



Submission to Senate Environment and Legislation Committee

Inquiry into Telecommunications Amendment (Access regime and NBN Companies) Bill 2015

Summary and Introduction

The CCC welcomes the opportunity to comment on the Telecommunications Amendment (Access Regime and NBN Companies) Bill (the Bill) and would welcome the opportunity to be represented at any future hearings the committee hold in relation to the Bill.

Members of the CCC have, over the past 15 years, been responsible for introducing many of the most transformative innovations in Australian telecommunications, including ADSL 2+ broadband, 3G mobile services, “bucket” pricing plans and itemised invoicing. Their collective actions demonstrate the primary role of competition and, crucially, investment by competitors and new entrants, in driving benefits to consumers and economic welfare generally.

The CCC and its members have also been deeply engaged with legislative and regulatory process throughout that period. Its members compete in many markets but acknowledge that a more competitive industry is to the benefit of all in the long term.

The CCC strongly opposes passage of the Bill in its present form. While some of the elements of the Bill could clarify present regulatory arrangements, the benefits of these benefits are far outweighed by the negative consequences of uncertainty, regulatory risk, additional unnecessary red tape, and potential damage to the interests of competitors and competition.

The constant changes to the legislation have a dampening effect on investment as the regulatory landscape become unpredictable.

Even more concerning, many of these specific proposals are hostile to the interests of competition and new entrant investment. They appear motivated by the arguments and interests of incumbents and those with market power.

While many of the proposed amendments appear technical, minor and fairly benign, to those with experience in the industry and a deeper understanding of the issues underlying the proposed changes, the Bill includes changes that go to fundamental principles and could result in serious negative consequences for competitors and competition.

Even more concerning is that that the amendments have not been proposed in response to any problems raised by the competitive industry.

On the contrary, competitors have expressed serious and fundamental concerns with several elements of the proposed amendments in response to an exposure draft of the Bill that was released last year. A joint submission from the CCC and Optus to the exposure draft is attached to this submission. The concerns raised at that time do not appear to have been addressed.

There remain numerous problems with the Bill.

- It risks undermining a core principle of the National Broadband network policy by opening the door to NBN discriminating against some retailers in favour of others. There is no convincing reason offered to justify such a radical departure from existing policy
- It risks creating unnecessary red tape
- It adds procedural and legal complexity and uncertainty to regulatory processes, again without any attempt to justify these changes.

CCC has engaged with Department to raise these issues. There seems no evidence these representations have been taken into account in the present Bill

