Senate Environment, Communications and the Arts Legislation committee

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 inquiry, October 2009

Questions for DBCDE

1. **The committee has received a large number of suggested amendments to the Bill, including some quite technical proposals. Has the Department reviewed these, and can it comment on these proposals? The committee is particularly interested in the Department's view on proposed amendments in Part 2 and Part 3 of the Bill.**

   A: The submissions to the Senate committee inquiry proposed a range of amendments to the Bill which the Department is in the process of reviewing. The Department will provide advice to Government on the amendments and decisions on the amendments will be a matter for Government.

2. **Pipe Networks raised two concerns regarding the Trade Practices regime. The first relates to the lack of any change to the facilities access regime under Schedule 1 of the existing legislation. The second concerns the possibility that having "agreed terms" prevail over determinations may actually make the new regime worse than the old regime. Can the Department respond to these concerns?**

   A: Regulation of access to telecommunications facilities is being considered separately by the Government.

   The relationship between access determinations and access agreements will also be given further consideration in the light of submissions provided by a number of parties.

3. **Can you advise the committee whether the NBN Co legislation will include additional processes for acquiring services from NBN Co, or is the Government's intention that these processes will be defined by the reforms contained in this Bill currently before the committee?**

   A: The content of the NBN-related legislation is a matter for Government.

4. **Can you explain why the Bill proposes that an access determination can exempt providers from offering the service? What is the Department's response to the suggestion that the Bill 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?**

   A: Part XIC of the Trade Practices Act currently allows carriers and carriage service providers to apply to the ACCC for an exemption to supply a declared service in accordance with the standard access obligations. The Bill continues to allow the ACCC to reduce regulation in a targeted manner, by providing that access determinations be able to exempt particular providers or classes of providers from having to provide access to the declared service.

5. The committee understands iiNet has written to the Minister with specific concerns regarding the Bill, and has provided a copy of this material to the committee. How is the Department responding to the issues raised in iiNet's submission to the Minister? Can the Department advise the committee on progress in considering iiNet's suggested amendments?

A: iiNet has raised a number of detailed issues relating to the proposed amendments to the telecommunications access regime in Part XIC of the Trade Practices Act, in particular regarding the proposed relationship between access determinations and access agreements. The Department will provide advice to Government on the issues raised by iiNet and decisions on any amendments to the Bill will be a matter for Government.

6. How many new or amended instruments/ determinations will be created by this Bill and how many of them, and which ones, are disallowable versus those that are specified as not being legislative instruments, such as the ministerial determination re functional separation principles (item 75), access determination (item 116) or ACMA directions on non-removal of payphones (item 175)?

A: There are 48 instruments provided for under the Bill and 22 of these are non-legislative instruments. Decisions to specify the instruments as non-legislative took into account a range of factors, including the nature of the instrument, the status of similar instruments under the Legislative Instruments Act and the need to provide certainty for the industry. The instruments are to be made by the ACCC, the Australian Communications and Media Authority (ACMA) or the Minister. The attached table (Attachment A) provides a breakdown for the Committee of the nature of the instruments.

7. What is the expected timing of other NBN related legislation, what will it include and will it consider the access regime? Why shouldn't the Telecommunications Legislation Amendment Bill wait until the NBN access regime is clear, as raised in the submission by Unwired?

A: The Government has indicated that it will introduce legislation that establishes:

- governance, ownership and operating arrangements for the wholesale-only National Broadband Network company; and
- the access regime to facilitate open access to the National Broadband Network for retail level telecommunications service providers.

The timing and detailed content of the NBN-related legislation is a matter for Government. It is the Government's intention that this legislation be introduced before the end of the year.

The Department notes the supplementary submission by Unwired which states that: *"For avoidance of doubt, Unwired Australia is not advocating that consideration of the current Bill should be delayed until the NBN Co legislation is debated."*

This Bill is primarily about the regulatory structure of the industry in Australia today, not arrangements for the NBN. It is important to put in place the reforms proposed in the Bill quickly to improve the competitive environment and investment certainty, and deliver clear outcomes for access providers and access seekers. Passage of the Bill will provide

all parties with the regulatory certainty they need to invest and provide consumers with additional and better services.

8. In relation to Part XIC of TPA, what analysis went into the ACCC recommendation (mentioned on page 51 of the EM) of a hybrid model and why was it dismissed by the Government as increasing the complexity of the regime? Couldn't different approaches for different market segments actually make matters simpler?

A: In the case of the 'two tier' model proposed by the ACCC, the Department concluded that, while dividing service providers into different groups based on how vertically integrated they were had some merit, there were always likely to be disputes about where the line should be drawn and how much effect integration had on market power. In addition, some declared services are likely to be supplied by more than one access provider with differing levels of vertical integration. This could result in two distinct regulatory regimes for the supply of one service. Therefore, it was considered that a consistent approach would avoid unnecessary complexity while still achieving the objectives of enhancing competition.

