

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**TELECOMMUNICATIONS BILLS PACKAGE 1996**

Senate Environment, Recreation, Communications and the Arts  
Legislation Committee

Opposition Senators' Report

March 1997

## **THE OPPOSITION SENATORS' MINORITY REPORT**

### **Introduction**

1.1 Opposition Senators agree overwhelmingly with the thrust of the Report of the Telecommunications Bills Inquiry.

1.2 A substantial proportion of the draft legislation was prepared by the previous Labor Government under the direction of the previous Minister for Communications and the Arts, the Hon Michael Lee MP.

1.3 We note that, during 1996, the new Minister for Communications and the Arts, Senator the Hon Richard Alston, conducted further public consultation which led to additional refinement of the legislation which was ultimately introduced into the Parliament in late 1996.

1.4 In view of the complexity of the legislation, the Opposition proposed to the Government that the legislation should be immediately referred to the Senate Environment, Recreation, Communications and the Arts Legislation Committee. This referral had two aims:

- (a) first, to provide an opportunity for Senators to become more fully informed about the legislative detail; and
- (b) second, to provide a 'round table' environment for the many interest groups to come together and discuss particular amendments.

1.5 Opposition Senators believe the referral of the legislation to a Senate Committee was an extremely beneficial exercise which accommodated the interests of as many concerned parties as possible.

1.6 We have a number of areas where we disagree with the majority report of the Telecommunications Bills Inquiry. The areas of disagreement can be broadly categorised under the following headings:

- (a) Carriers' powers and immunities;
- (b) Industry policy;
- (c) Untimed local data calls;
- (d) Review of competition notices;
- (e) Transitional access arrangements;

- (f) Tariff filing;
- (g) Price discrimination;
- (h) Definition of a standard telephone service; and
- (i) Resourcing of consumer organisations.

### **Carriers' powers and immunities**

1.7 The majority report discusses carriers' powers and immunities in Chapter 4 of its report.<sup>1</sup>

#### *Facilities*

1.8 Opposition Senators believe that the Government's proposed legislation is deficient in that it creates an unwieldy appeal mechanism. They strongly support giving Local Government the right of appeal against a proposal by a carrier to construct major facilities in their local area.

1.9 However, we are concerned about the Government's recommendation to allow State and Territory Governments to establish their own telecommunications planning codes. Opposition Senators believe that the involvement of State and Territory Governments would create a complicated situation for both Local Governments and carriers. There should be a simple system of regulation without the development of expensive and time consuming state planning provisions which may ultimately be over-ruled by appeal to appropriate Federal bodies.

1.10 The Opposition believes that in the event of a dispute over planning, both Local Government and the carrier would be more effectively served by a direct appeal mechanism to the Australian Communications Authority (ACA). This direct appeal mechanism would alleviate time delays and achieve a clear resolution to any potential dispute.

1.11 We will be considering amendments to streamline the appeal provisions regarding facilities in the legislation.

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1 Paragraphs 4.23 to 4.91 of Chapter 4.

## RECOMMENDATION 1

Opposition Senators recommend that the Telecommunications Bill 1996 be amended to streamline appeal provisions regarding facilities.

### *Mobile Towers*

1.12 Opposition Senators believe that mobile telephone towers and other communication towers should be excluded from the category of a low impact facility. This would enable Local Government to have a direct input into the design and siting of communications towers.

1.13 We will be moving amendments to the legislation to ensure that Local Governments and therefore local communities can have an effective input into the planning of telecommunications facilities such as mobile telephone towers. This would be achieved again through the creation of an appeal mechanism to the ACA to resolve disputes between the carriers and the community. The Opposition will continue to have discussions with the Australian Local Government Association (ALGA), the Government, carriers and other interested parties to achieve a satisfactory outcome on this matter.

## RECOMMENDATION 2

Opposition Senators recommend that the Telecommunications Bill 1996 be amended to exclude telecommunications and mobile telephone towers from the definition of a low impact facility.

