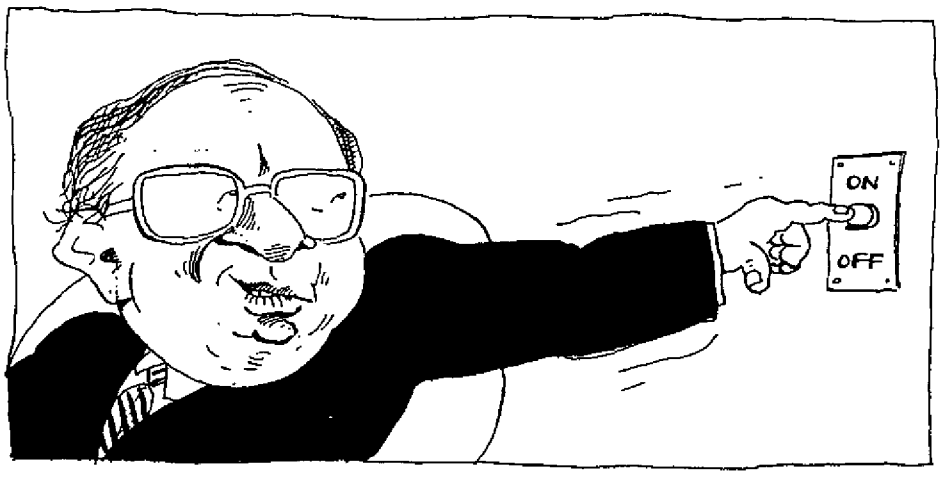
Forum 1: Restrictive trade practices regulation of media



TPC Chairman Bob Baxt tries his hand at media regulation

Warren Pengilley of Sly & Weigall, asks:
Does the media tail wag the merger policy dog?

If one wants to debate Australian merger policy, where does one start? Obviously, say journalists, with the media. One of the most surprising things is that most merger law reforms pushed by various interests seem to hang their reformist hats on media events. Maybe this is because journalists, not surprisingly, are intimately affected by such events. It should not, however, be forgotten (but for many the point is simply not even considered) that calls for *Trade Practices Act* merger law reform are calls for reform which affects all Australian business. The media is, of course, one important area of Australian business. But Australian business overall is much more important than any limited segment of it.

Politicians seem to have some belief that news has some uniquely nationalistic Australian qualities which are apparently missing in other products. Added to this is the intrinsic and frequently uncritically accepted dogma that, for some reason, media has to be "regulated". All of this makes it almost impossible often even to suggest, let alone have seriously considered, what could be quite sensible solutions to the present Australian media slough of despond.

Why not let in an overseas television network? Would not this new independent network have a pro-competitive impact? Could not the consumer decide whether to watch Jana Wendt or (in Minister Beazley's words) "some blonde haired vapid bimbo out of Los Angeles"? But we cannot have this because it would, apparently, corrupt our "Australianism" notwithstanding the fact that, world wide, there is always a demand for local television programming and presumably the Broadcasting Tribunal would still heavy us all with "Australian content" rules. Instead, we bumble along with at least two networks in a parlous state and a media policy which seems to prevent the influx of much needed capital into either of them.

Regulation has caused the problems

Apparently, we do not reach the obvious conclusion that regulation of television in the first place has caused most of the problems in the industry. Why? Because the regulatory system prevents the entry of new competitors (local or overseas) - be they new TV stations or be they pay TV. Legislatively mandated monopolies (or oligopolies) create artificial scarcity. People will pay for this scarcity because it represents insulation from competition. Put simply, the present position is that buyers have paid too much for their artificially created assets. If the present heavy regulatory system did not exist to the same extent no such problem (or no problem of such magnitude) would have arisen.

Strange, indeed, it is that regulations in relation to TV networks have been oriented in so many ways towards the preservation of media viability yet they have produced precisely the opposite result. The fault, of course, lies in the regulations themselves and not in their administration. It is all very well after the event to say the regulators should not have allowed Bond or Skase to buy into TV because the prices being paid made them non-viable. Who, at the time of such purchases, could have credibly run this line?

