9 September 2005

Committee Secretary
Senate Environment, Communications, Information Technology and the Arts Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Committee Secretary

INQUIRY INTO THE TELSTRA (TRANSITION TO FULL PRIVATE OWNERSHIP) BILL 2005 AND RELATED BILLS

Thank you for your invitation to comment on the above Inquiry.

Before setting out my comments on the Telstra (Transition to Full Private Ownership) Bill 2004 and related bills, I wish to express my disappointment that the Government has granted the Committee only 4 calendar days to consider the details of the proposed legislation and prepare a report on it. Consequently, members of industry and the public have had even less time (less than 24 hours in the case of certain bills) to review the legislation and prepare comments for the Committee.

The grant of such a limited period of time by Government reveals its arrogance and has rendered the consultation process a farce. The full privatisation of Telstra may be a desirable objective. However, it is important that the telecommunications legislative framework can deliver the robust industry competition which underpins Government's telecommunications policy and enables industry to deliver essential telecommunications services. Given the number of people and organisations who depend on telecommunications services and will be affected by the proposed legislation, it is shocking that Government is acting with such haste.

In the time permitted, I have prepared the comments on the proposed legislation set out in the attached appendix.

Yours sincerely

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APPENDIX

Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005

Provision	Comment
Schedule 1	
158ZI	The purposes of the Communications Fund are limited to implementing the recommendations of the Regional Telecommunications Independent Review Committee ("RTIRC"). If, as it has been alleged, there are a number of recommendations made by the Regional Telecommunications Inquiry in 2002 ("the Estens Inquiry") which have not been fully implemented and as it is not likely the RTIRC will complete its first review of regional telecommunications before 2008, the purpose of the Communications Fund should be extended to include implementation of the Government's response to the Estens Inquiry. Such an amendment will enable, among other things, the grant of Commonwealth financial assistance to States and other persons under the Bill for that purpose.
158ZJ	This provision specifies only that the Communications Fund may not exceed $2 billion. It grants Ministers the power to make payments into the Communications Fund but it does not require Ministers to pay and/or transfer a minimum amount of money and/or assets into the fund even in the event of a share sale of Telstra. The Bill should be redrafted so as to ensure the transfer of funds and/or assets if Telstra is sold.
158ZK	The Commonwealth may transfer assets to the Communications Fund under this provision; however, it is clear that it is the Fund which bears the risk of any depreciation or devaluation in the assets at the time they need to be realised (i.e., the payment of grants or implementation of recommendations of the RTIRC). $2 billion may not be or may never be available for the purposes stipulated in Clause 158ZI.
Schedule 2	
158P	The reviews by the RTIRC are welcome. However, the criteria against which the RTIRC evaluates the "adequacy" of telecommunications in regional, rural and remote parts of Australia need further consideration. As drafted, the sole criterion is "equitable access" for which no definition is given. It is therefore unclear what the term "equitable access" actually means. The concerns of subscribers in regional, rural and remote parts of Australia suggest three key factors, which should inform a definition of the "adequacy of

Provision	Comment
	telecommunications": • equivalence in access to all types of services offered in urban areas; • equivalence in service levels offered and achieved in urban areas for services; and • "affordable" or "reasonably priced" services. Clause 158P(2) should be amended accordingly.
158Q	Clause 158P(4) should be amended to include a deadline by which the RTIRC must prepare and submit a report. I would suggest one (1) year from the start of any review. There is no obligation on the Commonwealth Government to implement any of the recommendations of the RTIRC. Given the absence of such an obligation, if the Commonwealth Government departs from the recommendations of the RTIRC, it should be required to give reasons for its decision in the statement it must prepare under Clause 158Q(6)(a).
158T	Given the amount of work involved in a review and the fact that an RTIRC member holds office on a part-time basis (see cl 158U(3)), consideration should be given to increasing the membership of the RTIRC to a Chair plus 4 other members.
158ZD	This clause should be amended to permit the RTIRC to procure advice or assistance from third parties independent of Government or the telecommunications industry, where neither of the parties listed in 158ZD(1) can provide the assistance the RTIRC requires. The Minister should cover the reasonable costs of any such advice or assistance.
Schedule 3	
136A	The ability for bodies or associations to seek reimbursement for the development of consumer-related codes is welcome. However, the scheme should be extended to include *all* codes and should not be limited to codes which relate principally to "carriage service providers and their retail customers". All of the ACIF codes which deal with issues other than those handled by the Consumers Issues Reference Panel have some bearing on services to retail customers. See, for example, number portability. It is equally important that the codes adopted by the network, operations and customer equipment and cabling reference panels are adopted within a reasonable timeframe and achieve "best practice". Non-members of ACIF, especially carriers who must contribute to the funding of the

