Optus Submission to

The Senate
Environment, Communications, Information Technology & the Arts
Legislation Committee of Inquiry

into

The Telstra (Transition to Full Private ownership) Bill 2005 and Related Bills

9 September 2005

1. Introduction

1.1 Optus welcomes the opportunity to participate in this Senate inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills.

1.2 Optus re-iterates its long held view that the strengthening of telecommunications competition prior to the sale of Telstra should be the Government's overriding consideration.

1.3 Continued attention to telecommunications regulatory reform is necessary because Telstra remains dominant in fixed line telephony – and therefore tough regulatory measures are needed to protect competition.

1.4 Optus was encouraged by 'The Connect Australia' statement (17 August 2005) which recognises that regulatory safeguards are an essential ingredient to protecting and stimulating competition before the full privatisation of Telstra.

1.5 That statement proposed an operational separation framework to strengthen the regulatory regime. It also announced a $3.1 billion funding package which offers a once in a life time opportunity to leverage a significant 'step change' in the competitive structure of the telecommunications industry.

1.6 Optus welcomes the Government's policy commitment to operational separation. We are concerned however that the legislation as drafted does not give effect to the policy intent:

- The process for developing the 'Operational Separation Plan' (OSP) leaves the Government and the industry beholden to the co-operation of Telstra;
- There is no legislative requirement for Telstra to comply with the OSP;
- The penalties for Telstra's failure to comply with the OSP are weak;
- There is a need to extend the range of 'designated' services to capture access services to small business and corporate markets.

1.7 In relation to the rural funding package, Optus has some design suggestions to ensure that it achieves its purpose.

1.8 This submission sets out Optus' views on operational separation; the ACCC's new powers; the role of ACMA; and the Communications Fund.

2. Operational Separation

2.1 The success of the Government's plans for operational separation depend almost entirely on the cooperation of Telstra, and provide limited opportunity for the incorporation of views from other industry participants.

2.2 The arrangements as currently set out in the proposed legislation will fail to give effect to the Government's policy intention, in that:

- They give too much discretion to, and rely too heavily on the co-operation of Telstra;
- They involve several lengthy steps before enforcement action is taken; and
- When enforcement action ultimately is taken, the scale of the penalty will be quite modest.

2.3 Optus believes there is a serious risk that, left to Telstra as the legislation currently contemplates, the 'Operational Separation Plan' (OSP) will not deliver the promise that Telstra will treat all other telecommunications companies on a fair basis.

2.4 With the high level of discretion now set for operational separation, the Government should give a commitment to industry that it will be fully and genuinely consulted at key stages as the detailed operational separation regime is developed, to ensure there is full equivalence and transparency to Telstra's wholesale customers.

Stakeholder Consultation

2.5 The comment process for the OSP requires that comments must be given to Telstra rather than to the Government. Furthermore, it does not impose upon Telstra any requirement to agree to the comments. There is not even a requirement to give them consideration.

Compliance

2.6 The proposed arrangements allow for Telstra to develop the OSP. This obviously gives Telstra very wide discretion as to what it is actually required to do. It will undoubtedly be able to use this discretion to minimise the intention and impact of the arrangements.

2.7 Nowhere is there a requirement on Telstra in the legislation to comply with the OSP. If Telstra fails to comply with the OSP, the only sanction is that the Minister can direct that Telstra come forward with a rectification plan.

2.8 It is true that Telstra does face a requirement to comply with the rectification plan.

2.9 However, the concept of a 'rectification plan' introduces an unnecessary second step before enforcement action can be taken against Telstra. The legislation should be simplified by imposing a requirement that Telstra must comply with the OSP, and providing for enforcement measures to be taken when Telstra fails to comply.

2.10 Clause 60 of the new Schedule 1 Part 8 provides that if Telstra has contravened or is contravening a final OSP, the Minister may direct Telstra to

provide a rectification plan. This clause has a drafting flaw. It should be drafted to read:

"This Clause applies if, in the opinion of the Minister, Telstra has contravened"

2.11 Without this drafting correction, Telstra will be able to mount a legal challenge whenever it is directed to issue a draft rectification plan. The challenge will be on the basis that, as a matter of fact, there was no breach of the OSP. Hearing that challenge could take many months.

2.12 Significantly, there is no private right of action available to a competitor to enforce compliance by Telstra with its OSP.

Rectification

2.13 It is troubling that the sanction for a breach of the OSP is a requirement by the Minister to issue a rectification plan. In practice, this means that enforcement action by carriers who have a concern about Telstra's failure to comply with the OSP will involve making a representation to the Minister for Communications (or in practical terms the Department of Communications) that there has been a breach of the OSP. It would make much more sense if the body to whom the complaint was made was the ACCC, which has well established expertise in telecommunications enforcement matters and deals with Telstra very closely. By contrast, the Department is a policy making body that does not have the same degree of compliance or enforcement expertise.

