

Chapter Eight

Reforming the Regulatory Environment

8.1 This chapter considers the impact of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, particularly as it relates to the NBN.

Background¹

8.2 Until 1997, Telstra, formerly Telecom Australia,² was a Commonwealth Government statutory authority under the *Telecommunications Act 1975*. That Act established Telstra as the monopoly provider of domestic telecommunications services with exclusive rights to supply, install, maintain, repair and operate the basic telecommunications services in Australia. Telstra was also the technical regulator of customer service equipment, private telecommunications networks and value-added services.

8.3 During the 1980s Telstra's monopoly position faced significant criticism on two main fronts: rapid changes in technology required significant new investment, which the government would struggle to afford; and pressure from businesses to relax Telstra's monopoly to create opportunities for private investment in the expanding telecommunications industry.

8.4 In 1989 an independent regulator, AUSTEL, was established and regulatory control of telecommunications was separated from Telstra. During the early 1990s the Australian telecommunications industry was gradually opened up to competition, in the first instance by allowing Optus to enter the domestic market, thus creating a duopoly; and also through enabling a triopoly in the mobile telecommunications market with Telstra, Optus and Vodafone. The *Telecommunications Act 1991* also merged Telstra and the Overseas Telecommunications Commission (OTC) - previously a separate statutory authority - into a single publicly owned carrier.

8.5 Under the previous Coalition Government, Telstra was privatised in three stages in 1997, 1999 and 2006. In 2006, the remainder of the government's shares (then comprising around 17 per cent) were transferred to the Future Fund.

1 O'Leary, G, 'Telstra Sale: Background and Chronology', *Parliament House of Australia, Parliamentary Library*, 15 September 2003, available at <http://www.aph.gov.au/library/pubs/chron/2003-04/04chr03.htm#appendixc> (accessed 13 October 2009).

2 For the purposes of simplicity, the name 'Telstra' is used herein to refer to Telstra Corporation and its previous incarnations.

8.6 The privatisation of Telstra raised some difficult regulatory issues. On one hand, Telstra is bound by corporations law to act in the best interests of its shareholders. However, Telstra is also the owner of the vast majority of telecommunications infrastructure in Australia and provides essential services to Australians. Consequently it has to provide for the conflicting interests of ensuring a maximum return for its shareholders, while on the other hand, ensuring that its retail and wholesale customers receive an efficient and effective service level.

8.7 Accordingly, successive Commonwealth governments have, in a variety of ways, continued to regulate the way in which Telstra does business in order to ensure that the service needs of Australian telecommunications consumers are met, and that Telstra's competitors have reasonable access to its telecommunications infrastructure.

8.8 One of the key regulatory dilemmas for government has resulted from Telstra's vertical integration. Telstra is at the same time a wholesaler of telecommunications infrastructure, and a retailer in a competitive retail market. Therefore there is no ordinary incentive for Telstra to sell its wholesale product to its retail competitors at a reasonable price. The WA Chamber of Commerce and Industry (WA CCI) described this conundrum as follows:

... a conflict of interest arises when a monopoly carrier is required by law to provide network access to its retail competitors, and is also required by law to maximise the return to its shareholders.³

8.9 As discussed in the committee's interim report, this conflict of interest has resulted in ongoing anti-competitive behaviour by Telstra.⁴

8.10 On 15 September 2009, the government introduced the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 into the House of Representatives, which attempts to overcome Telstra's current conflict of interest by separating Telstra's wholesale and retail arms.

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

8.11 Although the NBN will be a wholesale-only network, there is concern that, because the deployment of and transition to the new network is scheduled to take up to eight years, this period could be utilised by the incumbent to further strengthen its monopoly position and hence impact on the potential for the completed NBN to be competitive and commercially viable.

8.12 In response to these concerns, and to address the conflict of interest mentioned above, the government introduced the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, (the Bill). This Bill

3 WA CCI, *Submission 17*, p. 3.

4 Senate Select Committee on the National Broadband Network, *Interim Report*, 2 December 2008, pp.49-51.

seeks to directly address the regulatory regime that enables Telstra's anti-competitive behaviour. The Bill seeks to address Telstra's vertical and horizontal integration, to streamline the access and anti-competitive conduct regime, and to strengthen consumer safeguards, including the Universal Service Obligation (USO) and the Customer Service Guarantee (CSG) and priority assistance.