At the fringes, we have the Trade Practices Commission. It is concerned with the preservation of competition. It operates under a statute which does not give it wide discretions in relation to individual operative decisions. The Commission, unlike the Broadcasting Tribunal, cannot, for example, find anyone not to be "fit and proper" and thus to be excluded from media participation. It thus asserts that it is not a "regulator" like all the other watchdog bodies. But neither the absence of statutory authority nor the Commission's philosophy has, apparently, been a matter of undue concern to the Commission when television networks are involved. The writer understands from press reports, such as that appearing in the *Sydney Morning Herald* on 17 September 1990, that the Commission was prepared to seek an injunction against Malcolm Turnbull having any involvement in the Network Ten receivership. Although press reports were silent on the exact terms of the TPC intervention, this involvement seems to the writer to infringe no section of the *Trade Practices Act* unless Turnbull can be characterised as a "share" or an "asset" being acquired by a company (and, in law, he cannot, of course, be so characterised). Had Turnbull not terminated his affiliation with Channel Nine, the Commission could have justified its stand on the basis that Network Ten could have been regarded as "associated" with another network leading to a possible breach of S.50 (2A) of the *Trade Practices Act*. But Turnbull's association with Nine had been terminated so this argument could not be run.

Commission fails to justify

Commission Chairman, Bob Baxt, when recently questioned as to the statutory authority which permitted him to act as he did, was reported in the *Business Age* of 3 October 1990 as having been "unusually reticent. Someone else - ie Turnbull - had also asked the question, he said, and the Commission was under a QC's recommendation not to talk about it". So, our national competition authority has also taken unto itself an interventionist regulatory role which it cannot, or will not, justify in terms of its legislative brief.

The writer finds it quite extraordinary that the Commission, a high profile public body, cannot cite even the legislative authority for its actions. This view is taken whatever any Queen's Counsel may have said on the issue. The public is thus left with having to try and make sense of the Commission's conduct from what little has been reported in the

ress. Until convinced otherwise, this writer elieves that there is no authority in the *Trade ractices Act* for what the Commission did. It s hard to see how competition law prevents Malcolm Turnbull from taking up the Ten ecovery challenge. Is the media different or oes the Commission now have some gen- ral role in vetting directors and consultants s to their acceptability? If so, why? If not, why ne attitude in relation to Turnbull?

In the newspaper world, things are not nuch better. In terms of ownership, Rupert Murdoch runs or sponsors seven out of the en of the country's surviving capital city newspapers. It is not licensing barriers which have created the problems here. The Australian phobia of overseas control may well be relevant, however, in that the Treasurer is unlikely to permit a substantial overseas stake being taken in the Fairfax Group -the very thing which may perhaps make it more competitive with the Murdoch chain. The overseas investment guidelines may even prevent an overseas new entry to compete with both newspaper chains should someone want to do this.

The spectre of Murdoch

This leaves the possibility of Murdoch buying out Fairfax. This is a result which is quite unacceptable in competition terms and the Commission, quite rightly, is opposed to it.

The Commission says that Murdoch could structure his arrangements so as to avoid the merger provisions of the *Trade Practices Act* based on the principles upheld by the Federal Court in the Commission's litigation loss in the *New Zealand Steel* case. The Commission has convinced Attorney-General Duffy to amend the merger provisions of the *Trade Practices Act* to take account of a perceived threat that Murdoch would act in this way. But there must be a fear that we have here, as elsewhere, the media tail wagging the merger policy dog. This is because:-