### *Cabling*

#### *Cut off date*

1.14 Opposition Senators believe the Government should adhere to the original decision that no new overhead cables be installed after 30 June 1997 without the express approval of the relevant Local Government authority. Local communities have been informed from early 1996 that 30 June 1997 would be the cut-off date. The three month additional time now proposed is not within the spirit of what local communities have believed since early 1996.

### RECOMMENDATION 3

Opposition Senators recommend that the Telecommunications Bill 1996 be amended to have the immunity for the installation of overhead telecommunications cables end on the 30 June 1997.

#### *Undergrounding*

1.15 Opposition Senators believe local communities must be given some long term plan to have the existing overhead telecommunications cables placed underground over a reasonable period of time. The undergrounding of cables could be achieved by extensive consultation between Local Governments, the carriers and the ACA. The ACA should be empowered to set a reasonable levy on carriers to achieve the eventual undergrounding of cables in a designated area without cross-subsidisation from other areas.

### RECOMMENDATION 4

Opposition Senators recommend that the Telecommunications Bill 1996 be amended to allow an Australian Communications Authority approved levy to be imposed on carriers who own overhead telecommunications cable, as a part of a long term plan for placing them underground.

1.16 Opposition Senators believe that State electricity supply companies should be encouraged to participate in any undergrounding program on a shared basis.

1.17 We will consult further with the Government, the ALGA, carriers, other interested parties and other parties in the Senate on this matter to achieve an agreed and workable outcome on this issue.

## **Industry Policy**

1.18 The Australian Telecommunications Industry Association (ATIA) have argued strongly for the need to be specific in defining an industry development plans, stating:

These commitments have been a central element of the significant increase in exports of the industry and will underpin future growth and investment.<sup>2</sup>

1.19 The majority report discusses industry development plan obligations in Chapter 4.<sup>3</sup> Opposition Senators support the changes by the Government to improve the detail of what constitutes a suitable industry development plan, but believe it is necessary to be even more specific, as outlined originally by the ATIA in their submission.<sup>4</sup>

1.20 However, the Opposition is of the view that sanctioning carrier for non compliance with specific requirements relating to the provisions of, and adherence to, their industry development plan is necessary to ensure enforcement.

1.21 The Committee received advice from the Department of Foreign Affairs and Trade indicating that sanctions can be applied in defined circumstances. We are therefore of the view that the Minister should establish sanctions to apply in these areas as part of the amendments to the Telecommunications Bill 1996.

1.22 The effect these amendments will be to create an enforceable regime where carriers establish their own goals in industry development and research, with the substance of their commitment being subject to the approval of the Minister on an initial and subsequently annual basis.

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2 Australian Telecommunications Industry Association, Submission 45, Vol 3, p 524.

3 Paragraphs 4.6 to 4.13 of Chapter 4.

4 Australian Telecommunications Industry Association, Submission 45, Vol 3, p 525.

## RECOMMENDATION 5

The Opposition Senators recommend that Part 2 of the Telecommunications Bill 1996 be amended to include appropriate sanctions to be applied against carriers who fail to comply with their specified industry development commitments.

### **Untimed local data calls**

1.23 The majority report discusses the legislative provisions which will require carriers and carriage service providers to offer untimed local call options in Chapter 2.<sup>5</sup> The majority report recommends that the Minister for Communications and the Arts be required to review whether there is significant exploitation of the untimed local call provisions by 1 July 1998.

1.24 Opposition Senators are strongly supportive of mandating the option of residential untimed local calls for data services. While the Opposition acknowledges the concerns raised by Telstra in its submission, it notes that the Committee received conflicting evidence from Telstra, and from Internet service providers, commentators and users on the extent to which Internet or other data use was leading to network congestion or resulting in systematic exploitation of these provisions. Opposition Senators were not convinced by Telstra that immediate concerns exist and support the review proposed by the Committee in Recommendation 2.16. The Opposition fought strongly for the preservation of untimed local calls for data services and welcomes the unanimous decision by to the Committee to support the extension of the obligation to these services.

