Unwired Australia Pty Ltd

Submission in response to

Senate Environment, Communications, Information Technology and the Arts Committee

Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

October 2009

Executive Summary

The history of the regulation of the telecommunications industry is one in which the regular flow of amendments has both been cause of and caused by the failure to fully analyse the way the legislation could work, rather than how it is intended to work.

The current Bill has the potential for the same consequences and accordingly it should be amended in a number of ways to expressly deal with some of the scenarios that could occur. In addition there are matters that could be addressed in different ways to have more general application.

In particular;

1. The legislation should be amended to ensure that if the Federal Court finds there is a breach of the structural separation undertaking then the Court must order the divestiture of spectrum (if acquired) and (if exemption from the requirements were granted) the separation of the HFC network and Foxtel.
2. The proposed section 577A(11) should be amended to allow the Minister to determine that a part of a network is exempt from the separation requirement.
3. The process for acceptance of the structural separation undertaking must include provision for public consultation by the ACCC.
4. The Committee should inquire into whether the provisions for restricting access to spectrum may not have been better achieved by amendment to the Radiocommunications Act and the element in the Telecommunications Act being limited to requiring the relevant limitation provision being used.
5. The Committee needs to seek the detailed view of the ACCC on the operation of the functional separation provisions. The Bill should be amended to include the ability for the ACCC to apply to the Federal Court for a divestiture order as remedy for breaches of the functional separation undertaking.
6. The Committee should consider whether the NBN Co access regime needs to be introduced before the Parliament passes this part of the legislation.
7. The legislation should be amended so that an access determination must specify terms and conditions for all declared services and not be able to exempt providers from offering the service.
8. The provision for access determinations to include fixed principles provisions should be amended to enable the ACCC to make fixed principles determinations that are to operate across all access determinations during their period of currency.

In addition a number of minor drafting issues are noted, together with some concluding comments that highlight that the legislation is not particularly unusual and does not discriminate against Telstra shareholders.

1. Introduction

The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the **Bill**) currently before the Committee has been labelled by the Minister as "historic reforms to telecommunications regulation."[1] They are historic reforms, but as will be noted in this submission they are historic reforms that continue a process of reform that commenced in 1988, and has seen major legislative changes every few years.

Some of those changes were motivated by the desire of the Government of the day to introduce some other program, most notably the privatisation of Telstra. The current reforms are introduced by the Government at the same time as the Government is preparing to build the National Broadband Network (the **NBN**), though none of the provisions are presented as directly relating to that project.

However, while there will be further legislation to deal with the operation of the NBN Company it must be assumed that the Bill specifies the way the telecommunications regulatory landscape will operate in the NBN environment.

In considering this legislation then Unwired is taking the NBN as either a given, or as an extraneous consideration. Further, in this submission Unwired does not intend to argue the question of whether the objectives the Government has set itself are appropriate, merely whether the legislation as drafted is an appropriate program for achieving those objectives. In particular Unwired does not intend to argue the merits of structural separation, though some commentary will be provided on why this has not previously occurred.

The submission consists of a number of sections following this introduction;

Section 2 discusses some aspects of the history of telco regulation, and put the current Bill in context,

Section 3 discusses the various separation provisions included in the Bill together,

Section 4 outlines some concerns about the process for accepting a structural separation undertaking,

Section 5 suggests an alternative way to enact the provisions on the limitations for the allocation of spectrum,

Section 6 outlines concerns about the provisions for functional separation,

Section 7 raises concerns about the amendments to the telecommunications access regime, in particular concerns that the regime as amended should not be expected to apply to NBN Co,

Section 8 identifies some minor drafting changes that the Committee or Government could consider, and

Section 9 provides some brief concluding remarks.

---

[1] Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy Media Release *Historic reforms to telecommunications regulation* Canberra 15 September 2009.

2. Some Policy History

George Santayana observed that "Those who cannot remember the past are condemned to repeat it."[2], though the aphorism is more commonly mis-represented as "Those who cannot learn from history are doomed to repeat it."

In a submission to the Senate Environment Information Technology and the Arts Committee I September 2005 AAPT noted that "telecommunications is a large and complex industry that has great significance to the economic and social well-being of all Australians, and the history of amendments is that they end up being gamed… Previous amendments have not worked as effectively as planned." [3]

One reason for this is that amendments sometimes address the policy issue that was prevalent before the current issue. That appears to be the case in two aspects of the current Bill; the approach to the resolution of disputes, and the processes to be used by the ACCC in determining terms and conditions of access. These will be addressed later in this submission.

The major feature of the current Bill is the approach taken to addressing the ongoing structural problem of the industry. This structural problem is, in essence, that one firm remains the largest provider in each of three telecommunications market segments, being fixed line voice telephony, fixed line Internet and mobile services. The same firm is the market leader in the subscription television market.

