The role of Austel in deregulation

Judy Stack, of Bond Communications argues that deregulation must be anchored in vigorous regulation by Austel.

In the Australian telecommunications arena today, "deregulation" is the buzz word, regulation is the anathema but deregulation cannot be achieved without regulation.

Regulation and free enterprise are words rarely found in the same sentence. However, free enterprise in the communications industry can only prosper if Austel actively regulates Telecom's activities. There is a tremendous imbalance in the power of those operating in the marketplace. While a monopoly of this size and power continues unchecked, effective competition from the private sector is all but impossible.

Monopolies are terrible things unless you happen to own one. In telecommunications, regulation of the monopoly is essential if deregulation is to proceed. So what then is Austel's role?

Austel's task

Austel is a lean organisation with accessible staff however its existence has set very high expectations within the industry.

Austel has three major constituencies:

- its political masters being
  - cabinet
  - minister (department)
- the telecommunications industry
  - public sector (carriers)
  - private sector (telecommunications companies)
  - unions and associations
- and of course the general public
  - the system users (corporations) and
  - basic telephone users(Mr and Mrs Average)

Austel will obviously have difficulty satisfying the interests of all three groups but if deregulation is the desired end then Austel must provide the means, and the means is found in achieving a balance between these groupings. Balance can only be found through regulation and the creation of a level playing field between the monopoly, Telecom, and the private sector.

Robin Davey, chairman of Austel, has constantly espoused Austel as a facilitator. Being a "facilitator" is fine, but being a "regulator" is essential. What is needed is a regulator to redress the imbalance in the market - Telecom has to be regulated.

The telecommunications industry has long been subjected to an intolerable farce, that is, Telecom as a commercial services provider and regulator. The 25 May 1988 Statement recognised this and sought to resolve the conflict by creating an independent regulatory authority with five major areas of responsibility: technical regulation; protecting the carriers monopoly; protecting competitors from unfair carrier practices; protecting consumers against misuse of the carriers' monopoly powers; and finally, promotion of efficiency of carriers especially in relation to the public carriers' community service obligations.

The Telecommunications Act 1989, recognises the need for a regulator role and this is clearly spelt out in ss. 18-24 - those sections dealing with the general functions of Austel. Section 24 gives it the power to carry out those functions.

If Austel is to work towards the creation of a level playing field, it must take an aggressive regulatory role to correct the imbalance in the market.

Telecom has restricted not only the private sector but also the other carriers. Assat has been brought to its knees financially because it was prevented from functioning as it was designed to do. The protection of Telecom has been at great cost to the community both financially and in limited service offerings.

A level playing field can only be achieved through reducing Telecom to the same opportunity level as the private sector; or regulation to avoid, in the words of Henry Ergas, "the incumbent's accumulated dominance from distorting the competitive process" together with the provision of compensation to the private sector, for instance, tax rebates. Telecom could also be excluded from the market for a limited period. There is a good case which can be put for baring Telecom from the non-reserved services market for 3 - 5 years.

Accounting practices

Most important is policing the relationship between carriers and competitive suppliers and the ability of Telecom to cross subsidise its commercial activities from its reserved service activities. The conflict is enormous and the potential for abuse is very tempting. Separate accounting measures included in the Telecommunications Act to assist in controlling unfair practices by carriers is not enough.

If Telecom is to be allowed to continue to operate in the non-reserved services market, Austel should require Telecom to have arms length companies where it operates in the competitive arena. This structural separation is essential to give the private sector greater confidence that monopoly abuse by Telecom will be eliminated.

Further, the accounting policies and return on investment criteria of these companies must be regularly monitored. Telecom should not be allowed to use its market and dominant financial position to enter into ventures where it will not see a commercial return just to block the successful entry of other parties.

Austel must be vigilant in policing potential unfair practices by carriers. It has the power to do so. Section 20 of the Telecommunications Act says:

"The functions of Austel include protecting the suppliers of competitive facilities and services from unfair practices of the carriers, and generally promoting fair and efficient market conduct in relation to the supply of competitive facilities and services, and for those purposes:

(a) regulating the manner in which the reserved facilities and services of carriers are made available to suppliers of competitive facilities and services; and

(b) regulating the manner in which the carriers supply competitive facilities and services."

Further reading of the Act suggests Austel not only has the power to act as a regulator, it must be a regulator whether it desires to be or not.

Community service obligations

Bond Communications initiated Freedom of Information Act requests to uncover the results of the Bureau of Transport and Communications Economics' study into the costs of Telecom's community service obligations (CSOs).

I am very glad to state that our attempts, and those of others, have now been rewarded with the publication of the Bureau's findings. As we have long suspected, the CSO's costed a mere $240 million in 1987/1988.

The CSOs have long been the bogey behind which Telecom has asserted its right to the monopoly and, in fact, this bogey forms the fundamental basis for the whole thrust of

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to the Broadcasting Act was in relation to a grant of a new commercial FM licence in the same area as that served by the applicant's existing AM radio station '2GO Gosford'. In that 1988 inquiry the Tribunal adopted the principles formulated and method of analysis applied in previous licence grant inquiries. In reaching its decision to grant a new commercial FM radio licence to serve the Gosford Wyong area.

