Senate Standing Committee on Environment, Communications and the Arts

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

Submission of PIPE Networks Limited

(Public version)

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1. Executive summary

PIPE Networks Limited (**PIPE**) thanks the Committee for this opportunity to make a submission. Although PIPE is supportive of the policy goals underlying these amendments, we submit that there are some deficiencies in the Bill which should be addressed before it is enacted. In particular, PIPE submits that:

- The 'negotiate-arbitrate' model should also be replaced with respect to access to 'eligible facilities' under Schedule 1 of the *Telecommunications Act 1997* (Cth);

- The proposed amendments to Part XIC of the *Trade Practices Act 1974* (Cth), as they are presently drafted, are flawed in that they allow access seeker's existing contractual agreements with Telstra to trump future terms of access set by the ACCC;

- Any ability of access seekers to contract out of terms and conditions set by the ACCC must be subject to strong safeguards to prevent Telstra from pressuring access seekers to contract out of those terms and conditions, to the detriment of competition; and

- The proposed amendments to Part XIB of the *Trade Practices Act 1974* (Cth) are the bare minimum necessary to attempt to restore the effectiveness of Part XIB.

2. Scope

This submission deals only with parts 2 and 3 of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (**the Bill**), and does not take a position on the other parts of the Bill.

This submission has been approved by the Managing Director of PIPE.

3. About PIPE Networks

PIPE is a publicly-listed telecommunications carrier which owns and operates the third-largest metropolitan fibre-optic network in Australia. PIPE's network connects most of Australia's major data centres and a significant number of Telstra exchanges in PIPE's core markets.

PIPE's extensive fibre-optic network delivers cutting-edge Fibre-To-The-Premises services to PIPE's customers, which include major corporations, other carriers and Internet Service Providers, and Commonwealth, State and local government departments and agencies.

4. Importance of facilities access

Telstra, by virtue of its ownership over bottleneck infrastructure such as the Telstra underground duct network,[1] controls essential inputs required by all carriers who deploy competitive land-line networks (whether copper or fibre-optic) in metropolitan areas of Australia. Competitive carriers are constrained by economic and physical necessity to obtain duct access from Telstra, yet Telstra remains the largest competitor of those carriers in all relevant markets. It follows that it is to Telstra's considerable commercial benefit to provide facilities access to their competitors on disadvantageous terms.

This is a significant impediment to competition in telecommunications markets. The claims made by the ACCC in its current Federal Court proceedings against Telstra's 'exchange capping' practices demonstrate the extent that Telstra will go to to hinder competitive access to its facilities.

Indeed, there is reason to believe that Telstra might not provide access to such facilities *at all*, if not for the fact they are required to do so. Schedule 1 to the *Telecommunications Act 1997* (Cth) (**Schedule 1**) contains standard carrier licence conditions, which are imposed on all licensed carriers.[2] Part 5 of Schedule 1 requires carriers to provide other carriers with access to facilities including ducts.

4.1. PIPE's fibre network

PIPE's fibre network presently consists of **[Confidential material redacted]** of 'outdoor' fibre-optic cable,[3] yet only **[Confidential material redacted]** of that cable **[Confidential material redacted]** is installed in duct owned by PIPE. The majority **[Confidential material redacted]** is installed in ducts owned by Telstra. The remaining **[Confidential material redacted]** is installed in duct owned by third-party carriers other than Telstra. PIPE's ability to access the duct of Telstra and other carriers is dependant on the effective operation of Schedule 1.

4.2. 'Facilities access' vs 'declared services'

The facilities access regime created by Schedule 1 exists independently of the regime for access to 'declared services' in Part XIC of the *Trade Practices Act 1974* (Cth) (**Part XIC**). Both Schedule 1 and Part XIC presently adopt a 'negotiate-arbitrate' model, which the government accepts is 'not producing effective outcomes for industry or consumers',[4] 'time-consuming and litigious',[5] and 'complex and delay-prone'[6] in relation to Part XIC. PIPE agrees with much of the criticism levelled at the 'negotiate-arbitrate' model by the government and industry – the 'negotiate-arbitrate' model is clearly broken.

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[1] In this submission 'duct' is used as a generic term and should be read as including cable tunnels, manholes, pits, and other types of 'eligible underground facility', within the meaning of Schedule 1 to the *Telecommunications Act 1997* (Cth).
[2] These conditions are imposed by s 61 of the *Telecommunications Act 1997* (Cth).
[3] This figure excludes cabling installed inside buildings.
[4] Explanatory memorandum, p 3.
[5] Explanatory memorandum, p 45.
[6] Explanatory memorandum, p 46.