The regulation assessment in the explanatory memorandum to the Bill contains some detail of Herfindahl-Hirschman index (the **HHI**) to demonstrate the degree of concentration that exists in each of these markets.[4] Not only are the concentrations high, they are increasing. This is despite the fact that the number of licenced carriers has increased every year since the current regime began in 1997 as shown in Figure 1.

The Minister has described the Bill's attempt to address this concentration through proposals for structural reform in the following ways;

> *While significant structural reform has occurred in other key infrastructure industries, previous governments of both persuasions have failed to undertake necessary structural and microeconomic reform in telecommunications. The measures in this legislation will finally correct the mistakes of the past.*[5]

---

[2] George Santayana, The Life of Reason, Volume 1, 1905

[3] AAPT Ltd *Submission to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee Inquiry into the Telstra (Transition to Full Private ownership) Bill 2005 and related bills* September 2005

[4] The HHI is calculated as the sum of the squares of market shares, and ranges from zero to 10,000 if share is expressed as a percentage, or from zero to 1 if share is expressed as a fraction. Its use in Trade Practices law derives from its property of describing what level of mark-up firms can obtain above the competitive price in an oligopoly.

[5] Senator Stephen Conroy, etc , *Transcript Media Conference Opening Address* Tuesday 15 September, 2009 Australian Parliament House, Canberra

So the competition policy rules that have been set in place, beginning back under the Hawke-Keating Government, and moving through the Howard Government, have failed to deliver for Australian consumers. And what we've put forward today is a pathway.[6]

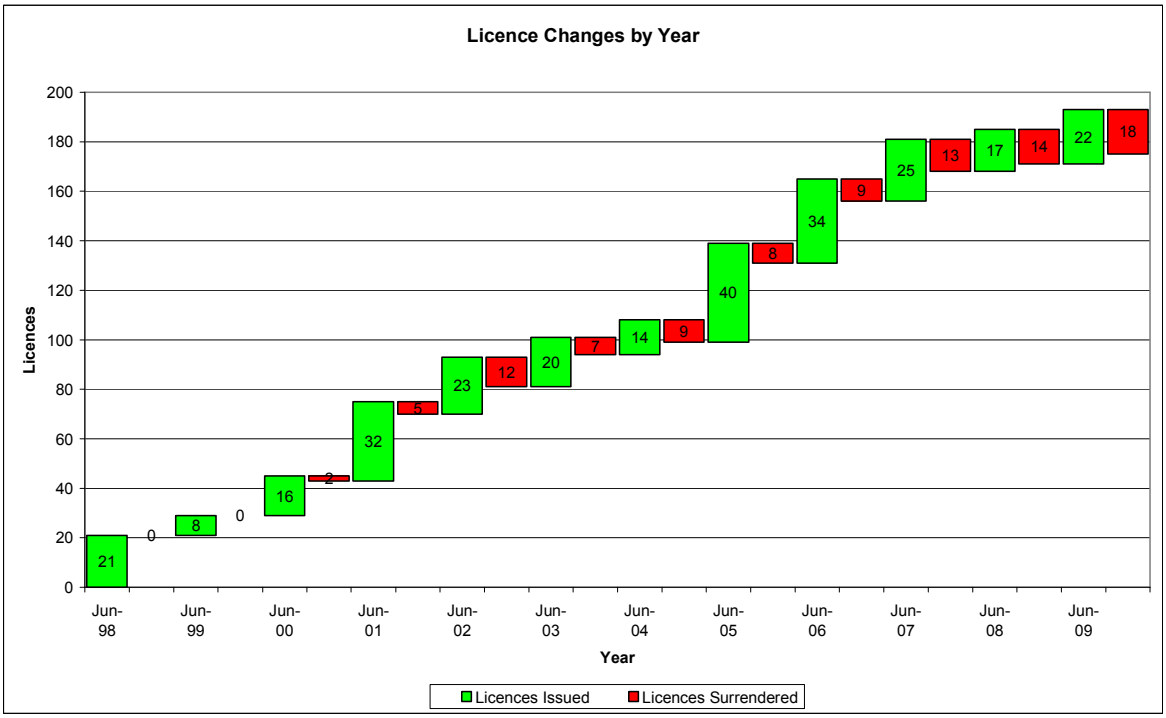

Figure 1: Annual change in carrier licences.

If we are to follow Santayana's aphorism we should perhaps explore some of the elements of these policies over two decades that the Minister says "have failed to deliver".

