

Parliament of the Commonwealth of Australia

**Telecommunications (Consumer Protection
and Services Standards) Amendment Bill
(No.1) 2000**

**Report of the Senate Environment, Communications,
Information Technology and the Arts Legislation Committee**

June 2000

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TELECOMMUNICATIONS (CONSUMER PROTECTION AND SERVICE STANDARDS) AMENDMENT BILL (NO.1) 2000

Introduction

1.1 On 10 May 2000, the Senate referred the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000 to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, (Selection of Bills Committee Report No 6 of 2000). The Committee was required to report to the Senate by 19 June 2000.

The Bill

1.2 The Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000 amends Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the part of the Act that establishes the universal service regime for telecommunications. The universal service obligation (USO) ensures that the standard telephone service (ie. voice telephony), payphone and other prescribed services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business. The complementary digital data service obligation (DDSO) underpins access on request to a 64kbps (or comparable) data service.¹

1.3 The Explanatory Memorandum to the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000 states that the purpose of the Bill is to:

- provide greater advance certainty for industry in relation to USO costs;
- provide greater certainty for prospective tenderers in the Extended Zones Tender about the regulatory environment in which they would be operating should they win the Tender;
- provide the Government with greater administrative flexibility in the context of the Tender and the operation of the USO regime generally; and
- to facilitate greater competition in the supply of services under the Digital Data service Obligation, by reducing regulatory hurdles.²

1.4 Telstra is currently the only universal service provider, a role that it is required by law, to undertake. Telstra's USO costs for 1997/98, 1998/99 and 1999/2000 were capped by Parliament and a review of USO arrangements was undertaken in 1999. The Bill amends section 57 of the current Act to enable the Minister to make a written determination specifying an amount that is to be the USO cost or a method for working out the USO cost for a specified person, or for each person in a specified class, for a specified financial year. In order to provide longer-term certainty, the Minister's determination will be able to

1 Explanatory Memorandum, Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000.

2 Explanatory Memorandum, Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000, P.7

encompass up to three successive years.³ The Explanatory Memorandum states that the Minister would generally seek the advice of the Australian Communications Authority before making such a determination.

1.5 As part of the sale of the second tranche of Telstra in 1998, Parliament allocated \$150 million (referred to as a “Social Bonus”) to provide untimed local calls in remote Australia. In accordance with decisions announced by the government on 23 March 2000, the Bill amends the Act to give the successful tenderer for the provision of untimed local call to a particular region, the certainty that it will become the regional universal service provider (USP).

1.6 Other amendments seek to provide prospective tenderers in the Extended Zones tender ongoing access to information necessary to fulfil their obligations as a USP and greater certainty about the regulatory environment in which they would be operating should they be successful. The Explanatory Memorandum to the Bill gives further details in relation to the proposed amendments.⁴

1.7 In his second reading speech, the Minister flagged that a second Telecommunications (Consumer Protection and Service Standards) Bill (Part 2) dealing with USO matters will be introduced at a later date. More substantive than the Bill under consideration, the second Bill will seek to implement all elements of the Government’s USO package announced on 23 March 2000.

The Committee’s inquiry

1.8 The Committee advertised its inquiry in each State capital city newspaper as well as in *The Weekend Australian* and *The Australian Financial Review*. Details of the inquiry were also placed on the Committee’s homepage on the Internet. The Committee received 4 submissions, 3 of which went to the core of the issues addressed in the Bill. After careful deliberations, the Committee decided to prepare its report to the Senate on the basis of written submissions only without holding a public hearing. All the submissions received are publicly available through the Committee Secretariat. A list of the submissions is at Appendix 1.

The submissions

1.9 One of the submissions received was a complaint about Telstra’s level of service in Telstra’s Call Centres and specifically in relation to a new phone connection in Margate, Tasmania. It was not directly related to the Bill.

1.10 In its submission, Telstra argues that the stated policy of the Government in relation to universal service provision and the remote Australia untimed local call tender “has not been adequately given effect to in the drafting of the Bill”.

