

○ TELECOMMUNICATIONS TURMOIL?

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Telecommunications in Australia faces an uncertain future over the next few years. Such a prognosis may at first seem surprising but can be explained by appreciating current issues and historical precedents.

Four developments are destined to have a profound impact – optical fibre in the access network; revision of the Telecommunications Act; Telstra's aggressive stance; and the policies of the next federal government.

Optical fibre in the access network: Telstra's ubiquitous customer access network, cables of copper pairs connecting each subscriber to nearby telephone exchanges, was in the main constructed many decades ago. Typically, the civil work involved has comprised some 90 per cent of total capital costs. Due to the resultant economy of scale, the paired-copper access network has long been regarded as a natural monopoly for delivering fixed line services and since the advent of competition this has resulted in access regulation by the ACCC.

Whilst the roll-out by Telstra and Optus of hybrid fibre and coaxial networks from 1995 to 1997 for delivering pay television was a major development of Australia's fixed line access network infrastructure, it is destined to remain a technological orphan.

Mooted since late 2005, the proposed deployment by Telstra of fibre-to-the-node (as well as fibre-to-the-home) technology in the customer access network will instead be a real watershed in creating 'next generation' infrastructure. Modern optical fibre technology offers almost unlimited bandwidth compared to all previously developed transmission media. By exploiting 'sunk' elements of the existing customer access network (civil works and paired-copper cables), optical fibre in the access network will embody huge economies of scale and scope – unheard of with any other available access technology for delivering fixed line services.

Capable of delivering ever-increasing levels of bandwidth for almost no added cost to the network provider, optical fibre in the access network is the epitome of a true natural monopoly. Whoever controls such infrastructure is ideally placed to command an enduring bottleneck in the market for fixed line services for many decades to come.

Revision of the Telecommunications Act: Telecommunications services and regulation have undergone relentless change over the last 30 years, from Telstra being both regulator and monopoly service provider to the present situation of independent regulation and more open competition. The *Telecommunications Act*, related legislation and derivative instruments give the federal government the necessary head of power to effect changes in policy.

The 1901–89 era saw basic telephone services made available to almost all Australians, with government-owned entities providing national, international and satellite-based connectivity. It was an era of massive nationwide building of telecommunications infrastructure. The *Telecommunications Act* of 1989 permitted for the first time competition by way of value-added services and private networks, whilst retaining the monopoly provision of basic services by Telecom Australia, OTC and AUSSAT.

Anticipating more open competition by 1997, the *Telecommunications Act* of 1991 permitted facilities-based competition by licensing Optus as a second carrier of basic services (and also selling them AUSSAT), merging Telecom Australia and OTC to become AOTC, and licensing

three carriers of mobile telephony services (AOTC, Optus and Vodafone). The key to this new competitive, multi-carrier environment was regulated access between the networks of each carrier and to service providers.

The *Telecommunications Act* of 1997 permitted open competition between multiple carriers to provide any type of service. Amendments to the *Trade Practices Act* empowered the ACCC to regulate the access regime based on general competition principles, which took into account the dominant market position of Telstra in access network-based service delivery. The industry scene changed irrevocably as Telstra was progressively privatised by tranches in 1997, 1999 and 2006.

The significance of the above historical review is simply this: there are only very limited opportunities available to re-visit the legislation governing telecommunications. Each such opportunity heralds significant change in industry composition and service delivery. The Minister for Communications has already announced that the next revision of the Telecommunications Act will be in 2009; clearly most of the preparatory work will be undertaken in 2008.

Telstra's aggressive stance: Shortly after Sol Trujillo's arrival as Telstra's CEO mid-2005, he was pleading in secret to the government for exemption from access provisions of the Trade Practices Act so Telstra could create the next generation of wireline access network as a new monopoly. The federal government balked and Telstra responded with an indefinite threat to withhold investment in optical fibre access.

