**Competitive Carriers' Coalition**

**September 10, 2005**

# Supplementary Submission to the Senate Environment, Communications, IT and the Arts Legislative Committee

## Inquiry into the Telstra (Transition to Full Private ownership) Bill 2005 and related bills

## Purpose and Context

This submission focuses on concerns that have arisen subsequent to the CCC providing its initial submission to the Legislative Committee on the Bills in question. The CCC remains concerned by those issues raised in its initial submission to this inquiry.

As the CCC continues to examine the legislation, further issues emerge. The CCC therefore urges the Senate to take the time necessary to ensure a full consideration of this most important legislation.

## Unenforceability of the Operational Separation Plan

The Operational Separation plan Telstra is required to prepare, once accepted by the Minister, is not a licence condition. It is the CCC understanding that only when Telstra breaches the plan, is found to have breached the plan, has been required to present a rectification plan to the Minister outlining how it will address the breach, and has had that plan accepted, does compliance with the rectification plan become a licence condition.

There appears to be no clear process whereby the breach of the plan is investigated or established other than by a decision of the Minister. There is no process detailed whereby the rectification plan is subject to public scrutiny. There is no process detailed whereby compliance or failure to comply with the rectification plan is established other than by annual reports by Telstra on its compliance.

This is an uncertain, unclear and possibly unworkable process that urgently needs clarification. The CCC believes it is crucial that compliance with the operational separation plan itself is a licence condition on Telstra. In the absence of such a discipline experience suggests that the behaviour of Telstra will be guided by a desire to find and exploit any gaming opportunity that presents itself.

Telstra has clearly indicated, most recently at the public hearing of this committee on September 9, that it considers regulation an unfair impost and complies only grudgingly. It has also indicated that it plans to challenge the established principles that have underpinned the pricing of access to its bottleneck services. This is further illustrated by its claims that regulation will “cost” it $850 million this financial year. These claims are examine and critiqued in a letter from the CCC to ASIC that is attached as an attachment to this submission.

In these circumstances, it can be confidently predicted that failing to make compliance with the operational separation plan a licence condition will create opportunities for gaming by Telstra that will be exploited.

## Role of the ACCC

The CCC is profoundly concerned that there is no formal role described for the ACCC in numerous processes where it would be expected that the Minister would at least be required to seek expert advice from the ACCC. It is understood that the role of the ACCC and others in the Ministerial decision-making processes arising from the legislation are intended to be described by regulation of Ministerial directive at some later date.

However, the absence of these requirements in the legislation creates an unprecedented level of uncertainly that will overhang the whole telecommunications industry. The CCC strongly urges the Senate to consider means by which the role of the ACCC can be described and defined in the Bill.

## Linkage Between Operational Separation and Part XIB and XIC of the TPA

The telecommunications specific elements of the Trade Practices Act are at the heart of the management of the telecommunications industry in Australia. The Department of Communications indicated at the public hearing that it intended the operational separation plan to be complementary to, and not in conflict or a replacement for, Part XIB and XIC of the Act, which allow the ACCC to act against anti-competitive conduct and to establish access requirement for bottleneck services.

However, the Bill requires the ACCC to consider where relevant, issues arising from the operational separation arrangements when exercising its powers under these parts of the TPA.

This is the single most concerned aspect of the Bills for the CCC. It is not clear what is meant or intended by this requirement. However, it can be said with certainty that Telstra will seek to exploit this requirement whenever the ACCC seeks to take any action based on these powers.

The unenforceability of the operational separation plan can only make this situation more risky. At best, there is no doubt it will delay and slow the use of these powers by the ACCC as it seeks to intervene to prevent harm being done to a market by anti-competitive conduct by Telstra. At worst, it could become a “get out of jail free” card for Telstra, which can claim that the fact that it has not been shown to have breached an unenforceable operational separation plan, which has attached to it no defined complaint or investigation process, prevents the ACCC acting.

This aspect of the Bill needs urgent review. The CCC can see no reason why the ACCC should be required to have regard to the Operational Separation Plan when exercising it established powers.

## Contact

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