1.11 In particular, Telstra argues that other carriers and the community as a whole would have to bear higher Net Universal Service Costs (NUSC) because under the Bill, Telstra’s status as a national universal service provider (USP) will not be affected by another carrier

3 McGauran, P, MP Second Reading Speech, Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000.

4 Explanatory Memorandum, Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000.

winning the tender to become the new regional USP. Telstra would be obliged to maintain its network (as a USP) even if it were not the successful tenderer.⁵ In its supplementary submission to the Committee, the Department of Communications, Information Technology and the Arts (DCITA) stated:

The Department 's legal advice is that this interpretation of the Bill is incorrect

As a result of the operation of s.21(30) of the Act, the declaration of a new RUSP would remove Telstra's obligation in relation to the region covered by the RUSP declaration. This is irrespective of whether the declaration takes place via the proposed deemed declaration through the untimed local call agreement or through direct declaration.⁶

1.12 In its submission to the Committee the CEPU also expresses concern that the NUS costs are likely to rise as a result of the proposed new framework.

Determination of Net Costs of a Universal Service Provider

1.13 In relation to item 70 of the Bill, the power for the Minister to determine the Net Universal Service Cost (NUSC) of a Universal Service Provider, the Communications, Electrical and Plumbing Union (CEPU) called for greater transparency in the cost assessment methodology and stated that:

In the Union's view, if the Minister is to be empowered to make NUSC determinations, it should be upon the recommendation from the ACA (Australian Communications Authority). If the ACA recommendation is not accepted, the Minister should be obliged to state the basis for any adjustments to the ACA estimate.

At an absolute minimum, the Minister should be required to make public the basis of any universal service cost assessment.⁷

1.14 For its part, Telstra called for the Ministerial power of determination to be conferred by amending section 57 of the Act to be limited so that:

the Minister must be satisfied, after reasonable inquiry, that the figure he determines is a reasonable estimate of the figure that would be derived by application of a methodology set out in the Act or, alternatively, another methodology declared by the Minister under a disallowable instrument.⁸

1.15 The Department of Communications, Information Technology and the Arts stressed in its submission to the inquiry that in determining the USO costs:

The Minister would obtain the advice of the ACA ...

5 Telstra (Submission No.2), pp. 2 & 3

6 DCITA, (Supplementary Submission No.3a, p. 2

7 CEPU (Submission No.4), p. 4

8 Telstra (Submission No.2), p. 7

...Prior to making a determination the Minister will be able to seek the advice of the ACA and consider any other matter that is relevant.⁹

1.16 In its supplementary submission, DCITA pointed out that:

The Government has already asked the ACA to provide forward-looking estimates of the USO costs as the basis for the Minister's determination.¹⁰

1.17 Both Telstra and the CEPU expressed concerns about proposed new sections 20(2A) and 26(A(2A)), which provide that, in making USP declarations, "the Minister is not limited to considering only the persons suitability to provide the services that must be provided to fulfil the universal service obligation".

1.18 Explaining its concern with the breadth of the powers conferred on the Minister under the Bill and in particular with those powers relating to determining USO and DDSO providers, the CEPU stated that "clear public policy criteria need to be specified to guide the process of USP selection".

1.19 Telstra's position was that:

There should be appropriate limitations on the discretion conferred on a Minister in the making of such declarations.¹¹

1.20 The CEPU has a particular concern about the Minister's power to choose a Digital Data Service Obligation provider, "without reference to even the most broad criteria" and calls for greater transparency in this process.

Compulsory information provision

1.21 Telstra expressed its concern at proposed new sections 24A and 26F (items 19 and 49 of the Bill) which in its view, give incoming USPs:

Extensive powers to require the production of commercially valuable, sensitive and unnecessary information from former USPs.

