



Submission to the  
Senate Environment, Communications, Information Technology and the Arts  
Legislation Committee

Inquiry into the provisions of the  
Telecommunications Legislation Amendment  
(Regular Reviews and Other Measures) Bill 2005

by

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## 1. Introduction

AAPT Ltd is pleased to have the opportunity to make a submission to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee's consideration of the provisions of the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005 (the "**Bill**").

This Bill includes two of the measures that were included in the Telstra (Transition to Full Private Ownership) Bill 2003 that was considered at length by the Committee and subsequently rejected by the Senate. It is important to note, however, that the provisions as now proposed do not make any assumption about the future ownership of Telstra, and can be considered on their merits.

AAPT does not wish to make any detailed comment on the provision for Telstra maintaining a presence across Australia. The provision in the legislation itself really only creates the possibility that the Minister could make the licence condition, but does not mandate it. Presumably in the legislative sequence the Minister would make that condition on Telstra irrespective of the future ownership and the detailed provision would be in place prior to the consideration of any future ownership change.

AAPT does wish to comment on the proposals for independent reviews of regional telecommunications. In our opinion the reviews should be more frequent and have a wider brief than currently considered in the legislation. In addition we have some further observations on the structure of the review process.

This submission has two further parts. The first discusses briefly the dimensions of public policy in relation to communications services for the last century. The second details AAPT's suggestions for the progress of future reviews.

## 2. Public policy in communications

Section 51(v) of the Constitution provides that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to postal, telegraphic, telephonic, and other like services." The decision to federate the Post Offices was neither universally welcomed, nor it seems, widely debated. As Ann Moyal has noted in her history of Australian telecommunications;<sup>1</sup>

*Colonial Postmasters-General, accustomed to power and position in their own bailiwicks, entered the Commonwealth with reluctance. 'It is with much regret', R. A. Sholl, Western Australia's Postmaster-General conveyed his unhappiness in his last report to his Colonial Secretary, 'that I am compelled to sever my official relations with the State Government'. The mood was no more cheerful in South Australia where as one new Federal MP testified 'almost to a man and woman, South Australia opposed the proposal to federate the postal service'. In New South Wales, the Colonial Postmaster-General Joseph Cook (who would lead the nation as Prime*

<sup>1</sup> Moyal, Ann. 1984. *Clear across Australia: A history of telecommunications*. Thomas Nelson. Melbourne. Pp 88-89

*Minister in 1913), declared on the eve of Federation that, though it had always been assumed that the post office would be taken over at the Commonwealth's formation, he himself 'had not heard a single effective argument in favour of doing so'.*

The Post and Telegraph Bill was introduced in the Senate on 5 June 1901. The Commonwealth had inherited a series of State run monopolies from the Colonies, a model that was reinforced by British and European (though not American) practice. To quote Moyal, "It was a concept of a steadily expanding and upgrading service that would in general, though not invariably, underlie telecommunications practice and development in Australia."<sup>2</sup>

The debate on that Bill commenced a debate that continues to this day, of whether communications services should be regarded as a social policy or whether they should be operated as business enterprises. To again quote from Moyal;<sup>3</sup>

*On the larger question of PMG management and responsibility, some ideological differences did arise. Should the department accept a policy of 'running at a loss' to assist the development of the country, offering services in distant and uneconomic places and making up the drain on departmental revenue through taxation? Or should the department run its business as a 'commercial concern', balancing revenue and expenditure, and carrying out its programme through loans on which interest must be paid? The Postmaster-General (Senator James Drake) favoured a policy of management as far as possible 'on business lines'. He found timely support from senatorial colleagues in Tasmania, Western Australia and Queensland. But Victorian Senator Best made the case for a 'more service-oriented department' and claimed that there could be too great an emphasis on the commercial aspect of the measure. 'We have here', he put the proposition 'a vast undeveloped continent...and a duty to render to those who do not crowd themselves into cities. We ought to offer them every possible facility with a view to making their lives as agreeable as possible.' It was, Best articulated, the concept of service to the bush, a 'general principle we should all bear in mind.'*

It should be noted that these debates were about a conglomerate that provided post, telegraph and telephone service, and that in 1901 there were a mere 24,577 telephone connections. However, the telegraph service was a busy operation with 9,530,347 telegrams dealt with. The postal operations however dwarfed these representing 1.567 million pounds of the PMG's revenue, of a total of 2.388 million.<sup>4</sup>

However, the core conflict continued, was the PMG's role one of equity in delivering a fair service for one country or was the PMG a business enterprise. Dr J. Forbes in the House of Representatives in 1959 observed that since its inception the Postmaster-General's Department had always recognised its special obligation to provide services to remote areas. However, he continued, "despite the emphasis inherent in these priorities for rural dwellers, rural electorates know that there is still much to be done before the situation can be described

<sup>2</sup> Moyal, Ann. P. 90.

