

Pacific Rim Report: Telecommunications Structure and Development in Malaysia

Gerald Wakefield reports on Malaysia's system of telecommunications regulation

Historical Perspective

Malaysia is a federation of Peninsula Malaysia and includes the States of Johore, Kedah, Kelantan, Malacca, Negri, Sembilan, Pahang, Perang, Perak, Perlis, Selangor, Terengganu (referred to as "West Malaysia") and the States of Sarawak and Sabah (referred to as "East Malaysia"). Diverse political history has left numerous legal jurisdictions which are now being replaced by Malaysian Acts applying to all States. Nevertheless, by virtue of its historical background, the legal system of Malaysia is steeped in English legal tradition and philosophy.

There is equal protection under the law for foreigners and foreign-owned companies and the court procedure is very similar to that which exists in England. Appeals to the Privy Council from the Supreme Court of Malaysia were abolished in 1985. Commercial disputes may be resolved by arbitration conducted either ad hoc or under the auspices of the Regional Centre for Arbitration in Kuala Lumpur, with rules based on the UNCITRAL model. In 1986 Malaysia gave effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Development of Telecommunications

Before World War II, telecommunications services were introduced into Malaysia to provide links for the various tea and rubber estates and tin mines. Since the early 1950s a network linking the main towns has been installed. The desirability of a central role and programmed growth of the telecommunications infrastructure was recognised by the Government and reflected in the allocation for the third Five Year Plan (1975-1980), where a 200 percent increase in financial spending was committed compared with the previous five years.

The telecommunications development in Malaysia is well illustrated by a

recurrent advertisement in *UTUSAN MALAYSIA*, a leading Malay language newspaper. This paper regularly carries an advertisement depicting a TABIB, a traditional practitioner of Malay medicine and sex therapy, advertising his services which purport (there is no TPA section 52 equivalent in Malaysian law) to guarantee enhancement of the male sex life and general health. There is nothing peculiar about this advertisement except the TABIB is holding a cordless phone to his ear. Is this, one asks, the new technological age image of the traditional medicine man? Any sexually impaired male from any country may now contact the TABIB instantaneously, at any hour for advice (the author has the telephone number should any reader feel the need to interconnect).

This is the second article in the Bulletin's series on communications developments in the Pacific Rim. As a telecommunications law practitioner, Gerald Wakefield is one of a growing number of Australians providing consultancy services to the expanding communications sector in South-East Asia and Indo-China. This article provides an excellent overview of Malaysia's telecommunications development and regulatory structure.

This emphasises the important role of modern telecommunications in the day-to-day affairs of Malaysians. In the streets of Malaysia it is now possible to see hawkers raking orders from their regular customers through the cellular mobile phone network, and as in many other Malaysian cities, it is not uncommon to see businessmen in Kuala Lumpur equipped with hand or car phones.

The legislative framework for the telecommunications infrastructure in Malaysia consists of the Malaysian *Telecommunications Act 1950* (as revised in 1970 and 1985) which gives the Government the exclusive privilege of establishing, maintaining and working telecommunications in Malaysia. In practice, this is through ministerial determination on advice from Jabatan

Telecom Malaysia (JTM), the regulator, and through a licensing system in telecommunications, radio communications and satellite communications.

The infrastructure is therefore deregulated in the sense that if the Minister can be persuaded that a service is required in Malaysia, he has the power to authorise such a service with whatever conditions he chooses in the licence. So far, the Minister through JTM has not authorised a second terrestrial carrier.

The Monopoly Carrier

Telecom Malaysia (formerly STM) is the monopoly carrier for terrestrial based voice and data telecommunication services in East and West Malaysia and for international services. Telecom Malaysia operates under a licence to establish, maintain and work a telecommunications system providing domestic and international voice and other services to the public for a 20 year period which is renewable. The carrier under the licence must also permit interconnection to its system from other operators.

An essential feature of the regulatory framework is the mandatory nature of community service obligations. These are provided for not only in the operating licence of Telecom Malaysia, but also in the 1985 amendments to the *Telecommunications Act 1950*.

The shares of STM were listed on the Kuala Lumpur Stock Exchange in 1990. In September of that year 23.8% of the corporation's issued paid up capital was floated. In accordance with the Malaysian Government's policy of enhancing indigenous equity stake, Telecom Malaysia reserved some 30% of the issued shares to Bumiputera related institutions and individuals, 5% to foreigners and 15% to Telecom Malaysia's employees. The Annual Report of Telecom Malaysia in 1990 indicated that the Government of Malaysia holds the majority of 76% of Malaysian shares, individuals from Malaysia own 3.3% and foreigners including Singaporeans 3.7%.

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The Regulator

The independent Government regulator Jabatan Telekom Malaysia (JTM), was established as part of a restructuring scheme whereby the Government retained the regulatory functions. The legislation states the functions of this body as:

- To regulate the conduct of telecommunications;
- To regulate the running of telecommunications services;
- The establishment of standards and their enforcement;
- To regulate the use of radiofrequency spectrum;
- To regulate the national use of the geostationary-satellite orbit.

