ATUG Submission to the ECITA Committee on the Inquiry into Telstra

Transition to Full Private Ownership Bill 2005 and related bills

Tom Amos and
Rosemary Sinclair
Managing Director

12 September 2005

This document summarises ATUG's views on Telstra Bill package under review by the ECITA Committee relating to the further sale of Telstra equity.

Better and sustainable telecommunications are of relevance to all users of telecommunications - consumers, businesses small and large and government agencies - because of the importance of telecommunications to economic growth, productivity and efficiency and regional sustainability and development:

1) Competition in telecommunications
2) Consumer safeguards
3) Support for regional and rural end users, and
4) Regulatory effectiveness

ATUG is a self-funded, not for profit organisation that has been representing the interests of end users of telecommunications since 1980, and has participated in all of the major policy debates and developments in telecommunications and related areas. Our prime focus is medium to large organisations but our interests extend also to home based users - whether as customers, clients or teleworkers.

As part of this submission to the Committee, we note that these Bills for review on the 8th September despite the importance of these issues and the Government's stated position that the issues relating to improvement of the competition framework were not dependent on the sale legislation but related to industry developments and necessary updates.

This is the only time ATUG can recall such an important piece of legislation not being available in Exposure Draft form to all relevant parties. The core policy objective of telecommunications policy and legislation is to promote the long-term interests of end users of services. ATUG believes rushed and debate constrained legislative processes put this objective in jeopardy.

The copy of the Legislation package received included:

> The Telstra (Transition to Full Private Ownership) Bill 2005;
>
> The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005;
>
> The Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005;
>
> The Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005, and;
>
> The Appropriation (Regional Telecommunications Services) Bill 2005

Given the time made available to ATUG a thorough examination of all aspects of the Bills has not been possible and this submission thus reflects the time allowed.

The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005

We note and agree with the Objectives of amendments are:

1. facilitating a more ex-ante and transparent regulatory regime;
2. improving obligations to interconnect competing networks;
3. greater certainty for investment in future networks;
4. greater regulatory certainty and more timely access to bottleneck services;
5. greater incentives not to breach the competition rule;
6. minor changes to the telecommunications regime; and
7. improved compliance with the telecommunications regulatory regime.

ATUG supports these Objectives.

ATUG's comments to the Terms of Reference set out for the Committee are as follows:

(2) In examining the bills, the committee consider only the following issues:

(a) the operational separation of Telstra;

(b) the role of the Australian Competition and Consumer Commission (ACCC), including:

(i) the requirement that it consider the costs and risks of new infrastructure investment when making access decisions, and

(ii) streamlining the decision-making processes, including the capacity for the ACCC to make procedural rules;

(c) the role of the Australian Communications and Media Authority, including:

(i) the provision of additional enforcement powers,

(ii) improvement of the effectiveness of the telecommunications self-regulatory processes by encouraging greater consumer representation and participation in the development of industry codes; and

(d) the establishment of a perpetual $2 billion Communications Fund.

Operational Separation

ATUG supports the introduction of the new regulatory tool known as Operational Separation.

Operational separation in telecommunications has significant benefits for the industry and end users.

ATUG believes operational separation is a positive step for better end user services when it forms part of the further sale process of Telstra and when combined with the appropriate telecommunications policy and regulatory framework.

Australia has long been at the leading edge of developments in telecommunications policy and regulation and must remain there if we are to achieve the favourable long-term consequences of effective competitive in Australia's telecommunication services market. The alternative - failed competition in telecommunications - will have serious consequences because the next 10 years will see communications capability play an even more important role than ever before in economic growth, social development, efficient and effective delivery of government services.

