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To: Committee Secretariat
Senate Standing Committee on the Environment, Communications and the Arts

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INQUIRY INTO THE TELECOMMUNICATIONS LEGISLATION AMENDMENT (COMPETITION AND CONSUMER SAFEGUARDS) BILL 2009

The Internet Society of Australia (ISOC-AU) welcomes this opportunity to comment on the Committee's Inquiry into the Telecommunications Legislation Amendment (Competition and consumer Safeguards) Bill 2009 (the Bill).

ISOC-AU's fundamental belief is that the Internet is for everyone. We provide broad-based representation of the Australian Internet community both nationally and internationally from a user perspective and a sound technical base. We also consistently promote the availability of access to the Internet for all Australians. Because the Internet is a central driving factor in the demand for broadband, ISOC-AU has a direct interest in the outcomes of the arrangements that will underpin the provision of the NBN and legislation that provides the regulatory framework in which the NBN is provided.

ISOC-AU goals for the NBN and its surrounding regulatory framework are that the NBN be:

- High quality and bandwidth;
- As symmetrical in upstream and downstream as possible;
- Available to Australians wherever they are located;
- Meet the communications needs of people with disabilities;
- Affordable; and
- Provided in a competitive environment that gives Internet users genuine choice of service and service provider.¹

The proposed legislative amendments should help set a regulatory framework that achieves those goals.

¹ ISOC-AU, Submission to Department of Communications, Broadband and the Digital Economy Inquiry, Regulatory Arrangements Associated with the National Broadband Network, August 2008, p. 1. (available on www.isoc-au.org.au)

1. MINISTERIAL DISCRETION

Our general concern with the Bill is the very significant power given to the Minister to 'determine' a number of quite significant issues. Under the Legislative Instruments Act 2003, it is likely that most if not all of such Ministerial Determinations or specifications would fit within the definition of 'legislative instrument'², and as such, are required to be 'registered' and then tabled in both Houses of Parliament for 15 sitting days, during which time they can be disallowed.³ While the legislation recommends that Instruments that will affect the public be the subject of wider consultation, lack of such consultation does not make the Instrument ineffective.⁴

The regulatory policy for telecommunications that has been followed for twelve years is for the 'greatest practicable use of self regulation' without imposing 'undue administrative or financial burdens' on industry.⁵ This has allowed those with important and informative experience and expertise to contribute (from both industry and consumer organizations) constructively to outcomes.

By using legislative instruments to effect significant changes to the telecommunications legislation, a wide body of informed industry and consumer knowledge may be effectively shut out from contributing to those changes.

For changes to the competition environment, this is less of an issue. There is provision for public consultation on Telstra's draft Functional Separation (and variation) before final approval of the undertaking. Further, the difficulties with both Part XIB and XIC have been well documented in reports by both the Productivity Commission and the ACCC, made after considerable public comment on problems with both Parts XIB and XIC,.

Wide Ministerial discretion for consumer protection is more problematic. The regulatory landscape with a new NBN is likely to be significantly different and therefore consumer protections for the new environment should be widely discussed prior to their implementation.

Recommendation

Parts four to six of the Telecommunications Legislative Amendment (Competition and Consumer Safeguards) Bill 2009 be amended to require the Minister to release discussion papers on proposed changes to the Universal Service Obligation, the Customer Service Guarantee and Priority Assistance before a Ministerial Determination is made.

2. FUNCTIONAL AND STRUCTURAL SEPARATION

FCC Chair Genachowski recently spelled out the importance of an open Internet and the challenges to that openness.

I am convinced that there are few goals more essential in the communications landscape than preserving and maintaining an open and robust Internet. I also know

² Legislative Instruments Act 2003, Section 5(1) – (3)

³ Legislative Instruments Act sections 24, 38.

⁴ Legislative Instruments Act Part 3.

⁵ Telecommunications Act 1997, section 4

that achieving this goal will take an approach that is smart about technology, smart about markets, smart about law and policy, and smart about the lessons of history.

The rise of serious challenges to the free and open Internet puts us at a crossroads. We could see the Internet's doors shut to entrepreneurs, the spirit of innovation stifled, a full and free flow of information compromised. Or we could take steps to preserve Internet openness, helping ensure a future of opportunity, innovation, and a vibrant marketplace of ideas.⁶

As we have set out above, one of the important ISOC-AU objectives for the NBN is that it is provided in a truly competitive environment that ensures user choice of service and service provider. The current competition rules have not been effective in delivering that competitive outcome.

