

## **Telstra shoots itself in the foot**

Telstra's legal challenge might hasten the loss of its landline access monopoly, writes Ross Kelso

There is an unfortunate parallel between high-stakes legal action and planting a land mine. The intended quarry may be killed, but the mine might also be stepped upon by an innocent or even by whoever planted it.

So it is with Telstra's legal challenge to Communications Minister Helen Coonan. Any collateral damage will be to the competitiveness of Australia's telecommunications industry and prices paid by consumers and small businesses. A Telstra win will only drive away the last few supporters in the coalition government.

In January, Telstra started a constitutional challenge to the validity of the Trade Practices Act administered by the Australian Competition and Consumer Commission. It claims the telecommunications access regime amounts to unjust acquisition of property. If Telstra loses, the regime will be vindicated. It was established in 1997 primarily to counter Telstra's market dominance arising from its infrastructure monopoly, particularly in the access network. Any Telstra victory will be Pyrrhic, with the government of the day amending the Trade Practices Act to reinforce its role.

Telstra is not your average telecommunications carrier. It has a unique history and potential for massive impact on Australia's economy and social wellbeing. Until effective competition is achieved, Telstra will continue to be uniquely treated in legislation.

Although challenges against the ACCC are not new, they don't always have to succeed to result in a strategic and commercial win. With its co-owned partner Foxtel, Telstra fought the ACCC from 1999 to 2001 and lost. A series of court cases against potential competitors was also unsuccessful. However, to this day Telstra's pay television cable system remains monopolised. The prospect of meaningful competition in the access network, first envisaged in 1991, was set back a decade.

When Sol Trujillo arrived as Telstra's CEO in July 2005 he drove home the strategic significance of optical fibre in the access network. By August 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 government balked and Telstra responded with an indefinite threat to withhold investment in fibre access. Such a tactic could only succeed if Telstra was confident of its market power.

In early 2006, 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. Aware of the pay TV debacle, the consortium sought regulatory protection from being overbuilt by Telstra. Telstra ratcheted up its aggressive stance, threatening "the mother of all law suits".

The opposition Labor party then proposed a not dissimilar plan for an open access optical fibre network, but funded from the public purse. Although not yet detailed, this plan would likewise require protection from being overbuilt by Telstra.

After almost two years of intense industry lobbying, the coalition government relented and proposed an open access optical fibre network, though funded by industry, as suggested by G9. In June 2007, an expert taskforce was set up to determine the process for assessing competitive offers. Coonan also highlighted the need to introduce legislation in Parliament.

In other words, regardless of which party is in government after the federal election, it will have announced a plan to implement an open access optical fibre network to cover capital cities and major regional centres. Apart from the funding difference, both plans depend on two things: first, Telstra continuing to refuse to invest; secondly, new telecommunications legislation empowering a new, albeit shared, carrier monopoly to control the next generation of landline access infrastructure.

Telstra's board and shareholders are still blissfully unaware of the unintended consequences of the aggressive actions of their company. Both political parties have witnessed the ugly side of the lobbying and legal challenges. The beginning of the end of Telstra's natural monopoly over landline access infrastructure almost certainly will come next year. Structural separation will also be strong likelihood. Such an outcome gives a new meaning to collateral damage.

*Ross Kelso is investigating access to broadband networks for a dissertation at Queensland University of Technology. He is a former Telstra executive.*