# Phones in the desert: CSOs examined

**Peter Leonard examines the Federal Court's recent decision in the Yugul Mangi Community v Telecom**

Telecom's failure to provide switched telephone services to remote Aboriginal communities in the Northern Territory gave rise to the first legal challenge under the Australian Telecommunications Corporation Act 1989. On 24 August 1990 Justice Burchett found for Telecom on a number of grounds, including a claim by the community that Telecom had failed to discharge its community service obligations.

## Through the fact thicket

In 1979, Telecom commissioned a study to investigate the provision of telephone services to remote areas. This study compared Digital Radio Concentrator Systems (DRCS) and satellite technology as a means to provide telephone service to three categories of potential users: isolated agricultural and pastoral properties, remote communities and remote mining and other commercial operations. In what subsequently became a controversial decision, Telecom decided firstly, to utilise DRCS to service the first two groups and second, that satellite technology, (which was alleged to be more costly) would be utilised for special purposes, such as the needs of mining and petroleum exploration ventures and in special situations, such as Lord Howe Island.

The planned completion date of DRCS was subsequently set back from 1990 to 1992. In the interim, a number of remote Aboriginal communities depend upon high frequency radio telephone services provided by Telecom and the Royal Flying Doctor Service/St Johns Ambulance HF radio. These services have a number of drawbacks: susceptibility to interruptions of transmission, particularly during the wet season; lack of a duplex speech path; and failure to guarantee privacy.

Pending availability of DRCS, to be progressively rolled out under Telecom's Rural and Remote Areas Programme (or RRAP), the only alternative to current radio telephone services is AUSSAT's Iterra service. Considerable evidence was placed before the Court that the relative cost of interim provision of Iterra services, as against rescheduling of DRCS availability, would be relatively small, although the absolute cost would be not inconsiderable: the costings were the subject of considerable debate.

## Satellite vs DRCS

So why not use the satellite? Telecom suggested three reasons. Firstly, Telecom said that the communities are not the only people with unmet claims to improved telephone service, and it should not be asked to discriminate in favour of the communities. Secondly, if Iterra was provided on an interim basis, the demand from other communities and services for supply of similar services would soon result in a limit being reached at which the Iterra service would not be available, simply because there would be no capacity to cope with the additional demand which would be involved. This would mean that Telecom's planned use of Iterra service as a more expensive service for special purposes would be disrupted, resulting in inability to meet the needs of other users and the loss of profits derived from meeting those needs. Thirdly, in determining RRAP priorities, Telecom had to take account of competing (alleged) community service obligations (CSOs), including hospital services, telephone services at concessional rates to pensioners and the disabled, and public pay phones. The complexity of the these competing priorities raised questions which, Telecom said, the legislation left to Telecom's determination.

Clearly, the communities had a legitimate grievance: inadequate and unreliable phone service. They alleged that Telecom favoured business interests by reserving the satellite for commercial services. They pointed out that if Telecom could not provide timely interim services using their commercial satellite service, AUSSAT could. They estimated the cost of interim services would be 0.09% of Telecom's 1988/89 profit or 0.38% of the annual cost of Telecom's CSOs as measured by the Bureau of Transport and Communications Economics. It was also suggested that Telecom had not properly considered the relative cost of satellite and DRCS service and that had there been a proper evaluation of the relative costs of these services, satellite would have been the preferred option.

Were the communities entitled to allege that Telecom failed to discharge its community service obligations? Telecom was required to prepare corporate plans setting out its policies and objectives including a statement of the strategies and policies that Telecom is to follow to carry out its community service obligations. The Minister could direct Telecom to vary its statement of strategies and policies where considered necessary in the public interest. In addition, AUSTEL was given authority to direct Telecom to supply standard telephone service or a pay phone for a particular place or area where AUSTEL was of the opinion that Telecom's refusal or failure to provide such service was inconsistent with Telecom's corporate plan. On this basis, Telecom suggested that the process of approval for its corporate plan, including its plans for CSO expenditure, by the Minister, and of oversight by AUSTEL, was intended to oust further supervisory jurisdiction by the Courts. As Telecom put it in submissions, "there can be no implication that the legislature contemplated even a limited accountability of the Corporation [Telecom] to the Courts, as opposed to an accountability to Parliament itself as to the manner of performance of obligations".

## CSOs and the law

Before the 1989 legislation, Telecom's charter was expressed in general terms and its duties were stated to be not enforceable by court proceedings. This changed in 1989: section 27 of the Australian Telecommunications Corporation Act required Telecom to "supply a standard telephone service", being "public switched telephone service", "between places within Australia", "as efficiently and economically as practicable". Section 30 of that Act granted Telecom immunity from actions bought by any person "because of any act or omission (whether negligent or otherwise) by or on behalf of Telecom in relation to the supply of a reserved service". The Telecommunications Act 1989 gave AUSTEL powers to monitor and report to the Minister on the appropriateness and adequacy of Telecom CSO strategies and policies and the efficiency with which Telecom carries out those obligations.

The communities, although accepting that DRCS as and when provided would fulfil Telecom's obligations, claimed that the

services provided by radio telephone were not part of "the standard telephone service" and that this service was not reasonably accessible to them on an equitable basis when only accessible by HF radio. Telecom's legal response was firstly, that the communities had no legal entitlement to bring proceedings against it, and secondly, that there was no breach of Telecom's obligations, as Telecom had taken reasonable and proper steps to satisfy its obligations within a reasonable time, by progressively rolling out DRCS in accordance with plans and strategies approved by the Minister.

