

Inquiry into the Performance of the Australian Telecommunications Regulatory Regime

Submission to Senate Environment, Communications, information Technology and the Arts Committee

Introduction

Thankyou for the opportunity to provide this submission to the Inquiry by the Senate Environment, Communications, information Technology and the Arts Committee into the performance of the Australian telecommunications regulatory regime.

Generally, the State road authority is supportive of the telecommunications industry, and the ongoing investment in the industry, however concerns and inequities over impacts on roads must be addressed.

Overview

The core of the telecommunications regulatory regime was put in place in July 1997, when the Federal Government enacted the Telecommunication Act 1997. This legislation sought to de-regulate the industry and promote competition. Clearly, the legislation did not anticipate that there would be the level of participation and activity in the industry – there are currently over 150 licensed carriers each with infrastructure in place or planning for telecommunications infrastructure location.

No longer is the Telecommunication industry managed and resourced through government, but is rather operated by a collection of overseas and national corporations. Licensed carriers relying on the telecommunications legislation have been given unprecedented power by the legislation – in particular the ability to enter and acquire an interest in land to locate their infrastructure and maintain it (see Third Schedule Telecommunications Act 1997).

Under the Telecommunications Act 1997, (the Act) a carrier is able to access road corridors to install its infrastructure without the need to obtain the road authorities agreement or consent. A carrier only has to forward a Notification of its intentions. Carriers pay no compensation at the time of road works (and have denied any claim when made). In all cases, carriers refuse to bear any costs to relocate or protect their asset (which at times has been objected to by road authorities) due to conflicts with plans for future enhancement of the road.

All benefits gained by carriers at the expense of the road authority and the community are distributed amongst various shareholders and not the public or for public benefit.

Telecommunication installations within the road reserve needs to be better regulated –

- so as not to act as an additional burden to the community and road authorities; and
- to resolve inequities resulting from carriers profiting from use of public purpose land while costs of their use are passed to the State or local government.

For example, locating low impact telecommunications plant in a road (without having paid compensation) and then relying on the State to rectify environmental concerns and charging the State or local government for relocation costs when the plant is to be moved for road widening (new plant for old).

Response to Specific Terms of Reference

This submission will focus on only a few of the terms of reference, primarily where they interact with roads – some of the comments do overlap.

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

The current regulatory regime does not adequately address the impacts between licensed carriers, their contractors and road authorities. There is no person or tribunal which is satisfactorily identified to deal with complaints about a licensed carrier concerning failure to comply with legislative requirements for plant installation and maintenance. Contact with the Australian Communications Authority shows no ability or resources to deal with such concerns.

Additionally, certain Codes of Practice and Guidelinesⁱ are not mandatory and are often ignored by carriers or their contractors in carrying out works.

The Queensland Department of Main Roads, local governments and other road authorities experience difficulties in the rectification of installation works and subsequent relocation of telecommunication plant in road corridors. Relocation costs and the costs of rectification of poorly done telecommunication works are substantial and are eating away at road project budgets. The development industry and government planners have identified improved road infrastructure as the essential focus of public infrastructureⁱⁱ spending. Effectively carriers are opting not to invest in quality infrastructure but cut corners.

Additional to the substantial costs mentioned above, road authorities are also expected to carry the costs to confirm the location of telecommunications infrastructure (for example, optic fibre cables) on site. Carriers do not retain accurate information as prescribed by legislative instruments. Subsequently there is reliance on information providers such as "Dial Before You Dig" – such information is not a true indication of what exists on site or at a specified location – at best, it is approximate detail.

No action is taken by the Australian Communications Authority (ACA) to ensure detailed information is provided or that any of the obligations specified in the Third Schedule of the Act are met. See (1) (e) for examples.

(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;

As indicated previously, telecommunications installation within the road reserve should be regulated and such regulation resourced – so as not to cause additional burden on the community to meet expenses like rectification of installation, relocation costs and information checking and storage.

Examples of failure in the regime are –

- Adoption of poor practices in installation and maintenance work contrary to the obligation in Third Schedule sections 8, 9, 10 (to do as little damage as possible, to restore land and act in accord with good engineering practice). In particular-
 - Backfill for an optic fiber cable trench along East St, Warwick was not compacted, and scoured out to gully proportions after heavy rain. This caused not only loss of soil due to erosion but also created a hazard to pedestrians and road users. Main Roads, Border Districts stipulates a minimum 600mm depth of cover along road reserves; compaction levels; and to leave a level surface – such requirements were not followed.
 - Bruce Highway, Carnarvon, Toowoomba - Leyburn, Warrego and other Highways have all had vegetation clearing incidents over the level of clearing.



The above photograph shows the Bruce Highway after an optic fiber cable was installed. The destruction of flora included areas listed as endangered and protected. The carrier relied on exemptions found in Third Schedule section 37 to avoid State laws for protection of the environment. Complaints to the carrier and ACA concerning failure to comply with legislative requirements met with no action. Such situations have not been uncommon.

Poor practices such as the above require Main Roads intervention to rectify the environment. Not only to re-instate as best as possible the flora of the road reserve but also to deal with potential fire hazards caused by dead timber from destroyed flora. Dead timber, leaves and refuse provide a good fuel load for bushfires to start in and spread – not only in the road but to adjacent properties.

