

SUBMISSION TO

THE SENATE INQUIRY

INTO

THE PERFORMANCE

OF THE

AUSTRALIAN TELECOMMUNICATIONS

REGULATORY REGIME

April 2005

Tower Sanity Alliance

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Tower Sanity's Response to ECITA.

What is Tower Sanity?

Tower Sanity was formed in 2004 and is comprised of residential communities concerned about current practices in telecommunications tower rollouts. Community concern has always been there but it is growing as rollouts accelerate under a methodology that strips communities of reasonable rights.

Tower Sanity has no source of funding and no other mission other than to represent the concerns of the community, provide independent information and lobby for change to Federal Government policy.

This response was written by a cross section of members from the alliance.

Tower Sanity's response to the terms of reference:

- (1) Whether the current telecommunications regulatory regime promotes competition, encourages investment in the sector and protects consumers to the fullest extent practicable, with particular reference to:
 - (a) whether Part XIB of the *Trade Practices Act 1974* deals effectively with instances of the abuse of market power by participants in the Australian Telecommunications sector, and, if not, the implications of any inadequacy for participants, consumers and the competitive process;

Response:

Market power is abused in the relationship between a carrier and its potential supplier – an ordinary commercial building owner. In this instance, the abuse of market power occurs not just because of the size of intensity of market share, but because of federal government legislation outside the Trade Practices Act.

Under Schedule 3 of the Telecommunications Act 1997, a carrier has the option to force a building owner to put a mobile tower on his/her roof without their permission for low-impact installations. This creates enormous market power for one of the negotiating parties – i.e. the carrier. The carrier is in a position to say:

- 1) Here are the terms we offer to provide you (the building owner) with a lease stream for putting our tower on your roof.¹
- 2) If you don't accept our terms, we can force you to have our tower on your roof under the Act. In this situation it is a crime for you to inhibit us, and we can put a tower on your roof without paying you any rent.²
- 3) And if you want any compensation you will have to go to court.³

This is a very unreasonable power to give one party and results in the building owner having no power to negotiate fair commercial terms for the use of their own property. It also ultimately disallows the building owners to refuse to negotiate. This is totally against the intention of the Trade Practices Act and needs to be addressed.

It can be reasonably demonstrated that this is an abuse of market power. One only has to look at the peppercorn leasing rates carriers pay building owners for the right to use their roofs. Typical lease rentals range from \$10-\$15K a year. This is much less than 1% of the revenue stream created from a tower installation.

¹ Letter from UrbisJHD (for Telstra) to Summer Hill landowner (appendix 1)

² Letter from UrbisJHD (for Telstra) to Summer Hill landowner (appendix 1)

³ Letter from UrbisJHD (for Telstra) to Summer Hill landowner (appendix 1)

Also in Tower Sanity's view, there has been tacit market co-operation by the carriers to force building owners into a range of acceptable rents. So it doesn't matter whether you are Hutchison, Optus, Telstra or Vodafone, nearly all of the building owner lease streams we are aware of are between \$10-\$15K per year. In an open and competitive market this would be seen as anti-competitive. Yet in a market where the carrier can force the building owner to put a tower on their roof, what is the legal position? Are they engaging in cartel-like behaviour or are they in fact being generous in allowing any rent, given that an Act of Parliament would support a forced acquisition of someone else's property?

Further, in many instances, the building owners will lose value in the capital of their building and have risk shifted from the carrier to them. This risk shifting occurs as many building owners undertake more expensive insurance as a direct result of having a tower installed on their roof, and have uncertain public liability issues as a result of any health impacts resulting from having a tower on their roof.

This unreasonable amount of market power given to the carriers under the Australian telecommunications legislation must be changed. The provision that allows carriers to force building owners to accept a tower must be removed.

Carriers' practices on negotiating supply contracts with building owners, which seem to indicate a cartel-like behaviour, need to be investigated.

There is no other commercial relationship in Australia that would allow one negotiating party to be in a position to be allowed to legally enforce its will against another negotiating party without sharing any commercial benefits and without sharing in the cost of managing increased risk.

- (b) whether Part XIC of the *Trade Practices Act 1974* allows access providers to receive a sufficient return on investment and access seekers to obtain commercially viable access to declared services in practice, and whether there are any flaws in the operation of this regime;

Response: No response.

