regulator, idiosyncratic definitions of anti-competitive behaviour, which introduce regulatory uncertainty which is particularly harmful where industry boundaries are blurring, as in broadcasting and communications. On the other hand, **economy-wide competition** laws enforced through the courts produce reactive results, allow an incumbent to burden new entrants with litigation (as in New Zealand), and hence allow market failure. The "Hilmer Hybrid" is a specific scheme for de-regulating industries, and sets up a common policy body and a common enforcement agency. It is capable of accommodating industry-specific legislation - which can deal with specific issues such as access and interconnection and stronger consumer protection for the telecommunications industry, within general principles applying across all de-regulating industries.

Peter Waters of Gilbert & Tobin argued that a universal regulator is a "dangerous concept", and the idea of a universal access regime applying across the whole economy "elevates a tool for policy to policy itself". Waters argued you should always start by asking what are the public policy considerations which lead you to take up the tool? If you want to avoid duplication of infrastructure, a thorough-going access regime is the answer. But if you want a diversity of facilities, you would be better to allow private operators to have an incentive to build them, by allowing private closed networks.

In Waters' view, the reforms introduced by the Telecommunications Act had yet to run their course, competition still needed nurturing, and it was premature to rely on trade practices principles alone. The answer was to have a separate sector of the NCC/ACC structure to deal with communications competition and interconnect, and able to manage the complex relationships between the parties to keep competition working.

Now

Submissions are now in to the government's review of telecommunications policy. A foretaste of the next paradigm may have been given by the Minister's statement on 24 November 1994, mandating open non-discriminatory access to broadband capacity on cable networks, while allowing pay tv network providers to control access (and hence share revenue from the content) to pay tv channels for at least two years.

But the questions canvassed at the conference are still largely open.

The conference "Telecommunications After 1997: Carriage, Convergence, Consumers" was hosted by the Communications Law Centre and sponsored by Gilbert & Tobin.

The case for competition in satellite delivered telecommunications services

Gregg Daffner, of PanAmSat, argues.

As Australia embarks on its eagerly awaited telecommunications policy review, an issue of fundamental importance is the extent to which competition in the provision of domestic telecommunications services via satellite should be authorised. The review of telecommunications policy provides the Australian Government with an opportunity to introduce genuine market driven consumer choice in the provision of telecommunications services and extend Australia's leading role as a progressive free trading advocate in the Asia Pacific region.

These issues are of particular relevance in the light of the recent launch by PanAmSat of its PAS2 satellite which services the Asia Pacific region and the impending launches of APSTAR2 and ASIASAT2. PanAmSat is the world's first private international satellite system operator with nearly 300 customers in over 70 countries.

The review by the Government of post 1997 telecommunications policy comes at a time when the Government is deciding upon its response to a request from PanAmSat to provide certain limited telecommunications services within Australia. In July 1993, pursuant to section 106 of the Telecommunications Act 1991 *("the Act")* PanAmSat requested the Minister for Communications to direct AUSTEL to authorise the immediate supply by PanAmSat of certain telecommunications services within Australia for broadcast programs and for private telecommunications networks. The 2 general carriers, Telecom and Optus, have voiced their opposition to PanAmSat's request.

PanAmSat did not challenge Optus' exclusive right to provide until mid 1997 satellite facilities for subscription television nor did it seek to compete with the general carriers' reserved rights regarding public switched telecommunications traffic. In the lead-up to 1997, PanAmSat's request offers the Government the opportunity to fulfil its self imposed mandate to establish the premier telecommunications infrastructure in the region.

The Carriers' Reserved Rights

Under section 92 of *the Act*, the general carriers (as the primary providers of Australia's public telecommunications infrastructure and networks) enjoy certain reserved rights until mid 1997. These reserved rights include the provision of domestic telecommunications services via satellite. Only a general carrier or a person acting for or on behalf of a general carrier may supply domestic telecommunications services by the use of satellite-based facilities. Australian customers can only use private satellites if services are provided through Optus or Telecom. The Minister is, however, empowered under section 106 of *the Act* (after consulting with each general carrier) to provide AUSTEL with directions to authorise the provision of reserved services.

The alternative to obtaining a direction from the Minister would be for the satellite operator to provide domestic telecommunications services for or on behalf of a general carrier under section 96 of *the Act*. However, the competitive benefits of direct customer access to a satellite operator would be significantly diminished for the following reasons:

- any agreement with a general carrier would necessarily increase the price of satellite services and derogate from the ability to provide competitively priced services;
- PanAmSat's experience is that customers, particularly those in the broadcasting industry, prefer to deal directly with facilities providers (eg: the ABC and the Nine Network in their dealings with PALAPA in respect of their Asian services);
- regulatory constraints affecting a general carrier's pricing and other terms of supply restrict a satellite operator's ability to provide services competitively;
- long term contracts with customers which operate beyond 1997 are usually contemplated.

