

FOREWORD

TELECOMMUNICATIONS LAW: AUSTRALIAN PERSPECTIVES

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FOR TELECOMMUNICATIONS READ FREEDOM

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FROM POST ROADS TO PROPHETIC WORDS

The founders of the American Republic determined that the Congress of the United States should have power to establish "post offices and post roads" to open up the far corners of the new nation. From the earliest tentative suggestions of an Australian Federation, the need for a national power in this regard was likewise perceived. W C Wentworth's Constitutional Committee in 1853 specified that "postage between the said colonies" should be regulated by the proposed Federal legislature. The draft Bill annexed to Wentworth's Memorial in 1857 specified "intercolonial telegraphs and postage". When the British North America Act established the Canadian Federation in 1867 the provision of a "postal service" was designated to Ottawa. Curiously, in the Federal Council of Australasia Act 1885 (Imp) posts and telegraphs were not even mentioned.

In the Australian Commonwealth Bill of 1891 "post and telegraphic services" were specified amongst the Federal heads of power. The same words were adopted in the Adelaide

session of the Convention in 1897. An attempt in committee to limit the Federal power by the addition of the words "without the boundaries of the Commonwealth" was there defeated by 30 votes to 5. It was in Adelaide too that the prophetic words "telephonic and other like services", as now appearing in s 51(v) of the Australian Constitution, were added. It was in these terms that the placitum was finally adopted to confer Federal legislative power with respect to "postal, telegraphic, telephonic and other like services" on the Australian Parliament.¹ By section 69 of the Constitution, the Public Service of each State dealing with "posts, telegraphs and telephones" were not to be transferred at Federation, but later. It is interesting to observe that at the time just before Federation, the annual expenditures of the States on posts, telegraphs and telephones were a mere £2.2 million. The new Federal Parliament lost no time in enacting the Post and Telegraph Act 1901.² That Act was to be administered by the "Postmaster-General", an office which endured until 1975. One has only to look at the provisions of that Act, which was last amended as recently as 1973, to notice the very different world of telecommunications in which we now live.

THE PRESSURES FOR CHANGE - POTS TO DIGITS

The passage of the Telecommunications Act 1989 in succession to the reforms of 1975 was designed, in the words of Kate Harrison³ to initiate "dramatic changes in the Australian telecommunications industry". The regulation of

the industry has passed from Telecom to AUSTEL. The new body also has the responsibility to implement a specified charter, adopted by the Federal Government and Parliament, to extend a greater measure of competition in Australian telecommunications, where formerly there was monopoly. This change follows the remarkable developments in information technology which have occurred, at escalating speed, during the past decade or so. Stimulated by such changes, and the difficulties experienced by the old-fashioned common carriers to keep in front of them, a number of the major western economies have set about breaking up the old monopolies - whether public or private. Three of the world's five largest national networks are now privately owned. The explosion of the new technology is, in the words of Richard Alson⁴ "creating an inexorable drive towards cost-based pricing from which Australia cannot hope to be immune". Large and powerful corporations in particular, "slugged for padded long-distance charges" by the old monopoly public carrier "will increasingly seek to bypass the common carrier grid by the installation of private networks". And the new technology makes their task easy, once the law allows it.

For some countries in the international telecommunications network, these are not yet the pressing problems of the day. For them, the provision of the plain, old telephone service (P.O.T.S.) remains at the top of their agenda. The numbers of such countries, which dominate the International Telecommunications Union (I.T.U.) continue to

influence the perspective and policies of that Union. But in a number of advanced economies - and Australia still likes to think of itself as one - the problems are different. Terry Cutler points out that the penetration of telephone facilities to households across the Australian continent has risen from 62% in 1975 to 92% in 1988. This compares with 93% in the United States of America and 81% in the United Kingdom.⁵ In such countries, P.O.T.S. has largely been achieved. Now the critical issue is how to modify telecommunications institutions and regulations in such a way as to seize the moment and the economic, political and cultural opportunities which the new technology of telecommunications presents.

Each country must devise its own system of telecommunication regulation, suitable to its peculiar needs. Mr Cutler points out that blind copying of North American, Japanese or European changes might not fit Australia's economy or society. Although our land mass is about the same as that of the United States, we have only 6% of that country's population. As well, that population is concentrated in relatively few urban centres. In telecommunications, we represent only 2% of the world market. These realities of market size and population density combine to require a uniquely Australian system of regulation. The system must be judged against social as well as economic criteria.

HEROIC REFORM FOR A SLOW TORTOISE?

