly forensic exercise in which every "i" must be dotted, "t" crossed and ambiguity exercised. Again this has lead to great complexity. For example, in the Geelong applications, one party sent out questions to other applicants which in some cases ran to over thirty (30) pages and read very like interrogatories in a commercial litigation matter. They invited replies of equally forensic complexity.

The ultimate criticism of the present procedure must lie in the fact that the generally anticipatory nature of the entire process makes it impossible to engage in any real analysis of applications. If the available audience is known only in the most general outline, if the size of the revenue in the market can only be guessed at, if the influence of overlapping stations and other media can only be guessed at and if the decision of the other station or stations in the market to go FM or not is not known at the time of the application, one wonders how any Tribunal can possibly carry out a realistic and fact based comparison of applications.

"The present system is patently not working and is grossly inefficient"

The present system is patently not working and is grossly inefficient. It has been estimated that each applicant in the Gold Coast spent in total executive time and direct costs more than $300 000.00 in preparing their applications. This means, if combined with the Tribunal's costs in conducting the enquiry, a total cost exceeding $4 000 000.00. Would this money have not been better spent in establishing the station?

If it is accepted that the process does not provide the Tribunal with any real answers as to which applicant is the most suitable to operate the station (except to perhaps eliminate the totally incompetent or the financially insecure), is there not a better system?

It is suggested that the following reforms could be easily implemented and would have a substantial impact upon the cost of Applications whilst providing the Tribunal with a clearer picture of potential applicants:

1. Before applications for grant are called, a "viability" hearing should be conducted at which the encumbent licensee or licensees will be entitled to argue the issue of their commercial liability in the context of the grant of the new licence. Potential applicants should be entitled to appear at this preliminary hearing and to ask questions of the encumbents.
2. An application fee of $25 000.00 per applicant should be charged;
3. These monies would be used to provide a single comprehensive market research and engineering analysis which would be made available to all applicants and which the Tribunal would use as the basis for all factual findings about engineering and audience matters.
4. The Tribunal would assume that all applicants are capable of providing the technical facilities necessary for an appropriate station and examination of issues such as studio size and numbers would be eliminated. Of course, each applicant would be required to give appropriate undertakings in relation to technical matters.
5. The Tribunal would lay down an appropriate corporate structure which applicants are invited to accept. If they wish to use some other structure then this must be specifically justified.
6. The Tribunal would lay down minimum capital requirements for all applicants for each particular station.
7. The Tribunal would lay down a series of criteria which it will use to assess applicants including the desirable level of local anticipation, the minimum amount of local programming, the minimum percentage of Australia content and similar matters.
8. Applications would be very simple in format and would primarily consist of a series of undertakings to comply with the outlined procedures and structures accompanied by schedules in which an applicant's choice to vary from the basic structural guidelines could be set out.
9. Each applicant would have a **private interview** with the Tribunal in which the Tribunal would be free to ask for further explanation of any aspect of an applicant's application or proposed management. At this time the Tribunal could ask for specific undertakings in relation to programming matters.
10. Each party would be given an opportunity to present in writing a final submission in support of its application.

This procedure should reduce if not eliminate the competitive nature of applications. Criticism of other applicants should be discouraged. In certain circumstances the Tribunal might even suggest the amalgamation of two or more applicants which, if the parties agree, would ensure the grant of the licence.

"Criticism of other applicants should be discouraged"

In the private interview process, the Tribunal could "negotiate" with applicants to ensure matters the Tribunal considered were important were included in applications although, of course, applicants would be free not to accept "suggestions" from the Tribunal.

Much greater emphasis should be placed upon the first licence renewal of each successful applicant to ensure that all undertakings given have been complied with unless the Tribunal has been notified and approved the variation from those undertakings. It is the sanction of loss of licence for failure to comply with undertakings which will be the most important part of this reformed licence grant system.

It is suggested that the reforms proposed above comply with the requirements of the Broadcasting Act and yet provide an efficient, cheap and fair licence grant system.

The administrative structures of the Tribunal will not be stressed to breaking point, citizens will obtain additional radio services much more quickly and efficiently and the encumbent will be treated more fairly.

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(5) Clause 52 and the definition of "reserved services" has an expanded operation by the "declaration of policy" contained in Clause 36. By stating an intention to Parliament referable to particular services, but without any attempt to define those services (eg "leased circuit services"), continuing argument will arise as to the proper interpretation of Clause 52. The scope of that argument is evident by the various submissions received by the Department concerning an appropriate definition of those terms. It is wrong to include those terms in the legislation, having regard to their acknowledged ambiguity.