

TELSTRA INQUIRY
Submission No. ...62.....

'yes'
OPTUS

Optus Submission to
**House of Representatives Standing Committee on Communications,
Information Technology & the Arts**
on its
INQUIRY INTO THE STRUCTURE OF TELSTRA

February 2003

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1. Overview

- 1.1 Optus appreciates the opportunity to provide a submission to the Standing Committee's inquiry. Since Optus entered the market for telecommunications services in Australia, there has been a substantial improvement in the range of communications services offered to all consumers. Prices have fallen substantially and service levels have improved. Optus believes that these outcomes are a direct result of increased competition across the telecommunications sector.
- 1.2 There is, however, more that can be done to enhance competition in existing markets and to ensure emerging communications markets (such as broadband) are not subject to Telstra's dominance. Telstra remains the vertically integrated owner of the ubiquitous customer access network (CAN) and its public switched telephone network (PSTN). As long as this remains the case, it has the capacity and the incentive to reduce competition in all markets that rely on these essential monopoly infrastructures as inputs.
- 1.3 Optus believes that whilst the structure of Telstra is an important policy question for Government to consider, there are more pressing public policy and regulatory reforms that need to be implemented in the telecommunications sector. Optus also believes that many of these reforms will deal directly with the concerns that proponents of structural separation are seeking to address. These include:
- *Tighter regulation of access prices for the CAN and PSTN services that are at the heart of Telstra's dominance.* Telstra's recent access undertakings for PSTN, local call resale and unconditioned local loop (ULL) services are an indication that its intention is to obfuscate the regulation of prices for these core access services. More prescriptive regulation of price and non-price terms of access to core telecommunications services may be warranted.
 - *Improving the terms of access to resale services* which are an important stepping stone to infrastructure competition
 - *Relieving competitors from obligations that apply to the incumbent.* This includes giving competing carriage service providers and carriers relief from the universal service obligation (USO) subsidy arrangement and the so-called Access Deficit.
 - *Increasing the regulator's powers to address discriminatory conduct.* At present, the standard access obligations (SAOs) are inadequate and do not have a robust enforcement regime. Reform is needed along the lines of non-discrimination rules which exist in the UK, the US and Singapore.
 - *Creating greater incentives for investment in competing infrastructure.* Mobile networks and aerial cable networks (such as Optus' HFC) provide the greatest opportunity to circumvent Telstra's bottleneck

infrastructure. These technologies have already shown capacity to substitute for the CAN and PSTN.

- *Measures that reduce the cost of switching between telecommunications carriers.* This has been achieved in part through number portability and preselection, but there remains substantial customer inertia that is limiting competitors from making renewed inroads on Telstra's market share dominance.
- 1.4 If measures such as these can be taken, then Optus believes the impact of Telstra's vertically integrated dominance can be reduced, and the costs of separation can be avoided. Optus believes that international experience (particularly in the US) shows that the time for structural separation may have passed. Policy and regulatory measures therefore need to face the realities of the existing competitive landscape.

2. Policy issues to be addressed

- 2.1 As in many countries, the aftermath of liberalisation (full or partial) and competition policy reform in Australia is a dominant vertically integrated incumbent carrier (Telstra). This reality creates many challenges for regulators and public policy makers as they try to introduce competition into the various markets and to ensure the benefits of competition are passed on to consumers.
- 2.2 In the 10 years since Optus entered the market there has been unprecedented growth in the take up of communications services including, internet, mobile, broadband, pay TV, data and voice. Customers have benefited from the diversity of products offered in the market place and prices have fallen significantly.
- 2.3 Unfortunately, competition has stalled in some markets. Telstra's dominance is entrenched in the local access and local call markets. The scope for inroads into these markets is found firstly in growth in mobile services and secondly direct connections to competing fixed access networks. These include Optus' HFC network, wireless local access networks, and to various competitors' CBD networks. Whilst these alternative networks are certainly significant, Optus does not believe their existence is of itself anywhere near sufficient to address Telstra's overwhelming market power.
- 2.4 In contrast, according to the Productivity Commission the mobile services market exhibits "characteristics of an effectively competitive market". Competition at both the wholesale and retail level is vigorous; product offerings are varied and price have fallen significantly. Importantly for competition, new entrants face few entry barriers and have the ability to achieve a disproportionately large share of new connections.
- 2.5 Unlike services that utilise the CAN, customer inertia in the mobile market is low, networks compete with each other for wholesale traffic and customers have a range of ready substitutes. As a result, Telstra has had greater difficulty in transferring its dominance of the fixed network into the mobile sector (though Optus monitors Telstra bundles of fixed and mobile services).

