Senate Committee finds in favour of the National Broadband Network reforms – but does this go against the weight of submissions?

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On 26 October 2009 the Senate Environment, Communications and the Arts Legislation Committee released its report into the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* (***Bill***), which includes the proposed National Broadband Network reforms. The report finds that the Bill, in its current form "*provides important and timely reforms to Australia's telecommunications regulatory regime that will be of benefit to providers and consumers*"[1]. The Bill is now back before the Parliament, having been introduced in the Senate on 26 October 2009 with a recommendation from the Senate Committee that it be passed.

The majority's findings

In arriving at the conclusion that the Bill was in the best interests of the telecommunications industry and consumers, the majority Senators on the Committee found that:

- the separation of Telstra will bring long term benefits for the community as a whole (paragraph 2.40);
- the three Telstra sale prospectuses were sufficiently clear about the potential for regulatory changes which might affect Telstra's competitive position (paragraph 2.41);
- it was not the Government's role to support the share value of one telecommunications company in preference to its competitors, but, in any event, there was no evidence that the reforms will be detrimental to Telstra's share value (paragraph 2.42);
- there was strong evidence of the need to reform the negotiate –arbitrate model currently found in Part XIC of the *Trade Practices Act* (***TPA***) (paragraph 3.51);
- some of the issues raised in submissions, particularly by access seekers, may present opportunities to further improve the regulatory framework, but time did not permit the Committee to form a view about these (paragraph 3.52);
- there is a particular need to examine concerns raised about the circumstances in which access agreements will prevail over access determinations and the retention of the negotiate-arbitrate model in the facilities access regime under the *Telecommunications Act 1997* (paragraph 3.52);
- the Government had recognised that more extensive actions to expand the scope of the universal service regime could occur in future (paragraph 3.56); and
- the passage of the Bill should not be delayed pending further investigation of the issues raised by some submitters or until the results of the National Broadband Network implementation study are known (paragraph 3.57).

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[1] Report of the Senate Environment, Communications and the Arts Legislation Committee dated 26 October 2009, paragraph 3.57.

The dissenting view

Not surprisingly, the Liberal National Party Senators on the Committee issued a dissenting report claiming that the majority report had "*almost entirely ignored the weight of the evidence presented to the Committee about this legislation* ", which they described as hostile to the legislation.

The dissenting report referred to the Bill, and, in particular, the provisions dealing with the possible structural separation of Telstra, as an "*attack on Telstra and its shareholders*". Quoting extensively from parliamentary debate on the matter in Hansard, the dissenting Senators expressed the view that "*until we know how this network will be rolled out, it is the view of the Coalition that it is premature for the Parliament to consider the reforms that affect the structure and operation of Telstra*".

On the issue of the possible structural or functional separation of Telstra, the dissenting Senators found that the provisions of the Bill were *"an extreme and unacceptable way of forcing a publicly listed company to the negotiating table."* In their view, the Government cannot afford to ignore what they found to be "overwhelming" concerns expressed by Telstra shareholders and respected investment and management firms about the sovereign risk (i.e. the risk of the State using its sovereign power to alter established rights of private companies) posed by the Bill.

The Coalition Senators supported reforms to the access regime in Part XIC of the TPA but expressed concerns about the powers to be given to the ACCC and the removal of merits review of ACCC decisions. Their preference is to await the results of the National Broadband Network implementation study before changes to the universal service regime are implemented, and before any of the reforms are enacted.

New South Wales National Party Senator, Fiona Nash, added her own comments, noting that the submissions which opposed the Bill on the basis that it will discourage investment or cause losses reflect "*short term thinking*" and that "*Companies in other jurisdictions that have undergone separation have adapted to, and in some cases welcomed, their new regulatory environment*".

Are the Committee's views supported by the submissions?

There is no doubt that the Senators waded through a raft of submissions, totalling 119 in number, as well as 224 submissions in the form of a form letter or variations on it. But does an analysis of the submissions justify the majority's findings or is there merit in the Coalition Senators' argument that the evidence presented to the Committee "*raises serious concerns that the Government must address*"? Does the polarity in views represent partisan politics or a misreading of the industry and public views by either the majority or the Coalition Senators?

A review of the submissions received by the Senate Committee indicates that:

- telecommunications industry participants (other than Telstra and Foxtel) overwhelmingly support the proposed reforms, including the possible structural or functional separation of Telstra, although many have made suggestions for amendments to various aspects of the reforms;
- a significant number of funds managers oppose the reforms insofar as they involve the possible structural or functional separation of Telstra; and
- with only a few exceptions those Telstra shareholders who made submissions oppose the reforms insofar as they involve the possible structural or functional separation of Telstra.

There is no doubt that the polarising issue before the Committee was the possible structural separation of Telstra. Many Telstra shareholders took the opportunity to voice their opposition to the reforms, some describing the reforms in language such as "*a monumental swindle*", "*fraudulent, misleading and deceptive*" and "*morally abhorrent*". There is also no doubt that, of those individuals and funds managers who took the time to make a submission, the overwhelming majority opposed the structural separation of Telstra. It is, however, important to put those submissions in context.

Although vocal and vehement, the number of submissions from shareholders is relatively small when compared to the total number of Telstra shareholders (which, depending on the figures used, is approximately 1.4 million), even taking into account the fact that various funds managers may represent other shareholders. Whether the failure of the remaining shareholders to make submissions indicates their support for the proposed reforms or merely apathy on their part can only be a matter of supposition but the fact remains that the Committee only had before it a relatively small number of shareholders' views.

The second issue to recognise is that most of those shareholders who opposed the reforms did so on the basis that they consider the prospectuses issued by the previous Government for the sale of Telstra shares failed to disclose that there may be changes to the regulatory regime which would have a negative impact on the value of the shareholding. Whether the prospectuses adequately disclosed the possibility of such changes will depend on the view taken as to whether statements in the prospectuses to the effect that the value of the shares on offer could be affected by factors including "changes in government policies", were sufficient to alert potential purchasers of the shares to the possibility of the reforms now before the Parliament. The only likely forum in which this matter could be resolved (other than at the polls) would be in Court proceedings alleging misleading and deceptive conduct against the Government – proceedings which are fraught with difficulties, as discussed in our earlier Alert dealing with the rights of Telstra shareholders.

The third issue is that sovereign risk is an inherent by-product of our parliamentary system. The possibility of a government using its legitimate powers to take action which may cause loss to particular parties, which could not have been foreseen at the time such parties took certain action (in this case, when people bought Telstra shares) and for which there may be no adequate legal remedy available, although undoubtedly unpalatable to those affected, is a recognised risk. The fact that some parties may object to the Government's action does not create a legal obligation on the Government to take account of the views of such parties nor does the fact that the Government may, after hearing from such parties, decide to continue with its action (as is the case with the proposed reforms) of itself, render such action illegal or contrary to public policy. The remedy for such parties will, no doubt, be at the polling booths in the next election.

On balance, the majority findings of the Committee have the general support of submissions, other than those of Telstra shareholders and funds managers. When taken in context, the shareholder submissions, although expressing what are undoubtedly genuine concerns from aggrieved parties, do not mean that the majority findings lack justification.

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