

## LEGISLATIVE NOTE

### CUSTOMER SERVICE: GUARANTEED?

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#### I. INTRODUCTION

This article is about laws and markets for communications services. It is also about promises, politicians and politics.

Through the 1980s and early 1990s, many of the fundamental points of difference in the economic policies of Australia's major political parties disappeared. In particular, institutions like QANTAS, the Commonwealth Bank and the Federal Airports Corporation, were privatised by a government of the Labor Party, whose economic and social aspirations had until then been founded on public ownership of enterprises in key sectors of the economy.

By the 1996 federal election, one of the few major enterprises left in wholly government hands was the biggest of them all – Telstra, the successor to Telecom Australia, and the Post-Master General's Department. For a time, even it seemed vulnerable under the Labor Government. Prime Minister Keating had hinted that the ownership of Telstra might not matter 'of itself', but these musings did not find their way into the party's policy platform. Labor went to the 1996 election promising to keep Telstra fully in public hands, while the Liberal/National Coalition promised privatisation.

Polls consistently demonstrated majority public opposition to the Coalition's plans to sell Telstra and there were several elements incorporated into its policy to soften the impact of the sale and to help convince voters and senators to support the necessary legislation if the Coalition won office: only one third would be sold; there would be tight limits on foreign ownership; the company would remain headquartered in Australia and the chairperson of its board and a majority of its

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directors would be Australian citizens. Further, the Coalition promised to introduce a 'Customer Service Guarantee'.<sup>1</sup>

## II. PROMISES

Although conceived as part of the Telstra privatisation package, the 'Customer Service Guarantee' was proposed to apply to all telephone companies. It was intended to ensure "that customer service levels are not only maintained but enhanced"<sup>2</sup> as a more competitive telecommunications market and Telstra's private shareholders imposed the anticipated more stringent financial disciplines which might otherwise see Telstra's uneconomic services reduced.

After winning the March 1996 election, legislation to sell the first third of Telstra<sup>3</sup> was introduced into the Parliament in May and, after an inquiry by a Senate Committee,<sup>4</sup> passed by the narrowest of majorities late in 1996. It inserted new provisions into the *Telecommunications Act 1991 (Cth)*,<sup>5</sup> which was itself in the process of a complete overhaul, to introduce a 'Customer Service Guarantee'.

The basic idea of the Scheme was to establish minimum standards for certain areas of performance by communications service providers and to impose penalties where service providers failed to meet them. These penalties would be paid to customers without procedural complexity. Service to customers at the minimum standard would therefore be 'guaranteed'. This Customer Service Guarantee would supplement other remedies which may be available to customers, such as actions under the general law of contract or fair trading legislation.

## III. THE INITIAL SCHEME

Although crucial to the Government's rhetoric about safeguards to protect residential and small business customers from declines in service quality under privatisation, the Customer Service Guarantee Scheme set out in the legislation, and subsequently developed by the Australian Communications Authority (ACA),<sup>6</sup> was no consumer protection tiger.<sup>7</sup>

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1 *Privatisation, Liberal and National Parties' Policy for the 1996 Federal Election*, printed and authorised by A Robb, Melbourne, 1996, pp 22-3; *Better Communications, Liberal and National Parties' Policy for the 1996 Federal Election*, printed and authorised by A Robb, Melbourne, 1996, pp 27-8.

2 *Privatisation*, note 1 *supra*, p 20.

3 *Telstra (Dilution of Public Ownership) Bill 1996 (Cth)*.

4 Senate Environment, Recreation, Communications and the Arts References Committee, *Telstra, To Sell or not to Sell?*, Consideration of the *Telstra (Dilution of Public Ownership) Bill 1996*, Senate Publications Unit, Canberra, April 1996.

5 Section 87P.

6 The new telecommunications and radiocommunications regulator after 1 July 1997, formed through the amalgamation of AUSTEL and the Spectrum Management Agency.