Penalties

2.14 Given Telstra's size and the value impacts at stake for Telstra, the sanctions for failure to comply with the Operational Separation Plan are quite modest. As noted in the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 the maximum penalty for failure to comply with a carrier licence condition is $10 million. It might well be rational for Telstra to fail to comply with operational separation requirements in relation to, for example, Unconditioned Local Loop (ULL) if the only penalty it will face is a civil penalty of $10 million.

Services

2.15 Optus notes the initial list of 'designated services' will be determined by the Minister. Optus agrees with the suggestion in the Explanatory Memorandum that the following services should be included:

- Unbundled local loop service;
- Local carriage service;
- Line sharing service;
- Wholesale ADSL (layer 2);

- Public switched telecommunications network service originating service;

  and

- Public switched telecommunications network service terminating service.

2.16 However, these services all relate to residential services. The proposed list of services should be extended to include access services to small business and corporate markets. Competitors reply on Telstra's infrastructure to enable it provide end-to-end services in the business segment. Additional services that should be included are:

- Access Transmission Leases which are declared;
- Business Grade DSL; and
- Data Access Radial (DAR).

2.17 A weakness in the arrangements is that the legislation fails to provide that Telstra must specify the 'mapping' from a particular wholesale service to a particular retail service. Today, Telstra routinely argues that the service standards applicable to a particular retail service such as Digital Data Service (DDS) are not relevant in the case of a wholesale service such as Data Access Radial (DAR) because DAR is a wholesale service which is not used by the Telstra retail division. Similar arguments are made about ULL, Local Call Resale and a great many other Telstra wholesale services. These arguments are specious. Digital Data Service is very similar to Data Access Radial. To prevent these arguments being made, Telstra must be required to agree to a list of wholesale services which 'map' to the relevant service Telstra provides in the retail market. For example, Telstra must be required to agree that Local Call Resale 'maps' to its Home Line Part retail service.

Objectives of Operational Separation

2.18 While Optus supports the broad objectives of operational separation, we are concerned that the Government's intentions could be undermined by Schedule 11 Part 8, clause 48(2)(g), which requires that the aims and objectives 'do not impair Telstra's ability to compete on a fair and efficient basis'.

2.19 Operational separation is intended to prevent Telstra from exploiting its market power. Requirements that prevent it from continuing to do so will, almost by definition, be unfair on Telstra (Retail) relative to its current position.

Recommended changes to the legislative provisions

2.20 Optus considers that the following changes should be made to the legislative provisions:

- require consultation with the ACCC and Telstra's wholesale customers on Telstra's wholesale customers on Telstra's first draft operational separation plan;
- give the Minister power to vary the plan as he or she thinks fit;
- make it a legal requirement on Telstra to comply with its operational separation plan;
- remove the unnecessary and time consuming step of the rectification plan; and
- give a right of action to sue Telstra to enforce its compliance with the plan, so Telstra's competitors can choose to take private legal action against Telstra to enforce a breach.

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

The requirement that it consider the costs and risks of new infrastructure investment when making access decisions.

3.1 Optus understands the amendment is intended to clarify the intention of the Act, rather than introducing any new specific changes.

3.2 Optus has proposed the "Bridge to Broadband" plan, under which we would get concessional local call resale pricing in exchange for a commitment to roll out a broadband network. This would require that in setting the wholesale price which we are required to pay Telstra for local call resale, the Government or ACCC should have the power to set a lower price in exchange for a commitment from Optus in respect of a different service, namely ULLS. We believe this new provision would potentially give the ACCC the power to entertain such an arrangement, and to that extent it is potentially a positive development.

3.3 We note that Telstra has argued that the ACCC does not today give adequate consideration to the effects of its decisions on Telstra's incentive to roll out new networks. We believe this argument is baseless, and is simply a smokescreen for Telstra's real agenda which is to be released from access obligations for any new broadband network it rolls out. We believe the ACCC already has adequate power to consider the impact on Telstra's investment risk of its pricing decisions. These risks are already taken into account by the ACCC via the asset beta component of the WACC, which considers variations in earnings or cash flows that are attributable to company-specific (as opposed to market-wide) factors. Therefore, to the extent that this provision is intended to empower the ACCC to give consideration to investment risk, we consider that the provision simply clarifies what already occurs.

Streamlining the decision-making processes, including the capacity for the ACCC to make procedural rules.

3.4 Optus has been engaged in a process with the ACCC, commencing in December 2004, regarding the consideration of Optus' undertaking on mobile termination pricing. This includes consideration of a number of arbitrations notified by access seekers. An existing process for the consideration of the undertaking and the arbitrations has been in place and has been implemented over the past eight months. The ACCC has recently notified Optus that it will be likely to complete its assessment of Optus' undertaking in a matter of months (ie before 25 December 2005).