For all that, sheltered behind its comfortable monopoly guaranteed by the 1975 Act, Telecom, in the opinion of a number of contributors to this book, failed abjectly to serve the home market. Still less did it take full advantage of the great opportunities presented by high technical skills to sell telecommunications services to other countries scrambling to get into the new age. Instead of venturing forth to conquer new fields and to bring vital foreign exchange earnings to Australia as a reward for its technological know-how, a few modest services to telecommunication starved nations was the most that could be achieved. To some extent these failures reflected the common incapacities of PTTs in the field of capital raising and marketing. To some extent they reflected the special Australian rigidities caused by the institutional overlap between Telecom, OTC and AUSSAT. But for the lucky country to become the clever country⁶ something better was needed. As Vanessa Fanning points out, the Australian reforms of telecommunications law were part of the government's efforts to achieve structural adjustment of key industries. In the words of Prime Minister Hawke, the government's goal was:

"To ensure that the manufacturing and service sectors, in particular, become more efficient and so improve our trade competitiveness, reduce our reliance on imports and ensure the Australian economy has the versatility, adaptability and resilience necessary to take advantages of the rapid⁷ changes this nation faces in the years ahead."

The casual reader of the early chapters of this book will be tempted to think that the achievements of reform reflected in the Telecommunications Act 1989 are truly heroic. In one sense they are. The rigidities of lawmaking in a Federation are well known. The special difficulty of securing radical reform in Australia is emphasised by the divorce between the bustling metropolitan areas where business and social life go on and the semi-rural national capital where live and work the mandarin class that make many of the key decisions. It is this class of highly talented, cautious, honourable but often unimaginative civil servants who advise governments and Ministers. The latter come and go, snatching their brief hour of glory on the public stage. The mandarins linger on. It took a Minister of rare determination and intellectual gifts (Senator Gareth Evans) to push forward the legislative changes which provide the statutory centrepiece for this book. That it was a government of the Australian Labor Party which created and extended the telecommunications monopoly of the 1975 Act is less surprising than that it was a government of the same party which pushed through the "restructuring" legislation of 1989 designed to achieve a measure of industry deregulation. So many assumptions of political life in Australia have changed in the past decade that there is no point in dwelling upon this irony.

Some of the contributors to this book obviously think that the reforms have not gone far enough. The bracing wind of unbridled competition is, for example, what Dr Warren

Pengilly looks for.⁸ For him, the 1989 Act, far from being heroic reform, is just another measure to preserve and extend the Telecom monopoly in the face of radical technological change and international competition. Indeed, it is really the "dead hand of regulation" in another guise.

Dr Pengilly ruefully suggests that the telecommunications monopoly in Australia traces its origins to the 1887 decision of the Victorian government to acquire privately owned telephone companies. It did so, significantly, because they were threatening the large profits of the State-owned telegraph company. The passage of a century could not, in his view, elevate the resulting monopoly which has endured to be a "natural" one. AUSTEL will not, in Dr Pengilly's judgment, be a market oriented entity. Inevitably it will be a regulation-oriented government body when market and technological advances should put pressure to dismantle regulation and public control. For Pengilly, this is reform; but at a tortoise pace:

"If you allow it to go at its pace [the bureaucracy] goes at a tortoise pace which is slow. But if you push it what happens? It pulls its head in and then it sits; and then the pace gets even slower."⁹

I certainly recognise this phenomenon from my nine years in Federal law reform in Australia. The more one pushes and prods, the slower sometimes becomes the pace of effective change in Canberra.

Nevertheless, change there has been. The core chapters

of this book illustrate and describe the change. The political reformer operates within constraints that go far beyond the federal system of government and the cautious bureaucracy. The Australian Government discovered this when Telecom's flirtation with timed local calls led to a tremendous electoral backlash. The story of Telecom's exquisite timing is told by Anne Davies. Talk of "deregulation" was soon replaced by "restructuring". From the opening contribution by Vanessa Fanning and Alex Arena (two administrators who have obviously escaped the stereotype) the changes are described from within the bureaucracy. Anne Davies gives an excellent description¹⁰ of the forces which actually led to the government moves for change. Not unimportant in this regard was the David and Goliath struggle between Tytel Pty Limited and Telecom in which Tytel went to court to fight for authorisation from Telecom for telephones it hoped to make available in the home market.¹¹

A LEGAL GUIDE THROUGH A NEW MINEFIELD

In the central section of the book, a number of the contributors call attention not only to the structure and provisions of the new legislation but also to the unusual techniques adopted to express the legislative intent. The growing tendency of Australian courts, stimulated by interpretation statutes and developments of the common law, to look beyond the words of an Act for the meaning of Parliament are brought out in the contribution of Amanda

Harkness.¹² But not all of the contributors approve of the way the 1989 Act has been expressed. Ian Cunliffe,¹³ for example, considers that some of the broad statements of policy are mutually inconsistent, or at least difficult to reconcile. Perhaps a lack of clarity is inevitable in legislation which represents a compromise between those who would mark out a larger, and a smaller, section of telecommunications for the Telecom monopoly. Perhaps it simply reflects differences between those who emphasise the provision of a universal telecommunications service to a nation and those who welcome the stimulation of market competition as the best way to achieve that objective.

