November amendments: fundamental or technical?

Joan Malkin and Deena Shiff discuss recent amendments to the Telecommunications Act

The November 1990 Micro Economic Reform Statement on telecommunications foreshadowed the main competitive safeguards for the introduction of a second carrier in Australia. These included the obligations that the Australian and Overseas Telecommunications Corporation (AOTC) interconnect its network to the network of the new carrier and that it gives the new carrier access to ancillary facilities which it required. AOTC would also be required to carry and complete calls on behalf of the new carrier.

Responsibility for the determination on how interconnection and access would work was delegated to AUSTEL. The result was a series of reports issued in June on the commercial and technical aspects of interconnection. Shortly thereafter, the *Telecommunications Act* 1991 was enacted giving effect to the restructure of the industry and providing for the introduction of the second carrier.

The boundaries of the concepts of interconnection and access in the Act, together with the licence conditions establishing 'supplementary access' (eg to facilities such as ducts, poles and masts) determine the boundaries of the regulated (and preferential) pricing regime available to the second carrier, the permissible scope of a registered access agreement between the two carriers and each carrier's obligation to provide services to the other.

Section 137

In November, Parliament passed a series of amendments to the Act. The amendments to section 137 of the Act were described by the Senate as "of a technical nature" and which the Supplementary Explanatory Memorandum noted were necessary to remedy "technical defects" in the original section 137. Technical perhaps, but the amendment has resulted in a fundamental change in the conceptual underpinnings of the Act.

Prior to the amendment, section 137 provided that a carrier had the right to interconnect its network facilities with the network of another carrier. It also obliged the other carrier to carry communications across its network for the purpose of the first carrier supplying telecommunications services. The Explanatory Memorandum noted that section 137 established both a carrier's right of interconnection and the associated right of having its calls carried and completed by another carrier. It noted that "these rights are of the kind that should reasonably apply to all carriers in an open competitive environment".

Section 138

These rights are to be distinguished from the supplementary access rights provided for in section 138 of the original Act. Prior to amendment section 138 rights related to access to facilities, information, and billing and directory services. The Explanatory Memorandum noted that these rights were "necessary to assist a second general carrier in overcoming the competitive advantage of the dominant incumbent".

The regime established by the Act, then, provided the two classes of rights. The section 137 class of rights related essentially to the interoperability of the carriers' networks. The rights were reciprocal in nature and could be justified by the fact that, with interconnected networks, a carrier necessarily has to carry and complete calls of the other carrier's customers.

By contrast, the section 138 rights were warranted because of the incumbent carrier's dominance and advantage: to enable the second carrier to 'catch up'. These rights were to be reflected as conditions of the dominant carrier's licence, an instrument more readily capable of amendment than the Act. As the Government expects that in time the telecommunications market will become effective and competitive, these supplementary access rights will only last so long as AOTC is the dominant carrier.

Telecommunications services

The November amendments marked a significant shift in emphasis from the original carefully plotted regime. While Section 137, as amended, preserves the right to interconnect facilities and networks, the carriage obligation has been replaced by the obligation to supply telecommunications services.

The term 'telecommunications service' is defined broadly in the Act to mean "a service for carrying communications by means of guided or unguided electromagnetic energy or both". It encompasses higher level services, which a carrier has no obligation to provide under the original section 137 (except perhaps where incidental to carriage across its network). It also encompasses basic carriage services, bringing within the reach of section 137 services which are wholly unrelated to interconnection and network interoperability.

By way of example, section 137 now obliges a carrier to provide transmission capacity to another carrier, even where that transmission capacity is utilised in, and as part of, the other carrier's network or where it is used for non-interconnected calls. The exclusion of such services under the original section 137 is one of the technical defects referred to in the Supplementary Explanatory Memorandum.

"In particular... section 137 was not clear (as to whether) dedicated capacity and leased lines may become part of the network of the second carrier for the purposes of section 137, and accordingly would not be dealt with under the access right in the existing subsection 137(2)".

Reasonableness

In short, while earlier concerns focused on the scope of interconnection and access, the amendments to section 137 have redirected attention to the range of services one carrier must provide to the other. The obligation to supply telecommunications services is subject to a carrier 'reasonably requesting' the service. 'Reasonableness' is largely to be determined having regard to the objects set out in section 136.

Section 136 speaks of:

- promoting the long-term interests of consumers;
- protecting and promoting competition
- enabling the carriers to compete on a level playing field protecting carriers from a misuse of market power in relation to access to essential facilities or access to customers.

