and prescribed interests have been issued pursuant to the prospectus and there have been at least 100 holders of prescribed interests at all times since the prescribed interests were issued under the prospectus.

An important consequence of this is that many "closed" unit trusts or other prescribed interest offers which are no longer being marketed but at some time previously have issued prescribed interests pursuant to a prospectus will be Disclosing Entities (for so long as they have at least 100 holders).

This will cover most film investment where there has been a prospectus (but probably not those where the funds were raised using an offer document that fell within section 215C of the former Companies Code).

Securities that are quoted on the Australian Bloodstock Exchange Limited are declared not to be ED Securities.

what must be disclosed?

Section 1001A applies to a listed disclosing entity, and requires compliance with stock exchange rules relating to continuous disclosure (including Listing Rule 3A(1)).

In the case of an unlisted disclosing entity, section 1001B applies.

The continuous disclosure rules apply to information which:

- is not generally available; and
- a reasonable person would expect to have a material effect on the price or value of the Disclosing Entity's ED Securities, i.e. it is "price sensitive".

Information is "generally available" if:

- it is readily observable; or
- it has been made know to investors in securities of a kind whose price or value might be affected by the information and a reasonable period of time has elapsed since the information was made known for it to be disseminated among such investors.

Information is likely to have a material effect on the price or value (i.e. is price sensitive) if the information would or would be likely to influence the investors described above in deciding whether to subscribe for or buy or sell the securities. The fact that there is no buy-back covenant and that there may be no market in the relevant securities (as is the case in many prescribed interest schemes) will not automatically mean information is not "price sensitive".

These concepts follow closely the insider trading provision of the Corporations Law.

Importantly, the threshold test in determining whether information is generally available refers to investors and not their advisers. The information must therefore be widely disseminated to reach those investors who invest in securities whose price or value might be affected by the information.

In contrast to the continuous disclosure rules for listed entities (especially the revised Listing Rule 3A(1)), there is currently no express exception for commercially sensitive information where the release of such information would cause a detriment that arguably outweighs the benefit of disclosing the information to the market.

how and when is information to be disclosed?

The obligation to disclose information arises when the manager of the Disclosing Entity becomes aware of the information.

Such obligation is satisfied by the manager of the Disclosing Entity lodging the information with the ASC as soon as possible. Information that has been lodged is not required to be sent to the holders of the prescribed interests.

Information is not required to be lodged with the ASC if the information would be required to be included in a supplementary or replacement prospectus.

This means that the continuous disclosure requirements will generally not adversely impact on a manager of a prescribed interest fund which has a prospectus on issue so long as that manager is fully complying with its obligations to issue supplementary or replacement prospectuses. However, a manager of a Disclosing Entity which does not have a current prospectus on issue (or where the information specifically does not relate to that prospectus) will be required to lodge relevant information with the ASC.

contravention

A contravention of the continuous disclosure rules as they apply to prescribed interest schemes will occur if the manager of the Disclosing Entity intentionally, recklessly or negligently fails to disclose the required information.

A person involved in that contravention may be civilly liable to a person who suffers loss or damage as a result.

It is a criminal offence if the failure to disclose is intentional or reckless.

exemptions and modifications

The ASC has the power to exempt specified persons from all or specified disclosing entity provisions.

In addition, regulations may be made to exempt specified persons from all or specified disclosing entity provisions or to declare specified securities of bodies not to be ED Securities.

It is not clear in what circumstances exemptions or modifications will be made.

David Williams, Partner, Mallesons Stephen Jaques.

Telecommunications after 1997 - Carriage, Convergence, Consumers

Helen Mills, Director, Communications Law Centre reports on the CLC's conference held on 9 November 1994.

One of the most engaging features of the conference was hearing debates between the major telecommunications players on licensing, regulation, interconnect arrangements, universal service and other critical aspects of the post - 1997 arrangements, at a point just before submissions were due to be sent to government.

Not surprisingly, perhaps, Telstra is adopting a purist pro-competitive position on these issues; Optus favours continued involvement by the regulator and policy makers to keep the rules of the game; and the service providers argued that they were already effectively bearing many of the burdensome obligations of carriers, while getting none of the benefits (eg: interconnect at carrier rates).

Why Limits on Telecommunications Providers

Optus Director of Corporate and Regulatory Affairs, Andrew Bailey, argued that while Telstra has control of the customer base, sunk infrastructure costs and the advantages of its diverse network, it will enjoy advantages which cannot be neutralised simply by the operation of general competition law. Hence Optus supports continuation of a regulator which

is able to intervene promptly, with both formal arbitration and informal facilitation. Whether that regulator stands apart from or is integrated with the proposed Australian Competition Commission as a specialist arm, is still an open question, from their point of view. (Peter Waters of Gilbert & Tobin, Optus legal advisers, put forward an eloquent argument for a specialist regulator - this is discussed later in this article).

On interconnect, Bailey challenged the embedded margin for Telstra in the negotiated interconnect rates, which he claimed was a significant factor in the (then) plans for Optus Vision - the proposed fibre optic cable network which would piggy back telephony onto pay television and interactive services.

