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Recent developments in Australia by Ian McGill and in New Zealand by Bruce Slane

Telecommunications reform

On 31 July Mr Beazley announced that two consortia, the Kalori Communications Group and Optus Communications, had been invited to take part in the second stage of the selection process of the second telecommunications carrier. This includes a comprehensive examination of relevant information about AUSSAT and telecommunications in Australia and the negotiation of sales contracts and related documents. Final offers are expected to be lodged in October with the selection of the second carrier due for completion by the end of this year. The Kalori consortium has now broken up leaving only one of its members, Hutchinson Communications of Hong Kong in the contest against Optus.

In August Mr Beazley announced that AUSTEL's recommended charges for the second carrier to gain access to the Telecom/OTC network had been accepted by the Government. The charges are intended to be 'initial' charges which will apply until the second carrier gains sufficient market power to negotiate effectively with Telecom/OTC on an equal basis.

On 5 September Mr Beazley introduced into the House of Representatives the AUSSAT Repeal Bill 1991. The Bill proposes to appropriate monies from the Consolidated Revenue Fund to pay out existing obligations of AUSSAT prior to its sale to the second carrier, empower the Treasurer to guarantee AUSSAT's borrowings, prevent AUSSAT's tax losses in income years prior to the sale being used as a tax deduction for income tax purposes from the time of sale, and to repeal the *AUSSAT Act 1984* and make consequential amendments to other Acts.

Broadcasting reform

An exposure draft of The Australian Broadcasting Services Bill was released on 6 November 1991 with a view to the introduction of legislation into Parliament in the autumn session of 1992.

Inquiry into radio frequency spectrum management

In August the Australian House of Representatives Standing Committee on Transport, Communications and Infrastructure released Preliminary Conclusions in its Inquiry into the Management of the Radio Frequency Spectrum. The Standing Committee found that the present system of spectrum management practices are not sufficiently flexible and timely with regard to changing demand or spectrum use, and that setting the very highest possible technical standards in order to minimize the possibility of interference comes at a cost borne by new and prospective users for the benefit and at no cost to existing users.

The Standing Committee also concluded that the current approach to setting fees for spectrum access has little, if any, effect on managing demand, and that annual fees should be based on recovery of the costs involved in managing the spectrum on behalf of users.

An administrative system for setting priorities for allocation and assignment for radio communications purposes was not supported because it was seen as too inflexible and imposing an unacceptable administrative cost burden on spectrum management. Nor was a market based system of tradeability in spectrum supported because it was seen to lead to uncertain outcomes and it is not practical to give or guarantee access to public sector and non profit organisations sufficient funds to acquire spectrum whenever it is needed.

The Standing Committee therefore supported a proposal for a mixed market/administrative system requiring tradeability of spectrum resources for commercial use at a gradual rate of development, with non-commercial users having the option of continuing under the current administrative system, with the introduction of an auditing procedure for such users.

Commercial radio developments

In July Mr Beazley announced measures for the speedier introduction of new commercial FM radio services for regional areas of Australia. This included a reduction in fees paid for new commercial FM licences in regional areas, the easing of restrictions on the transfer of AM or FM (supplementary) licences to new owners, the limiting of consideration of 'commercial viability' in licence inquiries and defining this term in the *Broadcasting Act 1942* and the clarification of the *Broadcasting Act* to expedite the work of the Tribunal in granting licences.

As part of its 1991-92 Budget measures the Government halved commercial radio licence fees generally, claiming to give the radio industry an $8 million boost for 1991-92. The Government had acknowledged that the present fee structure had to be changed to lesson the impact of increases in the fees. For example, in the ten years prior to 1989-90 licence fees as a proportion of licensees' gross earnings had increased by over 100 per cent.

