Chapter 5

Convergence and Standardization in Telecommunications Regulation: Trajectories of Change and Reform in the Asian Pacific Regulatory State

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Introduction[1]

The 'globalization of reform' is a common phrase used to describe many dimensions of contemporary state restructuring and public sector reform. Much attention has been paid to convergent forms and trends such as NPM or the 'new governance' (Salamon 2002) while, in the case of regulatory reform, theorists have identified a constellation of trends under the label of the 'regulatory state' (or even 'post-regulatory state' (Scott 2004)). But the convergence proposition is not uncontested: an alternative view is sanguine about the convergence of national regimes on global models, stressing not only the common themes but the continuing – if not deepening – variety in processes and outcomes (Common 2001; Pollitt 2001; Hood 1998, 194–221). Thus, NPM is not the only administrative reform paradigm that has attracted the attention of reform advocates and governments in recent decades (Peters 1996) and even where it is taken up it results in numerous transformations (Christensen and Lægreid 2001b).

But the global trajectory of reform ideas and movements is indisputable – for example, there are multiple channels through which ideas and experience spread, including multilateral institutions that promulgate dominant models and fashionable templates. In this chapter, I take a particularly striking case of seeming convergence – the changing administrative organization and style of national telecommunications regulation – and look at the reform processes and the outcomes in three Asian Pacific jurisdictions: Australia, Hong Kong and Malaysia. The analysis proceeds as follows: first, a discussion of the 'regulatory state' and 'new governance' (and its connections with NPM); second, a brief review of theories of convergence and their applicability

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to the telecommunications policy sector; and third, an account of the trajectory of telecommunications regulatory reform in the three jurisdictions, which aims to demonstrate how and why, despite very different starting points and divergent domestic political conditions, they all ended up with a variety (the emphasis is on 'variety') of the same kind of new regulatory regime.

The Regulatory State

The so-called 'regulatory state' is characterized both as a product of a changing global economic order and also as a constellation of new regulatory techniques and organizational forms. Its central features are the increasing scope of pro-competitive regulation by independent regulators and the deployment of a different mix of regulatory instruments (Moran 2001a, 2001b, 2002; Cook et al. (eds) 2004; Jordana and Levi-Faur 2004; Schmidt 2004; Levi-Faur and Jordana 2005). In an era dominated by neo-liberalism, the underlying aim is to create a more efficient economy under the pressures of globalization, that is, to force businesses to compete and to strip away anti-competitive institutions and practices (Rioux 2004). The state's traditional regulatory roles of a mix of direct provision and 'setting down rules and powers', honed over decades of social and economic protection, are supplemented or substituted by various modes of hands-off oversight and more light-handed regulation, including self-regulation. Transnational and supranational institutions play a bigger role, often through standardization and self-monitoring. However, while regulation may be 'softer' and the range of actors entailed in it expands, the state does not disappear from the picture, for '… ends are ultimately set and determined by the sovereign state' and regulatory regimes characteristically involve '… legal underpinning for indirect control over internal normative systems' (Scott 2004, 167–8).

The regulatory techniques featured most prominently in this model – such as contracting, quality assurance and the use of performance indicators – are the kinds of 'instruments' or 'tools' of government that have also been directly associated with 'the new governance' (Salamon 2002). Most are also characteristic of NPM. Both 'old' and 'new' regulatory instruments are depicted in Table 5.1, which classifies regulatory techniques according to the kinds of resources used for steering (authority, money or knowledge) on the vertical axis and the underlying basis of the nature of regulation (from compulsion to voluntarism) on the horizontal axis. The instruments said to be characteristic of new governance and the regulatory state use less direct application of government authority and 'softer', less intrusive forms of intervention (located towards the bottom-right rather than the top-left of the grid).[2]

2 The use of 'old' and 'new' should not be taken as suggesting that the process has involved inventing new instruments. In the art of statecraft, most things have been tried at one time or another. The argument is that the 'mix' is changing. Table 5.1 is adapted form Knill and Lenschow (2004); on the classification of tools into 'sticks, carrots and sermons', see also Bemelmans-Videc et al. 1998.

Table 5.1 Steering mechanisms and modes of regulation

	Direct Government	**Regulatory Standards**	**Indirect Government**	**Self-regulation**	**Standardi-zation**
Authority	Ownership and direct provision or restraint	Legally binding ex ante rules of conduct	Procedural / framework rules and contracts	'Shadow of hierarchy' (fall-back rules)	Compulsory reporting and monitoring (league tables)
Incentive Structures			Taxes, auctions, concessions, subsidies	Delegation to private actors and 'industry forums'	Peer pressure
Learning			Education / information provision	Communication in private networks	Benchmarking / best practice models

Not only is there a new mix of techniques but also a greater reliance on 'para-state' and non-state actors. The growth of independent regulators and the use of more indirect forms of regulation are accompanied by a growth in the power and role of industry experts. Enforcement roles are shared with private 'regulatory officers' employed both by industry associations and by large corporations in their compliance divisions. Industry associations monitor their members according to collectively agreed on 'best practice' standards (usually arrived at in co-operation with the independent regulator and often backed by 'fall-back' legal provisions). 'Benchmarking' is a common tool, as each organization monitors and corrects itself according to 'best practice'. The partial decoupling of regulatory capacity from traditional state forms is closely associated with globalization and the rise of transnational networks of governance. Industry insiders, in close co-operation with state actors, develop regulatory norms and standards in non- or quasi-governmental (and increasingly transnational) arenas of professional interaction (Slaughter 2004). In such a context, as the next section discusses, there may be particularly powerful forces for convergence: as Levi-Faur (2005) argues, the regulatory state is at one and the same time a national (bottom-up), transnational (horizontal) and supranational (top-down) phenomenon.