Telstra is concerned that the powers conferred on carrier competitors are far wider than they reasonably ought or need to be.¹²

1.22 Telstra is seeking amendments that would, among other things, limit incoming providers to require:

the production of only that information that is 'reasonably necessary to enable' the incoming provider to do those things that it is "required to do as a USP;...

and it is calling for:

9 DCITA, (Submission No.3, p. 8

10 DCITA, (Supplementary Submission No.3a, p. 4

11 Telstra (Submission No.2), p. 5

12 Telstra (Submission No.2), p. 6

either the Minister or the ACA (to be) given an unequivocal power to declare that information sought is not required to be provided, either because the request is unreasonable or because access to the information sought is not necessary to honour a USP obligation.

1.23 In its submission, the Department of Communications, Information Technology and the Arts explained that USPs cannot simply ask for any information they may feel like having:

Information requested must assist the new USP to do something required (eg service customers) or permitted (eg to claim costs) under Part 2 (ie. the universal service regime)...

The Minister's ability to determine information to be relevant is designed to facilitate the prompt resolution of any disputes.¹³

1.24 In its supplementary submission, DCITA agreed that the Bill provides the incoming USPs with access to a wide-range of information but explained:

The proposed provisions are far-reaching, but it is appropriate given the importance of the information to the maintenance of universal service in regional Australia, and Telstra's past reluctance to provide information.¹⁴

Conclusion

1.25 Having considered the Bill and the issues raised in the submissions it has received, the Committee makes the following recommendation:

Recommendation

The Committee recommends that the Bill be passed.

Senator Alan Eggleston
Chair

13 DCITA, (Submission No.3, p. 13

14 DCITA, (Supplementary Submission No.3a, p. 3

APPENDIX 1

LIST OF SUBMISSIONS

- 1 Mr Anthony Powell
- 2 Telstra
- 3 Department of Communications, Information Technology and the Arts
- 3a Department of Communications, Information Technology and the Arts
- 4 Communications Electrical and Plumbing Union (CEPU)

SENATE ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY
AND THE ARTS LEGISLATION COMMITTEE

INQUIRY INTO THE TELECOMMUNICATIONS (CONSUMER PROTECTION AND
SERVICE STANDARDS) BILL NO. 1 2000

LABOR SENATORS' MINORITY REPORT

JUNE 2000

EXECUTIVE SUMMARY

THE UNIVERSAL SERVICE OBLIGATION

- Labor Senators acknowledge the fundamental importance of the Universal Service Obligation in ensuring the delivery of minimum telecommunications services to rural and regional Australia.
- Labor Senators condemn the Government for its continuing push for the full privatisation of Telstra, a policy which will inevitably see a decline in services to rural and regional Australia.
- Labor Senators note that the Government has sought to portray competitive tendering of the Universal Service Obligation as both the solution to all the ills of the decline of services to rural and regional Australia following on from the partial privatisation of Telstra, and as an argument to pursue full privatisation.
- Labor Senators note the Government's own admission of the limitation of the scope of its competitive tendering policy by requiring Telstra to remain as the safety net service provider of last resort in the two proposed pilot project areas.
- Labor Senators believe that the Universal Service Obligation must be upgraded in the future to encompass access to minimum digital data services, and condemn the Government for continuing to ignore the growing need for reliable data services for Australians in remote or isolated communities.

CALCULATING THE COST OF THE UNIVERSAL SERVICE OBLIGATION

- Labor Senators believe that any Ministerial determination regarding the calculation of the cost of providing the universal service obligation, whether in full or in part, should be based on advice from the Australian Communications Authority, and should be by way of disallowable instrument.

EXTENDING LOCAL CALL ZONES TENDER

- Labor Senators do not believe that the successful tenderer for the \$150million extension of local call zones project should automatically become the nominated Universal Service Provider for that area, particularly as this goes further than the Government's proposed competitive tendering pilot projects.
- Labor Senators believe that any prospective universal service tenderers be selected on the basis of clear, defined objective criteria, expressed through legislation.

CARRIER INFORMATION PROVISIONS

- Labor Senators believe that the information framework should reflect commercial sensitivities and address only the specific needs of an incoming carrier in respect of carrying out specific obliged services or functions.
- Labor Senators believe that the ACA, on approach from an affected carrier, should be given the power to declare a request for information unreasonable.
- Labor Senators believe that, consistent with freedom of information principles, carriers should be able to recover the reasonable costs of complying with a request for information.