Provision	Comment
	consumer-codes scheme under this provision, also enjoy the benefits of self-regulation in these three areas without paying for them. The arguments raised by the Government in the Explanatory Memorandum for the Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005 apply equally to codes which do not directly affect the customer relationship. The provision also does not address the problems of ensuring active and meaningful participation of consumer groups in the development of codes. For information about the difficulties of consumer participation, see Derek Wilding's article entitled 'In the Shadow of the Pyramid' in the Winter 2005 edition of the *Telecommunications Journal of Australia*. The Government should consider amending this provision so that consumer groups may apply for funding from the ACMA to participate in and/or pay their travel expenses etc as part of code preparation.
Schedule 4	
Items 4, 5 and 6	The references to subsections 8AL(3), 8AS(5) and 8BA(4) appear to be incorrect.

Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005

Provision	Comment
	The Government should require all industry participants including carriage service providers with turnover over a specified threshold to pay for the costs of self-regulation. Under the *Communications Act 2003* (UK), carriage service providers must contribute to Ofcom's costs. Moreover, Ofcom has managed to resolve the administration issues of collecting fees fron non-licensed entities. The adoption of a specified threshold should address any concerns that any impact fees may have on start-up companies.

Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005

Provision	Comment
Schedule 4	
Item 1 Clause 151BX(3)(a)	Fines should be determined by reference to a set percentage of turnover as is done in the UK and by the European Commission. Using this formulation avoids the problem that the increased amount of fines stipulated in the Bill may cease to have any deterrent effect over time.
Schedule 10, Item 2	

Provision	Comment
Clause 572B	Third parties should also have the right to enforce undertakings given to ACMA in the Federal Courts and sue for damages as a result of any breach of either undertakings or licence conditions. An equivalent provision has been inserted into the *Communications Act 2003 (UK).* See s 104 of that Act.
Clause 48(3)	The definition of "equivalence" provided is narrow, even more so because it applies only in relation to "designated services" as defined in clause 50A. It does not apply to the provision of certain types of important "commercial information" about designated services. Examples include information about product development/modifications, marketing strategy and intelligence, product launch dates, and network coverage by Telstra's wholesale business. The definition of "equivalence" should be extended to include commercial information, which is as important as actual terms and conditions.
Clause 50A(2)	Under this provision, the Minister is unable to designate an "eligible service" other than an "active declared service" except with the written consent of Telstra. Although it is reasonable not to expect Telstra to provide equivalent access to new or other wholesale services in relevant markets where it does not enjoy dominance, the inquiry procedure by which the ACCC declares an eligible service to be a declared service can be lengthy. The provision again highlights the need for Government to ensure that the ACCC has sufficient resources to conduct inquiries promptly in accordance with administrative best practice. It is highly unlikely that it would ever be in Telstra's corporate interests to permit the application of the equivalence principle to wholesale services in markets where it is non-dominant.
Clause 55(3)	It is odd that Telstra's compliance with the final operational separation plan is not treated as a condition of its carrier licence. As a result, there does not appear to be any incentive to comply with the terms of the final plan or even prepare a draft plan. There is no possible application of a financial penalty for non-compliance. Failure to comply with the plan may result only in a direction from the Minister requiring Telstra to prepare a rectification plan. It should also be noted that if the final operational separation plan is not treated as a condition then the powers given to the ACCC under clause 69A are meaningless. They apply only in relation to breaches of final rectification plans. As such, clause 55(3) should be deleted and/or some penalty mechanism should be inserted if Telstra fails

Provision	Comment
	to comply with the terms of the final operation separation plan and/or rectification plan. The entire provision as drafted gives Telstra too much scope to play the system with negative consequences for competitors to Telstra.
Clause 57	As any variation of the final operational separation plan to which this clause applies is not minor, the period of consultation under subsection (2) should be extended to 30 days.