1. The *New Zealand Steel* case involved an attempt by the Trade Practices Commission to injunct in Australia a merger blessed on public benefit grounds in New Zealand. This has real repercussions under the Closer Economic Relations Treaty with New Zealand and in terms of Australian antitrust imperialism intruding into areas which are of more immediate concern to other countries. It is hoped that this issue will be considered in any amendments. However, such issues may well be bypassed in an obsession to do something in a "media case".
2. The Attorney's statement is that the legislation amending the *Trade Practices Act*, when enacted, will operate from 8 October 1990. The despicable habit of regulation by Press Release, so long a major cause of uncertainty in the taxation area, is thus also to be repeated in relation to amendments to our competition law.
3. Amendments to trade practices legislation are generally slow in gestation. Despite the immediacy politicians see in them at the time, they have in the past taken up to a couple of years to be effected when important policy considerations are involved. There is now yet another "study" into merger law to be engaged in. How many more enquiries and studies on merger law do we need? The study is not, it is to be understood, to be limited to *New Zealand Steel* type issues but may well put the whole of the merger law test back into the melting pot. No doubt any amendments will await a report of the newly commissioned study and debate on it. How can the commercial community operate with any degree of certainty in the interim?
4. If the above appears to state the case too highly, it should be noted that the amendments suggested may well require definitional amendments to such quite fundamental provisions in the *Trade Practices Act* as the term "acquire". If this is so, the amendments may have considerable repercussion in many areas of competition law quite unrelated to merger policy. Of course, it is possible that the amendments may not go as far as this. But who knows? Do we have to live with the uncertainty of retrospectivity in many areas of the *Trade Practices Act* whose exact parameters are currently quite unknown?

In short, the media simply has too many regulatory cooks brewing too many divergent broths. Much of the present debacle is caused by regulations aimed at protecting the public but which have, in fact, done anything but this. Should we not perhaps think of dismantling a substantial number of these regulatory constraints? Should we not think of changing our views on overseas investment in Australian media? Above all, there must be concern for the way in which media problems are paraded as justification for many of the attacks on merger laws. Media simply is not the most important Australian industry upon which merger laws operate - something which cannot and must not be forgotten. One is forced to wonder why we want still more enquiries into the adequacy of merger laws. We have had the present test blessed by each political party and by the recent Griffiths Committee Parliamentary Inquiry. The present merger law test of dominance may have its problems but it appears to be the best we can evolve.

Certainty needed in competition law

There has to be a time when business can feel safe in planning on the basis that the law is unlikely to change before each year ends. Above all, purely because the Commission wants to amend the Act to cover the deficiencies which it feels are in the Act, and which gave rise to its loss in the *New Zealand Steel* case, let us not subject the whole of Australian industry to that uncertainty in the competition law which previously characterised only the tax system. And lastly, will someone (hopefully the Commission itself) tell us all how the Trade Practices Commission justifies its stand in relation to Malcolm Turnbull? Does the Commission have some new found role to regulate those who may participate in the media and, if so, where does it find its statutory authority for such role? Is the media unique or is the Commission's new found "regulatory" role now quite a general one? These questions must be publicly answered. The writer holds no brief either for or against Malcolm Turnbull but the point is an important one and of vast impact in relation to any future media advice - and perhaps to future advice in wider areas as well. Silence, or hiding behind Queen's Counsel's robes, is simply not good enough on an issue as important as this.

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Paul Malone of the Trade Practices Commission argues that the Commission's processes and media industry dynamics are poorly understood by the Commission's critics

The day after the Trade Practices Commission released its determination on the West Australian Newspapers Ltd bid for the *Daily News*, a News' representative on Perth talkback radio implored listeners to ring the Commission and tell what they thought of the decision. Within minutes the Commission switchboard in Perth lit up with calls.

Commission Chairman, Professor Bob Baxt, took one of the first calls himself. "Will there be a *Daily News* today", the caller asked. "I don't know. You'd better ask the management of the Daily News", Baxt replied. "Your decision was appalling", the caller said. "Have you read it?" Baxt asked. "No", the caller said. So the conversation continued until finally the caller asked "Are you going to change your

decision?" "We can't", said Baxt. "Oh", said the caller taken aback "Then I've just wasted 22 cents."

The call was one of many which illustrated the ignorance of many on the role of Commission and the issues at stake - an ignorance not confined to the general public. Senior politicians and West Australian commentators showed the same command of detail as the anonymous caller.

The day after the Commission rejected the application by West Australian Newspapers Ltd (WAN) on September 10, 1990, the management of the Daily News announced the closure of the paper, blaming the Commission for its action. The Commission was blamed, not only by the management but by others, for the loss of journalists', printers' and staff jobs.