Telstra then embarked on a public relations course openly critical of the government and the Minister for Communications, employing language and tactics never before witnessed in corporate Australia. When a consortium of rival carriers, the G9 group, proposed an alternative arrangement whereby all parties could access a common network in a non-discriminatory manner, Telstra ratcheted up its aggressive stance, threatening 'the mother of all class action law suits'.

In January 2007, Telstra started a constitutional challenge to the validity of the Trade Practices Act administered by the ACCC. This ongoing court action claims the telecommunications access regime amounts to unjust acquisition of property. Telstra aggressively accused the ACCC of being a 'rogue regulator'; the ACCC responded by declaring that it would indeed become a rogue regulator if it gave into Telstra's demands.

Telstra next commenced legal proceedings in August 2007 against the Minister for Communications demanding she provide documents relating how the funding decision was made in favour of a joint venture between Optus and Elders to provide a new regional and rural telecommunications network. The case failed in October but succeeded in creating a degree of uncertainty.

Whilst Telstra continues to justify its aggressive stance against the government and the ACCC as being in the interests of shareholders, no other company could ever contemplate such a tactic unless it was supremely confident of firstly its market power and secondly its ability to translate that into political power. Both the *Telecommunications Act* of 1997 and the amended *Trade Practices Act* of 1974 seem to be impotent in dealing with such market power.

Policies of the next federal government: Capitalising on the Coalition Government's inability to resolve Telstra's refusal to invest in optical fibre access and a counter-proposal from the G9 group (both to be self-funded), the then Opposition Labor Party launched a plan in March 2007 for a national broadband network. This proposed fibre-to-the-node network would deliver a minimum of 12 Mbit/s to 98 per cent of Australians, with improved broadband services given to the remaining 2 per cent by other means. The rationale was that a government-funded network

chosen through public tender would settle the Telstra/G9 impasse. Required to operate on 'open access' principles, it could make use of up to \$4.7 billion of public funds. Unspecified regulatory reforms would also be made to facilitate the roll-out which would have to be completed within five years.

By June 2007, the Coalition Government had announced its Australia Connected initiative with three components leading to new broadband network solutions for all Australians:

The awarding of almost \$1 billion of public funds towards a joint venture between Optus and Elders, known as OPEL, to create new networks involving a mix of optical fibre, ADSL2+ and wireless broadband platforms to deliver at least 12 Mb/s to outer metropolitan, rural and regional areas. The network would operate on 'open access' principles.

A government sanctioned, but not government funded, new high speed broadband network serving capital cities and major regional centres and also to be operated on an 'open access' basis. Assessment guidelines and the call for industry proposals were issued in September 2007. Proponents are to detail and justify 'any proposed legislative or other regulatory changes' considered necessary. Ninety nine per cent of Australians would receive new broadband services by either of the above two networks.

A safety net arrangement to financially subsidise service providers delivering broadband to the remaining one percent of Australians living in the most remote or difficult to reach areas.

Why then should the above four developments be a recipe for uncertainty in 2008 and beyond? By end-2007, Australians will have elected a new federal government with a mandate to implement one version or another of the above broadband policies.

Consider the scenario of an ongoing Coalition government. To an extent, there would be increased certainty as to outcomes with implementation of their broadband policy now at a relatively advanced stage. With the funding agreement signed in September 2007, roll-out of the OPEL network to serve outer metropolitan, rural and regional areas is now underway. Telstra's legal proceeding against the Minister failed to block the roll-out. The Expert Taskforce has issued assessment guidelines for a new high speed broadband network serving capital cities and major regional centres, with responses due in February 2008 and a report to the Minister for Communications due by June 2008.

As to Telstra's constitutional challenge to the Trade Practices Act, if Telstra loses then the regulatory regime will be vindicated. After all, the Act was amended in 1997 primarily to counter Telstra's market dominance arising from its infrastructure monopoly, particularly in the access network. But any Telstra victory will be Pyrrhic, with the government simply amending the Act to reinforce its intended purpose. Telstra's anti-Coalition stance before the election will embolden the government to teach the aggressive carrier a lesson.

