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Inquiry into Telecommunications Amendment (Mobile Phone Towers) Bill 2012

Public hearing in Canberra on Thursday 12 April 2012

Question on notice:

Purpose

The purpose of this paper is to answer the following question on notice,

"Senator FISHER: how do you legislate with whom consultation should be had, how it must be done—by letterbox drop, email or phone—and when it must be done? What are the time frames? I am looking for the who, the how and the when in a one-size-fits-all measure, which is what legislation inevitably is"

Background

Consultation is defined in the ACIF code as a process whereby Carriers seek to inform other parties about a proposed project at particular premises with the intention of giving those parties an opportunity to respond to the proposal and to have their responses considered.

Key requirements of consultation include engagement with stakeholders (e.g. council and communities) prior to the decision being made, consultation usually involves the presentation of options, and incorporating feedback into the tower's design

Consultation differs from communication, whereby stakeholders are advised what will occur, without the ability to change the proposal.

The revised ACIF code retains the phrase "... to have regard to..." this enables the carrier to meet the code's requirements for consultation, and then proceed with their original proposal without any changes.

The ACMA as the current regulator is unable to pursue a breach of the code, as the carrier will document that a comment was received, irrespective of the action taken, and in doing so will have "had regard too"

The Objective of any consultation plan should be that it is fit for purpose; this will mean that a consultation strategy for a rural location may differ from an urban location, an industrial area will differ from a residential area etc.

Legislating Consultation

1. How do you legislate

The key to effective legislation for stakeholder consultation is a requirement that

a. The consultation plan be fit for purpose,
b. A strong regulator, with an array of penalties to ensure compliance, and.
c. An Appeals body, such as the Australian Appeals Tribunal (AAT) to adjudicate disputes

This strategy would recognise that proposals which are straightforward and supported by the community are not unnecessarily delayed by red tape, but stakeholders in so called “red” sites, in community sensitive locations are appropriately engaged, and an agreed solution developed with the community.

The current industry self regulation, and industry code, where carriers must “have regard to” certain criteria, means the regulator (the ACMA) is powerless to prosecute where a carrier does not action community feedback. Investigations by The ACMA in Bardon confirm that a carrier who dismissed 100% of community feedback was ruled to have complied with the Industry code, having “had regard too”, and the ACMA ruled that no breach had occurred. This is borne out nationally in the ACMA’s annual reports, comprising of a complaints handling statistic of 96 complaints and only 1 formal investigation since 2005.

Consultation plan fit for purpose: Consultation methods will vary from site to site, but may include correspondence (letter drop), print media advertisements, web sites, one on one meetings (e.g. with elected representatives), community meetings, local signage, newsletters, establishing community liaison groups. The consultation plan should document the site assessment criteria, and also contain a list of stakeholders, a programme of activities, service level agreement, consultation strategy (information or engagement), and results of previous consultation. A variety of consultation measures are documented in the revised Industry code.

Strong Regulator: NTNS’s experience to date is that the ACMA’s strategy is to avoid investigations where possible, examples include only hearing evidence from the carrier, and not community, seeking community members to investigate for them, not investigating a breach where the carrier amends their proposal, and not being proactive in assisting communities. It is thought that the ACMA may not be an effective regulator in this regard.

It is recommended that the regulator have the following functions and powers legislated:

A. advising and making recommendations to the relevant Minister and reporting on the proposal, and industry’s performance

B. monitoring and enforcing compliance with the Telecommunications legislation, and industry code, including through enforceable undertakings, legal proceedings and prosecutions

C. providing advice and information on the Governments expectations to carriers and communities

D. collecting, analysing and publishing statistics

E. fostering a cooperative, consultative relationship between carriers and the community, including its representatives

F. undertake Legislation, and Industry code compliance audits

G. Prosecute carriers for breaches of the Act.

Penalties for non compliance: I’d recommend an escalating rang of tools for non compliance. Tools that could be made available to the regulator under the Telecommunications Act in regards to enforcement and compliance may include notices, enforceable undertakings and prosecutions. The current act only appears to have prosecutions available to the ACMA, a tool the ACMA appears not to utilise

A work improvement notice, or Corrective Action Report as used in a Quality Assurance process could be used to record minor breaches, this would elevate to a Formal notice if not rectified