1.25 Opposition Senators are of the view that such a review will put pressure on Telstra to fully substantiate its claims regarding exploitation of the local call provisions and show clear public benefits from any proposal to tighten these arrangements. A report by the Minister on this issue will allow the Parliament to properly consider all of the issues before determining whether any legislative amendment in this area is warranted.

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5 Paragraphs 2.73 to 2.81 of Chapter 2.

## Review of Competition Notices

1.26 The majority report of this inquiry discussed a Telstra proposal that the issuing of a competition notice under the proposed Part XIB of the Trade Practices Amendment (Telecommunications) Bill 1996 should be subject to merits review by the Australian Competition Tribunal (ACT).<sup>6</sup>

1.27 Opposition Senators believe that the receipt of a competition notice will have the potential to substantially restrict the ability of a carrier or carriage service provider to engage in its business activities. Where this restriction limits anti-competitive behaviour, it is appropriate. However, failing to provide a competition notice recipient with the opportunity to challenge the notice's merits will create business and regulatory uncertainty, and may dampen the very competition this legislative package seeks to promote.

1.28 The ACT is a body experienced in dealing with the particularly complex economic matters covered by trade practices law and is more likely than the Federal Court to have the necessary expertise to deal with these matters. Opposition Senators are also conscious of the costs and expense of taking action in the Federal Court.

1.29 Opposition Senators are of the view that appeals to the ACT regarding the issue of a competition notice will provide greater certainty to the industry as a whole, without significantly affecting the ability of the Australian Competition and Consumer Commission (ACCC) to act swiftly. We acknowledge, however, that mechanisms of review have the potential to be exploited by well resourced industry participants. In order to reduce this potential, we believe that appeals rights under the *Administrative Decisions (Judicial Review) Act 1977* should be removed.

1.30 Opposition Senators also considers it appropriate that the ACT have discretion in regard to whether a competition notice which is the subject of review continues to have effect during that review. In making that decision, the ACT should have regard to the balance of convenience and have the power to accept undertakings from any party to the review with regard to losses or damages which may be incurred by another party as a result of its decision.

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6 Paragraphs 5.8 to 5.16 of Chapter 5.

## RECOMMENDATION 6

Opposition Senators recommend that Part XIB of the Trade Practices Amendment (Telecommunications) Bill 1996 be amended to:

- a) enable persons who are the subject of a competition notice to seek a review of the merits of the notice from the Australian Competition Tribunal; and
- b) remove from persons who are the subject of a competition notice the right to appeal to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* in regard to that notice; and

Where a carrier or carriage service provider seeks a review of a competition notice, the Australian Competition Tribunal should have a discretion in regard to whether that notice continues to have effect during the period of the review. In making that decision, the Australian Competition Tribunal should have regard to the balance of convenience and have the power to accept undertakings from any party to the review with regard to losses or damages which may be incurred by another party as a result of that decision.

### **Transitional arrangements for the telecommunications access regime**

1.31 In introducing this legislative package into the Parliament, the Government has acknowledged the central role that the telecommunications access regime will play in fostering genuine competition between carriers and carriage service providers.<sup>7</sup> The transitional arrangements for bringing the service provider sector of this industry within the new regime will shape the development of competition over the next few years. Without adequate arrangements to ensure service providers receive network access on terms and conditions which are reasonable, competition will be stunted.

1.32 The majority report discusses transitional arrangements for the access regime in Chapter 6.<sup>8</sup> It recommends that, where existing carriers or service providers resort to arbitration by the ACCC on the terms and conditions of their access under the new arrangements, any determination by the ACCC has effect

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7 Second Reading Speech, Trade Practices Amendment (Telecommunications) Bill 1996, *House Hansard*, 5 December 1996, p 7803.