- 2.6 Going forward, Optus believes that some of the greatest risks to competition lie in the broadband market. At present, a range of technology, including HFC cable, satellite, wireless access, and xDSL over copper wire, enable this important emerging market. To the extent that these technologies rely on access to Telstra's CAN (in particular xDSL which is becoming an important delivery technology), Optus believes competition is at risk and that the take up of broadband services may prove to be less than optimal.
- 2.7 Telstra's vertically integrated structure provides it with the ability to substantially lessen competition in broadband through discriminatory conduct and high access prices. Geographic reach and local economies of scale mean that there are substantial first mover advantages in this market, particularly with xDSL over copper wire services. Already, competition concerns have arisen with Telstra's broadband ADSL service. Telstra's conduct amounted to a price squeeze and constructive refusal to supply services. As a result the ACCC issued a competition notice to Telstra on 7 September 2001.
- 2.8 More generally, it is important to identify at the outset the public policy concerns that the proponents of structurally separating Telstra are trying to address. While not exhaustive, Optus believes the key concerns relate to:
- *Anticompetitive or discriminatory conduct by Telstra.* The combination of Telstra's ownership of the ubiquitous CAN and PSTN along with its vertically integrated structure provides it with the means and opportunity to lessen competition in markets that are deemed to be subject to competition. It does this by providing discriminatory terms and conditions of access and by imposing vertical price squeezes on downstream competitors.
 - *Monopoly access prices.* Telstra's charges for core telecommunications services are some of the highest in the world. This has called into question the effectiveness of the regulatory regime of negotiate-arbitrate when applied to core services such as PSTN, local call resale and unbundled local loop services (ULLS).
 - *Lack of investment, innovation and service quality.* The characteristics of monopoly business are such that incentives to invest, innovate and achieve service levels comparable to competitive markets, are limited.
 - *Conflicting commercial and community obligations.* At the heart of the recent Estens inquiry is the tension that exists within Telstra in its role as commercial operating entity and its obligation to provide a universal standard telephony service to all Australians at a reasonable price.
- 2.9 A vertically integrated Telstra has potentially damaging effects on competition. By charging high prices for access to its core network it has the capacity to extract monopoly rents and to foreclose competition in downstream markets. As discussed, Telstra's ownership of the ubiquitous CAN and PSTN means that it can damage competition in all related markets.
- 2.10 Telstra still collects over 75% of all telecommunications revenues in Australia, and earns over 90% of the industry profits. Optus believes that this is not the result of Telstra's superior business operations, but is a function of inadequate regulation and competition reforms.

3. Objectives of reform

- 3.1 Tanner (2002) asks “what is the best way of ensuring that the positive impact of competition, new investment and innovation is maximised, and the broader community obligation of Telstra to ensure that all Australians have genuine access to essential communications can be achieved?”
- 3.2 Optus believes that Tanner’s question is central to the debate over the future structure of Telstra and the competitive landscape in the telecommunications sector over the medium to long term. Optus believes that competition; new investment and innovation are inextricably linked. By encouraging facilities based competitors to Telstra, the benefits of innovation are maximised and spread amongst all consumers.
- 3.3 Facilities based competition is central to the interest of end users of telecommunications services. Competition has brought many enduring benefits, not least of which are lower prices for existing services. The key to “future proofing” these same benefits for new services is supporting competition in emerging markets.
- 3.4 In the long run, competition will also serve to minimise the cost of community service obligations. This will not happen however, whilst new and competing carriers continue to subsidise Telstra’s profitable network business via USO subsidy arrangements and the access deficit levied on PSTN access charges.