Yet, for no apparent reason, the Bill proposes that this model be replaced **only** as it relates to the declared services regime in Part XIC – Schedule 1 will be left with the broken 'negotiate-arbitrate' model.

This omission is all the more puzzling given its timing. Of the nine services currently declared under Part XIC, six of those services relate to services supplied using legacy copper cables which may be rendered obsolete by the currently preferred Fibre-To-The-Premises (**FTTP**) model for the National Broadband Network (**NBN**).[7]

In contrast, access to duct will be a vital component of the NBN.[8] Access to telecommunications towers (for the deployment of fourth generation wireless services to provide coverage of 'gaps' in FTTP infrastructure) is also likely to be a significant part of the NBN. Access to both these types of facility is regulated by Schedule 1 and not Part XIC.

PIPE notes that the ACCC, in its submission to the Department of Broadband, Communications and the Digital Economy 'National Broadband Network: Regulatory Reform for 21st Century Broadband' inquiry, recommended the amendment of Schedule 1 to make it more consistent with Part XIC.[9]

PIPE submits that, even though it has not been the subject of as many ACCC arbitrations, the 'negotiate-arbitrate' model in Schedule 1 suffers from the same failings as that in Part XIC and that Schedule 1 should also be amended to replace this model.

5. The proposed replacement for 'negotiate-arbitrate'

PIPE has had the benefit of reading a draft submission which we understand that iiNet proposes to make to Senator Conroy on this issue. This section of PIPE's submission draws from iiNet's submission.

So far as PIPE is aware, no carrier currently has access to either declared services or eligible facilities from Telstra without being a party to a Telstra 'Customer Relationship Agreement' (**CRA**) in relation to those services or facilities.

5.1. Current approach – arbitration prevails over agreed terms

In the case of declared services under Part XIC, Telstra must ensure that the terms of its CRA are consistent with any applicable access undertaking which is in force.[10] Terms determined by the ACCC in an access arbitration can override terms and conditions of the CRA, but the ACCC cannot impose terms and conditions via an arbitration which are

[7] Those services are Domestic PSTN Originating Access, Domestic PSTN Terminating Access, Line Sharing Service, Local Carriage Service, Unconditioned Local Loop Service, and Wholesale Line Rental.

[8] This is true regardless of whether a FTTN or FTTP model of the NBN is adopted. Although the FTTN model will retain existing copper infrastructure from the 'node' to the premises, duct access will be required to install fibre-optic cables for backhaul from the node to an aggregation point.

[9] See http://www.accc.gov.au/content/item.phtml?itemId=889815&nodeId=54ed3cd392aa9e20df994d16b4a17931&fn=ACCC%20regulatory%20reform%20submission%20%28June%202009%29.pdf at p 76.

[10] Sections 152BS(1) and 152CBA(3)(b) of the TPA.

inconsistent with the terms of an access undertaking.[11] Therefore, currently the sources of terms and conditions of access to declared services are, in order of highest precedence:

1. Access undertakings;

2. Arbitrations; and

3. Terms agreed between the parties (i.e. the Telstra CRA).

In the case of eligible facilities under Schedule 1, access undertakings are not available and the terms of access are as agreed between the parties, or failing agreement, as determined by an arbitrator.[12]

In both cases, a carrier may therefore be a party to a CRA with Telstra but may seek to have the ACCC arbitrate a dispute over objectionable portions of the CRA. The results of the arbitration will prevail over the CRA to the extent of any inconsistency.

PIPE believes this to be a vital part of the existing access regime. PIPE's experience with negotiating – or, more accurately, attempting to negotiate – amendments to a CRA with Telstra are that although Telstra is willing to enter into dialogue, no substantive amendments will be agreed to, especially on issues such as pricing, and that the CRA is essentially offered on a 'take it or leave it' basis.

Given that Telstra is often the only source of the necessary declared services and eligible facilities, access seekers have very little bargaining power and very little alternative but to accept the terms of the CRA which Telstra is prepared to offer, albeit under protest. The only alternative would be to refuse to sign a CRA, and begin the ACCC arbitration process, which could take years to be finally resolved.

5.2. New approach – agreed terms prevail over determinations

The evident approach of the amendments in the Bill is to allow the ACCC to make regulated terms of access, either by an access determination, or binding rules of conduct (collectively, **Regulated Terms**), but to allow a carrier and access seeker to agree that the Regulated Terms will not apply to their access agreement.[13] New section 152BCC provides that an access determination has no effect to the extent that it is inconsistent with an 'access agreement.' Similarly, new section 152BDB provides that terms of binding rules of conduct have no effect to the extent that they are inconsistent with an 'access agreement.'

An 'access agreement' is defined in new section 152BE, and it seems quite clear that the CRA which already exists between Telstra and most other carriers will qualify as an 'access agreement.'

