

25 Communications

Ongoing innovation, technological change and globalisation mean that the communications sector is rapidly changing. A fundamental issue for governments is whether the existing regulatory framework is able to meet these changes and anticipated future developments. The Commonwealth has significant legislative responsibilities for communications, including responsibilities for broadcasting and related services. The Commonwealth-owned Australia Post and the part-owned Telstra are significant operators in communications markets, calling up competitive neutrality responsibilities. There is also a question, arising from the part privatisation of Telstra, of whether the current structure of Telstra is the best way in which to facilitate competition in telecommunications.

Legislation restricting competition: matters for the Commonwealth

Broadcasting Services Act 1992

The regulation of broadcasting in Australia is the responsibility of the Commonwealth Government. The *Broadcasting Services Act 1992* is the regulatory legislation. The Act specifically mentions radio and television services in defining its objectives (s.3a). However, technological change is likely to expand greatly the range of broadcasting services being regulated in the future.

The *Television Broadcasting Services (Digital Conversion) Act 1998* added major new provisions to the Broadcasting Services Act. These provisions set the framework for the conversion of television services from analogue to digital format, and for the regulation of these services and other potential services provided via the digital spectrum.

Radiocommunications Act 1992

The *Radiocommunications Act 1992* is the key legislation governing the use of the radiofrequency spectrum. Its primary objective is to maximise the public benefit derived from the use of the spectrum by ensuring its efficient and equitable allocation. Other objectives include making adequate provision for

using the spectrum for public and community services and encouraging the use of efficient technologies to provide a wide range of services.

The Act implements these objectives by providing for:

- the preparation of spectrum plans by the Australian Communications Authority, setting out which parts of the spectrum are to be available for which purposes;
- the issuing and trading of spectrum licences (authorising the use of transmitters/receivers on a given part of the spectrum) and their resumption by the Australian Communications Authority;
- the issuing of apparatus licences to operate transmitters and/or receivers on parts of the spectrum not allocated for the issue of spectrum licences;
- the issuing of class licences for specific purposes; and
- the reallocation of parts of the spectrum.

Australian Postal Corporation Act 1989

The *Australian Postal Corporation Act 1989* establishes Australia Post as a legislated corporation. The Act guarantees an Australia-wide postal service, known as the universal service. It also requires Australia Post to provide this universal service at a uniform price, whether a letter is sent from interstate or around the corner in a capital city.

To ensure Australia Post can fulfil the universal service, the Act gives Australia Post an exclusive right to provide some postal services (reserved services). Thus, without the risk of losing market share from competitors, Australia Post can use the protected profitable services to subsidise the services that it provides only because the Commonwealth requires it to.

The postal services sector, however, is considerably broader than Australia Post alone. Outside the reserved services, a range of other operators offer related services, such as express delivery, parcel services, unaddressed mail delivery and so on.

Legislative restrictions on competition

The Act restricts competition by reserving certain postal services to Australia Post. With a few exceptions, only Australia Post can carry a letter for less than \$1.80 if it weighs less than 250 grams. In addition, only Australia Post can deliver international mail in Australia.

Regulating in the public interest

Providing a universal postal service at a reasonable cost are the main objectives of the Government's legislation. Further, postal services fulfil an important and growing business role, where innovation and flexibility may be more important than for households.

Any reforms need to maintain and, if possible, enhance the social obligation of Australia Post to provide a mail service that is reasonably accessible to all Australians. They should aim to maximise the contribution of Australia Post to the Australian community while facilitating the emergence and growth of competing firms in the postal services industry in the interests of the Australian community.

The Commonwealth has reviewed this legislation. Amending legislation was withdrawn in March 2001. The Council will assess progress at the 2002 assessment.

Competitive neutrality matters

Competitive neutrality measures seek to ensure that significant government-owned businesses do not have an advantage over their private competitors simply as a result of their public ownership. They do so by making sure that significant government businesses face the same taxes, incentives and regulations and that prices for their goods and services reflect the full cost of supply (see chapter 3). Businesses that believe their publicly owned competitors are not applying appropriate competitive neutrality principles can raise a complaint with the competitive neutrality complaints body in their jurisdiction.