As well as these regulatory functions, JTM has other functions which include government representation at international fora, the promotion of consumers' interests in respect of price, quality and variety of services, the encouragement of major users to establish business in Malaysia and the promotion of research.

In discharging these duties JTM is required to consider efficiency and economy, satisfaction of all reasonable demands, encouraging the world wide development and expansion of telecommunication services and the provision of domestic and overseas services at rates consistent with efficient service.

Ministerial Powers

In addition to the powers conferred on JTM, the statute gives the Minister wide regulatory powers. These relate to tariffs, conditions subject to which data may be transmitted and equipment used, the necessary precautions for preventing improper interception or disclosure of data, the form of licences and the manner in which applications for licences are made, the prescription of terms, conditions and restrictions on licences (and subject to which licences are granted), the fees payable for any licences, the working and use of radio communication equipment and the licences of dealers in the sale or transfer of radio communication equipment.

Licences

The Minister retains the power to establish, maintain or work a telecommunication in any part of Malaysia, and, subject to the approval of the Land Authority, a licence

may extend to authorising the licensee to place, lay, carry or maintain any posts, cables or wires for the purpose of the telecommunication. A licence may be revoked at any time on the breach of any of the conditions or in default of payment of fees.

In addition to terrestrial services, the Minister retains the power to licence the establishment of any radiocommunication station or the installation or working of any radiocommunications apparatus in any place in Malaysia or on board any local vessel, or local aircraft or in any vehicle including satellites.

Enhanced Services

Even though Telecom Malaysia is the monopoly carrier, it has been possible for some years for private organisations to operate within a liberalisation policy. For example, customers may own and maintain their own terminal equipment, and the maintenance of PABX or other terminal equipment may be carried out by private firms. Paging services are provided directly by a number of private companies. This liberalisation policy now extends to other value added services. In Malaysia, the determination of what is a value added service, which is not defined in the legislation or regulations, is somewhat ad hoc, although so far, in practice, this approach has worked.

Cellular Mobile

In the areas of cellular mobile, there is competition within the system. Malaysia's first cellular mobile system called ATUR (Automatic Telephone Using Radio) is operated by Telecom Malaysia, and is based on the Nordic mobile system and Ericsson is the provider. By the beginning of 1986, Malaysia was the first country in Asia with a fully automatic nationwide cellular mobile telephone system. It provided coverage to 329,749 square kilometres of country using 86 radio base stations and a coverage of 95 per cent of the population with 68,000 subscribers. At the end of Phase 4 development there will be capacity for 85,000 subscribers. In 1988 a 900 MHz CMTS was installed to complement the ATUR 400 MHz System. Celcom is in competition with Telecom Malaysia's nationwide NMT 450 MHz services with a predominantly urban E-TACS 900 MHz service with a subscriber base of 60,000.

Value Added Services

In the value added services market, there are several suppliers. One example of such a service is the network offered by Information Networking Corporation Snd Bhd (INC).

INC was incorporated in February 1990 with a paid up capital of \$11 million, with the Tabung Haji (the organisation that acts as a bank for pilgrims journeying to Mecca) holding 40% and the remaining 60% being equally shared by Gelombang Udara Smd Bhd and Modcomp It(m) Snd Bhd. INC has spent some \$32 million Malaysian dollars on establishing its infrastructure of which some 80% is investment in equipment. The Tabung Haji head office building in Kuala Lumpur acts as the central communications hub for INC which has nodes in every State including East Malaysia. All are linked through Telecom Malaysia's existing Network. In order to gain international access, INC has established a link via the AsiaSat space segment into Hong Kong Telecom International, from which INC gains worldwide access to databases and networks. INC is online with the Kuala Lumpur Stock Exchange and through the Hong Kong link has access to information from all of the world's stock exchanges. INC also offers an EDI service and is associated with SNS in Singapore.

Malaysia has also decided to establish its own regional satellite facilities for South East Asia. A memorandum of understanding for the manufacture and launching of the MEASAT (Malaysian East Asian Satellite) Satellites has been signed for launching before 1 January 1995. The memorandum was signed between Binariang Snd Bhd, the Malaysian owner, Hughes Communications International Inc, the satellite manufacturer and ArianeSpace, the European launch organisation. According to the Malaysian press, the project is estimated to cost \$M300 million and is designed as a regional satellite system with footprint covering countries in South East Asia only.

Binariang has also signed a Satellite Users Agreement with four companies in the region including Philippines Long Distance Telephone Company (PLDT), Malaysia's Uniphone, Communications and Satellite Services and World Sport and Entertainment of the US.

Malaysia is growing strongly. The Bureau of Transport and Communications Economics in 1991 estimated its growth rate in gross domestic product at 7.7% in

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Developments in technology will change the face of broadcasting service delivery over time. It is highly likely that within a few years new technology will make it possible to accommodate more services of comparable or better technical quality in the existing spectrum allocated to broadcasting services.

