

National Broadband Network – the regulatory landscape for Telstra and other participants takes shape

On 15 September 2009, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced fundamental reforms to Australian's telecommunications landscape (see http://www.minister.dbcde.gov.au/media/media_releases/2009/088)

These reforms were drafted with regard to the previous submissions received by the Government in response to the *National Broadband Network: Regulatory Reform for 21 Century Broadband* Discussion Paper released on 7 April 2009.

Structure of the Bill

The reforms are introduced via the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Bill)*. Senator Conroy has announced that these reforms are aimed at enhancing competitive outcomes within the telecommunications service industry and strengthening consumer safeguards.

The Bill contains amendments to the following pieces of legislation:

- (a) the *Telecommunications Act 1997 (Cth)*;
- (b) the *Radiocommunications Act 1992 (Cth)*;
- (c) the *Trade Practices Act 1974 (Cth)*;
- (d) the *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)*; and
- (e) consequential amendments to the *National Transmission Network Sale Act 1998 (Cth)*.

Objectives of the Bill

The Bill is stated to have three primary objectives:

- (a) addressing Telstra Corporation Limited's (**Telstra**) vertical and horizontal integration;
- (b) streamlining the access and anti-competitive conduct regimes provided for under Parts XIB and XIC of the *Trade Practices Act 1974 (Cth) (TPA)*; and
- (c) strengthening consumer safeguard measures and reducing unnecessary red tape.

Addressing Telstra's Vertical and Horizontal Integration

Telstra's integrated position across all the telecommunications platforms has led to concerns that the existing telecommunications structure is failing consumers, businesses and the economy in general. The Bill proposes fundamental actions aimed at addressing Telstra's vertical and

horizontal integration and the power imbalance which flows from Telstra's dominance in the provision of fixed line carriage services.

The Bill will allow Telstra to voluntarily undertake structural separation and to voluntarily offer to divest control over its hybrid coaxial networks and subscription television broadcasting licences (Foxtel). Strong incentives are included in the Bill for Telstra to provide such voluntary undertakings, in the form of denial of access to designated parts of the spectrum if it does not do so. If structural separation is not offered by the end of 2010, the Government will impose a strong functional separation framework on Telstra by requiring it to require that:

- (a) conduct its network operations and wholesale functions at arm's length from the rest of Telstra;
- (b) provide equivalent price and non-price terms to its retail business and non-Telstra wholesale customers; and
- (c) be transparent to the regulator and competitors via strong internal governance structures.

Changes to the anti-competitive conduct and access regimes contained in Parts XIB and XIC of the Trade Practices Act

In order to address concerns that the access provisions of Part XIC of the TPA have failed to adequately provide access to telecommunications infrastructure in a timely fashion and that the provisions of Part XIB of the TPA have not adequately addressed possible breaches of competition law within the telecommunications services market, the Bill proposes certain amendments to both Parts.

Surprisingly, the amendments to Part XIB are relatively minor by removing the procedural fairness requirements which previously obliged the ACCC to consult with a party before issuing a Part A competition notice (a process which the Government believes was previously prone to delay and obstruction).

The amendments to Part XIC are more substantial and give the ACCC a greater role in determining the terms and conditions on which access is to be granted to telecommunications infrastructure by allowing the ACCC to:

- (a) determine up-front terms and conditions for a 3-5 year period (following industry consultation);
- (b) determine principles to apply for longer periods; and
- (c) make binding rules of conduct to immediately address problems with the supply of regulated wholesale services.

Strengthening Consumer Safeguard Measures

The Bill identifies the following two objectives in relation to strengthening consumer safeguard measures:

- (a) strengthening consumer safeguards in the transition to the NBN; and

- (b) reducing red tape by addressing the eligibility of carriers to pay the universal service obligation (USO) levy, the carrier licence fees, the costs of the National Relay Service and funding for the Australian Communications and Media Authority (ACMA).

The Bill introduces a number of actions to affect these objectives, some of which include:

- (a) requiring Telstra to meet new minimum performance benchmarks in their management of the USO (including civil penalties of up to \$10 million for failures to do so);
- (b) providing new minimum performance benchmarks on the Customer Service Guarantee provided by telephone companies to meet or exceed CSG time periods;
- (c) requiring telephone companies to either offer priority assistance services or inform them of their availability to be purchased;
- (d) providing the ACMA will increased powers to issue infringement notices instead of commencing court proceedings; and
- (e) exempting carriers with a revenue less than \$25 million per annum from paying an annual Carrier Licence Charge.

An initial impression

The Bill represents a vital first step in establishing the regulatory framework in which the NBN will operate. However, it may not deliver the outcomes it seeks to achieve. Some of the reasons for this are:

1. There remains significant uncertainty surrounding the possible structural separation of Telstra. Not only does this uncertainty arise because Telstra is only required to “voluntarily” submit a structural separation undertaking, but the effects of a failure to do so, in terms of denial of access to parts of the spectrum, may lead to challenges by Telstra to the Constitutional validity of the scheme proposed in the Bill; and
2. Much of the detail surrounding the terms on which structural separation and functional separation undertakings will be approved remains unstated. In the case of the former the role of the ACCC and the Minister in terms of determining the factors which will be taken into account are not specified. In the case of the latter, while the requirements of functional separation are more clearly outlined, the final decision to accept or reject lies with the Minister who must seek the ACCC’s advice.

The Government appears to be applying commercial pressure to force Telstra to sell its assets to the NBN without making it do so. In what could be a flag for its true intentions, in its outline of the Explanatory Memorandum, the Government says structural separation:

“...may involve Telstra progressively migrating its fixed-line traffic to the NBN over an agreed period of time and under set regulatory arrangements, and sell or cease to use its fixed-line assets on an agreed basis. This approach will ultimately lead to a national outcome where there

is a wholesale-only network not controlled by any retail company—in other words, full structural separation in time. Such a negotiated outcome would be consistent with the wholesale-only, open access market structure to be delivered through the National Broadband Network.”

Telstra will have a difficult decision to make and must make it fairly quickly. The longer it delays deciding to “roll” its assets in (if that what it ultimately decides), the greater the risk that those assets will have less value to NBN Co as it builds its own network. Historically Telstra has seized every avenue to protect its position. It is arguable that this time the Government has applied some significant pressure to avoid that.

It seems that the Government has chosen to regulate competition in the market in the important transition period to the NBN through means of incentives for Telstra to structurally separate and by giving the ACCC broader powers to determine access terms and conditions. Whether these will be successful in controlling the current “elephant” in the industry, Telstra, or preventing the emergence of another dominant market player, or whether they will just result in the ACCC becoming a de facto industry participant remain to be seen.

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