The process of reform can be traced to May 1988 and a series of reforms announced by Senator Gareth Evans as Minister. These commenced a process of regulation external to the telecommunications authority (AUSTEL), the deregulation of aspects of the customer premises equipment and value added services market, and the commencement of a number of inquiries into industry structure, the funding of community service obligations and the structure of the industry.[7]

These policies crystallized in 1991 in the decisions announced by Kim Beazley as Minister to licence a second carrier, and to issue that carrier and a third provider with mobile licences. In addition a decision was made that the restriction on the number of carrier licences would be removed in 1997. These decisions were amongst the most deregulatory decisions announced anywhere in the world.

In the process of allocating the second carrier licence the Government undertook a process to reduce its three Government owned operators to two. In the end the decision was made to join

[6] Senator Stephen Conroy etc *Transcript: Television Interview* Tuesday 15 September, 2009 ABC Lateline
[7] The latter inquiry was even known as ROSA – Review of Structural Arrangements.

Telecom Australia with OTC in Government ownership, and to sell AUSSAT as the foundation of the second licence. This decision to form what was then nicknamed "Megacom" is often claimed as being the big error. This wasn't however the major part of the structural review. The structural review had fundamentally considered whether the policy to be pursued should be "resale competition" or "facilities based competition", and chose the latter.

This choice point has long been misconstrued as implying that the long run goal was full duplication of facilities. It was not. It was, however, a conscious decision that the restrictions on any one other than Telecom Australia from building infrastructure for selling services should be removed.

The decision on OTC was a second order issue, and was motivated by a common expectation that the wave of deregulation in telecommunications around the world would reflect the outcomes in banking and finance and that "new entrants" in relevant markets would be incumbent firms in other countries. Incorporating OTC into Telstra was designed to both better able Telstra to meet these skilled competitors, and to provide a platform for Telstra's own offshore expansion.

Despite the fact that many telcos around the world tried international growth strategies, the practical outcome was that very few succeeded. Telstra was one of those who did not succeed, and it has faced very little competition from large overseas incumbents. The reason for this outcome is that all these firms are experts in exploiting the benefits of incumbency rather than experts in marketing and service in telecommunications.

The second point at which the structure was further concentrated was when Telstra was allowed to build an HFC network and form the Foxtel partnership with News Corp. At the time Telstra's entry was not seen as anything other than competitive, as Optus was already in the field as a powerful looking competitor, as was Australis Media using MMDS and satellite. Optus seemed to have a stronger offering and certainly at least an equal offering to what Foxtel and Australis Media had.

It is true that a proposition was put to the Keating Government that regional monopolies for deploying HFC network should be considered. That suggestion was declined, presumably on the basis of advice at the time from the Industry Commission[8] that two HFC networks were viable, and, one suspects, in part because the person asking for the monopoly was an Optus Vision investor, Kerry Packer.[9]

Finally, the last point was the point at which the Howard Government commenced the sale of Telstra. Going into the 1996 election the Liberal/National coalition developed a policy to create an environmental fund from part of the proceeds from privatizing a third of Telstra. The Keating Government in response floated the idea that it would not sell the fixed line business, but may sell some of the lines of business such as mobiles. This resulted in the counter promise from the coalition that it would not separate any of Telstra.[10]

At the same time as commencing the privatization of Telstra the Howard Government implemented the bipartisan policy of full deregulation of the telecommunications industry in

---

[8] Albon, R., Hardin, A. and Dee, P. "Telecommunications economics and policy issues", *Industry Commission Staff Information Paper*, AGPS, Canberra. 1997

[9] Mark Westfiled *The gatekeepers: the global media battle to control Australia's pay TV* Pluto Press Sydney 2000

[10] See Paul Fletcher *Wired Brown Land?: Telstra's Battle for BroadbandUniversity of New South Wales Press, 2009.*

1997. It was "full deregulation" in the sense that there was no restriction on the number of carriers or carriage service providers, and indeed a number of moves to facilitate entry, including the facilities and service access regimes and policy to release additional spectrum.

The access regime in particular reflected an expectation that the industry would evolve into one with a clear distinction between wholesale and retail activities, with terms and conditions determined by industry agreement through the Telecommunications Access Forum, through acceptance of undertakings on standard terms and conditions or through bilateral agreement.

To describe the policy decision on separation in the current Bill as "correcting the mistakes" is perhaps an error. It is an error because none of the decisions in the past particularly looked like mistakes at the time. To the extent that these were policy mistakes they are perhaps the consequence of the reliance on legislation and rather vague objectives. The consequence of this has been that participants have an incentive, and possibly even an obligation to shareholders, to place a narrow construction on the legislation, to seek judicial review where possible and to claim the narrowest of competition outcomes as indicating success of the regime.

The lesson in contemplating the current and future legislation is that the scrutiny of the legislation needs to be thorough in considering not merely what it purports to state, nor merely what the intentions are, but on how industry participants could act following on from the legislation. In the current case there is a tendency to focus exclusively on one firm, Telstra, but there are equally significant considerations of NBN Co and other large integrated telcos.

