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Super League : Full Federal Court Prefers Competition On And Off The Field

Murray Deakin reviews the key findings of the trial judge and the Full Federal Court in the Super League case and examines some of the case's implications

On 4 October 1996, the traditional custodians of rugby league football in Australia, New South Wales Rugby League Limited ('**the League**') and Australian Rugby Football League Limited ('**ARL**'), suffered a massive and historical defeat. In a dramatic reversal of fortunes, the Full Federal Court swept aside the decision of the trial judge who had earlier found in favour of the League and ARL. Mr Ken Arthurson of the ARL was reported to have said to the media on the day of the decision: *'I can't believe it, one day we win 100:0 and eight months later we lose 95:5.'*

On 15 November 1996, the High Court refused to grant the League and ARL special leave to appeal. This marked the end of the appeal process and effectively enshrines the Full Federal Court's decision as the final judicial authority on the issues raised.

Introduction

The Super League case arose out of the attempt by News Limited ('News') to establish a new professional rugby league competition in Australia, known as 'Super League', in opposition to the national rugby league competition run for many years by the League and ARL.

News sought to attack certain contractual arrangements, the Commitment and Loyalty Agreements, which the League and ARL had entered into with each of the 20 rugby league clubs participating in the 1995 national competition. Those contractual arrangements committed the clubs to playing exclusively in the League's national competition until the year 2000. News attacked these arrangements under sections 45 and 46 of the Trade Practices Act 1974 ('**TPA**'). Under section 45, News argued that the agreements constituted an arrangement containing exclusionary provisions or an arrangement substantially lessening competition. News also argued that by entering into the agreements, the League had misused its market power in breach of section 46.

The League and ARL argued that the establishment of Super League constituted an attempt to destroy the existing competition by unlawful means. The nub of their case was that News and its associated Super League companies induced some of the clubs participating in the national competition to breach fiduciary and contractual obligations owed to the League, ARL and other clubs.

Trial judge's decision

In a colourful judgment, Justice James Burchett comprehensively rejected the attempt made by News to set up Super League.

Burchett J decided that the Commitment and Loyalty Agreements which the League and ARL entered into with each of the clubs did not contravene the TPA and therefore were valid and enforceable. His Honour also rejected the claim made by the rebel clubs (aligned with News) that they were subjected to economic pressure or duress by the League when signing the Commitment and Loyalty Agreements.

By joining Super League, each of the rebel clubs were found to be in breach of contract with the League and also of breaching their fiduciary duties to the League, as each of the clubs were found to be involved in a joint venture with the League.

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By enticing League players and coaches into joining Super League, Burchett J found that News and the Super League companies had committed the tort of intentionally inducing the rebel clubs and coaches into breaching their contract with the League.

Definition of Market

A critical element in the Super League case at first instance was the definition of the market.

At the trial, News argued that the relevant market was confined to the professional sport of rugby league football. Burchett J rejected that market definition. He concluded that the market was much wider than rugby league and included not only rugby league but other sports such as rugby union, soccer, Australian Rules football and basketball and possibly other types of entertainment.

Although the Full Federal Court's unanimous decision has corrected much of the trial judge's flawed reasoning, the appellate judges did not find it necessary to consider questions of market definition. The Full Federal Court's judgment therefore leaves undisturbed the trial judge's definition of the relevant market. As he found a very broad market, his analysis is likely to be used in future cases by those who seek to dilute the impact of their allegedly anti-competitive conduct by having the Court examine their conduct in the context of the widest possible market. For this reason, it is worthwhile reviewing the trial judge's market definition analysis in more detail.

Burchett J's finding of a multi-sport market is at odds with a series of US antitrust cases which have found a number of discrete markets each confined to a single sport. While it is no doubt appropriate, as the trial judge observed, to take into account the complexity and range of forms of entertainment available in the United States when examining the American decisions, Burchett J's attempts to distinguish this line of authority is unconvincing. His Honour's reference to the possibility that some of the American cases may be concerned with per se violations of the *Sherman Act* is not a distinguishing feature as the Super League case involved a potential per se violation in the form of an exclusionary provision in breach of section 45(2) of the TPA. His Honour also referred to the recognition of submarkets in the United States and the existence of the 'rule of reason' doctrine as further reasons why American courts may draw markets more narrowly than in Australia. However, none of these factors would account for an approach to market delineation so substantially different to that which should prevail in Australia.

Now that the High Court has refused special leave to appeal from the Full Federal Court's decision, it is clear that there will be no review of Burchett J's analysis of the market. This is regrettablee as the author believes that the trial judge's market analysis ignores the functional dimension of the market.

The starting point to any definition of the market is to identify the goods or services that are supplied by the undertaking in question. The services supplied by the League are the services associated with the organisation of a national rugby league football competition.

In identifying the relevant market, it is necessary to examine whether there are any other services that are, in the words of section 4E of the TPA, 'substitutable for, or otherwise competitive with' the League's organisational services. From a supply side perspective, it would seem possible but unlikely that organisers of

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other sports (for example, organisers of soccer, basketball or Australian rules football) would switch sporting codes and proceed to organise rugby league if given a sufficient price incentive. From a demand side perspective, the rugby league clubs (who are the acquirers of the League's organisational services) would be unlikely to switch sporting codes and offer their players as soccer, basketball or Australian rules players as they would lack the appropriate skills for these sports. However, the same league clubs would, given a sufficient price incentive, switch their allegiance to another rugby league organiser. The conduct of the rebel clubs, in aligning themselves with News, demonstrates this level of substitutability in demand.

This analysis would suggest that the relevant market was the market for the organisation of national professional rugby league football competitions. The current rivalry between the News-sponsored Super League competition and the Optus Vision-sponsored ARL competition lends some factual support to this narrower definition of the market.

Rather than examining substitutes at the organisational level, Burchett J would appear to have examined substitutability at the game level by posing the question whether other sports were substitutable for or competed with the game of rugby league as a spectator sport or entertainment event. Substitutability was examined at this level by looking at admission charges for other sports, the perceptions of other sporting bodies, the scheduling of games by venue administrators and the perspectives of rugby league officials, television proprietors and major advertising sponsors. However, a criticism of this approach is that the trial judge examined the substitutability of the end product of the League's organisation (namely, the football game itself) rather than the substitutability of the League's organisational services.

Implications

As the approach to market delineation adopted by Burchett J has not been disturbed by the full Federal Court, this may have wide implications reaching well beyond the Super League case. First, the decision would represent a windfall gain for other sporting bodies (such as the Australian Football League and the Australian Rugby Union) who may have believed they occupied such a powerful position in their sport that they needed to be conscious of trade practices law prohibiting anti-competitive conduct. These sporting bodies would, under Burchett J's definition of the market, have a powerful defence to any attack made against them under those provisions of the TPA which require an assessment of competition.

Outside the sporting world, the decision would support much wider market definitions than have traditionally been applied. For example, it would be difficult, in relation to Foxtel's earlier proposal to acquire Australis Media, to reconcile a market confined to pay TV with Burchett J's judgment.

Full Federal Court's decision

The key findings of the Full Federal Court may be briefly summarised as follows:

a) The Commitment and Loyalty Agreements contained exclusionary provisions within the meaning of section 4D of the TPA.

b) The clubs and the League entered into the Commitment and Loyalty Agreements pursuant to a common understanding between them and for the purpose of restricting the availability of rugby league teams and players for any rival rugby league competition organiser (including Super League).

c) Accordingly, the making of the Commitment and Loyalty Agreements contravened section 45(2)(a)(i) of the TPA.

d) As the exclusionary provisions cannot be severed from the Commitment and Loyalty Agreements, those agreements are void.

e) The only valid contracts between the Clubs and the League were those created when each club was admitted by the League to the 1995 competition. As these contracts were to last for one season only, the contractual obligations of each club to the League and ARL expired at the end of the 1995 season.

f) Each of the 1995 season contracts contained an implied term requiring each club to do everything reasonably necessary to enable the 1995 competition to be carried on in a manner that allowed the League and ARL to receive the benefit of that competition.

g) By releasing their players during the 1995 season and by taking other action to support Super League, the rebel clubs breached the implied term of their 1995 season contracts. The trial judge was justified in finding that News and the Super League companies had induced the rebel clubs to breach these implied terms. Given that the League and ARL had already enjoyed the benefit of an injunction restraining Super League from establishing its rival competition during the 1996 season, the remedies available to the League and ARL for the rebel Clubs' breach of contract and Super League's actions of inducing those breaches should be confined to an award for damages.

h) The relationship between the League, ARL and the 20 clubs admitted to the national competition in 1995 was not such as to create reciprocal fiduciary obligations among those parties. Accordingly, the rebel clubs did not owe fiduciary duties to the League and did not therefore act in breach of any such duties. Similarly, News and the Super League companies could not have induced any breaches of fiduciary duty.

The Full Federal Court's decision to declare void the Commitment and Loyalty Agreements rests solely on a finding that those agreements contained exclusionary provisions (as defined in section 4D of the TPA) in breach of section 45(2)(a)(i) of the TPA.

The complete reversal of the trial judge's decision on exclusionary provisions is not the result of any real disagreement on the legal meaning or elements of the prohibition but the result of the appeal court drawing very different conclusions or inferences from the same facts. Perhaps the most striking differences between the Full Federal Court and the trial judge in this area relate to the findings in respect of purpose of the contracts and whether an arrangement or understanding should be inferred among the parties to those contracts.

Purpose

The issue which vexed the Court was the purpose of the League, ARL and the clubs for including in the Commitment and Loyalty Agreements provisions which prevented for five years (1995 to 1999) the supply by the clubs of

teams to a rival competition organiser and the acquisition by the clubs of the services of a rival competition organiser.

Burchett J found that while the negative stipulations in the contracts had the exclusionary effect of shutting News out as a rival competition organiser, the purpose of the League was to preserve the quality of its rugby league competition through the joint participation of all the clubs.

By contrast, the Full Federal Court found that the League, ARL and the clubs perceived News to be a potential rival competition organiser and entered into the contracts for the purpose of 'shutting out...News as a rival organiser and locking in the clubs to the national competition, to the exclusion of their participation in a rival competition.'

Arrangement or understanding

Another critical issue was whether an horizontal arrangement or understanding among the clubs (to which the League and ARL were parties) should be inferred from the circumstances in which each of the clubs executed the Commitment and Loyalty Agreements. It was undisputed that each agreement was executed by each club in substantially identical form and within a short time of each other.

Burchett J found that the clubs had no more than a hope or expectation that others would execute the Commitment and Loyalty Agreements. His Honour pointed to the absence of direct and express communications between the parties to the alleged arrangement or understanding and held that it was not possible to infer an horizontal arrangement or understanding out of a series of vertical agreements.

By contrast, the Full Federal Court found that the existence of the Super League proposal and Mr Arthurson's concern about it were common knowledge among the clubs. The Court pointed to the extensive newspaper coverage of the Super League proposal, the communication between club officials and Messrs Arthurson and Quayle and the receipt of a draft contract by each club which expressly prevented that club, for a five year period, from participating in any competition not conducted or approved by the League and ARL. Notwithstanding the absence of evidence of direct communications among the clubs, the Court stated that 'it is difficult to resist the conclusion that the clubs were consenting, through the medium of Mr Arthurson and Mr Quayle, to carry out a common purpose. They were not merely hoping that the other clubs would join in; what they were doing made sense only as a common undertaking.'

It is open to debate whether the evidence, at least in respect of the Commitment Agreement, properly supports a finding of an horizontal arrangement or understanding between the clubs. It remains arguable that what occurred was mere 'conscious parallelism', a concept well accepted in US anti-trust law as falling short of a conspiracy.

Conclusion

On balance, the author believes that the Full Federal Court's findings are more consistent with the evidence tha the trial judge's findings. However, the absence of any detailed analysis by the appellate court in respect of these critical elements of the prohibition against exclusionary provisions creates a level of uncertainty which is unacceptable in this field of law and makes it difficult to advise or act with confidence.

Murray Deakin is a Senior Associate with Minter Ellison, Sydney

A New Standard Telephone Service?

Holly Raiche analyses the expanded definition of 'Standard telephone service' in the *Telecommunications Bill* 1996 and explains why it has implications which require closer examination.

What a 'standard telephone service' (STS) is and does and how it is funded will be significantly different from the 1991 concept of an STS if the *Telecommunications Bill* 1996 is passed into law.

Under the Bill, the context of STS moves from the legislative mechanism for one carrier delivering telephony service to all Australians, to a benchmark for all providers of basic telephony services. Its definition potentially changes from the provision of a service, to a combination of service and equipment. Where there was only one deliverer of the STS in an area, the delivery of components of the STS may be split between USO carriers. Finally, the funding for STS provision, now based on provision of services to geographic areas, will need to be changed to accommodate the provision of equipment as part of the STS.

The changes to the STS and its context within the universal service are best understood by reviewing the current STS structure to highlight the signifcant changes made by the Bill.

STS In Context

Under current legislation, STS terminology is used primarily in the context of the universal service obligation (USO). The USO is the requirement on the universal service carrier to provide both a standard telphone service and payphones which are 'reasonably accessible to all people in Australian on an equitable basis, wherever they reside or carry on business.[1]

The only other reference to an STS in the current regime is the obligation on general carriers supplying an STS to residential or charitable customers to provide the option of access to untimed local calls if access to those calls was provided at the commencement of the Act.[2] This requirement ensures that the USO carrier, whether Telstra or another general carrier, continues to provide access to untimed local calls in areas where it had been available in 1991.