Whilst supporting operational separation, ATUG notes the following matters need review or correction to ensure that the framework that is developed delivers the desired outcomes for the industry and the users:

Schedule 11 of the Competition and Consumer Issues Bill amends Schedule 1 to the Telecommunications Act to insert a new Part 8 relating to the operational separation of Telstra, and makes related amendments to Parts XIB and XIC of the TPA;

ATUG believes that the model takes into account Telstra's existing organisational structure and business practices and commits Telstra to:
:

a. operational and organisational separation of the wholesale business unit and key network functions from the retail business units including, separate staff and premises and staff incentive programs to ensure equivalence is provided;

ATUG supports this proposal

> b. equivalence between the internal wholesale price faced by Telstra's retail business units and the wholesale prices paid by Telstra's competitors for designated services;

One of ATUG's major concerns is how the internal wholesale price is set.

The Second Reading speech describes:

> A group that includes the ACCC, DCITA and Telstra (with an expert facilitator if necessary) would develop a set of principles for the establishment of the internal wholesale price. This group would also seek to establish a formal understanding about use of the internal wholesale prices in assessing whether anti-competitive behaviour exists. This process would provide the internal wholesale price that the ACCC has identified as important to its role of enforcing compliance under Part XIB of the TPA.

In the Telstra Briefing document released publicly last week, Tab 4 outlines The Digital Compact and National Broadband Plan: Enabling Regulatory Reforms. This document outlines Telstra' preferred regulatory position. An extract from that document is contained in attachment 1.

ATUG believes the position outlined in the document is crucial in understanding Telstra's likely response to the responsibilities set up under the provisions for Operational Separation.

In regard to wholesale pricing issues (which are the core debate between Telstra and the ACCC with Telstra arguing for inclusion of overhead, joint and common costs and the ACCC using an incremental cost model – as do its peers around the world) the Tab 4 documents says at page 3:

"Prices determined in arbitrations must at least cover efficient costs.
The Commission, in determining charges in an access arbitration, may not determine a charge which would not allow an efficient provider to recover all of its costs in the longer run, taking account of (1) the need to recover overhead costs and joint and common costs, (2) the need to provide sufficient capacity to cater for expected growth in demand; (3) the need for investments to eran a commercial rate of return that fully reflects risk; and (4) any social or other policy obligations (including CSGs) to which the service provider is subject and the need for the recoupment of costs associated with those obligations."

ATUG's concern given this statement is that Telstra would use the introduction of its price setting powers under Operational Separation to INCREASE significantly wholesale prices to competitors and hence prices for end users would rise substantially. Competitors may be indifferent to pass through of all these additional costs but the impact on end users would be very negative.

The consumer safeguards that have been introduced over time have been directed at addressing monopoly behaviour – poor quality, slow service, high prices. Operational Separation should not allow Telstra to effectively wind back years of competition and consumer safeguard reform or to transfer Telstra's view of costs to consumers.

The way the Bill is currently drafted that will be the effect.

The recent debate about USO costs highlights the magnitude of the variation – ACMA has determined the USO cost for 2004-2005 to be in the order of $250 million, of which approximately $70million is funded by industry. Telstra's view of the USO cost is something "north" of $ 1billion as ATUG understands it. The time for the debate about USO costing and funding is the next review of the USO not when wholesale prices are being set. ATUG would also make the point that the increases in line rental allowed under the Price Control regime already take account of any "access deficit" which may have existed in line rental charges.

The Second Reading speech also indicates:

> Schedule 11 would also amend Parts XIB and XIC to insert provisions that would require the ACCC, when performing its functions or exercising its powers under either Part XIB or XIC, to have regard to conduct that Telstra's engages in (in) order to comply with a final operational separation plan, to the extent that that conduct is relevant to the functions being performed or the power being exercised. These amendments would provide a linkage between the operational separation plan and Parts XIB and XIC where relevant.

This wording seems to have the potential override existing ACCC powers under Part XIC to provide pricing principles for declared services and under Part XIB to determine anti-competitive conduct. Since the Plan is going to be developed by Telstra it seems ludicrous to ATUG that such a plan might be allowed to override ACCC access pricing principles and price squeeze determinations.