3 The Separation Provisions

The Bill creates a framework within which Telstra can voluntarily make three different undertakings; an undertaking about structural separation, an undertaking about hybrid fibre-coaxial networks and an undertaking about subscription television broadcasting licences (the **structural separation undertaking,** the **HFC undertaking** and the **Pay TV undertaking** respectively).

If a structural separation undertaking is accepted by the ACCC then Telstra will avoid the requirement to provide a functional separation undertaking. If all three are accepted Telstra will avoid the limitations imposed by this Bill on acquisition and utilisation of spectrum defined as designated part of the spectrum. The latter limitation may be limited to only requiring that a structural separation undertaking has been accepted or the Minister has by written (but not legislative) instrument exempted Telstra from either or both requirements. The Minister must not make such an instrument unless "the Minister is satisfied" that an accepted structural separation undertaking is sufficient to address concerns about Telstra's market power.

Each of the undertakings requires something to occur about Telstra's position to control certain assets by a certain date. In the case of the Pay TV and HFC undertakings this date is no more than twelve months after the date of the undertaking. In the case of the structural separation undertaking this date is 1 July 2018 or such other date as may be specified by the Minister. The longer timeframe permitted for the structural separation undertaking reflects the scenario stated in the Explanatory Memorandum as;

> *Structural separation may, but does not need to, involve the creation of a new company by Telstra and the transfer of its fixed-line assets to that new company. Alternatively it*

may involve Telstra progressively migrating its fixed-line traffic to the NBN over an agreed period of time and under set regulatory arrangements, and sell or cease to use its fixed-line assets on an agreed basis. This approach will ultimately lead to a national outcome where there is a wholesale-only network not controlled by any retail company—in other words, full structural separation in time. Such a negotiated outcome would be consistent with the wholesale-only, open access market structure to be delivered through the National Broadband Network.[11]

However, this longer timescale creates certain difficulties in the operation of the regime. Most specifically it is possible that Telstra is exempt from the additional two undertakings, and allowed to acquire and use additional spectrum, on the expectation that the delivered undertaking will have achieved both the structural separation outcome and the desired reduction in market power when the ultimate success of the undertaking in delivering on the expectation may not be fully known until 2018.

As has been explained above, the history of telecommunications regulation is one of unfulfilled expectations. Accordingly it would be prudent to expect that the structural separation undertaking may fail to fulfill its expectations.

One possible scenario is that Telstra gives the undertaking in relation to the migration of its fixed line customer base, and achieves the exemptions, but then after the fact changes its policy to aggressively pursue the switchover of its customer base to the HFC network and wireless services prior to the migration to the NBN. Not only may Telstra be in a position to retain market power, but the NBN business model may be permanently damaged by not experiencing the level of customer take-up foreshadowed in the undertaking.

Further the legislation is too imprecise in the constraints placed upon the Minister in considering the exemptions from the Pay TV and HFC undertakings. This is a feature of all the telecommunications legislation to date, which is a lack of precision about what the target market structure might look like. The only reasonably objective measure that can be placed on industry structure is the HHI. It would be preferable if the legislation could specify expected values for the industry HHI in the target outcome.

More specifically, the exemption from the HFC and Pay TV undertakings should be amended to refer to either a provisional exemption or a deferral of the obligation rather than a complete exemption to refer to the circumstances above. Further the restraint on the acquisition or use of additional spectrum should include a provision that can provide that the divestiture of the spectrum and that Telstra be not able to use the spectrum can be an order available to the Federal Court.

While these matters may fall within the categories of order available to the Federal Court under the proposed s577G(2) in particular 577G(2)(a) and (b) the legislation should be stronger and indicate that these are minimal requirements following a finding that Telstra has breached the structural separation undertaking.

The legislation should be amended to ensure that if the Federal Court finds there is a breach of the structural separation undertaking, then the Court must order the divestiture

---

[11] Telecommunications Legislation Amendment (Competition And Consumer Safeguards) Bill 2009 Explanatory Memorandum Pp

of spectrum (if acquired) and (if exemption from the requirements were granted) the separation of the HFC network and Foxtel.

4 The Structural Separation Provision

The specification of the requirements of a structural separation undertaking as drafted require Telstra not to supply any fixed-line service using any network they control. The way the provision is drafted even if Telstra divested its access networks, indeed its entire Australian network, it still could not offer a retail service buying an access line from NBN Co as it would still control the network (Reach) that provides international connections. (s577A(1))

The legislation provides the Minister the discretion to exempt a "network" by a legislative instrument (s577A(11)). The definition of "telecommunications network" given in s7 of the *Telecommunications Act 1997* is;

> ***"telecommunications network"*** means a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy.

