

# QONs- Inquiry into the Telstra Corporation and Other Legislation Amendment Bill 2021

Department of Infrastructure, Transport, Regional Development and Communications

**1. Can the Department provide further information on the consultation undertaken on the Bill, including in September 2021, and any planned further consultation, including:**

- **Which stakeholders have been consulted to date?**
  - On 14 September 2021, five industry stakeholders determined to be most significantly affected were provided a copy of the exposure draft of the Bill. Stakeholders were Telstra, TPG Telecom, Optus, NBN Co and Vocus. Amplitel was later consulted by Telstra.
  - Various meetings were held with stakeholders within government from July 2021 to October 2021 which included the Department of the Prime Minister and Cabinet, the Treasury, Department of Finance, Department of Defence, Australian Competition and Consumer Commission (ACCC) and the Australian Communications and Media Authority (ACMA). These stakeholders also received a copy of the exposure draft of the Bill.
  - It was determined that broader stakeholder consultation was not appropriate prior to introduction, due to the market sensitive nature of the Bill.
- **What involvement did the ACCC have in the preparation of the Bill?**
  - The Department consulted with the ACCC at various times during the development of the Bill. In particular, the ACCC was consulted in relation to the authorisation provisions (see items 2, 79, 80 and 81 of Schedule 1, item 48 of Schedule 2, and item 1A of Schedule 3 of the Bill). ACCC representatives were invited to participate in discussion forums, such as inter-departmental committees. The Bill makes amendments to the *Competition and Consumer Act 2010* which is administered by the ACCC. The Treasurer gave authority for the amendments associated with authorisation provisions.
- **What issues were raised and by which stakeholders?**
  - On 14 September 2021, the Department released an Exposure Draft to industry stakeholders. Stakeholders provided commentary on areas of interest to them. These included comments regarding extending the tower access regime with concerns about how this may impact commercial negotiations, application of foreign ownership restrictions, the appropriateness of capturing certain 'Telstra successor companies' and the scope of anti-cartel conduct provisions in relation to the Definitive Agreements between Telstra and NBN Co Limited (NBN Co). The Department is limited in the details it can provide as feedback was provided in confidence.
- **How were the issues raised addressed in the Bill's drafting?**
  - Issues that arose from consultation on the Exposure Draft were reviewed. Each issue was considered and several policy options were evaluated in light of the feedback. Based on feedback, amendments were made in several instances.

- **Is any further consultation anticipated, including prior to the Bill’s commencement, and during implementation (including the 6-month consultative process involved in determining the control threshold for the facilities access regime), and, if so, with which stakeholders?**
  - The Department has met with the Australian Communications Consumer Action Network (ACCAN), the Communications Alliance and BAI Communications. The Department has also contacted the National Farmers Federation to brief it on the Bill. The Department remains ready to discuss the Bill with any further stakeholders that indicate an interest in the Bill.
  - The Department continues to meet with industry stakeholders on a range of issues relevant to the industry, of which one is the Bill.
  - As set out in the Bill, the extension to the tower access framework is dormant for six months from Royal Assent. The Bill requires that the ACCC undertake an inquiry into the control threshold used. The Department tested a range of potential control thresholds during the development of the Bill. Whilst the Department’s view is that the initial control threshold of 15 per cent was appropriate, this could be usefully tested by the competition regulator in a public inquiry process, with advice to be provided to the Minister.
  
- **Are any amendments being considered to the Bill as drafted and if so, at what stage of drafting are these at?**
  - The Government hasn’t been asked to agree to any amendments at this stage. However, the Department is in discussions with Telstra and NBN Co about their concerns regarding the authorisations provisions (see items 2, 79, 80 and 81 of Schedule 1, item 48 of Schedule 2, and item 1A of Schedule 3 of the Bill).
  - The Department is also in discussions with BAI Communications (further detail is provided below).

**2. Can the Department consider and respond to the issues raised in Telstra’s submission (of 1 November 2021), giving particular attention to the following specific issues raised and amendments proposed:**

- **That the drafting of proposed subsection 577BA(10C) in the *Telecommunications Act 1997* is too narrow (pp. 4-5);**
  - The Department notes that authorisation provisions in the Bill are tightly drafted. This is intentional. The authorisation provisions intended to enable the Definitive Agreements between Telstra and NBN Co that underpin the operation of the National Broadband Network to continue to operate following Telstra’s restructure. However the provisions are designed to avoid permitting unrelated anti-competitive or cartel conduct which would not be in the public interest.
  - The Department further notes the purpose of the *Telstra Corporation and Other Legislation Amendment Bill 2021* is to maintain regulatory equivalency. Therefore the Bill needs to facilitate Telstra and NBN Co putting in place arrangements akin to what applies to Telstra and NBN Co today, and not extend to Telstra or NBN Co new, more favourable arrangements.
  - The Department understands the concerns raised by Telstra and NBN Co and is considering amendments to provide appropriate limited additional flexibility.