On 18 February 2000 the Conference of Asia Pacific Express Carriers (CAPEC) lodged a competitive neutrality complaint against Australia Post with the Commonwealth Competitive Neutrality Complaints Office (CCNCO). The CAPEC claimed that Australia Post enjoys a competitive advantage in competing for business because it receives preferential treatment from Customs with respect to screening charges. In particular, the CAPEC argued that Australia Post is advantaged by:

- higher thresholds for incoming and outgoing postal items before formal Customs screening requirements take effect; and
- exemption for postal items from recently introduced reporting and cost recovery charges for high-volume, low-value consignments.

The CCNCO investigated the complaint and reported on the matter (CCNCO 2000a). It recommended that:

- the value thresholds for formal Customs screening of incoming and outgoing mail be aligned for postal and nonpostal articles;
- the Government further consider the feasibility of imposing cost recovery charges for informal Customs screening of incoming postal items; and
- the concerns about charges for nonpostal items in high-volume, low-value consignments be addressed as part of the broader issue of whether Australia Post should pay cost recovery charges for informal screening of incoming postal consignments.

The Council's 1998 report on Australia Post raised the issue of differential Customs treatment. The Council recommended that the *Customs Act 1901* be amended so that all postal operators are subject to a threshold of the same value.

The Government has introduced the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2000 which includes changes necessary to control lower value consignments within the export permit and licence system. The Minister for Justice and Customs has undertaken to harmonise the value thresholds for both incoming and outgoing postal and non-postal items when the legislation is implemented. The Minister noted that there are practical difficulties in imposing cost recovery charges on Australia Post for informal Customs screening of incoming postal items. However, he has asked Customs to consult with the Department of Communications, Information Technology and the Arts before taking the matter up with Australia Post.

Structure of Telstra

Telstra supplied Australia's telecommunications services as a public monopoly until 1991. Gradual deregulation occurred over subsequent years, culminating in the introduction of open competition in July 1997. Telstra is the still dominant player in the Australian telecommunications industry. The Australian Competition and Consumer Commission's (ACCC) submission to the Productivity Commission's inquiry into telecommunications competition regulation commented on the characteristics of the Australian market and Telstra, noting:

... the overwhelming dominance in the national market, and almost every segment of that market, of a single, vertically integrated incumbent. This dominance creates the potential and the fact of extensive market power in the most basic carriage services as well as a range of enhanced services. Telstra's ubiquitous network and integrated nature ensure that even when other firms operate with it in the delivery of retail services, they rely on interconnection to its network in almost every circumstance. These circumstances are not

matched to anywhere near the same extent in any other network industry. (ACCC 2000b, p. 6)

Obligations under NCP

Legislation in 1997 and 1999 provided for the part privatisation of Telstra, and the company is now 49 per cent privately owned. The part privatisation raised a commitment under clause 4 of the Competition Principles Agreement (CPA) for the Commonwealth to review, *inter alia*, 'the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly'.

The Council noted in the first tranche assessment that:

This examination should have been undertaken prior to the partial privatisation and should have involved considering the merits of structurally separating the local fixed network from the non-monopoly elements of Telstra's business, or alternatively, arrangements for ring-fencing the local fixed network and Telstra's business units. (NCC 1999a, p. 338)

Assessing compliance

As part of the first tranche assessment, the Council assessed the Commonwealth's progress in meeting its NCP commitment to review and reform Telstra. The Council reported that it:

...questions the extent to which the Commonwealth has ensured that the structure of Telstra ... facilitate[s] competitive outcomes. ... clause 4 of the CPA places a responsibility on the Commonwealth to have ensured prior to the partial privatisation of Telstra in 1997 that the regulatory framework and Telstra's structure and commercial objectives facilitate competitive outcomes consistent with the public interest. (NCC 1999a, p. 338)

The Council noted advice from the Commonwealth that it believed related reviews before the part privatisation satisfied its clause 4 obligations. The Commonwealth indicated that it preferred to prohibit anticompetitive conduct and to facilitate third party access to services via the use of telecommunications-specific parts of the *Trade Practices Act 1974* (TPA) (parts XIB and XIC respectively), rather than to pursue the structural separation of Telstra's fixed local network.