9. What is the rationale for the urgency of changes to the USO given the EM states that the nature of the USO will again need to be considered more broadly in early 2010 in context of the NBN? (page 80)

A: The proposed changes to the Universal Service Obligation are intended to address immediate concerns with the Universal Service Obligation in the transition period to the NBN environment. As indicated in the Second Reading Speech, once the detailed operating arrangements for the NBN have been settled, the Government will consider the broader range of issues associated with the delivery of universal access in an NBN environment.

The changes to the USO are needed now to address increasing costs imposed on consumers through declining service quality and the ongoing removal of payphones. These costs borne by consumers disproportionately affect remote and regional Australia. For example, the most recent ACMA published report on telecommunications performance for the March 2009 quarter found:

- For payphones provided under the Universal Service Obligation, only 59 per cent of faulty payphones in remote areas were repaired within the 3 day period specified in Telstra's Standard Marketing Plan. This compares to 82 per cent repaired within two days in rural areas and 91 per cent repaired within one day in urban areas.
- For new fixed telephone connections, 84 per cent were provided by the Universal Service Provider within the Customer Service Guarantee time frame for remote areas. This compares to 90 per cent in urban areas.

The Regional Telecommunications Independent Review Committee found that the current Universal Service Obligation arrangements lack clarity and that the ACMA finds enforcement difficult (see page 183 of the Review Committee's 2008 Report). Failure to strengthen the Universal Service Obligation now would therefore expose consumers to increasing risks of falling service quality.

10. How does section 60 of the Radiocommunications Act operate in practice, with specific regard to limiting access to spectrum? What powers would Government

have to influence the allocation of spectrum on matters such as market power without the proposed section 577J of the Telecommunications Act?

A: Subsection 60(1) of the *Radiocommunications Act 1992* provides that, before allocating spectrum licences, the ACMA must determine procedures in writing which will apply to the allocation of spectrum licences (ss 60(1)).

Subsection 60(5) provides the ACMA with an express power to determine procedures under ss 60(1) to impose limits:

- on the aggregate of the parts of the spectrum, that may be used by any one person or any specified person, as a result of allocation of spectrum licences under Subdivision B; and
- on the aggregate of the parts of the spectrum that may, in total, be used by a specified group of persons.

However, the ACMA is not permitted to exercise the power to impose limits under subsection 60(5) unless it receives a direction to do so from the Minister in accordance with subsection 60(10) (see ss 60(9)). If the ACMA receives such a direction from the Minister, the ACMA must exercise its powers consistent with any directions given by the Minister (ss 60(12)).

Subsections 60(6) and (6A) provide guidance as to the extent of the limits that might be imposed under subsection 60(5). Subsection 60(6) provides examples of the way in which limits might be expressed to apply, including limits regarding:

- a specified part of the spectrum
- a specified area; or
- a specified population reach

Subsection 60(6A) makes it clear that limits of nil in relation to specified persons or to members of specified groups of persons are permissible.

Subsection 60(5) and a number of related provisions regarding imposition of limits were inserted by the *Radiocommunications Amendment Act 1997*. Subsection 60(6A) was introduced by the *Radiocommunications Legislation Amendment Act 2000.* It is clear from the wording of the Explanatory Memoranda that accompanied the associated Bills that the ability to impose limits on spectrum use under section 60 is intended to address competition concerns.

A number of directions have been issued under subsection 60(10), including:

- the *Radiocommunications (Spectrum Licence Limits – 3.4 GHz Band) Direction No. 1 of 2000; and*
- the *Radiocommunications (Spectrum Licence Limits—2 GHz Band) Direction No. 2 of 2000*

Both instruments referred to above have the effect of placing limits on the total amount of spectrum that may be allocated to any one person or group of persons in specified frequency bands in designated areas. The first instrument additionally has the effect of placing limits on the total amount of spectrum that can be allocated to Telstra and any related body corporate in specified frequency bands in specified areas.

Having regard to section 60 when read as a whole, the Minister has a wide scope to direct the ACMA in regard to the imposition of limits on spectrum use arising from allocation of spectrum licences.

However, under the Radiocommunications Act neither the Minister nor the ACMA can impose restrictions on the ability of a person to acquire spectrum licences on the secondary market.

A key difference between section 60 of the Radiocommunications Act and proposed section 577J of the Tel Act, therefore, is that proposed section 577J is accompanied by related sections 577K and 577L, which prevent Telstra from obtaining access to 'designated parts of the spectrum' through the secondary market.

Questions taken on notice during the hearing

11. *Shareholder representatives' previous submissions*

Senator LUNDY—Are you able to advise the committee whether submissions were received on behalf of shareholders or institutional investors in Telstra shares regarding the regulatory reforms in either of those extensive review or consultation processes?
Ms Spence—I will double-check it but, as far as I am aware, I do not think that we did receive submissions. But we can double-check that.
Senator LUNDY—I am happy for you to take that on notice. I think it is an important question to get correct.