<sup>3</sup> Moyal, Ann. Pp. 90-91.

<sup>4</sup> Commonwealth Bureau of Census and Statistics. *Official Year Book of the Commonwealth of Australia*. No 2. 1909. Melbourne.

as satisfactory. There is still the 'submerged tenth' of the telephone users who operate within very restricted hours. There are still too many overloaded party lines. There are still too few trunk lines, and this causes long delays in making long-distance calls." Forbes argued that the PMG should raise its charges to a level where "in the overall operations of the undertaking, revenue will cover all costs" but that this cross-subsidising a utility wouldn't result in profit "in any conventional sense of the word."<sup>5</sup>

The view that the PMG had an obligation to provide services to remote areas was not necessarily as persistent nor enduring as Forbes claimed. In 1968 when the government was considering changes to the provision of services in rural Australia, the cabinet submission by then Postmaster-General Alan Hume said in relation to remote services;<sup>6</sup>

*In considering any liberalisation of the current conditions, it is necessary to exclude the vast remote areas served by the radio communications systems of the Royal Flying Doctor Service and other Outpost radio networks. The capital cost of serving these sparsely settled areas with conventional telephone facilities would run into more than \$50m.... Strong pressures will continue to be exerted by those excluded but it would exceed all reasonable bounds for the Post Office to bear the huge cost of provision and maintenance of normal telephone services in such areas, especially as there would be the prospect of only very small financial return from most of the services. No other country in the world with anything like comparable areas accepts such a responsibility.*

The debate continued all the way to the review that ultimately led to the separation of post and telecommunications, the Commission of Inquiry into the Australian Post Office chaired by Sir James Vernon that reported in April 1974.

The report in Chapter 3 details the two views on the Role of the Australian Post Office, and the history behind them. The report described it as<sup>7</sup>;

*Two differing views have been advanced on the nature of the role of the A.P.O. in the community. One is that the A.P.O. is essentially the supplier of a social service to the Australian public and, as such, should not be oriented to making a profit on its services; on the contrary it should provide service wherever there is a demonstrated community need and any shortfall between revenue and costs should be met by contributions from public moneys.*

*The second view is that the A.P.O. is a business enterprise and as such should provide services based on commercial criteria and with the minimum overall objective of matching revenue with expenditure.*

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<sup>5</sup> Moyal, Anne. 1984. Pp. 202-203.

<sup>6</sup> NAA: A5868, 360. Cabinet Submission, 11 November, 1968. Provision of Lines for Country Telephone Subscribers. P.3.

<sup>7</sup> Australia. Commission of Inquiry into the Australian Post Office. *Report*. Canberra. 1974. (referred to as the Vernon Report). Vol 1. P. 53.

The Commission went on to detail the history of these contesting views through 5 major public reviews in the preceding 70 years. In the end the Commission decided that statements from earlier inquiries did not give an adequate description of the service philosophy of the A.P.O. The Commission saw the A.P.O. as an organisation which;<sup>8</sup>

*offers a comprehensive range of postal and telecommunications services at standards which meet, within reasonable and responsible limits, the requirements or needs of the whole community;*

*offers those services on the basis of a tariff structure which:-*

- i. provides for the reasonable costs of those services to be recouped from revenue received from customers;*
- ii. ensures that the community contributes to the revenues of the A.P.O. in proportion to the use each member makes of those services;*
- iii. provides a reasonable return to public revenues for the use of community funds employed in the enterprise.*

*is administered in accordance with accepted principles of business management so that the efficiency and vitality of the organisation is consistently under review.*

This statement resulted in the now oft quoted duties of Telecom Australia established in the *Telecommunications Act 1975 (s6)* of;

*The Commission shall perform its functions in such a manner as will best meet the social, industrial and commercial needs of the Australian people for telecommunications services and shall, so far as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia for all people who reasonably require those services.*

The Commission took the steps of recommending both the separation of the postal and telecommunications authorities, and their operation through statutory authorities rather than as a Department. The Commission does not at any time seem to have addressed the possibility of either business being conducted as other than a monopoly state-owned enterprise. Interestingly, the report included a chapter on urban and regional development, though its focus was on then Government policy of regional growth centres. It observed that these centres already had the same automatic services as provided in the cities. It noted that some submissions had called for the elimination of distance charge bands on trunk calls and rejected it on the basis of cost.