Optus's point is that without its own infrastructure it can't effectively compete in local calls, because of the high interconnect charges it pays to Telstra. Infrastructure development can't produce returns on investment in the short term, so carriers should continue to have the advantages of carrier interconnect rates and land access powers - that is, the carrier/service provider distinction should outlast 1997. About the only area of flexibility Bailey was prepared to concede is in service providers getting into the business of building their own line links after 1997.

Deena Shiff, Telstra specialist regulatory counsel, started from two propositions: the duopoly will end in 1997 and will not be resurrected as a triopoly or any other form of oligopoly; and that the national competition framework will to the greatest extent possible determine the rules on access and competition post 1997.

In bold pro-competitive mode, Telstra urges reliance on the market and converging technologies to set the pace for industry development.

Shiff argued that carrier privileges (exclusive rights to install infrastructure, land access powers and interconnect rights) are being eroded in value as switched resellers are able to benefit from off-shore liberalisation of simple resale, and thereby shape their cost structures more along carrier lines. And the Optus Vision structure illustrates how the legislative concept of the carrier falls short of covering all companies engaged in infrastructure development. The ability of service providers to deal directly with customers, effectively sub-contracting to network operators for connectivity, meant they were getting the advantages of carriers without the burdens of universal service contribution, accountability for quality of service and consumer protection obligations.

Remedy? Any operator who carries public communications (voice, text, data or video) to or from customers using telephone or data address numbers should be able to become a "carrier", regardless of the bandwidth or technology employed. Access and interconnection - including operators' access to customers, whether by preselection or some other method, and network interconnections arrangements (ensuring that customers of one network can call those connected to other networks) - should be handled under general competition rules. While the present proposals need fine-tuning - for example, facilities and services needed for end-to-end connectivity should be deemed essential services - the competition policy legislative framework is adequate, and better than dreaming up some special interconnect regime which will be technologically outpaced, anyway.

Shiff took issue with Bailey about the government's role in ordering the market; their differences on this point took on greater salience at the end of November 1994, when Minister Lee announced the access rules for broadband services and cable-delivered pay tv. Bailey's position was that if the private sector is funding infrastructure development, it must be able to make its own decisions about demand and supply, in order to get adequate cash flow and rate of returns. Service providers must demonstrate that they are "extending the value proposition" by real innovation, beyond just extending the marketing reach of the carriers, before they can legitimately expect to be dealt into the main game through access rights.

Alan Horsley, Managing Director of Vistel Ltd, a Victorian government owned company providing telecommunications services to the public sector in that State, gave the users' perspective (he's also a member of the Broadband Services Expert Group). Horsley said that the role of policy was to ensure equal opportunity to providers of content, which required transparency of commercial arrangements - possibly even commercial separation within organisations which have multiple roles. From the end user perspective, equity of access depends on tariff flexibility and the availability of options, rather than tariff structures designed by the carriers to suit their own purposes. In his view we need "an enabling and pro-active regulator", one which "makes things happen within the policy framework". The task is to ensure there is a balance between privileges and obligations on industry participants, in order to ensure there are commercial benefits and that applications development is seriously addressed.

Carriers & Convergence After 1997

The services providers' perspective was put by Brian Perkins, AAP Telecommunications, and Dough Clements, Managing Director of Paynet.

For Perkins, access to infrastructure is the dominant issue, and the Hilmer competition policy structure offers no answers for the telecommunications industry, because it is designed to force access to monopoly facilities. The focus should be on "key facilities" and "bottleneck control"; the weakness of the current arrangements is that service providers have no access to vital facilities such as the customer information base.

Clements maintained that post-1997 pay television operators should be able to compete to offer telephony, as well as interactive services, and other services such as meter monitoring and demand management for electricity utilities. With pay tv as the driver for building infrastructure, there is a good business in combining telephony, given reasonable penetration rates.

Who Manages What Shop

AUSTEL's new chairman, Neil Tuckwell, identified two different levels of regulation: a minimum level, that which is necessarily required, and a second level which responds to the broad range of industry stakeholders. There have been at least two "paradigm shifts" from the pre-1991 position of preservation of monopoly and public ownership, the 1991 reforms driven by a micro-economic reform agenda, leading to the introduction of competition and a level of private ownership.

We may be moving to a new paradigm, which could be characterised by a focus on convergence, or on furtherance of micro-economic reform, or on delivering social goals - or by some balance of all three. The consideration of Optus Vision's access arrangements by AUSTEL, the ABA and the TPC tests the limits of the current paradigm.

Tuckwell sees four main regulatory options - industry self-regulation; function-specific bodies such as the Spectrum Management Agency, and Standards Australia; an industry specific body incorporating AUSTEL's functions; or a general economic regulatory body as proposed in the national competition policy. Which option is adopted may be determined by paradigm decisions.

Prof Henry Ergas, consultant to the TPC, analysed three common problems for competition policy in de-regulated industries. They are access, abuse or market power by the still-dominant supplier, and consumer protection and public service obligations. These problems can be addressed by industry-specific, economy-wide or Hilmer-type "hybrid" regulatory approaches.

