

teams to a rival competition organiser and the acquisition by the clubs of the services of a rival competition organiser.

Burchett J found that while the negative stipulations in the contracts had the exclusionary effect of shutting News out as a rival competition organiser, the purpose of the League was to preserve the quality of its rugby league competition through the joint participation of all the clubs.

By contrast, the Full Federal Court found that the League, ARL and the clubs perceived News to be a potential rival competition organiser and entered into the contracts for the purpose of 'shutting out...News as a rival organiser and locking in the clubs to the national competition, to the exclusion of their participation in a rival competition.'

Arrangement or understanding

Another critical issue was whether an horizontal arrangement or understanding among the clubs (to which the League and ARL were parties) should be inferred from the circumstances in which each of the clubs executed the Commitment and Loyalty Agreements. It was undisputed that each agreement

was executed by each club in substantially identical form and within a short time of each other.

Burchett J found that the clubs had no more than a hope or expectation that others would execute the Commitment and Loyalty Agreements. His Honour pointed to the absence of direct and express communications between the parties to the alleged arrangement or understanding and held that it was not possible to infer an horizontal arrangement or understanding out of a series of vertical agreements.

By contrast, the Full Federal Court found that the existence of the Super League proposal and Mr Arthurson's concern about it were common knowledge among the clubs. The Court pointed to the extensive newspaper coverage of the Super League proposal, the communication between club officials and Messrs Arthurson and Quayle and the receipt of a draft contract by each club which expressly prevented that club, for a five year period, from participating in any competition not conducted or approved by the League and ARL. Notwithstanding the absence of evidence of direct communications among the clubs, the Court stated that 'it is difficult to resist the conclusion that the clubs were consenting, through the

medium of Mr Arthurson and Mr Quayle, to carry out a common purpose. They were not merely hoping that the other clubs would join in; what they were doing made sense only as a common undertaking.'

It is open to debate whether the evidence, at least in respect of the Commitment Agreement, properly supports a finding of an horizontal arrangement or understanding between the clubs. It remains arguable that what occurred was mere 'conscious parallelism', a concept well accepted in US anti-trust law as falling short of a conspiracy.

Conclusion

On balance, the author believes that the Full Federal Court's findings are more consistent with the evidence than the trial judge's findings. However, the absence of any detailed analysis by the appellate court in respect of these critical elements of the prohibition against exclusionary provisions creates a level of uncertainty which is unacceptable in this field of law and makes it difficult to advise or act with confidence.

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A New Standard Telephone Service?

Holly Raiche analyses the expanded definition of 'Standard telephone service' in the Telecommunications Bill 1996 and explains why it has implications which require closer examination.

What a 'standard telephone service' (STS) is and does and how it is funded will be significantly different from the 1991 concept of an STS if the *Telecommunications Bill 1996* is passed into law.

Under the Bill, the context of STS moves from the legislative mechanism for one carrier delivering telephony service to all Australians, to a benchmark for all providers of basic telephony services. Its definition potentially changes from the provision of a service, to a combination of service and equipment. Where there was only one deliverer of the STS in an area, the delivery of components of the STS may

be split between USO carriers. Finally, the funding for STS provision, now based on provision of services to geographic areas, will need to be changed to accommodate the provision of equipment as part of the STS.

The changes to the STS and its context within the universal service are best understood by reviewing the current STS structure to highlight the significant changes made by the Bill.

STS In Context

Under current legislation, STS terminology is used primarily in the context of the universal service obligation (USO). The USO is the requirement on the universal service

carrier to provide both a standard telephone service and payphones which are 'reasonably accessible to all people in Australian on an equitable basis, wherever they reside or carry on business.'⁽¹⁾

The only other reference to an STS in the current regime is the obligation on general carriers supplying an STS to residential or charitable customers to provide the option of access to untimed local calls if access to those calls was provided at the commencement of the Act.⁽²⁾ This requirement ensures that the USO carrier, whether Telstra or another general carrier, continues to provide access to untimed local calls in areas where it had been available in 1991.

Under the Bill, use of the STS term goes well outside provision of the USO. The term is still used in the context of continuing access to untimed local calls. It is also, however, used in the context of customer safeguards such as the provision of customer information, directory assistance and itemised billing.⁽³⁾

This raises the issue as to whether the STS, under the Bill, is being used to set a general benchmark of requirements which must be met by all carriage service providers providing voice telephony services to consumers, whether or not they are a universal service provider.