National Convergence within the Global Telecommunications Sector

The liberalization of domestic telecommunications markets and the accompanying regulatory reforms seem to have been an unstoppable trend over the past 20 years or more. Governments everywhere, facing similar competitive pressures and technological development, have undertaken corporatization or privatization of

state-owned telecoms, opening up of new markets to multiple providers and the introduction of new regulatory regimes under the control of an independent regulator (Drahos and Joseph 1995; Levi-Faur 1998). How do we explain these seemingly convergent trends and, more broadly, the wider convergence (if there is one) towards the new regulatory state? A diverse literature encompassing many disciplines and traditions has produced a number of possible answers to this question. Various forms of 'modernization' theory, especially those naming technological change as a driver, underpin some perspectives, as just indicated in the case of telecommunications. In economics, a political economy tradition postulates a 'race to the bottom' among competing jurisdictions anxious to provide equally business-friendly regulatory environments for footloose capital.[3] In contrast to this structural explanation, in which agents are 'bearers' of an overwhelming logic, another viewpoint stresses 'ideational' factors and the role of agents in an increasingly globalized world culture (Drezner 2001, 55–63). Actors also play a role in diffusion theory, which offers reasons why some kinds of models or examples are imitated rather than others: for example, factors such as distance, prestige and familiarity come into play, as well as frequency of direct contact and communication between the relevant actors (Eyestone 1977). Anne-Marie Slaughter (2004) argues that the proliferation of 'global networks' directly stimulates such processes. International organizations under the auspices of bodies such as OECD and the United Nations can play a major role in co-ordination and in the legitimation of models and templates (Sahlin-Andersson 2001, 45, 67–9).

All of these approaches overlap with organizational theories of isomorphism (DiMaggio and Powell 1991). Organizations adapt to their social, economic and political environments, which primarily comprise other organizations. The logic of copying is often dominant as organizational leaders observe successes in other organizations and react mimetically to the threats and opportunities provided by such examples. These processes of isomorphic change are particularly powerful in situations of high uncertainty, such as rapid technological change and high economic instability. However, organization theorists also note the extent to which this process involves 'editing' and 'transformation' through selective borrowing, local interpretation and 'hybridization' (Sahlin-Andersson 2001). When what is being copied (a 'reform') has a strong ideational element, fashion may be a driving force, suggesting that the new way of doing things may be only skin-deep, appearance rather than substance: 'reform talk' is only loosely coupled with actual practice, so much reform is essentially hypocritical (Brunsson 1989). Christopher Pollitt (2001) has argued for the need to distinguish between, first, convergence in adopted models and ideas (the most common); second, convergence in implemented measures; and third, convergence in outcomes (the least common).

In the case of the potential for convergence in the telecommunications sector, two intrinsic features are significant: first, the trans-border scope and nature of the industry; and second, the rapid pace of technological development. The first characteristic has given rise to a number of international arrangements and

3 This view is confounded somewhat by a competing logic of the 'race to the top', in which some jurisdictions succeed by making a 'quality' pitch as a differentiation strategy.

mechanisms for co-ordination, principally under the auspices of the International Telecommunications Union (ITU). Technological change in the information technology sector has accelerated rapidly in recent years, continuously making existing modes of provision redundant and placing a high premium on innovation and flexibility in domestic markets, as well as requiring intensified co-ordination efforts across national borders. However, while these features of the industry may well explain convergence on technical 'best practice' and the impossibility of holding out against modes of provision and distribution that literally know no borders, the extent to which these transformations are accompanied by pro-competitive, market opening strategies may require other forms of explanation. One such explanation is a top-down one: the erection of a supranational regulatory regime.

International co-operation over telecommunications regulation has been transformed in the past 30 years from a model based on technical co-operation between state-owned monopolies via the co-ordinating instrument of the ITU, to one based on open competition between multinational corporations (including some that remain fully or partly state-owned) under the umbrella of the WTO 'trade in services' agreements (Drahos and Joseph 1995; Braithwaite and Drahos 2000). Market access has become the rallying cry for the new supranational regulatory regime. Under the General Agreement on Trade in Services (GATS) Annex on Telecommunications, negotiated between 1994 and 1997, governments (among them, Australia, Malaysia and Hong Kong) signed up to a process under which they each agreed to their individual timetable of liberalization.

The most important players in this supranational regulatory regime are the 'core' nations of the USA, Japan and Europe. The world's largest multinational telecommunications manufacturers and providers are located in these countries, seeking open access for investment and trade in the global industry. As well, each of their governments has a particularly strong interest in ensuring that all significant telecommunications markets provide efficient, low-cost telecommunications services to foreign investing companies. The 'peripheral' nations all seek the benefits of integration into the system of international trade, and the core nations extract their price for membership of the club – liberalization of each country's domestic markets. In some shape or form, this comprises privatization of state-owned monopolies, greater access for overseas as well as domestic private investors and market entry for new providers in all segments of the market. For peripheral nations, an innovative, efficient telecommunications sector is a key infrastructure support for succeeding in the international trading system and in attracting foreign business to invest. In Southeast Asia, Hong Kong and Malaysia (as well as Singapore and Thailand) have each at one time or another announced their intention of becoming a 'regional information hub' through liberalizing their telecommunications markets. Meanwhile, the traditional domestic monopoly provider is encouraged to enter the global market through overseas investment in foreign, newly liberalized telecommunications markets.

While the international free trade regime provides the framework within which national regulatory systems operate, other transnational players also shape regulatory reform (see Appendix Table 5A.1). The IMF and the World Bank have supported privatization and pro-competitive telecommunications regulatory reforms

in developing countries. Their technical and financial assistance is often the trigger for the reform process and shapes its outcomes. The World Bank supports *InfoDev*, an on-line support network for providing technical assistance on information and communications technology (ICT) to developing countries. The World Bank has published a series of manuals on regulatory reform along with countless research reports and discussion papers on privatization policy and regulatory techniques.[4] OECD has also played a role in disseminating information on best practice in telecommunications regulatory reform, particularly among its member countries. This dissemination of ideas about regulatory reform has overlapped at significant points with the OECD's wider advocacy of NPM.

Regional multilateral institutions also play a role in affirming commitments to liberalization and in supporting technical development and information exchange. The Asia–Pacific Telecommunity (APT) is a regional organization of government departments, regulators, manufacturers, providers and other stakeholders co-sponsored by the ITU and the UN, holding regular conferences and meetings, disseminating a newsletter and publishing annual reports. Australia and New Zealand provided initial financial and secretarial support for this organization (Stevenson 1991, 487). At the intergovernmental level, ASEAN Telecommunications ministers meet annually as ASEAN-TELMIN, spawning a series of official level working groups. APEC – Asia Pacific Economic Cooperation –promotes trade liberalization in the region; its Telecommunications Working Group (APEC-TELWG) had its first meeting in 1991 (Stevenson 1991).[5] It operates through a number of task forces and steering groups, in which officials from relevant ministries and regulatory agencies participate. Liberalization and regulatory best practice are frequently on the agenda of these meetings. One concrete result has been a mutual recognition agreement on standards.