4. Structural separation

- 4.1 Structural separation can be used as a regulatory tool to enhance competition within industries by removing the ability of a vertically integrated operator to misuse power in upstream markets to the detriment of downstream markets.
- 4.2 In the context of the telecommunications industry, a vertically integrated incumbent operator that controls the wholesale market (i.e. the local loop) has the ability to discriminate in competitive retail markets, or to create cross-subsidies that would provide the retail arm of the business with an unfair advantage over competitors. Structural separation attempts to drive a line between the competitive (retail) and monopoly bottleneck (wholesale) activities of the incumbent in order to ensure a fair and competitive downstream market.
- 4.3 Proponents of structural separation draw upon a variety of arguments to promote the use of structural separation by regulators. While these arguments are noteworthy, it is important to recognise that a variety of costs, and potential costs, are associated with structural separation. Indeed, the OECD recommendation on structural separation encourages member states to carefully balance the benefits and costs of structural separation versus vertical integration in the course of regulatory decisions.
- 4.4 It is unclear exactly what is meant by structural separation in an Australian context. Some valid questions include (a) Do you split of local loop co nationally or regionally? (b) Do you split of Country Wide? (c) Do you split of mobile or other competitive businesses? Clearly these issues would need to be

clearly defined before a complete analysis of the pros and cons can be undertaken.

- 4.5 The remainder of this section outlines the potential benefits that can arise as a result of structural separation, and then discusses the range of potential associated costs.

Potential benefits of structural separation

- 4.6 The motivating driver behind the use of structural separation in telecommunications markets is to promote and preserve competition in retail markets. Structural separation creates a more even playing field for retailers by forcing the incumbent's wholesale arm to deal with its retail arm on the same terms that it deals with any other competitor. A more even playing field will result in the emergence of stronger and more effective competition.
- 4.7 Enhanced competition will, by definition, promote new entry into the retail market. The benefits consumers can reap from increased entry into the market are obvious, where at the most fundamental level, increased consumer choice is synonymous with lower prices and better service.
- 4.8 It can be argued that the emergence of pressure by the retail arm of the incumbent on the wholesale entity to provide services at reasonable prices may exert downwards pressure on wholesale prices. This form of countervailing market power would be new to the market, as it is currently inhibited by:
- The lack of incentives for the retail component of Telstra to drive down wholesale prices, and
 - The absence of market power of new entrants in the retail market.
- 4.9 Structural separation can reduce (but not eliminate) the need for regulatory oversight of retail markets as it brings the incumbent's incentives more into alignment with non-integrated carriers, thereby promoting more effective competition. This would allow regulators to focus more fully on the wholesale network to encourage service quality, network reliability, and access to essential network facilities at cost-based prices.
- 4.10 Structural separation is a pro-active tool for enhancing competition, as opposed to a reactive tool (by contrast, the present regulatory regime relies heavily on reactive tools such as competition notices). Consequently, structural separation is arguably more effective. Structural separation targets the root cause of the failure of effective competition to arise within vertically integrated industries; that is, it removes the ability of the integrated firm to discriminate in downstream markets and create anti-competitive internal cross subsidies.
- 4.11 Structural separation would increase transparency, certainly more so than accounting separation.

Potential costs of structural separation

- 4.12 There are costs associated with structural separation which gives rise to the need for caution when considering the implementation of this regulatory option.
- 4.13 Allowing a monopoly entity to remain integrated may enable it to capture certain efficiencies if there are economies of scope between the operation of the wholesale and retail businesses. Conversely, once structurally separated, these economies of scope will be lost. Further, structural separation may deprive the entity of the full economies of scale, remove efficiencies, and increase operational costs. These increased costs would be passed onto downstream markets in the form of higher prices. While downstream retailers may absorb a proportion of costs, consumers will almost certainly be faced with higher costs.
- 4.14 The complexities of implementing structural separation are immense. Consequently, separation is a very time consuming and expensive exercise. This can give rise to: investment uncertainty, consumer confusion and delayed competition in the retail market. Again, these costs will almost certainly be passed onto consumers.
- 4.15 The dynamic nature of the telecommunications industry will lead to constantly shifting boundaries between activities that are competitive and non-competitive. This may give rise to the need to continuously adjust the degree of vertical separation. Consequently, the ongoing costs associated with structural separation may be high, and the resources necessary to monitor the on-going effectiveness of the industry's structure may be extensive.
- 4.16 Similarly, the telecommunications industry is characterised by rapid technological change, which will give rise to difficulties in determining the appropriate structure of the new wholesale and retail entities. In particular, regulators will be presented with the challenge of ensuring that regulatory outcomes are technological neutral, and that the costs associated with structural separation do not take longer to recoup than the technology itself will remain profitable or viable.
- 4.17 Another troubling issue associated with creating a separate monopoly entity lies in the resulting impact on innovation and infrastructure investment. It can be argued that the synergies between the retail and wholesale arms of Telstra incentivise continued investment and innovation of the local loop, as a poorly managed local loop can detrimentally impact on the performance of the retail arm of Telstra. In the event of structural separation, given that a poorly managed local loop will not necessarily translate to poor financial performance of the local loop business, the removal of the direct link between local loop operation and retail financial performance could remove the incentives of the wholesale operator to ensure an efficiently functioning local loop.