Bob Baxt faced a Perth press conference, not surprisingly crowded with Daily News journalists and sympathisers, in an effort to explain the difficulties the Commission had had with the decision and the possible options that were open to the *Daily News* management.

But little of his comments and the Commission's considered determination came across in the media coverage. With few exceptions - P.P. McGuinness in *The Australian* and Alan Kohler in the *Australian Financial Review* were two - the Commission's decision was condemned.

Afternoon newspaper markets in decline

Three weeks after the *Daily News* announcement the management of News Ltd announced the merger of its morning and afternoon newspapers in Sydney and Melbourne. Newspaper commentators now began a rational discussion of the afternoon newspaper market. The worldwide decline in afternoon newspapers was noted. The influence of television on the demand for papers, the changing habits of city commuters, the advertising preferences of retailers and the quality of the papers themselves, all came up for discussion. The future of two remaining capital city afternoon papers - the Adelaide afternoon tabloid, *The News*, and the *Sun* in Brisbane - was also raised.

What was clear, if it was not clear to the commentators at the time of the Commission determination on September 10, was that the *Daily News* closed because of its own financial plight. The *Daily News'* operating loss in 1987 was $371,517. The following year it rose to $4.12 million and in 1989 was $3.92 million. At a conference with the Commission on August 29, the *Daily News'* management revealed that current debts stood at $13.22 million, of which $92 million was owed to WAN. Circulation of the *Daily News* fell from 101,000 in 1985 to 75,000 in August 1990.

One aspect which had escaped the West Australian critics of the Commission's determination was that WAN chose not to explore the avenues which might have enabled it to take over the *Daily News* and maintain its operations. Immediately the Commission announced its determination, the *Daily News* management, in which WAN exercised a substantial degree of influence through its 49.9 per cent interest in the company, announced the closure of the paper.

As Professor Baxt indicated to the anonymous caller, the Commission could not overturn its determination, but WAN could have pursued an appeal against the Commission's determination before the Trade Practices Tribunal. Commentators should also have understood (and some of them did not) that the Commission does not have the power to decide that a merger is illegal, thus preventing it taking place. This power rests in the courts. If the Commission believes that a merger would result in market dominance, the Commission is required to fight the issue before the Federal Court.

The Commission decided that the public benefits which might result from the *Daily News* takeover did not outweigh the anti-competitive detriment. It was open to WAN to test this view before the Tribunal.

The Commission noted that from a competition point of view, closure of the *Daily News* would reduce the barriers faced by a new entrant. An opportunity for successful entry to the West Australian newspaper market could be created. The Daily News was said to have had a circulation of 75,000 and a readership of 200,000. It was said to be able to attract certain advertising, eg Friday entertainment. If it closed, another newspaper might be able to pick up this demand.

'clear anti-competitive consequences would arise from the acquisition of the Daily News *by WAN'*

In the Commission's view, clear anti-competitive consequences would arise from the acquisition of the *Daily News* by WAN. The creation of a dominant firm publishing both the morning and afternoon newspapers in Perth would raise barriers to entry which would make entry for a new metropolitan daily difficult. The long established positions of the *West Australian* and the *Daily News* and the limited size of the available readership and advertising in Perth would constitute substantial deterrents to any new entrant.

There were other matters the media did not pick up. WAN offered $13.22 million for the *Daily News*, a generous offer when compared with the $250,000 Heytesbury Holdings Ltd offered for the rights to the masthead of the paper. But while suggesting that the Heytesbury offer was derisory, the West Australian media commentators never asked why WAN was willing to pay so much for the loss making operation. Could it have been that the premium was due to the fact that ownership of both papers would ensure no new entrant could get into the Perth daily newspaper market?

In its determination the Commission considered the "failing company" arguments put on behalf of the merger. The questions to be considered in this context include:

- Is the potentially failing firm going to fail irrespective of whether or not authorisation is granted?
- What are the real causes of the failure of the firms?
- What alternative solutions to a merger are available?
- Is the proposed acquirer the only available purchaser?
- Is the proposed acquirer the least anti-competitive acquirer available? and
- Will the apparent cause of failure of the firm be addressed by the new acquirer?

