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Attn. Dr Jacqueline Dewar,
Inquiry Secretary,
Environment, Communications, Information Technology and the Arts,
Australian Senate,
Parliament House, Canberra ACT 2600

Dear Dr Dewar,

Thank you for the opportunity to make a submission to the Inquiry into the Performance of the Australian Telecommunications regulatory regime.

This submission has been prepared by CEG who are Telecommunications consultants and who have consulted a group of West Australian persons who have a knowledge of the Telecommunications industry in Western Australia.

The case studies cited in the submission are all drawn from experiences in Western Australia.

We request the opportunity to make a verbal presentation to the committee as we believe we have a number of issues where the current legislation is inhibiting the development and provision of Telecommunication infrastructure, as well as reducing competition.

In the past we have made submissions via teleconference, but the quality of the communications has been poor and has inhibited discussion due to the need for repeating statements, or having to clarify misunderstandings, due to poor voice quality.

In view of the importance of this inquiry we request the committee to consider providing assistance with an airfare and one night's accommodation to attend the hearings.

Yours sincerely,

Dr W.B. Green
Director.

1. Current Telecommunications Regime

a) Part X1B – Competition

The current Telecommunication legislative and regulatory framework is adequate, however there are a number of gaps or omissions in Part X1B which should be remedied:

i) A key failure in the current regulatory regime is the assumption that it is possible to construct a sound legal case based on econometric modelling to prove abuse of market power. This assumption is flawed because all the key data to prepare a legal argument is held by the carrier, and it is impossible to remove the effects of other transactions to enable a clear and unambiguous case to be presented.
ii) There is no clear methodology or process for proving abuse of market power. In many cases the ACCC have asked for evidence to support a claim, however there is no outline or description as to what evidence is acceptable or what evidence will assist the ACCC in preparing a sound legal case. This makes it both expensive and difficult for all concerned in collecting and analysing evidence.
iii) In many cases the persons who can assist the ACCC are dependent on Telstra for revenue and connections to customers, so there is a reluctance to antagonise Telstra by lodging a complaint to the ACCC.

Experience in a few cases of alleged abuse of market power have led us to agree with the statement by the ACCC "that it is impossible to regulate Telstra".

b) Part X1C – Access

The overall structure of Part X1C is good however there are a number of weaknesses and omissions which undermine the intent of this section of the Act.

The flaws in the operation of this regime are the inadequacies of econometric modelling and lack of adequate data to construct a sound legal argument to justify a price determination or conditions of access.

There are some services which are critical for competition or delivery of Telecommunications services that are not declared, and the ACCC have stated clearly that under the current regime they cannot be declared (Reference Letter from C. Pattas to Dr W Green re: Declaration of 2Mbit/s links).

In many cases it is impossible to get access to data that will be acceptable to a court of law, and that can be used to construct a sound economic or legal argument to declare a service.

There are five generic methods that carriers can use to increase profits without changing prices. The ACCC does not have the regulatory support to deal with many of the cases in these instances.

c) Issues Inhibiting Growth

The main structural issue inhibiting the effectiveness of the current regulatory regime is the integration of the wholesale and retail segments of Telstra. There are too many accounting or financial uncertainties that prohibit the effective regulation of the incumbent and promotion of competition.

There is considerable argument against structural separation however the experience in the UK with OFCOM/BT should be considered seriously.

d) Consumer Protection Safeguards

The current regime provides some protection for residential and very small businesses however the value of compensation is far too small and should be equivalent to the total spend on the service averaged over 3 months. This definition should allow for the case where multiple carriers are pre-selected for different types of calls e.g. mobile, STD, local etc.

The consumer protection safeguards for business need to consider three sizes of business,

i) Those businesses covered by the current consumer protection safeguards,
ii) Those organisations with no buying power, and
iii) The large corporations with sufficient buying power to who can gain discounts and better service.

There is a large group of businesses and organisations that have no protection because their annual spend is below the threshold for exerting any buying power or for getting any compensation for poor service.

In theory they have the option of choosing an alternative carrier however Telstra has a monopoly on the copper and fibre "last mile" infrastructure and hence indirectly controls the prices and service quality, regardless of which carrier is selected.

The recent decision to exclude businesses from the resident basket of services is acceptable, however there is a case for a SME business basket of services where there is no buying power or market leverage.

Those organisations with sufficient buying power are able to obtain adequate protection and prices.

