

**Submission to Senate Standing Committee on Environment,
Communications and the Arts concerning the Inquiry into the
Telecommunications Legislation Amendment (Competition and
Consumer Safeguards) Bill 2009**

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Background

The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 is designed to reshape the structure and regulation of the telecommunications sector during the eight-year rollout of the National Broadband Network. The intended outcome is said to be a healthy competitive market promoting different business models and innovation such that end-users enjoy improved quality, prices and choices.

The Bill is structured to achieve this through three primary approaches: addressing Telstra's vertical and horizontal integration; streamlining the access and anti-competitive conduct regimes; and strengthening certain consumer safeguard measures.

It is understood that subsequent legislation will address the operation of the National Broadband Network itself and, depending on the outcome of Telstra's ongoing level of integration, yet another round of changes to the access regime and consumer safeguards.

Changes to Telstra's current structure

The Second Reading speech presented on 15 September 2009 claims that the bulk of the current telecommunications regulatory regime was introduced in 1997. Whilst this is technically correct, the problems this Bill is intended to correct are also directly traceable to the telecommunications reforms introduced in 1989/1990 with the introduction of duopolistic fixed network competition in 1991, ending of the moratorium on pay television in 1992 and ministerial determination permitting closed access to cable television systems from 1994.

This latter point is pertinent to the government's view that Telstra's high level of integration has hindered the development of effective competition in the telecommunications sector and in order to lessen the market power of Telstra it should, among other things, divest its Hybrid Fibre Coaxial (HFC) cable network.

When the Keating government permitted cable television (and specifically a proposed one by Optus) to be operated as closed access systems, the decision was made on the grounds of enabling greater competition. The outcome was the opposite yet in preparing this Bill the current government has failed to appreciate why this happened. Instead, a sledge hammer approach is now proposed to force Telstra to divest its HFC network and thereby allow another operator to take over what remains substantially a closed access network. This makes a mockery of the claim in the Explanatory Memorandum that such divesting 'could see new entrants into the Pay TV sector with new channels providing greater choice for consumers. It could also see increased competition in the telephony and broadband markets as Pay TV services could be bundled with other telecommunications providers'.

Only two weeks ago, Foxtel announced a significant increase in new television channels and specifically ones for delivery over the Internet by any ISP. However, the Bill fails to prescribe open access for telephony and broadband services delivered by a divested Telstra HFC network, or for that matter any of the other HFC networks. Whilst Telstra and Foxtel gave an undertaking some

years ago to open the television channel capacity to competition (which incidentally has failed in the marketplace), the ACCC has never declared the telephony and cable modem capacity of HFC networks. Their reason for not doing this has been that industry competitors have never requested open access!

On one hand the government has declared its commitment to a wholesale-only, open access model for the NBN, yet during the transition period it requires Telstra to divest its HFC network to be then taken over by another entity – whilst at the same time perpetuating the anti-competitive situation of allowing all HFC networks (whether operated by Telstra, Optus or any of the smaller operators) to remain monopolised in the delivery of telephony and cable modem services. Such a policy approach of perpetuating closed access is not only inconsistent but clearly against the better interests of end-users. It heightens the perception that the purpose of the Bill is to ‘get’ Telstra.

It is recommended that the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 be amended to require the ACCC to declare access to the telephony and cable modem services of all HFC networks. Open access to such services can only be in the better interests of end-users.

Changes to the access and anti-competitive conduct regimes

The Government’s objective is to promote competition which is in the interests of consumers, businesses and the economy more broadly. The Explanatory Memorandum states that the proposed changes to the regulatory process will provide a reasonable degree of regulatory certainty for access providers and access seekers and that requests for access to telecommunications services will thereafter occur in a timely and efficient manner. A regulated access regime enables wholesale communications services declared by the ACCC to be provided to access seekers who in turn provide retail services to end-users.

In other words, the telecommunications access regime basically serves the interests of access providers and access seekers through the setting of wholesale price and non-price terms and conditions. This is more so the case since the test for promoting the long-term interests of end-users is biased against the better welfare of end-users, as explained in later sections of this submission. Rather, end-users can only benefit from the access regime in a trickle-down fashion and, depending on the overheads of the access seeker, end-users may or may not find the retail costs satisfactory. It does not follow that increased wholesale/retail competition will necessarily result in lower prices for end-users. Rather, the marketing of near-identical telecommunication products and particularly the bundling of products leads to a confusopoly.