In 2003-4, the Senate References Committee on Environment, Communications, Information Technology and the Arts held an inquiry into competition in broadband services. Their report concluded that the competition regime was not effective and should be reviewed.⁷ It is a conclusion shared by the Productivity Commission in its 2001 Report⁸ and the ACCC in its more recent report on competitive safeguards.⁹ Quoting from the more recent Department Discussion paper on the National Broadband Network Company, the negotiate-arbitrate framework for the access regime is 'ineffective, largely because there is a vertically integrated incumbent that has the incentive to discriminate in favour of its own retail business'.¹⁰ ISOC-AU supported, at the least, functional separation, and preferably structural separation to address the competition issues.

2.1. Functional Separation

The Bill provides that Telstra make a draft functional separation undertaking in accordance with the principles set out in the Bill and in accordance with requirements determined by the Minister. After the draft undertaking has been release for the very short period of 14 days, the Minister may accept of vary the undertaking. If varied, the draft undertaking is released for a further short period of public consultation before coming into force.

To the extent that Telstra's undertaking results in a more competitive environment, we support the proposed requirements for functional separation. However, Telstra is currently operating under requirements for Operational Separation, with the legislative wording of the current requirements very similar to wording for functional separation used in the Bill. As statements above suggest, Operational Separation requirements on Telstra have not resulted in a competitive environment.

⁶ Julius Genachowski, Chair, Federal Communications Commission, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity and Prosperity", The Brookings Institute, Washington DC 21/9/09 p, 4.

⁷ The Senate Environment, Communications, Information Technology and the Arts Reference Committee, Competition in Broadband Services, August 2004. See pages 72-79.

⁸ Productivity Commission (2001) Telecommunications Competition Regulation: Inquiry Report, Report No. 16, September, Chapter 9

⁹ ACCC, Telecommunications Competitive Safeguards for 2005 – 2006, May 2005, p. 55

¹⁰ DBCDE, National Broadband Network Company: Discussion Paper, August 2009.

If a functional separation regime is to be effective, we believe that there must be very detailed requirements on Telstra that ensure genuine separation of business units into infrastructure, wholesale and retail units, genuine equivalence of service offerings and sufficient mechanisms of transparency and accountability to ensure functional separation achieves its policy objectives. The undertakings made by British Telecom to the UK regulator, Ofcom, provide an example of the sorts of requirements that have been seen as necessary to ensure that the infrastructure arm of a telecommunications infrastructure provider (in the case of BT, called Openreach) provides all of its customers (including its own retail arm) with an equivalence of inputs, and provides the incentives within its infrastructure arm to do so.¹¹

Recommendation

The functional separation principles contained in the proposed Part 9 of Schedule 1 of the Telecommunications Act be considerably strengthened to ensure there is genuine separation of business units, genuine equivalence of offerings to all customers and sufficient mechanisms of transparency and accountability to ensure true functional separation.

2.2. Structural Separation

Telstra may choose to structurally separate, particularly with the incentive of possible access to new spectrum for wireless telecommunications services. If Telstra does choose this path, the regulatory framework clearly requires that the structurally separate company (NetCo) that provides the fixed network for fixed carriage services cannot be controlled in any way by the structurally separate Telstra.

2.3. A new landscape

At this stage, it is not clear whether Telstra will choose to structurally separate, or whether only functional requirements will apply. It is therefore also not clear what the relationship will be between the new NBNCo, Telstra's wholesale network (whether owned by Telstra or not) and other providers of communications links to customer premises (including, for example, TransACT or providers of fibre in greenfields estates.).

The Government's Implementation Study will be reporting to Government on a range of NBN issues including economic, operational and technical issues. If the Government's policy goals, as announced in April 2009, are to be met, then there should be minimum requirements for new providers (including providers to greenfields estates) of communications infrastructure.

Recommendation

To meet ISOC-Au objectives for high capacity and quality bandwidth and customer choice, minimum requirements be set on providers of communications infrastructure to the premises that include:

- ***The network be wholesale, open access, with non-discriminatory carriage of communications, regardless of service provider***
- ***Provision to the premises of 100Mb/s capacity at service quality levels***
- ***There is customer choice of service/service provider for services accessed over the communications infrastructure***

¹¹ See Ofcom. Final Statement on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002, 22 September 22 2005, pp 57-111.

