COMPETITION POLICY AND COMMUNICATIONS CONVERGENCE

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I. INTRODUCTION

This paper argues that competition policy as it relates to converging technologies cannot be considered in a vacuum, and that it is critical to consider wider consumer issues such as consumer protection and complaints mechanisms, pricing, access to services, quality of service, content regulation and technical regulation when reforming competition law as it relates to the communications industry.

A brief view of the current regulatory structure is conducted, a critique of the Report (the "Hilmer Report") by the Independent Committee of Inquiry into National Competition Policy (the "Hilmer Committee") is undertaken, a review of the meaning of public interest and public benefit is done, specific issues peculiar to the communications industry are raised and, finally, a regulatory framework for the communications industry is proposed. References to the experience in New Zealand, the United Kingdom and the United States are made where relevant.

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A. Competition Policy and the Communications Industry

Competition policy "seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives".[1] Competition per se is said to "offer the promise of lower prices and improved choice for consumers and greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole".[2] There is a policy tension between competition policy and consumer protection in that competition policy usually advocates that the market determine desirable outcomes based on the general "deregulatory" nature of competition law, whatever that may mean,[3] whereas consumer protection and associated public interest considerations usually rely on some form of government intervention to ensure that consumers and certain sections of society are not disadvantaged by market conduct. Consumer protection and public interest considerations fit neatly into the accommodation of social objectives referred to in the above objective of competition policy. Theoretically at least, competition policy as stated in the Hilmer Report recognises that concerns other than economic efficiency need to be included in formulating effective competition policy.

One of the greatest challenges for competition policy in Australia in the next decade will be coping with the issue of converging communications technologies.

Balanced against the goal of competition policy and the concept of competition are the objectives of regulating the communications industry, which can be summarised as follows:

- ensuring democracy - that is, ensuring access to diverse ideas, information and views, which is critical to ensuring informed decision making by the community;
- encouraging information equity in terms of free speech and universal access to essential information;
- ensuring accountability and scrutiny of governments, industry and the media;
- promoting cultural identity;
- increasing flow-on effects such as competitiveness, efficiency and productivity in other industries; and
- providing profits and employment.[4]

To achieve this mix of objectives, current regulatory policy focuses on three areas:

- how communications are delivered (technical regulation);
- what is communicated (content or programming regulation); and

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1 Independent Committee of Inquiry, *National Competition Policy* (the "Hilmer Report"), AGPS (August 1993), p xvi.

2 *Ibid*, p 1.

3 W Pengilley, "Deregulation or Re-regulation" in SG Corones (ed), *Competition Policy in Telecommunications and Aviation*, Federation Press (1992) pp 111-15.

4 M McAuslan, "Trade Practices and the New Communications Industry", presented at the Annual Trade Practices and Consumer Law Conference, 9 October 1993.

- who can own or control the means or content of communication (ownership and control regulation).

Regulation to date has been organised on an industry basis, with separate regulations for broadcasting, telecommunications and radiocommunications. Each area has been fundamentally affected by recent events and recent changes to the relevant legislation, broadly intended to introduce self-regulatory and pro-competitive principles and to acknowledge the reality of convergence. It is the issue of ownership and control, including vertical integration of corporations involved in the communications industry, which is most relevant from the competition policy perspective.

Key questions are: should economic efficiency be the only - or primary - goal in regulating the markets created by converging technology and converging industries? Is competition for competition's sake either achievable or desirable? Are the objectives of regulating our communications industry under the industry-specific legislation compatible or consistent with competition policy?

Competition policy issues facing Australian regulators today are not new. Many countries, in particular the United States and the United Kingdom, have been addressing these issues since the 1970s, although the emergence of a global market in converged services is new. Communications policy in Australia is at a crossroads as reflected in the number of current inquiries initiated by Government into issues associated with convergence.

At the time of writing there were four separate committees and inquiries into all aspects of convergence from industry development to copyright - the Audio Visual Taskforce, the Broadband Services Expert Group, the Communications Futures Project and the Copyright Convergence Group - all of which are due to report some time in 1994. The Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure is also currently conducting an inquiry into telecommunications infrastructure.[5] In addition the Minister for Communications and the Arts has recently announced that a review of post 1977 telecommunications policy and regulation will begin early in the 1994/95 financial years.[6] Further, the *Broadcasting Services Act* 1992 (Cth) requires that the Minister conduct a review prior to July 1997 of the television broadcasting industry to assess the benefits of permitting more than three commercial television broadcasting services in each licence area.[7] The Act also requires the Minister to conduct a review prior to July 1997 of the current condition that subscription television broadcasting licensees (that is, pay TV licensees), whose services include a service which is devoted predominantly to drama, must ensure that 10 per cent of its program expenditure for that service is spent on new Australian drama.[8] The legislative prohibition on advertising on pay TV expires in 1997.[9] These legislated

5 See Appendix 1, which provides a brief outline of each of these committees and inquiries.
6 M Lee, "Telecommunications Policy Review Set to Begin", Media Release, 31 May 1994.
7 Section 215(1).
8 Section 215(2).
9 Section 10(1).

review mechanisms and time frames emphasise the evolving nature of the new broadcasting regime.

The impetus for the above-mentioned inquiries and reviews has been fuelled in part by the approach of 1997 when the Federal Government intends to end the legislated telecommunications carrier duopoly. Further, as the reality of pay TV is with Australia for the first time, so are regulatory issues associated with vertical and horizontal integration of corporations involved in service delivery and programming. With one minor exception,[10] Australia does not have any communications industry-specific legislation impeding cross-ownership or other alliances between such corporations, in contrast to the position in the United States and the United Kingdom, for example (which are considered further below). However, there is a restriction on cross-ownership between the two Australian satellite pay TV licensees.[11]

The formation of strategic alliances between players in the telecommunications, broadcasting and computing sectors in Australia is part of a worldwide trend. Australian examples include the following:

- formation of the so-called Packer-Murdoch-Telecom (PMT) pay TV consortium;
- the acquisition by the Nine Network of 15 per cent in Optus Communications (the country's second telecommunications carrier), which apparently will give the Nine Network access to the Optus satellite and fibre optic network;
- the acquisition by Telecom of 10 per cent in the Seven Network;
- the recently announced strategic alliance between Telecom and News Corporation to pursue Asian investment opportunities in multimedia; and
- the recent report that Telecom and Microsoft have agreed upon the terms of providing a narrowband interactive on-line service.

Undoubtedly alliances such as these encourage rapid technological innovation and pass on significant benefits to the community in terms of choice of services. The desirability of these types of "public benefits" are consistent with the enunciated objects of the *Broadcasting Services Act*, the *Telecommunications Act* 1991 (Cth) and the *Radiocommunications Act* 1992 (Cth).

The most obvious competition law issues concern concentration of ownership (and therefore lack of diversity) as a result of merged entities and the potential for such corporations to abuse market power. The chief executive of one of Australia's newest entrants into the telecommunications marketplace, AAP Telecommunications Pty Ltd, recently flagged concerns about the issue of vertical integration at a major industry conference when he said:[12]

> If and when a decision is taken that Australia needs a broadband services network, the only way that we can and will derive maximum benefits is for it to be operated and controlled on the basis of a structural separation of carriage and content.

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10 *Broadcasting Services Act* 1992 (Cth), s 108.

11 *Ibid*, s 110.

12 B Wheeler, "Broadband Services: A Triumph of Technology Over Demand?", presented at ATUG '94, 2-5 May 1994.

Historically, content regulation has been viewed as the domain of broadcasting, and regulation of carriage of services has been perceived primarily as a technical standards issue. The ability to deliver services through different media - the phenomenon of convergence - poses a major challenge for policy makers as this traditional separation is dismantled.

B. Convergence

Convergence means that voice, data, text, image, sound and vision can all be carried on the same network whereas previously often different forms of delivery for these services was required.[13] Put simply, convergence means that different types of technology can "talk" to each other with little - or no - conversion steps needed to be taken to establish technical compatibility. The major force behind this compatibility is digitalisation:

> With digitalisation all of the media become translatable into each other - computer bits migrate merrily - and they escape from their traditional means of transmission. If that's not revolution enough, with digitalisation the content becomes totally plastic - any message, sound, or image may be edited from anything into anything else.[14]

"Convergence", "broadband services", "multi-media" and the "information superhighway" are expressions which refer to this breaking down of traditional boundaries between broadcasting, telecommunications and radiocommunications, computing and the entertainment industry. Historically, each of these sectors has been regulated separately and to a different extent, reflecting the various policy foci of government. Telecommunications, for example, is not subject to cross-ownership and control restrictions, whereas broadcasting is. Spectrum has only recently become a tradeable commodity and it, like telecommunications, is not subject to cross-ownership and control restrictions. The computing industry has never been subjected to a specific regulatory regime apart from copyright law and general trade practices law.