5. Priorities for a reform agenda

- 5.1 As discussed, Optus does not believe that structural separation is a panacea to the underlying competition issues within the telecommunication sector. Given

the mature state of the market in Australia, Optus believes that there are greater priorities for reform than the structural separation of Telstra. These are discussed below.

Regulating access prices for “core” services

- 5.2 Telstra’s dominance of the fixed local loop enables it to charge monopolistic prices for access interconnection and other building block network services that use the local loop.
- 5.3 Telstra’s current practice is to provide PSTN, local services resale and unbundled local loop services (ULLS) on unreasonable terms and conditions, including excessive prices. This practice is reducing entry, downstream competition and innovation, and lowering consumer welfare. Hence, pro-competitive interconnection regulation of these services will foster efficient and prompt competition at the local exchange level. The task of setting fair and reasonable terms of interconnection for unbundled local loop and local resale services remains to be implemented under the Part XIC access regime.
- 5.4 Access price regulation should be focussed on only those telecommunications services where there is substantial market power in supply of building block services. The recent amendments to the *Trade Practices Act 1974* have defined these as “core” telecommunications services, though Optus believes these should be extended to include not only PSTN, ULLS and local call resale, but also non-competitive transmission, ISDN and other natural monopoly infrastructure. This better balances the dangers of over-regulation of competitive services versus the under regulation of monopoly services.
- 5.5 Notwithstanding ACCC intervention¹, there is still a substantial gap between Australia and world’s best practice interconnect rates as found by telecommunications consultants Ovum International in their latest international benchmarking of telecommunications interconnection rates at May 2000. This shows PSTN prices of the sixteen best practice incumbent carriers in other countries are between 0.6 to 1.6 cents per minute. In contrast, Telstra’s access undertaking of January 2003 seeks a rate of 1.7 cents per minute.
- 5.6 Similarly, Telstra does not provide competitors with a local calling product at prices that permit effective competition — or that reflect costs Telstra avoids from not retailing local services. Hence Telstra’s competitors, when adding their own retailing costs, are required to loss-lead in the provision of local calling via resale if they are to provide consumers with the one-stop shop or complete telephony service. This has decreased effective competition in both local and long-distance calling as well as the internet services market.
- 5.7 Whilst reforms have recently been made to the operation of *Part XIC* to encourage Telstra to submit undertakings for core services, it remains to be seen whether Telstra are truly committed to giving access seekers fair, reasonable and efficient prices, free of monopoly profits. It also remains to be

¹ See Optus’ submission to the Productivity Commission inquiry into Telecommunications Competition Regulation for a history of telecommunications access pricing in Australian and the ACCC’s interventions.

seen whether Telstra will seek to delay, appeal and obstruct the regulatory process provided under *Part XIC*. After 5 years of debate we still do not have certainty on the price of key inputs to telecommunications services. The rest of the world has moved on, whilst Australia continue to debate fundamentals.

- 5.8 Optus believes the next 12 months to be an important test for Telstra, the ACCC and the regulatory regime (including the recent reforms). If Telstra does not accept the regulator's decisions and do not offer acceptable price undertakings, then the Government should seriously consider the introduction of tighter, more prescriptive regulatory controls. These may need to be introduced in the form of wholesale price caps for "core" telecommunications services, or a power for the ACCC to set prices for "core" telecommunications achieve the objectives of *Part XIC*. This would give the ACCC the equivalent role of OFTEL in the UK and the IDA in Singapore.