The key features of the Scheme, which commenced operation on 1 January 1998, were the industry players, customers, types of services and types of service faults it covered, the performance standards set, the sanctions which could be imposed, the process by which they could be imposed and the effect of the Scheme on existing forms of redress.

The Scheme covered the provision of 'standard telephone services' and enhanced call-handling features, such as call-waiting, call-forwarding and call-barring by 'carriage service providers' (broadly, anyone providing telecommunications services). The matters for which performance standards were set were timeframes for connecting services and repairing faults and punctuality in the keeping of appointments:

- maximum connection times: these ranged from three working days, where there was already an in-place connection, to 27 months in the most remote areas where there was no in-place connection and the location was not adjacent to existing infrastructure;<sup>8</sup>
- maximum fault rectification times: these ranged broadly from the end of the next working day for metropolitan customers, two days for customers in regional centres to three days for remote customers. In practice, this meant, for example, a fault in a metropolitan centre notified after the close of business on Monday must be fixed by midnight on Wednesday; and
- keeping of appointments: the service provider was required to arrive within 15 minutes of the appointed time. It was allowed to make 'morning' (8am-12 noon) or 'afternoon' (12 noon-5pm) appointments, or, with the approval of the customer, all-day appointments. In practice, this meant, for example, that the penalty would be payable where the service provider arrived for a morning appointment after 12.15pm.

Where the service provider failed to meet these standards, the initial scheme imposed penalties of a month's rental for each day of delay in connecting or repairing a service (50 per cent of this sum if the breach related only to the connection or disconnection of an enhanced call-handling feature) and for each missed appointment. A month's rental for a standard telephone service with Telstra is currently \$11.65 for residential customers and \$20 for business customers. Although these amounts had been foreshadowed in the Government's pre-election policy statement, they were considerably below the maximum figure of \$25 000 set in the legislation.<sup>9</sup>

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7 The initial Scheme was set out in three pieces of delegated legislation determined by the ACA following a direction from the Minister, the *Telecommunications (Customer Service Guarantee) Direction No. 1 of 1997*; the *Telecommunications (Customer Service Guarantee) Standard 1997*, the *Telecommunications (Customer Service Guarantee) Scale of Damages 1997* and the *Telecommunications (Waiver of Customer Guarantee) Instrument 1997*.

8 The 27 month timeframe was reduced to 12 months when the Minister approved Telstra's new Universal Service Plan in May 1998: Minister for Communications, the Information Economy and the Arts, "Alston approves Universal Service Plan", Media Release, 18 May 1998.

9 This figure was increased from \$3 000 in the draft legislation.

The mechanism for imposing penalties where standards are breached raised particular legal challenges. The telecommunications industry established an industry ombudsman scheme in 1993, which was given a statutory basis in 1997 through requiring providers of standard telephone services, mobile telephone services and Internet access services to join the scheme.<sup>10</sup> The obvious way to introduce a Customer Service Guarantee seemed to be to have the Telecommunications Industry Ombudsman (TIO) determine whether the penalties should be imposed in particular circumstances. He already received and had the capacity to settle up to a maximum of \$10 000 complaints from telecommunications industry customers. However, there was concern that this would involve the organisation in activities which were judicial in nature and which Chapter III of the Constitution requires to be performed by a court.<sup>11</sup> The solution was to have the TIO issue 'evidentiary certificates' which would be treated in a court as *prima facie* evidence of the matters contained in it. The TIO thus does not determine whether the penalty will be imposed: this is up to the courts. However, it is expected that a service provider would settle matters where the TIO indicates there has been a breach without the need for matters to be taken to court.<sup>12</sup>

The Customer Service Guarantee was not intended to limit or affect other rights to action or damages,<sup>13</sup> or to provide a mechanism for consumers to 'double-dip' into different sources of compensation from service providers. Section 235 of the *Telecommunications Act 1997* (Cth) requires that the amount payable under the customer service guarantee is reduced to the extent that the offending service provider makes any payment to the customer in respect of a right existing outside the Customer Service Guarantee.<sup>14</sup>