- (c) whether there are any structural issues in the Australian telecommunications sector inhibiting the effectiveness of the current regulatory regime;

Response:

The breadth of the carriers, especially Telstra, in their employment of service providers inhibits competition. It is very difficult to find independent legal or professional advice (e.g. on issues of radiation pollution in the community) without running into conflict of interest issues – as almost everyone in the area relies on Telstra or another carrier for their commercial survival. In such a small and highly concentrated market, the government has a role in providing professional and independent services to support community and small business action against abuse of power by the carriers.

There is no service that community or small business can go to for support when a carrier has breached the act. Neither the ACA nor the ombudsmen provide this service.

- (d) whether consumer protection safeguards in the current regime provide effective and comprehensive protection for users of services;

Response:

There are gaps in requirements for informing consumers on the radiation emitted from purchasing mobile phones. Specific Absorption Rates (SAR) should be advertised in much the same way as health warnings are advertised in cigarette sales. Further advice should be given to consumers on the potential hazards associated with extended use of radiation emitting devices (like mobile phones, wireless phones and wireless internet devices), especially around children.

Carriers and their distribution outlets should be mandated to display these advice, and all distribution points including web sites, brochure materials, franchised and fully owned outlets should be required to display advisory material on radiation emitted devices and their proper use.

- (e) whether regulators of the Australian telecommunications sector are currently provided with the powers and resources required in order to perform their role in the regulatory regime;

Response:

The ACA needs significantly more power to fine carriers for breaches of the ACIF Code – Deployment of Radiocommunications Infrastructure. The current fine for breaches of this industry code is a mere \$250K, and it is also subject to determination by the ACA. This is unsatisfactory and does not provide a level of deterrent to the carriers to perform installations under their code of conduct.

Two things are required:

- 1) Fines should be mandatory if a breach occurs and should not be subject to “opinion” of the ACA executive.
- 2) Fines should be increased from \$250K to \$10M to achieve the right level of incentive for carriers to meet their requirements under their code of conduct.

- (f) the impact that the potential privatisation of Telstra would have on the effectiveness of the current regulatory regime;

Response: No response.

- (g) whether the Universal Service Obligation (USO) is effectively ensuring that all Australians have access to reasonable telecommunications services and, in particular, whether the USO needs to be amended in order to ensure that all Australians receive access to adequate telecommunications services reflective of changes in technology requirements;

Response:

For mobile communication there is anecdotal evidence that major cities are over serviced whereas country areas are under serviced. If practicable, a requirement for a fixed percentage of all investments happening in country and rural areas would ensure that city areas are not overcapitalised to the detriment of country services.

- (h) whether the current regulatory environment provides participants with adequate certainty to promote investment, most particularly in infrastructure such as optical fibre cable networks;

Response: No response.

- (i) whether the current regulatory regime promotes the emergence of innovative technologies;

Response: No response.

- (j) whether it is possible to achieve the objectives of the current regulatory regime in a way that does not require the scale and scope of regulation currently present in the sector; and

Response: No response.

- (k) whether there are any other changes that could be made to the current regulatory regime in order to better promote competition, encourage investment or protect consumers.

Response:

Consumers do need more protection. They need to be advised about radioactive emission from the devices that they are choosing so that they can make informed decision about the devices and their use.

Building owners need to be protected against predatory practices by the carriers. This can be achieved by removing carrier rights to enforce installations of mobile phone towers.

- (2) That the committee makes recommendations for legislative amendments to rectify any weaknesses in the current regulatory regime identified by the committee's inquiry.

Response: No response.

10th August 2004



Dear [REDACTED]

RE: PROPOSED TELSTRA INSTALLATION, [REDACTED] SUMMER HILL

Further to our ongoing discussions, I write again to request your further consideration of our client Telstra's proposal.

Telstra remains committed to proceeding with the service improvements in your area, and is therefore keen to finalise a commercial agreement with you. Whilst we acknowledge you have certain reservations over aspects of the proposal, we have endeavored to provide you with a suitable responses to these issues.

Accordingly, I again seek your acknowledgement to enter into an 'early access agreement' as proposed below. This is based on our previously agreed headline commercial terms.