Telecommunications and broadcasting have different foci. The most obvious is that broadcasting is point to multi-point distribution whereas telecommunications is point to point distribution. Second, the traditional concept of broadcasting is one way communication whereas telecommunications is interactive or two way communication. Third, broadcasting is public communication whereas telecommunications is viewed as a private communication. Fourth, broadcasting has been traditionally content based whereas telecommunications is connectively based.[15]

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13 L Free, "Convergence and Communications Policy" in T Stevenson and J Lennie (eds), *Australia's Communication Futures*, Qld U of Technology (1992) p 93; and L Free, "Black Boxes or Interfaces", presented at Consumer Perspective on New Media, 9 March 1994.

14 B Johns, "Borderless Markets - Key Communications Challenge" (Oct 1993) No 12 *ABA Update* 5.

15 C Scott, "The How and Why of Broadcast and Telecommunications Networking", presented at ATUG '94, 2-5 May 1994.

In the face of this technological convergence the question for policy makers is the extent to which the resulting converged industries should continue to be regulated according to objectives designed for the separated industries.

II. CURRENT REGULATION

There are, in effect, three gateways to the communications market: the technology or delivery gateway; the programming gateway; and the customer or subscribed access gateway (eg the subscription management systems or encoding technology).

There are currently three industry-specific regulators for the communications industry: the Australian Broadcasting Authority; the Australian Telecommunications Authority (AUSTEL); and the Spectrum Management Agency (which regulates radiocommunications). The general regulator, the Trade Practices Commission also regulates the communications industry.[16]

Since the introduction of radio in 1923, the Government of the day has sought to limit the extent of interests that any one person or group can own or control in broadcasting services. It is questionable whether government regulation has in fact contributed to increased diversity or merely entrenched concentration of ownership of the media, both print and electronic services.[17]

Following is a summary of the current regulatory structure for each of broadcasting, telecommunications and radiocommunications, as well as an overview of the *Trade Practices Act* 1974 (Cth). Each piece of communications legislation contains stated policy objectives, which encompass economic as well as social goals.[18]

A. *Broadcasting Services Act* 1992

Traditionally, broadcasting services (free-to-air television and radio delivered by spectrum) were regulated on the basis of an overriding public interest test based on the limited number of channels made available on the spectrum (a maximum of six television channels could be allocated in an area without causing interference).

More recently, the High Court recognised the capacity of the broadcast media "to influence public opinion and public values".[19] Mason CJ in the political advertising case,[20] further develops this theme, suggesting that in terms of free speech jurisprudence it is easier to justify legislative restrictions on the ownership and control of the medium, rather than on the content or programming. Permissible restrictions are based on the need to restrict control by the few to promote access by the many. This approach makes available a more useful theoretical

16 See *Austero Limited v Trade Practices Commission* [1993] 115 ALR 14.

17 Note 4 *supra*.

18 Those objectives are set out in Appendix 2.

19 *Australian Broadcasting Tribunal v Bond & Ors* [1990] 94 ALR 11 at 32.

20 *Australian Capital Television Pty Ltd & Ors v Commonwealth* [1992] 177 CLR 106 at 143-4.

underpinning for regulation of media power, not dependent on spectrum scarcity, and one which identifies the public interest in access to communications.

Whilst the underlying policy of the *Broadcasting Services Act*, in accordance with the Government's micro economic reform agenda, emphasises competition and economic objectives, social policy objects have not been abandoned.[21]

The *Broadcasting Services Act* maintains restrictions on ownership and control of the so called 'more influential' broadcasting services, in particular, commercial broadcasting and subscription or pay TV delivered by satellite technology. There are also cross-media restrictions in respect of commercial broadcasters, pay TV and newspapers. Foreign control limits apply in respect of commercial television and subscription broadcast television, but do not apply to radio.

Generally speaking, the limits have been increased from the levels under the pre-1992 legislation, the *Broadcasting Act* 1942 (Cth).

Enforcement of the *Broadcasting Services Act* is based largely on a self-regulatory model, with high penalties for failing to notify the Australian Broadcasting Authority in certain situations. Whilst the Australian Broadcasting Authority has extensive powers to monitor compliance with the Act, in reality its resources have been reduced by some 30 per cent from those provided to its predecessor, the Australian Broadcasting Tribunal, with responsibility for a wider range of services than covered by its predecessor. Its priority is for a system of "co-operative" co-regulation with industry.[22]

Whilst traditional free-to-air (commercial) services and broadcast pay TV can only be operated under an individual licence, new services such as narrowcasting will be operated under a system of class licences, which do not involve any registration or individual licensing.

B. *Telecommunications Act* 1991

Like the *Broadcasting Services Act*, the objects of the *Telecommunications Act* include both social and economic goals.[23]

Under the current regulatory regime there are no limits on the provision of telecommunications services, except for reserving until 1997 to the two main carriers, Optus Communications and Telecom, the provision and maintenance of infrastructure. For the majority of communications and information services, access to the infrastructure will be at rates and on terms and conditions set by the carriers on a strictly commercial basis. Use of this capacity will be under a class licence (Part 10 Div 3 *Telecommunications Act*). There is no registration requirement under the service provider class licence[24] and thus no regulatory limit on the number of new entrants in this area.

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21 *Broadcasting Services Act* 1992 (Cth) and see Appendix 2.

22 Note 4 *supra*, p 13.

23 See Appendix 2.

24 Under the International Service Providers Class Licence, international service providers must register with AUSTEL.

Licence conditions may be imposed under the *Telecommunications Act* in respect of, inter alia, "the extent of foreign ownership or control of the holder of the licence".[25] For example, Optus has a majority Australian ownership.

C. *Radiocommunications Act* 1992

The *Radiocommunications Act* has a range of economic and social objectives.[26]

Save for some already existing reserved uses of the spectrum, there are no ownership and control restrictions under the *Radiocommunications Act*. Once it is put on the market by the Spectrum Management Agency (SMA), anyone can buy parts of the spectrum and either on-sell it or maintain it for a period, in the hope that new technologies or extensions of services will make it more desirable in the future. Speculation in, and hoarding of, rights to the spectrum is a live issue in this area:

> Recourse to the *Trade Practices Act* may not provide any easy answers. There are substantial uncertainties in determining whether an attempt by a large player to deny competitors access to [spectrum] may amount to taking advantage of market power under s 46 of the Act.[27]

Generally speaking, recent changes in the *Broadcasting Services Act*, the *Telecommunications Act* and the *Radiocommunications Act* have paved the way for far more extensive private ownership of delivery technologies. Previously, this private ownership had been limited to basic technology such as receivers and transmitters, with the government, principally through Telecom and AUSSAT, owning other types of delivery technology such as line links and satellite. Private ownership has also been further enshrined as a result of the liberalisation of ownership rules in the *Broadcasting Services Act*, the introduction of private competition in telecommunications, and the ability to trade in spectrum.

D. *Trade Practices Act* 1974

Whilst there are no objects specified in the *Trade Practices Act* itself, the objects of the Act can be gleaned from both the Act and the Second Reading Speech. Essentially, the *Trade Practices Act* is concerned with ensuring the operation of efficient and competitive markets (as well as with consumer protection functions). It is based on the premise that competition will yield the best allocation of resources, the lowest prices to consumers, the highest quality of goods and services and the greatest national progress.[28]

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25 *Telecommunications Act* 1991 (Cth), Part 5 Div 3.

26 See Appendix 2.

27 D Lindsay, "Spectrum Licensing: Awaiting the Hard Decisions" (1993) 12(4) *Communications Law Bulletin* 1 at 2. In addition, there are no foreign ownership rules, for example, to stop a foreign power from buying a chunk of strategically useful spectrum and using it for its own purposes or to block Australian use of it. See A Davies, "Flogging off the Spectrum" (Dec 1992) No 84 *Communications Update* 18.