Changes to consumer safeguards

The proposed legislative changes to further protect consumers in terms of changes to the universal service obligation (USO), the customer service guarantee (CSG) and the priority assistance arrangements are welcomed. However, it is a fundamental misconception to regard the safeguarding of consumer welfare as only enshrined in the USO, the CSG and priority assistance arrangements. These measures constitute merely a safety net behind the more fundamental need to protect and enhance consumer welfare by promoting the long-term interests of end-users (LTIE). It is not trite to observe that the telecommunications industry exists only to serve end-users.

Promotion of the long-term interests of end-users constitutes the foundation stone of the current telecommunications legislative framework, viz:

- The main object of the Telecommunications Act 1997 (TA) is to provide a regulatory framework that promotes:

- (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
- (b) the efficiency and international competitiveness of the Australian telecommunications industry.
- The object of Part XIC of the Trade Practices Act (TPA) is to promote the long-term interests of end-users in the provision of carriage services or of services provided by means of carriage services.

I have serious concerns that the 1997 amendments of the TA and the TPA defined the long term interests of end-users in a flawed manner and since then its resulting application has seriously disadvantaged the welfare of telecommunications consumers. In fact, whilst now an academic exercise, it is plausible to claim that had the LTIE been properly framed and applied to serve the better interests of end-users since 1997, the government may not now have had to re-regulate the telecommunications sector and to establish a National Broadband Network.

It is recommended that the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 be amended to re-frame the LTIE so as to better serve the interests of end-users, whether consumers or business. In so doing, Australia's efficiency and international competitiveness will be greatly enhanced both in the intervening period leading to the NBN and thereafter. Further detail of the proposed amendment is given in the following section.

Truly historic reforms to telecommunications regulation that enhance consumer welfare

The announcement by the Minister for Broadband, Communications and the Digital Economy on 15 September 2009 of the proposed reforms since enshrined in the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 was heralded as being historic. The Government's key objective is to promote an open, competitive telecommunications market to provide Australian consumers with access to innovative and affordable services. Yet these reforms are substantially about the telecommunications industry and only about end-users in a trickle-down fashion.

I propose that the Bill be amended to adopt the following three initiatives which would be truly historic for enhancing end-user welfare, both for consumers and business, and in so doing strengthen the development of a networked information economy.

The long-term interests of end-users

The Telecommunications Act does not define the long-term interests of end-users but instead refers to the definition in section 152AB of the Trade Practices Act, where the promotion of the LTIE is achieved through meeting the objectives of:

- the objective of promoting competition in markets for listed services;
- the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;
- the objective of encouraging the economically efficient use of, and the economically efficient investment in the infrastructure by which listed services are supplied, ...

Surprisingly, the Telecommunications Act 1997 defines neither the 'long-term interests of end-users' nor 'any-to-any connectivity', despite the former being a main object of that Act. By leaving these definitions to the Trade Practices Act, the policy makers at the time clearly saw both overwhelmingly in competition terms, despite the Explanatory Memorandum to the Telecommunications Bill 1996 wishing for a wider meaning which it did not offer.

However, under the Trade Practices Act, end-users would appear to be only persons and not inanimate things such as file servers. Furthermore, to be relevant to promoting the long-term interests of end-users, these end-users must be connected by communicative rather than distributive services. Both these interpretations are far narrower than the original conception. It is therefore plausible to conclude that any-to-any connectivity currently applies only to real time communication between two persons via fixed or mobile telephony and apparently not any communication involving data transmission. Internet-based services such as e-mail and the Web involving intermediate file servers and non-real time communication, as well as all pay television and video-on-demand services are then all disqualified!

Compounding these concerns, over the last decade there has been decreasing tolerance for giving regard to any-to-any connectivity as a worthwhile objective. Commencing 1997 it has been, at the most, just one of three 'sub-tests' for promoting the long-term interests of end-users. The importance of any-to-any connectivity was further diminished by being seen more as a proxy for promoting competition, in addition to being restricted solely to communicative services. From 2005, the increased weighting given to the investment 'sub-test' further sidelined any-to-any connectivity. The Productivity Commission, whose recommendations tend to be eventually followed by governments, was so dismissive of any-to-any connectivity that it sought its removal from the test of long-term interests of end-users. Rulings by the ACCC now substantially ignore the sub-test of any-to-any connectivity.