It is not clear from the above that the Minister's discretion extends to a network as defined by the Minister.

While overall it would be preferable to specify that it is the delivery of fixed line services by an access network controlled by Telstra, this creates the difficulty of defining an access network. The alternative is to at least remove the doubt in relation to what it is the Minister can determine and amend s577A911) to read "to a telecommunications network, or part of a telecommunications network, specified".

The proposed section 577A(11) should be amended to allow the Minister to determine that a network or part of a network is exempt from the separation requirement.

A greater concern with the provision for a structural separation undertaking is the fact that there is very little specification in the legislation about what processes the ACCC must follow in reaching a decision on whether to accept the undertaking. In addition there is no restriction on how long the ACCC might take to consider the undertaking.

While it is common to place great faith in the wisdom of the ACCC, in its regulatory processes in telecommunications the ACCC is usually bound by very specific requirements of public consultation. The ACCC can be expected to consult voluntarily, and the Chair has indicated he will. However, absent a specific legislative requirement it might be possible for the process of consideration of the undertaking to be delayed due to procedural disagreements over how this consultation should occur.

As the final undertaking will need to be published on the ACCC's website, and as the draft undertaking could be considered market sensitive, it would appear to be preferable to require in the legislation that the submitted undertaking be published on the ACCC's website. Given that this would then create a public trigger of when an undertaking had been received for consideration then a series of time constraints should apply. Based on existing processes it is suggested that there should be a minimum of one month from publication of the submitted undertaking till comment on the draft undertaking closes, and that the ACCC has three months

from the close of submissions to make a final decision. If a final decision has not been made within that time then the undertaking is considered to be rejected. If the ACCC rejects the undertaking it must provide a statement of reasons outlining how the undertaking would need to be modified to allow it to be accepted.

If following rejection a revised undertaking is submitted exactly in the terms requested by the ACCC then the ACCC must accept the undertaking. If the revised version varies then the consultation process should be shortened to two weeks for public comment and one month for determination.

The process for acceptance of the structural separation undertaking must include provision for public consultation by the ACCC.

5. Limits on Allocation of Spectrum

The provisions in the Bill that will result in limitations on the allocation of spectrum by Telstra and restrictions on the use of spectrum by Telstra hinge on the definition of "designated part of the spectrum". The definition is very precise in referring to the two areas of most current public interest, but at the same time totally open in that the Minister may vary the part of spectrum specified by legislative instrument.

It is important to note that under s60 of the *Radiocommunications Act* 1992 the ACMA can limit the amount of spectrum that may be acquired by a person and that can be nil. The section also provides that the Minister can direct ACMA in the exercise of that power. This power is referred to in industry circles as specifying "competition limits" on spectrum. It should also be noted that determining that telecommunications providers with significant market power in one market are limited in acquiring spectrum or otherwise entering other markets is not an unusual regulatory stance. Suggestions that such a proposal would disrupt investment or create "sovereign risk" in the telecommunications or other sectors are fanciful.

The provision which is additional in this Bill is that Telstra is restrained from acquiring spectrum after the allocation or of using the spectrum after the acquisition by some one else. Under the Radiocommunications Act the subsequent trading or use of the spectrum is only limited by the merger provisions of s50 of the *Trade Practices Act 1974* (and of course other provisions restricting cartel conduct).

This raises the question of whether the preferable legislative route is to strengthen in total the operation of the competition limits provisions in the Radiocommunications Act, and in the current Bill specifying that the Minister must issue a direction to the ACMA in to restrict Telstra from acquiring the designated spectrum unless the relevant undertakings have been received.

The alternative route provides a better legislative framework for future allocations. While the current legislative focus is the market power of Telstra, a consequence of the changes may be to increase dramatically the market power of the providers who are allowed to remain vertically and horizontally integrated.

The Committee should inquire into whether the provisions for restricting access to spectrum may not have been better achieved by amendment to the Radiocommunications Act and the element in the Telecommunications Act being limited to requiring the relevant limitation provision being used.

6. The Functional Separation Regime

The functional separation provisions in the Bill will only come into effect if Telstra does not provide a structural separation undertaking that is accepted. The hope, and possibly expectation, of the Minister is clearly that these provisions will not be required.

That these provisions are required anyway is a reflection of the lost opportunity of the introduction of the operational separation requirements in the lead up to the final sale of Telstra. The legislative provisions were introduced hurriedly, with interested parties having about one day to prepare submissions for the Committee review and then only one day for hearing.