INTRODUCTION

The Telecommunications (Customer Protection and Service Standards) Amendment Bill No.1 2000 seeks to make a range of amendments to the Telecommunications (Customer Protection and Service Standards) Act 1999, in the following areas:

- i. Initial development of a framework for competitive tendering for Universal Service Obligation services;
- ii. A framework to issue a \$150 million tender to extend local call facilities to remote parts of Australia;
- iii. Adjusts the mechanism used to calculate the cost of the Universal Service Obligation, to enable the Minister to nominate a figure for three years in advance.

These proposed amendments flag the potential for significant change to the framework for providing universal telecommunications services to all Australians, regardless of where they live or work.

Labor Senators acknowledge the fundamental importance of the Universal Service Obligation in ensuring the delivery of minimum telecommunications services to rural and regional Australia.

THE UNIVERSAL SERVICE OBLIGATION

It is the view of Labor Senators that the Government is not engaging in the process of possible reform of the Universal Service Obligation with clean hands.

Service levels, particularly in rural and regional areas, have declined under the partial privatisation of Telstra, and Labor Senators believe that the Government has ignored these areas in its ideological obsession with the initial privatisation and subsequent push for the full privatisation of Telstra.

Service levels in some parts of Australia remain woefully inadequate, and it is the view of Labor Senators that any change in the universal service obligations arrangements must not be at the expense of genuine improvements in service levels in those areas.

Labor Senators note that the Government has sought to portray its proposed competitive tendering framework as the solution to all the ills in the decline of rural and regional service delivery since the partial privatisation of Telstra, and as an argument to pursue the full privatisation of Telstra.

Labor Senators note the Government's own acknowledgment of the limitations in its approach, namely that:

- (a) Firstly, its plan is limited to two pilot projects in undefined areas the results of which will not be known for a number of years; and
- (b) Secondly, its decision to require Telstra to remain as a safety net provider of last resort in the areas to be covered by the pilot projects acknowledges the unique role of Telstra in the delivery of services to rural and regional Australia and therefore the folly of pursuing full privatisation.

Labor Senators condemn the Government for its continuing push for the full privatisation of Telstra, a policy which will inevitably see a decline in services to rural and regional Australia.

There is little attention paid to the detail of how specific service difficulties faced in USO serviced areas will be addressed by these changes.

The high cost and limited availability of broadband or data services represents a significant barrier to the use of the Internet and other emerging digital services by rural, regional and remote communities.

Labor Senators believe that the Universal Service Obligation must be upgraded in the future to encompass access to minimum digital data services, and condemn the Government for ignoring the growing need for reliable data services for Australians in remote or isolated communities.

CALCULATING THE COST OF THE USO

The Bill would allow the Minister to determine the Universal Service Cost for up to three years in advance, generally based on estimates provided by the Australian Communications Authority(ACA).

The issue of calculating the cost of providing the universal service obligations has been debated for some time, as the cost is borne by industry, by way of an *ex post facto* levy based on a calculation of cost by proportion of market share.

In 1999, the ACA reviewed the framework for determining the USO cost, in the wake of a \$1.8billion claim for the cost by the Universal Service Provider, Telstra.

These amendments complement legislation enacted by the Parliament in 1999, in advance of an ACA review, which established a temporary provision which allowed the Minister for Communications to make a determination concerning the cost of providing the universal service for the years 1998-99, 2000-01, and 2001-02, for the purpose of providing industry certainty.

Concerns have been raised that the Bill reduces the role of the ACA in developing and administering a methodology for the calculation and collection of the Universal Service Obligation cost and levy, as the Bill confers a power on the Minister to require the ACA to use a particular methodology or formula for determining the cost.¹

Labor Senators believe that any Ministerial determination regarding the cost of providing the universal service obligation, whether in full or in part, should be based on advice from the Australian Communications Authority, and made by way of disallowable instrument.