8.13 The Department of Broadband, Communications and the Digital Economy (the Department) noted that 'this bill is primarily not about the NBN: it is about the regulatory structure of the industry in Australia today.'⁵

8.14 In his second reading speech of the Bill, the Minister for Infrastructure, Transport, Regional Development and Local Government, the Hon Anthony Albanese MP, described the purpose of the Bill:

The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 is designed to reshape regulation in the telecommunications sector in the interests of consumers, business and the economy more broadly. It is also designed to position the telecommunications industry to make a smooth transition to the NBN environment as the new network is rolled out. The measures will provide the flexibility for Telstra to choose its future path and streamline the regulatory framework to enhance competition and better protect consumers.⁶

8.15 The Senate Standing Committee on Environment, Communications and the Arts has examined the Bill as a whole in greater detail, and from a broader policy perspective than this committee.⁷ Noting the comments made above by Mr Harris, this section of the report will focus on the aspects of the Bill that will impact on the NBN, namely:

- (i) the separation of Telstra's retail and wholesale arms;
- (ii) the introduction of fall-back benchmark access terms for declared telecommunications infrastructure; and
- (iii) strengthening and clarifying universal service obligations and customer service guarantees.

5 Mr Peter Harris, Secretary, Department of Broadband, Communications and the Digital Economy (DBCDE), *Committee Hansard*, Senate Standing Committee on the Environment, Communications and the Arts (ECA), Canberra, 14 October 2009, p. 19.

6 The Hon Anthony Albanese MP, *House of Representatives Hansard*, 15 September 2009, p 9643.

7 Senate Standing Committee on Environment, Communications and the Arts, *Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, October 2009.

Separation

8.16 The Bill proposes the separation of Telstra's retail and wholesale arms. This separation is aimed at addressing the widely-held belief that:

Many of the problems with the current market structure and the regulatory arrangements have their root cause in the vertically integrated structure of Telstra and the corresponding misalignment of incentives this creates.⁸

8.17 The Bill gives Telstra two options for separation:

- Voluntary structural separation; or
- Government mandated functional separation.

Structural separation

8.18 Structural separation is the most extreme form of separation that would require the company to establish legal, separate entities responsible for the wholesale and retail services. To facilitate this, Part 1 of Schedule 1 to the Bill propose the addition of a new Part 33 to the *Telecommunications Act 1997* (the Act), which would allow Telstra to give, and the ACCC to accept, an undertaking that:

- (i) Telstra will not supply fixed-line carriage services to retail customers using a telecommunication network over which Telstra is in a position to exercise control; and
- (ii) Telstra will not be in a position to exercise control of a company that supplies fixed-line carriage services to retail customers using a telecommunications network over which Telstra is in a position to exercise control.⁹

8.19 Under proposed sections 577C and 577E respectively, Telstra may also make, and the Australian Competition and Consumer Commission (ACCC) may accept, undertakings in relation to hybrid fibre-coaxial (HFC) networks (the dominant infrastructure for supplying cable television) and subscription television broadcasting licences respectively. Such undertakings would involve Telstra not being in a position to exercise control over a HFC network or subscription television broadcasting licence. This seeks to address the horizontal integration also enjoyed by Telstra, and in effect will divest Telstra of its interests in cable television infrastructure or in Foxtel.

8 Optus, Submission to Senate Standing Committee on Environment, Communications and the Arts, *Submission 47*, p. 5.

9 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 577A.

8.20 The desired outcome is that structural separation 'would be consistent with the wholesale-only open access market structure to be delivered through the National Broadband Network'¹⁰ and consequently facilitate a smooth transition to the NBN.