The sources of terms and conditions of access to declared services under the proposed new regime are, in order of highest precedence:

[11] Section 152CGB of the TPA.
[12] See e.g. s 36(3) of Schedule 1, in the case of access to eligible underground facilities.
[13] See explanatory memorandum, p 141 and 145.

1. Access agreements (i.e. the Telstra CRA);

2. Undertakings;

3. Binding rules of conduct; and

4. Access determinations.

It should be noted that this order of precedence gives the most precedence to what under the current regime is given the *least* precedence. Significantly, **it appears that under the proposed new regime, carriers with Telstra CRAs have no meaningful recourse to the new Part XIC regime to dispute the objectionable provisions of those CRAs**. In PIPE's submission, this situation would be **worse than the status quo**.

The **Bill requires further amendments** to ensure it achieves its admirable intention of providing a legislative framework under which access seekers can obtain reasonable terms of access that promote competition and the interests of end-users without frequent recourse to costly and time-consuming arbitration.

While PIPE has great respect for freedom of contract, and has no objection – in principle – to carriers and access seekers negotiating that terms and conditions other than the Regulated Terms will apply, the Bill seems to proceed on the assumption that all existing contracts between carriers and access seekers were freely negotiated, that they represent a willing bargain between the parties, and that they were entered into with the intent that they trump any Regulated Terms that might be established by the ACCC.

These assumptions are clearly fallacious, especially given that all existing CRAs were entered into in the context of the existing Part XIC regime which provides access seekers with recourse to ACCC arbitration.

Further, unless any Regulated Terms which might be put in place offer a complete and all-encompassing solution to access seekers – i.e. an access seeker can rely on the Regulated Terms to offer a complete solution for the acquisition of declared services or access to eligible facilities, without the need for any other contractual agreements with the carrier – access seekers will still need to enter into a contract with the carrier, giving the carrier an opportunity to force terms upon the access seeker which will trump the Regulated Terms.

In PIPE's submission, it would be dangerous to allow carriers and access seekers to contract out of Regulated Terms because of the significant risk that carriers (and especially Telstra), by virtue of its position and superior bargaining power, could exert leverage upon access seekers to induce them to contract out of the Regulated Terms, to the detriment of competition. Any ability to contract out of Regulated Terms must be subject to strict safeguards to ensure that the incumbent does not abuse this ability to take access seekers outside the protection of Part XIC.

iiNet's draft submission to the Minister proposes two alternative solutions to this problem, which are supported by PIPE both in terms of access to declared services under Part XIC and access to eligible facilities under Schedule 1.

6. Telstra's monetary incentive to delay

The *terms* – including pricing – on which carriers can access the eligible facilities and declared services of other carriers are as important as their ability to gain such access in the first place. **[Confidential material redacted]**

PIPE has notified the ACCC of a dispute between PIPE and Telstra as to the terms under which PIPE acquires duct from Telstra. **[Confidential material redacted]** Given that ducts are and will remain a vital component of the NBN, this will result in long term benefits to the end-users of all telecommunications services provided by fixed-line networks.

[Confidential material redacted]

An important difference between Part XIC and Schedule 1 access disputes is that Part XIC expressly provides that the ACCC may backdate a determination and order the repayment of excessive payments.[14] To a degree this removes the incumbent's incentive to delay negotiations and frustrate arbitrations. Schedule 1 does **not** provide the ACCC with this specific power and thus Telstra has a clear financial incentive to stonewall negotiations and delay the arbitration process.

If the regime which replaces the 'negotiate-arbitrate' model expressly allowed for the back-dating of determinations in regards to both facilities and service access, it would remove the monetary incentive for Telstra to delay the regulatory process.

PIPE submits that the new model (which should be adopted for Schedule 1 as well as Part XIC) should expressly allow for determinations to be back-dated, to remove the significant financial incentive for Telstra (or any other carrier) to delay the regulatory process.

7. Amendments to Part XIB

PIPE agrees with the criticisms of Part XIB of the *Trade Practices Act 1974* (Cth) (**Part XIB**) contained in the explanatory memorandum to the Bill. The amendments proposed in the Bill reflect the bare minimum necessary to attempt to restore the effectiveness of Part XIB.

PIPE does not take a position on whether these amendments are likely to be sufficient or effective. PIPE submits that the amendments to Part XIB should be reviewed after 12 months to determine whether they have been effective, and whether further amendments are required.

8. Conclusion

Although PIPE strongly supports the policy goals of Parts 2 and 3 of the Bill, we have identified several shortcomings with those parts of the Bill as they are presently drafted.

We would be pleased to provide any further information or assistance which the Committee may require in its deliberations.

[14] Section 152DNA of Part XIC.