8 Paragraphs 6.9 to 6.19 of Chapter 6.

from (and if necessary is backdated to) 1 July 1997 or the first date on which the service concerned was supplied.

1.33 While the recommendation made by the majority report goes some way towards addressing the real concerns expressed by the service provider market, it fails to provide the business certainty necessary to enable service providers to compete from day one. In particular, it does not do anything to reduce the potentially lengthy negotiations and possible arbitral processes a service provider must engage in. In circumstances where the backdating of access prices is necessary, a service provider will not be in a position to determine its own cost structures until well after it supplies services. Its ability to determine appropriate retail prices will, therefore, be limited. This competitive disadvantage, when competing with carriers of the size of Telstra, should not be entrenched in legislation.

1.34 Opposition Senators firmly believe that the legislation should ensure that existing service providers transiting to the new telecommunications access regime are guaranteed firm, transitional access prices from 1 July 1997. This is necessary to ensure that adequate certainty is provided to existing service providers in the early stages of new regulatory regime. To ensure that the ACCC gives adequate priority to this issue, it should be required to deal promptly with unresolved access negotiations regarding transitional pricing.

## RECOMMENDATION 7

Opposition Senators recommend that the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 be amended to provide that:

- a) existing and new entrants are able to seek Australian Competition and Consumer Commission arbitration on transitional terms and conditions of access to services which were declared under the transitional arrangements if agreement is not reached within two weeks of commercial negotiations beginning;
- b) if the Australian Competition and Consumer Commission is required to arbitrate on transitional terms and conditions, it must make a determination within a further two week period;
- c) the transitional price of service provider access to these services must be cost-based;
- d) transitional terms and conditions would apply until:
  - the access provider and access seeker reach agreement on terms and conditions under the new access procedures in Part XIC, or
  - 31 December 1997

whichever is sooner;

subject to a Ministerial power to extend this time period. The Minister should only exercise this power upon receiving a recommendation to extend from the Australian Competition and Consumer Commission.

The Bill should also be amended to include a requirement for the Australian Competition and Consumer Commission to prepare, in advance of 1 July 1997, pro-forma terms and conditions regarding access to transitional declared services where access is sought by new entrants.

## Tariff filing

1.35 The majority report discusses transitional arrangements regarding Telstra's tariff filing obligations in Chapter 6.<sup>9</sup> While Opposition Senators support the extension of Telstra's existing tariff filing obligations into the new regime, we are concerned that sunseting those arrangements after two years fails to acknowledge the continuing dominance that Telstra wields in many telecommunications markets. Without ongoing requirements for Telstra to submit its tariff information to the ACCC, the Commission will be limited in its ability to make a rapid assessment regarding market conduct of concern.

### RECOMMENDATION 8

Opposition Senators recommend that the legislative package be amended to require Telstra to file tariffs with the Australian Competition and Consumer Commission in regard to those services which it is currently required to file tariffs with AUSTEL under the *Telecommunications Act 1991*.

The Australian Competition and Consumer Commission should have a discretion to review the necessity for continuing of these tariff filing obligations and to submit its findings to the Minister for Communications and the Arts. Removal of the tariff filing obligations should, however, be a matter for legislative amendment.

## Price discrimination in local call charges

1.36 Price discrimination is an area of the regulatory regime which has significant impacts on both competition and the interests of the community generally. The majority report of this inquiry discusses the issue of price discrimination in Chapter 9.<sup>10</sup>

1.37 Opposition Senators note the fine balance which must be achieved between promoting vigorous competition in markets and ensuring that the benefits of that competition flow to all Australians regardless of whether they live in the few capital cities which are now beginning to see competition in the local loop. We are firmly of the view, however, that guaranteeing an equitable

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9 Paragraphs 6.20 to 6.30 of Chapter 6.

10 Paragraphs 9.2 to 9.12 of Chapter 9.

approach to distributing the benefits of competition to consumers in regional Australia will require carriers to lower their local call charges across Australia.