8.21 There are two main consequences if Telstra chooses not to make undertakings to divest itself of control over its fixed line telecommunications networks, of its HFC infrastructure and of its interests in Foxtel. The first is that the Bill will require the functional separation of Telstra, which is expanded upon later in this chapter. In addition to requiring functional separation, the minister may prevent the Australian Communications and Media Authority (ACMA) from allocating Telstra the additional spectrum licences necessary for advanced wireless broadband services.¹¹

8.22 The Bill, however, does contain provisions which enable the minister to waive the requirements relating to Foxtel and HFC infrastructure if the minister is satisfied that Telstra's structural separation undertaking is:

...sufficient to address concerns about the degree of Telstra's power in telecommunications markets.¹²

8.23 The Explanatory Memorandum sets out how Telstra might choose to structurally separate in light of the NBN project:

Structural separation *may*, but does not need to, involve the creation of a new company by Telstra and the transfer of its fixed-line assets to that new company. Alternatively it *may* involve Telstra progressively migrating its fixed-line traffic to the NBN over an agreed period of time and under set regulatory arrangements, and sell or cease to use its fixed-line assets on an agreed basis. This approach will ultimately lead to a national outcome where there is a wholesale-only network not controlled by any retail company—in other words, full structural separation in time.¹³

8.24 In response to the Bill's requirement to structurally separate on a voluntary basis, Telstra has submitted that:

10 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 4.

11 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clauses 577H and 577J.

12 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 4; Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, Part 10.

13 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, pp. 3-4.

[Structural separation] would only be considered if the Board and Management of the company were convinced it were in the best interests of Telstra shareholders.¹⁴

8.25 Telstra has also said that the structural separation proposed by the legislation: ...does create a high degree of uncertainty around any structural separation undertakings, and this places constraints on our board.¹⁵

8.26 These uncertainties include the fact that the minister retains discretion in his decision to waive the requirement that Telstra divest its interests in the HFC and Foxtel, even if Telstra structurally separates, meaning that Telstra has no guarantee that if it separates it will receive that particular benefit. Telstra argued that this uncertainty means it is difficult for the Telstra board to make a judgment that separation is in the best interests of shareholders.¹⁶

Functional separation

8.27 If Telstra does not structurally separate, then the Bill contains provisions whereby the government may functionally separate Telstra. Functional separation would still be based on a behavioural remedy, modifying the current operational separation provisions. This is the course that was taken in the UK, with BT.

8.28 Item 22 of the Bill inserts a new Part 9 to the Telecommunications Act, which would allow the government to functionally separate Telstra. The Bill sets out a process for the minister to make a written determination specifying requirements which Telstra must meet in preparing a draft functional separation undertaking.¹⁷

8.29 If the minister makes such a declaration, Telstra would then have 90 days to prepare an undertaking which complies with those requirements, as well as the other requirements set out in clauses 73 and 74 of the Bill.¹⁸ The minister may then approve or vary the undertaking.¹⁹ Telstra must comply with a functional separation

14 Telstra, Submission to Senate Standing Committee on Environment, Communications and Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 88*, p. 3.

15 Mr Geoff Booth, Group Managing Director, NBN Engagement, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 3.

16 Mr Booth, Group Managing Director, NBN Engagement, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 3.

17 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 75.

18 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 76.

19 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 77.

undertaking, unless it has already made an undertaking to structurally separate under clause 577A.

8.30 Functional separation in essence involves the principles that:

- There should be equivalence in relation to the supply by Telstra of regulated services to Telstra's wholesale customers and its own retail business units;
- Telstra should maintain separate retail and wholesale business units, which operate at arms length from each other;
- Telstra should have systems, procedures and practices that relate to monitoring and reporting on compliance with, the development of performance measures for, and independent audits and checks of the final functional separation undertaking; and
- Telstra's wholesale business unit should not consult its retail unit regarding proposed services or development of those services unless it also consults with other wholesale customers at the same time and in the same manner.²⁰

Impact of separation on the NBN

8.31 The aim of causing the separation of Telstra is to provide a telecommunications environment that would mirror the wholesale-only environment created by the NBN proposal. The government believes that the separation of Telstra will be:

Consistent with the market structure that will be delivered through the NBN...²¹

8.32 However, the government has indicated that its principal reason for wanting to separate Telstra is to address concerns with the Australian telecommunications industry in the short term, prior to the rollout of the NBN. The Minister for Infrastructure, Transport, Regional Development and Local Government said, in the second reading speech of the Bill:

As transformative as the NBN initiative is, it is a detailed and complex project. During the eight-year rollout of the NBN, the existing telecommunications regulatory regime remains critical to the delivery of affordable, high-quality services to businesses and consumers. Telecommunications services are a vital input to the daily functioning and activity in modern societies. The reforms being introduced today are required to address longstanding and widespread concerns that the existing telecommunications regulatory regime is failing Australian consumers and

20 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 74.

