The ATUG Submission to the Government's Telecommunications Carrier Review

Diana Sharpe and Miro Mijatovic comment on the Australian Telecommunications Users Group submission to the review on the relationship between the government carriers

In December, 1989, the then Minister for Transport and Communications, Mr Willis, announced a review into "the present ownership arrangements and structural relationships between Telecom, OTC and AUSSAT in the conduct of their respective reserved services". Mr Beazley (the new Minister) and the government have evinced an intention to push through major reforms to the communications industry as part of a program of accelerated industry restructuring. Accordingly, the results of the review are eagerly awaited by those in the telecommunications industry as possibly heralding a new era in the industry.

The major questions facing the Minister are first, the future of AUSSAT (the satellite operator) and second, whether Telecom and OTC (the international telephone operator) should be exposed to full competition.

A report has been prepared by the Australian Telecommunications Users Group (ATUG) and submitted to the Minister on behalf of Australian users and suppliers of telecommunications services. In its report this influential body makes a number of recommendations in key areas, all of which will be of interest to all those involved in the industry.

The current state of play

The operation of the Telecommunications Act 1989 ("the Act") currently grants Telecom, OTC and AUSSAT ("the Carriers") certain exclusive rights in relation to the supply of networks and the provision of telecommunications services.

Broadly, the carriers have three monopolies. Telecom has a monopoly in the provision of public switched voice services, public switched data, public switched text and video, public switched integrated services digital networks (ISDN), leased circuits and mobile phones; OTC has a monopoly in the provision of overseas telecommunications services: and AUSSAT has a monopoly in the provision of Australian satellite telecommunications facilities.

In the service sector of the industry certain services are reserved to the carriers, namely a service is reserved if it is one which, in the words of the Act is "for primary communications carriage between two or more cadastrally separated places or persons". (The word "cadastrally" means across property boundaries.) Any other telecommunications service is a value added service and is open to competition.

To distinguish between reserved and value added services requires a characterisation of whether a telecommunications service is a service for primary communications carriage. It is so if it carries out only those functions necessary to arrange, operate and manage connectivity across the telecommunications network or, in other words, carry communications across the network. "Connectivity" is therefore the pivotal issue. Since "connectivity" remains as yet undefined, the boundary line between reserved services and value added services remains unclear. This is one of the major problems in the administration of the Act in its current form.

AUSTEL, which was established to administer and regulate the telecommunications industry, has as one of its functions, the regulation and administration of this boundary line. The administrative complexity and expense in administering this flawed and blurred distinction satisfactorily would, however, take up much of AUSTEL's time and reserves both of which might be more productively spent in other areas.

A different boundary is defined under current legislation in relation to the supply of telecommunications equipment. The boundary between the monopoly network reserved to Telecom on the one hand, and the competitive supply and installation of customer cabling and customer premises equipment on the other is either the first telephone socket in smaller premises, or (for larger commercial premises) the building's main distribution frame. Supply, installation and maintenance of the premises, wiring/cabling and attachment points beyond these respective network boundaries are open to all service providers with appropriate qualifications.

The provision of value added services and private network services is subject to class licensing systems. These licences cover all currently approved services.

Pro-competitive safeguards

Since the carriers are allowed to compete in the provision of value added services and private network services, the Act has a number of provisions to guard against any abuse by the carriers of their monopoly position. The Act provides that the carriers may not unreasonably refuse to connect value added services in private network services provided by private suppliers and that the carriers shall not discriminate in charges levied or in any other manner against people supplying or using the value added services and private network services.

These safeguards are called non-structural safeguards and are opposed by competitors to the carriers who advocate the operation of "structural safeguards". The provision of structural safeguards would mean that carrier affiliated competitive services and equipment would have to be provided through a structurally separate entity (subsidiary). This separate entity would have separate accounting and personnel and would operate in competition with non-carriers conducting business in the same area.

The current situation can be criticised as being insufficiently liberal, and its reliance on a boundary line between reserved services and competitive services is difficult to administer and increasingly blurred by further technological developments. It operates therefore merely as a stage in the process of Australian telecommunications liberalisation rather than the conclusion of that process. The industry is now entering the next phase of its development and it is in this context that the ATUG Report should be considered.

ATUG's position

The ATUG Report takes a broad look at Australian telecommunications from the perspective of economic efficiency and makes a number of recommendations. It points to a number of currently existing inef-

ficiencies which it suggests are fostered by the current regulatory scheme. The Report goes on to propose that the existing inefficiencies might be cured by fostering competitive forces and by adopting accepted economic reasoning that competition increases efficiency - an efficiency which is of course in the interests of all Australians.

