

Environment, Communications and the Arts Legislation Committee

Submission into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009



**Submission by
Communications Experts Group Pty Ltd**

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INTRODUCTION

This submission is being prepared by Communications Experts Group Pty Ltd who are Telecommunications consultants and who have consulted a group of West Australian persons who have a knowledge of the Telecommunications industry in Western Australia.

The case studies cited in the submission are drawn from experiences overseas and in Western Australia.

Prof Green is a Director of ATUG and has been a member of a number of committees providing Telecommunications Policy advice to the WA State Government.

As a Director of ATUG, Prof. Green receives a number of enquiries and requests for advice on telecommunication services from a wide range of persons and is familiar with the telecommunication issues affecting Western Australians.

BACKGROUND INFORMATION

We support the legislation amendment in its current format, however in analysing the legislation to assess its effectiveness over a 3 – 10 year period we have identified a few areas which need to be strengthened or expanded.

The Telecom Industry is more difficult to regulate than other similar industries because Telecom infrastructure consists of two components:

- The Transmission network consisting of backhaul and connections to customers.
- Switching consisting of a hierarchy of switching points or nodes that add value to the information being transmitted.

Structural separation allows the two components to be effectively separated, simplifies regulation and promotes innovation and competition.

The major weakness of the 1997 Act was that it did not recognise this fact. This enabled, and in some cases encouraged the “gaming” and manipulation by the carriers.

Our concerns with the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 are based on two scenarios:

- a) Providing adequate safeguards when the Government sells its stake in the NBN and the NBN is a private company.
- b) It is possible for Telstra to change its business model and make a few strategic investments to ensure that in the long term it can have substantive control over the NBN.

In order to explain our concerns, two concepts need to be outlined.

- a) Track Records of Companies that have bought Government Utilities

Throughout the World Governments have been selling utilities such as train services, gas, water, electricity and telecommunications. In nearly all cases the infrastructure has had sufficient spare capital for growth and sufficient redundancy and reliability to

deliver a good quality service. In most cases, under private enterprise, investment and upgrades were substantially reduced, which in turn caused overloading, congestion and serious failures. In the telecommunication industries, investment in new types of services, such as ADSL, were delayed, as well as efforts to delay or prevent competitors from introducing new services.

These outcomes have occurred because of a focus on profits and returns to investors with little or no regard for quality of service, customers or end users. Their liabilities are also limited to the supply of the service, and not any consequential losses incurred by their customers or communities. [A good case study on cause and effect is the Baker Report on the Texas City BP Disaster, where cuts in maintenance costs, led to explosions that killed 15 people].

In many cases the outcomes could have been improved if investors and management had been required to take into account the Long Term Interest of End Users (e.g. the gas supply disasters in Melbourne and Western Australia).

b) Network Control

The Telecommunications Industry is unique, because content providers, and the control of the delivery of content do not occur in any other industry.

The issue of content providers has been sufficiently addressed in the legislation, however the control of delivery of information to retailers to manage their services has been omitted. The management of a Directory Service such as Sensis is critical for the roll out of the NBN as well as retailers. In the past, some carriers and carriage service providers have been disadvantaged by not being able to offer an efficient directory service, despite supplying customer information to Sensis for publication in the Directory. There are other items of information that Telstra can control to disadvantage other resellers.

It is important to include either “core network information” or “network information services” as well as content providers to ensure all retailers and carriage service providers have equal access to the NBN infrastructure.

PROPOSED AMENDMENTS

Division 2 Structural Separation

Sections 577 B, 577 D and 577 F

Clauses 4, 5, and 9 describe the matters to be considered by the ACCC when taking into account an assessment of a variation to an undertaking. In particular Clause 9 states that “the matters are not a legislative instrument”.

It is recommended that an amendment be added to ensure that the Long Term Interests of End Users be taken into account and that this criteria cannot be challenged or undermined.

Rationale

During the drafting of the 1997 Act it became clear that Structural Separation would not form part of the Legislation. In view of the history of poor outcomes of companies that had purchased government assets, the concept of the “Long Term Interests of End Users” [LTIE] was introduced to try and balance the commercial pressures from investors and stakeholders. Attempts to include LTIE in the Licence Conditions for carriers also failed and the LTIE provisions were left in the hands of the Regulators.

Even when the Government had more than 50% of the shares in Telstra, a number of practices, prejudicial to customers and the community still occurred. This situation progressively deteriorated as the Government Shareholding decreased, despite the ACCC winning a number of court cases against Telstra. In a number of cases the LTIE assisted the regulators in winning court actions.

The purpose of the proposed additions is to ensure that application of the LTIE cannot be challenged in any way.

The optimum solution is to mandate that the NBN [and any subsidiary or supplier] be required to make decisions based on commercial interests and the Long Term Interests of End Users.

Part 3 – Anticompetitive Conduct

Division 1 – Amendments

Trade Practices Act 1974

158 At the end of section 151AF in addition to the new sub clause, add a further sub clause either

; (e) network information services

or

; (e) core network information

Rationale

Other sections of the Amendments adequately cover the control of networks by legal means such as trusts etc, however the technical control of networks is not adequately covered.

The ownership of Sensis is one area where technical network control can be exerted, even though it may be argued that Sensis is a content provider.

There are a number of other areas of Technical Control that can occur, such as Quality of Service [QoS] management (as described in Communications Experts Group Senate submission to the Select Committee on the National Broadband Network; dated 31st October 2008).

The addition of the second sub clause will ensure that all aspects of possible control will be covered.

In the case of Sensis, if the Act did not cover network information services then it could be argued that Sensis was not a content provider, and Telstra could exert undue influence.

If both clauses are included, then it does not matter which definition is applied, Sensis will still be covered by the Act.

Section 80 Variation of Final Functional Separation

Clause (4) (a) (ii)

This clause determines the period of response by interested parties to a variation. The period of 14 days is too short to be informed about a variation, assess its impact and prepare a submission.

It is recommended that submissions be made within 28 days.

Rationale

The 14 day period may be sufficient for carriers and retailers, however the changes may impact end users, and they require a longer period to prepare a submission.