Under the Bill, use of the STS term goes well outside provision of the USO. The term is still used in the context of continuing access to untimed local calls. It is also, however, used in the context of customer safeguards such as the provision of customer information, directory assistance and itemised billing.(3)

This raises the issue as to whether the STS, under the Bill, is being used to set a general benchmark of requirements which must be met by all carriage service providers providing voice telephony services to consumers, whether or not they are a universal service provider.

The most obvious advantage of using the STS as a benchmark for all STS services providers is that the public will be guaranteed some minimum level of service from whatever STS provider they choose. It will ensure all STS offered to the public include the possibility of access to untimed local calls where now available. It will also, because of the way the STS is defined, ensure people with disabilities have access to a voice equivalent service.

However, there may be some disadvantages in using the STS as a more general benchmark. Smaller carriage providers may want to offer voice telephony at very low cost, but on a timed call basis only. Under the Bill, they would not be able to do so.

Further, because equipment and other services can become part of the supply of the STS, as discussed below, smaller carriage service providers may be deterred from offering only basic voice telphony services.

STS Definition

The STS is now defined as a 'public switched telephone service that is supplied by a carrier and is supplied by means of a telephone hadnset that does not have switching functions, the definition provides for regulations to include other telecommunications services in the STS definition, as the mechanism for upgrading the STS.(4)

The Bill has preserved the terminology of universal service and a standard telephone service, but has made important changes to the way the STS is defined.

The proposed USO is in very similar terms to the 1991 obligation: to ensure that the STS and payphones are 'reasonably accessible to all people in Australia on an equitable basis'. The new requirement is that 'prescribed cariage services' are also reasonably accessible.(5) - in essence repeating the upgrading process of an STS by regulations, but maintaining a separation between what an STS is and what additional 'prescribed' services will be delivered as part of the USO (though not part of the STS).

The new definition of the STS is a carriage service which either provides voice telephony and passes the connectivity test(6) or, if a voice telephony service is not practical for an end user with a disability, then a carriage service which is equivalent to a voice telephony service which passes the connectivity test.(7)

A new section further defines the 'supply of the STS' as including the supply of customer equipment, if prescribed by regulations. That equipment can be a telephone handset without switching functions, other equipment for use by people with disabilities, or other goods and services used in connection with the STS.(8)

STS Standards

The 1991 Act allows AUSTEL to develop performance standards both for the STS and other goods and services supplied to consumers.(9) Because of AUSTEL's roles in handling USO complaints and reporting to the Minister on the implementation of the USO, AUSTEL has also developed its 'views' of an expanded definition of the STS as including access to free emergency services, voice grade service meeting international standards, access to directory assistance and fault reports, and a unique telephone number.(10)

Under the Bill, some of AUSTEL's views about what is included in an STS (as part of the USO obligation) have now been included in the more general requirements on Service Providers providing an STS.(11) The issue, again, is whether service standards and quality measures should be set generally for all providers of the STS or whether general standards should be set for basic telephony providers, and some additional and/or different test developed in connection with the USO requirements.

STS Price Controls

Currently, there is a *de facto* price control regime on standard services (including the STS) by the coincidence of Telstra being subject to price controls under its own legislation(12) and also being the universal service carrier for Australia under the Act. (13)

Because of the very real possibility of more than one USO carrier, the Bill quite sensibly provides a direct link between any USO provider and the prices charged in connection with the USO. Under the Bill, the STS and other 'specified universal service charges' can be brought under the price controls through Ministerial determination.(14) Because the 'supply' of the STS now includes cuostmer equipment, it opens up the possibility of price controls on customer equipment in connection with the USO as well as the STS and payphone charges.

Telstra can still be subject to price controls under its own Act. And under this Bill, Ministerial determinations made relating to universal service charges will not affect any price controls imposed on Telstra under its own legislation.(15)

That raises the obvious issue of consistency between the price controls on Telstra and price controls on other USO providers (including controls on Telstra *qua* Telstra as against controls that might be imposed on Telstra *qua* USO provider).

More than One STS Provider

The Act now requires that, for any given geographic area in Australia, there is now only one universal service carrier,(16) whether there is only one universal service carrier for the whole of Australia or for a specified area or areas in Australia.

The Bill allows for only one national universal service provider whose area of responsibility extends nationally, except to areas where another carrier or carriers have been declared as regional universal service providers. (17) The Bill further allows, however, for a declaration of more than one regional universal service provider in an area.(18)

Presumable, this is to allow the provision of the STS by one regional USO carrier or the national carrier, and

other 'prescribed services' or payphones which are part of the USO by another USO provider.

The advantages of splitting the USO into component services, and allowing different carriers to provide different components is that it allows services to be provided by a carrier which can provide that service most efficiently and cheaply.

There are some obvious issues, however, about whether allowing the USO to be provided by different carriers will mean customers must subscribe to more than one carrier to receive the USO benefits, and possibly incur additional charges in doing so.

Tendering for the STS

The system of regional USO providers allows potential providers to tender to provide the USO in a given area or areas.(19) The process does not appear to include oversight of whether their tendered cost for providing a USO service is reasonable.

Ordinarily, if a corporation underbids for the right to provide a service, it simply wears the loss or goes bankrupt. In the case of a USO provider, however, there are public consequences for underbidding.

Most importantly, the incentive for the USO provider may be to provide a lower quality service to make up the loss. Further, if the USO provider goes bankrupt, the responsibility will be on the national USO provider to pick up the costs, which may be considerably higher than tendered for and, ultimately, all participating carriers will contribute to the higher costs resulting from the original under-funded tender.

Funding STS provision

The current STS definition and the compensation mechanisms for loss incurred in its provision highlight two aspects of the STS. It is an obligation to provide a service only, not equipment.(20) And the obligation to provide a STS is concerned only with ensuring universal geographic coverage of Australia.(21)

Recovery for losses incurred in providing the USO are still, under the Bill, based on the concept of 'net cost areas'.(22) Because, however, the supply of the STS can now include equipment as well, using a geographic concept for cost recovery of USO provision is no longer totally appropriate.

It may be that concepts of net cost areas can still be used as the basis of recovery for the provision of loss making service in areas. However, additional mechanisms for loss recovery need to be developed so that provision of equipment and other goods and services required as part of the USO can be compensated for where necessary.

Conclusion

The Bill preserves the Government's election commitment to maintain a policy of universal service to all Australians. However, the new structure and definition of the standard telephone service raise both potential benefits and concerns for the carriers, potential service providers and the public which should be carefully considered before the Bill is passed into law.

Holly Raiche is a communications consultant and lectures in communications law at the University of Technology, Sydney.

References

(1) Section 288 *Telecommunications Act* 1991.

(2) Section 73 *Telecommunications Act* 1991.

(3) See Service Provider Rules *Telecommunications Bill* 1996, Schedule 2.

(4) Section 5 *Telecommunications Act* 1991. The *Explanatory Memorandum, Telecommunications Bill 1991* said the allowance for additional services to be included in the STS was to 'take account of changing community expectations or technology.'

(5) Clause 1320(1)(a), (b), and (c) *Telecommunications Bill* 1996. Prescribed services are further defined in Clause 1309 as a service specified in regulations.

(6) The connectivity test requires that 'end users' of a service can communicate with all other end users of the same service, regardless of whether the same telecommunications network is used: clause 115A(2) *Telecommunications Bill* 1996.

(7)Clause 115A(1) *Telecommunications Bill* 1996.

(8) Clause 1310 *Telecommunications Bill* 1996.

(9) Section 38(2)(b) *Telecommunications Act* 1991.

(10) For a complete AUSTEL description of the STS, see AUSTEL, *Occasional Paper, Telecommunications: Universal Service Obligation*, p. 30-31.

(11) See fn 3.

(12) Part 6 *Telstra Corporation Act* 1991.

(13) *Telecommunications (Universal Service Carrier) Declaration No. 1 of* 1992.

(14) Clauses 1375-79A *Telecommunications Bill* 1996.

(15) Clause 1379(2) *Telecommunications Bill* 1996.

(16) Section 290(4) *Telecommunications Act* 1991.

(17) Clause 1330(1) and 1340(1) *Telecommunications Bill* 1996.

(18) Clause 1330(3) and 1340(2) *Telecommunications Bill* 1996.

(19) Clause 1345(1) and (2) *Telecommunications Bill* 1996.

(20) This view of the USO, and provision of the STS in service terms only was challenged by the Human Rights and Equal Opportunities Commission Decision, Scott and Disabled Peoples International v Telecom Australia (1995), decision of 19 June 1995.

(21) Division 2, Part 13 *Telecommunications Act* 1991, compensates for the provision of service to net cost areas.

(22) Division 5 *Telecommunications Bill* 1996.

The Potential Of The Internet For Law And Legal Services

Simon Rice and Sandra Davey outline how network technologies ranging from the Law Foundation's proprietory network to the Internet benefit both the legal profession and the public.

INTRODUCTION

Networks generally

A stand-alone computer is as useful for communicating with others as is a typewriter or a letter. Connect two computers and the resulting 'network' might equate with the capacity of a telex in the age of typewriters: an active process is created. Quite simply, in modern communications systems, the network is more important than the computer: the computer is simply a tool used in the production and distribution of information. The computer is peripheral; what is most important is the network itself. Whether a local area network (LAN), a proprietary network like First Class or Lotus Notes, or a global network like the Internet, the network provides the framework for communications. It is in effect a technical parallel to a social network.

The Internet

The Internet means different things to different people but certainly, at its simplest, it is a means of electronic communication that can convey either plain text messages - email, or hypertext and images - the World Wide Web. The exciting colour-and-movement developments have been with the Web, with hypertext, audio, images and animation. The more prosaic side of the Internet, its email role, is a well established phenomenon for many professions, but not for lawyers.

The impact of the Internet, as a social space, on workflow procedures, information access, social formation, politics, language and culture, has yet to be fully understood. Unlike traditional media mechanisms such as television and print, networks redefine participation in both consumption and production. Although traditional media technologies have attempted to encourage levels of participation, through talk-back and letters, they fail in their attempts to be inclusionary simply because of their inherent limitations. Electronic communications provide a framework for active consumption, active production and, most importantly, active participation. For those who are connected, the Internet is currently the technology that can claim the greatest participatory possibilities.

Unlike other mass media, the Internet and other information-based networks are bidirectional: information flows both ways in the consumption and production process. This makes the Internet potentially more interactive and participatory than traditional media mechanisms. Further, it enables resource sharing, political networking, collaboration on joint projects, communications exchange and a potential reduction in costs.

It is bidirectional in two ways asynchronously and synchronously. In asynchronous communications such as electronic mail, people interact with each other on a one-to-one basis, or on a one-to-many basis, sharing ideas and opinions through mailing lists, discussion groups and bulletin boards. Individuals, groups of people and organisations are using these communication technologies in such areas as sharing information on current activities, holding and organising committee meetings, distributing agendas and minutes, working collaboratively on policy formulation, press releases and urgent submissions, creating special interest groups, offering support and advice, and as a central archiving mechanism for documents and publications.

Synchronous communications occur in real time, on a one-to-one, one-to-few and many-to-many basis, replicating the flow of a conversation of debate. Because they have a higher participatory and production value than existing media, synchronous communications have profound implications for the reconfiguration of workflow practices, social formation, community, the distribution of cultural and symbolic forms, politics and the construction of identity.

It is in this context that the text and practice of law, meets the Internet - email and the Web: how then can the Internet be used to enhance both access to law, and the practice of law?

THE INTERNET IN LEGAL PRACTICE

Public legal information

Law, whether legislation from Parliament, regulations and rules from bureaucracy, or decisions from courts and tribunals, is *public* legal information. We are presumed to know it. It is uncensored. It is public. It is applicable in every corner of Australia, and in many cases beyond. It is priceless, and no one should be in a position where they must pay money for access to it.

Emphasis here is on universality and equity of access to our laws: the Internet is not truly universal, nor is access to it equitably distributed across society, in a Western industrial capitalist society let alone throughout the greater part of the world. Nevertheless, no previous means of delivering information has ever had the potential of the Internet for such a degree of universality and equity.

Should legal information *be* public?

If we want to ensure that public legal information is publicly available through out Australia, the Internet is a very powerful means of doing so. It may well be that we do not all have that desire; there are many arguments raised to counter the assertion that all people should have access to all law at all times. Many people, many institutions and a large industry are dependent on the fees that can be charged for expertise in law, and the principle of universal access to legal information seems to threaten that financial dependency.

Reinforcing the vested financial, professional and personal interest in preserving the domain of expert knowledge of law, is the argument that 'a little knowledge is a dangerous thing'; this argument runs in tandem with 'old law is bad law'. Both these arguments are

true - the law is complicated, and it changes rapidly. Neither, however, is a reason for depriving people of knowledge of the law, they are merely reasons for ensuring that the measures taken to give people access to the law are comprehensive, efficient and reliable.

To the extent that access to legal information will reduce a person's dependence on lawyers, without compromising a person's access to rights and remedies, lawyers may object; such objections in those circumstances can only be self-interested. It is the case however, that access to legal information will *not* always, or even often, enable people to do without lawyers without compromising their access to rights and remedies; lawyers will remain experts in their field, but will be dealing with better informed clients who will be able to give better instructions, rely less on the lawyer's discretion, and will demand higher levels of service.