In that vary short hearing one participant suggested to the Committee that the equivocal statements of the Chair of the ACCC Graeme Samuel indicated that the ACCC did not support the way the implementation of operational separation had been proposed. That interpretation of the ACCC evidence was disputed by some Senators.[12]

Subsequently the ACCC has been very clear on the limitations of the operational separation regime, noting that "Since coming into effect in June 2006 the operational separation arrangements that apply to Telstra have been shown to be ineffective in a number of essential areas…. The ACCC is of the view that the operational separation regime applying to Telstra is a weak form of functional separation which, in its current form is not working as the Government intended."[13]

The concerns that were raised by the ACCC and others before the enactment of the operational separation requirements were the inadequate role afforded to the ACCC in the determination of the suitability of the operational separation plan, and of the lack of a role for the ACCC in enforcing the operational separation plan. The functional separation requirements are enhanced by being by way of undertaking rather than plan, with greater clarity about the objectives.

However, there seems to be little real consideration of how the effectiveness of the plan can be guaranteed and of any significant consequence for Telstra of breach. The public focus has been so much on the structural separation undertaking that little consideration has been given to the functional separation that is the "fall back". The Committee needs to question the ACCC at length on how it sees the functional separation provisions working in practice.

However, the most significant element in ensuring the effectiveness of the functional separation provisions to deliver genuine arms-length dealing would be to provide a power for the ACCC to apply to the Federal Court for a divestment order as a remedy of a series breach of the functional separation undertaking.

The Committee needs to seek the detailed view of the ACCC on the operation of the functional separation provisions. The Bill should be amended to include the ability for the ACCC to apply to the Federal Court for a divestiture order as remedy for breaches of the functional separation undertaking.

---

[12] Senate Environment, Communications, Information Technology And The Arts Legislation Committee *Official Committee Hansard Reference: Telstra (Transition to Full Private Ownership) Bill 2005* Friday, 9 September 2005 Canberra.

[13] Australian Competition and Consumer Commission. *Submission to the Department of Broadband, Communications and the Digital Economy "National Broadband Network: Regulatory Reform for 21st Century Broadband*" June 2009. Pp 21-22

7. Changes to the Access Regime

The Bill makes a number of changes to the access regime in Part XIC of the *Trade Practices Act 1974*. These changes result in no aspect of the means of determining the terms and conditions of access remaining the same as provided in the original 1997 amendments that introduced the Part.

In particular the original structure allowed for terms and conditions to be agreed by an industry body called the Telecommunications Access Forum, or to be determined by the ACCC accepting an access undertaking or by the ACCC arbitrating a dispute after a failure to agree by negotiation. These procedures were all designed to create the possibility of reaching an outcome through a market mimicking mechanism.

It has been sometimes said that access providers want the price to be high and access seekers low, but in reality there are limitations to both. If prices are too high access seekers have an incentive to pursue inefficient investment. It can be argued that Optus building an HFC network for Pay TV when they had a monopoly in the satellite component of satellite delivered Pay TV to simply try to bypass high PSTN access prices is a case. Similarly, if access prices are too low the access provider doesn't invest enough in providing services and their access seeking customers suffer.

The idea of the messy processes was to find a way to reveal the points through iteration between providers and customers. The failure of the regime is due in no small measure to the fact that the access provider was vertically integrated, that the provider therefore had both the incentive and opportunity to create delay in the process. The delay in the process resulted in greater uncertainty by access seekers in their input costs and hence where they could afford to invest to compete.

The TAF provisions were deleted in earlier amendments, at the same time an additional kind of undertaking (a special access undertaking) was introduced that could be used to operate prior to the declaration of a service. The current Bill deletes the other two elements (ordinary undertaking and arbitration) and inserts instead a process whereby the terms and conditions of access to declared services are determined by the ACCC.

It might seem strange that the Bill that attempts to resolve the structural issue in the industry, at the same time replaces an access regime best suited to a structurally separated industry to one best suited to a vertically integrated one. The explanation can be found both in the confused history of regulatory reforms, and in the fact that there is nothing in the current Bill to guarantee that the industry might not be dealing with an access provider who is (at least partially) vertically integrated until 2018.

The Bill is silent on whether the expectation is that the provisions as outlined are also the provisions that will apply to services offered by NBN Co or not. This is Unwired's primary concern, as we believe that relying only on the acceptance by the ACCC of a special access undertaking (i.e. before services are declared) or on the ACCC first declaring and then determining access terms is an inadequate way to progress developing the terms and conditions of access for the NBN Co. However, at this stage we will only outline our concern and reconsider the matter when the legislation that addresses the NBN Co is introduced.

The Committee should consider whether the NBN Co access regime needs to be introduced before the Parliament passes this part of the legislation.

The legislation also repeals the processes by which the ACCC can grant exemptions from the standard access obligations for declared services. The ACCC can instead make such exemptions as part of the access determination.