28 See Second Reading Speech by Senator McMullan to the introduction of the Trade Practices Amendment Bill 1992.

"Competition" is central to the purpose and enforcement of the Act. Not defined in the *Trade Practices Act* itself,[29] it has been left to the courts, applying well-established principles of economics, to define the term. In *Re Queensland Co-operative Milling Association Ltd* the Court considered that:[30]

> Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources.[31]

Prices and profits were seen as the pivotal indicator of effective competition:

> In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.[32]

Part IV, and in particular s 50, is the primary regulator of industry structure under the *Trade Practices Act*. Section 50 is essentially concerned with the concept of competition. It prohibits acquisitions that would result in a substantial lessening of competition in an identified market. There are no specific limitations on the ownership and control of an industry other than this prohibition.

An assumption behind the injection of competition into any industry is that it benefits consumers: competitive providers of goods and services will be more responsive to consumer needs, will have to operate more efficiently and will pass on these benefits to consumers in the form of better and more services at lower prices.

III. THE CHALLENGE OF MULTIMEDIA ALLIANCES

A. United States' Experience

Not surprisingly, the United States has seen an increased momentum in the move to form alliances between corporations specialising in different aspects of multimedia.[33]

Barrett identifies two motivations behind the increasing number of mergers and alliances in programming and delivery/carrier corporations:

> The first is the pursuit of the opportunity to participate in the digital multimedia future. The second is the necessity to protect core businesses and assets in the race for position in these major new markets.[34]

The communications sector in the United States is regulated mainly by the *Communications Act* 1934 which establishes a single industry-specific regulator,

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29 Sections 4 and 4G of the *Trade Practice Act* contain a limited definition.

30 [1976] 25 FLR 169.

31 *Ibid* at 187.

32 *Ibid* at 188.

33 See AC Barrett, "Shifting Foundations: the Regulation of Telecommunications in an Era of Change" (1993) 46(1) *Federal Communications Law Journal* 39.

34 *Ibid* at 47.

the Federal Communications Commission. The Federal Communications Commission has jurisdiction over "all interstate and foreign communication by wire or radio". Whilst the *Communications Act* specifies telephony and radio broadcast, the United States Supreme Court in *United States v Southwestern Cable Co*,[35] has held that new communications technologies fall within the Federal Communications Commission's "ancillary jurisdiction".[36]

The concept of a "communications common carrier" is fundamental to regulation under the *Communications Act*. The *Communications Act* regulations define "communications common carrier" as "any person engaged in rendering communications service for hire to the public". The general obligation of a common carrier is "to provide service on demand at tariffed rates that are just and reasonable without any unreasonable discrimination or undue preference".[37]

The powers of the Federal Communications Commission include screening prices and terms of proposed rates, investigation of existing rates and, if required, prescribing alternative rates.[38]

Of most interest for present purposes are the powers of the Federal Communications Commission, characterised as "industry oversight" mechanisms, which relate to transactions between carriers, internal management of common carriers and mergers and consolidations.[39]

Under s 211 of the *Communications Act* carriers must file all contracts they enter into with other carriers and there is a discretion in the Federal Communications Commission to require filing of non-carrier agreements. Under s 215, the Federal Communications Commission must examine these contracts and report to Congress as to whether it considers that they adversely affect service or rates.[40]

An industry-specific ownership and control mechanism is provided for in s 212 which prohibits all interlocking directorships between common carriers without the Federal Communications Commission's approval. There is an exception for a parent common carrier and its subsidiaries where the parent holds at least a 50 per cent interest. Further, under s 218, the Federal Communications Commission can inquire into the management of carriers. There are other internal management powers granted to the Federal Communications Commission relating to financial information of carriers.[41]

The Federal Communications Commission also has a specific authorisation power with regard to mergers and acquisitions provided for in s 221(a) of the *Communications Act*. Mergers and acquisitions which will result in a common

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35 392 US 157 (1968) at 172.

36 MK Kellog, J Thorne and PW Huber, *Federal Telecommunications Law*, Little Brown & Co (1992) p 86. It should be noted, however, that the FCC power over *intrastate* communication by wire or radio is extremely limited. The tension caused by this duplication is beyond the scope of this paper.

37 Note 36 *supra*, pp 112-13.

38 *Ibid*, p 119.

39 *Ibid*, p 128.

40 *Ibid*.

41 *Ibid*, p 129.

carrier must have Federal Communications Commission approval before they can proceed.

The Federal Communications Commission must notify relevant State regulatory authorities on which the merger impacts, hold a public hearing if it receives a request to do so and also consider the effect of the merger on competition. If a proposed merger or acquisition receives Federal Communications Commission approval as being "in the public interest", it will be exempt from general competition law. The detail required in the application for authorisation is comprehensive. It includes the purchase price and how this was arrived at, whether shareholder or director approval was obtained, what type and what quality of service each party brings to the transaction, a case for a finding in the public interest, financial information for each party and, finally, the type of service to be provided after the merger or acquisition.[42]

One United States' commentator believes that monopolisation in the converged industry is unlikely:

> It is doubtful that any single entity will dominate the new multimedia marketplace because of the brisk pace of technological change.[43]

This view contrasts with others who argue that the potential for monopolisation of all three gateways (delivery, programming and subscriber management) is vast.[44]

B. United Kingdom Approach

Like the United States, the activities of telecommunications carriers and cable television operators have overlapped for some years. Consequently, telecommunications industry-specific rules have developed to ensure wider issues associated with delivery of communications services are considered. In the United Kingdom, cable TV operators can provide telephone services, although British Telecom (trading as BT) cannot compete in the cable TV market.

The United Kingdom has adopted a hybrid system of telecommunications regulation by using industry-specific legislation combined with general competition law principles, which are tailored to accommodate the dynamics of the industry.

There are three main ways in which competition in telecommunications is controlled. First, the Department of Trade and Industry and the Office of Telecommunications (OFTEL) are responsible for policies concerning licensing and equipment approval. Second, major industry participants are subject to "fair trading" licence conditions. Third, telecommunications competition is regulated by the general United Kingdom competition conduct rules, which also take into account telecommunications issues.

The fair trading conditions (which all public telecommunications operators and some private operators are subject to) cover three aspects of business activity:

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42 *Ibid*, p 130.

43 Note 33 *supra* at 48.

44 Note 4 *supra*.

conduct towards third parties (customers, suppliers or competitors); business structure; and access to financial information concerning a licensee's business.[45]

The extent of this regulation is wide. For example, it is a licence condition that British Telecom notify the Director General of Telecommunications at least 30 days in advance of any agreement or arrangement which would result in British Telecom:

1. acquiring "control" (defined to be at least 20 per cent of the relevant shares) of a company:
   (a) running a licensed telecommunications system; or
   (b) providing telecommunications services; or
   (c) producing apparatus where the apparatus production would result in a "monopoly situation" which would not otherwise exist; or
2. creating a joint venture for running a telecommunications system or providing telecommunications services.[46]

The general United Kingdom competition law has been adapted to the telecommunications industry in several ways relating to potential misuse of market power in telecommunications markets. For example, the Director General of Fair Trading can request the Director General of Telecommunications to exercise its functions under Part III of the *Fair Trading Act* 1973 (UK) in relation to "courses of conduct detrimental to the interests of consumers of telecommunications services or apparatus, whether such interests are economic or are interests in respect of health, safety or otherwise".[47]

Further, there are concurrent powers for the Director General of Fair Trading and the Director General of Telecommunications under Part IV of the *Fair Trading Act* 1973 (UK) in relation to monopoly situations relating to "commercial activities connected with telecommunications".[48] Also, the Director General of Telecommunications is given concurrent powers with the Director General of Fair Trading in relation to courses of conduct which adversely affect competition in relation to the production, supply or acquisition of telecommunications apparatus or the supply or securing of telecommunications service.[49]

In addition to the statutory powers, the Director General of Telecommunications has taken on an informal, although highly effective, role in relation to merger references in the telecommunications industry made by the UK Secretary of State to the Mergers and Monopolies Commission.[50]

It is argued that Australian policy makers should adopt industry-specific competition policy mechanisms similar to those in the United States and the United Kingdom when examining regulatory options for converging technologies. Recommendations of the Hilmer Committee did not advocate tailoring competition

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45 Butterworths, *Competition Law* at [1978].
46 BT licence condition 49.
47 *Telecommunications Act* 1984 (UK), s 50(1).
48 *Ibid*, s 50(2).
49 *Ibid*, s 50(3).
50 Note 45 *supra* at [2021].

policy mechanisms to the particular dynamics of the communications industry. However, regulatory options for communications will be measured against the Hilmer Report recommendations.