The most obvious advantage of using the STS as a benchmark for all STS services providers is that the public will be guaranteed some minimum level of service from whatever STS provider they choose. It will ensure all STS offered to the public include the possibility of access to untimed local calls where now available. It will also, because of the way the STS is defined, ensure people with disabilities have access to a voice equivalent service.

However, there may be some disadvantages in using the STS as a more general benchmark. Smaller carriage providers may want to offer voice telephony at very low cost, but on a timed call basis only. Under the Bill, they would not be able to do so.

Further, because equipment and other services can become part of the supply of the STS, as discussed below, smaller carriage service providers may be deterred from offering only basic voice telephony services.

STS Definition

The STS is now defined as a 'public switched telephone service that is supplied by a carrier and is supplied by means of a telephone handset that does not have switching functions, the definition provides for regulations to include other telecommunications services in the STS definition, as the mechanism for upgrading the STS.'⁽⁴⁾

The Bill has preserved the terminology of universal service and a standard telephone service, but has made important changes to the way the STS is defined.

The proposed USO is in very similar terms to the 1991 obligation: to ensure that the STS and payphones are 'reasonably accessible to all people in Australia on an equitable basis'. The new requirement is that 'prescribed carriage services' are also reasonably accessible.⁽⁵⁾ - in essence repeating the upgrading process of an STS by regulations, but maintaining a separation between what an STS is and what additional 'prescribed' services will be delivered as part of the USO (though not part of the STS).

The new definition of the STS is a carriage service which either provides voice telephony and passes the connectivity test⁽⁶⁾ or, if a voice telephony service is not practical for an end user with a disability, then a carriage service which is equivalent to a voice telephony service which passes the connectivity test.⁽⁷⁾

A new section further defines the 'supply of the STS' as including the supply of customer equipment, if prescribed by regulations. That equipment can be a telephone handset without switching functions, other equipment for use by people with disabilities, or other goods and services used in connection with the STS.⁽⁸⁾

STS Standards

The 1991 Act allows AUSTEL to develop performance standards both for the STS and other goods and services supplied to consumers.⁽⁹⁾ Because of AUSTEL's roles in handling USO complaints and reporting to the Minister on the implementation of the USO, AUSTEL has also developed its 'views' of an expanded definition of the STS as including access to free emergency services, voice grade service meeting international standards, access to directory assistance and fault reports, and a unique telephone number.⁽¹⁰⁾

Under the Bill, some of AUSTEL's views about what is included in an STS (as part of the USO obligation) have now been included in the more general requirements on Service Providers providing an STS.⁽¹¹⁾ The issue, again, is whether service standards and quality measures should be set generally for all providers of the STS or whether general standards should be set for basic telephony providers, and some additional and/or different test developed in connection with the USO requirements.

STS Price Controls

Currently, there is a *de facto* price control regime on standard services (including the STS) by the coincidence of Telstra being subject to price controls under its own legislation⁽¹²⁾ and also being the universal service carrier for Australia under the Act.⁽¹³⁾

Because of the very real possibility of more than one USO carrier, the Bill quite sensibly provides a direct link between any USO provider and the prices charged in connection with the USO. Under the Bill, the STS and other 'specified universal service charges' can be brought under the price controls through Ministerial determination.⁽¹⁴⁾ Because the 'supply' of the STS now includes customer equipment, it opens up the possibility of price controls on customer equipment in connection with the USO as well as the STS and payphone charges.

Telstra can still be subject to price controls under its own Act. And under this Bill, Ministerial determinations made relating to universal service charges will not affect any price controls imposed on Telstra under its own legislation.⁽¹⁵⁾

That raises the obvious issue of consistency between the price controls on Telstra and price controls on other USO providers (including controls on Telstra *qua* Telstra as against controls that might be imposed on Telstra *qua* USO provider).

More than One STS Provider

The Act now requires that, for any given geographic area in Australia, there is now only one universal service carrier,⁽¹⁶⁾ whether there is only one universal service carrier for the whole of Australia or for a specified area or areas in Australia.

The Bill allows for only one national universal service provider whose area of responsibility extends nationally, except to areas where another carrier or carriers have been declared as regional universal service providers.⁽¹⁷⁾ The Bill further allows, however, for a declaration of more than one regional universal service provider in an area.⁽¹⁸⁾

Presumably, this is to allow the provision of the STS by one regional USO carrier or the national carrier, and

other 'prescribed services' or payphones which are part of the USO by another USO provider.