'Early Access Agreement'

Lessee	Telstra Corporation Limited ABN 33 051 775 556
Lessor	
Lessor's Solicitors	
Land	Lot 1 on DP 235141
Type of Facility	Macro BTS, comprising equipment room, 6 panel style antennae, associated cable runs, trays and supporting steelwork.
Premises	Part [REDACTED], Summer Hill
Access to Premises	<p>Telstra shall have unrestricted access to the Premises 24 hours a day, 7 days a week from the date of this 'Early Access Agreement' until the commencement date of the lease, to undertake tests, surveys, inspections and construction, installation and operation of the Facility.</p> <p>Telstra shall have unrestricted access to the Premises 24 hours a day, 7 days a week during the term of the lease and any holding over period.</p>
Permitted Use	To access, install, inspect, maintain, construct, excavate, replace, repair, renew, alter, clean, operate and remove the Facility on the Land for telecommunications operations and

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	associated services.
Term	5 year initial term.
Consecutive Lease(s)	3 consecutive lease(s) of 5 year(s) each.
Commencement Date	Upon execution of this document.
Rental	\$20 800 per annum
Rent Review	The rental fee will be increased by the greater of 5 % or CPI per annum on each anniversary of the commencement date during the term and any consecutive lease term.
Payment of Rent	Yearly in advance with the first year's rent to be paid from the Commencement Date. Subsequent rent payments will be made by EFT deposit directly into your nominated account.
Legal & Other Costs	Telstra agrees to pay your legal costs for the negotiation and execution of the lease and reasonable disbursements to an amount not exceeding \$1000 . Telstra will also pay stamp duty, registration fee and, if the land is subject to a mortgage, any reasonable mortgagee consent fee payable in relation to the lease.
Lease Documentation	A copy of Telstra's standard lease for this type of Facility is attached to this document. This document incorporates the agreed commercial provisions outlined in previous correspondence.
GST	Unless otherwise stated, all amounts quoted in this Early Access Agreement are exclusive of GST.
Australian Standards	Telstra will install and operate the Facility in accordance with the relevant Australian Standards and regulations.
Insurance	Telstra self insures for property damage and has a global insurance policy for public liability.
Easement for Services	If the local power authority requires an easement to be registered on title, the lessor will do whatever is necessary to procure the registration of an easement on title. Our assessments have concluded that this is not likely to be required.
Telstra's Requirements	This offer is subject to: <ul style="list-style-type: none"> • Telstra's final approval; and • Telstra obtaining consent from any statutory authority or other relevant authority to the construction of its Facility.
Low Impact Installation	It is acknowledged that the Facility is a low impact installation under the Telecommunications Act 1997 (Cth) (Act).
TERMS AND CONDITIONS OF ACCESS	From the date of this letter until entry by the parties into formal lease documentation, the Lessor agrees to allow Telstra access to the Site to construct the Facility on the following terms and conditions. <ol style="list-style-type: none"> 1. The Lessor gives Telstra (and its authorised employees, agents, contractors,

licensees and invitees) unrestricted access 7 days a week, 24 hours a day to the Site to carry out and complete all works required to install and construct the Facility, including without limitation:

- (a) undertaking tests of the Facility and surveys of the land prior to, during and upon completion of the construction and installation of the Facility to ensure the effective operation of the Facility;
- (b) laying telecommunications cables above or below the Site which are connected to the Facility located on the Site;
- (c) laying electricity cables above or below the Site to connect the Facility to an electricity supply; and
- (d) operating the completed Facility pending entry by the parties into formal lease documentation.

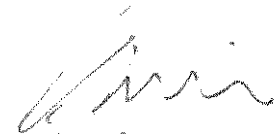
- 2. Telstra agrees to make good any damage caused to the Site during construction and installation of the Facility, having regard to the condition of the Site prior to Telstra's access to the Site.
- 3. Telstra indemnifies the Lessor against all claims arising out of the negligent or wilful act or omission of Telstra (and its authorised employees, agents, contractors, licensees and invitees) except to the extent that the Lessor (and its authorised employees, agents, contractors, licensees and invitees) has contributed to it.

We would appreciate if you could please sign and return the attached copy of this agreement confirming agreement to the provisions, thereby granting Telstra access to the Site for the construction, installation and operation of the Facility prior to entering into a formal lease arrangement with Telstra.

Telstra is committed to negotiating mutually acceptable terms with you, as it does with all of its site providers. However, in the event this matter has not been resolved by the close of business on the 25th August 2004, Urbis JHD will recommend to Telstra that it utilise its powers under the Telecommunications Act 1997. In such a circumstance, Telstra would be under no obligation to enter into any commercial lease, nor pay any ongoing site rental. In lieu of agreement to the issued lease documentation, compensation would be determined by a Court of competent jurisdiction assessed on the unrecovered actual loss or damage caused after the installation of the facility. This would undoubtedly be a most unfortunate outcome for both parties. Therefore, please confirm your willingness to proceed on the above terms.

If you have any questions in relation to the below 'Early Access Agreement', please do not hesitate to contact the undersigned on 8233 9927

Yours faithfully



Iain Lawrie
Site Acquisition Consultant