- **Suggested amendments to the new section 80 and subsections 577BA(10A) and (10B) of the *Telecommunications Act 1997* (p.5);**
  - The Department believes the transitional provisions in the Bill are appropriate, although are in ongoing discussion with Telstra. We make the following observations:
    - Regarding section 80: Telstra commented in its submission to the Committee that minor amendments are needed to ‘the transitional authorisation given by the new s80 of the *Telecommunications Act 1997* so that members of the Telstra Group are authorised to engage in conduct to facilitate the operation of the current Definitive Agreements prior to scheme implementation’. Section 80(2) of the Bill is intended to do that, and operates prior to the scheme commencing.
    - Regarding subsection 577BA (10A) and (10B): The Department believes that the associated provision already apply to Telstra, NBN Co and necessary associated subsidiaries. The use of the term ‘body corporate’ at 577BA (10A) and (10B) is intended to apply to both entities, unless otherwise indicated.
    - The Department is discussing the issue further with Telstra.
  
- **That the Bill should include wording to clarify that if an obligation in relation to a Structural Separation Undertaking or Migration Plan is performed by one party it is then taken to have been complied with by others (and suggested new subsections 577ACA(3) or (5) and 577BEA(3) or (5) (pp. 5-6));**
  - The proposed section 577ACA re-points the structural separation undertaking. Subsection 577ACA(1) states that if a structural separation undertaking is in force, it is as if each obligation and prohibition imposed on Telstra were imposed instead on the specified Telstra successor company specified in an instrument under proposed subsection 577ACA(2). Subsection 577ACA(2) allows the Minister, by legislative instrument, to specify one or more designated Telstra successor companies for re-pointing the structural separation undertaking. Subsections 577ACA (3)-(4) allow the Minister, by legislative instrument, to determine that one or more specified obligations or prohibitions in the structural separation undertaking are not re-pointed to one or more specified designated Telstra successor companies.
  - The Department does not support amendments to the Bill in relation to a Structural Separation Undertaking or Migration Plan where the obligations are performed by more than one party, and it is then taken to have been complied with by others (including Telstra’s suggestions for new subsections 577ACA(3) or (5) and 577BEA(3) or (5)). The Department’s view is this would have unintended consequences - where multiple Telstra entities have obligations placed on them in relation to structural separation, only one Telstra entity would be required to meet that obligation (making the amendment suggested, would for example, allow entities in the group to vertically integrate, as long as one was structurally separated).

- **That the regulatory regime of the *Foreign Acquisitions and Takeovers Act 1975 (FATA)* is a more appropriate regime to regulate foreign ownership in InfraCo Fixed, ServeCo and Amplitel than the *Telstra Corporation Act 1991* (pp. 6-7);**
  - The Bill intends to create legislative equivalency, so that the obligations that apply to Telstra today continue to apply to the appropriate Telstra successor companies. It is not the Bill's intention to amend the regime to regulate foreign ownership of Telstra in a new way. The foreign ownership provisions in the *Telstra Corporation Act 1991* reflect Telstra's history as a significant national telecommunications service provider and were debated at length during the privatisation of Telstra. The Bill does not seek to alter this position, it simply continues it.
  - The Department notes that the FATA regime serves a different, and complementary purpose to the foreign ownership restrictions being carried forward in this Bill. FATA provides a mechanism to control, including by limiting foreign ownership. The *Telstra Corporation Act 1991* restrictions place a ceiling on foreign ownership. Entities in the Telstra group will need to comply with both frameworks.
- **That the requirement to notify of the transfer or variation of relevant contracts may impose a significant regulatory burden on Telstra (p. 9);**
  - Telstra plays a unique role in the Australian telecommunications market nationally as well as in regional, rural and remote Australia. Telstra's public interest telecommunications obligations generally apply nationally. However, they can be of added importance in regional, rural and remote Australia where alternative telecommunications providers may be limited, and communications are crucial to overcome geographical and social isolation. Therefore it is essential that Telstra maintains its regulatory obligations, for essential consumer services such as Universal Service Obligation (USO) that guarantees the delivery of basic telephone and payphone services, including in rural and remote areas, the Customer Service Guarantee (CSG), the Network Reliability Framework, and Priority Assistance, as well as the operation of the Triple Zero Emergency Call Service.
  - The Bill includes the requirement to notify the transfer or variation of relevant contracts. This is essential in providing the Government with the necessary visibility to monitor and regulate the provision of communications, to which Telstra provide critical infrastructure and services to all Australians. It is expected that Telstra entities will establish inter-company contracts to maintain the supply of important services relating to the USO and other obligations. The Bill establishes a right for the Commonwealth to obtain copies of these contracts in order to understand if they will enable regulatory obligations, such as the USO or CSG, to continue to be met.
- **That the requirement to notify of a transfer of a telecommunications asset can be managed, provided any declaration by the Minister exempts non-material assets and businesses (p. 10)**
  - In its submission, Telstra makes the statement that it can manage the reporting requirements provided that the Minister exempts non-material assets and businesses.
  - The Department notes the requirement to notify is inactive, by default on commencement of the Bill.