## The court's findings

The court construed section 27 as calling for, in each case, "an adjustment between ideal goals and what Telecom is able to do". The judge found that "it is Telecom which must make that adjustment, notwithstanding that other sections [of the Australian Telecommunications Corporation Act] require it to do so subject to the direction of the Minister". As competing considerations required the balancing of individual interests to achieve the broader public interest, section 27 should be read as imposing a duty upon Telecom to achieve the set goals within a reasonable time, having regard to these competing needs, the resources available, and Telecom's assessment of the relative priorities of each need. The judge concluded that as the broad duty imposed by section 27 involved the development and application of policy objectives, to be performed nationally, the fulfilment of which, being subject to many constraints, could not be achieved absolutely and could be achieved (so far as was possible) in many different ways, it was Telecom that must make the assessment of when and how to implement its plans.

Justice Burdnett stated:

*"Finance, manpower and the availability of equipment being all subject to limitations, it could only have been disruptive to have conferred a right such as that which the applicants claim: a right enforceable in the Courts, and not restricted by the wide discretion which the nature of the problems suggest".*

Accordingly, the Court concluded that section 27 was not intended to allow complainants, such as the Aboriginal communities, to "interfere" with the staged implementation of plans fulfilling Telecom's community service obligation. The powers of direction conferred upon AUSTEL suggested that it was AUSTEL, not the courts, that should deal with cases where Telecom's performance of its CSO's is challenged. As the policy issues were so complex and intertwined, it was not appropriate for the courts to determine how Telecom should allocate its priorities in fulfilling community service obligations.

For similar reasons, the court rejected the Aboriginal communities application under the Administrative Decisions (Judicial Review) Act for the court to exercise its discretion to review Telecom's exercise of its administrative discretions (ie its RRAP programme). The nature of the discretion conferred upon Telecom was such that it would be extremely difficult to find that the limits of the exercise of Telecom's administrative discretions had been passed, and the court was not well equipped to undertake such a policy enquiry. Further, given that the communities could seek a review by AUSTEL of Telecom's decision, adequate alternative avenues of redress were available to the applicants.

## Implications of the decision

On the basis of this decision, only in most unusual cases will a court intervene in decisions as to when and in what manner Telecom will fulfil its community service obligations. The case stands in strong contrast to United States administrative law cases and demonstrates the conservative attitude of Australian courts towards intervention in decision making by public instrumentalities.

The court did not say that Telecom was immune from private challenges as to performance of its community service obligations. Instead, the Judge said that "nothing put before me suggests that Telecom has gone outside of the bounds of the very wide discretion conferred upon it. At least unless it does so, section 27 creates no private right of action as the applicants seek to pursue". Accordingly, except in the most blatant and unreasonable cases of refusal to provide switched telephone service, the appropriate avenue for redress will be complaint to AUSTEL and a request that AUSTEL exercises it's discretion to give directions to Telecom requiring it to provide switched telephone service or a public payphone for a particular place or area.

It should also be noted that the case does not say that HF radio telephone service is an acceptable level of service in discharging Telecom's community service obligations. Rather, the case acknowledges that Telecom's obligation to provide switched telephone service must be qualified so as allow Telecom a reasonable time to roll out such service, having regard to competing priorities and needs.

The case confirms the importance of AUSTEL's role and responsibilities in monitoring and reviewing Telecom's performance. This places a heavy responsibility upon AUSTEL to keep abreast of Telecom plans and to make its own evaluation of the extent to which competing needs are being met. This also means that isolated and remote communities will need to pay attention to Telecom strategic plans as submitted to the Minister and focus their requests for improved service at the political level or, failing Ministerial assistance, through AUSTEL.

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# EDI: the legal fuss

**Ian Cunliffe examines some of the legal issues raised by this news technology**

EDI - electronic data interchange - is in many ways the child of transactions which for hundreds of years have been conducted by people exchanging bits of paper - quotations, order forms, offers, acceptances, contracts. However, while there is a lot in common between Mitsubishi placing an order electronically for a thousand mufflers, and placing the same order by mail, telex or even fax, there are also important differences.

In the first place, over the hundreds of years that we have been buying and selling things with bits of paper, the courts have worked out most of the hard but important questions - like when an acceptance is made and thus a binding contract is entered - or conversely, the latest time at which an offer can be revoked.

Some of that law translates readily enough to the electronic analogy of paper transaction (i.e. EDI). But some of it does not. Questions like the following will arise:

- When is an acceptance effective where, for example, the acceptance is sent to an electronic "mail box"?
- Is an order which was automatically generated by a malfunctioning computer, without any human intervention, a binding offer or acceptance?
- Does the fact that an EDI transaction is recorded on CD Rom, with electronic "signatures" of the parties, sufficient to satisfy the requirements of laws like the Statute of Frauds which require that certain agreements be "in writing" and "signed" by the parties?

If matters are not carefully spelt out in advance, there will be uncertainty about what might happen in the event of a dispute.

Secondly, in their present state, the laws of evidence are ill adapted to cope with