The Liberal and National Parties' Law and Justice Policy (February 1996) recognises the principle of public access to public legal information:

WINDOW ON THE LAW

Ignorance of the law is no defence at law. However, this most basic notion is increasingly at odds with the complex nature of our laws. It is essential that Australians have access to information relating to at least the basics of the legal system and the operation of laws that are most likely to affect them.

The complex web of laws and regulations are a mystery to most of our citizens, as are some of the fundamental principles. Some knowledge and understanding of the law is essential if we are to benefit from its protection.

Everyday, ordinary Australians come into contact with areas such as family law and criminal law. Unless they know how to find their way around a law library, a statute book, a law report or a legal text book it is difficult, if not impossible, to gain information without a lawyer. It is equally difficult to gain information about the court process, whether it be the Family Court or a State Magistrate's Court.

Modern computer and interactive technology provides significant scope to reduce the complexity of law and legal processes to an understandable and user-friendly format.

A Liberal and National Government will:

- *commit resources to a project to be known as Window on the Law to ensure that all Australians have access to clear understandable user-friendly information about the legal system.*

Window on the Law will:

- *comprise a series of CD-ROM/interactive (or equivalent technology) products. It will produce a series of software products beginning with an overview of the Australian legal system. This will be followed by products targeted to more specific areas frequently encountered by ordinary Australians, such as family law and criminal law; and*
- *provide those with a legal problem or question with a fuller understanding of their rights and responsibilities and with knowledge of how to access the justice system.*

The software will be made available as widely as possible to libraries, schools, legal aid and information centres. As far as is practicable, the information will be made available on the Internet.

Equally, the Labor Party when in Government produced in May 1995 the Justice Statement, to similar effect at pages 128-136.

The Federal Government's resolve was tested in May 1996 when an ill-informed newspaper report, which was picked up uncritically by other news services, created public consternation at the availability on the Internet of Family Court cases. When the true picture eventually emerged - that what is on the Internet is only what has been published for years in hard copy and been publicly available - there was still concern that the 'scare' might cause undue caution in the Federal government in relation to Internet publishing. Far from it: the Federal government repeated its endorsement of electronic access to legal information, and fully supported the continuing provision of cases and legislation to the Law Foundation of NSW and to AustLII for publication.

Some side effects

Use of the Internet to distribute legal information for free is a challenge to our received notions of the form and indeed ownership of legal information. The arcane world of statutes and precedents is now more open, but the deeper and broader understanding that legal practitioners have will never be indispensable. Nor will the value that commentators, authors and commercial publishing houses add to the text of statutes and cases be rendered irrelevant; those who add value to the raw text will now have to consider their market more carefully as the plain text becomes more readily accessible. Whereas once the text was not available unless it was purchased with the value added to it, the Internet is making the text available, and is challenging providers of secondary and explanatory material to better define their product and the markets for it.

In the same way that use of the Internet has focussed the minds of lawyers, publishers and commentators on the public nature of the base material with which they work, our use of the Internet has rejigged governments' understanding of their function, and of their relationship with the community. Previously, without the financial or technical means to promulgate their business, i.e. the law of the land, as widely and cheaply as the Internet can now do, governments could content themselves with selling their own packaging of the legislation through a limited number of outlets, and making it available to publishers to sell, with added value. Public publishing of the material has focussed government on its ability to speak directly to its community.

The Liberal and National Parties' Law and Justice Policy (February 1996) recognises this in its policy on Crown copyright:

WAIVER OF CROWN COPYRIGHT

The retention by the Government of Copyright in legislation and related documents imposes an unnecessary cost or barrier to ordinary Australians wishing to access the law. A Liberal and National Government will:

- *establish a Crown Copyright waiver scheme for legislation, transcripts and related documents so as to maximise access by all Australians and to reduce the cost.*

The Internet has similar implications for the Courts in relation to the public accessibility of their decisions. For institutions as distinctive and self-determining in their processes as courts are, exposure of their 'products', the judgments, to the world in raw,

unpackaged form is having some interesting effects. There is already a move to greater consistency in the form of the judgments that we are putting on the Internet, and a greater willingness to consider preparing and delivering judgments in a way that makes them more presentable and comprehensible from the start, without simply leaving it to the commercial vendors to enhance them.

The global nature of Internet research means that a decision of a single judge of the provincial court of Nova Scotia is as accessible as that of the full bench of the Australian Federal Court. Whether it is useful or even relevant is another matter, raising a curious question for the common law doctrine of precedent: universal publication has blurred the distinction between reported and unreported judgments, raising (or reducing) all court deliberations to the same level on that score.

USING THE WORLD WIDE WEB FOR EASY ACCESS TO LEGAL INFORMATION

Enthusiasm for the Web is enthusiasm for a small part of what it has to offer, and for very focussed use of that part. There are many reservations now being expressed and debated about the merits of the mass delivery of massive amounts of information. How viable a data-information-knowledge-wisdom continuum is in a technology-driven environment is a serious question for society, about which we need to be at least cautious, if not sceptical. Nevertheless, the Internet is unrivalled in what it can do for enhancing the accessibility of legal information, even if there is much more to be done in enabling people to sift and sort, and use the information effectively.

Other mechanisms

The World Wide Web on the Internet is a form of delivery mechanism, of getting information across, along with CD ROMs, and online databases. Technically, the hypertext capability is as useful on CD ROMs and online services as it is on the Internet; the emphasis here is on hypertext in the context of the Internet because, for dissemination of public legal information, the Internet has the advantage that it is, relatively speaking, public and, again speaking relatively, very cheap.

The Internet has a distinct advantage too in its ability to deliver up-to-date information: the information is updated centrally, rather that having to distribute updated information to users, a little like the difference between getting the latest news every hour on the radio and waiting for the delivery of the latest edition of the newspaper.

Flexibility

The Web is a flexible, attractive and easy means of dealing with what is, at the end of the day, merely pages and pages and pages of the written word. While it is the business of lawyers to understand the written word, the necessary level of comprehension does not exist throughout the community. Thus, the delivery of all law to all people at all times, in great piles of paper on their kitchen tables, is hardly likely to improve their access to an understanding of law.

The Web is between the text and the reader - what a web page does is add value by supplementing the reader's own skills and abilities. The reader can manage the materials in a way that better reflects their own needs: save them, copy them, 'bookmark' them, jump around them, link disparate parts together.

The AustLII database, and other similar databases such as that at Cornell, are accessible only through the Web, either by connecting directly or by linking from other Web sites. A comparison of the Web page access provided by AustLII to its own data, with the Web page access provided by Foundation Law to the same data, illustrates the amenability of the Web to customised design. Foundation Law provides simple and intuitive access to the information, without relying on assumed knowledge of the user.

For non-lawyers, access to legal material can be designed that does not require an understanding of the distinction between primary and secondary legal materials, or an ability to distinguish State and Federal courts by their name alone.

Simplification

Another feature of the Web is its ability to sit on top of complex legal search software. A powerful search engine such as SINO, designed by Andrew Mowbray at AustLII, or many of the commercially available products, is, if it is to be effective, complex in its operation. In the same way that the data is transformed into something more accessible for the user, so too is the complexity of the search engine apparent to the user as a simple mechanism of entering search terms and pointing or clicking with a mouse.

Multiple references

The capacity of the Web, through its hypertext feature, to take a reader back and forth to different databases at will, is unique. A non-electronic equivalent might be opening 15 books on your desk at once with yellow sticky tabs on the pages, or holding five fingers of one hand and two fingers of another in different sections of the one book that you are reading.

Thus the Web access to the AustLII database enables you to read the section of an Act that is referred to in the judgment you are reading, to take time out to cross reference a point being made in one judgment with a similar point being made in another judgment, or to follow one of the mazes that our legislative cross reference takes us into in order to answer a relatively straight forward question. Quite simply the Web, when combined with a database and search engine, puts all the information in one place, on the screen in front of the user.

Economy of text

A further advantage of the Web's particular ability to bring together many resources in one place is the presentation of the same information to different people in a way that is tailored to their needs. A legal database, a collection of the text of legislation and cases, is comprehensible to a lawyer because it is a lawyer's skill to read and understand such text. The particular access that the Web gives to this data is directed more to facilitate access and cross referencing than comprehension of the actual text.

Thinking of the Web as a filter of sorts, a different filter will allow the same material to be seen in a different light: Web pages can be designed to enhance a non-lawyer's comprehension of the same material that is already comprehensible to a lawyer. The Web allows a reader to take time out to refer to explanatory text, to illustrations and examples. The Web is effectively creating many books from the same text, without having to alter or replicate the text.

RECENT CHANGES TO LEGAL PRACTICES

There is no relevant empirical data about the operation of legal practices on which to assess the way that information technology has changed that operation. The Bar Association in early 1996 conducted a survey of computer ownership and use among barristers, the results of which showed a surprisingly high level of use of computers, although this is something short of making full use of the information aspects of modern technology.

First Class Law

The operation by the Law Foundation of NSW of the First Class Law communications project was an opportunity for close study of the manner in which lawyers can use information technology to undertake transactions, and take part in processes, that quite simply were not possible otherwise.

First Class Law is a proprietary communications network which is built on the First Class© software from SoftArc. It relies on a user installing the software from a disk, and dialling in to the First Class Law server at the Law Foundation via modem. It has the features of most similar products, such as Lotus Notes, in that it is private and access is limited to subscribers; it is not the public forum that the Internet is. In addition, it is easy to install, easy to use, and secure. It therefore provides a slightly distorted view of the prospects for use of the Internet, as these features, essential to the ready adoption by lawyers of technology, are not present to the same degree in the Internet.

Electronic legal practice - communications

The Law Foundation's use of this communication technology has seen the following:

- *electronic exchange of documents.* Lawyers and clients have been exchanging correspondence and substantial documents. Contracts are drafted, commented on, redrafted and finally approved with the so called "document" being sent backwards and forwards from one computer to the other in electronic format.
- *electronic briefing and advising.* Solicitors have taken to briefing barristers electronically, and barristers have been able to provide their advices in the same way. At either end the user can print off the document in hard copy if their personal work practice requires it, or to maintain a hard copy filing system.
- *Court Lists.* Court lists are available as soon as they have been finalised by the court: the day before the relevant day, rather than in the Sydney Morning Herald on the morning. Lawyers, clerks and librarians go to the court lists to check for the time and place for their own matter, and larger law firms and legal organisations can go to the court lists and either reroute them to their internal network or print off a hard copy.
- *Transcripts.* The transcripts of the Police Royal Commission have been available to a subscriber group within the First Class Law subscribers, immediately the transcripts are created, and well before they are available in hard copy.
- *Information exchange.* In public, private and topic-specific discussion groups, lawyers have been asking questions about current practice, current matters, legal developments, and thorny issues. And other lawyers have responded, giving answers, offering practice tips, precedents, news and gossip.

It is not difficult to extend these examples into quite realistic forecasts of what else is possible. The court lists for some courts could be done for many, the transcripts for one jurisdiction could be done for many, the document exchanges among the subscribers of First Class Law could be done among all those with electronic access, and whole new areas of activity could be developed such as electronic lodgment of documents.

Because of the potential of the Web, and its dramatically expanding coverage and accessibility, the Internet is now a more likely medium for these developments than a private communications system. To different degrees, all the activities mentioned above can be carried out through the Internet.

The real effect of communications on legal practice

While these changes to legal practice are happening, a real question must be asked - to what end? There is no doubt that some of the examples given are attractive for the way that they overcome barriers of time and distance, opening up new contacts and connections, enabling more time for planning, and quicker execution of tasks. But similar justifications can be made, after the event, for the adoption of word processes, faxes, voice mail and mobile phones. When the criteria are mobility, accessibility, speed and capacity, most new technology is a "success" and a "must have" before it even starts.

Is the conduct of legal practice more efficient as a result? If more efficient, what is done with the time and resources saved? Does it result in any of: cheaper legal services, more leisure time for legal practitioners, better allocation of time to produce better quality services? More things are done more quickly, but to what end?

Whatever the answer is, it is unlikely to halt or even slow down the almost compulsive adoption by lawyers, no less than by the community generally, of new technology. We would be well served by understanding the effects on legal practice of the adoption of technology if it meant that we could introduce and advocate for criteria other, and more sophisticated, than "more done more quickly".

One such consideration that has become apparent from the First Class Law project is enhanced sharing of information. Unlike increased speed and quantity, an increase in the sharing of information by lawyers, among lawyers is a worthwhile end in itself, particularly in a profession that is so secretive and competitive (in the old sense of the word).

In the First Class Law project, lawyers ask, at large, a question about an issue in their practice. This communication immediately breaks down the distance and isolation that characterises regional, suburban, small and sole practice. As well, it enhances any lawyer's ability to do what professional practice is all about: to know what's going on, what current views and practices are, what changes are in the

offing, what different and better ways there might be for a process or transaction.

The lawyer, in asking the question, risks the question reflecting adversely on their ability, but the very asking of it reflects favourably on the lawyer's willingness to learn, and to enhance service to the client.

