



14 June 2005

Louise Gell
Secretary, Senate Environment,
Communications, Information Technology
& the Arts References Committee

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Dear Ms Gell,

In the recent Senate hearing into Australia's telecommunications regulatory regime, I undertook on behalf of Unwired to provide our views on how the Government can ameliorate obstacles to other infrastructure competitors rolling out into regional and rural Australia.

Unwired believes the Government needs to take the following steps to improve the competitive framework for telecommunications and to create incentives for investment in infrastructure to create sustainable competition across the nation.

1. Establish maximum backhaul charges for rural and regional Australia. Excessive backhaul charges are a major factor in not deploying networks outside metropolitan Australia.
2. Establish new provisions under the Trades Practices Act to more effectively address market power abuse in the telecommunications industry. For example, amend the Act to provide the ACCC with a 'cease and desist' power.
3. Develop specific initiatives as part of the National Broadband Program to stimulate the creation of competitive services in rural and regional Australia. For example, establish new technology trials in select regional centres to create more than one technology option for the future.

I will address each point in more detail and I have also attached our response to the DCITA Issues paper on Telecommunications Competition Reform (April 2005) that expands on these points even further.

1. Establish maximum backhaul charges for rural and regional Australia.

The key question Unwired needs to ask before rolling out infrastructure beyond the major population centres is how much will it cost us to get the data back to the internet?

In areas where there are a number of infrastructure providers, competition allows service providers like Unwired to negotiate over price and data volume to the benefit of our customers. This is not the case for much of rural and regional Australia, where the choices are usually limited to Telstra and, in some cases, Optus.

For smaller players to contest Telstra's charges for backhaul in non-competitive areas (including areas where backhaul is declared) requires an arbitration process with Telstra. Initiating this process is cost prohibitive and time consuming for smaller and regional providers. We believe a fairer process is to establish indicative pricing comparable to the competitive routes.

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Based on our existing intercity traffic arrangements, Unwired would be seeking a backhaul charge of less than \$300 per Mbps per month for any regional area. We shall be providing detail to the ACCC in relation to this matter.

To establish indicative pricing will do many things, including:

- Significantly increase the level of financial certainty for companies looking to invest by rolling out infrastructure in regional areas
- Provide a more level playing field for smaller companies
- Make the prospect of investing in rural/regional areas a more attractive option.

The ACCC is on record as saying pricing guidance can have an important role to play in informing commercial negotiations around the pricing of access to declared services and it has established a commercial work program considering both the suitability of the existing backhaul declaration and the associated approach to pricing the service. We will be looking to get involved in this program.

2. Establish new provisions under the Trades Practices Act to address market power abuse in the telecommunications industry.

a. The 'Purpose Test'

Telstra's dominance in this market means its actions have an impact on the rest of the market regardless of its intentions.

To make Section 46 of the Trade Practices Act (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. The removal of the purpose test, replaced by 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.

b. 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 of a kind dealt with in a competition notice that was in force at the time when the alleged conduct occurred.

Provision for recourse to the courts for injunctive relief has also proven unequal to the task whether for practical or technical legal reasons.

The competition notice has been shown to be a flawed instrument as many have attested. This was most recently evidenced in the case of Telstra reducing its retail price for broadband internet access in 2004 below its wholesale price, forcing the market into a price-cutting war and destroying incentive for investment in new infrastructure.

After protracted complaints and the issuing of a competition notice, Telstra agreed to reduce its wholesale price to allow retailers to resell its service with some margin for their own costs and settled the matter for a, for Telstra, paltry \$6.5 million. Hardly the hallmark of a market open to new investment in competing networks.

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 this telecommunications market. In the context of last year's broadband price cuts, a cost to Telstra of \$6.5 million becomes a cost of doing business, not a disincentive to cease conduct.

Unwired believes ACCC needs to be empowered to take action by exercise of a 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 means 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.

3. Develop specific initiatives to stimulate the creation of competitive services in rural and regional Australia.

There is little doubt that wireless broadband networks are a good choice for metro and particularly rural and regional areas because they are relatively low cost and take little time to build. In Sydney Unwired built its network, that covers greater Sydney (2000 square kilometres), for capital expenditure of just \$28 million and in just eight months.

We have previously stated that we could build a wireless broadband network covering 75 per cent of the Australian population for \$300 million within a few years. This compares to Telstra's estimate of \$30 billion over 20 years.

For a young business like Unwired, access to capital is the major constraint on growth. For this sector to grow the Government must consider more direct ways of stimulating competition in rural and regional markets through stipulating the use of new technologies in creating contestable markets, in a similar way to the government's initiative in establishing competitive USO pilots.

New technology deployments would have greater appeal than the current USO Contestability pilots, and provide an opportunity to demonstrate the potential impact new technologies and new players can have in regional communities.

As part of the National Broadband Strategy, Unwired recommends the establishment of new technology showcase deployments in select regional centres funded initially by the Government.

Companies offering new technologies, such as wireless broadband, would be asked to tender for these deployments but those with existing infrastructure in these centres should be excluded to ensure customers are truly getting greater choice – not only in terms of technologies but in the companies that they need to deal with.

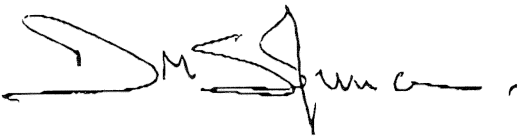
This is not about picking winners but about creating more than one option for the future – future-proofing our shared investment in broadband infrastructure.

4. Conclusion

Having a regulatory environment that encourages new and alternate infrastructure will provide a much needed boost for sustainable long-term competition, and the benefits this brings, for Australians. It will also improve the speed of the delivery of broadband services to rural and regional Australia.

Unwired's wireless broadband network is already giving consumers a real 'Telstra- free' choice in Sydney and we want to give this choice and access to the latest technology via our network to as many Australians as possible.

Yours Sincerely



David Spence
CEO
Unwired Australia Pty Ltd