> c. equivalent standards of service for designated services provided by Telstra to its retail business units and its wholesale customers, with published internal contracts to set out the conditions upon which Telstra's network business units provide services to its wholesale and retail business units;
>
> d. improved responsiveness to wholesale customer requirements, including but not limited to, regular reviews, information on network deployment, a wholesale service improvement plan and reporting on access to Telstra's exchanges;
>
> e. procedures and processes, including rules for how the separate business units interact and monitoring and reporting to verify that the above commitments are being met; and

> f. an annual compliance report to Government setting out details of Telstra's compliance. This report would include an external auditor's report.

This compliance assessment is post event. We need to ensure that compliance during the period is continuously assessed and can be remedied if problems emerge. Annual reporting is too late.

> The model would be introduced through a licence condition that required Telstra to produce, implement and adhere to an operational separation plan. The commitments above would be reflected in the operational separation plan, and would be delivered through a comprehensive monitoring and enforcement regime, including an annual compliance report produced by Telstra and provided to the Government, and by ongoing enforcement of the licence condition by the ACCC and the Minister for Communications, Information Technology and the Arts (the Minister).

If Telstra contravenes a final operational separation plan the Minister can require it to prepare a rectification plan. Breach of a rectification plan would be a breach of Telstra's carrier licence, and would enable enforcement action by the ACCC.

ATUG Comments

The way the legislation is worded the Operational Separation Licence Condition is to produce, implement and adhere to the plan. ATUG believes the contents of the Operational Separation Plan should part of the licence condition. Questions arise as to how long Telstra could spend "producing" the plan – would we ever get to the point of having something to "implement and adhere to". The final plan should be required for the Licence Condition to be met.

ATUG is concerned that ACCC does not have a regulatory role until very late in the process, and only to pursue breach of licence action. But given the new role of Minister as regulator it is not clear to ATUG how will we know if there has been a breach of the Licence Condition and how will enforcing the licence condition assist competition. There should be continuous in-confidence disclosure to ACCC of internal contracted prices between Telstra divisions and lodging of price negotiations between Telstra Wholesale and competitors to enable on-going "equivalence" compliance assessment

In general, ATUG is concerned about the new role of the Minister in regulatory processes. The independence of regulatory processes, complexity of issues to be reviewed and decided, the time constraints on the Minister and the fact that this seems to be unprecedented in other industries all raise concerns. The role of the ACCC as Australia's independent, expert regulator of telecommunications should be enhanced and not watered down because of Telstra's non-acceptance of ACCC decisions.

> Schedule 11 would also provide for the operation of the operational separation licence conditions to be reviewed by 1 July 2009 and a report of the review to be tabled in both Houses of Parliament and for the Minister <u>to make a declaration, after the report had been tabled, that Part 8 of schedule 11 ceases to have effect.</u> However, the Minister's declaration could not be expressed to have retrospective effect.

ATUG Comments

This sunset clause is a concern. The legislation should provide the power for the Minister to make the declaration depending on the findings of the review. Discretion should be provided such that the Minister **may** make the declaration, not that (s)he will do so.

ATUG wishes to raise a further point in regard to the definition of designated services in:

> b. equivalence between the internal wholesale price faced by Telstra's retail business units and the wholesale prices paid by Telstra's competitors for designated services;

Whilst there has been much emphasis on the promotion of infrastructure at the heart of the need for operational separation is an acceptance that open resale of declared services will continue to play an important role in the development of sustainable competitive communications, as it has done since the inception of deregulation.

ATUG welcomes the inclusion of clause 50 in Part 8 of Schedule11 but the clear matter of open resale of declared services seems to be omitted. Given that in excess of 40% of user expenditure involves the purchase of monopoly fixed to mobile terminations services by users ATUG we would have expected that this matter would have been clarified in 50B going forward, by including all declared and designated services as available as wholesale products for resale. ATUG would not like to see Operational Separation used as a lever to reduce the number of wholesale products available.