The Scheme, which took effect from 1 January 1998, was announced with considerable fanfare, with the Australian Communications Authority declaring "Customers to Receive Guaranteed Service Levels from Phone Companies".<sup>15</sup>

#### IV. CRITICISMS OF THE SCHEME

From the outset, there were significant criticisms of the details of the Scheme, which it was argued would make it ineffective in improving service levels.<sup>16</sup>

The services covered were very limited. It was argued that, in addition to standard telephone services and enhanced call-handling features, the Scheme should apply to the other services covered by the TIO Scheme: mobile telephony and Internet access services. The performance standards adopted were those which

10 *Telecommunications Act 1997* (Cth).

11 See *Explanatory Memorandum, Telecommunications Bill 1997*, Vol 1, pp 138-9.

12 A Grant (ed), *Australian Telecommunications Regulation: The Communications Law Centre Guide*, Communications Law Centre (1997).

13 Note 11 *supra*, p 134.

14 See Communications Law Centre, *Liability in Tort for Network and Service Failure*, September 1998.

15 Australian Communications Authority, Media Release, 13 November 1997.

16 See note 4 *supra* at 137-43.

already existed, although the Coalition had promised that service quality would improve.<sup>17</sup> In particular, there was criticism of the maximum period of 27 months which a customer could be required to wait for a new connection in the most remote parts of Australia, particularly since the legislation imposed a new requirement on Telstra to make high-speed ISDN services available within 90 days of request to 96 per cent of customers throughout Australia. Most Australians could get an enhanced service within three months, but some might have to wait nearly ten times as long for any service at all. The sanctions which could be imposed were argued to be too small to affect the behaviour of service providers and the process by which they could be imposed too complex. There was no requirement for service providers to publicise the availability of the new remedy to their customers. If customers did not know about it, critics questioned how it would have any impact. Finally, although many features of the new regulatory arrangements for Australian telecommunications were in place for the commencement of the legislation on 1 July 1997, the customer service guarantee was not operational until 1 January 1998.<sup>18</sup>

These deficiencies in the Scheme betrayed the softness of its stated purpose:

The primary intention ... is not to benefit customers financially, but [to] provide carriage service providers with an incentive to meet performance standards ... While the CSG must ultimately be enforced by a court, the scheme has been designed to encourage voluntary compliance by the industry ... The [Scheme] is not intended to address every individual service difficulty that may arise...<sup>19</sup>

The Customer Service Guarantee had more to do with the politics of garnering support for privatisation than it did with serious action to address the needs of vulnerable residential and small business consumers.

## V. POLITICS

In March 1998, Prime Minister John Howard announced his government's intention to sell the remaining two-thirds of Telstra.<sup>20</sup> He intended to adhere to his election commitment not to sell more than one third without a further mandate, by introducing legislation to facilitate the further privatisation before the election, but including in it a provision preventing the sale until after the next election. It was a highly irregular parliamentary strategy designed to capitalise on two factors: the perceived willingness of senators, who had passed the first piece of privatisation legislation, to accept further privatisation, and perceived public enthusiasm for

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17 AUSTEL had established a range of features for the standard telephone service, including maximum connection and fault repair times, in a document called *AUSTEL's Views of Telstra's Universal Service Obligation*, AUSTEL (April 1996) although this document had no formal legal status.

18 See also Communications Law Centre, Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee Consideration of the Telstra (Transition to Full Private Ownership) Bill 1998, CLC, May 1998.

19 *Explanatory Memorandum*, Telecommunications Bill 1997 (Cth), Vol 1, p 134.

20 Minister for Communications, the Information Economy and the Arts and Minister for Finance and Administration, "Telstra - Mandate sought for further sale", Joint Media Release, 15 March 1998.

further privatisation, following the sharp increase in the price of Telstra shares after listing in November 1997 which had benefited buyers in the float.