Relief from obligations imposed on the incumbent

- 5.9 Optus believes that competition is being hindered because competitive carriers are compelled to subsidise Telstra to fulfil its obligations in relation to the provision of universal services and its retail price controls. In addition, Optus believes that the Government's approach to funding of rural and regional telecommunications has entrenched Telstra's monopoly position. While expedient, this will not serve regional users in the long term who know that competition is the only way of "future proofing" their services.

Universal service obligation (USO) subsidy

- 5.10 The requirement of other carriers to cross-subsidise Telstra to provide USO services acts as a severe impediment to the provision of advanced and competitive services in non-metropolitan Australia. Whilst the USO as a mechanism to provide basic services is supported, there needs to be reform as to the way the USO is funded.
- 5.11 The Government should accept the recommendation of the Estens Inquiry that there be a review of the USO, particularly its impact on competition.
- 5.12 In Optus' submission such a review should find that Telstra should fund the USO in its entirety, consistent with the obligations on many other incumbent telecommunications companies around the world. A policy of the incumbent funding the entire cost of the USO is not new. British Telecom bears the full cost of the USO in the United Kingdom. An examination of EC countries shows that other than Italy and Spain the incumbent does not receive a cross-subsidy from its competitors. Finland, Sweden and Norway are particular examples. Like Australia, large proportions of these countries are remote, thinly populated and face extreme weather conditions.
- 5.13 Optus supports the USO mechanism as the main means of ensuring the provision of basic communication services. The issue that need to be considered is the way the USO is funded. The essential problem is that the requirement of other carriers to pay Telstra to provide services is a huge barrier to improving communications services in regional Australia.

- 5.14 As noted by the Productivity Commission, the nature and extent of universal service arrangements, and their funding, can affect services and competition, particularly in regional areas.²
- 5.15 In Optus' view, the current USO funding arrangements have a detrimental effect on the provision of competitive services in rural and regional Australia. This is as a consequence of a regime that requires competitive carriers to fund the provision of Telstra's service in rural and regional Australia. That obligation has a number of very negative consequences for the promotion of competition.
- 5.16 First, in an environment where competitive carriers are struggling to make inroads against the continuing massive dominance of the incumbent, the USO regime actually *requires* competitive carriers to cross-subsidise Telstra's activities, and thus strengthen Telstra's position.
- 5.17 Second, the USO contribution acts as a significant disincentive for competitive carriers to provide their own regional and rural services. When a carrier is forced to pay another party to deliver standard services, there is no incentive to itself provide standard services, and a much more limited incentive to provide any additional services.
- 5.18 Third, the contribution of other carriers to Telstra bolsters the significant value Telstra obtains from being the national carrier, and providing a ubiquitous service. These benefits are not considered when the USO is valued. Therefore, other carriers are paying Telstra to entrench its rural and regional dominance. Telstra makes much of its regional role in its marketing, which Optus and other carriers partially fund.
- 5.19 Fourth, there is no understanding or acknowledgment amongst rural and regional consumers of the USO regime, and that the industry as a whole contributes to the provision of their standard telecommunications services. This creates a perception amongst regional and rural consumers cementing their loyalty to the incumbent, and making change less likely.

Access deficit contribution

- 5.20 The access deficit contribution (ADC) is a significant proportion of the PSTN access charges paid to Telstra. Based on the ACCC's indicative price of 1.3 cents per minute for 2001/02, the ADC represents 0.57 cents per minute or 44 per cent of the charge.
- 5.21 The ACCC defines an access deficit as existing when "...the revenue from line related charges (e.g. connections and line rental) is insufficient to cover line related costs."³ Increases in line related charges are constrained by Telstra's inability to increase line rental charges for basic telephony. It cannot do this because of the Retail Price Control instruments imposed by the Government. Presently this is set at CPI plus 4 percent.

² Productivity Commission, Telecommunications Competition Regulation, Sept 2001, p 561

³ ACCC, *A report on the assessment of Telstra's undertaking for the Domestic PSTN Originating and Terminating Access services*, July 2000. Page 20.