The Vernon recommendations were almost completely accepted. Most fundamentally was a recommendation that Telecom Australia (and Australia Post) have a financial objective of achieving self-financing of at least 50 per cent of their new capital investment. There was some consideration by a Cabinet Working Group that this objective should instead have been expressed as achieving a specified return on existing investment.<sup>9</sup>

<sup>8</sup> Vernon Report. Pp 58-59.

<sup>9</sup> NAA; A5915, 1490. Report of the Interdepartmental Working Group on Recommendations of the Australian Post Office Commission of Inquiry.

These matters may have been allowed to end, with a clear statement of policy reconciling the apparent “two views” that had bedevilled policy makers for three-quarters of a century. But the moment was short lived. The growing importance of telecommunications to commerce, primarily the operation of telexes and the advent of data communications, was about to highlight a whole new area of deficiency – this time primarily about the services in the cities.

Again a committee of inquiry reviewed telecommunications services, this time chaired by J. A. Davidson which reported in October 1982. Again an attempt was made to define the ‘national interest’ in regard to telecommunications as follows<sup>10</sup>;

- *to provide every householder with the opportunity to obtain a telephone at a fair cost;*
- *to maintain a level, range and quality of telecommunications services which will permit Australian industry and commerce to remain internationally competitive;*
- *to achieve growth in telecommunications services which will provide employment in the telecommunications industries and the many industries using those services;*
- *to ensure that the benefits of technological developments are made available as widely as possible;*
- *to provide a sustainable industry base for local manufacture, assembly, product development and software adaptation and development;*
- *to ensure maximum reliability of telecommunications services.*

While the heavy business flavour is in part explained by the terms of reference which specifically required the committee to examine and report on the extent to which the private sector could be more widely involved, the inquiry was significant because for the first time the concept of competition had been included and recommended in a Government report.

In considering “country services” the committee concluded that the process of automation of the network had proceeded satisfactorily. However, the committee was highly focussed on the question of achieving “cost based” pricing and submissions to the committee raised a concern that the introduction of competition would remove the capability to “cross subsidise” services.

The cross subsidies identified included call prices subsidising line rentals, trunk calls subsidising local calls, metropolitan services subsidising country services. While the committee claimed that the expressed aim of “uniform pricing is to subsidise customers with a genuine need for subsidy” only one of these cross subsidies is indeed a matter of “uniform pricing.”

However, this time the report was not acted on before a change of Government. However, many of the core concepts carried through into the reforms of 1988, 1991 and then finally

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<sup>10</sup> Australia. Committee of Inquiry into Telecommunications Services in Australia. *Report*. AGPS. Canberra. 1982. Pp 6-7.

1997. These reforms were all carried through without the formal inquiry process that had typified earlier policy in this area.

However, since 1997 there have been four major “independent” reviews, two triggered by legislative requirements. These have been;

- the Telecommunications Service Inquiry (“Besley”) that reported in September 2000
- the Productivity Commission review of Telecommunications Competition Regulation, that reported in September 2001 (required by the telecommunications amendments to the Trade Practices Act)
- the Regional Telecommunications Inquiry (“Estens”) that reported in November 2002
- the USO and CSG Review (conducted by the Department) that reported in June 2004 (required by provisions of the Telecommunications Consumer Protection and Service Standards Act)

At the same time there have been a number of other inquiries including that of the Broadband Advisory Group and the Senate Environment, Communications Information Technology and the Arts two inquiries into the Australian Telecommunications Network and Competition in Broadband Services.<sup>11</sup>

The key distinction is that from the major reviews of the 1970s and 1980s we are now confronted by a set of separate reviews, each of which has been focussed on a sub-component of the sets of policy issues involved. This is disappointing given the history of the policy area, and the interconnection that exists between various aspects.

The reviews proposed in the Bill were a recommendation of the Estens inquiry. The Productivity Commission inquiry into Telecommunications Competition Regulation concluded that the provisions of Part XIB of the Trade Practices Act should be subject to review in “three to five years” (recommendations 5.9 and 6.1). However, the Government response to that was simply to announce that a review would occur in 2007, but did not include that in legislation even though the Productivity Commission review itself had been triggered by a legislative provision, and that there were two packages of amendments introduced in response to the review.