Electronic legal practice - The Web

The *Foundation Law* Internet project has given these examples of changes that might occur in legal practice as a result of the way in which the Web makes legal information available:

- *Barristers.* Public legal information is largely legislation and judgments, the very basis of a barrister's practice. It is the Bar that has been signing up to *Foundation Law* in disproportionate numbers. They of course are the ones who really want to be able to sit at their desks and bring up on their screens the latest amendments and the latest cases; depending on their word processing skills they can then cut and paste text from a case into an advice.
- *Practice libraries.* It seems that the availability of the text of legislation and judgments on the Internet is sufficient for many practitioners who have decided to do without subscriptions to particular services, and so to reduce the costs of their library. For many lawyers there will still be the need to buy the value that commercial publishing houses add to legislation and judgments, and the commercial publishers will be able to sell access to their products with member subscriptions to password protected Web sites. But for public legal information, private practitioners are finding the opportunity for savings.
- *Other resources.* The Web delivers to users all that is on it, and it's hard to know where to begin. The favourable responses we have had to the packaging of *Foundation Law*, which delivers customised software with references to other legal information sites on the Web, indicates at this early stage that lawyers are looking around. Through the Web sites they can ask the questions referred to above when describing First Class Law, and get answers from the jurisdiction of their choice.
- *Introduction to Technology.* More a transient phenomenon than a substantive change, the awareness of the possibilities of the Internet has begun to turn lawyers to technology. Many of the *Foundation Law* subscribers are coming to computers, or to Windows programs and modems for the first time, lured by the Internet and its promise. The push from recent law graduates, who have learnt their legal search skills on-line and on the Web, is adding to the impetus for wholesale practice change.

A possible future

Network technologies offer prospects for very different forms of legal services. The point is made simply by referring to the proliferation of do-it-yourself legal kits and guides, and the slow but persistent trend to legal procedures that are comprehensible to non-lawyers. Think of that phenomenon, and add to it the power of information technology.

There are already expert legal systems available. Law subjects have been taught by computer with the lecturer becoming a supervisor, tribunal application forms can be completed by responding to a guided tour through the application on screen. The development of a legal expert system that substitutes for the intuition and experience of a professional person is Holy Grail, but complex diagnostic systems have been developed for general medical practitioners and are feasible for lawyers in specialised areas of practice.

Video conferencing can bring a client to a lawyer 'virtually'; the Internet can convey a question to a million people, any of whom may offer an answer within minutes; expert systems can substitute for a real physical presence; property and company searches can be done from the desk, as can the filing of documents.

It's not all good, it's not all bad, but for lawyers it's all very, very different.

Simon Rice is the Director of the Law Foundation of NSW; Sandra Davey is the Law Foundation's IT Manager and is manager of the Foundation Law communications project.

VOD: Broadcasting or Telecoms?

Grantly Brown outlines developments in the provision of Video on Demand (VOD) in Hong Kong, including an analysis of the recent decision on the regulatory status of VOD in Hong Kong.

Introduction

Few services better illustrate the difficulties of maintaining a rigid regulatory dichotomy between broadcasting and telecommunications than video on demand ('VOD'). VOD also demonstrates how technological developments tend to leave legislators flat-footed and reveal legislative ambiguities that some parties are very willing to exploit and that other parties are just as anxious to cure to shore up existing franchises.

The appropriate regulation of VOD has been an issue of smouldering discord between cable operators and PTTs for some time now in such places as the United Kingdom and the USA. In Hong Kong this year, the dispute became a conflagration as Wharf Cable, fearful that Hong Kong Telecom's ('HKT') proposed VOD service would erode its fledgling cable network's business, took the Hong Kong Government to Court. Wharf claimed that the VOD service was really a subscription television service which infringed Wharf's monopoly to provide these services in Hong Kong for a period of at least 3 years. The case was the culmination of a very public 12 month campaign by Wharf to pressure the Government into delaying HKT's VOD service.

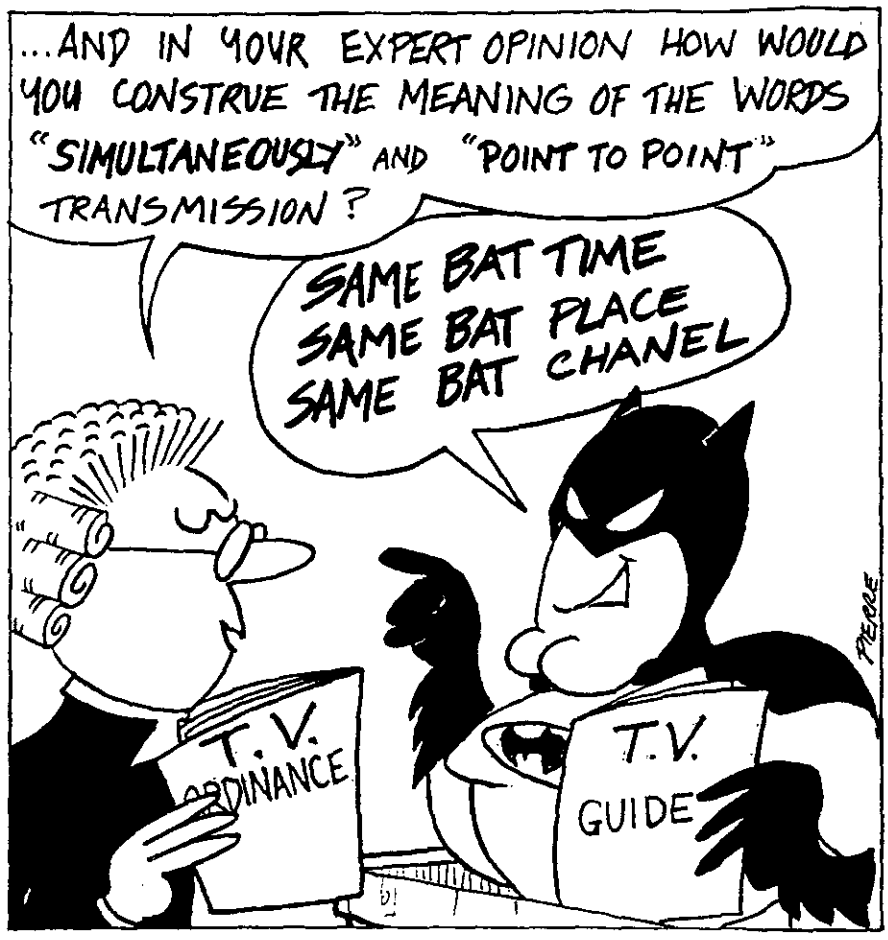
Background

HKT first commenced technical trials of its VOD service in 1994. This was a limited trial of ADSL technology to 400 households of HKT employees. At this point, HKT still enjoyed the exclusive right to provide 'public telephonic traffic' in Hong Kong under the *Telephone Ordinance* 1951. This right did not originally extend to non-telephonic service. However, as many new types of services started to become common offerings of PTTs around the world in the 1970s, it was decided to exempt HKT from the obligation of having to continually apply for licences for any non-telephonic services that utilised, in whole or in part, its public switched network. While a VOD service was clearly beyond the ken of regulators twenty years ago, the service equally clearly satisfied the language of the exemption, notwithstanding Wharf Cable's protestations.

In 1995, HKT undertook a full commercial trial of its proposed VOD service. By this time, the regulatory landscape had changed. HKT's domestic monopoly on the provision of fixed telephony within Hong Kong expired on 30th June 1995, the *Telephone Ordinance* was gutted and four new fixed telecommunications network services ('FTNS') licences were issued under the Telecommunications Ordinance, including one to HKT. These licences authorise each of the new FTNS licencees to provide 'all telecommunications services between fixed points in Hong Kong capable of being provided utilising the Network' other than certain specified services including, significantly, 'a service subject to licensing under any other legslation'.

The Court case

This neatly brings us to the subject of the recent litigation, which did not concern the *Telecommunication Ordinance*, but rather the *Television Ordinance* ('TV Ordinance'). Basically, Wharf claimed that HKT's proposed VOD service was a subscription television service as defined in the TV Ordinance and, as it would therefore require a licence under the TV Ordinance, it fell outside the scope of the services FTNS licencees were permitted to provide under the *Telecommunication Ordinance*. Further, as the TV Ordinance established an exclusivity period of at least three years in which only Wharf could provide subscription television services, HKT's (or any other of the FTNS licensees') provision of a VOD service would infringe its monopoly.



Subscription television broadcasting is defined in the TV Ordinance to mean:

'the transmission...of television programmes that are made available to two or more residential or commercial premises simultaneously or to the general public on payment of a subscription...but does not include any transmission that is specified in Schedule 1.'

Schedule 1 of the Ordinance (borrowing language from Australian and British regulatory regimes) excludes at para 2 the:

'transmission of television programmes that [are] made available only to persons making a request for the programmes on a point-to-point basis'.

For Whart to succeed in the case it had to establish both that:

- VOD falls within the definition of subscription television services; and that
- VOD falls outside the scope of the exception specified in the schedule.

The case before the Supreme Court went over 17 days in February and March, 1996 and involved the Court examining several thousand pages of affidavits, many technical publications and hearing many days of testimony from expert witnesses.

Simultaneous Transmission

In resolving the issue of whether VOD fell within the definition of subscription television services in the TV Ordinance the central issue became the concept of simultaneous transmissions. Here J. Sears relied heavily on the evidence of a Mr Hadfield, a Senior Manager of HKT responsible for developing its interactive multimedia services ('IMS') network. Mr Hadfield said:

'Pay television, as a distributive service, is very similar to the free-to-air broadcasting services available to consumers in Hong Kong. In the case of free-to-air or pay television..., the broadcaster transmits a constant stream of programming down stream to the users' reception equipment. The content

and format of the television channels that are transmitted in this way have been determined wholly by the broadcaster. The user is a passive receiver of television programmes and must work to the programming timetable of the broadcaster by either watching or recording the programme at a pre-determined time...'

'VOD, on the other hand, is an interactive service as it is only provided on the request of the user. For example, a user may decide that he or she wishes to watch a particular feature length movie at 6.00pm. The user will then dial-up a media server in the IMS network and will be able to review a menu of movies. Having made a final choice the user will select the desired movie through his or her set-top box remote control. The movie will then begin to play on the television screen and the user may 'pause' or 'rewind' the film using the remote control...The transmission of that movie to the user and the user's control of its play functions will occur independently of any other transmission over the IMS network.'

Justice Sears found that:

'There is no doubt that there is a fundamental difference between television (whether free or not) and VOD. In the former, the television programmes are transmitted simultaneously. House A cannot get different programmes from House B....Both in standard and cable television the transmission of programmes is occurring at fixed, pre-determined times. In VOD the transmission is not pre-determined - it only occurs when the customer requests his programme and it is transmitted to him.'

Accordingly, J. Sears concluded that VOD was not transmitted simultaneously and therefore did not fall within the definition of subscription television services in the TV Ordinance and hence require a TV Ordinance licence. Athough this permitted him to dismiss Wharf's case he went on to consider the proper construction of the exclusion at Schedule 1: that the 'transmission of television programmes that are made available only to persons making a request for the programmes on a point-to-point basis' falls outside the definition of subscription television services for the purposes of the TV Ordinance. The critical issue was the meaning of the words 'on a point-to-point basis'.

Point-to-point

Wharf submitted that the words 'point-to-point' only captured transmissions on a line which is dedicated and unswitched. Wharf relied on the expert evidence of Dr Troughton, a former Managing Director of British Telecom Enterprises and CEO of New Zealand Telecom, whose evidence was:

'a point-to-point connection is one that, once installed, transmits signals only between two fixed locations. Any routing or multiplexing is set up when it is installed, then not changed for the days, months, or years for which the customer requires it. There is no switch. The link is private in that the signals transmitted along it cannot be switched through the public exchange so as to be received by anybody else.

Transmission of video programmes via a VOD system is not on a point-to-point basis because the connection between the viewer and the media server is not formed for a fixed and pre-determined period; it is only formed for as long as a programme is being supplied.'

Justice Sears, however, preferred the analysis of another expert witness, Mr Huggins, called by HKT. Mr Huggins said that:

'Transmission on a point-to-point basis is not a description of the communications circuit, nor of the physical technological connection. It is simply a description of a transmission between only two points. It describes the number of points involved in (a) the transmission of information on the one hand and (b) the receipt of information on the other.

The term 'point-to-point', therefore, means transmission from one single point to one other single point, as distinct from one point to more than one point ('point-to-multi-point'). The technical configuration...of circuitry involved and the method by which the message is transmitted is irrelevant.

And, in particular, 'switching' is irrelevant. A point-to-point transmission may be either switched or unswitched.'

Justice Sears concluded in his judgment:

'I, therefore, find as a fact that the meaning to be given to the words 'on a point-to-point basis' is from one point to another point in contradistinction to one point to multipoint. I do not accept the evidence from Wharf that it means an unswitched transmission. I am sure the meaning of para two [of the Schedule 1] is not dependent on the technology of the network.'

Interestingly, J. Sears did observe in the course of his judgment that 'VOD is an important and far-reaching service' which the Government should regulate.

The Government's VOD Proposals

Notwithstanding the money the Government was spending on lawyers in February defending its view that VOD was not a broadcast service, while the case raged it released for public comment its proposals for the regulation of VOD as a species of television broadcasting.

Briefly the proposal paper stated that:

- the Government supported the introduction of VOD services to Hong Kong as part of its 'policy objective of providing Hong Kong with the widest possible choice of programmes of high quality at reasonable cost';
- the Government has a policy of ensuring that television programmes transmitted to the general public in Hong Kong should meet the basic standards of public taste and decency and that VOD should be regulated in a manner consistent with subscription television services with a similar potential impact;
- similar obligations imposed on, and restrictions applying to, the free-to-air broadcasters and Wharf Cable should be imposed on and apply to VOD operators as the Government had a 'long-standing policy in respect of television broadcasters to provide a level playing field';
- cross media and foreign ownership and control restrictions applying to licencees under the TV Ordinance would also apply to VOD service providers.

