



Telecommunications Legislation Amendment (Regular Reviews and other Measures) Bill 2005

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Law and Bills Digest Section

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Telecommunications Legislation Amendment (Regular Reviews and other Measures) Bill 2005

Date Introduced: 10 March 2005

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: On Royal Assent

Purpose

The Bill amends the *Telstra Corporation Act 1991*, the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Services Standards) Act 1999* ('the *Consumer Protection Act*'). According to the Explanatory Memorandum, it purports to respond to the recommendations of the Estens Report relating to:¹

- the need for Telstra to maintain a local presence in regional, rural and remote parts of Australia (hereafter referred to as 'regional Australia'); and
- the establishment of an independent committee to review, no less than every five years, the adequacy of telecommunications services in regional Australia.

Background & Discussion

History of these provisions

The matters dealt with in this Bill were previously dealt with in the *Telstra (Transition to full private ownership) Bill 2003* ('the Telstra Sale Bill'). The new Bill deals only with those matters and not with any other matter in that earlier Bill—including the sale.

The provisions in the Bill are, with only minor exceptions, identical to those dealing with the same matters in the Telstra Sale Bill. However, this Bill establishes the review committee under the *Telecommunications (Consumer Protection and Customer Service) Act 1999* and not under the *Telstra Corporation Act*. It is not immediately apparent that this makes any difference to the operation of the committee.

Basis of policy commitment

The Bill gives effect to the Government's response to the recommendations in Chapters 8 and 9 of the Regional Telecommunications Inquiry Report of 2002 ('the Estens Report').² The Estens Inquiry followed the report of the Telecommunications Service Enquiry of

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2000 ('the Besley Report').³ Two of the three members of the Besley Inquiry served on the later Estens Inquiry.

These inquiries were set up to assess the adequacy of telecommunications services in Australia. The Besley Report noted that there was a 'greater degree of concern expressed by rural and remote Australians about service levels compared with those in metropolitan areas'.⁴

As a consequence of the Besley Report, the Estens Inquiry was established to inquire into the adequacy of telecommunications services in regional Australia. It was also to report on the arrangements that should be put in place to ensure the adequacy of such services. Amongst other matters, the Inquiry panel was to advise the Minister on;

'5. The ongoing commitment of Telstra to a local presence (such as Telstra Country Wide) in regional, rural and remote Australia.

6. The most effective means by which the Government can ensure that people in regional, rural and remote Australia can share reasonably equitably - in terms of availability and cost - with residents in metropolitan Australia in the benefits of future advances in telecommunications services resulting from competition and new technologies.'⁵

On 6 November 2002, panel provided its report to the Minister. It included the following recommendations;

'RECOMMENDATION 8.1

Telstra should be required to maintain an ongoing local presence in regional, rural and remote Australia. The requirement should only apply to Telstra consistent with its status as the primary universal service provider. The requirement should not be unduly prescriptive or burdensome, and should be broadly compatible with Telstra's commercial interests.

RECOMMENDATION 8.2

Telstra should be required to develop and publish a local presence plan to set out the range of activities and strategies it would deploy in regional Australia to address the Government's broad objectives. Telstra would be required to regularly report on its achievements against the plan and to demonstrate to the Government, and to regional communities, that it was providing an effective and beneficial local presence.

RECOMMENDATION 9.1

The Government should put in place a process to regularly review telecommunications services in regional, rural and remote Australia, and to assess whether important new service advancements are being delivered equitably in those areas.

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The review process should be linked to a strategic plan for regional telecommunications, and underpinned by ongoing arrangements that provide a high degree of certainty that Government funds will be made available to support service improvements in regional, rural and remote Australia, where they will not be delivered commercially within a reasonable timeframe.

RECOMMENDATION 9.2

Establishing a structure for future reviews of regional, rural and remote telecommunications services should:

- provide certainty for regional, rural and remote communities;
- ensure that reviews are independent from executive government; note this is not ensured
- allow for flexible and appropriate policy responses to meet the range of needs in regional, rural and remote Australia; and
- promote competition and commercial service delivery as the most effective and sustainable service outcome.

RECOMMENDATION 9.3

The scope of regular reviews of regional, rural and remote telecommunications services should be flexible, but there should be a core focus on assessing whether important new telecommunications services are available equitably across Australia.

RECOMMENDATION 9.4

Future governments should be legally obliged to respond publicly to the recommendations of future reviews, and to justify responses that are not in accord with review recommendations.

RECOMMENDATION 9.5

The Government should provide funding for future service improvements in regional, rural and remote Australia, rather than imposing financial obligations on industry.

RECOMMENDATION 9.6

The Government should ensure that regular reviews of regional telecommunications services are supported by organisational arrangements that provide a strong focus on monitoring and assessing regional, rural and remote service levels. The Australian Communications Authority would be an appropriate body to undertake this function.⁶

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What the Bill does

Telstra's local presence

Section 63 of the *Telecommunications Act 1997* empowers the Minister to impose conditions on carrier licences. The conditions in Telstra's carrier licence are found in the *Carrier Licence Conditions (Telstra Corporation Limited) Determination 1997*.⁷ The Telstra licence conditions do not expressly include a requirement to maintain a local presence in regional Australia.