- 5.22 Optus believes the ACCC's current definition of 'line related charges' is overly narrow. There are strong arguments to suggest that the ACCC's focus on connection and line rental revenues is inappropriately narrow and that the calculation of the access deficit should take into account contributions from all services that use the CAN. Narrowly defined, such net revenue streams may include net revenue from xDSL, ISDN, and line sharing. Broadly defined, such net revenue streams could include the value added to the incumbent in other areas (eg, higher mobile revenues) as a result of benefits it receives from its CAN related customer base.
- 5.23 Telstra itself has implicitly supported such an approach when making submissions on the appropriate ADC to be included in ULLS charges. Telstra claimed that the access deficit is a common cost to the PSTN and ULLS and argued that total service long run incremental costs (TSLRIC) should include a contribution toward common costs. Telstra also claimed that the access deficit is a common cost to providing all services using the CAN and that all calls using the CAN should contribute to the deficit on an equitable basis.⁴
- 5.24 Notwithstanding these technical arguments, the reality is that Telstra's CAN and PSTN are hugely profitable. Telstra uses the monopoly profits it earns on wholesale access to these services to subsidise its inefficiency in markets where it faces competition. As a result, competition is lessened and consumers miss out on lower prices for basic services.

Funding for regional telecommunications

- 5.25 Funding arrangements for regional communications need reassessing. Under past policies, funding has mainly propped up the incumbent, bolstered its near monopoly position in regional Australia, and failed to support new technologies and advanced solutions.
- 5.26 Since 1997 over \$750m has been applied to regional communications. Most of that has either been applied to piecemeal projects, of little demonstrable benefit, or it has supported Telstra.
- 5.27 Where funding for large-scale infrastructure projects has been made contestable, such contestability has generally been an illusion. Almost no other carrier has been in a position to compete with Telstra in regional areas. Optus has significant practical experience of the anti-competitive hurdles erected by both the Government and Telstra. The un-timed local calls tender, and tenders to improve mobile coverage are particular examples.
- 5.28 Policy needs to change to achieve optimal outcomes. There needs to be focus on funding projects of scale. Demand aggregation is an important means of achieving this. New mechanisms are required to promote competitive infrastructure, for example including sustainable infrastructure competition as an explicit criterion in the selection of proposals that receive telecommunications funding and contracts.
- 5.29 The recent National Communications Fund (NCF) illustrates a much better funding mechanism to improve communications services in regional Australia.

⁴ See page 20 of the ACCC's *Pricing of the Unconditioned Local Loop*, Final Report March 2002

NCF as a model has been endorsed by the Estens Inquiry. Estens has also recommended the introduction of an incentive scheme to promote broadband. If properly designed, Optus supports such a scheme.

Enhancing the standard access obligations (SAOs)

- 5.30 The ability of a vertically integrated incumbent to discriminate between its downstream competitors in favour of its downstream division raises serious anti-competitive concerns. Whilst Optus supports the efforts of Government to increase transparency via improvements to the accounting separation regime (the Regulatory Accounting Framework), more “operational” reforms are need to discourage discriminatory tactics.
- 5.31 In particular, reform is needed on two fronts; the standard access obligations (SAOs) need to apply to all Telstra wholesale services, and an enforcement regime more flexible than the Federal Court needs to be introduced.

SAOs need to apply to all services

- 5.32 The reforms implemented in December 2002 have improved and enhanced the SAOs. The SAOs now explicitly cover ordering and provision, however, the new arrangements are still sub-optimal and provide Telstra with too much scope for discrimination. The non-discrimination standards based on the SAOs still only apply to declared services and interconnection and not to the full range of services supplied by Telstra to Optus.
- 5.33 An international survey of rules to prohibit discriminatory conduct shows that unlike the restricted Australian approach, the new EU directive does apply a non-discrimination principle broadly to interconnection and access. The terms interconnection and access are not further defined by the EU, with regulatory agencies of member states being given the authority to determine the type of services to which the non-discrimination principle should apply.
- 5.34 In the UK, Oftel has proposed that an access service for the purposes of non-discrimination as provided by the EU, means “any wholesale service that enables competitors to deliver their own services to customers (eg. network elements, end to end service or an interconnection service). It may also consist of a right to use or have access to a facility associated with a network or a service”. Clearly, this definition of access would incorporate within the non-discrimination principle a whole range of services that are currently outside of the SAO based non-discrimination principle in Australia. An example of such a service is ADSL services supplied by Telstra to other carriers on a resale basis (Optus does not acquire wholesale DSL from Telstra). These are currently outside of the SAOs based non-discrimination principle.
- 5.35 In the USA, as in the EU, the non-discrimination principle is not restricted to any sub-set of services, with the non-discrimination principle applying broadly to the provision of interconnection and access to network elements. The breadth of the individual services to which the non-discrimination principle applies results from the broad definition that the FCC has given to the term “network element”. “Network elements” includes all facilities/ equipment