The Council also noted that further changes to the regulatory regime governing Telstra had been proposed in the Telstra (Transition to Full Private Ownership) Bill 1998. Moreover, the ACCC had established a telecommunications working group to review Telstra's accounting and cost

allocation arrangements, to assist the development of an accounting separation model for Telstra.

The Telstra (Transition to Full Private Ownership) Bill has not proceeded. Thus, the further limitations on anticompetitive behaviour by Telstra which it would impose, and which the Council had indicated would considerably address the Commonwealth's responsibilities under CPA clause 4, have not come into effect. However, the ACCC telecommunications working group released draft record keeping rules in June 2000, with final record keeping rules coming into effect in May 2001.

The telecommunications-specific parts of the TPA (parts XIB and XIC), on which the Commonwealth has largely relied to constrain Telstra's conduct in relation to market competitors, are under review by the Productivity Commission. The review is scheduled for completion by September 2001. The terms of reference for the review require the Productivity Commission to report on whether the relevant parts of the TPA:

... are sufficient to prevent integrated firms taking advantage of their market power with the purpose or effect of substantially lessening competition in a telecommunications market, or whether alternative arrangements are required or appropriate. (Costello 2000, 4c)

While this term of reference appears broadly consistent with the underlying requirements of CPA clause 4, the term of reference at 5(c) specifically prevents the Productivity Commission from considering the structural separation of Telstra. This limitation on the scope of the review appears to limit severely the range of 'alternative arrangements' for consideration if the existing provisions are found to be inadequate. It has prevented the inquiry from specifically considering the merits of the option in CPA clause 4(3)(b) of facilitating competition in telecommunications by separating the natural monopoly and competitive elements of Telstra's business.

The Productivity Commission's draft report found that Telstra held 85 per cent of retail local telephony services at end June 2000. Although Telstra's share had fallen by nine percentage points over the preceding 12 months, and is likely to be further eroded, the Productivity Commission stated that 'Telstra will continue to maintain market power through its ownership, by way of vertical integration, of the only ubiquitous fixed local access network' (PC 2001b, p. 4.20).

The Council considers the Productivity Commission's draft report finding concerning the link between Telstra's ability to maintain market power and its ownership of the fixed network emphasises the importance to telecommunications of appropriately addressing the structure of Telstra. The Council acknowledges that the part privatisation means that shareholders have invested in Telstra on the basis of its ownership of the integrated local network. However, the Council believes it is important to achieving a competitive telecommunications industry capable of delivering substantial benefits to consumers that further consideration of the structure of Telstra,

including the potential structural separation of the fixed network, be encouraged.

Table 25.1: Review and reform of legislation regulating communications

<i>Jurisdiction</i>	<i>Legislation</i>	<i>Key restrictions</i>	<i>Review activity</i>	<i>Reform activity</i>	<i>Assessment</i>
Commonwealth	<i>Broadcasting Services Act 1992 (including Television Broadcasting Services (Digital Conversion) Act 1998)</i> <i>Broadcasting Services (Transitional Provisions and Consequential Amendment Act 1992)</i> <i>Radio Licence Fees Act 1964</i> <i>Television Licence Fee Act 1964</i>	Licensing, entry, ownership, conduct	Review by Productivity Commission completed in March 2000. Public consultation involved public release of an issues paper, draft report, consultation, public hearings and receipt of submissions. Review raised significant questions and made extensive recommendations for reform.	Government is yet to respond.	Council to assess progress in 2002.
	<i>Radiocommunications Act 1992</i> and related Acts	Licensing, spectrum allocation	A review commenced in 1997. However, the national competition principles aspects of the review were not completed. The Productivity Commission commenced a review of the Act in July 2001, to be completed in July 2002.		Council to assess progress in 2002.
	<i>Australian Postal Corporation Act 1989</i>	Legislated monopoly for Australia Post for activities including letter delivery and inwards international mail	Review completed in 1998. Review recommended reserving only household mail to Australia Post.	Amendment Bill reducing Australia Post monopoly protection from four times the standard letter rate to one times the standard letter rate and the weight restriction from 250g to 50g, removing incoming international mail from the monopoly and establishing an access regime, withdrawn. No further response.	Council to assess progress in 2002.