A: The lists of submissions from the two recent public consultations ('Regulatory issues associated with the NBN', June 2008 and 'Regulatory Reform for 21st Century Broadband', April 2009) have been reviewed. No persons who made submissions identified themselves as institutional investors. Two individuals who made a submission to the 2009 discussion paper identified themselves as Telstra shareholders.

12. *Legal advice on structural separation*

Senator BIRMINGHAM—Did you receive advice that, had this bill mandated structural separation rather than setting up the so-called choice that it sets up, the Commonwealth may have been liable to compensation claims or have an increased risk or exposure to compensation claims?
Mr Harris—Given that we are experimenting here with legal advice perhaps it might be better if I take that on notice and provide you with a written answer if that is acceptable.

A: The Department obtained all legal advice necessary on relevant matters. Disclosure of the legal advice obtained could prejudice the position of the Government in possible future legal proceedings, not necessarily connected with the particular issue raised.

13. *Separation as a global trend*

Senator BIRMINGHAM—What about when Telstra talks about separation as a global trend? Everyone likes to talk about the UK and New Zealand when talking about separation, but those instances have been matters of functional separation; they are not structural separation, which the government says is its clear desire from this. Where can we look to for structural separation and, indeed, can you point to separation as a global trend? Is Telstra wrong when it says that European regulators have explicitly rejected functional separation? It cites examples in the US and elsewhere.
Ms Spence—We would also look at the *OECD Communications Outlook 2009* publication, which refers to the fact that there are many cases where regulatory frameworks are being reviewed to

ensure that competition prevails. We can send the details of that through to the committee if that would assist.

A: A copy of the OECD *Communications Outlook 2009* is at Attachment B.

14. *Anti-competitive conduct in the wireless market*

Senator BIRMINGHAM—What evidence does the department have that Telstra is in any way impeding investment by competitors in the wireless market?
Mr Harris—I cannot specify on the wireless market, although we can go and look for individual advice, but I know the submissions from the ACCC listed and the EM contains examples of specific activities or inactivities. We can provide you with some advice on that if you would like.
Senator BIRMINGHAM—Are those specific activities all relevant to the fixed-line market?
Mr Harris—I do not have them with me, so it is very hard for me to say what they do or do not do. I am saying that we will ask the ACCC for what information they have in this area, if that is what you are looking for. In this hearing we are trying not to turn this into a Telstra-bashing outcome. But, if you are interested in gaining information, we can supply information to the committee.

A: The ACCC has advised the Department that it has received complaints in the past about bundling practices, including allegations of cross-subsidisation between legacy access services and more competitive services, including mobile services. The complaints included suggestions that these practices were inhibiting investment.

The OECD has also concluded that Telstra's horizontal integration has reduced the development of facilities-based competition in Australia in comparison to other countries and has contributed to Telstra's dominance in the market. The OECD has also acknowledged the resultant negative affects on competition that Telstra's high-level of integration can have:
'*The broadband sector, which is regulated by the ACCC, is dominated by the incumbent, Telstra, which was privatised at the end of 2006. This company has more than two-thirds of the market and plays a major role on all platforms for access to these services. Telstra controls over 80% of the sector that uses digital subscriber line (DSL) technology, and it owns the copper telecommunications network. It also owns more than 50% of cable-related infrastructure and has a strong presence in mobile services that use wireless technologies. This impedes competition between technologies, yet such competition is fruitful as it encourages product differentiation. Indeed, Telstra has little incentive to develop new services for each of these platforms, which would tend to lower the value of its current assets (i.e. copper network) and reduce income earned on other networks.*'

—Organisation for Economic Co-operation and Development, *OECD Economic Surveys: Australia*, 2008, pp.116–117.

15. *ACCC delegation of power to a single commissioner*

Senator MARK BISHOP—Is that determination process by the ACCC proposed to be done at single commissioner level or at panel level? Is the appeal mechanism from determination in the first instance on merit review or only on point of law review?
Mr Buettel—On the first question, the power is given to the commission. For significant access determinations, I would expect that the commission as a whole would make the determination. But I must admit I am not actually sure what arrangements the commission has for delegation of powers. Whether they have the power to delegate to a single commissioner to make a determination is a matter that we would have to check with the ACCC.
Senator MARK BISHOP—Can you check that and advise the committee?

A: The ACCC advises that section 25 of the *Trade Practices Act 1974* provides that the Commission may, by resolution and with some specific exceptions, delegate to a single Commissioner any of the Commission's powers.

16. *Impact on Telstra's workforce*

Senator FISHER—Given the concerns about this issue [the impact of the bill on Telstra's workforce], are you able to make that work public, the work you have said you have done?
Ms Spence—As I said, we considered what the impacts would be. I can take on notice to see if there is anything further that we can put into the public arena, if that is all right.
Senator FISHER—And if it is not able to be made public, why not? Thank you.

A: In preparing the regulation assessment on measures for addressing Telstra's vertical and horizontal integration, the Department considered the broad range of potential costs of the measures included in the Bill. The Department decided that as structural separation is not a mandatory requirement under the Bill and as employees in divisions separated under a functional separation framework would remain employed by Telstra, no analysis was required.