1.38 In the absence of such an obligation, Australia may well see the evolution of a multi-tiered rate for local call charges with highly competitive urban markets, such as Sydney and Melbourne, enjoying rates a number of cents below that of regional and rural Australia.

1.39 Opposition Senators believe that the legislative package should be amended to require that where a carriage service provider offers prices or pricing plans for local calls in one local call zone, they must offer those prices or plans in all other local call zones in which they operate. This will ensure the lowest possible prices are available to consumers across Australia.

#### RECOMMENDATION 9

Opposition Senators recommend that the Telecommunications Bill 1996 be amended to require where a carriage service provider offers prices or pricing plans for local call services in a particular local call zone, the carriage service provider must make those prices or pricing plans generally available in all other local call zones in which they operate.

These arrangements should be subject to a Ministerial review by 1 July 2000 in similar terms to that provided by clause 151CN of the Trade Practices Amendment (Telecommunications) Bill 1996.

#### **Majority Report of the Standard Telephone Service (STS) Review Group**

1.40 Opposition Senators note the discussion of the Report of the Standard Telephone Service Review Group in Chapter 9 of the majority report of this inquiry.<sup>11</sup> We believe the STS Review Group report makes an overwhelming case that digital data capability should be made reasonably available to all Australian telecommunications users by the year 2000. The Opposition considers that it is entirely reasonable to act now to ensure that this is achieved.

1.41 We note Telstra's commitment to providing 93.4% of Australians with access to digital data capable services by the middle of this year. Demand is clearly bringing these services to urban and some regional areas. That demand reflects the increasing importance of these services to every day business and

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11 Paragraphs 9.13 to 9.17 of Chapter 9.

community life and highlights the importance of ensuring that other areas do not miss out.

1.42 Opposition Senators also endorse the remaining recommendations of the STS Review Group which addressed key areas of concern regarding service quality and access, including for example, access by people with disabilities.

#### RECOMMENDATION 10

The Opposition Senators recommend that the Telecommunications Bill 1996 be amended in line with the majority report of the Standard Telephone Service Review Group's Recommendations 1 to 16. The Bill should include an objects clause stating that it is an objective of the proposed Telecommunications Act that digital data capability be available to all Australia by the year 2000. The Bill should also contain provisions to facilitate monitoring of the industry's progress in meeting this objective.

### **Community consultation and social policy research**

1.43 During the course of the inquiry, a number of submissions expressed concerns that consumer and public interest research organisations may not be well placed to participate in industry self-regulatory and other processes to be established under the telecommunications legislative package.

1.44 In its submission, the Small Enterprises Telecommunications Centre Limited (SETEL)<sup>12</sup> suggested an industry-wide levy be established to fund the representation of small business and residential users of telecommunications on industry self-regulatory bodies. SETEL suggested the funds be collected by an independent agency such as the Telecommunications Industry Ombudsman (TIO).<sup>13</sup>

1.45 In response to SETEL's suggestion, the TIO and the Department of Communications and the Arts indicated they held reservations about the

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12 The Small Enterprises Telecommunications Centre Limited represents small business in a number of fora involving telecommunications where a small business view or presentation of interests is necessary. It is recognised as the official representative of small business consumers on the TIO Council, the AUSTEL Numbering and Privacy Advisory Committees and the AUSTEL Consumer Consultative Forum.