On the question of the *Daily News*, the Commission expressed concern that irrespective of its decision, in the longer term the Daily News might not survive, or at least not survive in its current form.

Calls for reform

Currently there are calls for an inquiry into media ownership in Australia. Some have suggested that the Trade Practices Commission should be given a reference to conduct such as inquiry. At the same time the government is reviewing the *Trade Practices Act*.

The Act currently is concerned with mergers which result in or enhance dominance of a substantial market for goods or services in Australia, a State or Territory. Among the proposals for change is the suggestion that the "dominance" test be replaced by a "substantial lessening of competition" test, the test that applied before 1977.

Commission Deputy Chairman, Brian Johns has pointed out that had there been a "substantial lessening of competition" test in 1987, the much criticised Commission decision on the News Ltd takeover of the Herald and Weekly Times, would have been different.

The Commission had a different make-up at the time of the Herald and Weekly Times takeover and, when questioned recently, Commission Chairman, Professor Bob Baxt said that, in the context of what had happened, since he was sure that had the decision been taken today, all the implications would have resulted in a different approach.

The News Ltd decision to merge its afternoon and morning newspaper operations in

oth Sydney and Melbourne highlights the conomic realities of the newspaper industry. fternoon newspapers - even with successful rother morning papers - face an uphill battle o survive. The pressure newspapers face is ot due to the existence of the *Trade Practices ct*. Nothing is achieved by using the Commission as a scapegoat. No one can compel a ompany or individual to go on losing money on a business venture.

The *Trade Practices Act* is designed to promote a dynamic competitive environment - the environment which holds the greatest prospect for the long term survival of a variety of operations.

Paul Malone is the Information Director of the Trade Practices Commission.

Anne Davies of the Communications Law Centre argues there is no ground for Trade Practices Commission regulation of broadcasting or the conferral of Commission - like powers on the Broadcasting Tribunal

Considering that Australia now has one of the most concentrated levels of newspaper ownership in the world, the print media industry is not one of the Trade Practices Commission's success stories. It is therefore surprising that the *Trade Practices Act* is being flagged as a model for future regulation of ownership and control in the broadcasting sector.

Options have ranged from handing responsibility for ownership and control of broadcasting to the Trade Practices Commission, to adopting a similar regulatory approach, by creating explicit prohibitions on exceeding the ownership limits and introducing a range of monetary penalties for breaches.

No-one would dispute that the ownership and control provisions of the *Broadcasting Act* rival the taxation legislation in sheer complexity. Worse still, the events of the 1980s demonstrate they are ineffective. Licensees have regularly ignored the intent of the Act to limit foreign ownership to 20 per cent, and to limit audience reach to 60 per cent, by taking advantage of loopholes and extensive grace periods.

Overhauling the Broadcasting Act

With the industry now reeling from the after-effects of the media binge during the late 1980s, the Federal government is finally moving to overhaul the Act. The Minister for Transport and Communications, Mr Beazley, is expected to make a statement of principles underlying the legislation early in 1991. An exposure draft of legislation will be released for public comment probably by March.

However a departmental review team, headed by the Deputy Secretary, Mr Mike Hutchinson, has been working on options since late 1989. The rhetoric and thinking of the Department of Transport and Communications (DOTAC) has been guided by a belief that market forces, as far as is practically and politically possible, should be imported into the regulation of broadcasting. Longstanding principles that broadcasting involves a public trust, a view expressed most eloquently by Chief Justice Mason of the High Court in the *Australian Broadcasting Tribunal* v *Alan Bond* (1990), are dismissed as outmoded.

It is therefore not so surprising that the review team has lighted on the *Trade Practices Act* as the preferred model for reform of the ownership and control provisions of the *Broadcasting Act*.

Yet as no stage has there been any real analysis of either the adequacy of the *Trade Practices Act* as the preferred model for reform of the ownership and control provisions of the *Broadcasting Act*.