The Bill does not impose any obligations on Telstra to maintain a local presence in regional Australia. Nor does it require the Minister to include any such condition in Telstra's carrier licence.

Rather, it provides that, in relation to any condition in Telstra's carrier licence requiring it to maintain a local presence in regional Australia, which is included by the Minister under section 63, 'the condition may make provision for, or in relation to, a matter by empowering the Minister or the ACA to make decisions of an administrative character.'⁸ This could include, for instance, a provision requiring the ACA or the Minister to approve a draft local presence plan setting out how Telstra will fulfil its obligations to maintain a local presence in regional Australia.

The Explanatory Memorandum envisages that the Minister will include a licence condition requiring Telstra to have a local presence plan. This is 'aimed at ensuring the continuation and further development of Telstra endeavours in [regional Australia] through promoting

- Decentralised management and decision-making within Telstra;
- Representation for regional and rural interests within Telstra's executive management structure;
- effective direct customer servicing and support for regional Australia;
- effective concentration and application of resources in regional, rural and remote Australia, including additional specialist staff who can address specific needs of rural customers;
- effective coordination of effort in all service areas, and focus of responsibility for managing projects and service tasks;
- effective information to regional, rural and remote customers; and
- support through Telstra activities for broader regional community development.⁹

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Review Committee

The Bill provides for the establishment of the Regional Telecommunications Independent Review Committee ('RTIRC'). Members of the Committee must have a knowledge of, or experience in, matters affecting regional Australia and/or telecommunications. The Chair and the majority of members of the committee must not be officers of Telstra, a Telstra subsidiary or certain officers of the Commonwealth. Members are appointed by written instrument for a specified term. The written instrument is not a legislative instrument under the Legislative Instruments Act 2003¹⁰ and is therefore not required to be subject to parliamentary scrutiny.

The role of the RTIRC is to conduct reviews of the 'adequacy' of telecommunications services in regional Australia. The reviews must be conducted no less frequently than every five years. The RTIRC must report to the Minister who must table the report in Parliament within 15 days of receiving it. The Minister must, as soon as practical, prepare a statement setting out the Government's response to the report and table it within 6 months of receiving the report.

Observations on the Bill

The Bill closely follows the recommendations in Chapter 8 and 9 of the Estens Report. It does not, however, include a response to recommendation 9.5 above. That is, it does not deal with funding for telecommunications services for regional services. The Government has, however, accepted in principle this recommendation and the principle that 'non-commercial service improvements in regional Australia should be provided transparently by Government, and should aim to promote competition and minimise market distortions.'¹¹

The RTIRC is not given any express powers by the Bill.

There is almost no guidance given in the Bill about the way in which the 'adequacy of telecommunications services' is to be measured. All that is said in this regard is that

In determining the adequacy of those services, the RTIRC must have regard to whether people in regional, rural and remote parts of Australia have equitable access to telecommunications services that are (a) significant to people in those parts of Australia; and (b) currently available in one or more urban parts of Australia.¹²

Further, the RTIRC must have regard to any policies of the Government notified to the RTIRC by the Minister.¹³

The Estens Report conceived of 'adequacy' as meaning 'fit for purpose'.¹⁴ This, the Report says, means that telecommunications services;

- are provided in a timely way;

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- are of good quality and function well;
- are generally reliable; and
- are priced in a way that enables broad access and take-up by regional, rural and remote consumers.¹⁵

Further it addressed the issue of the assessment of *adequacy*. The Report noted that the complexity of the services being offered does not lend itself to easy measurement and that a flexible approach was preferable. While some indicia of adequacy are mentioned in the report at page 19, these have not been included in the Bill.

The approach taken in the Bill with regard to the assessment of *adequacy* can be contrasted with the more prescriptive approaches taken in the Consumer Protection Act in relation to, for instance, the Universal Service Obligation, the National Relay Service and the Customer Service Guarantee.

In recommendation 9.2 the Estens Committee noted that

‘Establishing a structure for future reviews of regional, rural and remote telecommunications services should:

- provide certainty for regional, rural and remote communities;
- ensure that reviews are independent from executive government;
- allow for flexible and appropriate policy responses to meet the range of needs in regional, rural and remote Australia; and
- promote competition and commercial service delivery as the most effective and sustainable service outcome.’¹⁶

It is not clear whether this is merely commentary on the earlier recommendation or a prescription for the manner in which the reviews are to operate. For instance, In any case, it is not immediately apparent that the Bill will lead to these outcomes. For instance, the objective of certainty (in point 1) would seem to sit in opposition to the object of flexibility (in point 3). Furthermore, the creation of a committee by legislation, albeit it with restrictions on membership, does not guarantee independence (point 2). One factor that militates against this is that committee members are appointed by the Minister without parliamentary scrutiny.

