

Fight looms over ACCC powers

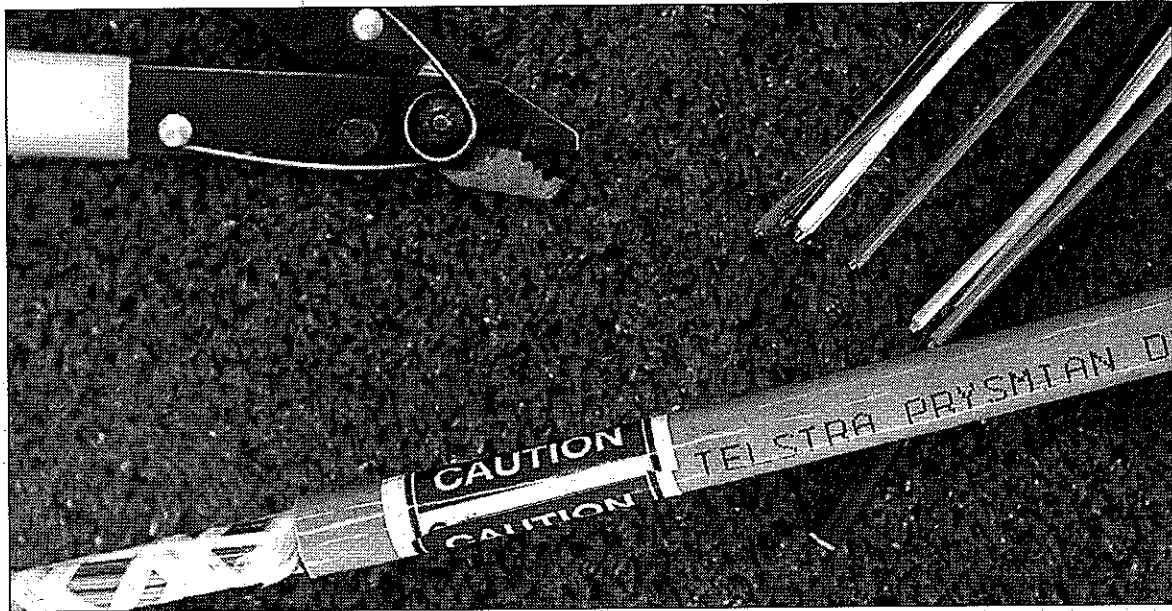
Both Telstra and the NBN could find themselves between a rock and the ACCC, write **Kathryn Edghill** and **Graham Maher**.

The proposed regulatory reforms ahead of the rollout of the national broadband network rely on a finely balanced carrot and stick approach, with the government dangling the carrot of access to Telstra to push it towards structural separation and providing the stick to the Australian Competition and Consumer Commission when it comes to industry regulation.

But will this carrot and stick approach succeed in reining in Telstra's power and enhancing competition, particularly in the important transition period to the rollout of the NBN, or will it simply result in a new round of legal and regulatory challenges for the industry?

Just how successful the carrot is may well determine how strong the stick needs to be, and that success depends on Telstra's appetite for structural separation or for a fight with the government over the terms of a separation. Telstra has not shied away from fighting for what it considers to be its rights in the past and it is hard to imagine a situation where those rights have been more at risk than they now are.

Telstra may choose to argue that the effect of the proposed reforms and the incentives to structurally separate fall foul of the guarantee in the constitution that any compulsory acquisition of property by the government can occur only on just terms. The critical issue here is whether the government, despite its insistence that Telstra has the flexibility to choose the future direction of its business, has in effect made Telstra an offer it can't refuse and which, if accepted, is likely to result in the NBN or other competitors acquiring Telstra assets at steeply discounted prices in what amounts to a forced sale.



The separation of Telstra, and on what terms, could create further battles ahead of the NBN rollout.

Photo: LOUIE DOUVIS

You do not need to be unduly cynical to imagine a scenario where the government and the ACCC may see an upside to competition in having the NBN, or others, acquire Telstra's divested assets at deflated prices and seek to achieve this through Telstra's "voluntary" separation undertaking.

This is where an argument about the scope of the constitutional guarantee arises. Has the government indirectly created a scenario where it could compulsorily acquire property other than on just terms? Previous decisions indicate that such an argument, although by no means a foregone conclusion, may be open to Telstra.

Then again Telstra may choose to agree to structurally separate but find itself at odds with the ACCC and the government over the terms. The proposed reforms, which provide for approval of the terms of any structural separation to be subject to unspecified matters to which the ACCC, with input and direction from Senator Conroy, may have regard, seem to be fertile ground for a fight, should Telstra wish to pursue it.

In all of this, the ACCC has been put in the box seat by the government.

The ACCC's enhanced powers to deal with access to telecommunications infrastructure by issuing binding rules of conduct and rejecting serial undertakings, and its role in approving any structural separation undertaking offered by Telstra and in advising the minister in respect of any functional separation undertaking, not only strengthens its regulatory function but provides it with a critical role in the design and shape of the industry into the future.

There is much to commend the government's approach of seeking to regulate competition in the market in the important transition period to the NBN, principally through means of incentives for Telstra to structurally separate. Its success will rely as much on the separation terms as on the fact of the impending separation resulting in changes to market behaviour by Telstra and other industry participants in the intervening transition period. It is in respect of

the separation terms and the conduct of Telstra in the intervening period that the enhancement of the powers of the ACCC both to approve any structural separation undertakings offered by Telstra and to determine access terms and conditions becomes all the more important. The two will be intrinsically related in the long nine-year transition period to the NBN and these powers mean the ACCC will have perhaps the most critical role in shaping the telecommunications industry.

Whether the government's attempt to strike a balance between regulation and the impact of market forces consequent upon structural separation will be sufficient to control Telstra or whether it will result in the ACCC becoming a de facto industry participant remains to be seen. However, one outcome seems certain: we have not yet seen the end of the battles between Telstra, the government and the ACCC.

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