In 1989, Wesgo Communications appealing the 2GO decision succeeded in its submission to the Federal Court that the Tribunal erred by considering not the commercial viability of the service provided by Wesgo, but the commercial viability of Wesgo itself, irrespective of the service it was providing pursuant to the 2GO licence (Wesgo Communications v ABT). Because the Tribunal had extensively referred to earlier decisions all made under earlier legalisation, made frequent references to commercial viability in the context of a broadcasting station's viability and failed to specifically use the expression 'commercial viability of the service' Justice Sheppard, although recognising that the Tribunal was aware of and may have considered the new legislation, concluded that the Tribunal had erred in its application of s. 83(6) (c) (iii). He appeared to have taken the view that the 1985 amendments to the Act substituting the expression 'service' for 'station' signified a substantive change.

The ABT vindicated

The matter went on appeal to the Full Court of the Federal Court which held that the 1985 amendment to s. 83(6) (c) (iii):

"was not designed to effect any relevant substantive change to the law; rather it was a consequential amendment designed to adjust the terms of the Broadcasting Act consequent upon the change of the basis of licensing from single 'stations' (which referred to physical structures) to 'service areas', that is to say, in relation to a licence, the area to be served pursuant to the licence".

The Full Court took the view that when the Parliament directed the attention of the Tribunal to the need for the commercial viability of the service or services provided pursuant to other licences "it was dealing with a practical question which turned upon the financial feasibility of the operations conducted by the relevant licensee with the respect to the relevant service". Although the 'service' comprises the programs that are broadcast, these do not stand apart from the general conduct of the operations of the licensee pursuant to the licence. The Full Court said that:

"It is too limited a reading of the expression of sub-s 83(6) 'the commercial viability of the service ..... provided pursuant to the other licence', to treat it as referring merely to the program material provided to the listening public in the service area"

Rather, what is involved is a "a practical test designed to enable the Tribunal to look at the provision of the relevant service by a particular licensee, and to consider if it is commercially viable or not in the sense of financially sustainable".

The Full Court therefore endorsed what a long line of Tribunal decisions in licence grant inquiries, particularly in the Perth inquiry, had said about the practical nature of the task the Tribunal had to perform when applying the 'commercial viability' criterion in the particular instance: that is, that one practically has to look at the total picture - the operations being conducted by the licensee pursuant to, and in accordance with, its licence, as well as the particular market environment in which it does so.

In 1988 ss. 83 and 86 were repealed but new sections substituted which included commercial viability as a criterion for grant of licences (except limited licences), for a renewal of licences and for their variation, revocation or the imposition of new licence conditions.

The criterion under threat

In the United States the Carroll doctrine has come under attack as being contrary to the First Amendment to the U.S Constitution guaranteeing freedom of speech and of the press. The cost in time and money to both parties and to the government of requiring consideration of the Carroll issue against what many consider the relatively remote possibility of actual harm to the public interest has been another source of criticism. Indeed, in May 1987 the FCC undertook an inquiry to consider abolishing the Carroll doctrine.

Interestingly, the same reservations about the concept of commercial viability have recently emerged in Australia. The July 1989 *Discussion Paper* by the Broadcasting Review Group of the Department of Transport and Communications (DOTAC) concluded that there was a case for re-examining the role of viability in the planning and licensing process. Striking a similar note to the FCC's *Inquiry Notice*, the Review Group identified a number of "special problems" associated with the 'commercial viability' criterion. For instance, it was the concept of commercial viability as forming "a barrier to entry allowing incumbent licensees to carry on business under its protection".

The Review Group also saw a "conflict of aims" between the general objectives of the government to remove unnecessary regulation, promote free markets, provide greater competition and increase variety of programmes with the protectionism inherent in the concept. It referred to the "complexity of licensing inquiries, the cost to participants in the inquiry, the amount of related litigation and the delays in delivery of new services to the public".

The Federal Government has not stood still. Stage II of the National Metropolitan Radio Plan in which there will be allocated by tender up to two new commercial FM radio licences in each capital city, envisaged that the Tribunal, although involved in awarding these new license, "will not have regard to viability of the proposed service or the effect on the viability of existing services".

The Federation of Australia Radio Broadcasters has taken a strong stand against the reform, referring to the development as "the most significant and far reaching reversal of broadcast planning policy in the history of Australian Broadcasting".

The recent upheavals in the industry caused largely by the financial problems experienced by the major television networks (or their owners) have exposed the inadequacy of present broadcasting legislation. Comments by the Deputy Secretary of DOTAC, Mr Mike Hutchinson, advocating a reversal of certain fundamental tenets which have governed broadcasting law in Australia, and the Minister's mixed response, suggest that serious reconsideration of the basic policy doctrines of Australian broadcasting is taking place beneath the surface.

The commercial viability criterion is obviously one of the many policies being currently assessed in the light of the new types of services and the changing environment of the broadcasting industry.

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the 1989 Telecommunications Act.

I note that the Minister must also see the low cost of the CSO's as an embarrassment and we welcome his announcement yesterday that the government is bringing forward its plans to look at the structural arrangements between the three carriers.

This review must extend to a full inquiry into whether or not there is any future justification for the continued Telecom monopoly over any or all of the reserved services. Austel is the appropriate body to conduct that inquiry.

Communications is a sunrise high tech industry. Australia needs private enterprise entrepreneurial energy to ensure that we are internationally competitive in this industry that is so vital to our economic health.

This is an edited version of an address Judy Stack gave to a CAMLA Luncheon on 7 December 1989.