The Digital Compact & National Broadband Plan: Enabling Regulatory Reforms

The Compact defined: The Government and Telstra, working together, will assume obligations to each other and to the public to build a national information infrastructure that brings high-speed, broadband services to more than 98% of the homes and businesses in Australia, with build-out beginning in the first quarter of 2006 – or as soon as the Compact is agreed to.

Only a few weeks ago, the Taskforce appointed by the Prime Minister to review Australia's Export Infrastructure reported that

> "Without action to remove **impediments to investment in infrastructure**, Australia's export potential over the next five to ten years risks being compromised."

The Taskforce went on to say that

> "The greatest impediment to the development of infrastructure necessary for Australia to realise its export potential is the way in which the current economic regulatory framework is structured and administered. It **is adversarial, cumbersome, complicated, time consuming, inefficient and subject to gaming by participants**."

At Telstra, we commend the Prime Minister's leadership in responding to that Report and we welcome the steps he has taken to secure regulatory reform through the Council of Australian Governments. Today, we are asking the Government to initiate similar, far-reaching, reforms in telecommunications.

The following pages outline the regulatory reforms that are needed to bring "next generation" broadband infrastructure and services to all Australians, no matter where they live.

1. Part XI-C

Re new and advanced services

- **No further declarations should be made under the existing declaration test.**
- **New infrastructures and services will exempted from regulation.** Specifically, the new infrastructure constructed under the National Broadband Plan, and services enabled by that infrastructure, will be exempt from declaration. Competitors will continue to have regulated access to precisely the same capabilities they have today – generally, 1.5 MB broadband service – either over existing copper or as a bitstream offering over newly installed fiber. Telstra will submit an undertaking guaranteeing such access.
- **New declarations of existing services would be subject to clearer and more specific criteria.** More specifically the Part should be amended so that new declarations may be made only if (1) the services are a natural monopoly, and a bottleneck to the development of competition in downstream markets; (2) the services could not have been provided by others at the time when they were introduced; (3) there are not alternative sources of supply of those services, nor is it likely that such services will develop in a reasonable time-frame; and (4) the ACCC, in determining whether to declare the service, has taken account of the desirability of restricting the range of services that are regulated.
- **Services should not remain declared when the conditions which made for declaration no longer hold**. All current service declarations shall lapse at a date that is the sooner of (1) three years from the time they were made, (2) December 1, 2008, and may only be renewed if they meet the test set out above.
- **There should be a right to seek review on the merits of service declarations**.
- **An effective undertaking mechanism shall be provided that allows for certainty not only with respect to services, but also for new facilities**. Service providers must be able to offer an undertaking not only for a service that has been declared, or might be declared, but also for a facility for which investment may or may not have taken place, with the objective of providing certainty as to the access terms and conditions for future periods. These terms and conditions may include no third party access.

- **When an Undertaking is offered in respect of a declared service, or in respect of a service which may be declared, or for an existing or proposed facility, the Undertaking must be accepted unless that Undertaking is unreasonable.** The ACCC must deem an Undertaking to be reasonable if the services or facilities covered by that Undertaking (a) have not yet been provided or (b) could have been provided by others at the time when the investment necessary of their provision was committed. Where that deeming provision does not apply, the ACCC, in assessing whether an Undertaking is unreasonable, must (1) take account of any social or other policy obligations (including CSGs) to which the service provider is subject and the need to recover costs associated with those obligations; (2) take account of the need for investments to earn a commercial rate of return that fully reflects risk; (3) take account (a) of the public interest in the reliability of supply and (b) of the need to provide incentives for the development and widespread availability of new services. Additionally, the ACCC must take account of (4) the need to recover overhead costs and joint and common costs and (5) the need to provide sufficient capacity to cater for expected growth in demand.
- **There should be clear timelines for consideration of Undertakings.** If an Undertaking is not rejected within 3 months, then the Undertaking shall be deemed to have been accepted.
- **If an Undertaking is rejected, and that rejection is appealed, there should be clear timelines for determination of that appeal**. The Australian Competition Tribunal shall have no more than 6 months in which to hear the appeal and must return a decision within 30 days of the completion of the hearings.
- **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 earn 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 recoupment of the costs associated with those obligations.
- **There should be a right to merits review of charges determined in arbitrations**. The Australian Competition Tribunal shall have no more than 3 months in which to hear the appeal and must return a decision within 30 days of the completion of the hearings.
- **The telecommunications access regime should cease**, and only the economy-wide access provisions should apply from no later than December 1, 2008.