Formal notices, similar to a “warning” would be a record of non compliance, which in itself does not indicate a breach of the code, but when seen in the context of national statistics will assist in developing best practice,

Enforceable undertakings (EU) provide an alternative to prosecution for a breach or alleged breach of the legislation, or industry code. An EU is a legally binding agreement between the carrier, and the regulator, with the aim of creating improvements to community consultation by carriers. An EU may be requested by the regulator, or community (through the regulator), in such cases the regulator would give a person who is seeking to make an EU written notice of the decision to either accept or reject the EU and of the reasons for the decision. Where it is accepted by the regulator, the decision to accept an enforceable undertaking should be published on the regulator’s website, detailing the reasons for the decision. This would not be an admission of “guilt” but a tool to drive improvements in industry practices. If a carrier breaches the EU, then the regulator may apply to a court to impose a fine, an order directing that the carrier comply with the EU.

Fines by the Regulator, which would be applied by the regulator, without the need to take the carrier to court would be the final step before formal prosecution

Prosecutions are currently available to the ACMA under current legislation, however it appears the ACMA are reluctant to use this tool, possibly due to the likelihood of failure in court, and cost.

Appeals Body: Most community groups are run by volunteers, with limited funds. If a community believes that a code or legislative breach has occurred, and the regulator has not adequately investigated the breach then the community should have the ability to appeal to an independent body, such as the Australian Appeals Tribunal, The registration fee ($777) could be further reduced or removed through legislation. For example if a complaint was made within 12 months of an alleged breach. The AAT would then manage the appeal in accordance with their processes.

2. With whom should you consult:

Consultation should be with those affected by the proposal. This will typically include land owners, and occupiers, legal guardians (in the case of a base station near a school) representatives of community groups and the like, elected representatives (local, state and federal level). It may include industry bodies, consumer advocacy groups (such as ACCAN), unions, Government departments (Department of Education for example if near a school). The affected area will also differ for rural and urban locations, as such a defined distance from the proposed tower may not be appropriate in all cases. There is no defined list of who should be consulted with, or in what manner. The key is that the consultation list is fit for purpose.

3. How do you Consult

As detailed above, there are many tools available to carriers for consultation, including correspondence (letter drop), print media advertisements, web sites, one on one meetings (e.g. with elected representatives), community meetings, local signage, newsletters, establishing community liaison groups. These are listed in the proposed ACIF code (appendix D); again the key is that the consultation list is fit for purpose.

4. **When should consultation be undertaken**
   Consultation with stakeholders should commence after a technical analysis of sites, but before any site is finalised, including the signing of an "intention to sign a lease" document by the Carrier and landowner.

   Carriers planning for a base station may take over 1 year, so increasing the community consultation time from 10-15 days will have minimal impact on the development and implementation programme (In Bardon for example the carrier commenced discussion with the land owner Early 2009, community consultation September 2009, and the final tower solution was operational December 2011).

   The 10 or 15 days proposed in the new industry code is very short for communities to get up to speed on a topic they previously had no knowledge of, especially given the long lead time the carrier has to develop the proposal.

Issues

The key issues to successfully legislating for community consultation are:

1. A consultation plan must be fit for purpose. This is a far higher duty of care for carriers than the current "have regard too" documented in the ACIF code
2. Consultation should involve engagement with stakeholders (not communication of the final design solution), and incorporating user feedback into the solution.
3. A regulator should be appointed with broad powers and a variety of penalties for non compliance, including warnings, fines and prosecutions
4. The regulator should be sympathetic to communities who are less familiar with the complaints procedure than carriers
5. The cost of formally lodging a complaint or appeal should be minimal, or waived (community groups are typically run by volunteers, with limited funds)
6. Sources of balanced information are difficult for communities to track down in a short consultation period. No Towers Near Schools has been contacted by 96 community members asking for help (they then ask many, many more questions). There are over 160 communities objecting to phone towers identified in the media in recent years. NTNS estimates there are many communities would ask for help but have no idea where to obtain information.

Risk Assessment

With modern mobile telephone technology requiring increased number of sites in urban locations, there is a risk of increasing number of community complaints, and a lack of investigation by the regulator will lead to a breakdown of trust between communities and the federal regulator will result in negative reputational risk for the Federal Government.