used in the provision of telecommunications services and all features, functions and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signalling systems and information sufficient for billing or collection or used in the transmission, routing, or other provision of a telecommunications service.

Enhanced enforcement regime for the SAOs

- 5.36 The existing regime in Australia does not provide for a formal regime for ACCC guidelines and enforcement of the non-discrimination standards. The only recourse available to an affected party is the taking of private actions in the Federal Court. This unsophisticated and ineffective enforcement regime has resulted in the non-discrimination principle rarely achieving its objectives at a practical level.
- 5.37 In the absence of internal separation within Telstra, the concept of “supply to itself” is difficult to apply in practice. Within a vertically integrated entity, it is difficult to determine which step in the internal chain of supply is a relevant point of comparison for the purposes of the SAOs
- 5.38 The enforcement powers under the EU regime are a contrast to the largely ineffective Australian approach. Although the EU has not provided any clear guidelines on enforcement, member states (with the UK being an example) have set up strict enforcement regimes to ensure that the objectives of non-discrimination are achieved in practice. In the UK, Oftel has proposed that it will impose and enforce non-discrimination by:
- Requiring each party to whom the non-discrimination standard applies to set out terms and conditions of supply in a reference offer.
 - Issuing guidelines on how Oftel would assess whether a request for supply is reasonable, whether the terms (including non-price terms such as service level guarantees and provision times) of supply are reasonable and what should be included in the reference offer.
- 5.39 The enforcement powers under the US regime are also a contrast to the largely ineffective Australian approach. As with the approach of the EU, the FCC is empowered to arbitrate in relation to access disputes to ensure that the non-discrimination principles are adhered to. Furthermore, the FCC has set down a set of guidelines to be enforced by the state regulators for the collection of sufficient information from the ILECs to measure their compliance with the non-discrimination principle. These guidelines relate to the measurement of the ILEC’s compliance with the pre-ordering, ordering, provisioning, maintenance/repair and billing elements of the non-discrimination principle.
- 5.40 A strong and effective enforcement regime also exists in Singapore, with the IDA having the authority to require any licensee to obtain independent audits to prove its compliance with the non-discrimination standards.

Supporting competing infrastructure

- 5.41 A number of different technologies can now be used to provide telephony services to customers in competition with Telstra’s fixed line network. These

include services across the three mobile networks, fibre optic cable networks in CBD areas, Optus' HFC network and services via satellite.

- 5.42 Such technologies cannot yet compete on cost with Telstra's ubiquitous network, and duplication remains uneconomic. Telstra dominance remains in all but a small number of areas where alternative technologies can compete. However, as these initial investments have shown, facilities based competition is the only real opportunity to reduce the power Telstra holds via its ownership of bottleneck infrastructure.
- 5.43 Regulation of these new technologies and service is inappropriate and counter productive. Indeed, the Productivity Commission found that the grounds for regulating mobile services is weak given low entry barriers to the industry and the existence of workable competition.
- 5.44 Unfortunately, the ACCC has been inconsistent in its decisions in relation to the encouragement of facilities based competition. It has, for example, exempted local call resale in CBD areas from regulation because it believes these areas have developed sufficient competing networks to act as a competitive substitute for Telstra's network. However, the ACCC continue to regulate mobile termination.
- 5.45 Optus believes the declaration of mobile termination should be revoked. Instead of imposing restrictions on competing infrastructure, the Government should consider incentive mechanism and subsidies for carriers to extend the geographic reach and integrity of networks that can act as substitutes for Telstra's bottleneck infrastructure.