Mr Beazley announced in September that two Sydney AM radio stations, 2UW and 2WS, had successfully bid for the right to convert to FM, bidding $9,423,000 and $8,056,000 respectively. Tenders were conducted under Stage One of the National Metropolitan Radio Plan, under which stations have already converted from AM to FM in Melbourne, Adelaide, Brisbane and Perth. The two conversions in Sydney will double the number of commercial FM stations broadcasting in that city. As part of their tender bids, AM licensees agreed to transfer their vacated AM transmission facilities to the Commonwealth to be used to transmit the Radio for the Print Handicapped service and for the broadcast of Parliament.

Tribunal inquiries

The Australian Broadcasting Tribunal has announced a new inquiry into the reconstruction of the Seven Network. It will examine the sale of commercial television licences for ATN (Sydney), HSV (Melbourne), BTQ (Brisbane), SAS (Adelaide) and TVW (Perth) to a new holding company, Television Holdings Limited.

The Tribunal has also commenced an inquiry into the reconstruction of the Ten Network. The Tribunal on 27 September, approved the transfer of commercial television licences for TEN (Sydney), ATV (Melbourne) and TVQ (Brisbane) to wholly owned subsidiaries of the existing licensees. The Tribunal is inquiring into the subsequent acquisition of the shares in these subsidiaries by Television & Telecasters Limited (a subsidiary of Westpac Banking Corporation) to Westpac Banking Corporation.

Concerns about media ownership

Concerns have been raised in Parliament and by the Chairman

of the Australian Broadcasting Tribunal, Mr Peter Westaway, about the current media ownership laws. The Tribunal's consideration of media ownership issues, arising in particular from the recent Kimshaw/2UE transaction and licence renewal inquiries for the Seven and Ten networks, have led the Tribunal to the view that there are deficiencies in the *Broadcasting Act* which prevent it from enforcing the current ownership and control limits.

The Tribunal also noted deficiencies in the process for approving share transactions, with review needed of both the notification of transactions and 'deemed control' provisions. The Federal Government has attempted to remedy this perceived problem with provisions in the *Broadcasting Amendment Act*.

The Tribunal also saw difficulties with sanctions often seen as inappropriate or ineffective and there being a need to focus upon sanctions relevant to the breach rather than approach them through the licence process. It also saw as appropriate the need to strengthen arrangements for co-operations between the Tribunal and the Trade Practices Commission. Mr Beazley subsequently announced the appointment of Professor Johns, Deputy Chairman of the Trade Practices Commission, to the Tribunal.

Television advertising time

The Tribunal is currently conducting an inquiry to review advertising time on television. The Tribunal has determined that new issues have arisen in this inquiry which are substantially different from previous issues. It has therefore decided that it is necessary to advertise these new issues for consideration.

The new issues are whether a Television Program Standard (TPS) should be introduced which limits the amount of advertisements and programme promotions that may be scheduled on television. If so, the form such a Standard should take and such other matters as may be relevant will need to be determined.

Inquiry promotions for programs

The Tribunal has now determined the specific issues to be considered in its inquiry into TPS 12 'Promotions for Programs'. These issues are whether TPS 12 should be repealed or amended, whether a new TPS 12 should be introduced to regulate the broadcast of program promotions, whether the Tribunal should except industry guidelines for the broadcast of such promotions, what form amendments of TPS 12 or a new Standard should take, and what action the Tribunal should take to initiate establishment of new industry guidelines.

The inquiry into the content and timing of program promotions was announced on 31 July following a 347 per cent increase in complaints about promotions over the last two years. Most complaints were from parents who wish to supervise their childrens' viewing but who claimed that promotions for Adults Only ('AO') movies were being run in general viewing time. TPS 12 restricts the times at which promotions for AO and Parental Guidance Recommended ('PGR') programs can be shown on television. The concern is therefore that TPS 12 is ineffective, in this regard.

Liquor advertising

The NZ Broadcasting Standards Authority has supported changes to allow liquor brands to be advertised on television and radio. Broadcast liquor advertising has been permitted according to strict rules evolved over many years of voluntary self-regulation. The have been criticised for their inconsistency and anomalies both by the industry and the former Broadcasting Tribunal. A number of liquor companies and their outlets changed their names to incorporate a brand name so that they could, in the guise of corporate advertising, advertise their brands. Broadcaster liquor and advertising interests were invited by the Authority to submit a new voluntary codes acceptable to the Authority.