The application of exemptions to defined geographic areas has been of some recent interest and litigation. There is particular concern in some quarters about the appropriateness of these exemptions, and, in particular, whether the legislative process as subsequently applies sufficiently requires the ACCC to consider the effect on all markets.[14]

The legislation should be amended so that an access determination must specify terms and conditions for all declared services and not be able to exempt providers from offering the service.

The legislation includes a provision that the ACCC in making an access determination can decide that some aspect of that determination is a "fixed principles provision" (proposed s152BCD). This provision is apparently in response to concerns raised by the ACCC that under its existing powers new decisions require reconsideration of all the relevant factors anew. The particular example often cited is the work conducted in developing a cost basis from which prices can be set.

This does appear to be a case of legislative drafting fixing a problem that is about to disappear. It is about to disappear because the ACCC's powers in respect of making access determinations are both more wide ranging than the previous powers (to decide whether to accept undertakings or to arbitrate disputes) and are less subject to review. Accordingly, the proposed power is probably not required.

However, if the power is required it should be provided as a separate determination making power. One of the issues that has bedeviled the ACCC has been developing consistency between various proceedings for different declared services. While the new provisions allow the ACCC to make an access determination into a number of declared services together, the fixed principles provision will need to be made separately for each service. However, the example given above to justify the section relates to a cost base that does run across services.

A further concern is that the example given is of a cost base, which is only part of the means of determining a price. The cost base would not normally be a part of the determination of the terms and conditions of access, and making it a requirement to do so will only make determinations excessively complex.

Therefore the legislation would be better crafted if the section was amended to create a power for a fixed principle determination and that the ACCC is required to use any matters specified and current in such a determination in forming access determinations.

The provision for access determinations to include fixed principles provisions should be amended to enable the ACCC to make fixed principles determinations that are to operate across all access determinations during their period of currency.

---

[14] Regional Telecommunications Independent Review Committee *Framework for the Future* Canberra 2008. Recommendation 2.6.1

8. Minor Drafting Amendments

There are a number of places in which additional minor amendments could improve the operation of the legislation.

Declared network service

The proposed new Part 9 of the *Telecommunications Act 1997* introduces a term of "declared network service" at the new s70. Elsewhere in the legislative regime the term "declared service" refers to a specific group of services declared by the ACCC under Part XIC of the *Trade Practices Act 1974*. (This latter use occurs in the immediate following section – s71(1)).

The legislation will be clearer if the definition in s70 and its use in defining a "wholesale/network business unit" be amended to refer to a "designated network service".

Consistency of references to registers

When Parts XIB and XIC were first introduced there was a great deal of consistency throughout the parts. The ongoing process of piecemeal amendment continues to fragment the drafting. In the current case the extensive amendments to Part XIC have changed all references to the requirements for maintenance of registers to vary them from allowing the ACCC to maintain them in electronic form to requiring them to do so. (For example the new register requirement at s152BCW and the amendments to s152CC).

For the maintenance of legislative consistency sections 151AR, 151BH and 151BR should be amended the same way as section 152CC to require electronic registers. Similarly section 151BUA(6) should be amended to refer to publication on a website. Section 151BUE should also delete "may" and replace with "is to" to direct that reports on record keeping be published electronically.

Tariff filing

One consequence of structural separation should be the removal of a host of other specific legislative controls on Telstra. Telstra is required under s151BTA of the *Trade Practices ct 1974* to file with the ACCC certain retail tariffs. This provision may have been appropriate when the access regime alone may not have guaranteed effective competitive restraint on Telstra.

While the ACCC under 151BTA(7) may exempt Telstra from the requirement, it would be preferable to demonstrate the linkage between structural reform and the removal of other controls. To this extent either the repeal of the section consequent on the acceptance of a structural separation undertaking, or the inclusion of an appropriate subsection authorizing the Minister to direct the ACCC in the exercise of the power under s151BTA(7) if a structural separation undertaking has been received would be appropriate.

Consequences of separation

The existing telecommunications legislative and regulatory regime contains many Telstra specific elements. In general these are undesirable, however, they are likely to become contentious if a structural separation undertaking is accepted. Indeed, Telstra may reasonably expect that some of them should become conditions precedent for implementing the separation.

The complexity becomes clear if indeed Telstra were to actually undertake a wide ranging split of the entity into two entities. Only one would be "Telstra" within the meaning of legislation.

The example above is only one of these. The retail price controls on Telstra under Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* are just one further example.

While many of these constraints and controls are able to be removed or limited by subordinate instruments of the Minister or a regulator Telstra can justifiable expect that a thorough review of these provisions will be undertaken.

It would be preferable to include a provision that, once a structural separation undertaking has been accepted, the Minister will commission a review of the remaining legislation to ensure that all redundant requirements on Telstra are identified. The provision should require the Minister to table a response to that report within three months of receipt.