¹ Communications, Electrical and Plumbing Union - submission to the Committee, June 2000.

LOCAL CALL ZONE TENDER

The Government has proposed to issue a \$150million tender for the supply of infrastructure to remote areas currently without an untimed local call service.

Telstra raised in its submission the provisions of the Bill which would see the successful bidder for the \$150million automatically become the nominated universal service provider (NUSP) for the area covered by the tender², thereby potentially relieving Telstra of any responsibilities in those areas.

This raises valid concerns that customers in such areas may suffer the consequences if, for any reason, the tender project fails.

Labor Senators are concerned that the project goes further than the two competitive tendering trial proposed in respect of the Universal Service Obligation, in that this could replace Telstra as the universal service provider in those areas.

Labor Senators do not believe that a successful tenderer for the \$150million extension of local call zones project should automatically become the nominated universal service provider for that area, particularly as this goes further than the Government's competitive tendering proposals.

Concerns have also been raised about provisions in the Bill which confer a power on the Minister for Communications to determine a successful bidder for the \$150million local call zone project³.

The Bill states in proposed new sections 20(2A) and 26A(2A) that, in making Universal Service Provider declarations, "the Minister is not limited to considering only the person's suitability to provide the services that must be provided to fulfil the universal service obligation"⁴, without defining which other matters the Minister must consider.

² Telstra Corporation - submission to the Committee, May 2000.

³ Communications, Electrical and Plumbing Union - submission to the Committee, June 2000.

⁴ Telstra Corporation - submission to the Committee, May 2000.

This seems overly broad, and provides little guidance as to what matters would be considered important in determining who provides a universal service for a given area.

Labor Senators believe that any prospective universal service tenderers be selected on the basis of clear, defined objective criteria, expressed through legislation.

CARRIER INFORMATION PROPOSALS

The Bill would allow incoming universal service providers to “require the former provider to give to the [incoming] provider specified information...that will assist the [incoming] provider in doing something that the [incoming] provider is or will be required to do by...this part”⁵.

Concerns were raised with the Committee that the proposals allow for unnecessarily broad access to an incumbent carrier’s information.

In particular, Telstra submitted that the provisions were “objectionably wide”, because:

They are not limited to information that is “required” to carry out an obligated service;

They do not limit what the incoming carrier can do with the information;

They allow the Minister to declare what information must be provided, but do not allow the Minister to declare that certain information need not be provided;

They do not allow the Australian Communications Authority to declare a request unreasonable;

⁵ Telstra Corporation - submission to the Committee, May 2000.

They do not allow the former provider to recover costs for the preparation and delivery of information.⁶

Other concerns raised include:

That the broad nature of the information provisions increase the potential for ambit requests, designed simply to seek commercial information;

That any determination by the Minister should be by way of a disallowable instrument.⁷

Labor Senators believe that the information framework should reflect the commercial sensitivities of the information that may be sought, and address only the specific needs of an incoming carrier in respect of carrying out specific obliged services or functions.

Labor Senators believe that the Australian Communications Authority should be given the power, on appeal from affected carriers, to declare a request for information unreasonable.

Labor Senators believe that, consistent with freedom of information principles, carriers should be able to recover the reasonable costs of complying with a request for information.

SENATOR MARK BISHOP
(A.L.P., W.A.)

⁶ Telstra Corporation - submission to the Committee, May 2000.

⁷ Communications, Electrical and Plumbing Union - submission to the Committee, June 2000.

Australian Democrats Minority Report

Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No.1) 2000

Senator Lyn Allison

The Australian Democrats wish to raise a number of matters that arise out of this Bill. As a preface to those comments, we note that the small number of submissions to this inquiry did not include comment from any consumer groups.

Guaranteeing the fulfilment of the USO

Telstra's submission raises the concern that, if it does not win the tender to provide untimed local call access to those in extended zones and another carrier becomes the regional universal service provider for those zones, it will continue to be the universal service provider (USP) and will be obliged to maintain its network in that region as a result. Telstra expresses this concern as follows:

Telstra might have concurrent obligations with the new regional USP and will thereby remain obligated to maintain and operate the very network which the successful tenderer is being publicly funded to replace.