The paper also observes that:

'the increasing sophistication of multi-media services may make it difficult to draw the line between television programmes and other on-line

screen-based services. Consistent with our policy objective of facilitating freedom of access to information, we are proposing to define 'television programmes' that are subject to broadcasting regulation as essentially the type of programmes that are being broadcast currently by off-air and pay TV broadcasters. The definition will also make it clear that other on-line information services such as those currently available on the Internet are excluded from the proposed regulations.'

This might strike some as hopelessly vague but by adopting this approach the Hong Kong Government is at least in good company. A similar approach is adopted in the US *Communications Act.*

Pay TV Market Review

The Government followed up its February statement with the release of its review of the pay TV market in March 1996. This review arose out of an announcement made in July 1995 by the Secretary for Recreation and Culture to the Legislative Council that a review would be carried out in early 1996 to decide how best to deregulate the pay TV market with minimal impact on both existing and potential broadcasters.

The Government's report states it was based on an analysis conducted by outside consultants who advised VOD services would compete with Wharf and could significantly increase Wharf's current losses. Accordingly, the Government considered that complete deregulation was not in the interests of Hong Kong as 'severe competition' may force some competitors from the market. 'This', the Government stated,'could damage business confidence in Hong Kong at a sensitive time' - Hong Kong reverts to Chinese rule on 1 July 1997. Severe competition was also considered by the Government to be inconsistent with its policy of providing 'a healthy and fair operating environment for all broadcasting operators, in addition to promoting customer choice and industry competition'.

Accordingly, the paper recommended not one but two VOD service providers be licensed. The paper also recommended an extension of Wharf's monopoly in the provision of subscription television services for a further two years to mid-1998.

The Hong Kong Government, therefore, without any apparent discomfort, was happy to claim on the one hand that Wharf must be insulated from competition, and accordingly, no new pay TV licences will be granted, but on the other hand that VOD - which the government admits will compete with Wharf - should be allowed. Further, the Government proposed there should be not just one VOD service, as that would allow the selected operator to monopolise what would be, by the Government's own admission a competition market, there should be two operators. However, there shouldn't be more than two because that would be too competitive!

At the end of the day this wholly sorry course of events became somewhat academic for, just as the Government's policy deliberations overtook legal proceedings, commercial events overtook the Government. On 5 March 1995 HKT announced that, notwithstanding the fact that its trials demonstrated VOD was commercially viable, it was delaying the full roll out of its VOD network for a year or more to 'incorporate better technology'.

The Government's reports and HKT's announcement may have doused the flames of the dispute, but the embers are certainly still smouldering.

Grantly Brown is Vice President and Asian Counsel, CEA Pacific Rim Inc, Hong Kong.

'Interconnection from the New Entrant's Perspective'

Mei Poh Lee gives an account of New T&T's regulatory and commercial interconnection battles, as a new carrier in Hong Kong's telecommunications market, and provides comment on strategic issues and the role of the regulator.

Introduction

In October 1995 New T&T launched its first commercial services, with 'Revolution' as its theme. With the Chief Secretary of Hong Kong, Mrs. Anson Chan, and the Telecommunications Authority of Hong Kong ('the Authority'), Mr. Alex Arena, as the witnesses at our launch ceremony, we pledged to rewrite the history of telecommunications in Hong Kong. For indeed a revolution had occurred in the annals of the industry: the people in Hong Kong were about to be pleasantly surprised with the ability to choose between fixed network operators!

Our initial advertising campaign in October 1995 centred around the Beatles inspirational song 'Revolution', in answer to the incumbent operators advertising theme of 'Imagine', which used, as its signature tune, the song 'Imagine' by John Lennon. As a person who was not conscious during the Beatles' era, this vicarious involvement in Beatlemania was a high point in my life. Those were heady days indeed.

On a more serious note, I would like to state that this paper is aimed at giving you an insight into the practical issues and problems faced by a new operator in the Hong Kong environment, drawn from New T&Ts experience thus far. My aim is not to expound theories to you, even if we would have liked some theories to have been applied in practice over the past 30 months or so. Clearly, because of constraints placed by obligations of confidentiality, we cannot disclose particulars of any confidential interconnection discussions here. I am sure that even without those particulars

most of you will recognise the similarities between the interconnection issues we have in Hong Kong and those endemic to every newly competitive telecommunications market.

Who is New T&T?

New T&T Hong Kong Limited (formerly Wharf Telecom) was formed specifically for the purpose of bidding for one of four Fixed Telecommunication Network Services ('FTNS') Licences put on offer by the Hong Kong Government in June 1992 following what is described as a 'comprehensive review' of the Government's telecommunications policy. On 30 November 1993, the Authority announced that he had decided to issue FTNS licences to Hutchison Communications Limited, New T&T and New World Telephone Limited, as well as to Hong Kong Telephone Company Limited ('HKTC'), the incumbent operator, whose monopoly officially ended on midnight 30 June 1995. New T&T's licence was issued to it on 27 June 1995.

New T&T has built its backbone network along the route of the MTR System [Mass Transit Railway - Hong Kong's subway system]. This backbone network is an optical fibre network based on a SONET (Synchronous Optical Networks) 'ring-on-ring' topology, to ensure diversity and reliability of the network (or so my engineering colleagues assure me).

So, where does the regulatory framework fit into this, or *vice versa*?

In Hong Kong, there are four fixed line operators, 4 mobile operators, 6 PCS licencees and numerous PNETS (Public Non-exclusive Telecommunications Services) licencees. There are no anti-trust laws or laws which spell out the meaning of dominance in any market, let alone the telecommunications market. The rules regarding anti-competitive conduct in telecommunications can, however, be found in the General Conditions of the FTNS Licence, and in particular, in General Conditions 15 and 16.

General Condition 15 deals specifically with anti-competitive conduct, and expressly prohibits 'any conduct which, in the opinion of the Authority, has the purpose or effect of preventing or substantially restricting competition in the operation of the Service' (which is defined in Schedule 1 of the FTNS Licence as *inter alia* 'all telecommunication service between fixed points in Hong Kong capable of being provided utilising the Network', such 'Network' being 'all such telecommunication lines established, maintained possessed or used whether owned by the licencee, leased, or otherwise acquired by the licencee for the purpose of providing public fixed telecommunication network services').

General Condition 16 prohibits a licencee from engaging in conduct which 'has the purpose of preventing or substantially restricting competition in a market for the provision or acquisition of telecommunication installations, services or apparatus', where the licensee is, in the opinion of the Authority, in a dominant position in the market. Such conduct, provides General Condition 16, amounts to an abuse of the licencee's dominant position. Conduct which the Authority may consider falling within the conduct referred to above includes, but is not limited to-

- predatory pricing;
- price discrimination;
- the imposition of contractual terms which are harsh or unrelated to the subject of the contract;
- tying arrangements; and
- discrimination in the supply of services to competitors.

The rules set out in General Conditions 15 and 16 are applied in accordance with the Authoritys Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS Licence ('Competition Guidelines').[1] The competition provisions, however, according to the Competition Guidelines, are 'not to establish an exhaustive anti-trust and consumer protection regime for the telecommunications industry in Hong Kong'.[2] Rather, as the Competition Guidelines go on to say, 'they lay down standards of conduct required to be observed by FTNS licencees, the object being to ensure that the competition which is sought to be introduced is not rendered illusory'.

In addition to the Competition Guidelines, there are also the Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of the Telecommunication Ordinance and the FTNS Licence ('Interconnection Guidelines')[3], which sets out the bases upon which the Authority will intervene to make determinations in relation to interconnection matters, which are dealt with specifically in General Conditions 13 and 31 of the FTNS licence, and section 36A of the Telecommunication Ordinance of Hong Kong, which are the primary sources of the Authority's power to make such determinations.

General Condition 13 of the FTNS Licence requires New T&T (and other FTNS licensees) to interconnect its Services and its Network, the definitions of which we discovered earlier, 'to other telecommunication networks and services licensed, or deemed to be licensed, or exempt from licensing under the Telecommunication Ordinance.'

General Condition 13(3) requires a licencee to use 'all reasonable endeavours to ensure that the interconnection is done promptly, efficiently and at charges which are based on reasonable relevant costs incurred so as to fairly compensate the licensee for those costs'.

General Condition 31 provides, amongst other things, that if the Authority reasonably forms the opinion that it is in the public interest for certain types of facilities to be provided, shared or used by a licensee, he may issue directions to that licensee to coordinate and cooperate with other licensees in respect of the provision, use or sharing of any such facility, or if the parties to an interconnection arrangement cannot agree the terms and conditions of such arrangement within a reasonable time, the terms and conditions will be determined by the Authority. The Interconnection Guidelines state that the 'public interest' will be determined having regard to the following criteria:

- Government policy objectives for the telecommunications industry;
- consumer interest;
- encouraging the efficient investment in telecommunications infrastructure;
- the nature and extent of competition among the parties to interconnection, and their ability to compete with each other fairly; and
- such other matters particular to the circumstances as the [Authority] reasonably believes are relevant to the public interest.

The Interconnection Guidelines state that the key considerations on which the Authority will seek to make determinations at an early stage if commercial agreement has not been achieved will be aimed at:

- the promotion of economic efficiency;
- meeting the Government's intention that competition be introduced;
- ensuring that benefits of competition flow to all sectors of the community as quickly as possible; and
- the need for consumers to be able to access freely competing services and exercise choice in taking up services.'

The Guidelines go on to say that in making his determinations, the Authority will have regard to the 'overall reasonableness of the stated requirements of each party.'

At first blush, the Hong Kong regulatory framework as mapped out above could only be heralded as equal, if not better, than what exists in most newly-deregulated markets.

Strangely, however, all the discretions and powers of determination described before are set against a background of 'light-handed regulation', meaning that the Government has adopted a 'hands-off' policy where the dominant operator is concerned. From a new operator's point of view, this approach leaves quite a bit to be desired.

Leaving aside the issue of whether the Hong Kong Government's policy goals have a fatal flaw - which is not overlooking the fact that the local fixed line market in Hong Kong is a natural monopoly - it would be quite natural for the reasonable man on the Star Ferry (or the No. 48 tram if you live in Melbourne) to ask the following questions:

- how does one deal with the incumbent in such a situation?
- how does one curb the dominance of the incumbent?
- how does one achieve interconnection with the existing network infrastructure of the incumbent?
- what should be the applicable interconnection charges?
- what role does the regulator play in the interconnection negotiations, if any?
- is the regulatory framework in Hong Kong adequate for the protection of new entrants?

A New Entrant's Requirements for Interconnection

Let me first deal with some simple concepts of physical interconnection to preface my remarks on this topic.

In the Interconnection Guidelines referred to before, the Authority has defined 'interconnection' as having the following components:

- the provision of physical facilities to enable two networks to communicate with each other and transfer communications across their boundaries; and/or
- the carriage of services for an interconnecting licensee within networks, and across network boundaries.

The first type of interconnection model prescribed by the Authority for Hong Kong in his Statements No. 6[4] and No. 8[5] in relation to interconnection and related competition issues is called 'Type I' interconnection. This form of interconnection involves the meeting of two networks through their respective gateways, at a notional point (or point of interconnection ('POI')) midway between the two gateways, as set out in Figure 1.

The other type of interconnection prescribed by the Authority for Hong Kong is called 'Type II' interconnection. This involves the interconnection of two networks at various points in the local loop, which you can see in Figure 2.

Under Type II interconnection, in a world where all things are possible, network operator 2 can interconnect at points A, B or C of the network of operator 2 or other operators, where point A is the main distribution frame (MDF) of the local exchange; point B is a distribution point out on the street, for example, a manhole or a lead-in duct into a building; and point C is the main distribution frame in a building.

Let us now turn to the difficulties of turning such concepts into practical reality. I should remind you also, before we do so, that under our FTNS Licence, we are obliged, like all other FTNS operators, to achieve interconnection of our network with the networks of all other operators 'promptly and efficiently and at charges which are based on reasonable relevant costs incurred so as to fairly

Figure 1

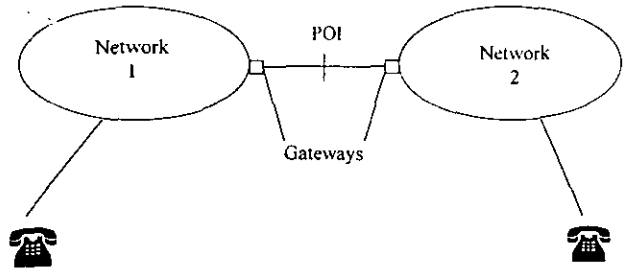
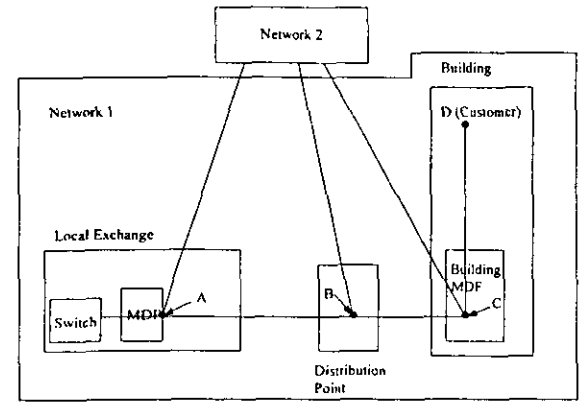


Figure 2



compensate the [other] licensee for those costs'. The significance of my emphasis of this point will become clear later.