Each of the telecommunications policy departments and regulators in the three jurisdictions covered in this analysis pays explicit attention in its organizational mission and structure to international operations. For example, the Regulatory Branch of the Hong Kong Office of Telecommunications Authority (OFTA) lists participation in 'international and regional telecommunications fora' as a core task; Australia's industry regulator has a 'regional strategy' that sets out a programme of 'regional collaboration and information exchange on radio-communications, standardization and convergence matters'.[6] It refers specifically to the APEC-TELWG and to regional collaboration in preparing for ITU meetings and agreements. Malaysia's regulator also emphasizes participation in 'regional preparatory meetings

4 The InfoDev Practical Handbook for Telecommunications Regulators is available at: <www.infodev.org/content/library/detail/842> (accessed 19 July 2006). The on-line version is in Arabic, Chinese, English, French, Russian and Spanish. For other examples of 'how to do it' publications, see also Wellenius (1997) and Wallsten (2002).

5 APEC is a regional association of 'economies', not 'states' or 'governments', thereby avoiding treading on the toes of ASEAN while also emphasizing its largely economic focus. It is an ideal setting for informal networking among sectoral policy specialists on 'technical' matters, standing at arms' length from inter-state conflict and diplomacy.

6 See<www.acma.gov.au/acmainterwr/telcomm/international_activities/regional%20strategy.rtf> accessed 24 April 2006.

for global conferences and other activities which focus on Malaysia's and the region's requirements'.[7] That is, the networks of contacts and co-operation are extensive and regular. They also include ad hoc exchanges, such as the event organized by OFTA in August 2005 to discuss Australia's recent experience in convergence of telecommunications and broadcasting regulation, when the acting deputy chair of the Australian Communications and Media Authority (ACMA) was among the invited participants. OFTA and the ACMA have a regular staff exchange scheme for senior regulatory officers, with an individual spending several months as the other's guest each year (Cheah 2005).

Thus, the transnational mechanisms of persuasion, co-operation and communication are multiple and complex in the telecommunications policy sector. The most compelling force for convergence is the WTO, which provides a mechanism of persuasion and negotiation by which governments sign up to the process of entering the global telecommunications market. ITU and its technical and standardization work is the other main forum. Gaps and the detail are filled in by the various regional networks of technical, professional and government-business co-operation and communication that disseminate practical knowledge. Each of the three governments had already embarked on telecommunications industry reform before signing up to the WTO-monitored market opening commitments. Each of them eagerly participated in the other sector-specific international and regional organizations and networks, often competing for opportunities to host events and meetings. This international activity can be an important channel for the spread of ideas and norms about telecommunications reform. However, it is only part of the story. The various bodies and networks have no direct jurisdiction over the decisions of particular governments in the regulatory reform process. Even signing up to WTO is in one sense only a signal of good intention, as the kind and level of commitment made is voluntary and 'slippage' on implementation is common. The liberalization process in each country follows its own path, influenced by local political events as well as by sector-wide ideas and norms. Domestic players beyond the networks of actors involved in cross-border sectoral arenas are also important actors. In the next section, we trace in outline the steps each of the three governments took in the process of regulatory reform, and show how, despite very different starting points and different reform processes and timetables, they all converged on a similar regulatory model.

Three Trajectories with a Common Target

The three cases encompass one middle-income (Malaysia) and two high income economies; a relatively small 'city-state' and two larger, more complex polities. All share a common British colonial and institutional heritage, albeit with significant differences. Australia and Malaysia have a similar prime minister and cabinet, parliamentary system of government, while Hong Kong has been described as 'neither parliamentary fish nor presidential fowl' (Scott 2000, 29). Australia has a

7 See <www.cmc.gov.my/what_we_do/intl_act/index.asp> accessed 24 April 2006.

long tradition of open, competitive democracy while Malaysia is usually classed as a 'soft authoritarian' or 'semi-democratic' political system, where some of the forms of democracy exist but political and civil freedoms are constrained. Hong Kong, on the other hand, has very limited democracy but high levels of political and civil freedoms.[8] Hong Kong is often singled out as a prime example of an 'administrative state' where highly paid, meritocratically selected civil servants receive high public regard and play prominent roles in policy-making and management.

Only one of the three governments – Australia – has been noted for its eager or widespread adoption of NPM. Australia now prides itself on being one of the most open, liberalized economies and one of the more 'managerialized' and 'marketized' systems of public administration in the OECD, despite a long history of public provision and protection. The other two governments have a reputation as active public-sector reformers, but have been more cautious in their adoption of reform models and techniques (Cheung 1997; Common 2001; Painter 2004, 2005). Privatization was attractive to Malaysia as part of a shift in economic-cum-political strategy in the 1980s (discussed later), while Hong Kong has always prided itself on being a bastion of the 'free market', where most public utilities were in private hands. But both Hong Kong and Malaysia have adopted a relatively conservative stance to typical NPM reforms such as autonomization, contract employment and internal markets and remain, by and large, attached to a traditional, hierarchical departmental system, staffed by a career service. In this regard, they are typically Asian bureaucracies in the 'statist' tradition (Cheung and Scott 2003, 11–14). Malaysia and (increasingly) Hong Kong have been strongly attracted to TQM and to benchmarking against ISO standards as a means of administrative improvement.

Reforms in telecommunications thus took place in each jurisdiction's distinctive local, public-sector-reform context as well as in a common, transnational telecommunications context. Local reform trajectories were influenced by diverse patterns of institutional inheritance, national politics and administrative style. Different institutional starting points were an important source of these different trajectories, while politics affected both the way the 'spoils' were divided when parts of the industry were opened to new players and also the way in which telecommunication services were perceived and valued by domestic constituencies.