The Department responded to this concern by suggesting that Telstra's interpretation of the Bill is incorrect and Telstra's obligations to the region would be extinguished. Whilst this appears to satisfy Telstra's concern, the Democrats are concerned about the potential for a situation where, for example, the new regional universal service provider becomes insolvent and is no longer in a position to service the area. If Telstra had already chosen to remove its operations and personnel from the area, how would residents of that area continue to obtain telecommunications services?

Some time ago, there was talk of Telstra being the carrier 'of last resort' so that if that type of situation was to arise, Telstra would be reinstated as the universal service provider for the area. What funding arrangements would apply in that circumstance? Is it still proposed that that will occur or would the Commonwealth be forced to 'prop-up' an insolvent service provider to ensure residents could obtain services?

Ministerial Discretion

Telstra also raised the concern that the Minister has an unfettered discretion in respect of the declaration of the universal service provider. Telstra suggested that as a minimum the Minister's considerations should at the least be limited to matters which he reasonably considers to be relevant to the achievement of the objects of the Act (the *Telecommunications (Consumer Protection and Service Standards) Act 1999*) as set out in section 9.

The Australian Democrats have a general concern about handing completely unfettered discretions to Ministers where such a wide discretion is not necessary. Confining the Minister to considerations relevant to achieving the objects of the Act would still leave it open for the Minister to consider a very wide range of matters.

I am unable to think of any circumstance which a Minister could properly consider which would fall outside such a limitation. Consequently the Australian Democrats will seek to amend the Bill to impose that limitation.

Provision of Information by Telstra (or other 'outgoing' USP's)

Telstra has expressed concern about the ability of incoming USP's to require the production of information by Telstra.

Rather than being concerned about the nature of the information that is able to be obtained, the Democrats are concerned about the purpose to which that information may be put. There are no limits on the use to which the information may be put.

I agree with Telstra when they suggest that the use of the information should be confined to honouring their USP obligations. The Departmental response to the concern is inadequate. I will be making further inquiries on this issue to determine if an appropriate amendment can be drafted to confine the use of information to matters which relate to USP obligations.

Ministerial Determination of the Net Universal Service Cost

The Minister is again provided with an almost unfettered discretion to set the universal service cost. Telstra submitted that the power of determination should be limited so that the Minister must be satisfied, after reasonable inquiry, that the figure he determines is a reasonable estimate of the figure that would be derived by the application of a methodology set out in the Act or declared by a disallowable instrument.

The Communications, Electrical and Plumbing Union (CEPU) said that the determination should be on the basis of a recommendation by the ACA and if the ACA recommendation is not accepted, the Minister should be obliged to state the basis for any adjustments to the estimate.

The ACA is the independent industry regulator. During the passage of the *Telecommunications Laws Amendment (Universal Service Cap) Act 1999*, the Australian Democrats took the view that instead of legislating an arbitrary cap on the USO cost amount, the government should have waited for the independent determination of the ACA. For the same reasons as we took that view, the Democrats are inclined to agree with the CEPU and believe that whilst the Minister has the final decision, he should be obliged to provide reasons should he depart from the recommendation of the ACA.

Conclusion

As a general comment the Democrats do not necessarily agree that competition is the best method of achieving better services at lower costs for people in rural and remote Australia. We are concerned at the prospect of ‘cherry-picking’ – that is, carriers choosing the potentially most ‘profitable’ areas and tendering to service those areas – resulting in improvements to services and increased availability of services to those areas whilst other areas continue to receive only basic services.

We believe that reviewing and increasing the level of the standard telephone service through the USO mechanism may be the best method, at this stage, of ensuring that residents of rural and remote Australia are not left behind with the continual advent of new technologies. We are disappointed that the government has not so far agreed to legislate a periodic review of the USO standard telephone service.

The Australian Democrats reserve our position in relation to this Bill.

Senator Lyn Allison