The Committee should ask the Department for its views on the number of suggested minor drafting changes.

9. Conclusion

In this submission we have focused on some very specific aspects of the Bill that we think require the Committee's attention. In the introduction we noted that the submission does not adopt a stance on the underlying policy questions, merely on how effective the Bill is in affecting the policy proposals as announced.

However, the underlying policy intent has drawn some public commentary and a number of specific claims about the implications of the Bill. In particular these have been claims that structural separation is a flawed policy and has not been effective elsewhere (in other industries or other geographies), that the legislation is a direct attack on Telstra and its shareholders and that (by conclusion) the legislation therefore creates sovereign risk in investment in Australia.

In response to these claims it should first be repeated that the core approach used here, that is the restriction of the availability of spectrum due to the market power of a firm, already exists in Australian law and has been used extensively in overseas jurisdictions. The deviation in this case is the clarity with which the Government is specifying by legislation the conditions under which this restriction will be relaxed.

In response to the claim that separation has not been effective it should be noted that the only historic structural separation in telecommunications was of AT&T in 1984. While just over two decades later the "continuing" AT&T long lines company finally succumbed to a series of poor management decisions, a number of the other separated firms performed strongly. Indeed, the period from 1984 to 1996 saw all perform strongly – only once the legislation was changed to allow reintegration did the disasters begin. AT&T in part also suffered from needing to meet in the market MCI/Worldcom. The latter was a case of systematic fraud resulting in large capital write-offs. It is perhaps the best advertisement for why inefficiently duplicating facilities not only damages the entrant but also the incumbent.

Separation in electricity markets has had a varied history. The competition by electricity retailers over common distribution networks has perhaps not resulted in significant outcomes to date, but nor has it created negative outcomes. The separation of generation from distribution has created in this country an effective market. The crises in the USA, and in particular California, can be attributed as much to the operation of a rogue firm (Enron) as to any other

cause. Enron was not just poorly managed but engaging in widespread systematic corporate fraud. No market structure can insulate consumers from that effect.

In response to the claim hat the legislation is a direct attack on Telstra and its shareholders it should be noted that the entire Bill could have been drafted without specifically referring to Telstra. Instead the Bill could have indicated that the restriction on spectrum allocation would occur when the market as a whole was concentrated (by reference to an HHI standard) and that the restriction applied to a firm with a specific market share. It is just more convenient to write "Telstra". The various undertaking requirements could then have been written as one undertaking requirement that would result in either the total concentration falling below a specific level and/or the firm's individual share dropping below a specific level.

In other regimes trade practices or anti-trust law already provides generic powers under which divestiture of assets can be ordered. In both the USA and UK these powers exist. A specific provision under one Act that creates an incentive, but not an obligation, for divestiture by a firm with significant market power is therefore not unusual, and should not result in any additional "sovereign risk". No one has ever suggested that these anti-trust powers I the USA or UK result in sovereign risk in those markets.[15]

Further Government's regular make decisions that will be in the interests of citizens generally that might disadvantage the shareholders of individual firms. A simple example is laws that prohibit the advertising of tobacco products or of smoking in certain places. To the extent that Telstra shareholders might claim some special position as the Government was the vendor of the shares, the reality is that the prospectus for each of the tranches sold specified that the Government remained committed to the development of competition and that being vendor did not constrain it from any action to further that policy.

There is no reason why a Government policy for structural reform of telecommunications should be considered unusual, or create concerns amongst investors.

This submission has focused on the adequacy of the legislation in pursuing the policy objective and suggests that the Committee further inquire into;

- Whether the spectrum limitation provisions should be introduced by more general reforms to the Radiocommunications Act 1992,
- The views of the ACCC on the functional separation provision,
- The planned operation of access for the NBN Co, and
- A number of minor drafting issues.

We have further concluded that the legislation should be amended to;

- Ensure that the Federal Court would be required to force the divestiture of certain assets if the structural separation undertaking is breached,

[15] Sovereign risk is a term that has been bandied around since Richard Alston first used it against proposals advanced by Lindsay Tanner as shadow communications minister for structural separation. It amounts to a premium investors would require to invest in a country due to the inadequate protections offered by a country's legal system. Australia's legal system includes an express constitutional provision ensuring just terms for acquisition of property.

- Ensure the Minister can exempt part of a network from the structural separation requirement,
- To require public consultation by the ACCC prior to accepting a structural separation undertaking,
- To remove the ability for an access determination to exempt services from the standard access obligations, and
- To require fixed principles to be specified by separate determinations rather than as part of access determinations.

We encourage the Committee and the Senate to consider the legislation on its merits and to pass the Bill with the above amendments.