In Australia, telecommunications from its earliest days was seen as a tool for 'opening up' a huge continent and for providing access to the outside world, even for those in the most remote regions of the continent. From the earliest years of federation, the use of the telegraph network to 'conquer distance' was seen as a national mission. The Postmaster-General's Department's goal to build a national telegraph and telephone network was essentially a unifying, equalizing one (McElhinney 2001, 235). Universal service remained a critical consideration in Australia, particularly the issue of equality of access between city and country. By 1975, as the government-owned sole provider of domestic services, the Department

8 The chief executive and ministers are not directly elected political office-holders, but there is a directly elected but relatively weak legislative council in a strongly 'executive-led' set of constitutional arrangements. However, for the council elections, some seats are reserved for restricted 'functional constituencies'.

had connected over 60 per cent of households. International services were placed under the Overseas Telecommunications Commission (OTC) after 1946. In 1975, the Australian government took its first step towards restructuring the monopoly provider, splitting the Department into two government-owned enterprises, Telcom Australia and Australia Post. Telcom inherited the old Department's regulatory functions. In 1981, the government set up Aussat as the monopoly operator of satellite communications services. Telcom, OTC and Aussat had separate, defined segments of the market and did not compete with each other. In the legislation setting up Telcom Australia, specific reference was made to the support of uneconomic services. The manner in which this was done – through internal cross-subsidies from profitable services such as long-distance calls – was increasingly controversial, with business groups in particular objecting to the 'hidden burdens' they faced. A committee of inquiry in 1981 pointed towards the future, recommending full privatization accompanied by direct Treasury subsidies for identified 'uneconomic' services. This report was not implemented by the conservative government, in which country interests were very strong.

The 1980s was an era of economic liberalization in Australia, with government-owned banks, airlines and railways sold off and anti-competitive regulations demolished. In the telecommunications sector, however, liberalization was at first restricted to provision of terminal equipment and to paging services. In 1989 a major step was taken with the setting up of a separate, independent regulator, AUSTEL, although among its functions was the protection of the monopoly positions of the three government-owned carriers. However, each by now was fully corporatized and run along commercial lines (following a template applied to all such bodies by the government of the day).[9] In 1991, private participation in the provision of services was brought about by the sale of Aussat to Optus Communications, forming the basis for a full competitor with the government carrier, which in 1991 was restructured through the merger of Telcom and OTC (renamed Telstra in 1993). At the same time, mobile licences were granted to Telstra, Optus and a third private company, Vodafone. In addition, Telcom's monopoly in the provision of fixed line infrastructure was removed, while 'carrier service providers' were granted the right to purchase and resale capacity owned by the carriers. As a result of these reforms, Australia had a duopoly in the provision of fixed line domestic and international services and a triopoly for mobile services. The main industry players were guaranteed a stable market structure until 1997; in return, Optus had to meet certain commitments on the provision of new fixed infrastructure (Brown and Malbon 2004, 63–4).

Thus, by 1991, Australia had brought controlled competition to the market under the oversight of an independent regulator, but had not privatized the incumbent provider. This sequencing was reversed in the case of *free market flag-carrier Hong Kong. The domestic and international operators in the local duopoly were subsidiary companies of UK government-owned* Cable and Wireless, which was privatized by Margaret Thatcher in 1981, thereby creating two new private companies in the Hong Kong market (they joined forces in 1987 as Hong Kong Telecommunications Limited

9 'Corporatization' of government businesses was a common theme in NPM reform packages in New Zealand, the UK and Australia.

(HKT)). The Hong Kong government looked for ways to promote competition in areas beyond the exclusive, monopoly franchises (liberalization of customer premises equipment from 1983; three analogue mobile services licences issued in 1987; and one digital cellular services licence in 1992). In 1992, the government established an independent regulator, the Office of the Telecommunications Authority (OFTA), which took over from a government department (the Post Office).[10] A revised Telecommunications Ordinance spelt out the independent role of the Authority.

In Malaysia as in Australia, the telecommunications industry was an important tool of national development. Jabatan Telekomunikasi Malaysia (JTM), the telecoms monopoly, was the country's largest single employer and was used in the 1970s as a job-creation vehicle, with a 211 per cent increase in staff (Kennedy 1995, 220). Privatization plans for JTM were hatched as early as 1981, as part of a wider trend by a government disillusioned with the performance of its public enterprises (Jomo et al. 1995), but took several years to come to fruition (Kennedy 1995, 227–8). In 1984, its eventual successor, STM (Syarikat Telekom Malaysia) was set up as a government-owned company and in 1987 JTM's operational arm and 98 per cent of its staff were transferred to STM's control (while retaining existing employment conditions and privileges). JTM was re-badged as the regulatory authority. STM (renamed Telekom Malaysia Berhad or TMB) was granted a 20-year licence, with a monopoly over most telecommunications services. Part-privatization took place in 1990 through listing on the Kuala Lumpur Stock Exchange and floating of 25 per cent of equity.

Market liberalization – that is, the admission of new players – was commenced in the second half of the 1980s. It has been well documented that privatization and liberalization for the Malaysian government were instruments not only of economic reform but also of fostering Bumiputera (Malay) interests. More specifically, privatization was designed to favour a hand-picked selection of well-connected businessmen under the patronage of top ruling party (UMNO, or United Malay National Organization) leaders. The processes involved were ad hoc and secretive and followed the so-called 'first come, first served principle' under which the government invited 'good proposals' and responded individually to them (Jomo et al. 1995, 84–5; Salazar 2004). Key, well-connected business figures, some with little if any experience or credentials in the business, gained highly favourable treatment in the issue of new licences. In sum, the first phase of the liberalization of the telecoms industry in Malaysia was about dividing up the spoils and positioning the domestic winners – all of them well connected with the UMNO political elite – to reap the potential benefits of market growth and innovation. Licence decisions were made by cabinet, and were inextricable from a series of intricate, politically inspired deals over ownership and control. Only later did the basic elements of a pro-competitive set of regulations begin to develop.

