

Deregulation Issues for Communications

Background

Since Federation, the Postmaster-General Department (later to become Telecom Australia) provided national telecommunications services through the provision of infrastructure in and on both public and private lands. Such infrastructure items, involving poles and wires, conduits and cables, buildings and masts, were installed using the powers and immunities of the Crown. By and large, performance of these activities did not attract public or institutional criticism as they were seen to be in the public interest, provided services considered to be essential and were not exploitative. The PMG/Telecom Australia may have been a monopoly, but at least it was relatively benign and subject to ministerial control. One could generally be assured that an objection to an action would be fairly treated by the Department through the appropriate representation via a local MP or direct to the Minister! Up until the close of 1991, only Telecom Australia enjoyed the exclusive right to install, maintain and operate the telecommunications network and supply basic telecommunications services within the country.

The Effect of Competition: 1991-1996

In 1991, the Federal Government implemented policy changes to introduce limited competition into the telecommunications industry. Under the Telecommunications Act 1991, major “wireline” infrastructure (eg. conduits and cables) could also be installed and operated by a second carrier, Optus Communications, and mobile telephone or “wireless” infrastructure (eg. masts and associated buildings) could be installed and operated by Optus Communications and Vodafone, as well as by Telecom/Telstra. The 1991 Act extended the powers of the Crown previously exercised only by a Government Department to be now enjoyed by two other organisations, both private, and providing competitive services. For the first time, Federal legislation authorised a private carrier to be able to access both public and private land for the installation and maintenance of physical telecommunications infrastructure. Most importantly, such activities need not comply with any State or Territory laws.

The side-effects of competition were immediately felt by local communities. Without any effective regime obliging carriers to share infrastructure, particularly towers for mobile telephone services, and in the interest of securing full control over their own assets, the three mobile carriers quickly demonstrated competitive spirit by installing duplicate and even triplicate towers, often side by side, due to the need to occupy the limited number of elevated sites. Furthermore, some radio transmitter antennas were placed on top of hospitals, and in the yards of schools and kindergartens. Antennas not on top of existing buildings required the installation of 20 - 40 metre tall towers of sizeable diameter which stood out starkly against most skylines. Despite the rapid adoption of mobile telephone services throughout the community, public opposition to many of the towers was initially strident and widespread. Over time, triplication for new installations was reduced to duplication with typically Optus and Vodafone co-locating their facilities. Nevertheless, public concern over the wasteful duplication, environmental eyesore and possible harmful level of radiation has continued although admittedly the extent has not been uniform throughout all municipalities.

The next significant event for Local Government arose with the advent of the Broadcasting Services Act 1992. Although predicated upon firstly satellite and secondly microwave

(wireless) delivery of pay television services, the Government failed to anticipate the competitive behaviour of Optus and Telstra in their desire to roll out substantially duplicated broadband cable networks in the major capital cities. Again exploiting their powers and immunities under the Telecommunications Act 1991 but by now re-expressed in the Telecommunications National Code 1994, both carriers acted with breakneck speed to gain competitive advantage in being the first to connect subscribers to pay television on cable.

At the outset, the complete Optus broadband network was to be totally aerial and attached to existing power poles regardless of the perceived or real environmental impact. Telstra could not or would not provide space in its local distribution network to collocate the Optus cables and in any case, Optus was driven to gain “first mover” advantage. As it turned out, up to 30% of Telstra’s own broadband cable network was also to be aerial, mainly attached to the same power poles. Again, the extent of wasteful duplication and environmental eyesore was palpable. Ratepayers demonstrated, petitions were signed, public meetings held, MP representations made and even cable installation vehicles impounded. Whilst some municipalities reached an accommodation with Optus in exchange for a monetary consideration and promise to eventually go underground, others litigated albeit unsuccessfully. The groundswell of public anger was clearly felt by the Federal Government who was, by late 1996, anxious to pass legislation to privatise one-third of Telstra.

A revised Telecommunications National Code 1996, coupled with a new Land Access Code 1996, were the first corrective but small steps taken. Coming into effect on 1 January 1997, Optus and Telstra were obliged from then onwards to at least consult with relevant authorities (eg. Local Government) when engaging in exempt activities (eg. installing aerial broadband cables for pay television). Aerial cables were to be coloured grey rather than black and installed underground at major road intersections. Each carrier had to also prepare and comply with a Corporate Environmental Plan that outlined its approach to minimising the environmental impact of its activities. The industry regulator, Austel, must also audit the broadband cable roll-out and determine the technical feasibility of co-locating mobile telephone tower facilities. However, the new Codes allowed existing broadband cable roll-outs to be completed by 30 September 1997 and all other facilities by 31 December 1997, otherwise they would fall under a subsequent planning regime. These deadlines proved not to be onerous, as the loss-making cable roll-outs were to cease by then regardless.