The history of reviews of telecommunications services reflects that it is not just the adequacy of services in regional Australia that can be a relevant consideration. More recently, the reviews conducted by the Senate ECITA Committee on Broadband Services and the Australian Telecommunications network identified that there are significant limitations to

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<sup>11</sup> These reports are thankfully all currently available online. For convenience both the Estens and Besley reports are available from the Regional inquiry site at <http://www.telinquiry.gov.au/>. The Productivity Commission report is available at <http://www.pc.gov.au/inquiry/telecommunications/index.html>. The review of the USO and CSG is available at

[http://www.dcita.gov.au/tel/fixed\\_telephone\\_services/industry\\_issues/the\\_universal\\_service\\_obligation\\_uso/universal\\_service\\_obligation\\_uso\\_and\\_customer\\_service\\_guarantee\\_review\\_csg/](http://www.dcita.gov.au/tel/fixed_telephone_services/industry_issues/the_universal_service_obligation_uso/universal_service_obligation_uso_and_customer_service_guarantee_review_csg/). The Broadband report is available at [http://www.dcita.gov.au/ie/publications/2003/01/bag\\_report](http://www.dcita.gov.au/ie/publications/2003/01/bag_report). The two Senate reports can be accessed at [http://www.aph.gov.au/Senate/committee/ecita\\_ctte/completed\\_inquiries/2002-04.htm](http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2002-04.htm).

network performance in outer suburban areas or those parts of cities undergoing “urban renewal.”

From the above brief review it is clear that telecommunications policy remains an area where achieving clarity about the public policy objectives has been difficult for over a century. It is also clear that the major reforms over the last decade and the continuing processes of technological and social change continue to challenge the adequacy of policy and institutional response. It is also clear that the various aspects of telecommunications policy interact with each other. That competition policy and adequacy of services are part of the same consideration, not different considerations.

It would appear that institutionalising regular reviews of the adequacy of telecommunications services is indeed a valuable action. However, it would also appear that the nature and scope of these reviews should be inclusive of all the relevant policy issues and conducted in a way that is competent to deal with the issues. That then would inform a view of the objectives, frequency, staffing and processes of any review.

### **3. Future reviews**

#### *Scope*

The description of the list of recent reviews does not address the comments within those reviews or the process whereby sequential reviews result in narrower focuses. Thus, Recommendations 1 and 2 of the Besley inquiry related to matters they requested the Productivity Commission to consider in its review (which weren't, though one subsequently appeared in the ACCC's Emerging Market Structures report). Similarly the Estens reduced focus on only regional, rural and remote service issues flowed from the conclusion of Besley that this was of particular concern, though the subsequent Senate ECITA Committee identified issues in metropolitan Australia.

Consequently, it is unwise to be particularly restrictive in the terms of reference given to a review. If the majority of the issues relate to only a narrow scope, then those issues will dominate the review process and achieve the same objective. Further, the reviews now being proposed extend into the indefinite future and it is highly unlikely that the sets of issues will only be just about city/country equity, just as was discovered in the gap between 1974 and 1982.

The existing objects clause of the Telecommunications Act 1997 is a lot broader than the narrow economic reading often ascribed to it. The objects (section 3) are reproduced below.<sup>12</sup>

*(1) The main object of this Act, when read together with Parts XIB and XIC of the Trade Practices Act 1974, is to provide a regulatory framework that promotes:*

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<sup>12</sup> As is common with any legislation that includes specific dates for reviews, the objects of the Act now look somewhat tired and irrelevant, given they refer to ISDN service availability. A more thorough legislative review would consider revising this objects clause. The Bill only amends the Telecommunications (Consumer Protection and Service Standards) Act 1999, which adopts this objects section by reference in its s3 (as the content of that Act on first adoption were sections of the Telecommunications Act).

*(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and*

*(b) the efficiency and international competitiveness of the Australian telecommunications industry.*

*(2) The other objects of this Act, when read together with Parts XIB and XIC of the Trade Practices Act 1974, are as follows:*

*(a) to ensure that standard telephone services, payphones and other carriage services of social importance are:*

*(i) reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and*

*(ii) are supplied as efficiently and economically as practicable; and*

*(iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;*

*(b) to provide a framework under which a carriage service that provides digital data capability comparable to an ISDN channel is to become available to all people in Australia:*

*(i) by 1 January 2000; or*

*(ii) by another date having regard to the findings of the review into the timing of the availability of that service;*

*(c) to promote the supply of diverse and innovative carriage services and content services;*

*(d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;*

*(e) to promote the effective participation by all sectors of the Australian telecommunications industry in markets (whether in Australia or elsewhere);*

*(f) to promote:*

*(i) the development of the technical capabilities and skills of the Australian telecommunications industry; and*