The Hong Kong government's commitment to full liberalization was restricted by the exclusive rights inherited by HKT for local and international phone services, which were set to expire in 1995 and 2006 respectively. However, from the mid-1980s, the government used its licensing powers to open access for new operators

10 The first head of the Authority was an Australian.

through Public Non-Exclusive Telecommunications Service (PNETS) licences (which enabled 'value added' network services (VANS) to operate via HKT's network) and Public Radio Service (PRS) licences. The regulator carefully monitored the access and interconnection negotiations. These licences were challenged by the dominant operator in the courts, but the judgements were uniformly in the regulator's favour. After a series of negotiations with HKT, the government in 1998 announced payment of US$864 million as compensation for permitting the three non-dominant FTNS (Fixed Telecommunications Network Services) operators to connect with the fixed network and operate international services. The removal of the last monopoly accelerated the pace of liberalization. In March 1999, mobile number portability services began (the third in the world to provide this), and in January 2000 external facilities-based telecommunications and local wireless FTNS were introduced. Since 2001, 34 FTNS, Fixed Carrier Licensees and Mobile Carrier Licences have been issued, adding to nine such players already in the market. In the same period, more than one hundred licensees operated in the IDD market.

In Australia, the 'second wave' of liberalization occurred when open competition was effectively introduced in 1997, by which time Optus had established itself in the market. At the same time as putting in place a new regulatory regime permitting unlimited numbers of new entrants, a new set of regulatory institutions was set up. AUSTEL's functions were transferred to two bodies: first, the Australian Competition and Consumer Commission (ACCC), with pro-competitive regulations being incorporated in new telecommunications-related sections of the Trades Practices Act; and second, the Australian Communications Authority (ACA), which took over industry-specific matters. Further regulatory restructuring occurred in 2005 through the merger of the ACA and the Australian Broadcasting Authority (ABA), creating the ACMA. In Hong Kong, the government in 2006 issued a discussion paper setting out the steps proposed in merging the telecommunications regulator with the broadcasting regulator into a unified Communications Authority (Commerce, Industry and Technology Branch 2006).

In Australia, hostility to privatization remained strong among country voters and unions, with the government concerned to avoid accusations of deserting the universal service commitments to rural Australia. One-third of Telstra was privatized in 1997 and a further one sixth in 1999, both through public share issues, leaving 50.1 per cent in the hands of the government. Initiatives to support investment in rural services were introduced to soften the possible effects of full privatization, which was the avowed longer term aim of the conservative government of John Howard (first elected in 1996). In 2005, following a sweeping election victory giving the government control of both lower and upper houses of parliament, legislation was passed to give the government power to decide on specific arrangements for the sale, including the timing. Further large amounts were committed to rural telecommunications investment via a Communications Fund – by now the universal access obligations had become extended to cover internet broadband services as well as basic telephony (Bandias and Vemuri 2005). Restrictions on foreign ownership of the company under the 1991 legislation (35 per cent of listed capital in total and a maximum of 5 per cent for any single foreign owner) remained in place. Unlike

Telstra, its main competitor Optus is foreign-owned by Singtel, which is owned by the Singapore government.

Malaysia's regulatory reform process was somewhat less orderly than the other two cases. Despite issuing several full carrier licences, it was not until 1996 that the Malaysian regulatory authority arrived at a code to regulate interconnection by the newly licensed carriers with the dominant operator's fixed line at a realistic cost. In the meantime, the licensees could only compete in the emerging mobile markets. It was the Malaysian government's conversion to an IT-led growth strategy that stimulated the 'second wave' of reforms. A National Telecommunications Policy was launched in 1994 by Prime Minister Mahathir, with a commitment to develop Malaysia as 'the regional and international telecommunications hub in Southeast Asia' and a supportive attitude towards 'orderly competition'. The rhetoric of 'liberalization' and 'globalization' was strong in Mahathir's pronouncements on his plan to make Malaysia an advanced economy, *Vision 2020* (Bunnell 2004, 52). In this context, the decision to embark on telecommunications reforms was part of a wider strategy. Australian international consultants from McKinsey and Co. highlighted in a report for the Malaysian government the critical issue of technology convergence (telecommunications with broadcasting and the internet, and wired with wireless communications systems) along with the need to embrace the liberalization agenda. The end result was two new Acts in 1998 – the Communications and Media Act (CMA) and the Communications and Multimedia Commission Act (CMCA) – and the establishment of a Malaysian Communications and Multimedia Corporation (MCMC) to take over from JTM the role of telecommunications industry regulator. The restructuring also produced a new Ministry of Energy, Communications and Multimedia (reorganized as Energy, Water and Communications in 2004). The CMA articulated a clear pro-competitive philosophy in setting out a list of objectives and principles:

> The Communications and Multimedia Act 1998 is based on the basic principles of transparency and clarity; more competition and less regulation; flexibility; bias towards generic rules; regulatory forbearance; emphasis on process rather than content; administrative and sector transparency; and industry self-regulation (<www.mcmc.govmy/mcmc/the_law/legislation.asp>).

Thus, by the early years of the new millennium, each of the three governments had moved to open the telecommunications market to private providers, relaxed some foreign investment rules and appointed independent regulators. In the next section, we compare these new institutions and assess the degrees of convergence or distinctiveness that they exhibited.

Convergence and Variety

Table 5.2 shows the state of regulatory reform in the three jurisdictions. It is evident that there is a strong similarity in the model now in place, despite very different starting points and quite separate histories involving the play of political and bureaucratic interests. Indeed, the striking thing is that from such different separate

starting points and histories, a rapid convergence on a common template has occurred. In the discussion that follows, we shall focus not so much on the content of the regulations (such as methods of price regulation, consumer protection, licensing and interconnection regulation) as on the procedures and the organizational forms of the regulatory regime.

Table 5.2 Telecommunications regulatory regimes in the Asia–Pacific

	Hong Kong	**Malaysia**	**Australia**
Privatization of Incumbent Monopolist	Full (1981)	Partial	Partial
Independent Regulator with Licensing Power	Yes (1992)	Yes (1998)	Yes (1991)
Regulatory Convergence	Proposed (2006)	Yes (1998)	Yes (2005)
Transparency of Regulatory Decisions / Advice	Yes	Yes	Yes
Development by Regulator of Industry 'Codes' for (e.g.) Inter-Connection	Yes	Yes	Yes
Industry Self-Regulation	Limited	Extensive	Extensive
Appeals Mechanisms	Tribunal / Courts	Minister / Courts	Tribunal / Courts

Just as there are core similarities, so there are differences in detail in these three regulatory regimes. One difference, at least on the surface, is in the extent of government ownership in the sector. However, each of the operators was corporatized from an early date and part-floated on the stock exchange so as to put their management on a commercial footing. Arguably, this is the crucial step rather than full divestiture, as it signals the intent of the government to operate the business as a commercial entity. While Malaysia continues to show no interest in divesting itself of majority ownership in the dominant telecoms operator, the government has used its influence over their operators to hasten liberalization rather than to hinder it – for example, TMB was forced to sell part of its nascent mobile business to a new entrant. This is not to say that the regulatory regime does not also serve the dominant operators' interests. In Hong Kong and Malaysia there was a policy on the part of the regulator that stability of provision be maintained and that the transition to market opening should be 'smoothed' so as to prevent major disruptions. The initial phase of pro-competitive restructuring in Australia took steps also to nurture the main new incumbent Optus in order to create new infrastructure investment.