From the viewpoints of the Government and the telecommunications industry, the 1991-1996 period would be seen as successful in that it introduced facilities (ie. infrastructure) competition resulting in the creation of significant new regional and national networks for fixed and mobile telephony, value-added and broadband services. The unsaid claim would be that such investment could not have occurred without the exercising of carrier powers and immunities at the possible expense of private and public amenity, particularly at the municipal level. Such a claim remains forever untested.

The 1997 Planning Regime

The Telecommunications Act 1997 differs from its 1991 predecessor in that it now promotes open competition which can, at least in theory, result in any number of carriers installing any number of cables or any number of mobile telephone towers in a given neighbourhood. In practice however, only the existing carrier cable network operators are likely to continue in most municipalities, with satellite (eg. mobile and pay television) and terrestrial radio (eg. mobile) delivery being typically exploited by new entrants.

Carrier activities exempted from specific State and Territory laws are detailed in Schedule 3 of the 1997 Act. Although a new Telecommunications Code of Practice 1997 now largely replicates the provisions of the former Telecommunications National Code and Land Access Code, certain carrier activities will for the first time fall under State and Territory control. Nevertheless, Schedule 3 continues to prescribe that carriers retain an extensive suite of rights to maintain infrastructure and inspect land, and also to install a facility, if:

- it is a “low-impact facility”;
- the carrier holds a “facility installation permit”;
- it is a temporary facility used for defence purposes; or
- it is for the sole purpose of connecting a customer to a network in place as at 30 June 1997 and the installation takes place before 1 July 2000 and does not cross over or under a street.

What constitutes a low-impact facility is now defined by a Ministerial Determination and varies according to specific area zonal classification, eg. whether it is residential, commercial, industrial or rural. Certain facilities cannot be regarded as of low impact, viz. aerial cables of at least 13mm diameter, towers above a prescribed height or extension (where infrastructure is pre-existing). In fact, new aerial broadband cabling is specifically prohibited without the agreement of the relevant State or Territory authority. Facility installation permits require a public inquiry by the Australian Communications Authority (formerly Austel) and are expected to apply mainly to Telstra, Optus and Vodafone. Such permits could be sought where a carrier considers expansion of its existing network to be frustrated by an authority such as Local Government.

During 1998, individual State and Territory Governments will be finalising amendments to planning schemes and possible codes of planning practice as vehicles for realising the new powers delegated by the Federal Government.

The Future for Local Government

Recent experience suggests that carriers existing pre-1997 have adapted to the new low-impact classifications by changing installation practices so that fewer instances arise where a local planning permit is required. For example, new aerial cabling is rather unlikely to be deployed, new underground cabling works prefer to use directional boring rather than open trenching, and mobile telephone “fill-in” installations are tending to use small antennas attached to power poles or mounted on top of buildings.

However, the limited market size of Australia, market shares of the incumbents and the investment magnitude required for new infrastructure together constitute key factors expected

to strongly mitigate against the entry of new wireline carriers with a national presence. Telstra is expected to retain its monopoly position as the only wireline network operator throughout the bulk of regional Australia, with Optus providing the only wireline network competition in many capital city municipalities. New entrants will certainly re-sell network capacity and/or services from the incumbents and a few carriers will even install their own new cabling within CBDs and inner capital city municipalities. However, the extent of the latter will tend to be restricted to the servicing of corporate customers and rather unlikely to result in widespread duplication or triplication of wireline cabling throughout the bulk of Australia.

During 1998, Parliament is to receive a report from the Putting Cables Underground Working Group. This report, a condition of passage of the Telecommunications Act 1997 through the Senate, reviews options for retrospective undergrounding of both telecommunications cables and electric power wires.

Any new mobile telephone entrants must firstly purchase the necessary radio spectrum at auction and then either gain new tower sites or negotiate co-location agreements with one of the three mobile incumbents. Such barriers to entry will similarly mitigate against the entry of new wireless carriers but to a lesser extent than for the wireline domain.

Finally, the next few years beyond 1997 should witness a growing resolve of Local Government to find legal avenues for charging wireline carriers a rate or other charge for use of road reserves to accommodate poles and aerial cabling, as well as conduit and pits for underground cabling. Such funds are expected to be applied towards long term undergrounding programs by municipalities.

The above notwithstanding, there have been many instances of legislation being unable to keep pace with technological and business developments, and also of unintended consequences of legislation. Therefore, Local Government should maintain vigilance in ensuring that in future years the environmental amenity of its neighbourhoods are not further degraded by new telecommunications ventures and that steps are taken to exploit new techniques for improving amenities whilst at the same time providing leading-edge services to the community.

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