IV. HILMER REPORT - A CRITIQUE FROM THE COMMUNICATIONS PERSPECTIVE

The Hilmer Report, released in August 1993, has engendered a debate on Australia's national competition policy - current and future - in a diverse range of industries, from agricultural marketing authorities to the legal profession. Undoubtedly, the Hilmer Committee recommendations will underpin the current Government review of telecommunications regulation.

Only one sector of the communications industry is specifically dealt with in the Hilmer Report - telecommunications - and this is more from an infrastructure perspective than a services point of view. However, it has been pointed out that "Professor Hilmer threw up a major challenge to our thinking - not so much for what he said outright, but for what he implied".[51]

There are two major recommendations of the Hilmer Report which are significant for the communications industry - the establishment of a single competition law regulator, the Australian Competition Commission, and the creation of a legislated right of access to essential facilities.

A. The Australian Competition Commission

The Hilmer Report proposed the establishment of a National Competition Council and an Australian Competition Commission. The National Competition Council would play a key role in policy decisions relating to issues such as structural reform of public monopolies, access regimes, monopoly pricing and "competitive neutrality".[52] In contrast, the Australian Competition Commission would be an administrative body, responsible for enforcing general competition law conduct rules, administrating the authorisation process under the rules, overseeing essential facility access rights (including the administration of any additional pro-competitive safeguards) and administrating prices oversight. The Australian Competition Commission would be formed from the Trade Practices Commission and the Prices Surveillance Authority.[53]

It appears that the Australian Competition Commission would also be responsible for administering and enforcing the consumer protection provisions of the *Trade Practices Act*. Reservation has been expressed about the dual role of the

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51 Address by Jeannett McHugh, Minister for Consumer Affairs, "Consumers and the Reform of Australia's Utilities: Passing on the Benefits", 18 March 1994.

52 Note 1 *supra*, pp 293-303.

53 Note 1 *supra*, pp xxxvi-xxxvii.

Commission:

> Consumer protection is not just a competition issue. Just like the law of the environment or Aboriginal land rights or gender equity, consumer protection brings other implications and imperatives to the debate on economic policy. Consumer protection can't be measured, analysed and given the tick on all its implications inside a commission set up with the specific task of engendering competition. Good consumer policy should be to examine the decisions made by such a commission for its broader social as well as strictly defined competition effects.[54]

To the extent that the telecommunications network is declared to be an "essential facility" under the regime, it would be regulated by the Australian Competition Commission. This has implications for current telecommunications pricing arrangements that Telecom is subject to. AUSTEL administers a price control regime which Telecom is required to comply with under the *Telecommunications Act* and the *Australia and Overseas Telecommunications Corporation Act* 1991 (Cth). If price control mechanisms - in whatever form - were to continue in the post-1997 deregulated telecommunications environment, it would appear the Australian Competition Commission would be responsible for the monitoring of, and compliance with, these controls.

B. Essential Facilities

Unlike the United States, Australian courts have not recognised the doctrine of "essential facilities". The doctrine as developed by American courts has been summarised thus:

- a facility is controlled by a monopolist. It is important to note that the facility in question must be essential not merely desirable;
- a facility , not a product, is involved;
- there is an inability of a competitor practically or reasonably to duplicate the essential facility;
- the denial of use of the facility must be to a competitor; and
- access, if granted, will not result in a diminution of service and the relevant denial of access cannot be justified for technical or capacity reasons.[55]

The Hilmer Report recommended that a legislated "essential facilities" access regime be created.[56] The Hilmer Report concluded:

> ... there are some industries where there is a strong public interest in ensuring that effective competition can take place, without the need to establish any anti-competitive intent on the part of the owner for the purpose of the general conduct rules. The telecommunications sector provides a clear example, as do electricity, rail and other key infrastructure industries. Where such a clear public interest exists, but not otherwise, the Committee supports the establishment of a legislated right of access, coupled with other provisions to ensure that efficient competitive activity can occur with minimal uncertainty and delay arising from concern over access issues.[57]

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54 Note 51 *supra*.

55 W Pengilley, "Misuse of Market Power: Present Difficulties - Future Problems" (1994) 2 *Trade Practices Law Journal* 34.

56 Note 1 *supra*, Ch 11, pp 239-68.

57 *Ibid*, pp 266-7.

The right of access will only be created if the owner agrees (although there is a mechanism for Ministerial declaration on the recommendation of the National Competition Council) and if the Minister is satisfied that access to the facility in question is essential to permit effective competition in a downstream or upstream activity. Further, the Minister must be satisfied that access is in the "public interest". The parameters of the proposed "public interest" test are confined to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness.[58]

Any access declaration is to set out the facility subject to the declaration, the user or class of user to benefit from the right, pricing principles for the facility and a catch-all provision for "any additional safeguards required to protect the competitive process".[59]

There are several issues which arise out of the Hilmer Committee approach to essential services when looking at the proposed regime from the perspective of the communications industry.

- First, assuming telecommunications facilities are declared an "essential facility", the access regime would regulate only the delivery of services over the telecommunications network.
- Second, the proposed access to facilities is between one business and another business, as opposed to access by consumers to a facility. Service providers operating under the service providers class licence under the *Telecommunications Act* are an obvious example of the acquirers of network services.
- Third, the prerequisite "public interest" test needs to be carefully scrutinised so as to ensure that issues peculiar to the communications industry are included within its ambit. Presumably, the consumer interest is dealt with by the accompanying pricing regime on the assumption that price control measures between the facility owner and the service provider will benefit consumers in a flow-on manner. However, pricing is only one issue.
- Fourth, in keeping with the general thrust of the Hilmer Report, the proposed access regime is to be legislated and administered on a general basis as opposed to an industry-specific basis.[60]

Interestingly the Hilmer Report pointed to "the lack of confidence in the ability of the general misuse of market owner provision, s 46 of the *Trade Practices Act* 1974, to deal effectively with essential facility issues in the context of introducing competition in markets traditionally supplied by public monopolies".[61]

The consumer protection provisions of the *Trade Practices Act* were not subject to review by the Hilmer Committee, apparently due to a view of enforcement under

58 *Ibid*, p 266.
59 *Ibid*, pp 266-7.
60 *Ibid*, p 248.
61 *Ibid*, pp 247-8.

that Act currently being undertaken by the Australian Law Reform Commission.[62] It is argued, however, that in the context of regulating the communications industry at least, consumer considerations must be included in any "public interest" test. If the regime was to be implemented, this extension of the proposed test would also benefit other industries where consumer pricing, quality of service and consumer access issues arise.

In redrafting the test, regard could be made to the public interest test contained in the objects at s 3 of the *Telecommunications Act*. Any definition should be consistent and compatible with objects in the industry-specific legislation.[63]

V. PUBLIC INTEREST v PUBLIC BENEFIT - WHAT DOES IT MEAN?

A. Overview of Public Interest Considerations in the Hilmer Report

Although the concept of the "public interest" does not have simple definition, it encompasses two broad aspects; efficiency and equity. The accommodation of public interest considerations within the context of the Hilmer Report on competition policy has been touched upon above[64] and the Hilmer Report acknowledges that concerns in addition to economic efficiency need to be included in formulating an effective national competition policy for Australia. However, this theoretical recognition does not appear to translate to effectively accommodate public interest considerations within the recommended framework in a manner which would ensure that the Australian public will accrue greater benefits from competition policy.

The Hilmer Report uses the concepts of "community welfare", "public benefit" and "public interest", which are collectively referred to in this paper as "public interest considerations". "Community welfare" is stated as the yardstick for measuring "the impact of competition on economic efficiency and other social goals".[65] The "public benefit" concept is used in the context of the test which is currently applied, and which Hilmer recommends should be retained, in assessing whether anti-competitive conduct is in the public interest. Hence, the "public interest" is to be preserved and protected within the competitive framework by restricting certain anti-competitive conduct.

The fact that the concepts of "community welfare", "public benefit" and "public interest" itself are included in Hilmer's analysis does not negate the above proposition that public interest considerations are not effectively accommodated within the competition framework. Each of the three concepts is restricted in its

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62 See Australian Law Reform Commission, Discussion Paper 56, *Compliance with Trade Practices Act* 1974, AGPS (November 1993).

