

RG 100901
7 October 2009

Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts

By email

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Submission to Inquiry on Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

Macquarie Telecom Pty Limited ("**Macquarie**") commends the Government on the introduction of the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* ("**Bill**"). Macquarie firmly believes that the proposed legislative reforms will achieve the Government's objectives of enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards. Further, the Bill addresses many of the issues expressed in Macquarie's submissions in response to the *National Broadband Network: Regulatory Reform for 21st Century Broadband* discussion paper.

While Macquarie strongly supports the substance of the Bill, based on its experience of the operation of the past legislation, Macquarie believes the Bill could be improved by the addition of:

- additional public consultation in some parts of the process towards the functional or structural separation of Telstra;
- further detail in respect of the functional separation principles; and
- clarification in respect of the new access arrangement in particular around:
 - primacy of access agreements over access determinations;
 - disputes during the transitional period; and
 - lodgement of access agreements.

These issues are largely procedural in nature and can be easily addressed by relatively minor amendments to the Bill which are described below. While these amendments are minor in nature, and we believe, non-controversial they will significantly improve the outcomes of the legislative reforms and address some unintended consequences of the current Bill.

1. Public Consultation

1.1 Relevant Sections

There are several critical points in the process towards the functional or structural separation of Telstra where the Bill does not correctly provide the opportunity for public consultation or comment. Given the significance for the market in respect of these points, and for similar reasons outlined below in respect of the Minister's functional separation requirements

determination, to ensure a more robust process and stronger outcomes, public consultation should be required in connection with:

- Telstra's structural separation undertaking (s577A);
- Telstra's HFC undertaking (s577C);
- Telstra's Foxtel undertaking (s577E); and
- The Minister's functional separation requirements determination (s75).

These public consultation periods can be easily inserted into the Bill without adding additional delay to the separation process.

1.2 Consultation on Structural Separation Undertaking

In the event that Telstra submits a structural separation undertaking, consultation should mirror the consultation process under the functional separation provisions. The Minister should be required to make available the structural separation undertakings and invite and consider submissions from interested parties and the ACCC prior to a decision being made to accept or reject the structural separation undertaking.

1.3 Consultation on Minister's functional separation requirements determination

The Minister's functional separation requirements determination together with the functional separation principles forms the backbone of the final functional separation undertaking regime. Given its significance in shaping the final functional separation undertaking, the Minister's functional separation requirements determination should be the subject of greater scrutiny and input from stakeholders and the ACCC. While interested parties and the ACCC are given an opportunity to provide submissions on Telstra's original undertaking any consultation at this stage may be too late to rectify any fundamental flaws or major issues. In order to ensure a more robust and transparent process, consultation on Telstra's draft functional separation undertaking needs to be supplemented by a consultation process in relation to the Minister's functional separation requirements determination.

2. Detail of Functional Separation Principles

2.1 Current Provisions

While greater detail of Telstra's functional separation will be set out in the Minister's functional separation requirements determination, Macquarie believes that further detail of the functional separation requirements should be given legislative weight by being added to the functional separation principles.

The functional separation principles together with the Minister's functional separation requirements determination form the backbone of the final functional separation undertaking. As presently drafted the proposed functional separation principles do not provide sufficient clarity as to the extent of the functional separation required to be undertaken by Telstra.

The functional separation principles are ultimately what will drive the content of a final functional separation undertaking. Accordingly, greater detail should be enshrined in these principles.

2.2 Proposed Solution/Amendments

Macquarie believes that the following five principles should be added as functional separation principles in section 75 of the Bill:

- **Equivalence:** The equivalence principle should specifically state that the terms and conditions of supply from Telstra wholesale must be no less favourable to access seekers than that which Telstra supplies to its retail business.
- **Brand:** Distinct branding between retail and wholesale activities should be observed.
- **Management:** Each business unit should have separate management and staffing structures. Each business unit should have independent objectives and operational performance targets. Staff belonging to one business unit may not work for the other business unit at the same time.
- **Information:** Separate management information systems must be created for each business unit. Information flows between the business units must be at arm's length.
- **Financial:** Each business unit should have separate financial reporting and recording systems which produce separate profit and loss statements and balance sheets.