The announcement, initially, was widely hailed in the media as a masterstroke. But Howard's announcement had not been widely discussed within the Government before it was made. Soon after, the Australian Communications Authority released its quarterly Performance Monitoring Bulletin for the December 1997 quarter, which includes data supplied by telecommunications service providers detailing their performance against certain standards. These standards are similar though not identical to the performance standards set under the Customer Service Guarantee.

In the election campaign, the Coalition had drawn attention to Telstra's declining service quality "in a number of important areas in recent years, particularly in respect to the time taken to effect repairs and to connect new services in regional and rural Australia".<sup>21</sup> The December quarter figures showed it was getting worse, not better.<sup>22</sup>

Privatisation and the Customer Service Guarantee were supposed to improve service quality. Although it was unreasonable to blame the worsening performance only on the privatisation which had occurred in November 1997, it was perfectly reasonable to point out that the figures were still heading in the wrong direction. Even the Minister had to concede that all was not well.<sup>23</sup>

All hell broke loose in the bush and the backbench<sup>24</sup> and the Government was reminded that the 1.8 million Australians who had bought shares in Telstra and enjoyed the gains from their increase in value were only a relatively small minority of the voting population. Even they were invariably Telstra customers who wanted decent telephone services, as well as healthy dividends and capital growth.

Telstra took the unusual step of releasing its own figures for the March quarter shortly after the regulator's release of the December quarter figures for the industry, claiming these showed an improvement in key areas. But it was too little, too late.<sup>25</sup> If the Government wanted the privatisation legislation to pass through the Senate, or perhaps even its own backbench, it was going to have to offer more by way of quality of service safeguards.

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21 *Better Communications*, note 1 *supra*, p 27.

22 Australian Communications Authority (ACA), (1997) 3 *Performance Monitoring Bulletin* 4.

23 Minister for Communications, the Information Economy and the Arts, "Telstra service levels unacceptable, says Alston", Media Release, 31 March 1998.

24 L Dodson, "Backbench revolt on sale" *Australian Financial Review*, 25 March 1998, p 3.

25 Releasing its official figures for the March Quarter in June, the ACA said "Telstra's connection of new telephone services on or before the date agreed with the customer remained at low levels" and criticised all carriers' failure to provide data to the ACA in which facilitated meaningful evaluation of their performance against the Customer Service Guarantee Standards: ACA, "Carrier Performance During March 1998 Quarter", Media Release, 29 June 1998.

## VI. REFORM

After the announcement of Telstra's poor December quarter quality of service performance, Minister Richard Alston acknowledged that the penalties under the Customer Service Guarantee scheme were 'nominal' and might be so small as to tempt service providers to pay the penalties rather than deliver service at a quality that would avoid them.

The legislation subsequently introduced into the Parliament to facilitate the further privatisation of Telstra included a provision giving the regulator a new power to give a service provider a "remedial direction" about compliance with performance standards. This power could be used to address "systemic problems" that arise in a carriage service provider's performance.<sup>26</sup> Breach of such a direction could lead to fines of up to \$10 million. This legislation was passed by the House of Representatives but was rejected by the Senate by a single vote in mid-July.<sup>27</sup> The ACA released a discussion paper at the end of June exploring ways in which such a power might be exercised if the legislation was ever passed.<sup>28</sup>

In addition, the Minister wrote to the ACA in May asking it to review the Customer Service Guarantee Scheme "with a view to tighter standards where practicable".<sup>29</sup> The Review would be finished by the end of September and new standards put in place by the beginning of 1999, a year after the initial scheme commenced. Five weeks later, with debate still raging about the privatisation legislation and no clear indication that it would pass the Senate, the Minister went another step. Following a recommendation by the Senate Committee which examined the further sale legislation,<sup>30</sup> the Minister directed the ACA to increase the penalties immediately.<sup>31</sup> After five days of delay in the connection or repair of a service, the penalty would increase from a month's rental per day to \$40 per day.