63 See Appendix 2.

64 See first paragraph, Part I Section A, of this paper.

65 Note 1 *supra*, p 3.

effectiveness as it is limited to the outcomes of activity in the market. The role of each of the concepts within Hilmer's framework is now examined.

B. Community Welfare

Economic efficiency is stated as a fundamental objective of competition policy "because of the role it plays in enhancing community welfare".[66] This suggests that enhancement of community welfare is the central objective of competition policy. However, the following analysis of the role which economic efficiency plays in enhancing community welfare illustrates that the supply side of the economic equation is paramount:

> Economic efficiency plays a vital role in enhancing community welfare because it increases the productive base of the economy, providing higher returns to producers in aggregate, and higher real wages. Economic efficiency also helps ensure that consumers are offered, over time, new and better products and existing products at lowest cost. Because it spurs innovation and invention, competition helps create new jobs and new industries. The impact of increased competition on efficiency is illustrated by the recent entry of Optus into the Australian telecommunications market, which has already resulted in consumers being provided with a wider choice of services at lower cost.[67]

The welfare of the community is determined by issues of supply, and consumers are passive, or at best reactive, ingredients in the above scenario rather than being assessed as pro-active forces determining and demanding beneficial outcomes.

The empowerment of consumers is referred to as being one of the other social goals, that is, a goal as well as economic efficiency.[68] Hilmer recognises that there are situations where competition, "although consistent with efficiency objectives and in the interests of the community as a whole", is regarded as inconsistent with some other social objectives, such as the empowerment of consumers. The term "empowerment of consumers" implies a sector within the economy which is pro-active in demanding particular outcomes. However, the social goal of empowerment of consumers is categorised in the Hilmer Report as a subsidiary goal. It is not attributed as being alongside the pivotal role played by economic efficiency but rather as a goal which will be accommodated if it can be.

The criticism that the pivotal goal of economic efficiency renders the consumer a receptor only of goods and services means, as Hilmer states, that consumers benefit from such rules to the extent that their interests coincide with the interests of the community as a whole.[69] The concern is that the interests of the whole community are determined by the suppliers of goods and services.

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66 *Ibid.*
67 *Ibid*, p 4.
68 *Ibid*, p 5.
69 *Ibid*, p 26.

C. The Role of Public Interest and Public Benefit in Competition Policy

The Hilmer Report states that misallocation of resources and inefficiency affect community welfare within the competition model.[70] However, the Report acknowledges that there are grounds for providing exemptions or special treatment within the competition policy framework and that these special circumstances are governed by public interest considerations. Prior to the Hilmer Inquiry being established, the Prime Minister, Premiers and Chief Ministers agreed to a set of principles to which a national competition policy should give effect, and these four principles include the following:

1. no participant in the market should be able to engage in anti-competitive conduct against the public interest; and
2. conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed.[71]

As stated above, "public interest" and "public benefit" are restricted in the role they play in the competition framework. It appears that neither concept is to play a central role. Their function within the competition framework is limited and does not reflect the full nature of public interest and public benefit.

D. Public Interest

"Public interest" encompasses the notion that outcomes which take into account the welfare of the community are determined for the market participants by a policy body. The concept of accountability of market forces to the outcomes in the public domain is central. The part played by "public interest" in the development of the US radio industry, as described in the following extract, illustrates its, albeit difficult to define and changing, influence:

> From the start, those intimately involved in creating the Radio Act found it necessary to characterise the airwaves as a public medium. Individuals 'privileged' to use the medium were said to be vested with a 'public trust', and the government's regulatory mandate over the airwaves was said to be in service to the 'public interest'. That broadcasters be regulated and that broadcast licences be issued to further the 'public interest, convenience and necessity' was the foundation for regulation under the former Radio Act of 1927 and remains the mainstay for regulation under the Communications Act of 1934. However, any apparent abiding consistency between 1934 and the present, as a result of an unchanged 'public interest' standard belies the fact that the 'public interest' has always been an amorphous concept, serving as a basis both for constructing a regulatory labyrinth over the communications industry and, in recent years, for dismantling that labyrinth.[72]

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70 *Ibid*, p 86.

71 *Ibid*, p 94.

72 RR Zaragza, RJ Bodorff and JW Emord, "The Public Interest Concept Transformed: the T, Trusteeship Model Gives Way to a Marketplace Approach" in JT Powell and W Gair (eds), *Public Interest and the Business of Broadcasting - the Broadcast Industry Looks at Itself*, Quorum Books (1988) 27 at 28.

The Hilmer Report analyses the justification of government regulation which produces anti-competitive consequences on the basis of public interest. It states:

> However, where anti-competitive consequences flow from government regulation, the public interest justification generally rests on policy judgements of elected governments and parliaments. These decision-makers are entrusted with defining and implementing the public interest, and must evaluate a range of competing considerations.[73]

The Report supports the following broad principles as the basis for regulatory restrictions on competition:

1. There should be no regulatory restrictions on competition unless clearly demonstrated to be in the public interest. Governments which choose to restrict consumers' ability to choose among rival suppliers and alternative terms and conditions should demonstrate why this is necessary in the public interest.
2. Proposals for new regulation that has the potential to restrict competition should include evidence that the competitive effects of the regulation have been considered, that the benefits of the proposed restriction outweigh the likely costs and that the restriction is no more restrictive than necessary in the public interest ...[74]

The concept of public interest is also utilised by the Hilmer Report in recommending that access rights to "essential facilities" be introduced. The recommendation that a Commonwealth Minister could declare access to a particular facility includes the criteria that such declaration could be given if the Minister is satisfied that:

> ... such a declaration is in the public interest, having regard to:
> 1. the significance of the industry to the national economy; and
> 2. the expected impact of effective competition in that industry on national competitiveness ...[75]

State governments expressed concern that the viability of community service obligations funded through cross-subsidies would be eliminated under an access regime to government-owned businesses. The Hilmer Report regards such issue as temporary in nature which transitional arrangements could address.

E. Public Benefit

"Public benefit" is a less vigorous and more narrow concept based upon the advantages which are conferred upon the public as a result of activity in the market place. The public benefit of any activity in the market emphasises those outcomes which, within the public interest, are more easily measured as being of advantage to the community.

As stated above, the "public benefit" is employed in the Hilmer Report as the test which will be applied in assessing whether anti-competitive conduct is in the public interest. This integration of the concept of the "public benefit" into the

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73 Note 1 *supra*, p 191.
74 *Ibid*, pp 206-7.
75 *Ibid*, p 261.

competitive framework reflects the current use and application of the concept in the *Trade Practices Act.*

Currently the Trade Practices Commission can authorise many types of anti-competitive conduct that would otherwise contravene the *Trade Practices Act,* if it is satisfied that there is a net "public benefit".[76] The *Trade Practices Act* does not define what constitutes public benefit, but guidance is given from the Commission's decision in *Re ACI Operations Pty Ltd,* which listed the following matters as constituting public benefit:

- economic development, such as encouragement of research and capital investment;
- fostering business efficiency, particularly where it results in improved international competitiveness;
- industrial rationalisation, resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries;
- employment growth in particular regions;
- industrial harmony;
- assistance to efficient small business, such as guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvement in the quality and safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and business to permit informed choices in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings, resulting in contained or lower prices at all levels in the supply chain;
- development of import replacements;
- growth in export markets; and
- steps to protect the environment.[77]

The term was considered in *Re Queensland Co-operative Milling Association Limited.*[78] It was held that the public benefit should be regarded in its widest possible sense and include:

> ... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.[79]

The Hilmer Report considered submissions that the public benefit test be limited to economic efficiency but concluded that other dimensions of community welfare should be embraced. However, the Hilmer Committee recommended that the *Trade Practices Act* should be amended "to confirm that primary emphasis should be placed on economic efficiency considerations".[80]

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76 Section 90.

77 (1991) 13 ATPR ¶50-108 extracted in RV Miller, *Annotated Trade Practices Act,* The Law Book Company Ltd (15th ed, 1994) at [1540.25].

78 Note 30 *supra.*

79 *Ibid* at p 182.

80 Note 1 *supra,* p 94.

F. Consequences of Hilmer's Public Interest Considerations

It is submitted that the above described manner in which "public benefit" and "public interest" are incorporated within the national competition policy will not ensure the optimum outcome for the Australian public.