Ministerial interest

The NZ Minister of Broadcasting, Mr Maurice Williamson, has revealed that he sat in front of television watching a controversial speeded up segment of the TV3 Nightline program known as '69 Positions in 60 Seconds'.

"You would really have to sit there, as I ended up doing, and go through it frame by frame to try and work out what was going on — that there were some naughty bits happening. It could have been gymnasts at an Olympic Games as far as I could tell" the Minister said. Mr Williamson told the *Dominion Sunday Times* he had no problems with the speeded up segment being shown but has suggested to TV3 they tone down the sexy bit on the late news-entertainment show *Nightline*.

Mr Williamson said his office had also talked to TV3 about the recent documentary investigating the Auckland sadism and masochism scene. He talked to TV3 the day before it was screened and asked if the channel had checked it with its lawyers. TV3's news and current affairs director, Rod Pederson, told the *Dominion Sunday Times* that he had had no approach from the Chief Executive and no changes had been made to the program after any approach or complaint. TV3's Corporate Affairs Manager said the channel had no problems with the Minister making suggestions or giving his view on programs: "It would be different if it was a ministerial direction, but we'd be disappointed if he didn't have a view".

Under the *Broadcasting Act*, the Minister has no power to give any directions regarding programming standards to any broadcaster. The independent Broadcasting Standards Authority determines complaints and there is a right of appeal to the High Court.

Maori broadcasting

New Zealand Maori Council and Wellington Maori Language Board have declined an offer by the Crown of $13m over three years to meet its Treaty of Waitangi obligations for Maori Broadcasting on television. Mr Justice McGechan had originally adjourned the case in May to enable the Crown to come up with proposals under which it would retain transmission and production facilities to meet treaty obligations. At a second hearing in July, the Judge found in favour of the Crown. An appeal has been lodged in the Court of Appeal.

Additional spectrum

The NZ Crown has put up for tender more radio spectrum frequencies — mainly in rural areas — following further expressions of interest by parties in obtaining additional spectrum. There are 9 MF, 32 VHF-FM, 29 UHF (some minor) for broadcasting and 5 UHF for distribution and music systems.

Since deregulation, radio has expanded to 71 AM and 78 FM stations.

The Crown has decided to abandon the second bid tender system and in this round, which closed on 4 November 1991, the highest tender will be successful in each case.

Clear's ads misleading

Telecom Corporation of New Zealand Limited and its new rival, Clear Communications Limited continue to litigate.

Telecom took Clear Communications to the High Court alleging breach of an agreement arrived at in March when Telecom originally sought an injunction to stop Clear from using its

advertisements which featured English chat show host Michael Aspel. The agreement was reached on the day of the hearing and set guidelines for future advertising. Accordingly, Clear modified its advertisements. In September Telecom appeared before Mr Justice Thomas in the High Court seeking a second injunction alleging the revised advertisements were in breach of the agreement. Its original three complaints concerned Clear's assertions it had built a nationwide network, a network that was 100 per cent digital, and that users of the service were to be charged only for the time used in a toll call.

Under the agreement, Clear said it would clarify its advertisements, but the Judge said some of the qualifications were so light that people would miss them and the impact of the advertisements were still the same.

Telecom rounded its charges for tolls up to the next minute. Clear's campaign was based on its users paying a minimum one minute charge and then six second increments. Mr Justice Thomas said the claim that customers only paid for the time they used was incorrect because charging times were rounded up.

Clear could not say its toll service was fairer than Telecom's without giving specifics nor could it use any of its slogans that told customers they were charged only for the time they use on calls. Mr Justice Thomas said he would not rule on claims that Telecom was abusing its dominant market position to hinder Clear's entry into the market as there was no need to examine those issues under the terms of the application.