Each of the newly created regulatory bodies is constituted as a statutory authority, under legislation specifying the manner of appointment and dismissal of the authority, board or commission; setting out the powers of the government and the authority respectively; and specifying various provisions concerning the way decisions are to be taken. The intention in each case is to set up a body that will be

perceived by the industry to be expert, impartial and transparent in its operations. Table 5.3 summarizes the different provisions. A number of differences are apparent, including the size of the authority (from one person in Hong Kong to at least seven in Australia) and the number of authorities (Australia being the odd one out, with two). In Malaysia, provisions relating to appointment and dismissal combined with powers of ministerial direction suggest a weaker form of independence from the political executive than in the other jurisdictions. Each of the bodies has some degree of budgetary autonomy, but staffing autonomy varies according to whether civil service rules apply. For example, although the Hong Kong Office of Telecommunications Authority (OFTA) is a Trading Fund, with a high level of managerial and financial autonomy, many staff members are on civil service terms (including the one-person 'Authority' himself).

Table 5.3 Regulatory authorities – varieties of independence

	Hong Kong OFTA	**Malaysia MCMC**	**Australia (ACCC)**	**Australia (ACMA)**
Method of Appointment	Chief Executive	Minister	Governor-General; consent of majority of States/Territories	Minister
Term of Appointment	Indefinite	3 years (max. 2 terms). Minister may dismiss without reasons	5 years, renewable	Up to 5 years, max. 10
Number of Members	1	5+ (1 member 'represents the government')	7 + additional part-time members	Up to 7
Powers of Direction	Yes, but must be written and published	Yes	No	Limited
Staffing	Civil Service Terms	Autonomy	Autonomy	Autonomy
Funding	Fees	Fees	Budget + Fees	Budget + Fees

During the 1990s the regulatory regime in Australia underwent a divergent reform, with the regulatory functions split between those relating to competition matters (given over to the general competition regulator) and those relating to industry-specific matters such as the allocation of the scarce spectrum resource, content and the universal services obligation, which were located in a new industry-specific authority, the ACA (later ACMA). The competition regulator, the ACCC, is a well-

established and highly respected regulatory body that carries the responsibility for all pro-competition regulation. The special provisions in the Trades Practices Act applying to telecommunications spell out pro-competitive principles as they apply to specific aspects of this market (for example, owners of infrastructure must charge cost-based interconnection and access prices when carriers connect to the facilities). Section 3.1 of the Telecommunications Act, under which the ACMA operates, states that the main purposes of the Act are to promote the long-term interests of the 'end-users' and the 'efficiency and international competitiveness of the Australian telecommunications industry' (quoted in Stuhmcke 2002, 74–5). The ACMA has a strong focus on consumer interests, in particular through its oversight of the 'Customer Service Guarantee', which requires all operators to comply with specified, agreed standards of service. It deals with technical standards as well as the monitoring of performance of licensed carriers and service providers.

On the surface, an important difference of the MCMC from other regulators is that a general power of direction lies with the minister. However, in the case of issuing licences, the minister's power is circumscribed by the fact that the MCMC must first give advice after calling for public submissions, and the minister must give reasons for rejecting it. So far, the minister has not rejected the Commission's advice. While there is a strong sense of separate corporate identity in the Commission, at the same time, MCMC includes a 'government member', a distinctive feature that emphasizes the extent to which the political executive wants to keep some control. These institutional arrangements, which seem to make less of the need for full and formal independence, may reflect the 'developmental state' orientation of the government's role in economic policy and planning: telecommunications reform is much too important for national development that it can be left entirely to the regulators. But at the same time, the regulator's 'neutrality' and 'independence' are stressed in its public pronouncements. The regulatory style adopted by MCMC exhibits openness, encourages public input and industry consultation, and strongly emphasizes neutrality and objectivity (for example, external, independently conducted performance audits of service quality).

Hong Kong's independent regulator also operates within a distinctive bureaucratic and political culture. The self-invented slogan of 'positive non-interventionism' nicely captures the sense of role and mission of Hong Kong's elite civil service, reflecting not only its market-friendly stance but also its paternalistic, guardian role within an 'administrative state' (Painter 2005). The TA is shown on the organization chart as a branch of the parent department, not as a separate agency (a not uncommon convention for statutorily independent officers in Hong Kong). The TA regularly consults informally with industry players as well as holding formal hearings (a practice consistent with strong, informal links between the civil service and big business); he is a member of the civil service 'directorate' (Hong Kong's 'mandarinate') and enjoys close relations with other civil servants; and he meets regularly for informal exchanges with the Principal Official (the 'minister') and his departmental permanent secretary. That is, while he is inextricably part of the civil service milieu, this does not detract from the perceived 'independence'

of his judgements.[11] Perhaps the most important factor in shaping perceptions of regulatory independence and neutrality in each of the jurisdictions is the nature of procedures followed in making decisions and resolving disputes by the regulator. The regulator's operating proceedings in all three cases are governed by rules of transparency – public announcement of consultations or inquiries; collection of public submissions; time for comments and rebuttals; publication of draft findings; and full publication of reasons.