'The government is exploring... "self enforcement" of the ownership limits'

Yet at no stage has there been any real analysis of either the adequacy of the *Trade Practices Act* in regulating the media industry or the impact of divorcing the ownership and control rules from the other major regulatory task of the Broadcasting Tribunal: ensuring quality and diversity of the media by way of regulation of program content.

Emasculation of the Tribunal

The first proposal originally floated by the department was the effective dismemberment of the Broadcasting Tribunal by transferring responsibility for ownership and control to the Trade Practices Commission while foreign ownership questions would be dealt with by the Foreign Investment Review Board. Mr Beazley's strong stance on foreign ownership seems to have put that idea to rest, at least in the short term although the Opposition has made encouraging noises about this proposal.

More recent reports have indicated that the government is exploring what has been termed "self enforcement" of the ownership limits. This would involve enshrining the current rules as prohibitions in the Act. In the same way as Part IV of the *Trade Practices Act* prohibits a takeover which will lead to dominance in a market, the new broadcasting act would simply state that a person shall not control licences for television stations which reach more than 60 per cent of the audience. So far DOTAC has not elaborated on how this might work in practice, but has promised that the Tribunal will be given the sanctions such as large fines to ensure compliance.

Apart from the difficulty inherent in monitoring the share structures of media groups, a number of which are now unlisted private companies, this approach raises a number of questions.

The policy objectives underlying broadcasting regulation are far more complex and in some ways contradictory to those which underly the *Trade Practices Act*. The Trade Practice Commission's charter is relatively simple: to promote fair competition. In broadcasting, however, the regulatory objectives are more complex and in some cases contradictory. There is a tension between, on the one hand, encouraging a diversity of services, and on the other achieving a level of quality and Australian content. As the minister recently acknowledged in a speech at the Australian Broadcasting Tribunal conference in November: "The industry is protected by limiting competition, in return for which we expect program quality, choice and diversity".

A divorcing of the ownership provisions from the regulation of content, whether it be by handing that responsibility direct to the Commission or by adopting a similar style of regulation, has implications for what many believe is the more important objective of broadcasting, of encouraging quality programming on television and radio. Nowhere is this more visible than in the licensing area. There is little point in awarding licences on merit of the service provided, if the licence can be transferred without considering the quality of service that will be delivered by the new owner.

Secondly, there remains a general level of community dissatisfaction with the Commission's handling of the print industry, stemming mainly from the definition of the market adopted when the Commission approved the takeover of Herald and Weekly Times Ltd by News Corporation Ltd in 1987. The Commission's decision to treat each geographic market as discrete meant it did not consider the overall issue of concentration of the market for news and ideas. Similar problems may well be experienced if the principles were to be applied to broadcasting.

Roles of the Tribunal and Commission different

The roles of the two bodies are also quite different. The Commission is foremost a policy body. Adjudication and enforcement of the Act are structurally separated and are the responsibility of either the Trade Practices Tribunal, in the case of authorisations under Section 45, or the Federal Court, in the case of mergers under section 50. Although the Commission gives informal rulings on whether a particular transaction will contravene the Act, it must go to the Federal Court to seek injunctions or the imposition of fines.

In contrast, the Broadcasting Tribunal has both an investigative and prosecutory role, as well as a quasi-judicial role. It not only investigates breaches of the Act, but rules on whether the Act has in fact been breached. It is able to impose some sanctions directly, such as imposing conditions on the licence or even revoking a licence, but where the penalties involve fines, it must refer these to the Director for Public Prosecutions. In practice, referrals to the DPP have been rare. In the last ten years there has been one prosecution which related to the breach of the incidental advertising provisions.

As part of the review, both the Department and the Minister have promised to expand the range of sanctions available to the Broadcasting Tribunal, citing the hefty fines available for breaches of the *Trade Practices Act*, as an example of the types of penalties that might be available. We may be left with the curious position where the Tribunal is able to revoke a licence but must, for constitutional reasons, go to the Federal Court to impose a fine.

More curious perhaps, is DOTAC's strong opposition to the idea of pre-notification to the Broadcasting Tribunal of ownership transactions, particularly as a number of commissioners at the Trade Practices Commission, notably Professor Brian Johns, believe that the *Trade Practices Act* would work a lot better if there was a similar requirement in relation to takeovers.