Telecommunications litigation

Clear Communications brought an action against Telecom Corporation alleging breaches of section 36 of the *Commerce Act*, first in refusing to agree to the connection of a gateway system generally, second in refusing to agree to the connection of gateway for the purpose of a Justice Department telephone contract and third refusing to supply direct dailing in (DDI) without insisting on the prefix 023.

Section 36 prohibits any person who has a dominant position in the market from using that position for the purpose of restricting the entry of any person into that or any other market or preventing or deterring any person from engaging in competitive conduct in that or any other market or eliminating any person from that or any other market.

It was common ground that Telecom had a dominant position in the New Zealand Telecommunications market and the local sub-markets created by the dialling district.

Clear alleged that Telecom was using that position for the purpose of preventing or deterring it from engaging in competitive conduct in the Wellington market in respect of the Justice Department numbers. The argument on the question of an interim injunction centred on the use of the prefix 023. The Judge said that he thought the evidence before him disclosed a strong case that the 023 or any other '0' prefix was a deterrent and would probably prevent Clear engaging in competitive conduct in the market. It was probable, too, that other methods could be used to identify Clear subscribers that would not have a damaging effect. Clear alleged that Telecom's insistence on the 023 reference in the directory was to give Telecom time to enter the market with a product to compete with gateway before Christmas and to give a false signal. The Judge said he was not prepared to say there was a strong case but he said there was a significant case to be determined. The Judge did not say he found it hard to understand why Telecom should not use some other non-discriminatory number combination.

However, Clear entered into the Justice Department contract with its eyes open and that was a strong factor against relief. An order would interfere with negotiations. It was possible for Clear to accept a proposal from Telecom which would permit the Justice Department to have its phones in the meantime. If Clear succeeded it would recover damages paid to the Department and something for less easily quantified losses. Clear would get its numbers which could be advised to all subscribers and there would be no stigma to the prefix in the minds of potential customers.

The Judge declined to grant an interim injunction but stated he would assist in the prompt disposal of the litigation.

Government intervention

The NZ Minister of Broadcasting & Communications, Maurice Williamson, has warned Telecom and Clear Communications that the government was prepared to impose tighter regulations if they failed to resolve their squabbles.

"The government can promote competition through more direct regulatory measures, and safeguarding competition in this area is important enough for me to keep a close eye on the negotiations" said the Minister. "But at this stage I'm not satisfied that Telecom and Clear have really tried to sort the thing out for themselves".

The companies had negotiated an inter-connection agreement to allow Clear to operate a national toll service but Telecom had yet to settle local inter-connect agreements with Clear and another new competitor, BellSouth, which plans to set up a rival cellular telephone network.

Telecom says that numbering ownership is included in its sale price. The Ministry of Commerce is investigating the numbering dispute. Mr Williamson has told both Clear and Telecom "We don't believe state-instigated inter-connection works. It's generally a compromise leaving the two inter-connecting parties dissatisfied with aspects of the deal and eager to redraw the agreement".

The Minister ruled out establishing a regulatory authority. "In these tight times, an unnecessary government body is a luxury that taxpayers would rather do without", he said.

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banks assume there is a logical relationship between value and the level of debt. There is not. In no sector of the Australian industry during this recession has this been more apparent than the media, where banks accepted the highly inflated value ascribed by proprietors to their intangible assets, such as broadcast licences.

- Sales processes should be shrewdly targeted. Spraying information memorandums round the world like confetti will diminish value. In the current market, a widespread sale campaign will often become a dutch auction.
- Targeting includes ascertaining the genuine bidders. These bidders should then be granted equal access to information and encouraged as much as possible. A one horse race is of no help to anyone but the horse.
- Finally, there is a need to tighten the practice of insolvency if we want to attract foreign investment. This includes developing a more consensual and constructive approach to all classes of creditors. Alienation for its own sake is rarely wise, and generally expensive. If some of our banks do not develop an interest in consensus, our own shortage of capital may force us to develop a local version of the US Chapter 11 laws.

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