*(ii) the development of the value-adding and export-oriented activities of the Australian telecommunications industry; and*

*(iii) research and development that contributes to the growth of the Australian telecommunications industry;*

*(g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:*

*(i) the provision of telecommunications networks and facilities; and*

*(ii) the supply of carriage services;*

*(h) to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry;*

*(i) to promote the placement of lines underground, taking into account economic and technical issues, where placing such lines underground is supported by the affected community;*

*(j) to promote responsible practices in relation to the sending of commercial electronic messages.*

This objects clause incorporates almost all the elements of the 1975 original, including a very specific equity provision of "ensure that standard telephone services, payphones and other carriage services of social importance are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business".

It would appear therefore that the scope of future inquiries might be best focussed on assessing whether the regulatory arrangements continue to further the achievement of the objects of the Act, rather than only one specific component of them. The terms of reference should therefore be something along the lines of;

The Independent Telecommunications Review Committee must conduct reviews of the adequacy of telecommunications services in Australia, and the extent to which those services meet the social, industrial and commercial needs of the Australian people for telecommunications services, and generally the extent to which the objects of the Telecommunications Act 1997 are being achieved.

In determining the adequacy of those services the Committee must have regard to whether the services are reasonably available throughout Australia for all people who reasonably require those services and in particular whether people in regional, rural and remote parts of Australia have equitable access to services.

In considering the achievement of the objectives of the Telecommunications Act 1997 the Committee must have regard to the extent to which the long term interests of end-users of telecommunications services (as defined in the Trade Practices Act 1974) are promoted.

Such an amended review task would necessitate consequential amendments to the name of the committee.

### *Frequency*

The Bill requires reviews to be completed every five years, while the Senate ECITA Committee when it reviewed the proposal recommended the frequency be every three years. One of the features of some recent inquiries has been contracted timeframes, a lack of time for the development of submissions, and the lack of process for what the courts would call cross submissions. Effective reviews necessarily take some time to be completed.

The Bill also provides that this timing runs from date of completion to date of completion. It is extremely hard to time a reviews progress before the event, and in any event it can facilitate frustrating a review if the review is constrained to a short completion time. Consequently, it is a bad idea to time reviews from completion date to completion date. It is better to time the review from completion of one to commencement of the next.

Finally, as we have seen recently five years is a very long time in telecommunications, while three is a very adequate time to enable recommendations to be put in place and effects showing. Consequently, the timing of reviews should be three years from completion of one to commencement of the next.

### *Independence and resourcing*

There is always a great store put on "independent" advice. However, just as with independent Directors, the risk can be getting advice from someone who is so sufficiently removed that they have insufficient knowledge or experience to contribute anything useful.

Secondly, independence in thought is not necessarily related to independence in remuneration. An old style tenured public servant is more likely to give independent advice

than a short-term appointee who may well look to the appointing body (or its associates) for their next appointment.

Consequently it is desirable to review the definition of "independent" used in 158T(4). It is hard to accept at the one time that the Australian Communication and Media Authority is an independent regulator, but then that its members would be precluded as not independent from this committee. Similarly, it is not clear why employees of Telstra but not employees of other licensed carriers should be excluded from membership of the Committee.

Further, there have been proposals made that the ACCC should have a Commissioner whose sole task is the administration of telecommunications legislation. Were that expertise to then be available it would be a pity to not have that person available as a part-time member of the Committee.

In addition the Chair of the Review Committee, whose job while part-time appears to be a near permanent appointment, would be a very logical part-time member of the Australian Communications Authority.

There are some further particular drafting issues here. The term "RTIRC member" is at some times used to include all members and at some times used to refer to only the members other than the Chair. It would assist if this could be clarified. Additionally, the proposed s158T 3(b) would result in a committee made up entirely of independent members if it numbered only three which is probably not the intent and the requirement should be that the whole committee including the Chair comprise a majority of independent members.

Finally it is logical for the Committee to draw on all the relevant resources of the Government. In that regard it would appear that the Productivity Commission should be listed in the list of parties in the proposed 158ZD that can provide assistance to the Committee.

#### **4. Conclusion**

The proposal to institutionalise regular reviews of telecommunications services independent of the decision about Telstra ownership is to be applauded. However, the scope should not be limited to only a part of Australian society, but should reflect the ongoing adequacy of telecommunications services for all Australians.

The frequency of reports, and the appropriate staffing and resources of the committee need to be considered carefully against the review terms of reference and the extensive resources already committed to the process of telecommunications regulation.