21 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 1.

businesses. On a range of measures of price, quality of services and availability, Australia continually trails key international competitors.²²

8.33 Telstra has disputed this rationale for separation, arguing that functional separation takes a number of years to implement, and accordingly:

...would pose serious obstacles to the migration of Telstra traffic to a national broadband network. Given international experience, the time taken to implement functional separation would create at least a double migration for customers from the current Telstra legacy systems to the functionally separated legacy systems; ... It really magnifies the potential for some chaos.²³

8.34 Telstra bases its assertion that functional separation would take in the vicinity of six years on the experience in the UK and New Zealand.²⁴ Furthermore, Telstra has submitted that the cost of functional separation would be substantial, and estimates those costs to be between \$500 million and \$1.2 billion.²⁵ According to Telstra, the time and costs would predominantly be in developing IT infrastructure.²⁶ This sentiment was supported by evidence provided to the committee by BT in March 2009:

...This was, and still is, one of the most complicated areas of the undertaking. ...separation of our management information systems and our OSS, the systems that drive the actual delivery of service ... we underestimated the complexity of this operation.²⁷

8.35 Mr McCarthy-Ward went on to comment on the high cost of this separation, noting that:

...it is moot whether or not the full cost of physical system separation is proportionate [to the benefit gained].²⁸

22 The Hon Anthony Albanese MP, *House of Representatives Hansard*, 15 September 2009, p. 9643.

23 Mr Booth, Group Managing Director, NBN Engagement, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 3.

24 Dr Tony Warren, Executive Director, Regulatory Affairs, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 7.

25 Telstra, Submission to Senate Standing Committee on Environment, Communications and Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 88*, p. 8.

26 Mr Booth, Group Managing Director, NBN Engagement, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 3.

27 Mr Peter McCarthy-Ward, BT Director East of England, *Committee Hansard*, Canberra, 4 March 2009, p. 5.

28 Mr McCarthy-Ward, BT Director East of England, *Committee Hansard*, Canberra, 4 March 2009, p. 5.

8.36 Telstra pointed out in its submission on the Bill that the diversion of resources, as required by separation, are likely to result in a decline in customer service.²⁹ Furthermore, Telstra submitted that resources will be diverted away from the NBN and that:

In practice, Telstra would be forced to focus on meeting its functional separation milestones and defer any transition to the NBN until after separation was implemented.³⁰

8.37 Telstra argued that its current tranche of IT reforms, which aim to 'hardwire' equivalence into its system, are sufficient to ensure that Telstra's competitors are given the same treatment as Telstra's own retail arm. Mr Booth told the Senate Standing Committee on Environment, Communications and the Arts that:

The question then is how you give people certainty, and transparency then becomes the issue... We propose abilities for the ACCC, for example, to do audits and to come in and drop the two orders in the top and see if they come out the bottom in the way we say they will.³¹

8.38 Accordingly, Telstra argued that separation of any kind is an unnecessary expense, and disputes the government's assumption that horizontal and vertical integration is an 'unambiguous negative'.³²

8.39 The Department has not disputed Telstra's costings, nor its anticipated time frame. However, the Department argued that, while it may take six years for total separation to occur:

When you talk to people in the UK and New Zealand...the way they organise it is to actually have a set of steps to be undertaken and a set of milestones to be met. They require the most important measures to be taken up front. The system changes that are relatively minor are done towards the end of the process. So they tend to see the big gains from separation very much in the early years. They have tended to see positive benefits within 12

29 Dr Warren, Executive Director, Regulatory Affairs, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 8.

30 Telstra, Submission to Senate Standing Committee on Environment, Communications and Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 88*, p. 12.

