



UNWIRED AUSTRALIA PTY LIMITED

SUBMISSION TO

The public hearing into the Telstra (transition to full private ownership) Bill 2005 and related bills.

September 2005

Executive Summary

Unwired Australia has been asked to submit a response to the public hearing into the Telstra (transition to full private ownership) Bill 2005 and related bills.

Unwired believes that for a competitive environment to prosper for the benefit of consumers post the sale of Telstra, a strict regulatory regime needs to be in place to curb Telstra's market power and to encourage the development of alternative infrastructure to Telstra's.

This submission covers three of the four key areas the senate committee and related parties will be discussing on 9 September 2005:

- a. The operational separation of Telstra
- b. The role of the Australian Competition and Consumer Commission (ACCC)
- c. The establishment of a perpetual \$2 billion Communications Fund

a. The operational separation of Telstra

The importance of the separation of Telstra's wholesale and retail, or infrastructure and services businesses cannot be overstated.

Unwired supports structural separation into two separate corporate entities, obliged to deal at arms length with each other. This should be the ultimate goal of competition policy in this area. As an interim measure however, Unwired supports the Government's plans for operational separation.

Operational separation can be achieved by the enhancement of the Record Keeping Rules currently administered by the ACCC, to enable enforcement and transparency of reporting and accounting.

Operational and reporting separation would achieve true cost allocation and therefore true pricing to both wholesale and retail customers, with transparency of all such activities in turn enabling proper policing. For example, proving predatory pricing behaviour, is at present virtually impossible as it is very difficult to establish the real cost to Telstra of products it is pricing. This is damaging competition in the market.

b. The role of the Australian Competition and Consumer Commission (ACCC)

Unwired has reviewed the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005. We agree with many of the details of this Bill and applaud the recognition of the risk of new infrastructure investment and the increased penalties for breaches of the competition rule. However, the Bill does not confer any additional powers on either the Minister or the ACCC in relation to setting wholesale or retail prices.

We believe there needs to be more focus on clarifying the ACCC's ability to manage Telstra's abuse of market power and to promote general competition in the telecommunications industry. Specifically:

1. New provisions need to be established under the Trade Practices Act to more effectively address market power abuse in the telecommunications industry.
2. The Trade Practices Act needs to be amended to provide the ACCC with a 'cease and desist' power. The competition notice system has failed to adequately curb monopoly behaviour.

Misuse of market power provisions

The dominance of the telecommunications market by Telstra is such that its actions have an impact on the rest of the market regardless of its intentions.

To make Section 46 of the TPA more effective in the telecommunications market, it is necessary to alter or remove the so-called purpose test, and replace it with a consequences or effect test. This will bring these provisions into closer alignment with the form of the competition rule in Part XIB of the TPA.

At present to establish that a corporation has abused its power in a market it is necessary to refer to the purpose of the corporation in undertaking certain conduct. This is notoriously difficult to establish.

Unwired contends that the removal of the purpose test, to establish a test focusing on the outcome rather than the intention, is a more effective way of dealing with abuse of market power.

Recommended amendments to TPA Section 46

Specifically, to remove the purpose test, the words "take advantage of that power for the purpose of" in subsection (1) being replaced with "act with the effect of" and the words "or being likely to eliminate or substantially damage" added after "damaging" in subsection (1)(a) and so on in subsections (1)(b) and (1)(c). Subsection (7) should explicitly state that "other relevant circumstances" include the effect on competitors of the relevant actions.

SECT 46

Misuse of market power

(1) A corporation that has a substantial degree of power in a market shall not ~~take advantage of that power for the purpose of~~ act with the effect of:

- (a) eliminating or substantially damaging or being likely to eliminate or substantially damage a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- (b) preventing or being likely to prevent the entry of a person into that or any other market; or

(c) deterring or preventing or being likely to deter or prevent a person from engaging in competitive conduct in that or any other market.

Part XIB – Competition notices and ‘cease and desist’ powers

The operation of telecommunications-specific anti-competitive conduct provisions of the TPA, set out in the competition rule of Part XIB, centre on the competition notice system. This system has proven ineffective.