Announcing the Ministerially directed review of the Scheme less than six months after it commenced, ACA Chair Tony Shaw "questioned whether the existing CSG standard is providing telephone companies with sufficient incentive to meet minimum service levels":<sup>32</sup> a question to which the consumer movement had given clear answers when the slim Scheme first appeared in draft legislation.

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- 26 *Telecommunications Act 1991 (Cth)*, proposed s 236A. See *Telstra (Transition to Full Private Ownership) Bill 1998 (Cth)*. A "systemic problem" is a problem which has the potential to cause widespread consumer detriment and which is indicative of failure of a system, process or practice of a carrier or carriage service provider.
  - 27 Senator Mal Colston voted against the Bill, having voted, around 18 months earlier, in favour of the legislation to privatise the first third of the company.
  - 28 Exposure Draft, *Customer Service Guarantee Guidelines and Procedures for Handling Systemic Issues*, ACA, 29 June 1998.
  - 29 Letter: Senator Richard Alston, Minister for Communications the Information Economy and the Arts to Tony Shaw, Chair ACA, 20 May 1998.
  - 30 Senate Environment, Recreation, Communications and the Arts Legislation Committee, *Telstra (Transition to Full Public Ownership) Bill 1998*, Senate Publications Unit, Canberra, May 1998, p 23.
  - 31 *Telecommunications (Customer Service Guarantee) Direction No. 1 of 1997 (Amendment No 1 of 1998)*, 29 June 1998.
  - 32 ACA, "Review to tighten customer service guarantee", Media Release, 29 June 1998.

On 22 July, the ACA amended the Customer Service Guarantee Standards to incorporate the increased penalties in the Minister's amended Direction. It also established new requirements for service providers to provide information to their customers about the Customer Service Guarantee,<sup>33</sup> one of the central reasons it had been argued the scheme had not had as much impact as it might.

With the pro-roguing of Parliament and the calling of an election for 3 October, the privatisation legislation lapsed, perhaps to be resuscitated now that the Coalition has returned to Government.

## VII. PARADOXES

There are many bigger issues being debated in Australian media and communications policy than the fate of the Customer Service Guarantee. However, there are a number of observations about it which go to the heart of questions about how a society should organise its resources to provide communications services.

First, the Government wanted to set Telstra free from the perceived constraints of government *ownership*, but the only way it could come close to a political consensus sufficient to achieve this was by subjecting the company to more government *regulation*. The end result is a shift in the way government is exercising power, rather than a complete transfer of that power to the market-place.

Second, although regulation is generally regarded as a more transparent, structured and accountable way of intervening in markets than ownership, the Customer Service Guarantee shows policy being made in precisely the kind of short-term, reactive way that governments-as-shareholders are alleged to behave.

Third, the Customer Service Guarantee raises a fundamental question about the role of government in a liberalised market, and, in particular, whether it should have any role in setting minimum service standards. The theory is that consumers will generally not require governments to protect them from poor service levels, because customers will not buy poor services. Henry Ergas demonstrated this position in an article critical of the Government's concessions to rural interests in the Telstra sale process. First, he complained that the benchmarks against which Telstra's service quality was being measured were high by international standards. Second, he argued it should be easier for telecoms providers to contract out of Customer Service Guarantee time frames and offer a lower quality service at a cheaper price.<sup>34</sup>

On the first point, one wonders why we are always told we should shoot for world's best practice on benchmarks such as corporate staffing levels and returns on shareholders' funds, but on customer service, we should be wary of aiming too

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33 Telecommunications (Customer Service Guarantee) Standard 1997 (Amendment No 2), 22 July 1998; Telecommunications (Customer Service Guarantee) Scale of Damages 1997 (Amendment No 2), 22 July 1998.

34 H Ergas, "Telstra privatisation - not at any price" *Australian Financial Review*, 20 August 1998.



high. On the second, most Australians are unlikely to feel too miffed that they have been deprived of the chance to get a phone service that is worse than the one they have now.