31 Mr Booth, Group Managing Director, NBN Engagement, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 6.

32 Telstra, Submission to Senate Standing Committee on Environment, Communications and Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 88*, p. 5.

months of embarking on functional separation, but it may well be the case that the less important measures do take a longer time to put in place.³³

8.40 Optus, and other Telstra competitors, have also taken a different view to Telstra with regard to separation. The General Manager of Interconnect and Economic Regulation at Optus, Mr Andrew Sheridan, told the Senate Standing Committee on Environment, Communications and the Arts that:

...from the evidence that we look at, the BT separation has been an undoubted success. I will just draw your attention to some comments from Ofcom, which very recently undertook one of its annual assessments of the undertakings that were given by BT, saying that the separation arrangements in the UK had led to 'greater choice and take-up of services, choice of suppliers, products and packages and increased value for money' for customers.³⁴

8.41 Additionally, with regard to Telstra's suggestion that its current IT projects will achieve equivalence at a lower cost, Optus has said that it is not sufficient. One of the key deficiencies in Telstra's proposal, according to Optus, is:

...that Telstra Retail will buy services directly from the network business—I think they talk about it—and Optus, Macquarie, AAPT et cetera would have to go through an intermediary, which is Telstra Wholesale. Therein lies the problem, because it is through that intermediary step that you lose transparency and these differences start to appear.³⁵

8.42 Mr Sheridan continued, pointing out that the solution proposed by Telstra does not dramatically alter the status quo where, in response to arguments about lack of equivalence, Telstra says '[B]ut we take a different service to you'.³⁶

Committee view

8.43 The committee considers that Telstra has been issued with an ultimatum to 'voluntarily' separate, and strongly questions the government's assertion that Telstra has been provided with a 'choice'.

33 Mr Rohan Buettel, Assistant Secretary, Networks Regulations Branch, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 14 October 2009, p. 23.

34 Mr Andrew Sheridan, General Manager, Interconnect and Economic Regulation, Optus, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Melbourne, 13 October 2009, p. 13.

35 Mr Sheridan, General Manager, Interconnect and Economic Regulation, Optus, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Melbourne, 13 October 2009, p. 15.

36 Mr Sheridan, General Manager, Interconnect and Economic Regulation, Optus, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Melbourne, 13 October 2009, p. 15.

8.44 The committee acknowledges that without considered, consistent regulation during the rollout of the NBN, NBN Co risks extensive over-build in deploying the FTTP network, particularly through not being able to make efficient use of existing Telstra infrastructure, and in possibly having to compete with Telstra simultaneously deploying its own fibre network.

8.45 While it is clear that current regulatory practices with regard to the telecommunications industry are not achieving maximum competition, or indeed fairness, it is not clear that the separation of Telstra—structural or functional—is necessary in order to achieve the government's stated aims with regard to the NBN. Compounding the issue is the government's insistence that the NBN Co is to be a profitable company, which then exacerbates the risk of over-build by an incumbent wielding significant market power.

8.46 Regardless of the fate of this bill, the committee believes the NBN cannot be commercially viable without the migration of existing Telstra customers to it. As telecommunications consultant, Mr Kevin Morgan, told the committee:

...the NBN demands a monopoly. It will need probably every cent of existing public switch network revenue if it is to achieve a commercial return—and bear in mind that the government has stated this is going to achieve a commercial return.³⁷

8.47 The committee also has significant concerns about the issues raised by Telstra, namely the cost of separation to that company, and the fact that this will prevent Telstra from investing that money into the new telecommunications infrastructure that this country needs.

8.48 The committee's concerns are supported by the views of economist, Mr Henry Ergas, who told the committee that separation has not been an overwhelming success in the UK, casting doubt on the government's fundamental assumption that vertical integration is bad for consumers:

[T]here is no evidence of an improvement in performance in the UK and some evidence of a deterioration in at least relative performance in the UK. The difficulty one has, as with all such situations, is that there were several factors that were changed at once. ... It is not easy to disentangle the impacts of functional separation from the impacts of those other changes but, to the extent to which people have tried to do so in a rigorous way, they have broadly taken the view that it is not obvious that the benefits from functional separation have outweighed the costs.³⁸

8.49 Even if the separation of Telstra was seen to be the best solution, the committee fails to see how this decision can be made without a clear understanding of how the NBN will be deployed, and the likely effects of the NBN over the short and

37 Mr Kevin Morgan, *Committee Hansard*, Melbourne, 7 October 2009, p. 52.

38 Mr Henry Ergas, *Committee Hansard*, Canberra, 1 October 2009, p. 41.

medium term. The committee's view is that it is essential to wait until the Implementation Study has reported before significant policy decisions concerning the regulation of the telecommunications market are made.