- The proposed legislative changes should come into effect from the date of announcement.

2. Part XI-B

<u>Re new and advanced services</u>

- **The legislation should be clarified by adding a purpose clause that states that nothing in Part XI-B should be used to prevent a carrier from introducing new services, improving existing services or offering sustainably lower prices to consumers**. It should be made clear that this provision must be taken into account in determining the interpretation of any provision in the Part.
- **Part XI-B should only apply to declared services.** To this end, the Part should be amended so that to breach the competition rule, (1) a carrier must have a substantial degree of power in a market; (2) that market must be the market for a declared services; and (3) that carrier must take advantage of that power with the effect or likely effect of substantially lessening competition.
- **Part XI-B should not prohibit or impede Telstra from meeting competitors' prices**. To this end, the Part should be amended to state that nothing in this part may be used to prevent a carrier from merely meeting the prices set by its competitors.
- **Telstra should not be subject to prolonged uncertainty about Competition Notices**. To this end, the Part should be amended so that Notices expire after three months. Additionally, the Commission must, within 3 days of issuing a Competition Notice, give a statement of reasons to the party against which the Notice is issued and that statement must allow that party to identify the conduct which is caught by the Notice and the changes it must make to that conduct for the conduct to be consistent with the Competition Rule.
- **Part XI-B should have a clear sunset clause**. The Part should be amended so that it expires on December 1, 2008.
- The proposed legislative changes should come into effect from the date of announcement.

3. Operational Separation

- **Operational separation should not undermine Telstra's efficiency or ability to compete**. To this end, any requirement for operational separation shall only apply in so far as it does not (1) compromise or unduly restrict Telstra's ability to operate as an integrated entity; (2) undermine Telstra's ability to develop, implement and provide new services; (3) undermine Telstra's ability to reduce costs; (4) increase the risks Telstra bears in undertaking new investments; (5) or in other ways hinder, impede or prevent Telstra from offering lower prices or better services to consumers.
- **Additionally, operational separation shall only apply to declared services and to services in respect of which Telstra is in practical terms the sole supplier**. To this end, the Minister, in determining the range of services covered by any operational separation requirement, may only include a service if that service is a declared service and the Minister is satisfied that Telstra is in practical terms the sole supplier of that service.
- **Operational separation shall provide for equivalence in service standards**. Within the constraints set out above, Telstra shall ensure that in the supply of the listed services, it ensures that those services are provided on non-price terms and conditions that are equivalent to those on which it provides those services to itself, taking account of any differences in the circumstances in which that supply occurs.
- **In ensuring equivalence in the prices on which listed services are provided to Telstra itself and to third parties, any operational separation requirements must not force Telstra to impose on itself prices any higher than those it offers material competitors.** To this end (1) nothing in the operational separation regime shall impede Telstra from offering to itself a price that is no lower than the price it offers a material competitor; (2) nothing in the operational separation regime shall impede Telstra from offering to itself a price that is required for it to meet the retail prices set by competitors, and (3) nothing in the operational separation regime shall impede Telstra from offering to itself a price that reflects the economies associated with the scale on which it supplies service to itself.
- **Any operational separation requirements should be implemented in a manner that minimizes compliance costs and is light handed**. In the first instance, compliance audit should be by accredited third parties, rather than by a regulator; the regulator may only carry out its own audit if requested by the Minister, and the Minister may only seek such an audit if there are reasons to believe that the compliance audit has been improperly carried out. Additionally, it needs to be made clear that it is not the intention of operational separation to act as an ex ante tariff approval regime, and that the regime is not be interpreted or implemented in a manner that creates or amounts to such an ex ante tariff approval regime.