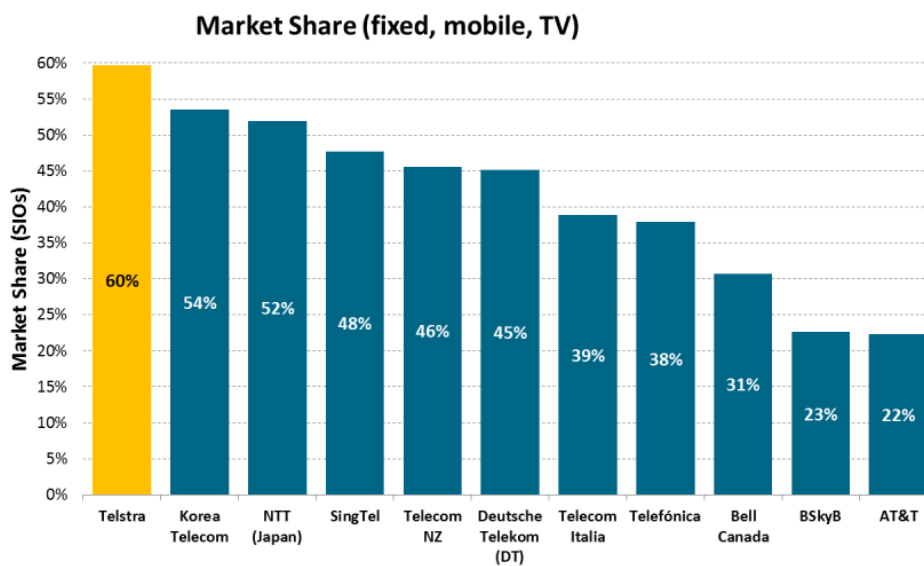
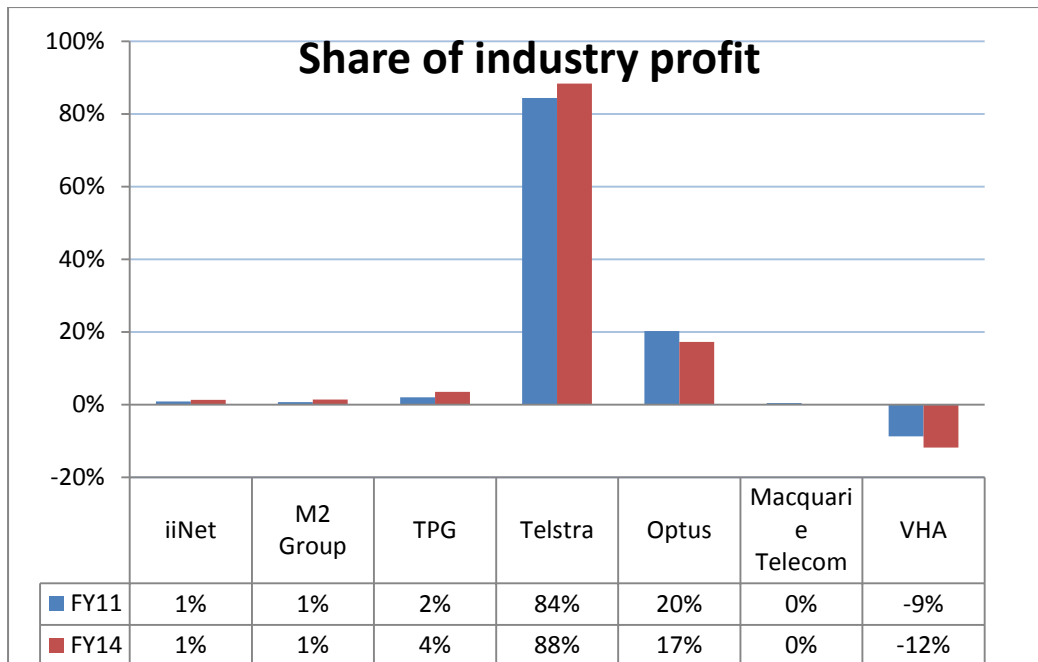
The Context of the Bill – a Deeply Uncompetitive and Expensive Market

Constant changes to regulation and policy need to be seen in the context of

- terrible performance of Australian communications in terms of cost and availability of services to consumers compared to other countries, and
- the disappointingly slow rollout of the NBN, which was intended as a vehicle to correct intractable structural weakness in competitive conditions.

Australians pay the highest or near highest prices in the OECD for fixed line services such as basic voice and broadband services. Australia's persistent poor performance in these rankings should be a primary concern for policy makers, and all policy and regulatory action should be driven by the need to reduce the ability of incumbent networks to dominate communications markets.

The reality of the Australian communications markets is that it is becoming more concentrated at a time when more a competitive, dynamic communications sector has never been more important to consumers and future economic prosperity. This is directly reflected in prices for fixed line services that are completely out of line with those in leading OECD economies.



NBN, which is precluded from operating in retail markets and required to favour no retailer to which it supplies customer access services, was intended to level the playing field for smaller, innovative and new entrant competitors. However, delays caused by a failure to meet its own rollout targets and changes in technology imposed by changed policy have meant the NBN is already years behind schedule.