8.50 Telstra has also argued that the 'penalties' that the legislation puts in place for failure to structurally separate are themselves anti-competitive. Dr Warren said:

We believe that taking us out of the upgrade path, the 4G market, would basically reduce competition in that market, particularly for rural and regional consumers, for whom we are the only network. Secondly, in the Foxtel space, clearly if we were forced to divest Foxtel it is most likely that a media player would acquire that, and we have not seen a good argument for how a greater concentration of media can be in the consumer interest.³⁹

8.51 The committee shares these concerns about the short term impacts of the legislation on telecommunications. Indeed, the committee views the government's use of 'sticks' and 'carrots' to encourage Telstra to separate 'voluntarily' as more closely resembling a non-negotiable ultimatum.

8.52 Furthermore the committee fails to see that restricting Telstra's future expansion in the mobile market, and/or withdrawing from the Pay TV market, will either strengthen competition in the telecommunications industry or pave the way for the NBN. In fact, the restriction of access to spectrum can be interpreted as anti-competitive action by the same government that is legislating to reduce anti-competitiveness in the market.

Benchmark access terms

8.53 Currently Part XIC of the *Trade Practices Act 1974* (the TPA) provides for a regime through which the ACCC can declare certain telecommunications carriage services to be 'declared services', which results in standard access obligations applying to providers of access to that service.

8.54 The standard access obligations simply require that the access provider (in most cases Telstra) makes the service available to the carrier (generally other telecommunication carriers), but do not set out terms and conditions. Rather, these are subject to negotiation and agreement between the access seeker and the access provider. If agreement cannot be reached, then either party can notify the access dispute to the ACCC. The ACCC then arbitrates the dispute.

8.55 Currently the terms negotiated by the ACCC apply only to the two parties involved in a dispute, and also apply only to the particular service in question in that dispute. This process is known as the 'negotiate-arbitrate' model.

39 Dr Warren, Executive Director, Regulatory Affairs, Telstra Corporation Ltd, *Proof Committee Hansard*, Senate Standing Committee on Environment, Communications and Arts, Melbourne, 13 October 2009, p. 10.

8.56 There has been widespread criticism of this model. As the Competitive Carriers Coalition (CCC) submitted to the Senate Standing Committee on Environment, Communications and the Arts' inquiry into the Bill:

The experience of the industry has been that this approach has been a dismal failure. Telstra has no incentive to negotiate a realistic price of access. Rather, it benefits from delaying the finalisation of a price for a service for as long as possible.

CCC members have waited seven years and more for price certainty on certain key access services. Telstra in the meantime operates freely in the retail market. These are not the circumstances under which businesses can be expected to invest and compete against a powerful incumbent.⁴⁰

8.57 The problems with the model are discussed in detail in the government's April 2009 Discussion Paper on regulatory aspects of the NBN entitled *National Broadband Network: Regulatory Reform for the 21st Century*.⁴¹ Stakeholder's principal concerns with the current model are that it is:

...slow, cumbersome and open to gaming (obstruction), and that Part XIC does not provide sufficient regulatory certainty for investment.⁴²

8.58 These deficiencies were noted not only by Telstra's competitors, but also by Telstra in its submission on the roll-out of the NBN.⁴³

8.59 Of the current model, the ACCC has said:

The tendency for Telstra to make continuous and incremental changes to undertakings and to keep raising both old issues and new cost claims means that resolution of access issues is cumbersome, vexatious and inefficient.⁴⁴

8.60 The Bill seeks to address this problem by giving the ACCC the power to set up front prices and non-price terms and conditions of access for declared services.

40 Competitive Carriers Coalition, Submission to the Senate Standing Committee on Environment, Communications and the Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 48*, p. 9.

41 Australian Government, 'National Broadband Network: Regulatory Reform for the 21st Century', *Discussion Paper*, April 2009, available at http://www.dbcde.gov.au/_data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf, p. 12-13.