- **The operational separation requirements shall apply to all providers of declared wholesale services.**
- Telstra's compliance with the pricing aspects of Operational Separation will **provide Safe Harbour status** with respect to XI-B

4. USO

- **The current USO provisions will be locked in for a period of 3 years**. Those provisions shall continue to apply only to the Standard Telecommunications Service.
- **Telstra will have a predictable stream of compensation for providing the current USO**. To this end, the Government will specify an amount, to be set on the basis of the cost of the USO at 1 January 2006, which will be the amount, corrected for inflation, which will be paid to Telstra each year as compensation for the cost of the current USO. Those payments will continue for 5 years.
- **The Government must also ensure that the ACCC has an obligation, in the exercise of its powers under Part XI-C, to take account of the need for Telstra to recoup the costs of the USO.**
- If at the end of the 5 year period, the Government retains Telstra's obligations with respect to the Standard Telecommunications Service, it must ensure that Telstra is compensated for those obligations by an annual payment equal to the amount provided in the last year of the 5-year period, adjusted for inflation.
- The Government will establish a fund that will have as its purpose to ensure that all Australians, regardless of where they live, work or carry on a business, will have reasonable access to telecommunications services including advanced telecommunications services. That fund will be required to operate in a manner that is transparent and competitively neutral. In particular, there will be no restrictions on Telstra's ability to bid for any part of the funding made available.

5. Local Presence Plan

- **The requirement to file a Local presence Plan shall apply equally to all licensed carriers** and should provide details of:
  1 areas where the carrier has invested in telecommunications facilities in the course of the previous 12 months and the extent of such investments;
  2 areas where they plan to invest in the next 12 months.

6. Service Standards and CSG's

- **All current CSGs and obligations associated with the Network Reliability Framework are to be reviewed within the next 3 years**. That review shall be carried out by the Productivity Commission and shall be made public. It should examine the costs and benefits of the relevant regulations and their impacts on the efficiency and competitiveness of the telecommunications industry.
- **Any changes to existing CSGs or service standards, renewals of existing CSGs or service standards, or introduction of new CSGs or service standards can only be imposed if the benefits of such to Australian society outweigh the costs**. In making this assessment, the communications regulator (ACMA) shall be required to take account of (1) the desirability of relying on markets to determine service quality, and (2) the extent to which acceptable levels of service would in any event be provided, even absent any specific regulation. The regulator's assessment is to be published.
- **Any CSGs or service standards must be competitively neutral and equally applicable to all providers of those services.**
- **The community should be made aware of the costs and benefits of service standard regulation**. The Productivity Commission shall be required to undertake and publish, at least once every three years, an assessment of the costs and benefits of the regulations.

7. Price Averaging

- **With respect to the existing copper loop and the legacy services of the PSTN, there is a general community expectation that a degree of price averaging will be maintained between metropolitan and non-metropolitan areas.** That expectation will not give rise to a specific legislative requirement, but may be a matter on which the Minister or ACMA reports from time to time, and should be a matter that the ACCC is required to fully take into account in its pricing decisions.

- Any expectation as to the averaging of retail pricing will only to apply to existing copper loop and legacy services, and will not apply in respect of new services, including ADSL.
- **To make that expectation more sustainable, the Government will legislate to ensure that regulated wholesale prices for declared services, and especially for those used in, or relevant to, the supply of the legacy services of the PSTN, and specifically including ULLS, will also be averaged as between metropolitan and non-metropolitan areas.** This will take the form of a requirement that in setting regulated prices for the relevant declared services, the regulator (or the ACT in appeal proceedings) must take account of the desirability of preserving reasonable parity of retail pricing as between metropolitan and non-metropolitan areas and must set the regulated prices in a manner that is consistent with, and promotes, that objective.
- **That legislation will not prevent Telstra from setting de-averaged wholesale prices where it chooses to do so, or from de-averaging its retail prices where required to do so to meet competition.**
- **The legislative instrument shall have a sunset clause**. That sunset clause will come into force if there is a policy decision that the relevant retail prices should be capable of being deaveraged and any legislation that may prevent that deaveraging (such as the local call pricing parity provisions) is repealed.
- The proposed legislative changes should come into effect from the date of announcement.