One of the difficulties of Type I interconnection is that the 'notional mid-way point' is almost always dependent upon the network architecture of the incumbent. In theory, the incumbent has an ubiquitous network at various points of which a new entrant can expect to interconnect. However, in reality a new entrant may come face to face with a network that is apparently so clumsy that one might be excused to think that interconnection with such a network may not be the pot of gold at the end of the rainbow one had hoped it would be. Or would that be swallowing monopolistic rhetoric? Thus, in order to find a mid-way point that is convenient to the incumbent, a new entrant may have to backhaul its optic fibre all around the territory to meet at this mythical mid-way point between its gateway and the gateway of the incumbent. Needless to say, such backhauling would be an extremely expensive proposition for any new entrant.

Even if one did not wish to do the backhauling, and decided to pay the incumbent to provide both ends of the POI links, it is still an expensive proposition, even if the incumbent's charges are cost-based: and, as we all know, the answers to the question as to what 'costs' are is as elusive and profound as the answers to the question as to what truth is.

The difficulty with Type II interconnection is the physical space, or lack thereof. In the Hong Kong environment this is an important issue: even if there is enough of it, it may come at a high price.

However, having recently achieved a Type II interconnection arrangement which involves co-location of our equipment at HKTC's local exchanges, we can attest to the fact that co-location is certainly a preferable way of interconnecting with the incumbent, from a new entrant's point of view. It would be even more beneficial if the road towards reaching that goal does not feel like an Olympic event which resembles a marathon and a decathlon all in the one event. It took us almost 8 months to arrive at a point where we could start engaging in serious discussions with the incumbent in order to achieve such co-location after having spent some months trying to cajole and persuade the incumbent to let us co-locate at their local exchanges on commercial terms, we spent a few more months trying to cajole and persuade the regulator to use his powers to level the playing field between the incumbent and the new entrants. Achieving interconnection of networks 'promptly and efficiently' took on a different meaning for me after that experience. But those were interesting months, nonetheless. One learns to be thankful for small mercies, as a new operator.

The moral of the story is therefore, whatever form of physical interconnection is possible, it is important, from the new entrant's point of view, that such interconnection be achieved as promptly and efficiently - in the true sense of those words - as possible.

Another important element of the physical interconnection story is that of the unbundling of the Customer Access Network, from the network termination point within the customer's premises right up to the local exchange of the incumbent operator. An Open Network Architecture (ONA) approach in relation to the incumbent's network, as we have seen being adopted in some states in the U.S, is the only way, I would submit, to have fair and equal competition in this environment.

Insofar as the various charges which should be applicable in relation to interconnection between two networks is concerned, it is important for a new entrant to be able to obtain information as to the cost structure of the incumbent - if the incumbent does not disclose this readily, it must be forced to do so by the regulator - in order that the new entrant is able to undertake reasonably useful cost/benefit analyses as to whether it ought to build or buy its own Customer Access Network or the various elements of it. It is also useful for a new entrant to know that it is not forced to pay monopoly rents, or reimbursing the incumbent for the sunk costs of a network built under a monopoly. I would submit that such reimbursement is tantamount to compensating the incumbent for losing its monopoly, which is hardly a fair proposition. Ex-monopolies tend to have self-serving memories: they always forget that they did not share their monopoly profits with anyone else, but are always keen to remind new operators that they should somehow pay for the drop in those profits.

Indeed, information is a precious commodity for new entrants - it is very easy for an incumbent to claim that any or all information relating to telecommunications traffic is commercially sensitive, including that information which is collected during the period in which it enjoyed a monopoly, such as the geographical splits of such traffic. Any regulator serious about making competition work must ensure that historical market information is available for new entrants, otherwise the dominance of the incumbent would be insuperable. In an age of faster and more information than you need, sometimes, at your fingertips, the lack of such essential information on which to base your business decisions is bizarre, if not downright frightening. On that note, I must say that OFTA's [Office of the Telecommunications Authority - the Hong Kong regulator] website is very informative on current statistics relating to the industry.

As to the charges payable by one network operator to another for the passing of traffic over the point of interconnection, again the "invisible hand" theory is likely to disappoint us: it is no secret that in a deregulated market, the incumbent will always perceive itself as the loser, and will employ delaying tactics to frustrate the process, and the new entrants along with it. With the best will in the world, it is unlikely that a new entrant will ever be able to walk away from commercial negotiations regarding interconnection charges feeling that a reasonable compromised commercial position has been agreed between the parties. Regulatory intervention at the early stages of interconnection negotiations between network operators is essential. To his credit, in Hong Kong, the Authority did do something about it, which culminated in the publication of a statement on carrier-to-carrier charging principles.(6)

Here in Hong Kong, we also adopt the theory that all interconnection charges should be based on Long-Run Average Incremental Costs (LRAIC). So far, we have been unable to ascertain what this highly commendable concept of costs means in practical terms, or whether it has been applied strictly in the charges we are paying for interconnection. Given a light-handed approach by a regulator who obviously believes that interconnection charges will follow the mythical economic principle that the prices will reflect what the market will bear, we have chosen to take a commercial view of the matter: we cannot afford not to be earning revenue for months on end whilst economists debate with each other as to the meaning

of such costs. Anyone used to monopoly pricing will know that one's bargaining position with a single supplier is not very strong.

I cannot over-emphasise the need for a new entrant to achieve physical interconnection with the incumbent's network as quickly and efficiently as possible: after all, the essence of competition in the industry is about customer access.

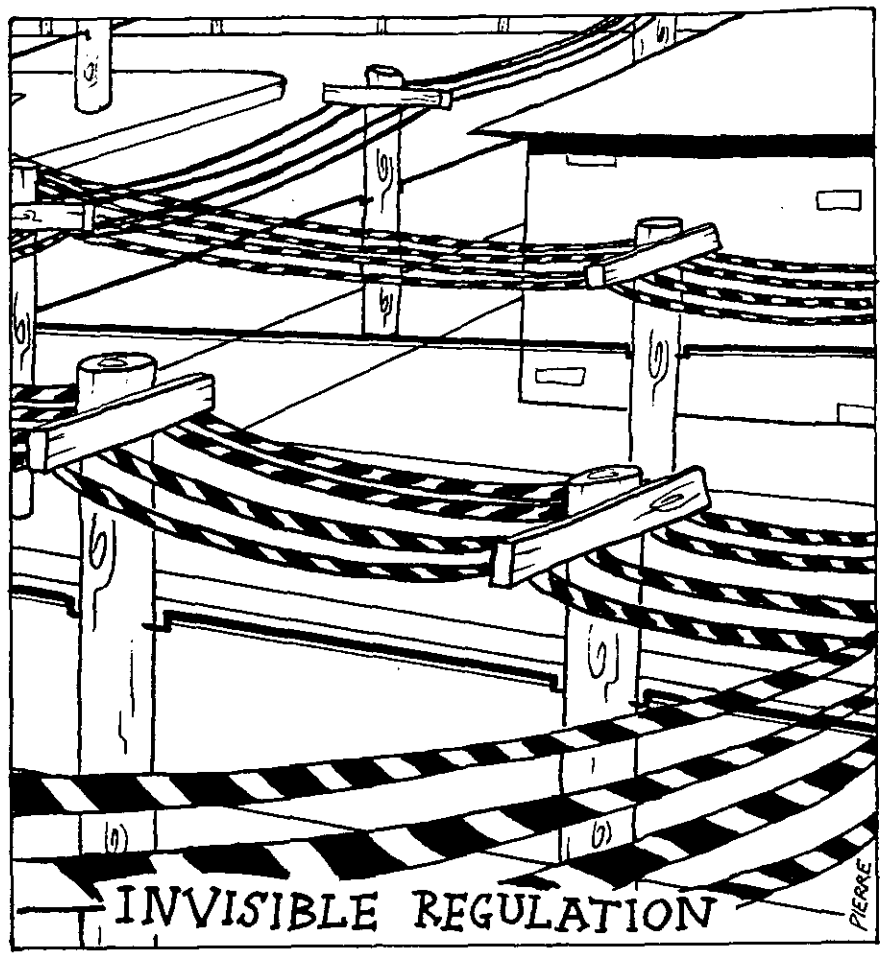
The most frustrating aspect about customer access in Hong Kong is the rate of access to buildings. Hong Kong's local loop is primarily a vertical loop hence access to this loop is essential, because it is effectively a bottleneck facility.

So far, the owners, managers and developers of buildings are reluctant to give access to a building to a new entrant. The incumbent, it appears, is not yet convinced that using its existing local loop is an efficient use of existing infrastructure. The new entrants, meanwhile, are feeling like sandwich filling.

However, to be fair to the regulator, two important breakthroughs in Hong Kong were brought about as a direct result of his actions: these were the allocation of indirect access codes to each FTNS operator and the requirement that CLI (Customer Line Identification) be passed between the networks on every call. This action allowed the new entrants to provide services earlier, without having to await the completion of the construction of their network infrastructure.

These two elements, including the requirement that network number portability be implemented through an interim solution (which is call forwarding), and by an IN (Intelligent Network) solution as a permanent solution by the end of 1996, have been instrumental in the new entrants, and in particular, New T&T obtaining some semblance of a customer base.

Have those actions been sufficient? From a new entrant's viewpoint, the answer is, on balance, that there is room for improvement. But it would probably be unfair to attribute the blame entirely to the Authority. Could it be that the legislative and administrative framework render him a "toothless tiger"? Do we need a much more complex set of rules regarding dominance, for example, given the current dearth of legislation dealing with such concept? How can the incumbent's dominance be curbed? Can it be curbed at all? Let me share some war stories with you.



Negotiating with the Incumbent

In the beginning of the interconnection bargaining process, it was considered a useful tactic for the new entrants to engage the incumbent in multilateral negotiations - a microcosm of the WTO Round Table Talks, and equally as frustrating and non-productive - in an attempt to counter the dominance and negotiating power of the incumbent and in the hope that things could be resolved much faster. Corporations, like nations, often have differing agendas and priorities, hence, unsurprisingly, this 'unholy alliance' was not the miraculous success everyone had hoped it would be.

In my opinion, however, despite the not unforeseen demise of the 'alliance' formed by the new entrants, there is definitely some benefit to be derived from the co-operation of smaller new entrants, when faced with the obviously bigger and strongly entrenched ex-monopoly provider. Even if it is a fact that a regulator should not be surprised by any claims that the incumbent is stalling in interconnect negotiations, he or she could or would more readily act if such claims represented a clear majority of the industry, as represented by the new entrants, as opposed to the claims of one entrant engaged in bilateral negotiations with the incumbent. Alternatively, appointing a spokesperson amongst a group of new entrants could be a useful tactic, like the experience of Nynex in U.K. in respect of the interconnect negotiations between BT and the cable TV operators turned telecommunications operators.

However, it is questionable whether blocs, alliances or arrangements of a similar ilk are actually effective in overcoming or reducing the dominance of the incumbent. In my opinion, it is ultimately the action (or inaction) of the regulator which has the most impact, positive or otherwise. As stated earlier, without the intervention of the Authority early in the process here in Hong Kong, we might still be attempting to negotiate the passing of CLI and the porting of numbers with the incumbent!

There is, of course, also the possibility that the incumbent realises the economic opportunities that the supply of customer access network services to new

entrants presents. Apart from enjoying the pecuniary benefits of being the sole supplier of such goods and services, and therefore still able to price at will to a certain extent, the incumbent can still control competition at the local loop through the provision of such customer access network services.

It is a very optimistic soul who expects an ex-monopoly to suddenly change its outlook and become customer-oriented, particularly in relation to a competitor. However, I would like to think that here in Hong Kong, there is slowly but surely, a gradual understanding that not only is being user-friendly to a new entrant good business sense, it also engenders strength and trust in the industry, which can only benefit all the operators and bring about the Government's policy goal of making Hong Kong a communications hub for the Asia Pacific Region. My view is that if ex-monopolies take the attitude that they must try to stop the competitors, they only end up hurting themselves in the process. If they took a more positive, commercial approach to the process of interconnection, that can only lead to healthier profits and higher share prices, because the new entrants would inevitably generate traffic and grow the market. Driving out competitors with financially healthy backers is not a cheap proposition, and foolhardy, when the alternative approach is not only to save money, but to make money off one's competitors. This would almost be as good as getting compensated for the loss of one's monopoly.

Role of the Regulator

We come now to the prickly issue of the role of the regulator in the matter of interconnection between networks.

In Hong Kong, the Government's policy goals for the telecommunications industry are set out in the Position Paper on Hong Kongs Telecommunications Policy[7], issued in January 1994. These policy goals are namely:

- that the widest range of quality telecommunications services should be available to the community at reasonable costs;
- that telecommunications services should be provided in the most economically and efficient manner possible; and
- that Hong Kong should serve as the pre-eminent communications hub for the region now and into the next century.