As discussed above, the Hilmer Report addresses efficiency issues by referring to public benefit, but equity considerations (fundamental to the notion of public interest), such as the extent to which groups of people participate in the efficient allocation of resources, are absent. It is only by addressing the issue of converging technologies from the broader perspective of the public interest, which includes matters such as optimising the access and use of technology by various groups within society, that public interest considerations will be adequately addressed.

If this issue of access, as opposed to the more limited issue of access to an "essential facility", as discussed in Chapter 11 of the Hilmer Report, is ignored, the Australian communications market will have to be re-regulated in the future to address Hilmer's current oversight. One aspect of this oversight has been addressed by US Professor Allen Hammond who argues that the "impending development of broadband communication networks has the potential to expand and equalise speech rights by endowing the public with more numerous and more powerful opportunities for speech".[81] However, while he argues that unconstrained market entry should be promoted, the US Congress must ensure that the broadband communication networks of the future are interconnected and accessible to the public. He states:

> To the extent the benefits of computer augmented broadband technology are privatised and provided exclusively to those with sufficient disposable income to demand and purchase new or enhanced services, the potential for an interconnected public forum is exchanged for a host of private ones. Under these circumstances, electronic speech rights become the province of speaker-owners and their customers, the wealthier individuals in our society. Those with limited property or wealth, as well as those with unpopular or unorthodox ideas, may find the electronic exercise of their speech rights threatened.[82]

The need to ensure that the public has mandated rights of access and diversity within the emerging world of converging technologies is a critical element in the function that public interest considerations should perform within this convergence. However, this will only be achieved if the national competition framework recognises public interest considerations as central to its functions. The following section details a proposed regulatory structure of the communications industry which could work together with the national competition framework proposed by the Hilmer Committee to ensure policy objects, such as diversity of services and access to services, are achieved.

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81 AS Hammond, "Regulation Broadband Communication Networks" (1992) 9 *Yale Journal on Regulation* 181.

82 *Ibid* at 231.

VI. A REGULATORY MODEL FOR THE COMMUNICATIONS INDUSTRY

A. The Importance of Content

One commentator has said "obviously, one impact of convergence ... is the need for a radical change of existing regulatory regimes".[83]

It has been said that regulatory oversight will be a major determinant of the rate of change in new communications services.[84] If regulatory structures cannot adequately accommodate new technologies, the level of oversight will be minimal. The reality is that once commercial relationships are in place, it is difficult - and not desirable from a commercial certainty point of view - for a Government to legislate retrospectively to "void" these transactions or require divestiture. Usually such arrangements are "grandfathered" in subsequent legislation.

The need for some level of regulation of the programming gateway (content) and its relationship with diversity of ownership is the key characteristic that sets the communications industry apart from other industries. This has been recognised in broadcasting regulation for some time. Brian Johns, Chairperson of the Australian Broadcasting Authority, has identified the "specific, central" challenges in broadcasting regulation today as:

> ... to find new vehicles for promoting and encouraging local programming material and for ensuring that no particular players or interests can dominate the markets in a way that prevents local viewers from accessing material that is culturally relevant and that reflects local interests and concerns ... [and] ensuring continued widespread national coverage and accessibility of diverse information and entertainment services, so that 'access gaps' do not develop as more and more services rely on direct customer subscription.[85]

Content regulation is a critical example of how the dynamics of convergence may not be adequately dealt with under general competition rules. The issue is not just one of market power. For example, although a proposed merger or acquisition might not be found to substantially lessen competition within the meaning of s 50 of the *Trade Practices Act*, the potential for that entity to limit access to, or affect the quality of, programming may be significant. Content regulation may not come within one of the measures of public benefit as that term is used in the *Trade Practices Act* and applied by the Trade Practices Commission and the Federal Court (as outlined above).

Mr Brian Johns pointed to content as the determinant of success for multimedia in Australia when he said:

> No matter how sophisticated the technologies by which services will be provided, no matter how numerous the broadcasting services which become available, it is the content of those services by which they will be judged, by the public, the politicians and the press.[86]

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83 Note 13 *supra*, p 104.

84 Note 28 *supra*, p 48.

85 Note 14 *supra* at 7.

86 B Johns, "Convergence and Culture", presented at ATUG '94, 2-5 May 1994.

The reasons given for this view were first, that program production is part of a global network of product sourcing and delivery, and second, that there has to be a focus on preserving and promoting different cultural values and yet reinforcing a sense of Australian identity.[87]

B. The Australian Communications Authority (AUSCOM)

Ownership and control of programming will impact directly on cultural identity and access to information, two of the stated objects in regulating broadcasting. It is argued that, as the traditional activities of broadcasters and telecommunications carriers are no longer exclusive of each other (as evidenced by the formation of strategic alliances), there should be a communications industry-specific regulatory structure in place which oversees the industry to ensure national communication policy objects are achieved.

This paper proposes a legislative structure for the electronic communications industry broadly along the lines of that in the United States. Regulation of the communications industry - that is, broadcasting, radiocommunications and telecommunications - could be pursuant to a single Communications Act. The single communications regulator - in this paper called AUSCOM - could have a policy and legislative review role as well as an administration and enforcement function. Certain quasi-judicial powers could be granted to AUSCOM so that it could carry out its enforcement function effectively.

The policy objects of regulating communications could be set out in a National Information Policy. The groundwork for an Australian National Information Policy is contained in "Australia as an Information Society: Grasping New Paradigms".[88] The outline for an National Information Policy as recommended by the House of Representatives Standing Committees is set out in Appendix 3.[89]

AUSCOM could work in co-operation with the National Competition Council proposed by the Hilmer Committee in policy formation and review, and with the Australian Competition Commission proposed by the Hilmer Committee in administration and enforcement to ensure there was minimal duplication of jurisdiction or unnecessary use of resources.

AUSCOM could be responsible for monitoring ownership and control of communications players, content regulation, oversight of access between carriers and service providers (interconnect) and between carriers/service providers and consumers, for subscriber management issues between carriers and service providers and for technical standards regulation. It could also work with the

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87 *Ibid.*

88 Report of the House of Representatives Standing Committee for Long Term Strategies, *Australia as an Information Society: Grasping New Paradigms*, AGPS (May 1991). See also the United States Information Infrastructure Task Force, *The National Information Infrastructure: Agenda for Action*, Executive Office of the President (15 September 1993), which takes the debate wide than issues of vertical integration of technology corporations and pricing to issues of, for example, extending the "universal service" concept to ensure that information resources are available to all at affordable prices.

89 S Fist, "Does Australia need a National Information Policy?" (Dec/Jan 1993/94) *Australian Communications* 77.

Commonwealth Privacy Commissioner to ensure that appropriate privacy principles are in place for issues associated with convergence.

It is possible that interconnection between carrier/carrier and carrier/service provider could be administered by the "essential facilities" access regime and the accompanying prices scheme proposed by the Hilmer Committee. AUSCOM could administer the "essential facilities" access regime proposed by the Hilmer Committee as it related to carriage of communications in co-operation with the Australian Competition Commission. An augmented "public interest" test for the industry could be designed to overcome the concerns expressed about the width of the Hilmer Committee's proposed test.

C. Self-regulation within the Proposed Structure

Content regulation and consumer complaints procedures could be provided for in a series of self-regulatory bodies administering industry codes of practice relating to particular areas. Importantly, these codes would have statutory status in the communications legislation. Enforcement at first instance would be through the relevant body, with a reserve power in the legislation for AUSCOM to make appropriate orders in the event of non-compliance with the industry body determination.

Industry and community groups could assist in formulating the codes and could be represented on the board of the administering body. This approach to regulation is consistent with the trend in Australian communications regulation towards such industry self-regulation.