13 Small Enterprises Telecommunications Centre Limited, Submission 47, Vol 3, p 549.

appropriateness of the TIO scheme being used to manage the funding of consumer representatives.<sup>14</sup>

1.46 The Consumers' Telecommunications Network (CTN) also noted the increasing demands on consumer groups to participate in the development of codes of practice and other regulatory arrangements. CTN concluded that:

neither consumer representatives nor the telecommunications industry will be able to fulfil the roles envisaged by the self-regulatory post 1997 environment without proper provision being made to resource consumer representation and research.<sup>15</sup>

CTN recommended that the interest earned on funds retained in the Universal Service Fund be allocated to support these activities.<sup>16</sup> The Australian Consumers' Association offered its full support for CTN's proposal.<sup>17</sup>

1.47 In its submission to the Committee, the Communications Law Centre (CLC) noted Telstra's decision in 1996 to discontinue its Fund for Social and Policy Research. The CLC argued that in a competitive environment, consumer and research funding will tend to be given a low priority by carriers and service providers. The submission recommended the establishment of a \$2 million fund for research, representation and public education activities, collected on a proportional basis in line with industry contributions to the USO or similar funds. The CLC noted support for its proposal from a number of research and consumer bodies.<sup>18</sup>

1.48 The Opposition agrees that the substantially increased role of industry self-regulation in this legislative package places significant new demands on the resources of consumer groups. It is of the view that the proposed regulatory arrangements will only be effective if consumer groups are adequately resourced.

1.49 The rapid developments in this industry highlight the importance of ongoing research into regulatory and industry development issues in telecommunications. The *Telecommunications Act 1991* has proven to be inadequate in dealing with some developments seen in the industry over the last

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14 Mr John Pinnock, Telecommunications Industry Ombudsman, Telecommunications Ombudsman Scheme, *Committee Hansard*, p 132; and Mr Anthony Shaw, First Assistant Secretary, Planning and Review Division, Department of Communications and the Arts, *Committee Hansard*, p 131.

15 Consumers Telecommunications Network, Submission 49, Vol 3, p 570.

16 Consumers Telecommunications Network, Submission 49, Vol 3, p 562.

17 Australia Consumers' Association, Submission 67, Vol 4, p 715.

18 Communications Law Centre, Submission 86, Vol 6.

few years. There is little evidence to suggest that this legislative package will have better foresight. What is needed is a source of frank, dispassionate discussion and research about how the digital revolution will affect the future of employment and society. It is only with a strong base of research resources that the regulatory environment will be able to anticipate some of the issues which will evolve in the future. Government needs to ensure this work is supported.

1.50 Opposition Senators do not believe that continuing to rely on the goodwill of Telstra is an adequate position. Telstra's recent decision to discontinue its Fund for Social and Policy Research is adequate evidence of this.

1.51 We are firmly of the view that carrier licensing fees should incorporate provision for funding of consumer representation on regulatory bodies and social policy research into telecommunications related issues.

#### RECOMMENDATION 11

Opposition Senators recommend that the Telecommunications (Carrier Licence Charges) Bill 1996 be amended to provide that annual carrier licence charges incorporate a levy, determined by the Minister in a disallowable instrument, to fund consumer representation and social policy research into telecommunications related issues.

The Opposition suggests that any framework the Government adopts to distribute the levy should incorporate a mechanism for ensuring beneficiaries remain fully effective and representative of consumer interests.

Opposition Senators further recommend that the Minister be required to report annually to Parliament on how the levy has been distributed.

1.52 Opposition Senators wish to place on the record their very strong appreciation to the staff of the Secretariat to the inquiry:

- Mr Frank Nugent, Secretary;
- Dr Cliff Bott, Executive Development Scheme placement;
- Ms Ann Campton (secondment from the Department of Communications and the Arts);

- Mr James Cameron (secondment from the Department of Communications and the Arts);
- Dr Frances Michaelis, Principal Research Officer;
- Ms Catherine Drinkwater, Estimates Officer;
- Ms Jane Osmotherly, Executive Assistant; and
- Mrs Winifred Jurcevic, Executive Assistant.

1.53 The Secretariat provided expertise on a complex and technically detailed legislative package. In particular, their assistance included concise briefing regarding issues raised in submissions received by the Committee and drafting of what is a very readable report.

Senator the Hon Chris Schacht  
(Deputy Chair)

Senator Kate Lundy