To bring about these policy goals the Hong Kong Government had decided on a 'light-handed approach', as opposed to what has been described in the TA's own words as 'intrusive'[8], in a reference to the US and other regulatory models . The Hong Kong approach is said to be deliberately 'less intrusive' on the basis of 'Hong Kong's 'free economy' philosophy'. What remains unanswered in my mind is whether this approach can still be justified on the few gains the new entrants have achieved in over a year of competition without the direct intervention of the Authority. In my opinion, the sort of 'intrusive' regulatory activity such as we have witnessed in Australia, the US and in the UK is needed in any newly competitive market environment especially one where space is a critical problem, and access to multi-storey buildings equates to access to customers. Even in those jurisdictions where the regulators have been interventionist in their approach, we have not seen the new entrants gain the sort of market share that would reasonably be expected with a more or less level playing field, let alone in an environment where the incumbent has the opportunity and ability to play new entrants off against one another.

Accordingly, if I could give a message to any regulator here today, I would caution against taking a light-handed approach so seriously that the very existence of the regulator is almost academic. Whether you believe in Adam Smith's 'invisible hand' theory or not, we would argue that no market is perfect, and markets do, and constantly, fail. Hence regulators do have an important role to play, even if they are coy as to their powers of intervention. In particular, their role becomes even more important in the early stages of competition, where they would arguably be required to act as 'surrogates for competition'[9]. Whether regulators use tools such as competitive checklists or gives directions under an operator's licence, they must act, and be seen to act, to stop any abuse or potential abuse of dominance by the incumbent operator.

Whilst it is all very well to be prepared to deal on a commercial basis with the incumbent, new entrants have a right to baulk at paying too much, and certainly should object to being toyed with through disingenuous tactics such as delay. When this happens, they should expect the regulator to take a serious view of such behaviour, and to take action to stop it. Sometimes new entrants can sound like eternal whingers, but the only way to stop the whinging if you are the regulator is to maintain an environment where the competition is real, not virtual. If companies invest in virtual profits, then virtual competition may be acceptable. Non-trivial sums of money are usually spent when new entrants engage in building real telecommunications networks. Therefore, it is not unreasonable for new entrants to hope for real market share through real competition.

Conclusion

Whilst dealing with incumbents and other interconnecting network operators is never easy, it is one of the most challenging and thought-provoking jobs around. Here in Hong Kong there have been some important gains by the new entrants partly due to regulatory action, and partly due to changes in some attitudes in the incumbent. New T&T looks forward to working closely with the Authority and OFTA to bring about an environment in which the terms 'virtual' and 'illusory' are never juxtaposed with the word 'competition'. All we ask for, like all new entrants everywhere, is an environment where it is possible to have fair and equal access to customers.

Mei Poh Lee is General Counsel, New T&T (Hong Kong) Limited, Hong Kong. This is an edited version of a paper she presented at 'Interconnection Asia '96' in Hong Kong, September 1996.

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Second Commercial Television Services In Small Markets

Gillian Saville and Alison Jones discuss the 'one station to a market' restriction imposed by the *Broadcasting Services Act* 1992 in the context of a recent decision by the Administrative Appeals Tribunal.

Introduction

One of the limitations which the Broadcasting Services Act 1992 (the 'BSA') places on the number of commercial television licences which a person may control is the so-called 'one station to a market' rule (section 53(2)). This rule is subject to an exception in favour of incumbent commercial television broadcasting licensees in solus markets, where due to the small size of the licence area there is only one commercial television licensee. Under the former section 73 (now section 38A) incumbent licensees can apply to the Australian broadcasting Authority ('ABA') for an additional licence.

The underlying policy of the former section 73 was to facilitate in appropriate cases the rapid introduction of second television services provided by incumbent licensees in solus markets, thereby giving effect to the object expressed in section 3(a) of the BSA to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information. This section reflected the desire to remove the historical disadvantage of the television viewers in solus markets, which are generally located in isolated and remote communities or centres and who have a limited choice of television services.

The recent decision of Deputy President Gerber of the Administrative Appeals Tribunal in *WIN Television Mildura Pty Ltd, MTN Television Pty Ltd and Territory Television Pty Ltd-v-Australian Broadcasting Authority and Imparja Television Pty Ltd (Party Joined)* (1 July 1996, Part I, unreported) dealt with the issue of whether existing commercial television broadcasting licensees in solus markets should be permitted to operate a second service. It was both the first and the last decision to consider the former Section 73 of the BSA prior to its repeal in January 1996.

The Former Section 73

The former section 73 dealt with the provision of additional commercial television licences in solus markets, by allowing existing licensees to apply to the ABA for permission to operate a second television broadcasting service.

The test to be applied by the ABA in deciding whether to exercise its discretion to give permission to the existing licensee to operate a second commercial television service in the licence area is found in section 73(2). Section 73(2) provides that.. 'if the ABA is satisfied that it is unlikely that another person would be interested in, and likely to be in a position to, operate another commercial television broadcasting service in the licence area ...', it may give the licensee permission to operate a second service for up to five years.

Price-Based Allocation System - Sections 36 and 38

A price-based system for the allocation of commercial television broadcasting licences was determined by the ABA pursuant to section 36 of the BSA. It is set out in the *Commercial Broadcasting Licence Allocation Determination No.1 of 1995*. Where the ABA is going to allocate a commercial television broadcasting licence under the price-based allocation system, section 38 requires the ABA to advertise for applications for that licence.

It is an 'over the counter' approach to allocating licences. Allocation under the scheme is not subject to the constraints of any specified licensing criteria directed to the capabilities of the licence applicant, other than a limited 'suitability' test. Applicants are required to pay a $10,000 application fee which is usually refundable if unsuccessful. If there is more than one eligible application, the licence is to be allocated to the highest bidder in an auction-style allocation exercise. If there is only one eligible applicant, then the licence will be allocated to that applicant.

The only real restrictions on this 'over the counter' approach to licence allocation under section 38 are that a licence is not to be allocated to an applicant if:

1. it is not an Australian company with a share capital (section 37(1)(a)); and

2. if the ABA has decided that section 41(2) of the Act applies to the company. Section 41(2) will apply if the ABA is satisfied that allowing the applicant company to provide broadcasting services would lead to a significant risk of an offence against the Act or regulations or a breach of licence conditions.

The applicant must also complete all of the relevant forms and acknowledge having read the *Determination*. Significantly, and in contrast with the section 73 process, the ABA is not required to be satisfied about the applicant's likelihood of being in a position to operate the service.

The New Section 38A

The *Broadcasting Services Amendment* Act 1995 (the 'Amendment Act'), which commenced operation on 5 January 1996, made a number of amendments to the BSA. Relevantly, it repealed the former section 73 and largely reinstated it in the BSA in a new section, 38A.

Other than by changing the nature of the instrument from a 'permit' to a 'license', the new regime under section 38A is in many respects the same as the regime under the former section 73. However an important difference between the former section 73 and the new section 38A is the introduction of sub-sections 38A(5) and (6), which provide in a case where a section 38 process is being pursued in parallel with a section 38A application, the former will prevail by effectively freezing the section 38A process.

The Explanatory Memorandum to the *Broadcasting Services Amendment Bill 1994*, (which was subsequently passed as the *Broadcasting Services Amendment Act 1995*) states that 'the purpose of section 38A was to remove legal uncertainty about the operation of the existing provisions in section 73', and 'to provide a clear mechanism for the grant of an additional licence in a commercial television *solus market*'. In doing so, Federal Parliament has attempted to clarify the relationship between the section 38A application process and the section 38 price-based 'auction style' process of licence allocation.

Applications under the Former Section 73

MTN Television Pty Limited ('MTN'), WIN Television Mildura Pty Ltd('WIN') and Territory Television Pty Limited ('Territory Television'), are solus commercial television licensees in the Griffith/Murrumbidgee Irrigation Area, Mildura/Sunraysia and Darwin licence areas respectively.

Once the ABA identifies a licence as being available in a licence area plan (LAP), the licence can be allocated. The ABA released LAPs which identified a second commercial television broadcasting service as being available in each of the Griffith, Mildura and Darwin licence areas. Each licensee then applied to the ABA for permission to operate a second commercial television broadcasting service in its respective solus market, in accordance with the former Section 73 of the Act (as the Amendment Act had not yet commenced operation).

After seeking expressions of interest from persons interested in providing the second service and considering submissions from the applicants and interested persons, the ABA applied the test in section 73(2) and decided to refuse permission to each of the three licensees to operate a second service. Each of the unsuccessful licensees applied for a review of the ABA's decision by the Administrative Appeals Tribunal (the 'AAT'). As each of the applications involved the consideration of many similar legal and factual issues, the AAT decided to hear all three applications together.

Removal of Rights of Review

As a preliminary point, the ABA submitted that the effect of the changes made by the Amendment Act was to remove the existing rights of the licensees to have the ABA's decisions reviewed by the AAT in accordance with the former section 73. The general rule is that a statute is not intended to take away any existing rights. The AAT found that the transitional provisions of the Amendment Act did not disclose a clear contrary intention to displace the ordinary presumption of continuing rights. Accordingly, the AAT held that the three applicants' rights of review before the AAT were preserved, and the AAT had jurisdiction to determine those applications (decision of Deputy President McMahon, 16 February 1996, unreported).

Potential Conflict between the Review and the Auction Process

After the ABA refused permission to both MTN and WIN, and after Territory Television had applied for permission but before the ABA had made its decision, the ABA proceeded to invite applications for commercial television licences in Griffith, Mildura and Darwin under the price-based allocation system. Having instituted the procedure of calling for applicants under the 'auction' system, the ABA was under a legally enforceable obligation to allocate the licence to an 'auction' applicant, subject to a discretion which the ABA has under the *Determination* to withdraw the licence from allocation should it become aware that for any reason the licence cannot be allocated.

The AAT's review of the ABA's decision to refuse section 73 permission to the three existing operators was unlikely to have been finalised and decided prior to the completion of the ABA's allocation process unless the allocation process was delayed. This may have led to an anomalous situation if the AAT decided that the existing licensees should be permitted to operate a second service and the ABA had already allocated the second licence to another person. Ultimately, this problem never eventuated because the ABA extended the deadline for applications under the price-based scheme until after the AAT's decision.

The AAT's Decision

The thrust of each applicant's case was that, for various reasons, the ABA should not have been satisfied on the material before it that there was/is another person likely to be in a position to provide another commercial television broadcasting service in its respective licence area.

Of particular interest were the ABA's submissions in relation to ascertaining whether there is 'another person' interested in providing the second service. The ABA submitted that in making a decision in relation to a section 73 application the ABA did not have to have anyone particular in mind. The ABA argued that the real issue is whether someone makes an application if and when a section 38 advertisement process is formally commenced, triggering the public auction, and that it should be entitled to say that the commercial facts are such that someone else would apply if a section 38 advertisement is placed. The only way to actually discover what is likely to happen for the purposes of section 73(2) is to permit a public auction to occur under section 36. If no one applies, or if the person proves unable to operate the service, then the incumbent can renew its application under section 73. These submissions were rejected by the AAT in the context of the BSA prior to the January 1996 amendments.

The AAT considered the test in section 73(2) and its task at the time of writing its decision is to ask: 'is there some other person who is interested in and likely to be in a position to operate another commercial television broadcasting service in the licence area?' This involves determining whether there is a credible, recent expression of interest by another person in providing another service in the licence area and applying the same criteria that the ABA applied, which includes:

1. whether the person has access to the necessary capital to establish the service;
2. whether the person has, or could obtain in a timely fashion, managerial and technical expertise to establish the service;
3. whether the person is likely to be able to obtain timely access to a transmitter and transmitter site;
4. whether the proposal is for a service that meets the technical specifications set down in the LAP;
5. the person's estimate of operating costs and revenue of the service for the first five years;
6. when the person would be in a position to commence providing the service; and
7. if there has been a price-based allocation exercise, the results of the exercise.

The AAT was satisfied that Prime Television Limited in Griffith and Mildura and Imparja Television Pty Ltd in Mildura and Darwin technically and financially satisfied both limbs of section 73(2).

The AAT also considered the interpretation of section 73(2) in the context of the objects of the BSA. The evidence of all three existing operators was that if an independent operator were to be allowed to provide the second service, neither the existing operator nor the independent operator would be able to continue to provide the current level of matters of local significance to the community, including a dedicated local news service.

The AAT found that the ABA had adopted the view that it was not obliged to pay due regard to the likelihood of local programming being provided by 'another person' when considering the capacity of that person to provide another service, and apparently treated objects 3(a) and (b) of the BSA as being of greater importance than the remaining objects. The AAT considered that section 73(2), like any other section of the BSA, is subordinate to its stated purpose as set out in its objects. The problem is to balance two seemingly opposing objects - on the one hand the BSA seeks to encourage diversity in control of the more influential broadcasting services (object 3(c)), and on the other, to encourage an appropriate coverage of matters of local significance (object 3(g)). The AAT was of the view that this conflict could be resolved 'when it is borne in mind that we are dealing with small markets, where the provision of local material, albeit provided by a monopoly operator, is of greater significance than diversity in control, if that can only be achieved at the expense of local coverage' (at page 25). It was not for the ABA to 'cherry pick' through the various objects of an Act of Parliament, totally ignoring some while holding itself bound by others, by emphasising object 3(c) to the detriment of object 3(g) (see per Black CJ in *Tickner v Bropho* (1993) 114 ALR 409, at 418). The AAT considered that unique situations may require giving different weights to different objects, and did not read object 3(c) as though it provided that diversity in control must be achieved at any price.