Competitors repeatedly warned that the transition period from the Telstra-owned copper access network to the wholesale only NBN network was going to be particularly important and risky for competitors and competition as it was a period when the incentives on those companies historically dominating the market to do all they could to secure their market power into the future. An unfortunate consequence of the slow deployment of NBN has been a rush to consolidate in the industry as businesses seek to grab retail market share and

control input services required to connect to the NBN, creating a real risk that retail competition will be less dynamic when the NBN is finally fully deployed.

The Bill does not address these concerns. In fact, in many instances, the Bill would more likely enhance the ability of Telstra and NBN to exploit market power and make it more difficult for the ACCC to respond. This is the opposite of what is needed.

The most concerning elements of the Bill are discussed below.

Part 3 Pilots and Trials and Non Discrimination Rule Dilution

The proposal to dilute the non-discrimination requirements in order to allow NBN to do exclusive deals for “pilots and trials” is highly risky, unnecessary and supported by no persuasive evidence that there is a problem in existing rules.

The ACCC has issued guidelines under the present legislative arrangements that would allow for pilots and trials on the condition that NBN allowed participation by any access seekers that wished to take part. The CCC is unaware of any pilot or trial proposal that has been proposed and prevented under the present rules.

In the Explanatory Memorandum (Page 13), it is claimed; “A key issue for debate has been whether the non-discrimination obligations are harming efficiency.”

In fact, this is a debate that has been initiated and conducted entirely by the Government and its advisers, and NBN. There has been no advocacy initiated by industry to change the non-discrimination rules, and a near universal opposition to any change whenever the industry has been asked for its views.

This raises grave questions in the industry about what is motivating this amendment.

NBN’s consistent advocacy for changes to allow it greater flexibility – such as for the dilution of the very clear non-discrimination requirements placed on it by the Parliament when NBN was created– is a cause for concern in the industry. Competitors have repeatedly told NBN publicly and privately that they do not support any changes. These companies are NBN’s customers and its continued advocacy of positions those customers believe are to their detriment very clearly demonstrates that there are different incentives at play between NBN and retailers.

It was the anticipation of these different incentives that caused the Parliament to place such strict conditions on NBN when it was created.

The present non discrimination requirements were arrived at after extensive, constructive discussion with Senators from across the Chamber over an extended period. They reflect the very significant market power the NBN is in a position to exercise as it becomes the monopoly provider of fixed line access for more and more households and businesses.

NBN has never offered an adequate explanation – or examples – to show that these requirements impinge on its ability to conduct its business. However, it is abundantly clear that NBN has both the incentive and the ability to manage downstream markets to its own benefit if effective policy and regulatory arrangements are not in place to restrain it from doing so.

The non discrimination rules are a core element in restraining this market power. They should not be changed.

Part 4 Access Determinations, ACCC Processes and Regulation Changes

The proposed new legislative requirements relating to the way the ACCC performs its duties represent unnecessary red tape at best, an unwelcome injection of uncertainty at worst.

The Bill creates a requirement that the ACCC have regard to the method it uses when making price determinations regarding the NBN when it is making determinations for other access providers, and vice versa. It is clearly needless red tape and a legislative impingement on the administrative functions of the independent regulator.

As the Explanatory Memorandum to the Bill makes clear (page 5), there are no determinations in force relating to the NBN and the provisions “propose to respond to *potential future scenarios that might arise*”. (Italics added)

Further, in the context of the long established processes of the ACCC, it is unthinkable that the Commission would not have regard to its other decision-making if it did ever had cause to make a determination regarding an NBN service.

Likewise, the proposed requirement that the ACCC consult with affected parties before an interim access decision or binding rule of conduct is pointless at best, harmful at worst. Interim determinations and binding rules of conduct were specifically created to allow the ACCC to act decisively and quickly in the context of an industry that had become bogged down in legal conflict and ineffective regulation.

Again, the pointlessness of these provisions is clear from the explanatory memorandum, which makes clear that this is already how the ACCC conducts itself and that even if the ACCC does not consult with affected parties, its decisions would not be invalidated by these new provisions.