Predictions of the way the new legislation will work, and the contrast with the pre-existing law and policy, appear in the chapters by Stephen Menzies and Ian Phillip, Peter Leonard and Grantley Brown.¹⁴ This is the legal heartland of the book. Try as AUSTEL might to avoid the legalisms of the Australian Broadcasting Tribunal (an object apparently high on its agenda)¹⁵ it is impossible to get away from the legal constraints of the Constitution and the empowering words of the statute. At this point, the future operation of the legislation is necessarily unclear. These chapters will therefore be specially useful. Until there are definitive constructions of the Act, the informed opinions of these writers are likely to be among the few available guideposts. By them, advisers, public and private, may seek to pick their way through the new legislative minefield.

It is Peter Leonard who points to the inescapable tension which exists at the fulcrum of this Act, as of other international efforts to define "basic" and "value added" services of telecommunications.¹⁶ One person's "value added" is another's "basic" service. It all depends upon one's economic, social or philosophical starting point. Furthermore, the determination of the boundary line, as Leonard emphasises, is likely to become more blurred with further advances of technology, just around the corner. For example, the implementation of a fully digital network, will inevitably require reconsideration of whether the reservation of a monopoly to the public carrier should extend beyond basic voice telephony. Once again, technological developments laugh at lawyerly efforts of statutory definition and legislative control.

The particular difficulty of grafting on to the culture of Telecom an aggressive spirit of joint venturing with private capital is described by Ian Rowe.¹⁷ Not the least of the difficulties mentioned is presented by the fact that Telecom personnel are typically employed under the rigidities of government pay structures. The provision of a higher salary to joint venture personnel than that paid to the very top officials of Telecom scarcely contributes to a suitable relationship between them. Little wonder that the private sector continues to poach from Telecom its best officers.

The chapter on international regulations looks at the working of the I.T.U. from an Australian viewpoint. The

tensions that are emerging within that vital world body from the pressures reflected in Australia by the 1989 Act pose a fundamental question. For how long will I.T.U, until now substantially a cosy club of public carrier PTTs, resist the implications for the international market that lie in the explosion of telecommunications technology? In a world in which nations and continents are going their own way, can I.T.U. keep pace with change and successfully reassert its role to ensure global compatibility of systems? Clearly the changes evident in the laws and practices of a number of advanced economies, including Australia, will have implications for the international body which has a global mission that transcends momentary economic advantage and the "quick fix".

RECONCILING COMPETITION AND SERVICE

The book then turns to an analysis of the institutions of regulation and the mechanisms for dealing with decisions and complaints. Inevitably AUSTEL is the focus of most of the attention here. It is here that the contrast is seen between the relatively open procedures of the Australian Broadcasting Tribunal and the administrative procedures of AUSTEL. Clearly, behind these changes is an endeavour to diminish the role of lawyers with their expense, delays and alleged obsession with form over substance. But Federalism is legalism. With great economic and social prizes at stake, it may be doubted that the attempt to exclude the courts and the lawyers from the work of AUSTEL will be wholly

successful. Or that it should be. For all their faults, open courts and tribunals tend to be sensitive to the public interest and consumer needs. The vision of AUSTEL as a congenial stamping ground for well heeled private interests - speaking to each other in closed session or at seminars too expensive for public interest groups to attend - is discouraging. It will be important for AUSTEL to adopt procedures which will be sensitive to the many public interests involved in its activities.

There then follow four chapters on the interaction between Australia's trade practices regulation and the new telecommunications law. The Chairman of the Trade Practices Commission (Professor Robert Baxt) emphasises the modest resources with which that Commission, in co-operation with AUSTEL, must oversee the introduction of competition where formerly there was monopoly.¹⁸ A highly practical description is given by the Commonwealth Ombudsman (Professor Dennis Pearce) of the way his office deals with individual complaints about telecommunications services. Suitably it does so, in the large majority of cases, by telephone. This is now accepted. But release from capture by paper reports has a long way to go in the bureaucratic traditions of Australia. The final two chapters present the fundamental quandary of the book. How can competition be introduced, suitable to the dazzling new technology of telecommunications, whilst at the same time reserving unimpaired the supply to the people of Australia of a

universal telecommunications service? Can these seemingly conflicting objectives be secured simultaneously? And if they cannot, is there a more cost effective way to protect the rural subscriber and the lonely pensioner for whom the telephone is a lifeline, short of staving up Telecom's monopoly?