- Practices such as the above also facilitate the spread of pests and noxious plants through regions and disrupt pest eradication plans.
- Numerous situations have arisen where carriers have not accommodated other carriers within their infrastructure (co-location) and have insisted for the other carrier to install new plant clear of their existing installation. This policy adopted by a carrier ultimately requires a number of telecommunication cable alignments within a road corridor – making it very difficult for other public utilities (and other carriers) to use the corridor and increasing the cost of relocation when the road is upgraded. There is no ability for a road authority to pursue the collocation issue between carriers.
- Where complaints by Main Roads arising from notifications by a carrier to install plant in to a road have been made to the Ombudsman this highlighted the inadequacy of that office to deal with disputes of this type. The Ombudsman is not resourced to deal with technical disputes as to safety of works. Additionally, the time taken to provide a decision did not meet party expectations for a speedy resolution of the issues. Notifications to the road authority are to be given 10 business days prior to installation – and it is anticipated any issues would be resolved in that short period.

The ACA is unable to adequately deal with the above deficiencies or breaches. Other bodies such as the local government or Environmental Protection Agency are unable to act due to reliance on legislative exemptions afforded to carriers. Accordingly regulators of the industry need to either be given adequate powers to order rectification or alternatively the exemptions provided need to be removed to avoid abuses.

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

Main Roads and Telstra have agreed to work together to improve efficiency in operations and provide better outcomes for each other's business and for the community. Both organisations have recently signed a Memorandum of Understanding to develop and maintain more effective and efficient arrangements between the parties that will deliver an agreed framework of outcomes (set out in the memorandum). Primarily, both parties wish to see cost effective results – Main Roads having the issue of re-location costs and compensation addressed while Telstra seeks removal of delays to efficient infrastructure delivery.

The privatisation of Telstra should not discourage the advances made by Telstra in working with Main Roads. Primarily Telstra should continue to remain liable for compensation (pursuant to Third Schedule section 42) arising from the installation of infrastructure and its actions in the past.

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

There remains ambiguity over the regulatory regime, which impacts on certainty over investment decisions concerning such things as optical fibre cable networks. Primarily the concern relates to the growing practice of leasing conduit space in roads by one carrier to others. It should be appreciated that road authorities generally support co-location however concerns arise when notification of the new infrastructure in the conduits is not given and especially when the road authority has supplied the conduits for the carrier at the road authority's (the public's) expense.

In a number of situations concerning Brisbane roads, there has been construction of conduits for telecommunications optic fibre infrastructure by Main Roads at public expense (in most cases as part of a relocation of that infrastructure – normally upgrading the infrastructure and its installation). The carrier upon receiving the new infrastructure then proceeds to locate the optic fibre cables from other carriers and charge the other carriers a rental for the conduit.

No notification of this new low impact infrastructure is provided to the road authority – as a result cost decisions concerning relocation of infrastructure as part of road upgrade projects is inaccurate and taints planning decisions.

A further complication arises due to the costs to relocate telecommunications plant as part of road works not making any allowance for depreciation of the existing infrastructure. Bluntly, a carrier receives new telecommunications infrastructure, often upgraded (for example, copper cable replaced with fibre optic) in place of old infrastructure, which was depreciated and valueless. The new infrastructure located in the upgraded road is funded by the road authority (the State) and provides benefits to the carrier's shareholders and not the public. Notes to the Financial Statements in Telstra's Annual Report shows the service life of infrastructure such as cables (varying from 8 to 25 years) and conduits (up to 40 years) – making it very likely that the old infrastructure will be replaced by road authorities in the course of upgrades in rapidly growing urban areas.

As a road authority, Main Roads finds this carrier behaviour unpalatable, as it is a clear case where infrastructure is installed at public expense and then utilised by a carrier for its own benefit and that of its shareholders. The ability to conduct this practice does not encourage or promote investment in telecommunications infrastructure by carriers. Rather carriers are

encouraged to use the "powers" in the Act for their profit and benefit and at the expense of the public.

A further illustration of this is the gathering of information by public authorities on the location of telecommunications infrastructure in their land assets. Main Roads expends a considerable amount of road project budgets identifying the location and type of telecommunications infrastructure and then providing this information to the carriers.

(1) (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.

As highlighted above the following changes are sought to the regulatory framework –

- ❑ that the quality of information recorded and provided by carriers concerning the location of their infrastructure be prescribed and regulated – to avoid undue costs to the public alternatively that carriers be obligated to pay the costs of authorities (such as Main Roads) that need to locate and identify their infrastructure;
- ❑ that the exemptions from State law and from various environmental and town planning responsibilities be removed or reduced to encourage carriers to undertake appropriate quality of infrastructure and installation – rather than have the costs of rectification and remediation borne by the community;
- ❑ that carriers be obligated to recognise relocation costs of telecommunication infrastructure placed in the road and meet these costs when road projects require the shifting of the telecommunications infrastructure;
- ❑ that regulation of carrier's compliance with Third Schedule obligations (for example sections 8,9 and 10) be properly resourced so that breaches can be reported and dealt with.
- ❑ that the Ombudsman be properly established and resourced to deal with technical objections concerning the placement of telecommunications infrastructure in contested locations or by inappropriate means.

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

As indicated in 1 (k) above.

Conclusion

The current regulatory regime focus needs to be drawn to the interaction between those impacted by the investment in telecommunications infrastructure and how that investment is made. As highlighted above the regulatory regime is being used by carriers to defray costs of their operations and have their infrastructure funded by the public. Such action is not encouraging of competition but rather a focus on subsidising operations which are not

effective or appropriate. There is a clear need for regulatory change to bring about equity in costs of infrastructure delivery and maintenance – along with genuine general public benefit.

ⁱ For example, the Australian Communications Industry Forum, Industry Code – External Telecommunications Cable Networks, this Code is not binding on carriers. Main Roads participated in the last review of the Code but is not a voting member of the forum.

ⁱⁱ See Urban Development Institute of Australia (Qld) – published checklist available on <http://www.udiaqld.com.au/services/news.shtml>