By June 2008, the Minister will be determining who will become the new optical fibre-based network provider serving Australia's capital cities and major regional centres and what legislative and regulatory changes will be necessary. This decision will inevitably be made in anticipation of, or more likely as an acceleration of, the revision of the Telecommunications Act of 1997. The intensity of lobbying will be greatly heightened if, as is likely, a Coalition government loses its majority in the Senate and a parliamentary enquiry is established. Accelerated revision of the Telecommunications Act could be good for the industry but bad for telecommunication users.

If the selected winner happens to be Telstra, a stricter regime for separating retail from wholesale services, perhaps even full-blown structural separation, will become an inevitable im-

position on Telstra. Vengeance may be sweet for the government yet Telstra should be expected to take strong legal action. Telstra's conviction would be significantly buoyed if it had previously succeeded in overthrowing the Trade Practices Act. On the other hand, if the selected winner is not Telstra, two outcomes are almost certain: Telstra will launch both its promised 'mother of all class action law suits' with even greater vigour and roll out its previously withheld fibre-to-the-node network – which, after all, it has been legally able to do ever since first announcing plans in August 2005. The most predictable result will be greatly heightened uncertainty all round.

The scenario of a new Labor government is equally problematical. Their policy for a government-funded fibre-to-the-node network with a coverage of 98 per cent will immediately have to be revised downwards to achieve only about 70 per cent, due to roll-out of the OPEL network approved by the previous government. The selection process will also be at least six months behind that of the Coalition program, as the latter had been initiated prior to the election.

By end-2008, the Minister could be determining who will become the new optical fibre-based network provider serving Australia's capital cities and the remaining unserved major regional centres. Of an equally enduring nature will be the decision regarding concomitant legislative and regulatory changes. If the federal election also produces a Labor majority in the Senate, these decisions are much less likely to be subject to sustained parliamentary enquiry. On the other hand, the new Senate would not fully sit until July 2008 so a politically hostile enquiry could be expected during the first six months of 2008. Overall, the delayed timing will be more in line with a planned 2009 revision of the *Telecommunications Act* and related legislation.

Industry lobbying will be most intense as the network winner could be awarded up to \$4.7 billion of public monies compared to a Coalition-determined winner receiving nothing. Telstra lobbying, previously strongly anti-Coalition in the public arena and non-existent against Labor will most likely go underground, being conducted behind closed doors and particularly involving the CEPU.

The arguments regarding the expected outcome of a Telstra or non-Telstra winner are similar to that for a Coalition government. With strong ties to the CEPU and bearing no responsibility for the OPEL decision, Labor is much more likely to select Telstra than would the Coalition. Given that Telstra has always announced its intention to roll out a fibre-to-the-node network with its own funding, the offer of public monies by Labor must then be seen really as compensation for lost economic rent in having to ensure an 'open access' network (or in having to structurally separate, when seen from that perspective).

On the other hand, why would Telstra bother waiting for a Labor government to decide awarding it a fibre access monopoly when it effectively already has it? And furthermore, why wait just to be restrained to deliver only a 'open access'/structurally separated network? A Telstra roll-out of its long promised fibre-to-the-node network commencing at least by mid-2008 is a strong certainty no matter who becomes the next federal government.

Both political parties favour 'open access' service delivery for the next generation of access network infrastructure and also face an inevitable revision of telecommunications legislation by 2009. The key question is then: which government will be brave enough to declare it has a mandate to guarantee 'openness' – and perhaps even retrospectively at that – and amend all carrier licences accordingly? Unfortunately, 'open access' is not currently a right for access seekers under the Trade Practices Act so political realities may well see that requirement scrapped.

The future of telecommunications in Australia, for users and for providers, will only become more certain if current party policies are transformed into plans based on sound public policy principles and are implemented as such. Success in this regard is highly dependent on there being a debate which is open to independent and public scrutiny, with the interests of telecommunication users being given at least as much favour as the interests of shareholders.

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