



Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts
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Australia

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7th October 2009

Dear Committee Secretary,

**AUSTAR Submission to the Senate Inquiry on the Telecommunications
Legislation Amendment (Competition and Consumer Safeguards) Bill 2009
(Senate Inquiry)**

AUSTAR United Communications Limited (**AUSTAR**) is regional Australia's leading subscription television provider, with more than 725,000 customers, or over 2.3 million regional Australians, enjoying our digital television service. Internet and mobile telephony complete AUSTAR's product offering. Competitive access to broadband infrastructure remains a critical issue for the future productivity of Australia, and this is particularly so within AUSTAR's regional footprint.

AUSTAR appreciates the opportunity to make this brief submission to the Senate Inquiry. We have only provided comments on those aspects of most interest to AUSTAR.

We welcome the introduction of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (**Bill**) into Parliament. The Government is clearly committed to reforming the current regulatory regime in order to improve competition in telecommunications markets during the interim period prior to the National Broadband Network (**NBN**) being fully operational. We fully support the Government's vision to establish the NBN to facilitate the delivery of competitive

broadband throughout Australia. The interim period, however, will be a critical phase in the development of the communications sector in light of the growing convergence of the telecommunications and content markets, and robust reform is required due to Telstra's dominance in these markets. Our views on the NBN announcement and the interim regulatory settings were articulated in more detail in our 3 June response to the discussion paper "National Broadband Network: Regulatory Reform for the 21st Century", a copy of which is attached for the Committee's information.

In summary, we believe that the Bill as proposed delivers appropriate and fundamental reform to the current regime, and is necessary in order to deliver a market structure and regulatory settings that will maximise the benefits of economic efficiency and productivity in the transition to the NBN. This in turn will improve the availability, affordability and quality of communications services throughout Australia but most significantly, we believe, in regional and rural Australia.

Structural Reform

Vertical Integration of Telstra

We welcome the proposals set out in the Bill which allow for Telstra to structurally separate on a voluntary basis. In light of potential compensation issues, this approach will remove the uncertainty and legal wrangling that would have ensued had such an approach been imposed by the legislation. As previously articulated, AUSTAR firmly supports a structural approach to the separation of Telstra.

As a commercial access seeker of domestic transmission capacity in the past while considering investment in alternative broadband access network infrastructure in regional areas of Australia, AUSTAR was severely disappointed by the lack of feasible services on offer by Telstra (the sole provider of many of these services in regional and rural Australia). We believe that the transmission products that we required for backhaul that Telstra offered to us, a potential competing access provider, were wholly distinct from, and inferior to, the products that Telstra Retail obtained. The difference in service definition, not merely price, enabled Telstra

Retail to provide services in a more cost-effective, tailored and efficient manner than its retail competitors. This is just one example of the way in which a vertically integrated provider, such as Telstra, can discriminate against its competitors. We believe that full separation is critical to ensure that equivalence requirements are met and to fully avoid the discriminatory behaviour that a vertically integrated supplier is incentivised to conduct.

We support the implementation of clear functional separation in the event that Telstra chooses not to submit an undertaking on structural separation, and support the principles proposed, namely that:

- a) Telstra must conduct its network operations and wholesale operations at arm's length
- b) Telstra must provide the same information and access to regulated services on equivalent price and non-price terms to non-Telstra wholesale customers as it does its retail business
- c) Telstra must put in place strong internal governance arrangements to provide equivalence transparency to both the regulator and access seekers.

Horizontal Integration of Telstra

In respect of the measures proposed in the Bill to address the horizontal integration of Telstra, AUSTAR supports the approach. As identified in the Explanatory Memorandum to the Bill, in most other developed countries there are outright restrictions on the fixed-line incumbents from owning cable networks. As far as AUSTAR is aware, there are few, if any, instances worldwide of integration between the incumbent telecommunications operator and the owner of a competing cable network. The competitive benefit derived from such basic infrastructure competition is well recognised in most countries. Cable deployments have traditionally relied on TV services as their core business, however the capacity for cable networks to compete in the provision of telecommunications services including broadband has provided important competitive tension to the incumbent telecommunications operator in most countries, and provided therefore some form of essential facilities competition. The unique integration of Telstra through its ownership of the ubiquitous

copper network and the major competing cable network, and its 50% ownership interest in the largest pay TV operator in Australia has removed this crucial competitive element and served to reinforce the dominance that Telstra has maintained in the communications market. As noted in the Explanatory Memorandum to the Bill, *“new products that a pure media company or a pure telecommunication wholesaler might offer are potentially not being made available to consumers.”*¹ The fact that FOXTEL has not extended its product portfolio to offer a competing broadband access product, unlike other major pay TV providers in the developed world, is a clear indication that the services and products available to consumers are being limited by the integration of Telstra and FOXTEL.

AUSTAR believes that the divestiture of FOXTEL is a critical step in addressing competition concerns raised by Telstra’s horizontal integration. The capacity for Telstra to lock up content through its media interests remains a key issue where Telstra retains market power in the communications sector. As noted by the Chair of the ACCC in a speech to ATUG in May 2009, *“exclusive agreements for the supply of content are not necessarily anti-competitive..... However, concerns could arise if a telecommunications network operator is able to acquire sufficient compelling content on an exclusive basis, such that it limits alternative network owners’ ability to offer attractive packages to consumers.”* Access to exclusive content is not in itself an issue, and is a fair and reasonable way in which content providers can distinguish their service offerings. The issue arises where the owner of the exclusive content is also dominant in the telecommunications market and can use its access to content to reinforce its dominance in the related market. Telstra’s ownership of FOXTEL, by its very nature, incentivises Telstra to use its content rights to further leverage its dominance in the telecommunications market. It is only by full separation that this issue is removed.

In relation to the limits on allocation of spectrum licences, AUSTAR supports the approach however we are concerned with the breadth of the Minister’s power to declare that Telstra is exempt from the requirement to give an undertaking relating to subscription television broadcasting licences. The Bill provides that the Minister may make such a declaration where the Minister is satisfied that the structural separation

¹ Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p 36

undertaking is sufficient to address concerns about the degree of Telstra's power in telecommunications markets. Any declaration is not a legislative instrument and would not therefore be subject to the scrutiny of Parliament. We acknowledge that with the extension of "content services" to the definition of "telecommunications markets" in Part XIB of the Trade Practices Act 1974 (**TPA**), the Minister must be satisfied that the undertaking addresses concerns about Telstra's power in content markets however the declaratory power granted through the Bill does not specify what form of structural separation would address the competition concerns that exist through Telstra's control of FOXTEL. As stated above, we believe that full divestiture is the only means by which these concerns can be satisfactorily addressed.

Trade Practices Reform

AUSTAR fully supports the amendments to Part XIA and Part XIB of the TPA. The reforms will provide greater confidence and certainty for potential competitors to Telstra, who are considering investing in telecommunications infrastructure or services.

Red Tape

We note that the Bill proposes to remove the obligation on carriers, with less than \$25 million revenue per annum, from paying the universal service levy and carrier licence charges.

We recommend that this be amended in line with Option C set out in the Explanatory Memorandum to the Bill so that carriers with revenues less than \$50 million are exempted from carrier licence fees and the costs of the USL and NRS.

Conclusion

AUSTAR appreciates the opportunity to contribute to the Senate committee's debate, and would welcome the opportunity to clarify any of these comments before the committee.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Deanne Weir".

Deanne Weir
Group Director Corporate Development & Legal Affairs

APPENDIX:

Austar United Communications Limited's Response To National Broadband Network:
Regulatory Reform for 21st Century Broadband
3 June 2009