42 Australian Government, 'National Broadband Network: Regulatory Reform for the 21st Century', *Discussion Paper*, April 2009, available at http://www.dbcde.gov.au/_data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf, p. 13.

43 Telstra Corporation Limited, Public Submission on the Roll-out and Operation of a National Broadband Network for Australia, 25 June 2008, p. 23.

44 ACCC, *Telstra's Undertakings for the Unconditioned Local Loop Service Discussion Paper* (Public Version), March 2005, p. 2

These will create a fall back position if parties to an access dispute cannot agree on terms.⁴⁵

8.61 In making access determinations, the Bill sets out certain matters that the ACCC must take into account in clause 152BCA. These include: the long-term interests of consumers; the business interests of the supplier; the interests of users of the declared service; the cost of providing access; the cost of upgrades to the service; technical requirements necessary for the safe and reliable operation of the service; and the economically efficient operation of the service. The ACCC must also hold a public hearing about its proposal to make an access determination.⁴⁶

8.62 An access determination must set out a date of expiry,⁴⁷ which the Explanatory Memorandum states will ordinarily be 'set for a period between three and five years'.⁴⁸ The ACCC can also include 'fixed principles' in a determination, which only remain in force for a certain portion of the determination's duration, so that a determination can remain in force for a longer period and take account of inflation/depreciation etc.⁴⁹

8.63 The Bill also gives the ACCC the power to make written, binding rules of conduct with respect to declared services. These rules can regulate the terms and conditions of providing access and obtaining access to declared services, and impose requirements on parties. Importantly, the Bill enables the ACCC to make rules that apply only to certain carriers, service providers or access seekers.⁵⁰

8.64 Parties may continue to negotiate and make access agreements on different terms to a determination. Access agreements will have to be registered with the ACCC, however the ACCC will not have to approve the agreements.⁵¹

8.65 The Bill also amends the current oversight regime under the TPA by removing merits review of decisions under Part XIC. This means that decisions of the

45 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, Clause 152BC

46 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 152BCH.

47 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, Paragraph 152BCF(5).

48 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 5; Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 item 84.

49 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 152BCD.

50 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 152BD.

51 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 5; Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, clause 152BEA.

ACCC with regard to access determinations, binding rules of conduct, access agreements, and undertakings may only be reviewed by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, or under section 39B of the *Judiciary Act 1903*, on the grounds that the ACCC has made an error in law. The ability for telecommunications providers to appeal decisions of the ACCC on their merit has been removed.⁵²

8.66 As discussed in the first interim report, the committee has heard abundant evidence from a wide range of stakeholders about the failings of the existing regulatory regime under the TPA.⁵³ That report also detailed the problems resulting from Telstra's 'gaming' behaviour, and noted the deficiencies of existing legislation in providing mechanisms to counteract this behaviour. Weighing up the evidence, the committee concluded that reform was necessary in some form, but that 'any new regulations that underpin the NBN should ensure that any operator/owner of the new network cannot participate in anti-competitive behaviour'.⁵⁴

8.67 The amendments proposed by the Bill with respect to Part XIC of the TPA appear to offer a reasonable solution to some of the problems with the existing regulatory regime. Specifically, giving the ACCC the power to make determinations removes the existing system's reliance on good-faith negotiations between Telstra and its competitors, and has the potential to remove one aspect of Telstra's 'gaming' strategy.

Committee view

8.68 The committee generally supports the proposed changes to Part XIC of the TPA. However, the committee does hold significant concerns regarding the total inability for telecommunication providers to appeal any ACCC decision on merit. This equates to a proposal to waive procedural fairness. The committee strongly urges the government to incorporate an appropriate avenue for genuine cases of appeal.

Service obligations and customer guarantees

8.69 Part 4 of Schedule 1 to the Bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to add a new obligation to the Universal Service Obligations (USOs), that the universal service provider supplies, on request, standard telephone services. The standard at which those services must be provided

52 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 6.