3. Access Arrangements

Macquarie supports the Government's proposal to replace the previous negotiate-arbitrate model with "a streamlined regulatory process" providing the ACCC with the ability to make up-front determinations on price and non-price terms of access. Macquarie broadly supports the proposed provisions of the new access arrangements in the Bill. However, Macquarie is concerned that some provisions may have unintended consequences. Further, the comments set out below reflect issues that have arisen in the past in connection with the negotiate-arbitrate model. In particular Telstra's ability to engage in gaming tactics and to use its market power to exploit the lack of countervailing power on the part of access seekers.

3.1 Primacy of Access Arrangements

The Government has stated that the negotiate-arbitrate model does not work and has been widely accepted as a failure. In the Explanatory Memorandum to the Bill the Government states [at page 55]:

Based on feedback received from its public consultation process, the Government is persuaded that any reform undertaken must include the removal of the negotiate-arbitrate model from the regime, in favour of more direct ex ante price-setting by the regulator. This will lead to greater certainty, less disputation and more timely and efficient outcomes. It is also more broadly consistent with the access regimes that operate in other key infrastructure industries in Australia, such as gas and electricity, and the role of the telecommunications regulator in other international jurisdictions. Option B's package of reforms is therefore the recommended alternative, as on balance the benefits to be gained outweigh the potential costs.

The Bill gives primacy to access agreements over access determinations. While this is appropriate where an access seeker and access provider freely agree to depart from an access determination it is not appropriate for an access seeker to potentially be forced into an

unfavourable deal with an access provider in the period prior to an access determination being made by the Commission.

Accordingly, when an access agreement is in place, if an access determination is subsequently made by the Commission in relation to a declared service covered by the access agreement, the access seeker should be entitled to accept the benefit of such access determination in preference to the access agreement.

3.2 Proposed Solution/Amendments - Primacy of Access Arrangements

Proposed sections 152AY and 152BCC need to be amended to state that access agreements only prevail over access determinations to the extent of any inconsistency where the inconsistency is for the benefit of the access seeker. Alternatively, if an access seeker is party to an access agreement and an access determination is made which is more favourable, the access seeker should have the right to terminate the access agreement and take the determined price.

3.3 Disputes

Under the Bill, access disputes which are on foot continue under the transitional period (see ss154 and 155). Further for existing declared services an access seeker can continue to bring an access arbitration up until the first final access determination is made for that declared service. However, the ACCC may terminate the access arbitration any time after commencing the public inquiry into the access determination. This could unfairly disadvantage access seekers.

3.4 Proposed Solution/Amendments - Disputes

The Bill should be amended to clarify that if the ACCC terminates an access arbitration during the transitional phase, it should backdate the determined price set out in the access determination to the date on which the access seeker commenced negotiations with the access provider.

3.5 Lodgement of Access Agreements

Under the new laws all access agreements (including variations) will need to be lodged with the ACCC (see s152BEA). The Explanatory Memorandum states [at page 159] that the ACCC will use this information to assist it in performing its functions. One of its functions is setting access determinations and presumably the ACCC will review access agreements to understand the market rates for declared services. However, traditionally access agreements have been convoluted and difficult to interpret. The price stated for the access may not represent the true effective price once the discounts and other collateral benefits which apply are incorporated. This may give the ACCC a distorted view of the market rates.

3.6 Proposed Solution/Amendments - Lodgement of Access Agreements

When lodging access agreements with the ACCC, the carrier/CSP should also be required to provide all relevant information regarding discounts and collateral benefits so as not to distort the ACCC's understanding of market rates.

4. Closing

Macquarie appreciates the opportunity to make this submission to the Senate's Inquiry and urges that this important legislation is passed. Macquarie would be pleased to appear before the Committee to expand upon the views expressed in this submission and the matters addressed by the Inquiry. Should you have any queries in relation to this submission, please feel free to contact me.

Yours sincerely

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