The ATUG Report makes several major recommendations. The first of these proposes the removal of barriers to entry in the provision of all domestic and international networks and services, and involves amendment of the Act to remove restrictions on the establishment, maintenance, operation and resale of telecommunications facilities and networks and the provision of all services. However, until open competition is implemented, Telecom and OTC should continue to be restricted to their present lines of business to ensure the private sector can effectively compete with government business enterprises.

Secondly, pro-competitive safeguards should be introduced, requiring all carriers to provide non-discriminatory interconnection of their networks.

Thirdly, AUSSAT should retain its current line of business restrictions until it is privatised (which should occur as soon as possible). When AUSSAT is privatised, it should be able to compete openly in all telecommunications markets. If necessary, the government should refinance AUSSAT to prepare it for sale if it has a negative market value. Further, Telecom should be removed as a shareholder and board member of AUSSAT and should not be allowed to bid for AUSSAT when privatisation is effected.

Its fourth recommendation is that Telecom should retain the current line of business restrictions to provide only domestic telecommunication networks and services for a period of five years or until it is privatised. During this period, Telecom should be separated structurally into three arms length companies - one to provide network facilities (local and trunk), one to provide services (local, trunk, STD and enhanced (value added)) and a third to provide and operate CMTS (MobileNet).

OTC should retain the current line of business restriction to provide only international and maritime telecommunications networks and services for a period of five years or until privatised.

In addition, OTC and Telecom should not be merged since this would further delay open competition and would prejudge the combination of international and local business operations as the most efficient in the open market.

The Report also recommends that price caps be removed, since competition would constrain monopoly pricing by the carriers.

Finally, competitors should be allowed the same rights of way as the carriers.

The Report alleges that Telecom's requirement to provide community service obligations (CSOs) has often been used as an excuse for wasteful ventures. It notes that Telecom has used CSOs as a justification for cross-subsidisation and in this way a justification for retaining its monopoly rights. The Report also notes the minor cost of CSOs to Telecom and proposes that in the medium term AUSTEL undertake further analysis of CSOs. It concludes however that in the short term no arrangements need to be made regarding CSOs.

Conclusion

In summary, the Report recommends that the present monopoly boundaries established under the Act for the benefit of the carriers should be eliminated to permit open competition. However, until open competition is fully implemented and accepted, Telecom and OTC should continue to be restricted to their present lines of business. AUSTEL appears implicitly to support one of the ATUG Report's recommendations. In the Sydney Morning Herald of 9 April 1990 it was reported that AUSTEL is recommending to the Minister that three mobile telephone operators should operate in Australia by the end of the year. One of these operators would include Telecom's existing MobileNet. The operators would be required to pay an annual fee of between 5 and 10% of their yearly revenue for a 20 - year licence. AUSTEL notes that MobileNet would have to be properly separated from Telecom with a separate accounting system and would have to operate as an arm's length company, a proposal which is in line with the recommendations of the ATUG Report.

While the eventual outcome of the Ministerial Review is as yet unknown, it is encouraging for the industry to note that the government's intention appears to be to accelerate micro-economic reform in this area, and that AUSTEL favours competition, at least in the Mobile Phone segment. Given this, the ATUG Report appears to have played a significant role in the Review and its recommendations will probably prove to be influential. It may be that the future path of the Australian telecommunications industry is that recommended by the ATUG Report.

Diana Sharpe is a consultant with the Sydney office of Sly and Weigall, Miro Mijatovic is a lawyer with that firm.

The Friedrich case

Grant Hattam and Craig Richards report on a series of cases in which John Friedrich sought to suppress publication of evidence arising in liquidation hearings into the NSC

John Friedrich was only apprehended after one of the most publicised man hunts in Australia's recent history. The face of the former Chief Executive Officer of the National Safety Counsel ("NSC") was constantly in the press as the search for Friedrich, for details of his alleged mysterious past and for the truth about the NSC's missing $244 million was pursued. Much of what was missing was apparently public money and, as a result, significant public interest existed in its whereabouts. When Friedrich was ordered to attend before the Master of the Supreme Court to be publically examined by the Liquidator of the NSC pursuant to section 541 of the Companies Code, it was inevitable that issues would arise concerning the likely impact that publicity of this examination would have upon Friedrich's subsequent trial. He had been charged with one count of obtaining financial advantage by deception and 91 counts of obtaining property by deception.

On 9 November 1989 Counsel for Friedrich sought suppression orders to have the Examination Court closed, and publication of any report of the examination banned. The application required consideration of a number of competing policies. Not only was it necessary for the Court to balance the familiar competing rights of freedom of speech exercised through the dissemination of information by the press and the individual's right to a fair trial, but the community's interest in the honest conduct