- If the Minister activates the notification provisions by legislative instrument (see 581P (5) of the Bill), the Minister may declare by legislative instrument that a particular transfer of a prescribed business is exempt (proposed subsection 581P (2)) or that a specified telecommunications asset is exempt (proposed subsection 581P (3)) from the notification obligations.
  - **That ‘the extent of...reporting obligations has not been settled’ in relation to notification of transfer of assets (p. 10). To what extent have these obligations been settled and what further consultation will be undertaken with Telstra to settle these obligations?**
    - The inclusion of various reporting obligations for Telstra Group companies to notify the Minister of proposed contracts, relevant contracts, or asset sales or transfers is an important safeguard in making sure that the extensive public utility Telstra provides to Australia, including remote and regional areas, continues into the future. While the Department notes that a broad reporting power could create uncertainty for Telstra, the Explanatory Memorandum makes clear the intention of the provisions are associated with ensuring continuity of delivery of essential services.
3. **The Ministerial directions powers to be included in the Bill (such as to give directions to a Telstra entity in relation to compliance with the Telstra Universal Service Obligation Performance Agreement (TUSOPA) and definitive agreements, and where an entity is failing to fulfil its obligations) appear to be broad in scope and provide the Minister with considerable discretion.**
- **Can the Department provide any information on controls that will be in place in the exercise of these powers?**
    - Telstra has indicated that its existing obligations under the TUSOPA and the Definitive Agreements will continue to be fulfilled, notwithstanding its restructure. However, these are significant, multi-year agreements that affect the interests of the telecommunications industry and end users.
    - The directions powers in the Bill would need to be exercised in a manner which was consistent with, and not repugnant to, the *Telecommunications Act 1997*. Further, where the exercise of one of the proposed directions powers was an administrative decision, it would need to be in accordance with administrative law principles (including for example, affording procedural fairness to the affected parties), and would be open to judicial review.
    - As set out in the Explanatory Memorandum for the Bill, the directions powers proposed in relation to the TUSOPA and Definitive Agreements, as with other directions powers, are limited due to a range of pre-conditions that would need to be satisfied. Firstly, a directions power could only be used where the Minister is satisfied that a designated Telstra successor company that is a party to the TUSOPA or Definitive Agreements has failed, is failing, or will fail to fulfil its obligations under the TUSOPA or Definitive Agreements. Secondly, such a direction must be linked to facilitating a designated Telstra successor company to fulfil its obligations under the TUSOPA or Definitive Agreements, and it could only be made where the Minister is satisfied that the body corporate has the capability (including the technical, operational and organisational capability) to comply with the direction, or could reasonably acquire such capability. Thirdly, the Minister may also not give a direction in relation to the TUSOPA or Definitive

Agreements unless the body corporate is either a constitutional corporation or carries on a telecommunications business as defined under proposed section 581L in the *Telecommunications Act 1997*.

- Further, where the above conditions are satisfied, before giving or varying a direction in relation to the TUSOPA or Definitive Agreements, the Minister would also be required to consult the public, including publishing a draft of the direction and have due regard to any comments received.
- Telstra has indicated to the Commonwealth, in discussions and in writing, on many occasions its intention to continue to fully deliver its obligations under the TUSOPA and Definitive Agreements, supported, where needed, by appropriate, comprehensive inter-company agreements. The TUSOPA and Definitive Agreements directions powers are not expected to be frequently exercised, but provides an additional safeguard, along with others in the Bill.

**4. The Department notes at page 5 of its submission that it is ‘considering the extension of other elements of the communications framework to related entities’. Has there been any consultation to date with stakeholders (including Telstra) on this proposal, or is any consultation anticipated, and, if so, when is this consultation anticipated to occur?**

- The issue of how corporate restructures could affect other elements of the telecommunications regulatory framework is complex and should be considered in a broader context beyond the issue of the Telstra restructure. The Department’s view is that the matter should be given its own policy attention. If the Department were to proceed with such an examination, we anticipate that public consultation would be undertaken as a matter of course. No timings have been determined.

**5. The Department is asked comment on the “Impact and Consequences of the Bill for BAI” section in pages 2-3 in BAI Communications’ submission (dated 1 November 2021), noting each specific area of concern, and also to comment on the proposed two amendments set out in paragraphs (i) and (ii) on page 4 of the submission.**

- The Department confirms that the Bill was not intended to place telecommunications facilities access obligations on towers used to supply broadcasting services. However, we consider that Schedule 4 of the Bill is essential to ensure that the facilities access regime for telecommunications towers cannot be avoided by a company changing its corporate structure.
- The Department is in discussions with BAI communications on this issue.