Before the government styles the new broadcasting act on the *Trade Practices Act*, they would be wise to take a closer look first at the failings of the *Trade Practices Act* in dealing with the media industry, and secondly, at the implications of adopting this regulatory structure for the multifacetted role of the Broadcasting Tribunal.

Jim Stevenson of Buddle Findlay on competition law and the New Zealand communications market

The policy rationale

The last four years have seen comprehensive reform of the regulatory environment of the New Zealand communications sector. Communications markets in telecommunications, broadcasting, radio frequency rights and postal services are now among the least regulated markets in OECD countries. Deregulation has also been manifested in the fundamental changes that have been made to the competition law framework of the communications sector.

It is useful, first, to examine briefly the reasons for, and scope of, reform. The underlying aim, common to many Labour government initiatives in a variety of industries, was to promote greater efficiency in the use of resources in the New Zealand economy. More particularly for the communications sector, the aims were twofold: to achieve greater consumer choice and economic growth, and to promote social objectives more efficiently.

Like many OECD countries, the New Zealand communications sector had been characterised by substantial government intervention. government ownership of trading departments or organisations, which also carried out advisory and regulatory functions for the government, was prevalent. The protection of those agencies from competition mainly through restrictions on market entry was also typical.

The principal instrument of change has been the removal of regulatory barriers to entry for virtually all communications markets, the corporatisation of trading departments as companies under the *Companies Act* 1955 and the transfer of non-commercial functions to the New Zealand Ministry of Commerce. A property rights system has been introduced for the management of the radio spectrum.

Moves have followed to privatise the newly formed state-owned enterprises. Telecom Corporation of New Zealand Limited has been sold. The election policies of the new National government have hinted at the privatisation of at least part of Television New Zealand (TVNZ) and the commercial stations of Radio New Zealand (RNZ). There is also the prospect of privatisation of New Zealand Post Limited should the residual protection of letter post services be lifted.

Management rights and licences for radio frequencies are being sold allowing for frequency management by private sector organisations within defined conditions.

Overseas ownership in telecommunications and radio spectrum rights has been permitted, and the new government has proposals to liberalise, substantially, foreign ownership controls in broadcasting.

The legal framework

The consequence of these policy decisions is that the former legal framework for communications services has disappeared. Departmental control legislation, together with often impenetrable regulations and departmental administrative decision-making as well as licensing systems have given way to a framework relying on general competition and consumer legislation. These industry specific statutes and regulations which have been introduced mostly have the fundamentally different purpose of facilitating competitive entry into communications markets. Social policy objectives, notably in broadcasting, have been implemented in a more targeted way or in a considerably modified form.

These sweeping changes have meant that legal practitioners in the communications services markets need to become more versed in New Zealand's competitive law under the *Commerce Act* as well as commercial and administrative law issues. Indeed there is a greater diversity of participants in these markets and an increase in commercial activity leading to a demand for specialist legal services. Below is an outline of the new framework and some of the issues which are emerging.

The Commerce Act 1986

Probably the most problematic inheritance of government intervention has been highly concentrated market structures in the communication markets and especially the prevalence of dominant firms. Each of the State-owned Enterprises (in one case now a privatised company) such as Telecom, TVNZ, RNZ and NZ Post either are dominant or have considerable influence in their primary service markets and have the potential for dominance in others. The characteristics of those markets and New Zealand's small size means that, despite the removal of regulatory barriers, dominance will remain a key policy issue.

Misuse of a dominant position, or the potential for misuse of that position is addressed in three ways under New Zealand's general competition law, the *Commerce Act 1986* (as amended in 1990). Part II of the Act includes provisions prohibiting the misuse of a dominant position. Part II (as in force on 1 January 1990) prohibits acquisition of assets or shares which result in dominance or strengthening of dominance. Part IV provides for the imposition of price control (under current policy seen as a last resort) in conditions of limited competition.