These amendments can have no possible effect other than to create a lawyers’ picnic and slow the ACCC’s already laborious processes when it is asked to respond to allegations of anti-competitive conduct or set prices and access rules for monopoly services.

In the context of the Government’s vigorous campaign to remove unnecessary regulation and legislation, these amendments are inexplicable, especially given there is no evidence of a problem that needs to be addressed.

Part 5 Special Access Undertaking Variations

Special Access Undertakings are intended to provide certainty around the terms of access to monopoly assets that are subject to regulation by allowing the owner of those assets to propose the price, terms and conditions it will make access available.

There is a long and unhappy history of undertakings processes being “gamed” by Telstra to create confusion and delay rather than certainty.

The legislation as it presently stands was framed in response to this.

There is no evidence that there is a problem with the legislation beyond occasional complaints by those network owners with market power that they need to work hard to satisfy the ACCC that their proposed undertakings are reasonable and promote the long term interest of end users.

Rather, the process followed by the ACCC to deal with NBN’s special access undertaking proved that it is capable of balancing the interests of monopoly network owners with that of

the community in resolving enormously complex, wide ranging and long term undertakings applications within the present legislative framework.

The CCC believes a key reason for this success is that the legislation allows the ACCC to consider as a whole an undertaking presented by a monopoly network owner and to respond flexibly.

It is important to remember that any entity bringing forward an undertaking is, by definition, an owner of an economic bottleneck or monopoly. Why would legislation seek to give the monopolist greater flexibility and the regulator less unless there is clear evidence the rules have failed? The proposed amendments have the effect of shifting flexibility and discretion to the monopoly owners and away from the ACCC.

The CCC therefore strongly opposes these proposed amendments.

Part 7 NBN Line of Business Restrictions

NBN has argued that restrictions on its business activities are so tight that it cannot even dispose of equipment or goods surplus to requirements. No specific examples of this have been offered.

The CCC believes it is reasonable to clarify that NBN should be able to dispose of surplus goods. However, the lines of business restrictions were put in place for very important reasons.

NBN was created for a very specific reason and to provide very specific services. Once it has rolled out in a location, NBN enjoys a powerful monopoly over access to fixed line communications services to consumers in those locations.

It was Telstra's systematic exploitation of this power to the detriment of consumers and competition that led to the decision to vest this power in an all-new, wholesale only network operator.

The CCC believes NBN should remain strictly focused on the purpose for which it was created – addressing areas of market failure in wholesale markets.

Part 8 Definition of "Declared Service" to carve out Definitive Agreements

The proposal to amend the Act to specifically state that terms under which services are supplied to NBN by Telstra and Optus under their definitive agreements will not be affected even if the ACCC in the future duplicates existing provisions.

This represents yet another amendment that appears to be entirely unnecessary.

Under the law as it now stands, any commercial agreement between parties relating to a declared service takes precedent over any ACCC pricing or access decision.

The definitive agreements between NBN, Telstra and Optus constitute commercial agreements. Section 152BCC provides that "*an access determination has no effect to the extent to which it is inconsistent with an access agreement that is applicable to those parties*". All of the relevant agreements would be access agreements as defined in s. 152BE, and s. 152BE(3) makes clear that this is the case even if the relevant service was not a declared service at the time the agreement was made.

The arrangements under these agreements would therefore be unaffected even if a facilities access service were to be declared and the ACCC made an access determination that was inconsistent with the agreements.

There is no attempt in the Explanatory Memorandum to explain why it is necessary to add these additional provisions when the Act already provides for the desired protection of the definitive agreements. Accordingly, this proposed amendment appears to be adding complexity to the CCA for no purpose.

In the absence of any explanation, and in the context of the Government's expressed determination to remove from the statute books any unnecessary legislation, these provisions cannot be justified.

Contact

For further information please contact
David Forman