Position of significant interest groups/press commentary

The National Farmers Federation has indicated that the measures included in the Bill are inadequate in certain respects. First, it is concerned that the reviews must take place no less often than every five years. It would prefer the reviews to be more frequent and suggests that they be held, at the most, every three years. This, it is said, would reflect the rate at which telecommunications is changing. This is consistent with the Estens Report

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which suggests that three-yearly reviews would be appropriate.¹⁷ In fact, the Government indicated approval of this timing.¹⁸ Further, the NFF is concerned that the objectives of the reviews not clear.¹⁹

Main Provisions

Schedule 1—Amendments

Part 1—Amendments commencing on Royal Assent.

Telecommunications Act 1997

The *Telecommunications Act 1977* regulates entities such as carriers and service providers. A carrier's licence is subject to conditions.

Item 1 inserts a **new section 66** into the *Telecommunications Act 1977* to empower the Minister or the Australian Communications Authority to make decisions of an administrative character in connection with any carrier's licence conditions that *may* be imposed on Telstra to ensure that Telstra retains a local presence in regional, rural and remote parts of Australia. These administrative decisions could cover such matters as draft local presence plans.

Item 2 inserts a definition of the Regional Telecommunications Independent Review Committee (RTIRC) in the Act. The RTIRC will be established by a **new section 158R** (see **Item 6**). The RTIRC will conduct regular independent reviews of the adequacy of telecommunications services in regional, rural and remote parts of Australia.

Telecommunications (Consumer Protection and Service Standards) Act 1999

Item 2,3,4 and 5 insert new definitions relevant to the establishment of the Regional Telecommunications Review Committee.

Item 6 inserts a **new Part 9B—Independent reviews of regional telecommunications** into the Act (as **new sections 158P to 158ZD**). A proposed Regional Telecommunications Independent Review Committee (RTIRC) will review the adequacy of telecommunications services in regional, rural and remote parts of Australia. The reports of the RTIRC will be tabled in Parliament. The RTIRC will comprise a Chair and at least two other members, appointed by the Minister on a part-time membership basis. The RTIRC may be assisted in the performance of its functions by the Australian Communications Authority (ACA), the Australian Competition and Consumer Commission and the portfolio Department.

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Telstra Corporation Act 1991

Item 7 makes minor consequential amendments to this Act.

Part 2—Amendments consequential on the establishment of the Australian Communications and Media Authority.

Telecommunications Act 1997

Items 8 makes minor consequential amendments to the *Telecommunications Act 1997* to change the name of the regulator from ACA to ACMA.

Telecommunications (Consumer Protection and Service Standards) Act 1999

Item 9 to 11 make minor consequential amendments to the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to change the name of the regulator from ACA to ACMA.

Concluding Comments

The recommendations in chapter 8 and 9 the Estens Report have generally been followed, but, it would seem, without any further policy refinement.

Parliament may want to consider what safeguards could be included to ensure the independence of the committee including whether appointment to the Committee should be scrutinised by Parliament.

Parliament might also want to consider whether;

- reviews should be conducted more frequently
- the principles for the imposition of any condition on Telstra to maintain a local presence should be set out or whether such conditions should themselves be set out in the legislation
- there needs to be greater transparency in the process of the reviews. For instance, by the inclusion of a requirement that public submissions be available on a website, that transcripts of any hearings be made and made available, and
- the legislation should be more prescriptive about the matters to be addressed in determining the adequacy of services.

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Endnotes

- 1 Explanatory Memorandum, Telecommunications Legislation Amendment (Regular Reviews and other Measures) Bill 2005.
- 2 Regional Telecommunications Inquiry, *Connecting Regional Australia* (Estens D., Chairman), Department of Communications, Information Technology and the Arts, Canberra, 2002.
<http://www.telinquiry.gov.au/rti-report.html>
- 3 Telecommunications Services Inquiry, *Connecting Australia* (Besley M.A., Chairman) Department of Communications, Information Technology and the Arts, Canberra, 2000:
http://www.telinquiry.gov.au/final_report.html
- 4 Estens, op cit., page ix, (executive summary).
- 5 ibid., page 4 (Terms of Reference).
- 6 ibid., pp xxvi–xxviii (Executive Summary).
- 7 <http://scaleplus.law.gov.au/html/instruments/0/30/0/2003101601.htm>.
- 8 Schedule 1, Part 1, Item 1, (new s 66).
- 9 note 1, pp 5–6.
- 10 Item 1(9), Part 1, Schedule 1, Legislative Instruments Regulations 2004.
- 11 Government’s response to the recommendations of the Regional Telecommunications Services Inquiry,
http://www.dcita.gov.au/tel/regional_rural_and_remote_communications/telecommunication_inquiry_-_government_response/the_governments_response_to_the_recommendations_of_the_regional_telecommunications_inquiry
- 12 Subsection 158(2).
- 13 Subsection 158P(5).
- 14 Estens, op. cit., p 19.
- 15 ibid.
- 16 Note 6
- 17 Estens, op. cit., p 233.
- 18 Senator Nick Minchin, Senate Debates, 30 September 2003, page 17270.
<http://www.aph.gov.au/hansard/senate/dailys/ds301003.pdf>,
- 19 <http://www.abc.net.au/pm/content/2005/s1320724.htm>.

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