While the planning process is pivotal in the release of broadcasting services band licences, the new Act is otherwise technology-indifferent and concerned principally with the service, not its delivery. That distinction is reinforced by the fact that the technology licences for broadcasting transmitters will be issued under the *Radiocommunications Act 1983*, not the *Broadcasting Services Act*. To streamline these spectrum licensing arrangements, the Minister is expected to provide appropriate delegations for the ABA to issue the relevant radiocommunications licence.

The ABA will arrange for broadcasting channels not immediately required for commercial national or community services to be made available for other uses for a fixed period of time determined by the ABA. At the end of that period the spectrum so allocated will once again become available for allocation to broadcasting.

Licences for commercial broadcasting will generally be allocated using a price based allocation system. Thus, the present lengthy and litigation-prone commercial licence grant procedure will be replaced by a simple auction or sale. In single markets, however, the new Act requires the ABA, on request, to allocate to incumbents licences equivalent to present supplementary licences where there are at least two commercial radio channels available.

I expect the ABA will approach these planning tasks in several stages so that it can quickly make licences available in the areas of greatest need. This may involve initial consideration of priorities and planning based on current work and the results of recent market studies, coupled with direct public consultation in the relevant markets.

At the same time the ABA will likely open the way for a more comprehensive but slower review of planning and service development needs. This will encompass the future planning framework and as far as possible match the distribution of channel capacity with identified demand and the planning criteria set out in the Act. This will involve reconsideration of the planning assumptions that have been used for the past few years.

Commercial viability

The Parliament has also decided that the much-litigated and difficult to determine concept of commercial viability should be

discarded, and the issue approached in a different way. The ABT has, in the past, experienced quite a lot of difficulty in deciding whether incumbent radio licensees could remain commercially viable in the face of competition. No matter which way its final decision went, a disappointed party either became a litigant or a strong critic of the ABT, or more usually both. The ABT became a whipping post virtually every time it handed down a decision.

Market forces

The Parliament has decided to let market forces and risk assumption, steered of course by frequency planning, determine viability questions in future. The price-based allocation system will let an applicant bear the burden of its own judgment about the price it is prepared to pay for a licence. The Minister might give the ABA directions about actual reserve prices to apply to individual licences, and the ABA, for its part, might, in the absence of any such direction, set a reserve price. But that consideration apart, potential licensees will in future bear the risk themselves of pitching a price bid at a level that is economically viable for them.

"Beauty" or "Merit" contests will be no more, community licences aside; viability of the proposed service or existing services will not specifically be a factor to be taken into account in the licensing process, (although concepts of efficiency and competitiveness will be considered at a macro level in the planning process); a licence may only be refused or cancelled because the licensee is unsuitable.

All of this represents a marked departure from that which the industry has become used to, both substantively and procedurally. There are many challenges ahead for us all, and not least for the ABA in deciding its initial planning priorities.

Summary

In summary then, the Parliament has determined that the broadcasting industry has reached a stage of its development that is susceptible of lighter, less intrusive regulation than has been the case to date. The radio industry is obviously thought to be at a point where incumbents no longer need the protection of the commercial viability provisions, although incumbents in single markets, as something of a quid pro quo, will automatically be eligible for second licences.

The television "free to air" industry

remains protected from further competitors for another five years, but pay TV could complicate that market in the not too distant future.

Planning will be more public, licensing will be streamlined, regulation will shift to a different, internal emphasis, and technological developments will be capable of much easier accommodation within the regulatory regime than is now the case.

The new Act, it can be said, has the marked advantage over its predecessor of being based on a vision — a vision of the future that tries to serve the public interest in all its dimensions — social, cultural and economic — while endeavouring to meet the present and future needs of the industry.

The new Authority will, I am sure, play its part in all this. It will be a business-like and professional organisation, doing its best to get in and help the industry where appropriate, but not afraid either to stand outside it or take firm regulatory action when that is clearly called for. The experiences of the past make it obvious that such action may be necessary from time to time but the Authority, in sympathy with its charter and the spirit that underpins it, will strive for balance in all things.

Peter Webb is the Acting Chairman of the Australian Broadcasting Tribunal.

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1991/1995. This compares with a figure of 4.2% in Australia. The Bureau has also estimated that Telecommunications Expenditure Forecasts for Malaysia will increase by an annual average rate of 17.1% from 1990 to 1995. This compares with 10.7% in Australia. The structure of the Malaysian industry appears to work extremely well with a privatised monopoly terrestrial carrier and strong competition in other services such as mobile, paging and value added services. Should the launch of the MEASAT satellite of services proceed in 1994 as planned, Malaysia will have positioned itself to become one of the centres for telecommunications development in South East Asia and will have established the infrastructure for its further development and industrialisation. Malaysia is planning to be a fully industrialised society by the year 2020, and is well on the way to achieving this goal by creating a state of the art telecommunications infrastructure.

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