3. CONSUMER PROTECTION

Because of the unknowns about future transmission provision and the retail environment, it is particularly important that there be wide public debate and consultation on what if any changes may be necessary. In that context, we are particularly concerned that the Minister has wide discretion to determine significant consumer protection measures under the Bill. As we recommend above, any changes to consumer protections should only be made after wide public consultation.

In the NBN environment the possibility is that telecommunications transmission will become more like a utility, where infrastructure companies (including NBNCo) provide the transmission on a wholesale access basis to various providers of applications and/or services. The issues for consumers in that context will be:

- Access to transmission capacity at minimum service levels and speed
- Access to at least a basic communication service (of their choice)
- Access to basic services that are affordable

Universal Service Obligation (USO)

As set out above, ISOC-AU objectives for communications are:

- Geographic reach – to **all** Australians
- High capacity – levels equivalent to 100Mb/s
- Affordability of minimum levels of a broadband service
- Accessible for people with special needs
- Customer choice of service(s) accessed

The existing universal service obligation, together with other legislative requirements, go some way towards meeting those goals. Our specific comments on the Bill's provisions on the USO are:

Customer Choice in communications media: Traditionally, the STS has been a fixed line service that supports voice communications (or its equivalent). The Bill would allow customers to choose to have either a VoIP service or a mobile service provided under the USO instead. We support an expanded definition of what must be supplied to all Australians. We particularly support the possibility of VoIP services being considered as an STS, as this reflects the growing use of broadband-based services for communications.

We believe, however, that the term VoIP should be replaced by 'communications over IP', or 'Voice or its equivalent over IP'. The term will then cover people who use the Internet or other communications devices.

Our concern with the inclusion of VoIP and mobile services in the STS is whether consumers will be sufficiently informed if they choose to have a VoIP or mobile service rather than a fixed line service. It will be ACMA that determines requirements that must be met if a customer is taken to have consented to having a VoIP or mobile service rather than a fixed line service.

Recommendation

That there is public consultation with a range of consumer groups before proposed changes to the standard telephone service are made. The consultation

process must cover what requirements must be met to ensure that, if a customer chooses to be supplied with a VoIP or mobile service rather than a fixed line service, the customer's consent is truly 'informed'.

Minimum transmission Capacity to all Australians: With the removal of the Digital Data Service Obligation, there is now no requirement that all Australians have access to minimum broadband speeds. To some extent, the Broadband Service Guarantee has addressed that issue. The Government's announced policy of fibre to the premises will clearly address access to transmission speeds for 90% of the population. However, if all Australians are to benefit from access to broadband speeds and access to the Internet, the policy should set minimum transmission speeds that should be provided to all Australians

Recommendation

That the USO be expanded to ensure that all Australians have access to a minimum level of a broadband service.

Affordability: Currently affordability requirements for low income Australians are on Telstra. Specifically, Telstra is subject to price control arrangements, and is required under its licence conditions to provide services for people on low incomes. The other affordability measures are through the Broadband Guarantee Scheme. Under the Scheme, if a service is not available to a consumer at minimum speeds, with minimum download requirements at a set cost, a subsidy is available. The advantage of that funding arrangement is that it allows for customer choice of provider, while ensuring affordability of a minimum level of broadband service.

Recommendation

That the USO be redefined to set a minimum level of broadband service (including download limit) at a set price that should be available to all Australians or, if not available, provide a subsidy to ensure its availability.

In the longer term, many more issues arise about provision of an STS, however defined. If Telstra structurally separates, where will the requirement to provide all Australians with minimum transmission capacity lie? And if there is a ubiquity of transmission capacity available to all Australians, will the USO be more concerned with service quality and affordability – and will the obligations fall on one USO provider, or the many providers that will now have access to an open access wholesale fibre pipe?

It may be premature to make any changes to the USO regime until there is a clearer picture of the provision of a minimum service quality transmission to all Australians.

4. CONCLUSIONS

ISOC-AU welcomes provisions on functional and structural separation that will considerably strengthen competition in telecommunications. While we have not commented in any detail on the significant changes to Parts XIB and XIC, those changes will also support a more competitive regime, even without structural separation of Telstra. We also stress, however, that if Telstra does not choose to structurally separate, the rules surrounding functional separation must be far stronger than the current Operational Separation regime, and more in line with functional separation requirements on BT.

The Minister has powers to make some important changes to consumer protection measures, particularly to the Universal Service Obligation. However, we believe that any changes to consumer protections must not be made without wide public consultation, and only after a better appreciation of what the future telecommunications landscape will be.

We will be happy to provide any further comments on issues raised by this Inquiry

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