These general constraints are underpinned by supplementary measures specific to the industry which are principally concerned with facilitating the prospects of entry into the newly deregulated markets. While

[illegible] debate will continue over the [illegible] constraints, the New Zealand [illegible] approach to date has been to [illegible] direct intervention procedures [illegible] tip the balance in favour of [illegible], while closely monitoring the need [illegible] intervention. Industry specific [illegible] and related issues are discussed [illegible]

Telecommunications

The *Telecommunications Act 1987* and the 1988 amendments have been the vehicle for the phased liberalisation of customer premises equipment and telecommunication services of all kinds. Other principal features of the Act include assistance to [illegible] providers who require access to land and rights of way, regulatory powers with respect to international telecommunications services. The *Telecommunications (International Services) Regulations 1989* govern public switched telecommunications services or leased circuits between New Zealand and other countries. These are designed in effect to counter overseas monopoly service operators deriving the benefits of competition in New Zealand. As a result of a pre-privatisation review of the regulatory environment the *Telecommunications Amendment Act 1990* (inter alia) introduces regulation making powers to impose information disclosure requirements on Telecom. The draft regulations require Telecom to publish information on the prices, terms and conditions under which certain prescribed services are supplied. Telecom is further required to prepare separate financial statements for its [illegible] regional operating companies to promote transparency in their operations.

Broadcasting

The *Broadcasting Act 1989* essentially removed most regulatory barriers to entry in broadcasting and supplemented 1988 legislation restructuring the Broadcasting Corporation of New Zealand into two distinct state-owned enterprises for TV and radio. The Act also implements a number of social policy objectives. It maintains a regime of minimum behaviour standards in broadcasting administrated by the Broadcasting Commission to fund amongst other things New Zealand content and minority programming from the New Zealand Public Broadcasting Fee. The essence of the scheme is to maximise the benefits of public funds by competitive bids for those funds in preference to quota arrangements.

No special legislative or regulatory measures have been seen as necessary to enhance the ability of enterprises providing competing services to TVNZ and RNZ.

They are subject to the *Commerce Act* in relation to any misuse of dominant positions and their business acquisitions. A number of statutory privileges and disadvantages of the former BCNZ were nevertheless abolished under the 1988 and 1989 legislation. Moreover the "bottleneck" transmission facilities of the BCNZ were separated into a separate TVNZ subsidiary company, Broadcast Communications Limited, which has given undertakings to government concerning the arms length character of the transmission services it provides as between TVNZ and alternative television broadcasters.

Radiocommunications

The key to entry into many telecommunications and broadcasting markets is radio frequencies. An administrative first come first served licensing system founded largely on the government telecommunications monopoly and warrant restrictions on broadcasting was clearly inadequate and abolished under the *Radio Communications Act 1989*.

The Act provides for the establishment of new markets in radio frequencies through the creation of 20 year management rights. It has been government policy that where surplus demands for such rights or licences exists they will be tendered. Residual licensing of frequencies for other telecommunications purposes (other than tendered areas) are also administered flexibly.

'The key to entry into many telecommunications and broadcasting markets is radio frequencies'

In order to guard against the concentration of market power in downstream telecommunications and broadcasting markets, acquisitions of frequency rights and licences are treated as business acquisitions under the *Commerce Act*.

In its new jurisdiction the Commerce Commission has been required to grapple with several contested rights acquisition proposals and to define complex downstream markets. The growth of secondary markets in frequency rights will pose additional competition issues for the Commerce Commission.

It is perhaps ironic that one of the oldest form of communication, the letter post, remains subject to statutory protection under the *Postal Services Act 1987* although the scope of the monopoly has been modified under the 1990 amendment Act. Prohibitions on entry and ambiguity over entry into certain, services markets has nevertheless been removed. The 1990 amendment Act has also introduced information disclosure requirements to promote transparency between NZ Posts protected services operations and its unregulated operations.

Conclusion

Actions taken under the Commerce Act and the number of acquisition proposals determined by the Commerce Commission suggest that competition law in communications services will be an active jurisdiction. It is vital that the law continues to evolve to facilitate rather than hinder commercial growth in the sector.

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