While the boundaries of 'reasonableness' are certain to be tested at each turn, it is too early to assess how the objects will be interpreted. At a minimum, the notion of 'essential

to the New Zealand High Court to stop the transfer of six licences by the Ministry of Commerce. Mr Justice Jeffries granted the Hobart-based Mirell an interim injunction. The company had tendered the highest amount for some licences in parts of New Zealand but was not awarded the frequencies because of errors in the tender document. It was reported that the lot numbers were not correctly stated. Nineteen licences were sold for about $216,000 but Mirell was reported as having bid $332,000.

NZ TELECOMMUNICATIONS LITIGATION

Telecom New Zealand has failed to get a High Court order to prevent the Commerce Commission from investigating the telecommunications industry under New Zealand's trade practices legilsation. Telecom alleged that the Commission was exceeding its powers, acting unreasonably and that the investigation could prejudice litigation between Telecom and Clear Communications.

Mr Justice Gallen said Telecom could simply not take part in the Commission's investigation and that if the Court found in its favour after a full hearing which would take place in April 1922 then it would have lost nothing. Mr Justice Gallen said the Commission was not required to act in a vacuum and must be able to make investigations before performing its policing powers under the *Commerce Act*. Telecom had not been able to establish a case strong enough for an interim order to be granted in the absence of any evidence in rebuttal.

NZ TELECOM TRADE PRACTICES DISPUTE

Clear Communications Limited has to wait until June 1992 for the High Court to hear its trade practices claim alleging Telecom New Zealand was abusing its dominant position in the market place over local calling. The manager of Clear Communications, Neil Tuckwell, has been concerned about the amount of time it was taking to handle telecommunications issues.

"While the judiciary is of the view that these are important matters and require careful consideration — and we respect that — time is also of the essence. If we were to apply the amount of time it has taken for the Amps-A (cellular telephone) decision then we might not expect to see anything final until 1993 and then we would still have to negotiate inter-connection", he said.

In another set of litigation, Telecom has appealed to the Court of Appeal against a Commerce Commission decision that the addition of the "A" band of the mobile phone system frequency to the "B" band it already has, would increase its market dominance. The case was due to be heard by the Court of Appeal. On 10 December the High Court upheld the Commerce Commission's decision. The High Court judgment means the frequency would return to the control of the Ministry of Commerce which has to decide whether to re-tender the frequencies or offer them to the next highest bidder.

NZ TELEPHONE NUMBERING PLAN

The Commerce Commission has also expressed the view that Telecom's control of the telephone numbering plan should cease. Telecom determines the numbers which its competitors use, including the 050 access code phone users dial to use Clear Communication's rival toll network. The Commission said that gave a commercial advantage to Telecom and suggested control should be vested outside the market, as it is in Australia. "Competition can best develop if there is no difference in the dialing procedures and the time taken to place a call through competing networks," the Commission said. Its views were presented to the Ministry of Commerce which has since produced an interim report. It found ownership of the numbering plan which passed to Telecom when the company was corporatised in 1987 remained with it after privatisation. The Ministry of Commerce found that Telecom had bought the right to its own telephone numbers but did not acquire the right to allocate numbers to competitors and that if there was evidence that competition was blocked or severely diminished by numbering issues, the Government could still legislate on the issue.

NEGOTIATION OF NZ CONTRACTS

The Communications Minister, Maurice Williamson, still saw competition as the best regulator of the telecommunications market in his speech at a telecommunications seminar in Auckland in December 1991. He said there was "a lot of posturing and commercial rhetoric" from Telecom and Clear and not enough effort was being put in negotiating contracts. The Minister revealed that he had written to the Telecom chairman asking for confirmation of earlier commitments to fair and reasonable competitor practices.

Mr. Williamson said the government would tighten its control if the companies did not play by the rules. "The major message to the players is to go away and negotiate in good faith and use the courts, which are the most appropriate body, for making a ruling on the very difficult contracts issue."

One commentator at the seminar said, "The risk for government policy was that unresolved disputes would take many months to sort out and involve costly court battles. Shifting major competitive issues into the courts could also effectively stifle the attempt to create a unique regulatory environment."

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facilities' can be expected to shape one carrier's obligations to supply telecommunications services to the other.

On the other hand, an interpretation which leans too far in favour of requiring the provision of telecommunications services between carriers — the 'what's yours is mine' approach could have perverse results as far as consumers are concerned.

The motivation to innovate is largely conditioned in a competitive environment on the risk that the competitor bears that one carrier will provide services to consumers of a quality and type which the other cannot match. If a new carrier has recourse to all of AOTC's established network and services to build its own network and to AOTC's complete inventory of services for resale to third parties, these are two possible consequences. First AOTC, as the established carrier, will have a reduced incentive to innovate, as the new entrant can parrot offerings that achieve market acceptance. Second, the competitor will have a reduced incentive to differentiate its service offerings, particularly in areas of service quality less visible to the public (e.g. transmission capacity like fast packet switching).

In this way, consumers and service providers could be denied the full benefits of competition.

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