THE MULTIPLIER AND THE REVOLUTION OF 1989

This book must be read in the context of contemporary affairs. That context is even wider than the remarkable technological changes which provide the backdrop against which the text is written. The most extraordinary political events of 1989, coinciding with the new legislation described here, were undoubtedly those of the Soviet Union and its Eastern European allies. In the space of little more than a year, a dramatic revolution has occurred. Its events have been likened to the earlier upheavals of 1789, 1848, of 1918 and 1945. The changes which happened were largely unpredictable. Certainly, they came at a pace which caught most observers unawares. What began as the privately expressed concern of a privileged few and then the tentative movement in the docks of Gdansk, Poland, spread remorselessly through Hungary and Czechoslovakia. It engulfed the rigid regimes of Bulgaria, Mongolia and Romania. Lately it has caught up the Baltic States and Federal Yugoslavia. If the tide was temporarily stemmed in China in the middle of 1989, it has certainly continued to flood into the Soviet Union itself. Amongst the most vivid symbols of the change was the

demolition of the Berlin Wall which once signified the division between the Federal Republic of Germany and the Democratic German Republic - between West and East.

These changes are connected with the subject matters of this book. Amongst the powerful forces which stimulated change in the Soviet Union (making the acceptance of change elsewhere tolerable) was the realisation of the unacceptability of rigid control of the free flow of information. It was probably the shocking realisation of the price paid at Chernobyl in 1986 which finally convinced a number of the key operators of the Soviet Union that the only hope of economic and social restructuring of that country was Glasnost. And an essential element of Glasnost is an efficient and open system of telecommunications. Eyes opened, Soviet observers could see the growing distance between the technology available in the competitive market driven economies of the West and that available to those living in their sphere of influence. The locked photocopying machine stood as a nagging daily symbol of the technological backwardness of those regimes. The world of telecommunications, as a by-product of comparatively freer societies where ideas could more readily flourish, stood in stark contrast to the economic backwardness and social dislocation of the Soviet Union and its Comecon allies. And the differences could not be hidden forever.

Broadcasts by radio and telecom crossed the Berlin Wall. Telephone communications and direct dialling leapt

over even the energetic intrusions of the omnipresent censor. Satellites beamed the extraordinary developments of other economies. The data spoke with one voice of the multiplier stimulation which telecommunications provided to economic growth. Links with the reformist movements were established by interactive computers and by telefacsimile. The realisation of the growing technological backwardness (including in telecommunications) provided stimulus to the movements for change which have now become a deluge.

FOR TELECOMMUNICATIONS READ FREEDOM

This point serves to emphasise the high social importance of the subject matters of this book. Free societies communicate over distance. They do so readily amongst their own people. They do so beyond their borders with the world of ideas and innovation elsewhere. The provision of the means of communication within and beyond continental Australia has been an abiding matter of national concern from the earliest colonial days. And it still is. In today's economic circumstances, the provision of access to the whole range of technological innovation is an imperative necessity of an economy for too long sheltered from the world. Now, at last, it is throwing off the restraints of stagnant monopoly and protectionism.

In general, there is a coincidence between the forces which promote the rapid acceptance of new information technology and the forces of individual freedom that depend upon access to information. It remains the duty of

government, its laws and policies, to assure that coincidence. Market forces will not always do so. The importance of this book lies in the critical analysis which it offers of Australia's current laws and policies. In the light of the extraordinary developments of the year past, still unfolding, it is not too much to say that for telecommunications one should read innovation, the free flow of ideas, individual fulfilment and economic progress. In short, for "telecommunications" read "freedom".

FOOTNOTES

* President of the Court of Appeal, Supreme Court of New South Wales.

1. See J Quick and R R Garran, The Annotated Constitution of the Australian Commonwealth, Angus and Robertson, 1901, 559f.
2. See J Holmes, Chapter 12.
3. Chapter 14.
4. Chapter 21.
5. Chapter 22.
6. As Mr R J Hawke promised in the Australian Labor Party Policy Speech for the 1990 Federal election in Australia.
7. R J Hawke quoted by Fanning, chapter 2.
8. Chapter 18.
9. P Koornhof cited by Pengilley, chapter 18.
10. Chapter 4.

11. Tytel Pty Limited v Australian Telecommunications Commission (1986) 67 ALR 433 (FCA).
12. Chapter 5.
13. Chapter 13.
14. Chapters 6, 7 and 8.
15. See I Cunliffe, chapter 13.
16. Chapter 7.
17. Chapter 9.
18. See chapter 15.