

7 Westminster Boulevard  
ELANORA, Q'ld, 4221  
9 September 2005  
[kelso@internode.on.net](mailto:kelso@internode.on.net)

Committee Secretary  
Senate Environment, Communications, Information  
Technology and the Arts References Committee  
Department of the Senate  
Parliament House  
Canberra ACT 2600  
Australia.

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

I am pleased to make the following submission to the current inquiry. As you can see from my website <http://www.rosskelso.com>, my professional background includes over 30 years as an engineer and manager in the telecommunications industry, followed by 10 years as an independent researcher and consultant covering a diverse range of aspects from telecommunications strategy, policy and regulation to the social and economic aspects of information and communication technology and services.

At present, I am undertaking doctoral studies at Queensland University of Technology that involve the following research question: *What are the technical, commercial and policy settings required for achieving open access to next generation broadband networks that best serve national and community needs?*

Due to the extreme shortness of time available, I am addressing only one part of the Terms of Reference, viz.

- b. the role of the Australian Competition and Consumer Commission (ACCC), including:
  - i. the requirement that it considers the costs and risks of new infrastructure investment when making access decisions

This issue is raised by the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 as referred to the Senate Environment, Communications, Information Technology and the Arts References Committee on 8 September 2005.

Getting straight to the point, I argue below that:

- There is no need to amend Part XIC of the TPA to create greater certainty for investment in future networks because existing mechanisms of assessment adopted by the ACCC are adequate and the justification for biasing the LTIE test in favour of such investment is flawed; and

- The impact of any such amendment should not be applied to new infrastructure investment that would only enhance the existing market dominance of a carrier such as Telstra.

There is no need to amend Part XIC of the Trade Practices Act to create greater certainty for investment in future networks and the justification for such amendment is flawed

On pages 22 to 25 of the Explanatory Memorandum (EM), a case is presented in favour of amending Part XIC of the Trade Practices Act (TPA) to include 'a reference to new network investment in the matters for which regard must be had under the LTIE test' - Option (b) refers. However, within Option (a) it is already admitted that 'the ACCC considered that the current position already requires it to fully consider the relevant issues for efficient investment' and further Option (b) affirmed this as 'the ACCC's already existing practice'.

Not surprisingly, 'major carriers, including Telstra and Optus' are said to have disagreed with this position in their submissions to a Department inquiry into so-called regulatory reform. The only 'future' investments recently mooted by these carriers within the regulatory timeframe under discussion are the plans by Optus to install an extensive DSLAM network to resell DSL services off Telstra's paired copper customer access network and the plans by Telstra for widespread deployment of fibre-to-the home (FTTH) networks beyond that of the current trials.

There is no way that any reasonable person could consider the Optus DSLAM network to be a 'next generation network', even if it is intended to also operate ADSL2+ services. Hence any claim by Optus for regulatory forbearance is not supportable by known facts. However, the FTTH plans by Telstra can be readily considered to create a next generation network and so deserve more serious scrutiny.

The intent of the proposed amendments to Part XIC of the TPA is to modify the current test undertaken by the ACCC in determining what constitutes the long-term interest of end-users (LTIE). The argument in Option (b) claims consumers would benefit through 'more innovation and potentially greater competition'. On closer examination, this claim is flawed. What the EM conveniently omits to reveal is the legislative purpose of the LTIE test, which is that if the ACCC can justify that a proposal by a carrier will promote the peculiarly economically defined 'long-term interest of end-users', then that carrier may be granted exemption from some or all of the standard access obligations. In particular, such exemption denies access by third party service providers to the services under consideration. In other words, the sole purpose of an exemption is to create or extend a monopoly situation and stifle competition. It beggars belief how such an outcome could benefit end-users (consumers) in the long term!

The impact of any such amendment should not be applied to new infrastructure investment that would only enhance the existing market dominance of a carrier such as Telstra

In December 2002, the Telecommunications Competition Bill was passed which, in part, had the objective of promoting greater certainty for major new telecommunications infrastructure investment. Part XIC of the Trade Practices Act was then amended to enable the ACCC to grant exemptions from access declarations and approve undertakings for services that are not yet declared or supplied.

These new arrangements have already been applied on one occasion, viz. the ACCC granted Telstra and Foxtel anticipatory exemption from access declaration on the basis that they would convert their analogue pay television network and systems to digital working. Not surprisingly, Telstra and Foxtel had previously threatened not to invest in such upgrading and had successfully delayed access for third parties by many years of litigation!

Although that case is now history (with third party access to the Telstra/Foxtel network unfortunately rather unlikely to ever occur), we must re-examine the fundamental objective behind the Telecommunications Competition Act 2002 and now the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, and ask the question – should every access provider gain benefit (by way of greater investment certainty) from such amendments to the telecommunications regulatory regime?

On the premises that:

- Effective competition between telecommunications carriage and service providers needs to be facilitated by the government as the highest priority;
- As a dominant access provider of core infrastructure, Telstra has a long track record of lessening competition by inhibiting access for other providers;
- Any threat by Telstra not to invest in new infrastructure that exploits its existing areas of dominance (eg. in the customer access network, involving cables, pipes and pits; and in the rural trunk network) runs directly counter to the interests of its shareholders in the long term and should not be taken seriously; and
- Part XIC of the Trade Practices Act has already been amended pursuant to the Telecommunications Competition Act of 2002

I submit that the earlier amendments to Part XIC of the TPA pursuant to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 are already generous towards Telstra and no new case has been established for more favourable amendments pursuant to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005.

However, in the event that such amendments are made to the TPA, they should explicitly not be applied to new infrastructure investment of an access provider deemed to be dominant, or likely to become dominant, with regard to creation of the facilities or services in question.

In contrast, other competitive telecommunications carriage and service providers should remain able to take advantage of the proposed amendments where they are intending to deploy next generation network infrastructure. This would have the result of making the competitive 'playing field' more level for non-dominant players in the Australian telecommunications industry by denying dominant players an unnecessary 'free kick'.

Yours sincerely

Ross Kelso