In broadcasting, the Federation of Australian Commercial Television Stations (representing the commercial television industry) and the Federation of Australian Radio Broadcasters (representing the commercial radio industry), have consulted with the Australian Broadcasting Authority, pursuant to requirements in the *Broadcasting Services Act*,[90] in developing self-regulatory codes of practice. These codes of practice have statutory status and parameters for these are suggested in the *Broadcasting Services Act*,[91] but the onus is placed on industry participants to develop the detail of the relevant codes. However, in relation to the classifying of films to be broadcast on commercial and community television, the relevant codes of practice are required to include methods for ensuring films are suitable for broadcast and that films for "mature" or "mature adult" audiences are only broadcast during certain periods of the day.[92]

Another example of content self-regulation by industry codes of practices is to be found in the telecommunications industry. The Telephone Information Services Standards Council scheme applies to service providers of telephone information services (that is, services which are currently accessed by the prefixes 0055 and 0051). Complaints by consumers are reviewed by an arbitrator at first instance with a right of appeal to an appeals sub-committee comprising two community

90 Section 123(1).
91 Section 123(2).
92 Sections 123(3) and (3B).

representatives and an "appeal arbitrator". A complaint can also be referred to the Community Office of Film and Literature Classification if the arbitrator considers it appropriate. The Telephone Information Services Standards Council scheme is funded by industry and it has consumer and industry representation on its Board.

Complaints procedures could be provided for in a similar self-regulatory structure along the lines of the current Telecommunications Industry Ombudsman scheme. The Telecommunications Industry Ombudsman scheme was established as required in the carriers' licence conditions. It is a company, formed by the carriers, and funded by the carriers, according to a contribution formula which reflects the number of complaints relating to each carrier and the time spent. Its operations are overseen by a Council with an independent chair, and equal numbers of consumers/small business representatives and carrier representatives. The scheme envisages the possibility that service providers may join at some stage.

D. Judicial Regulation and General Competition Law Principles

Whatever regulatory model is adopted for communications in Australia, caution should be exercised in giving the Courts regulatory functions. Reservations about regulation by judges - as opposed to regulation by bureaucrats - have been expressed on several grounds.[93] Commercial uncertainty, delay and costs are major drawbacks to reliance on judicial regulation of the communications environment.

Regulation of telecommunications in New Zealand provides an excellent case study in the dynamics and outcomes of judicial regulation pursuant to general competition law principles in the absence of an industry-specific regulator. Regulation of business activities of telecommunications players in New Zealand is done through the general conduct rules in the *Commerce Act* 1986 (NZ) and through the *Telecommunications (Disclosure) Regulations* 1990 (NZ) (which require Telcom New Zealand to disclose certain accounting and contractual information). In November 1989 the Trade Practices Commission counterpart in New Zealand, the Commerce Commission, commenced an inquiry into the state of competition in telecommunications markets as a result of receiving a "large number" of complaints. Its conclusion on the status of telecommunications regulation was as follows:

> 438. The resulting picture in the [Commerce] Commission's point of view, is not that of an industry subject to 'light-handed' regulation. In the absence of competition (the best regulator of all), the gap is filled by self-regulation. More precisely, in telecommunications, in relation to many important segments and most of the critical inputs, Telecom [New Zealand] is the de facto regulator. Telecom owns or controls the key factors and so Telecom makes the rules and other parties in the industry, by and large, play by them.

93 Note 3 *supra*, p 114.

> 439. In reaching this conclusion, the Commission makes no comment one way or the other, on the merits of the situation. It is simply the factual background against which the Commission must determine its enforcement priorities.[94]

The new entrant, Clear Communications, required access to Telecom New Zealand's fixed line telecommunications network in order to compete in the local services market. Unlike Australia, interconnection arrangements are negotiated directly between carriers without an arbitration role for an industry-specific regulator such as AUSTEL. A dispute arose about the terms and conditions of access between the two carriers. Litigation resulted with the interconnection dispute between Clear Communications and Telecom New Zealand, which fell to be determined under s 36(1) of the *Commerce Act* 1986 (NZ), which prohibits a corporation holding a position of dominance in a market from using that position for an anti-competitive purpose:

> The issue therefore can be simply stated as whether the conduct of Telecom in its negotiations with Clear Communications Limited constituted use of that dominant position for the purpose of restricting Clear's entry into, or preventing or deterring Clear from engaging in competitive conduct in that or any other market.[95]

The matter went to the New Zealand Court of Appeal which found in favour of Clear Communications. In the words of Cooke P:

> So far the long drawn-out proceedings have benefited no one apart from Telecom, for the entry of Clear into the market has been delayed. Clear's success on appeal, after all that has occurred, should carry a commensurate award of costs ...[96]

This New Zealand example of judicial regulation pursuant to general competition law principles highlights the disadvantages of such a framework.

E. Universal Access and Quality of Service

Regulation of universal access by consumers to a minimum level and quality of service would be administered by the proposed AUSCOM. The key issue here is whether the definition of the "standard telephone service" will grow to include provision of a basic level of services which include, for example, broadband? Who will pay for this service delivery? If the means of delivery are owned and controlled by private interests, will these organisations be obliged to ensure access to certain community sectors such as educational institutions?

There are costs associated with providing access to regional and remote locations which need to be met. The mechanism used for provision of telecommunications in Australia today involves a carrier being declared a universal service carrier for a particular service and all carriers contributing through a levy to the costs of service provision. A major challenge for comminations regulation will be what is the fairest cost-allocation mechanism to provide universal service. Further, as more and more services become available, the definition of what

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94 Commerce Commission (NZ), *Telecommunications Industry Inquiry Report*, (23 June 1994) at [438]-[439].

95 *Clear Communications Limited v Telecom Corporation of New Zealand Limited & Ors* (1993) NZBLC ¶99-321 at 103,344 per Gault J.

96 *Ibid.*

constitutes a minimum service and the quality of that service will become more difficult to determine.

The United Kingdom approaches the access issue differently. Certain service obligations are imposed on broadband cable operators which are categorised as public telecommunications operators under the *Telecommunications Act* 1984 (UK).[97] There are two service obligations to which a broadband cable operator may be subjected. First, every broadband cable operator is required to construct its systems according to a timetable specifying the premises which must be capable of receiving telecommunications services on annual target dates within the operator's franchise area. Second, if the cable operator also wishes to supply telephone (or data in some instances) services it must obtain an appropriate determination from the UK Director General of Telecommunications authorising it to provide the services. The determination will require the operator to provide the services within a specified part of its service area. There is provision for a cable operator to be released from the requirement to obtain the determination.[98]

In the deregulated and privatised New Zealand telecommunications industry, the Government has retained control of the universal service obligation through the "Kiwi" share in Telecom New Zealand. This is a preferential share held by the Crown with certain enforceable rights attaching to it, including the universal service obligation.[99]

F. The Role of AUSCOM within the Hilmer Competition Framework

To date legislative regulation has been both industry-specific (under legislation such as the *Broadcasting Services Act, Radiocommunications Act* and the *Telecommunications Act*) and general (such as under the *Trade Practices Act*).

General legislation which is focused on economic efficiency creates its own problems for an industry like communications where there are objectives other than purely economic efficiency or competition. The focus of market analysis under general competition law is usually on short term conduct. In contrast, industry-specific communications regulation seeks to achieve and promote long term social as well as economic goals, some of which are not easily reconciled.

In the communications industry, we need to examine a wider concept of the market for the purposes of achieving both economic and broader public interest objectives. We can no longer distinguish communications and information services as discrete markets according to the means of delivery: telephones and facsimiles have historically been delivered by wires or cables but increasingly use radio for mobile services; television once almost exclusively delivered via wireless technology is now being trial delivered by Telecom Australia using cable. Merging of the communications delivery systems and the realities of the market will force us

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97 These cable operators are licensed by the Independent Television Commission to provide "cable programme services".

98 Note 45 *supra* at [1961]-[1962].

99 B Hill and T Weston, "Monopolisation and Telecommunications Markets in New Zealand", presented at the Fifth Annual Trade Practices and Consumer Law Conference, 9 October 1993, p 2.

to look at the communications industry serving a single, albeit highly complex, market or super market over and above the individual smaller markets.

There are several approaches that could be adopted to adapt market analysis to the communications industry. One approach would be to have a trigger mechanism requiring the proposed Australian Competition Commission to consult with the proposed AUSCOM when a proposed merger or acquisition under the general conduct rules would affect delivery of communications services or may result in a negative impact on the diversity of choice for Australian consumers. The proposed AUSCOM would be required to have regard to policy objects stated in the National Information Policy before recommending what action the Australian Competition Commission should take. A similar procedure has been adopted in the United Kingdom in cases where, for example, a course of conduct adversely affects competition in relation to the production, supply or acquisition of equipment or supply or access to services.[100]

VII. CONCLUSION

The Hilmer Report proposes that an effective national competition policy would deliver public benefits by promoting efficiency and economic growth, while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. It has been the contention of this paper that implementation of the reforms proposed by the Hilmer Committee would not adequately deal with policy challenges thrown up by the convergence of telecommunications, broadcasting and computing. The communications industry is distinguished by the singular importance to consumers of content (broadcast program content and the information content of telecommunications messages) and its intricate relationship with questions of ownership and control. Historically, government regulation has sought to promote broad communications objectives by regulating in three areas: technical regulation of the delivery systems; content or programming regulation; and regulation of the ownership and control of the means or content of commination. Typical objects of comminations policy include maintenance of cultural pluralism, promotion of national cultures, protection of community standards in content and universal access to services.