53 Senate Select Committee on the National Broadband Network, *Interim Report*, December 2008, p. 51.

54 Senate Select Committee on the National Broadband Network, *Interim Report*, December 2008, p. 58.

are to be determined by the minister,⁵⁵ and the Explanatory Memorandum states that they might include:

...maximum periods of time for new connections and fault rectification and reliability standards. There are also new provisions providing minimum performance benchmarks that the universal service provider must meet in fulfilling its responsibilities.⁵⁶

8.70 The Bill introduces similar provisions relating to the supply, installation, maintenance and location of payphones.⁵⁷

8.71 The aim of these amendments to the USO is to make the existing obligations more precise and easier to enforce.⁵⁸

8.72 Part 5 of Schedule 1 to the Bill seeks to 'arrest the decline in telecommunications service quality standards'. Amendments to the Customer Service Guarantee (CSG) provisions in the Consumer Protection Act to allow the minister to establish minimum CSG benchmarks.⁵⁹ The Explanatory Memorandum explains that:

While failure by a service provider to meet a CSG standard is not subject to a civil penalty under the Tel Act, failure to meet the minimum CSG performance benchmarks will be.⁶⁰

8.73 The proposed amendments to both the CSG and USO will be enforced by ACMA's expanded powers to issue infringement notices under proposed Part 31B to the Consumer Protection Act. The Explanatory Memorandum states that these infringement notices:

...will be a strong incentive on the industry to improve service quality.⁶¹

8.74 If CSG standards are not met, telecommunications companies may be required to provide customers with financial compensation.⁶² The Bill does contain

55 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, item 166.

56 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 7.

57 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 7.

58 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 7.

59 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 7.

60 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, pp 7-8.

61 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 8.

62 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 8.

provisions for customer's CSG rights to be waived, but this must be done expressly and in writing.⁶³

8.75 The Explanatory Memorandum states that the proposed amendments to the USOs and CSGs arise as a result of the fact that:

The Government is committed to ensuring consumers are protected in the transition to the NBN.⁶⁴

8.76 Telstra strongly argues that the Bill fails to achieve this aim for a number of reasons, highlighting their concern that:

...there are no safeguards against burdensome regulations that do not recognise Telstra's unique challenge of providing quality services across Australia's vast and challenging terrain.⁶⁵

8.77 Telstra continued by pointing out that the Bill also fails to address how USOs and CSGs will apply once the NBN is in operation, and more importantly in the short term, during the transition period to the NBN:

Moreover, Telstra notes that the USO remains uncoded and underfunded. The Government's long term vision for the broader USO and the role of NBN Co. is not clear from the Bill, yet is a key issue to be addressed in the transition to the NBN.⁶⁶

8.78 This is an issue of concern to the committee, particularly in a situation where Telstra is expending considerable resources on separation at the expense of its USOs and CSGs.

Conclusion

8.79 The committee does not make any findings or recommendations as to the Bill, as the Standing Committee on Environment, Communications and the Arts has examined the Bill in significantly more detail than is possible by this committee. The purpose of this chapter was simply to comment on the potential implications of the Bill for the NBN.

8.80 In that regard, the committee's view is that the Bill does not appear to be directly necessary for the success of an NBN, and in some ways, including the

63 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 8.

64 *Explanatory Memorandum*, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p. 7.

65 Telstra, Submission to Senate Standing Committee on Environment, Communications and Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 88*, p. 13.

66 Telstra, Submission to Senate Standing Committee on Environment, Communications and Arts, Inquiry into Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, *Submission 88*, p. 13.

diversion of resources, the Bill may hinder the successful and expedient rollout of the network.

8.81 The committee acknowledges the complexity of the telecommunications industry and the issues that this Bill is attempting to address. The committee also notes these complex issues are subject to analysis within the Implementation Study, which is due for completion in February 2010.

8.82 The committee strongly believes that decisions on this Bill should not be made within a vacuum. Consequently consideration of this Bill should have been delayed until the Implementation Study is completed. At risk are the investments of millions of Australian Telstra shareholders, the potential investors in the NBN, and ultimately the long term interests of end users of the telecommunications network. Consequently, the committee reiterates the recommendation made within the report on the inquiry into this bill:

Recommendation 11

8.83 That further consideration of the bill not proceed until after the NBN Implementation Study has been completed, the government has tabled its response to the Implementation Study and the Senate has certainty about the network structure of the NBN Co and the regulatory framework which will surround it.⁶⁷

67 ECA Committee Report, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, pp 44-45.