The extent of industry self-regulation is also a matter where national differences in bureaucratic and political culture, as well as contemporary policy, can be observed. In Australia, Section 4 of the 1997 Telecommunications Act describes the regulatory regime as 'self-regulatory' and Section 6 sets out the role of the Australian Communications Industry Forum (ACIF) as an industry self-regulator. ACIF is constituted as a company and a not-for-profit membership organization, funded by contributions from its members. It works in close collaboration with ACMA and ACC, as well as with the industry ombudsman, to develop industry codes and standards. These are formerly registered with the ACMA, after consultation with the ACC. Crucially, ACMA has the power to intervene and establish its own code or to declare an industry standard (again, after consultation with the ACC) should the industry fail to agree on a voluntary code. Moreover, ACMA provides a regulatory safety net for the voluntary codes, in that it can direct non-members of the ACIF to be bound by them. Another institution of so-called 'self-regulation' is the Telecommunication Industry Ombudsman (TIO) – 'an international first' (Stuhmcke 2002, 69) – which was set up in 1993 as an avenue for end-user complaints and redress. It is funded by industry levies (having the legal status of a company limited by guarantee) but has legislative backing for its role and functions. The Board of the company is composed of eight members from the companies whose levies fund the TIO's operations. Between the Board and the ombudsman sits a Council composed equally of consumer and industry representatives. TIO was set up following the 1991 Telecommunications Act, which included a provision that all licence holders must agree to fund an independent ombudsman scheme. Under the 1997 legislation, membership is compulsory for industry members and the ACMA can prosecute those who refuse to be part of the scheme. As well as dealing with complaints (most of them of a minor nature), TIO collaborates with ACIF and the government regulators on regulatory issues and must be consulted by ACMA before industry codes are registered. TIO is perceived by consumer interests to be 'too close to industry' but, at the same time, it is criticized by some of its own members for being 'too close to consumers', suggesting that it manages to sustain a degree of neutrality (Stuhmcke 2002, 81–2).

The roles of ACIF and TIO reflect not so much a pure case of 'self-regulation' as a form of 'co-regulation' (Grabosky and Braithwaite 1986), in that underlying

11 The Hong Kong association of telecoms operators has been highly critical of the 'toughness' and 'intrusiveness' of the regulator, calling for a new set of arrangements – a board including outside members – that will somewhat dilute the power of the single-person authority: see 'Maintaining Hong Kong's Leading Telecommunications Role', December 2002, available on-line at <www.itahk.org.hk/index01.htm> accessed 2 May 2006.

voluntary collaboration and compliance are the powers of compulsion that the regulators hold 'in reserve'. However, as a result of the arrangements, the processes by which codes and standards are drawn up increasingly involve close and detailed consultation among industry members. Moreover, the TIO and ACIF play a major role in 'educating' their 'members' about compliance obligations, while ACIF has increasingly seen one of its tasks to be to create a greater degree of consensus on key issues among industry producers and consumers.

Among the other two jurisdictions, only in Malaysia has a similar, serious effort so far been made to get the industry to organize among itself in order to self-regulate (or 'co-regulate'). Malaysia has a strong tradition of close government–business relations through a variety of consultative mechanisms, all with a strong 'top-down' flavour. The 1998 legislation set up four 'industry forums' – Consumer Forum, Access Forum, Content Forum and Technical Standards Forum. They are inclusive of both the 'supply' and 'demand' sides of the industry and the object is to use them to achieve voluntary compliance with agreed standards and guidelines. The Technical Standards Forum is the most productive of the four. The Consumer Forum is composed of 48 members from telecom providers and NGOs and oversees the consumer complaints handling process in accordance with a set of agreed procedures and standards. The Content Forum has developed a code on content (embodying sanctions) which industry members can sign up to, and also deals with complaints and runs a 'Content Advisory Centre'. The Access Forum, however, failed to reach agreement due to conflicting commercial interests on the details of an access code, and the MCMC called in consultants to frame a code. That is, like the ACMA in Australia, MCMC can make use of powers 'in reserve' to impose its own codes and standards on the industry.

In contrast to Australia and Malaysia, patterns of government–business relations in Hong Kong are less conducive to self-regulation. The Hong Kong telecommunications sector is characterized by cut-throat competition and a tradition of adversarial relations (for example, through frequent recourse to the courts to settle commercial disputes or to appeal the decision of the regulator) such that industry co-operation does not come easily. The local telecommunications industry forum is little more than a 'club' for industry players to meet and exchange views with, occasionally, an effort to express a collective viewpoint on matters of regulatory policy (characteristically, to complain about 'over-regulation' by the TA). At the same time, there is a formally constituted Telecommunications Users & Consumers Advisory Committee, one of many such advisory bodies set up over the years by the Hong Kong government to provide an instrument for the bureaucracy to undertake consultation and to seek 'consensus' with societal groups in the absence of other democratic procedures.

The use of 'codes of practice' as a regulatory instrument is commonplace in the four jurisdictions under their independent regulators. In Hong Kong, for example, the 1996 Advertising Code of Practice was the first, drawn up by OFTA after submissions from a range of industrial and social parties including the Consumer

Council and the Telecommunications Users & Consumers Advisory Committee.[12] OFTA produced more than 30 different codes of practice relating to service and operational requirements and consumer interests. The significance of pro-competitive codes backed by legal powers and sanctions is that they are intended to govern routinely all commercial transactions in a defined field – for example, in price-setting and in access or interconnection negotiations. The intention is that they become self-executing without need for intrusive enforcement. In sum, these 'codes' are instruments of co-regulation. Even those drawn up by ACIF in Australia are closely monitored by the regulator and must be registered. In other cases, as just discussed, the code is actually written by the regulator and is only an instrument of self-regulation in the sense that industry consultation is stressed and 'enforcement' is expected to take place without recourse to instruments such as legal orders or rulings. In OFTA's case, the existence of codes signifies the lack of a precise set of provisions in the existing ordinance, but the TA in such cases signals that a change to the ordinance will be sought if 'voluntary compliance' is not forthcoming. That is, such codes are a modified, less direct form of quasi-regulation that serves to embed pro-competitive behaviour in industry practices as well as in regulatory policy.