Proceedings for the enforcement of the competition rule (other than proceedings for injunctive relief) cannot be instituted unless the alleged conduct is dealt with in a competition notice in force at the time the alleged conduct occurred.

Provision for recourse to the courts for injunctive relief has also proven unequal to the task whether for court or evidentiary reasons.

The ACCC must be empowered to prevent a company from engaging in conduct that it considers may constitute misuse of market power or the reduction of competition in the telecommunications market. In the context of Telstra’s broadband price cuts last year, when it reduced its retail price below its wholesale price, a cost to Telstra of \$6.5 million becomes a cost of doing business, not a disincentive to cease conduct.

If such a breach of the Trade Practises Act can occur with the outcomes all in favour of the dominant player in both retail and wholesale markets, then there is no incentive for building a national competing infrastructure for broadband access. This will remain the case unless the ACCC has the explicit capacity to stop abuses of market power.

Unwired believes the ACCC needs to be empowered to take action by exercise of cease and desist power as well as or in place of its competition notice powers. Only then will actions cease and irreparable damage to the market that can occur during an investigation be avoided.

A related issue is the requirement of the competition provision of Part XIB that a corporation ‘take advantage’ of its market power in order to be liable.

Telstra’s position in the market is such that any actions it takes, regardless of its purpose in taking them, and whether or not it ‘takes advantage’ of its position to take them, have dramatic impacts on its competitors.

If negative impacts are to be controlled, the provisions should be amended to remove “*takes advantage of that power*” as follows to simply refer to a corporation acting with the prohibited effect:

SECT 151AJ

Anti-competitive conduct

(2) A carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider:

(a) has a substantial degree of power in a telecommunications market; and

(b) either:

(i) ~~takes advantage of that power~~ acts with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or

(ii) ~~takes advantage of that power~~, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.

Such changes would enable a finding of predatory pricing, for example, by reference to the consequences of a particular pricing strategy, without the need to prove that a corporation took advantage of its market power in doing so, for example, by proving pricing was below cost.

c. The establishment of a perpetual \$2 billion Communications Fund

Some would say it is unwise to try to foresee the most appropriate mix of technologies for the future, but for many communities that choice has effectively been made for them: they are constrained within the existing services Telstra operates.

As the industry follows consumer and business demand by moving towards data-optimised networks over voice-optimised networks, the need for modern telecommunications infrastructure across Australia becomes more acute.

Telstra's existing national network is built for voice not data. The Government should encourage and support new and alternative infrastructure built for data in order to meet the long term needs of Australians and to provide the choice needed to sustain competition and provide new innovative services.

Unwired supports the funding the Government has allocated to future-proofing telecommunications in Australia – this is good news for regional and rural Australians.

However, for the funding to be fully effective and bring true competition to consumers in regional areas, the rolling out of alternative infrastructure to Telstra's needs to be given priority.

We encourage the government to use this fund to promote direct ways to stimulate competition in rural and regional markets through stipulating the use of new technologies in creating contestable markets.

In addition, rolling out broadband services to regional and rural Australia needs to be done quickly and for the lowest possible cost. Australians cannot afford to wait up to 10 years for full broadband access in regional and rural areas.

New technologies, wireless broadband in particular, are much more cost effective and can be rolled out more quickly than other technologies such as ADSL and cable. Cost estimates from other companies and advisory groups for building a regional cable/fibre network across Australia range from \$5 billion to \$20 billion and will take years, possibly decades to complete.

Wireless broadband networks can be rolled out at a fraction of the cost of fibre in just a few years, and can cover up to 95 per cent of the population. The ability of companies such as AUSTAR and Unwired to transfer easily to future wireless broadband standards will deliver further rollout cost savings plus potential for even faster speeds and new applications.

Conclusion - The desired outcome

Our recommendations are directed at creating an environment conducive to infrastructure competition for broadband services. Amendments to the TPA will ensure competitors and the ACCC will be able to act effectively if companies abuse their market power.

Investing in a diversity of technologies and providers through the \$2 billion Communications Fund will in time stimulate further investment in new markets and create technology choice for more Australians.

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