All consumers are severely disadvantaged by the ability of a carrier to withdraw or amend conditions for minimum term or fixed term contracts. Part 23 of the Telecommunication 1997 Act needs to be amended to prevent carriers deleting services or changing prices during a fixed term contract.

e) Australian Telecommunication Regulators

The issues outlined under 1 b) describe some of the problems facing Australian regulators, particularly the ACCC.

In many cases the ACCC have to prove that a certain behaviour is unacceptable, and that the alleged offender caused or undertook the unacceptable behaviour e.g. offering retail prices below wholesale prices for some services. There are a number of cases where unacceptable behaviour should be specified, so that the ACCC only has to prove the unacceptable behaviour.

The powers of the ACCC should be strengthened to include the authority to force divestiture or separation in the event of abuse of market power.

The ACA should be able to mandate services where they have been proven to be technically feasible, such as roaming across mobile networks, especially where infrastructure has been paid under Federal or State grants.

The ACCC has inadequate financial resources to defend a prolonged court case, the ACCC should have the resources to effectively construct a legal argument and obtain the required evidence to support by interacting with carriers, and if necessary providing financial support in preparing a case.

f) Potential Privatisation of Telstra

The market power of Telstra has been clearly demonstrated over the past few years, even with the Federal Government having 50.1% ownership. With full privatisation the commercial pressures to maximise profits and minimise investment in new infrastructure will be enormous. The Basic Telephony standards used in the USO are clearly inadequate for a modern country such as Australia and there would be limited commercial pressure to provide adequate services.

The current regulatory regime has to be upgraded to meet the increase in commercial imperatives, that will occur after the T3 sale of Telstra.

g) Universal Service Obligation

The universal service obligation is a good concept however the current implementation has a number of flaws:

i) Determination of the Value of the USO

The value of the USO should be capped at no more than $300M to prevent or limit the $1.8Billion USO claims made by Telstra.
If the USO were to be increased to $600M this would harm other carriers and reduce the available investment funds for competitors.

ii) Some carriers are being inhibited from developing infrastructure in rural and remote areas because of the USO. Carriers who invest in rural areas should be allowed to claim a rebate on the USO based on their investment, and should be allowed to carry over any credits for a five year period.

This will encourage investment in rural areas and improve the profitability of such services.

h) Promotion of Infrastructure Investment

The current regulatory has a major gap in regards to the sharing of Telecommunication Infrastructure.
In simple terms 80% of the cost of provision of Telecommunication services is attributable to civil, structural and electrical entities such as ducts, masts, buildings, access roads, fencing, power supplies, cooling equipment etc (non-telecommunication services) and 20% of the attributable costs are for telecommunication equipment (switching equipment, cable, antennae, etc).

The life cycle of the Telecommunication equipment is approximately one third (15 years) of the "non telecommunication infrastructure" or civil infrastructure which has a life expectancy of 50 years.

Sharing common telecommunication infrastructure across a number of technologies and carriers can significantly reduce the cost of providing telecommunication services.

There is a strong case for the introduction of regulations to facilitate the sharing of Common User Telecommunication Infrastructure to reduce costs and increase competition.

The current regulatory has no provision for the sharing of infrastructure and the current ACA guidelines for sharing radio masts are easily nullified by legal and contractual debates.

In many cases the "first provider or user" can block and delay other carriers from access to the infrastructure, even though totally different (or non-competing) services are being introduced.

A new section of the Act is required to cover the concept of Common User Telecommunication Infrastructure (CUTI) to cover the following:

Minimum Infrastructure requirements (To prevent "single use or single purpose").

Access Rights to the infrastructure (The Engineers Australia can provide the required guidelines).

Shire or Community Rights
(Guidelines to Shires and Communities on procedures for providing access to infrastructure and prevent the first user from blocking access by others at a later date. Again Engineers Australia can provide advice).

i) Innovative Technologies

The issues raised in h) will substantially reduce the barriers to the introduction of emerging and innovative technologies.

j) Scale and Scope of Current Regulatory Regime

As outlined above there are a number of cases where the current regulatory regime needs to be expanded in scope, without the need to expand the scale (i.e. new or more agencies).

k) Other Changes

An important new feature of the legislation should be the introduction of regulatory guidelines for the sharing of Common User Telecommunications Infrastructure.

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A supplementary submission will be made to cover this section.