Table 5.2 showed that another common feature in the contemporary evolution of the three regulatory regimes is regulatory 'convergence' – that is, the merging of the broadcasting and telecommunications regulatory regimes under a broader 'communications' regulatory portfolio. Here, Malaysia was the leader (albeit under the influence of Australian consultants). The new regulatory instruments developed by the MCMC since 1998 stress convergence as a key theme, in a manner that has attracted worldwide interest. Licences and controls issued by the minister may cover content, applications, network services or network facilities across each of the industry sectors. MCMC regulates telephony, internet service providers and broadcasters using common principles and methods. Thus, in a revised access regime announced in 2005, MCMC identified a range of different 'bottlenecks' that potentially give a provider market dominance and adopted a common set of principles in the form of guidelines for ensuring open access on reasonable commercial terms, including independent dispute resolution mechanisms.

Conclusion

Going on the evidence of these three cases, the regulatory state in the Asia–Pacific region is both a transnational phenomenon and also a set of administrative reforms crafted by each government for its specific purposes. For each government, liberalization of its telecommunications markets is seen in terms of wider policy issues: pro-competitive regulation, privatization and so on are instruments used strategically for the pursuit of domestic economic policies (Painter and Wong 2005a). The account given here has emphasized the local circumstances and events

12 A summary of all the comments submitted to OFTA can be found at Annex 2 of the Advertising Code of Practice, available online at <www.ofta.gov.hk/frameset/consumer_index_eng.html>.

of the separate reform programmes and has clearly identified commonalities in the trajectories of change and in many of the outcomes. Although this analysis has not sought to unravel all the cross-jurisdictional sources and flows of ideas and contacts, it is clear that the parallel processes of policy formulation, legal drafting and regulatory oversight comprise linked, transnational fields of doctrine and practice. Clearly, the convergence of practices we have just identified is one dimension of an increasingly interdependent and globalized policy sector, reinforcing the significance of sector-specific transnational institutions and arenas. While each government consciously linked telecommunications reform with wider political objectives, more strikingly than in earlier reform eras the institutions and practices that comprise the regulatory state are less a product of conscious reform by political or bureaucratic leaders and more a product of self-reproducing standardization by 'industry insiders'.

Thus, the emergence of the regulatory state is a combination of bottom-up, top-down and horizontal processes (Levi-Faur 2005). The result is not a 'new kind of (Australian or Malaysian) state' but a new set of administrative forms and practices inserted into each distinct national political and institutional setting, thence taking on more and more a life of their own that transcends state boundaries. Yet the differences in detail recounted in the previous section are testament to the persistence of local administrative and legal practices that have evolved over many decades in each jurisdiction. The resulting adaptations and hybrids in each setting promise to create as many varieties of the regulatory state as there are different states, but the underlying similarities are inescapable (Painter and Wong 2005b). These common features are partly the result of diffusion and imitation and will be sustained and multiplied as a consequence of the transnational character of the institutions and networks through which this diffusion takes place. These networks, already dense and active, will likely become more so as the forces that drive market integration and regulatory convergence continue to exercise their influence over national governments.

Appendix Table 5A.1 The telecommunications supranational regulatory architecture

	International Telegraph Union (ITU)	World Bank	Organisation for Economic Co-operation and Development (OECD)	World Trade Organization (WTO)	Association of Southeast Asian Nations (ASEAN)	Asia–Pacific Telecommunity (APT) (Joint Initiative of UN and ITU)	APEC Tele-communication & Information Working Group (APEC-TELWG)
Year of Formation	1865	1944	1947	1948 (GATT) 1995 (renamed to WTO)	1967	1979	1989
Current Members	189 member states and 642 sector members	184 member countries	30 member countries	148 member countries	10 member countries	33 Members, 4 Associate Members and 103 Affiliate Members including governments and industries	21 member economies (the word 'economies' is used to describe APEC members)
Objectives	* Maintain and extend international co-operation between all its member states for the improvement and rational use of telecoms of all kinds * Promote and offer technical assistance to developing countries in the field of telecoms, and also to promote the mobilization of the material, human and financial resources needed to improve access to telecoms services in such countries	* Provide a vital source of financial and technical assistance to developing countries around the world * Provide low-interest loans, interest-free credit and grants to developing countries for education, health, infrastructure, communications and many other purposes	* Foster good governance in the public service and in corporate activity *Help governments to ensure the responsiveness of key economic areas with sectoral monitoring * Decipher emerging issues and identify policies that work * Help policy-makers adopt strategic orientations through individual country surveys and reviews	* Help trade flow smoothly, freely, fairly and predictably through: – administering trade agreements – acting as a forum for trade negotiations – settling trade disputes – reviewing national trade policies – assisting developing countries in trade policy issues – providing technical assistance and training programmes – co-operating with other international organizations	* Accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations	* Promote the expansion of telecoms services and information infrastructure and the maximization of the benefits of information and telecoms technology *Undertake studies into developments in telecoms and information infrastructure technology and policy and regulation in co-ordination *Encourage technology transfer, human resource development and the exchange of information	* Improve the telecoms and information infrastructure in the region and facilitate effective co-operation, free trade and investment and sustainable development

Mechanisms and Documents/ Agreements on Telecoms	* General Secretariat and Telecom * Radio-communication (ITU-R) a) Regulatory Publications b) Conference Publications c) Resolutions d) Service Publications e) Recommendations f) Reports g) Handbooks h) Opinions i) Software and Databases * Standardization (ITU-T) * Development (ITU-D)	* Regulatory 'Toolkit' (2000) * Telecoms Regulation Handbook (2000) covering licensing, interconnection, pricing, competition policy and universal service	* Annual reports * Case studies, e.g. Regulatory Overview of the Telecoms sectors 2001 * Country surveys, * Guidelines, e.g. on Broadband Development 2004 * Manuals, e.g. Interconnection Principles 2001; OECD	Fourth Protocol to the General Agreement on Trade in Services (adopted 30 April 1996; entry into force 5 February 1998). This document provided the legal basis for the annexation of new basic telecoms schedules to the Uruguay Round services schedules	* ASEAN Plan of Action in Transport & Communications (1994–1996) * Statement of Intent – ASEAN Telecommunication Regulators Council Singapore, 8 August 1997 * Ministerial Understanding on ASEAN Cooperation in Telecommunications and Information Technology, Kuala Lumpur, Malaysia, 13 July 2001	* APT Yearbook 2004 * Three APT Newsletters each year * Ten or more major APT Reports each year	* Meeting Documents produced by 10 telecoms working groups * Task Group Activities * Chair's Reports * Tel Ministerial Documents *Regulatory Updates