Industry-specific regulation suffers the weaknesses of industry "capture" of the

regulator, idiosyncratic definitions of anti-competitive behaviour, which introduce regulatory uncertainty which is particularly harmful where industry boundaries are blurring, as in broadcasting and communications. On the other hand, **economy-wide competition** laws enforced through the courts produce reactive results, allow an incumbent to burden new entrants with litigation (as in New Zealand), and hence allow market failure. The "Hilmer Hybrid" is a specific scheme for de-regulating industries, and sets up a common policy body and a common enforcement agency. It is capable of accommodating industry-specific legislation - which can deal with specific issues such as access and interconnection and stronger consumer protection for the telecommunications industry, within general principles applying across all de-regulating industries.

Peter Waters of Gilbert & Tobin argued that a universal regulator is a "dangerous concept", and the idea of a universal access regime applying across the whole economy "elevates a tool for policy to policy itself". Waters argued you should always start by asking what are the public policy considerations which lead you to take up the tool? If you want to avoid duplication of infrastructure, a thorough-going access regime is the answer. But if you want a diversity of facilities, you would be better to allow private operators to have an incentive to build them, by allowing private closed networks.

In Waters' view, the reforms introduced by the Telecommunications Act had yet to run their course, competition still needed nurturing, and it was premature to rely on trade practices principles alone. The answer was to have a separate sector of the NCC/ACC structure to deal with communications competition and interconnect, and able to manage the complex relationships between the parties to keep competition working.

Now

Submissions are now in to the government's review of telecommunications policy. A foretaste of the next paradigm may have been given by the Minister's statement on 24 November 1994, mandating open non-discriminatory access to broadband capacity on cable networks, while allowing pay tv network providers to control access (and hence share revenue from the content) to pay tv channels for at least two years.

But the questions canvassed at the conference are still largely open.

The conference "Telecommunications After 1997: Carriage, Convergence, Consumers" was hosted by the Communications Law Centre and sponsored by Gilbert & Tobin.

The case for competition in satellite delivered telecommunications services

Gregg Daffner, of PanAmSat, argues.

As Australia embarks on its eagerly awaited telecommunications policy review, an issue of fundamental importance is the extent to which competition in the provision of domestic telecommunications services via satellite should be authorised. The review of telecommunications policy provides the Australian Government with an opportunity to introduce genuine market driven consumer choice in the provision of telecommunications services and extend Australia's leading role as a progressive free trading advocate in the Asia Pacific region.

These issues are of particular relevance in the light of the recent launch by PanAmSat of its PAS2 satellite which services the Asia Pacific region and the impending launches of APSTAR2 and ASIASAT2. PanAmSat is the world's first private international satellite system operator with nearly 300 customers in over 70 countries.

The review by the Government of post 1997 telecommunications policy comes at a time when the Government is deciding upon its response to a request from PanAmSat to provide certain limited telecommunications services within Australia. In July 1993, pursuant to section 106 of the Telecommunications Act 1991 *("the Act")* PanAmSat requested the Minister for Communications to direct AUSTEL to authorise the immediate supply by PanAmSat of certain telecommunications services within Australia for broadcast programs and for private telecommunications networks. The 2 general carriers, Telecom and Optus, have voiced their opposition to PanAmSat's request.

PanAmSat did not challenge Optus' exclusive right to provide until mid 1997 satellite facilities for subscription television nor did it seek to compete with the general carriers' reserved rights regarding public switched telecommunications traffic. In the lead-up to 1997, PanAmSat's request offers the Government the opportunity to fulfil its self imposed mandate to establish the premier telecommunications infrastructure in the region.

The Carriers' Reserved Rights

Under section 92 of *the Act*, the general carriers (as the primary providers of Australia's public telecommunications infrastructure and networks) enjoy certain reserved rights until mid 1997. These reserved rights include the provision of domestic telecommunications services via satellite. Only a general carrier or a person acting for or on behalf of a general carrier may supply domestic telecommunications services by the use of satellite-based facilities. Australian customers can only use private satellites if services are provided through Optus or Telecom. The Minister is, however, empowered under section 106 of *the Act* (after consulting with each general carrier) to provide AUSTEL with directions to authorise the provision of reserved services.

The alternative to obtaining a direction from the Minister would be for the satellite operator to provide domestic telecommunications services for or on behalf of a general carrier under section 96 of *the Act*. However, the competitive benefits of direct customer access to a satellite operator would be significantly diminished for the following reasons:

- any agreement with a general carrier would necessarily increase the price of satellite services and derogate from the ability to provide competitively priced services;
- PanAmSat's experience is that customers, particularly those in the broadcasting industry, prefer to deal directly with facilities providers (eg: the ABC and the Nine Network in their dealings with PALAPA in respect of their Asian services);
- regulatory constraints affecting a general carrier's pricing and other terms of supply restrict a satellite operator's ability to provide services competitively;
- long term contracts with customers which operate beyond 1997 are usually contemplated.

Ministerial Authorisation

Section 106 of the Act gives the Minister the authority to authorise provision of domestic telecommunications services by a satellite operator other than a general carrier if doing so "will not erode unduly the practical value of the general carriers rights". The decision process under section