Ministerial Authorisation

Section 106 of the Act gives the Minister the authority to authorise provision of domestic telecommunications services by a satellite operator other than a general carrier if doing so "will not erode unduly the practical value of the general carriers rights". The decision process under section

106 of the Act is in many respects the reprise of an age old conflict: consumer interests versus carrier rights. Limited liberalisation of the competition rules would not only serve the best interests of the Australian public but would also promote the pro-competitive policy goals identified as the general objectives of the Act including:

- achieving optimal rates of expansion and modernisation for Australia's telecommunications infrastructure and networks;
- promoting the introduction of new and diverse telecommunications services;
- enabling all sectors of the Australian telecommunications industry to participate effectively in Australian and overseas telecommunications markets on a commercial basis and making Australia more attractive as an international telecommunications centre;
- promoting the development of other sectors of the Australian economy through the commercial supply of a full range of modern telecommunications services at the lowest possible prices.

effect on competition

Competition in the provision of domestic telecommunications services via satellite will produce a variety of benefits including rapid introduction of advanced satellite technologies, wider regional coverage and price competition.

Such benefits enhance the efficiency, viability and coverage of public broadcasters and RCTS remote services, educational and health services, services for government and private corporate users. Satellite service competition will also enhance Australia's attractiveness as an international hubbing centre, promote the development of hybid domestic/international networks and increase Australia's competitiveness in the Asia-Pacific region, not least by matching New Zealand's existing competitiveness.

Liberalisation of regulations governing use of satellite-based facilities will also encourage the development of private networks in Australia. Various Australian telecommunications users have acknowledged that the development of VSAT private network services have been severely retarded because of Optus' pricing policies. Liberalisation would also produce consequential Australian business development opportunities for "spin-off" industries (eg: the manufacture of earth stations, VSAT and antenna equipment).

Perhaps the most cogent reason for authorising the competitive domestic telecommunications services via satellite is that it will allow customers to use a single satellite for a hybid domestic/international network. If a customer has locations within Australia and outside Australia to communicate to, it currently would need to lease capacity from Optus for domestic coverage as well as an international system for international connectivity. This is both costly and inefficient. Ministerial authorisation under section 106 of competitive domestic satellite services would enable the supply of domestic and international connectivity by the same satellite at a single price and would force Optus to make available to customers a "fair deal" if Optus hopes to keep this business.

Against this background must be balanced the possibility of "unduly eroding the "practical value" of the general carriers' rights". In assessing the effect on the practical value of the general carriers it should not be sufficient for the carriers to claim some anticipated theoretical harm, such as a threat to proposed future VSAT private network services, but rather they need to show a real and substantial threat to services currently provided by them.

The Act provides little guidance as to how much "eroding" would constitute a violation of the general carriers' rights. PanAmSat has, however, confronted similar criteria in the US Government's analysis of whether PanAmSat's operations would cause "significant economic harm" to Intelsat under Article XIV(d) of the Intelsat Treaty. The US Government concluded that a prohibition on PanAmSat's provision of public switched telephone services (since repealed) would effectively shield Intelsat's core revenues from competition and on this basis authorised PanAmSat's operations. In recent years, Intelsat has admitted that competition from PanAmSat and other satellite systems has in fact not resulted in a loss of traffic or revenues and rather has led to greater market stimulation and an increase in Intelsat traffic and revenues. It is likely that similar considerations will apply to Telecom and Optus particularly in view of the limited competitive services to be offered by PanAmSat. A host of Australian companies and trade associations support an affirmative decision by the Minister.

With regard to broadcasting services, it should be noted that Australian broadcasters already have been granted special status under the existing regime. Broadcasters are entitled to install or maintain terrestrial line links used for supplying broadcasting services despite the general carriers' reserved rights (section 99 of the Act). It appears anomalous that no such exemption has been allowed with respect to the use of satellite-based facilities for such purposes. So much for technology neutral telecommunications regulation.

Finally, the recently reported decision by Optus to "park" its B3 satellite until there is sufficient demand to warrant it being commissioned into service would seem to demonstrate that there is unlikely to be any undue erosion of the general carriers' rights. It appears incongruous for PanAmSat not to be authorised to provide a satellite service for which there is customer demand when Optus has chosen not to make additional satellite capacity available.

The issue is a political one

The issue therefore is not a question of legality - it is a political one. On the one hand there are the carriers (possessing extraordinary political clout) fighting to maintain their reserved rights. On the other hand is customer choice and competition. A stalemate is a win for the carriers because no action by the Minister preserves the status quo.

In this context it is interesting to note the words of Optus' Chief Executive Officer, Bob Mansfield in 1993: "There is no doubt that competition in Australia has already brought levels of customer focus, service and price reductions not previously seen in the telecommunications industry in this country. Overseas experience has shown that the introduction of competition leads to service improvements and price reductions for customers, and reduced market share but improving revenues for the incumbent carrier" (Optus' 1993 Annual Report).

There is no doubt that the introduction of competition in the supply of domestic satellite services will also lead to enormous benefits both to the Australian telecommunications industry and Australian customers. Therefore, Dear Minister, please grant our request so that we can get on with it.

Gregg Daffner is PanAmSat's Vice President for Market Development and Regulatory Affairs. Prior to joining PanAmSat, he was Director for International Policy with the National Telecommunications and Information Administration US Department of Commerce where he was responsible for, among other activities, promulgating US satellite policy. In a previous life he was a film maker.