The prime object of telecommunications legislation should be to empower communication between end-users, whether animate or inanimate. Presently, Australia's telecommunications legislation gives primacy to the welfare of the industry rather than to end-users.

It is recommended that the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 be amended so that the objects of the Telecommunications Act and Part XIC of the Trade Practices Act reflect the achievement of any-to-any connectivity as a prime national goal and that the meaning of any-to-any connectivity should reflect the reality of modern communications.

Neutral carriage of end-user services

The basic principle of common carriage in telecommunications, that all users must be served without discrimination, has played an important role in the infrastructure services of transportation and communications, aiding telecommunications users' access and thereby also stimulating the development of networks. The most critical factor in mass adoption of the Internet has been the carriage obligation of telephone companies that permitted dial-up access between users and ISPs via the public switched telephone network (PSTN). This non-discriminatory connection of modems, using signals that mimic telephony calls, connected end-users with narrowband ISPs who in turn had data links to the public Internet.

With the introduction of competition under the Telecommunication Acts 1991 and 1997, backed by Parts XIB and C of the Trade Practices Act 1997, this semblance of common or non-discriminatory carriage all but disappeared. As a prelude to introduction of the NBN, Australian legislators now have the opportunity to restore effective non-discriminatory carriage and service delivery with a regulatory regime that directly empowers end-users with at least a similar degree of choice and control over service delivery as they previously experienced with the PSTN.

Thanks mainly to non-proprietary Internet protocols, affordable personal computing power and user-centric applications, there has been a marked shift in intelligence towards the ends of any network connection – and at these ends the equipment is owned and operated by users. Broadband

users in particular have taken much more control of their connectivity and are becoming decidedly more participative, rather than being passive recipients. Increasingly, service innovation is being driven by end-users exploiting any-to-any connectivity across the Internet at large.

End-users may be lulled into a false sense of security by assuming that the government's prescription of open access at the wholesale level to facilitate retail competition with the NBN is all that is required to protect their better interests. As such, it relates only to the input terms and conditions provided by the NBN wholesale operator to the NBN retail operators (mainly ISPs) and prescribes nothing more. Open access as currently defined by the government does not guarantee the delivery of services to end-users in a neutral manner, nor provide end-users with any-to-any connectivity in a neutral manner.

Network neutrality creates the right for users to access the content, applications and equipment of their choice. The prime goal of network neutrality is to foster competition between Internet-based content, applications and equipment at large rather than protect restricted competition between retail service providers connected to a specific access network.

It is recommended that, as a prelude to introduction of the NBN, the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 be amended to enforce the neutral carriage of end-user services.

Retail pricing

The Explanatory Memorandum states that whether Telstra separates structurally or functionally, the proposed reform measures will enable competitors to compete with Telstra on more level terms than currently. As a result, competitors will have the confidence to invest in the market, which will see greater innovation, lower prices and more choices for consumers.

Reports are now circulating from industry advisors that the NBN business case is such that end-users will likely be required to pay more for equivalent broadband services than they are currently paying. I realise that the Department recently appointed advisors who will be clarifying this matter by early 2010 and that a favourable outcome for end-users will most likely be significantly affected by whether and how Telstra may vend in its access network assets to the NBN.

However, I am particularly concerned to hear reports that during the eight or so years while the NBN is rolled out, Telstra is intending to seek higher wholesale prices and that, with newly adjusted pricing models, the ACCC is more inclined to accept such an application. If this eventuates, it will have the effect of ramping up retail prices for end-users over the coming years to the benefit of ultimately securing the business viability of the NBN. It also satisfies a long-term demand of Telstra for more favourable treatment by the regulator and appears to the uninitiated as a possible contra-deal by the government.

It is recommended that the ACCC be empowered to restrain retail price increases for broadband services delivered over Telstra's legacy network during the transition period of the NBN roll-out. If necessary, a CPI-X regime should be implemented.

Summary of Recommendations

The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 should be amended to:

- require the ACCC to declare access to the telephony and cable modem services of all HFC networks;
- re-frame the LTIE so as to better serve the interests of end-users, whether consumers or business, such that the objects of the Telecommunications Act and Part XIC of the Trade Practices Act reflect the achievement of any-to-any connectivity as a prime national goal and that the meaning of any-to-any connectivity should reflect the reality of modern communications;
- enforce the neutral carriage of end-user services;
- empower the ACCC restrain retail price increases for broadband services delivered over Telstra's legacy network during the transition period of the NBN roll-out.