The advantages of splitting the USO into component services, and allowing different carriers to provide different components is that it allows services to be provided by a carrier which can provide that service most efficiently and cheaply.

There are some obvious issues, however, about whether allowing the USO to be provided by different carriers will mean customers must subscribe to more than one carrier to receive the USO benefits, and possibly incur additional charges in doing so.

Tendering for the STS

The system of regional USO providers allows potential providers to tender to provide the USO in a given area or areas.⁽¹⁹⁾ The process does not appear to include oversight of whether their tendered cost for providing a USO service is reasonable.

Ordinarily, if a corporation underbids for the right to provide a service, it simply wears the loss or goes bankrupt. In the case of a USO provider, however, there are public consequences for underbidding.

Most importantly, the incentive for the USO provider may be to provide a lower quality service to make up the loss. Further, if the USO provider goes bankrupt, the responsibility will be on the national USO provider to pick up the costs, which may be considerably higher than tendered for and, ultimately, all participating carriers will contribute to the higher costs resulting from the original under-funded tender.

Funding STS provision

The current STS definition and the compensation mechanisms for loss incurred in its provision highlight two

aspects of the STS. It is an obligation to provide a service only, not equipment.⁽²⁰⁾ And the obligation to provide a STS is concerned only with ensuring universal geographic coverage of Australia.⁽²¹⁾

Recovery for losses incurred in providing the USO are still, under the Bill, based on the concept of 'net cost areas'.⁽²²⁾ Because, however, the supply of the STS can now include equipment as well, using a geographic concept for cost recovery of USO provision is no longer totally appropriate.

It may be that concepts of net cost areas can still be used as the basis of recovery for the provision of loss making service in areas. However, additional mechanisms for loss recovery need to be developed so that provision of equipment and other goods and services required as part of the USO can be compensated for where necessary.

Conclusion

The Bill preserves the Government's election commitment to maintain a policy of universal service to all Australians. However, the new structure and definition of the standard telephone service raise both potential benefits and concerns for the carriers, potential service providers and the public which should be carefully considered before the Bill is passed into law.

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References

- (1) Section 288 *Telecommunications Act 1991*.
- (2) Section 73 *Telecommunications Act 1991*.
- (3) See Service Provider Rules *Telecommunications Bill 1996*, Schedule 2.
- (4) Section 5 *Telecommunications Act 1991*. The *Explanatory Memorandum, Telecommunications Bill 1991* said the

allowance for additional services to be included in the STS was to 'take account of changing community expectations or technology.'

(5) Clause 1320(1)(a), (b), and (c) *Telecommunications Bill 1996*. Prescribed services are further defined in Clause 1309 as a service specified in regulations.

(6) The connectivity test requires that 'end users' of a service can communicate with all other end users of the same service, regardless of whether the same telecommunications network is used: clause 115A(2) *Telecommunications Bill 1996*.

(7) Clause 115A(1) *Telecommunications Bill 1996*.

(8) Clause 1310 *Telecommunications Bill 1996*.

(9) Section 38(2)(b) *Telecommunications Act 1991*.

(10) For a complete AUSTEL description of the STS, see AUSTEL, *Occasional Paper, Telecommunications: Universal Service Obligation*, p. 30-31.

(11) See fn 3.

(12) Part 6 *Telstra Corporation Act 1991*.

(13) *Telecommunications (Universal Service Carrier) Declaration No. 1 of 1992*.

(14) Clauses 1375-79A *Telecommunications Bill 1996*.

(15) Clause 1379(2) *Telecommunications Bill 1996*.

(16) Section 290(4) *Telecommunications Act 1991*.

(17) Clause 1330(1) and 1340(1) *Telecommunications Bill 1996*.

(18) Clause 1330(3) and 1340(2) *Telecommunications Bill 1996*.

(19) Clause 1345(1) and (2) *Telecommunications Bill 1996*.

(20) This view of the USO, and provision of the STS in service terms only was challenged by the Human Rights and Equal Opportunities Commission Decision, *Scott and Disabled Peoples International v Telecom Australia* (1995), decision of 19 June 1995.

(21) Division 2, Part 13 *Telecommunications Act 1991*, compensates for the provision of service to net cost areas.

(22) Division 5 *Telecommunications Bill 1996*.