Recent reforms to communications regulation have introduced self-regulation and pro-competitive principles, liberalised ownership regimes, and spelled out the social objectives to be achieved by regulating telecommunications and broadcasting. Convergence will reveal significant gaps in the regulatory framework, which the overlay of trade practices legislation and access to "essential facilities" regime as proposed by the Hilmer Report will not adequately fill in.

General regulation focused on competition and efficiency creates problems for an industry like communications where there are broad social objectives and rapid

100 See Part III, Section B *supra*.

change caused by convergence of technologies. Market analysis under competition law is focused on short term conduct. Anti-competitive conduct may be sanctioned on grounds of "public benefit", but there is no overriding obligation to promote the public interest, defined in terms such as access and diversity - the sort of terms needed to deliver on content objectives. General consumer protection principles, as applied under trade practices legislation, are similarly too narrow to meet the required objectives. In the communications industry we need a wider concept of the market to embrace the realities of convergence in an environment of already great concentration of ownership, and in which participants must be required to meet social objectives to do with access and consumer protection objectives to do with content.

The need to ensure that the public has direct rights of access and diversity within the emerging world of the converging technologies is a critical element in the function that public interest considerations should perform. This will only be achieved if the national competition framework recognises pubic interest considerations as central to its functions.

There will be a continued need for a communications industry regulatory authority to work alongside the general competition regulatory structure proposed by the Hilmer Committee. The proposed AUSCOM, replacing the current three industry specific regulators (the Australian Broadcasting Authority, the Spectrum Management Agency and AUSTEL), to work with the National Competition Council and Australian Competition Commission proposed by the Hilmer Committee is one option for communications regulatory reform which should be explored.

APPENDIX 1

Terms of reference for current Government committees and inquiries

1. The Broadband Services Expert Group established by the Department of Communications in December 1993 is due to report finally in December 1994 with an interim report due in June 1994. Members of the inquiry are from industry, users, carriers and research, education and finance institutions. The inquiry is examining the technical, economic and commercial preconditions for the widespread delivery of broadband services to homes, businesses and schools in Australia, having regard to matters such as:
   (a) current and likely future broadband services and the customer demand for these services;
   (b) the relative costs/benefits of delivery by optic fibre compared to other means, drawing on local and overseas experience;
   (c) the extent to which broadband services may be delivered by technologies other than optical fibre or through a staged evolution of technologies;
   (d) the industry development and export opportunities including the potential for increased employment;
   (e) the degree to which industry will be able to take advantage of the opportunities presented; and
   (f) the potential benefits to and impact on the Australian community of the availability of new broadband services.

   The inquiry is also examining the research and development effort required, the educational and training requirements for economic use of the proposed services options, the funding mechanisms for investment in such services and the role of international standards. The inquiry is also asked to identify options for co-operation among relevant interest groups and an appropriate role for government within the context of existing telecommunications policy.
2. The Communications Future Project was established within the Bureau of Transport and Communication Economics in mid 1993 to report within 12-18 months of establishment. It is to examine and report on:
   (a) the likely developments over the next decade and beyond in information, entertainment and communications services and technologies;
   (b) the implications of these developments for market participants in those industries including;
      (i) the underlying economic factors influencing industry growth and change; and
      (ii) the emerging patterns of commercial relationships within and between traditional industries; and
   (c) the implications of these developments for policy and regulation over the coming decade.

3. The Copyright Convergence Group established by the Minister for Justice in January 1994 is due to report in July 1994, the terms of reference being to consider the amendments necessary to the *Copyright Act* 1968 (Cth) to accommodate convergent technologies.

4. The Audio Visual Taskforce was established in September 1993 within the then Department of Industry, Science and Technology, a major objective being to promote commercial opportunities for Australia's audiovisual industries in the Asia-Pacific region.

5. The Terms of Reference for the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure Inquiry into Telecommunications Developments are:
The impact on industry, employment and the community of telecommunications developments up to the year 2000 and beyond. When assessing the impact of telecommunications developments the Committee will take account of the following:
   (a) telecommunications technology currently available in Australia and overseas;
   (b) anticipated developments in telecommunications technology in Australia and overseas;
   (c) availability and affordability of telecommunications technology for the majority of Australians;
   (d) industry's ability to implement and benefit from technology developments;
   (e) the effect on work practices and employment including working from home;
   (f) the social and cultural impact on home life in metropolitan, regional and remote areas;
   (g) the extent to which Australia's current telecommunications policies anticipate telecommunications developments;
   (h) the extent to which Parliament should give leadership to Australian innovation and the application of technology taking into account the social as well as technical and economic considerations.

APPENDIX 2

The objects of the *Broadcasting Services Act* 1992 (Cth) are:

(a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;
(b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs;
(c) to encourage diversity in control of the more influential broadcasting services;
(d) to ensure that Australians have effective control of the more influential broadcasting services;
(e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity;
(f) to promote the provision of high quality and innovative programming by providers of broadcasting services;
(g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance;
(h) to encourage providers of broadcasting services to respect community standards in the provision of program material;
(i) to encourage the provision of means for addressing complaints about broadcasting services; and
(j) to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them:

1. the Parliament intends that different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia;
2. the Parliament also intends that broadcasting services in Australia be regulated in a manner that in the opinion of the ABA:
   (a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services;
   (b) will readily accommodate technological change; and
   (c) encourages:
      (i) the development of broadcasting technologies and their application; and
      (ii) the provision of services made practicable by those technologies to the Australian community.

The objects of the *Telecommunications Act* 1991 (Cth) are:

(a) to ensure that the standard telephone service is supplied as efficiently and economically as practicable; and is ... reasonably accessible to all people in Australia on an equitable basis ... and is supplied at ... standards which reasonably meet the social, industrial and commercial needs of the Australian community;
(b) to maximise the efficiency of the carriers as the primary providers of Australia's telecommunications networks and services;
(c) to promote the introduction of new and diverse telecommunications services;
(d) to promote 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;
(e) to create a regulatory environment for the supply of telecommunications services which promotes competition and fair and efficient market conduct;
(f) to promote the development of Australia's telecommunications capabilities, industries and skills for use in Australia and overseas;
(g) to promote research and development within Australia in relation to new and diverse telecommunications facilities and services for use in Australia and overseas; and
(h) to ensuring that all parts of the community benefit from lower prices for telecommunications facilities and services and from the future development of telecommunications networks: (*Telecommunications Act* , s 3).

The objects of the *Radiocommunications Act* 1992 (Cth) are to provide for management of the radiofrequency spectrum in order to:

(a) maximise, by ensuring the efficient allocation and use of spectrum, the overall public benefit derived from the use of the radiofrequency spectrum;
(b) make adequate provision of the spectrum for use by public or community services;
(c) provide a flexible and responsive approach to meeting the needs of users of the spectrum;
(d) encourage the use of efficient radiocommunications technologies so that a wide range of services of an adequate quality can be provided;
(e) provide an efficient, equitable and transparent system of charging for the use of spectrum, taking account of the value of both commercial and non commercial use of spectrum;
(f) support the communications policy objectives of the Commonwealth Government; and
(g) provide a regulatory environment that maximises opportunities for the Australian communications industry in domestic and international markets: (*Radiocommunications Act* 1992, s 3).

APPENDIX 3

The Committee produced a set of principles which would form the basis of a National Information Policy. They were organised under the following headings:

- The right to know;
- Industry;
- Scientific and technological information;
- Intellectual property law;
- Transborder data flows;
- Sovereignty;
- Defence;
- Telecommunications/media;
- Media ownership and control;
- Libraries;
- Archives;
- Public accounting information;
- Social justice;
- Privacy;
- Education;
- Information research;
- Information statistics;
- Promoting efficient/effective information use;
- Promoting critical evaluation of information;
- Consumer information; and
- Copyright.