It is not clear to ATUG whether the defining of designated services by the Minister will increase or decrease the range of wholesale services by comparison to the process of declaration currently used by the ACCC under the Trade Practice Act. The intent of the legislation seems to be to have a reduced number of services subject to Operational Separation – as agreed byTelstra and the Minister without the public processes associated with the Declaration procedures.At the very least the ACCC ought to be consulted given the relationship of Operational Separation to Part XIC and Part XIB responsibilities.

It is intended that services would be considered as designated services if they were considered to be important to the development of competition, particularly, if there were concerns that they were currently not be supplied on an equivalent basis. While the initial list of designated services would be finalised by the Minister following further consultation, it is intended that it would include:

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.

ATUG suggests that this list should also include mobile termination access service.

ATUG also supports the following schedules to the Competition and Consumer Issues Bill and makes comment on a number of them below.

Schedule 4 increases the penalty that may apply to a body corporate for a breach of the competition rule in Part XIB of the TPA; Schedule 4 to the Bill amends section 151BX to provide for increased penalties for breach of the competition rule. The penalty for a body corporate would continue to be $10 million for each contravention and $1 million for each day for the first 21 days during which a breach continues. After 21 days, the penalty would be $3 million for each day the breach continues.

Schedule 5 amends Part XIC of the TPA to allow the Federal Court to enforce the conditions and limitations that apply in respect of exemptions from the standard access obligations;

Schedule 6 inserts drafting notes into two provisions of Part XIC to highlight the ability of the ACCC to vary or revoke class exemptions from the standard access obligations;

Schedule 7 permits the Australian Competition and Consumer Commission (ACCC) to make procedural rules which it would apply in carrying out its functions under Part XIC of the TPA;

Central to this option would be an amendment to the TPA to enable a range of matters to be addressed through procedural rules and then the establishment of a power by which the ACCC could determine and amend, in consultation with industry, these procedural rules.

ATUG has some concerns about this new power for the ACCC, given recent statements by Telstra in regard to exercising a more legally based approach to regulation. ATUG is concerned that ACCC attempts to develop procedural rules will lead to regulatory gaming by way of court action rather than speedy regulatory outcomes.

> Schedule 8 amends Schedule 1 to the Telecommunications Act to impose an obligation on a carrier to acquire certain services from a carriage service provider where this is necessary to facilitate and ensure any-to-any connectivity;
>
> There is currently no requirement on carriers who own, or supply carriage services over, large telecommunications networks to acquire declared services (in particular, terminating access services) from carriage service providers who supply carriage services over smaller networks, for the purpose of ensuring any-to-any connectivity for the end-users connected to those smaller networks. The practical effect of this is that it is possible for the carrier to deny any-to-any connectivity to end-users on a smaller network (such as a new fibre customer access network installed in new housing estates).

ATUG supports this amendment because of the importance to end users of any to any connectivity and the entry of new, smaller players into the telecommunications infrastructure market.

> Schedule 9 amends the object of Part XIC of the TPA to clarify that, in considering whether a particular thing promotes the long-term interests of end-users, the ACCC must consider the incentives for, and the risks involved in, investment in new network infrastructure;

ATUG supports this amendment as it adds clarity to ACCC decision making process. ATUG's view is that at the moment the ACCC already takes investment risk into account and that in general terms ACCC decisions support investment and innovation and hence the long-term interests of end users, rather than shorter term interests such as low prices for end users. We would cite the ACCC's work on Access Deficit as an example decisions which have weighted investment ahead of price decreases.

> Schedule 10 amends the Telecommunications Act to provide that a person may give the ACMA an enforceable undertaking that the person will take action to ensure the person does not contravene the requirements of the Telecommunications Act or the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (T(CPSS) Act);

ATUG supports this amendment.

> Schedule 12 provides that the ACCC is not obliged to consult with the parties to an access dispute in certain circumstances when it makes an interim determination on that access dispute, and provides that the ACCC may extend the period of an interim determination;

The ACCC will not be required to consult with the parties to an access dispute when making (or varying) an interim determination if it has determined pricing principles or model terms and conditions in relation to the relevant declared service, and the price-related terms and conditions of the interim determination as made (or varied) are consistent with the price-related terms and conditions included in the pricing principles or in the model terms and conditions.

The Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005

Schedule 3 to the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 provides for a scheme to enable industry bodies or associations to apply for reimbursement from the Australian Communications and Media Authority (ACMA) of the costs of developing consumer-related codes.

Through the amendments proposed in this Bill, ACMA will be able to recoup these payments from telecommunications carriers. Under the existing arrangements, carrier licence charges are equitably based on each carrier's share of total telecommunications revenue.

This scheme will mean more equitable funding of consumer-related codes. It will also increase funding certainty for industry bodies or associations, and enable increased consumer participation in, and more timely development of industry codes that benefit residential and small business consumers.

The amendments will help to address the concerns of consumer bodies, who have sought increased opportunities to participate in code development, for example in the report 'Consumer Driven Communications: Strategies for Better Representation'.

ATUG supports these amendments.

Proposed subsection 136A(1) will provide that bodies or associations that propose to develop certain types of industry codes may apply to the ACMA for a declaration that the body or association is eligible for reimbursement of the refundable costs that it incurs in developing the code

ATUG assumes it will be ACIF applying, not the individual associations – eg ATUG, CTN, SETEL etc. as consumer groups need to be reimbursed quickly for code development costs.

ATUG is also concerned about a number of consumer relevant codes that are being developed by other industry associations without direct consumer input e.g. Internet Industry Association codes on spam or perhaps Mobile Industry Association codes on mobile content codes. Consumer need to be represented in code development that is relevant to their interests. The trend to convergence will make the reference to “telecommunications codes” limiting over the next few years.

The Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005

> Schedule 4 to the Bill will make a consequential amendment to subsection 8BUA(1) of the *Telstra Corporation Act 1991* to ensure that at least 2 directors of Telstra will be required to have knowledge of, or experience in, the communication needs not only of regional areas but also of rural or remote areas of Australia.

ATUG believes that the ACMA also should have access to an Associate Director at least with Regional and Rural background and experience to add value to the ACMA decision making process with regard to rural matters. Part of the Government’s response to the Besley Report into Regional Telecommunications services was the addition of specific focus and knowledge about regional telecommunications. ATUG believes it is important that this expertise continues to be available to ACMA.

In addition ATUG believes that the ACMA should report annually regarding progress on Regional and Rural/Remote area matters to provide Parliament with updated information between the proposed three year reviews of regional service matters.

> Communications Fund
>
> S158ZJ provides that the total of amount of credits to the fund must not exceed $2 billion
>
> The Second Reading speech provides:
>
> The creation of a dedicated and perpetual Communications Fund of $2 billion from the proceeds of the final sale of Telstra will provide an ongoing income stream to fund the Government’s response to any recommendations proposed as a result of the regular reviews in to the adequacy of regional telecommunications.

It is important to end users that the fund be provided with the $2 billion committed rather than the “not to exceed” words in the Bill. s158ZK allows for the transfer of financial assets to the fund. ATUG notes these could be Government held Telstra shares. A mechanism needs to be found to ensure that the asset value of the fund is $2 billion at minimum given that it is the income from the fund that will be used to support the Government’s response to the independent reviews of Regional Telecommunications findings outlined in Schedule 2.

ATUG also would like to see funds being available should matters that need addressing arise in the ACMA annual reports on regional services that ATUG has suggested above.

> S159B refers to the Connect Australia package which contains a further $30 million for the Mobile Connect program to expand the satellite phone handset subsidies scheme, and for terrestrial mobile coverage where operating costs can be recovered and investment is commercially viable;

ATUG believes that operators who access these funds should be required to offer and accept roaming arrangements in regional areas to ensure end users get maximum coverage from government expenditures. This is similar to the any-to-any connectivity requirement in Schedule 8 of the Competition and Consumer Issues Bill.