The AAT rejected the ABA's conclusion that Prime was 'in a position to operate another commercial television broadcasting service in the area' within the meaning of the BSA, on the basis that it was satisfied that Prime was unwilling to provide the Griffith viewing audience with an adequate and appropriate coverage of matters of local significance. This was regarded by the AAT as an essential pre-condition that an applicant for another licence must fulfil before being eligible to compete in a small licence area. The service which Prime proposed to provide was clearly in breach of object 3(g) of the BSA. For the same reasons in Griffith, Prime was found not to be a person likely to be able to operate another service in Mildura.

However, in both Mildura and Darwin, the AAT was satisfied that Imparja was 'another person' likely to be in a position to operate another commercial television broadcasting service which complies in all respects both with the LAP and the objects of BSA.

Accordingly, the AAT set aside the ABA's decision in Griffith and affirmed the ABA's decisions in both Darwin and Mildura

As a result of the AAT's decision, the ABA proceeded with the section 38 licence allocation process in relation to the Darwin and Mildura licences. The commercial television licence previously advertised as available in the Griffith licence area was withdrawn from the price-based allocation process and was allocated to the incumbent licensee in accordance with section 38A of the BSA.

Conclusion

The amendments to the BSA which came into effect in January 1996 meant that this AAT decision was both the first and the last under the former section 73 of the BSA. However, the submissions made by the ABA during the hearing of these review proceedings may provide some guidance about how the ABA will handle future applications under the new

section 38A by incumbent solus commercial television operators for the allocation of an additional licence in their licence area. In order to identify whether there is another person who would be interested in operating another licence in that licence area, the ABA may commence the price-based allocation process under sections 36 and 38 and trigger a public auction. This would effectively freeze the incumbent's application until after the 'auction' process has been exhausted (section 38A(5)). If this 'auction' process leads to the allocation of the second licence, the incumbent's application will be taken to have been withdrawn (section 38A(6)).

Gillian Saville is a senior associate, and Alison Jones is a solicitor, with Blake Dawson Waldron's Sydney office. The views expressed in this article are their own.

Application for Review of a Determination of the Australian Competition and Consumer Commission revoking Authorisation No. A3005

Annabel Archer provides a Case Note on the Australian Competition Tribunal's decision to revoke authorisation for the Media Council of Australia's Accreditation System.

Background

In 1978 the Accreditation System of the Media Council of Australia ('**MCA**') was granted authorisation by the Trade Practices Commission ('**TPC**'). In order to grant an authorisation, the TPC must be satisfied that in the circumstances, the conduct sought to be authorised would be likely to result in a benefit to the public that outweighed the detriment to the public from the authorised anti-competitive behaviour.

The MCA's System continued in substantially the same form as was authorised in 1978, until 12 January 1995, when the Australian Competition and Consumer Commission ('**ACCC**') (formerly the TPC) issued a notice to the MCA pursuant to section 91(4)(a) of the *Trade Practices Act 1974 (C'th)* ('**TPA**') stating that it considered that:

(a) there had been a material change of circumstances since the authorisation of the System in 1978; and

(b) inviting submissions as to whether the authorisation should be revoked in accordance with section 91(4) or upheld on analysis of the public benefit and anti-competitive detriment flowing from the authorised conduct.

The MCA System and its operation

The System originally began as an informal industry arrangement, implemented by the MCA from 1968. Its underlying purpose was to provide accreditation to advertising agents as businesses of such financial standing and trustworthiness that they should be entitled to receive unlimited credit from the members of the MCA. These members consisted of most media organisations in Australia, as well as almost all the private proprietors of mass media in Australia, either as constituent or affiliated bodies. As constituent or affiliated members of the MCA, media proprietors were therefore bound by the MCA's objects and rules, including the rules governing the application, implementation and enforcement of the System.

There were discretionary criteria for accreditation however the primary criterion was that the applicant advertising agency demonstrate that it was capable of conducting a viable business and that it was therefore appropriate for the media to extend it unlimited credit when it placed advertisements, rather than requiring it to pay for the advertising space at the time an advertisement was booked, that is rather than requiring 'cash with copy'.

In return for the System's endorsement of an agency as a business worthy of receiving unlimited credit, an accredited agency agreed to assume responsibility for the content of the advertisements it placed with any MCA member media proprietors.

The System also provided a mechanism whereby the media paid commission to accredited advertising agents, in relation to the value of the advertising space bought by that agent, in return for:

(a) the agent's acceptance of the del credere risk for the amount of advertising placed and for any liability arising out of the contents of the advertisements;

(b) acceptance by the agent of responsibility for compliance with the relevant advertising codes and standards; and

(c) the agent's agreement to pay for the advertising on certain payment terms specified by the System.

MCA members were prohibited from paying commission to unaccredited agencies, or to agencies other than those responsible for lodging and taking responsibility for the relevant copy, and an accredited agent could not accept a higher rate of commission than the maximum rate prescribed.

The commission paid by the media to accredited agencies was factored into the amount charged by the agent to the advertiser and was usually deducted by the agent from the total amount due to the media proprietor when the accounts were paid.

The maximum rates of commission were prescribed by the constituent and affiliated associations of the MCA and ranged from 10%, the ordinary rate allowed by proprietors of metropolitan newspapers, country daily newspapers and television stations, to 12%, the ordinary rate allowed by proprietors of commercial radio stations, to 15% or 20%, which was the rate allowed by proprietors of non-metropolitan, non-daily newspapers.

The ACCC's power under section 91(4)

Section 91(4) empowers the ACCC to revoke an authorisation if at any time after the grant of an authorisation, it considers that:

- the authorisation was granted on the basis of materially false or misleading information;
- there was a condition attached to the grant of the authorisation and that condition had not been complied with; or
- there has been a material change in circumstances since the time the authorisation was granted.

As a matter of law, it was submitted by the MCA that the ACCC, or the Australian Competition Tribunal ('ACT'), can only act to revoke an authorisation if it is satisfied that one of the above grounds exist. The starting point for this process must therefore be the original authorisation decision and analysis of the information or circumstances, which should be presumed to be correct.

Within the meaning of section 91(4), 'change in circumstances' should be interpreted as a change in the external world which has occurred, and which was not impliedly or expressly envisaged at that the time of the authorisation as circumstances in which the authorisation would operate. Changes due only to the passage of time should not usually be considered 'material changes' as such changes would presumably have been intended at the time of the authorisation.

The relevant 'material changes' should be further limited for the purposes of section 91(4) to those changes which could have a significant and adverse impact upon the net benefit analysis accepted at the time the authorisation was granted.

Revocation of the System's authorisation

The ACCC received a number of submissions in response to its notice of determination. In support of revocation, submissions were received from the Australian Association of National Advertisers (the 'AANA') and the Association of Australian Advertising Agencies and Marketing Consultants (the 'AAAMC'). In support of continuation of the System's authorisation, submissions were received from the Advertising Federation of Australia Limited (the 'AFA') and the MCA. A number of other submissions were also received from interested parties, both in support of, and in opposition to, the revocation of the authorisation.

After reviewing these submissions, on 5 October 1995 the Commission gave its determination revoking the authorisation. The MCA and the AFAA then applied to the ACT to review the Commission's revocation determination.

After a hearing in March 1996, on 26 July 1996 the ACT affirmed the determination of the Commission and revoked the authorisation of the MCA's System.

The ACT's decision

Material changes in circumstances

For the purposes of its decision, the ACT identified two relevant markets. These were:

1. the market for advertising space and time; and
2. the market for advertising agency services.

Of the lengthy submissions made to it by the MCA, the AFA, the AANA and the ACCC, the ACT then identified four possible material changes of circumstances. These were that:

1. the MCA had departed from the conduct authorised, due to changes in the System's rules and in the financial criteria for accreditation;
2. the administration of the advertising Codes had deteriorated in that procedures for the adjudication of complaints were now unsatisfactory, certain product codes had been superseded, sanctions for breaches of the Codes were relatively ineffective, and media embargoes on advertisements found to have breached the Codes were harsh and inflexible;
3. there had been changes in the structure of the relevant markets. In relation to the advertising agency services market, these changes included:
   (a) the increased specialisation of agencies, including the rise of media buying houses with concentrated planning and buying functions;
   (b) the unbundling of agency functions with agencies increasingly performing only limited numbers of these functions;
   (c) the effect of technology in fostering the emergence of smaller agencies; and
   (d) the effect of technology in supporting discrete media planning and media buying agencies.

   In relation to the market for advertising space and time, these were:
   (a) the rise of direct marketing and new forms of media; and
   (b) the resulting changes in the range of potential arrangements and relationships within the industry; and
4. there had been changes in market conduct in response to the structural changes above.

The ACT found that, of the possible material changes, the structural changes in the market and the effect of these changes on market conduct were relevant material changes within the meaning of section 91(4).

It held that conduct throughout the industry was directed to circumventing the underlying intention of the System as authorised, and included the sharing of commission with unaccredited agencies

on a widespread scale, and the sharing of commission from unaccredited agencies to advertiser principals. In addition, media proprietors provided discounts to direct advertisers in lieu of commission, which was also conduct inconsistent with the intention of the System.

The ACT concluded that there were now numerous alternative commercial arrangements in the advertising services market, which were substantially different to those considered by the TPC in 1978 and which had led to changes in market conduct such that the application of the System, and the conduct of the System's participants, was substantially different to that envisaged at the time of authorisation.

Net benefit analysis

Once it determined that there had been a material change in circumstances, the ACT was then required to assess the public benefits or anticompetitive detriments arising from the system in light of these changes.

The relevant components of the System to this stage of the ACT's analysis were considered separately.

(a) Credit issues

It was acknowledged that the System's credit provisions assisted in the achievement of cost efficiencies on an industry-wide scale, and minimised bad debts on behalf of the media. However, the ACT did not accept that media was so different from other sections of the economy that it required a centralised system of credit assessment, particularly as in many other jurisdictions, media does not rely on such a centralised system. The ACT was not convinced that the media could not use standard credit control techniques such as credit insurance, reference agencies and bank guarantees, as in other industries.

The ACT also found that the System's credit provisions had prevented competition in risk bearing and credit terms as an incident of general competition in the industry and that without the System, other credit arrangements might develop with more efficient risk bearing as, in an efficient market, the party to bear the risk should be determined by the market.

On balance, the ACT found that the credit provisions of the System were anticompetitive as they reduced economic efficiency in relation to credit provision and restricted the development of alternative forms of credit provision and risk bearing, with no consequent offsetting public benefit.

(b) Commission issues

The ACT held that without the System there could be greater flexibility in relation to the remuneration structures existing in the industry. The System was said to increase the largely inherent conflict of interest between agents and their advertiser principals by:

- entrenching media commission as a method of remuneration to agencies;
- inhibiting the growth of a fully competitive market in which alternative remuneration structures would be more common;
- creating a spillover effect where the rate of commission tended to be fixed or at least where it was difficult to negotiate alternative rates of commission; and
- artificially preventing rebates of commission.

The ACT found that the benefits of commission were largely associated with the credit provisions, and as the credit provisions carried no substantial public benefit, the commission provisions were similarly on the whole anticompetitive.

(c) Code issues

The Codes were found to represent a net public benefit, however the ACT noted that the major sanction for breaching the Codes was the media embargo on publication or broadcasting of an infringing advertisement, not the penalty imposed on advertising agents by the MCA. The ACT also held that the Codes could effectively be bypassed by direct advertisers through the use of media placement agencies. However, as the Codes are the subject of seperate authorisation except for the manner of their enforcement through the System, the ACT did not feel it necessary to consider this aspect of the System further. It also left open the question of an alternative enforcement mechanism in relation to the Codes in the absence of the System and the MCA.

Conclusion

The ACT held that the System had two major anticompetitive detriments:

1. economic inefficiency in that credit and risk bearing functions were not efficiently allocated as they would be in a more open market; and
2. functionless market power, in that the rigid structure of the System inhibited alternative methods of carrying on business in the industry.

The ACT also found that these anticompetitive detriments did not have any consequent public benefit, except in relation to the Codes, which were the subject of a different and separate authorisation, and thus not directly relevant to the public benefit-anticompetitive matrix at issue in these proceedings.

As the relevant material changes since the time of authorisation in 1978 had fundamentally altered the net public benefit analysis within which the System and the MCA had been intended to operate, the ACT therefore concluded that the public benefits flowing from the System no longer offset the public detriment arising from the lessening of competition which resulted from the authorised conduct.

Accordingly, the ACT revoked the authorisation with effect from 3 February 1997, allowing approximately six months for the MCA to wind down its existing arrangements. The MCA was to retain its authority to administer and implement the Codes, however in September 1996, the MCA determined to relinquish this control from December 1996. It is expected that the AFA, the AANA and the various media proprietors will determine a self-regulatory system, however the scope and operation of such a system is yet to be decided.

Annabel Archer is a solicitor with Blake Dawson Waldron's Sydney office. The views expressed in this article are her own.

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Contributions in hard copy and on disk and comments should be forwarded to:

ANNE HURLEY
Tel: +61 2 9716 9048
Fax: +61 2 9716 9278
Email:
ahurley@enternet.com.au
or
ANDREW LAMBERT
Tel: +61 2 9330 8000
Fax: +61 2 9330 8111

Contributions and Comments

New Zealand contributions and comments should be forwarded to:

BRUCE SLANE
Assistant Editor
Communications Law Bulletin
C/- PO Box 466
Auckland 1

Communications and Media Law Association

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