3.5 The ACCC's new powers to make Procedural Rules are very broad and Optus is concerned that these new Procedural Rules, if applied to Optus' existing undertaking, will cause delays which are not in the interests of any parties. For example, in relation to deferral under new section 152CDA, the Procedural Rules may authorise the ACCC to defer consideration of an undertaking. Under modifications to the existing section 152CLA concerning deferral of arbitrations, the Procedural Rules may displace the existing rules that give priority to undertakings over arbitrations. Under separate amendments made in Schedule 7, the Procedural Rules may also provide for a time limit for the provision of information and a failure to meet the timeframe may result in a rejection of the undertaking.

3.6 Optus has a number of deferral requests on foot in relation to existing undertakings. These deferral requests must be considered in the existing context, where consideration of Optus' undertaking by the ACCC is nearing completion. Optus believes that the ACCC should devote its resources to consideration of the undertaking at this late juncture. Further, Optus has received several requests for information from the ACCC (including existing requests). Optus has responded promptly to all of these requests and provided the relevant information to the ACCC. It would be unfair to Optus should the ACCC exercise, at this late juncture, a right to reject the undertaking because of Optus' failure (if any) to fully meet a request for information, particularly given Optus' strong historical practices to date.

3.7 Optus therefore submits that the Procedural Rules should not apply to existing undertakings and arbitrations. All of the ACCC, Optus and access seekers have been considering the undertaking and arbitrations according to the existing procedures adopted by the ACCC. For these procedures to change in relation to existing undertakings and arbitrations will lead to delays and inefficiencies, which is not in the interests of any parties. Optus believes that the priority should be for the ACCC to make decisions about the existing undertakings, and not be diverted into applying different procedures to those undertakings.

3.8 Optus suggests the addition of a new item 29 to Schedule 7 of this Bill after item 28 covering the ACCC's ability to make Procedural Rules, which states as follows:

"The Procedural Rules made under Division 10A are to be disregarded in their application to:

(a) access undertakings lodged under section 152BS;
(b) access disputes notified under section 152CM,

prior to the commencement of this Division."

4. The role of the Australian Communications and Media Authority (ACMA)

The provision of additional enforcement powers

4.1 Optus has no comment on the additional enforcement powers for ACMA.

Improvement of the effectiveness of the telecommunications self-regulatory processes by encouraging greater consumer representation and participation in the development of industry codes

4.2 Optus applauds the concept of sharing consumer code development costs across all carriers in the industry rather than only those who are members of relevant self regulatory bodies such as ACIF.

4.3 Nevertheless, Optus is concerned at the statement in the Regulatory Impact Statement contained within the Explanatory Memorandum to the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 that Optus and Telstra are likely to face increased costs under the proposal.

4.4 Optus requests clarification from the Government as to why Optus is expected to face additional cots under a model which is designed to be more equitable. Optus after all is already a major participant in and financial contributor to voluntary self regulatory schemes.

4.5 Optus is keen to ensure that the proposed arrangements:

- do not give rise to 'over servicing', where a range of organisations seek to develop consumer codes beyond those justified, and then obtain reimbursement from the carriers via the Australian Media and Communications Authority (ACMA);
- do not lead to an 'over correction' towards excessive participatory models and elaborate code development structures beyond the optimum – again giving rise to excessive costs to be reimbursed from industry;

- encourage the streamlining of ACMA's administration process so that an additional layer of costs is not generated and passed on to the industry in the administration of the scheme, either directly or via additional core ACMA costs recovered via carrier licences.

5. The establishment of a perpetual $2 billion Communications Fund

5.1 The $3.1 billion 'Connect Australia' package has the potential to deliver a significant step change in the competitive structure of telecommunications in Australia, and Optus commends the Government for committing to design the funding schemes on a competitively and technologically neutral basis.

5.2 To realise that potential, the Connect Australia funding programs must be carefully designed to ensure errors of past funding initiatives are not repeated, and to ensure that fundamental competition principles are observed.

5.3 Optus believes that any program to allocate public money to provide additional telecommunications services in rural and regional areas should:

- be designed to actively encourage greater competitive entry; and
- include specific measures to prevent the funds being allocated disproportionately in favour of Telstra.

5.4 Optus recommends the Government:

- Implement an independent governance and oversight mechanism. This may take the form of an independent office and regular review and monitoring of the program objectives and of participants and ensure that funds are allocated on a competitively neutral basis.
- Introduce a funding cap of 60% of the total subsidy pool being available to Telstra. This measure would continue a measure introduced unde the HiBIS Scheme to restrict funding being used to reinforce Telstra's dominance in rural and regional areas. The measure would be monitored as part of the governance mechanism to ensure Telstra doesn't benefit disproportionately under the program.
- Aim for a small number of projects, each receiving a large proportion of the available funds, to leverage maximum impact. This will assist the Government achieve its stated goal of further encouraging telecommunications infrastructure competition.
- Release a Discussion Paper calling for expressions of interest for a national roll out of competitive infrastructure to a specific percentage of the population. The Discussion Paper would request interested parties to propose:
    - the magnitude of the subsidy interested parties would require;
    - what network reach would be achieved;
    - what specific rollout targets would be achieved; and

- the appropriate matrix of technologies required to deliver competitive services across Australia.