



Australian Government

Department of Communications and the Arts

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015

Thank you for the opportunity to appear before the Senate Environment and Communications Legislation Committee (the Committee) on Friday, 5 February 2016, for hearings on the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 (the Bill). I trust the evidence that I provided will assist the Committee in its consideration of the Bill.

I am writing to follow-up on three matters that have arisen from the hearing.

1/. Proposed regulation power to modify NBN Co's line of business restrictions

For the benefit of the Committee I would like to clarify some comments I made in relation to Part 7 of the Bill. As the Committee knows, Part 7 proposes to add a regulation-making power that would enable the line of business restriction provisions in the *National Broadband Network Companies Act 2011* (NBN Companies Act) to be modified. During the hearings, Senator Ludlum asked whether the proposed changes to Part 7 would enable NBN Co to operate in certain retail markets, such as the provision of retail data centre services. I responded that NBN Co could not provide retail services on the basis of the prohibition in section 9 of the NBN Companies Act, which prevents NBN corporations from supplying an 'eligible service' to another person unless that person is a carrier or a service provider, and that the regulation-making power is drafted so that 'it does not affect the operation of section 9', as indicated in proposed new subsection 22B(2).

In light of Senator Ludlum's comments, however, I have reviewed this matter and relevant submissions further. As a result of this review, I think an argument can be made that the proposed regulation-making power could provide scope for an NBN corporation to operate in some retail markets in some instances. This would be where regulations enable NBN Co to provide services that were not 'eligible services' as defined in the *Competition and Consumer Act 2010* (CCA). This is because such services may not be subject to the overarching wholesale-only restriction in section 9. This could include data centre services, as these are more concerned with the storage and processing of data, as opposed to its transport between points, which is the essence of the definition of an 'eligible service'.

That said, for an NBN corporation to be able to provide a retail data centre service, two decisions would need to be made by Government and reflected in any enabling regulation. First, that an

NBN corporation could provide data centre services (other than where they are ancillary or incidental to the supply of eligible services, which is already permitted). Second, that it could provide them on a retail basis. As the proposed regulation-making power requires the regulation to specify the circumstances in which the line of business restrictions in sections 18, 19 and 20 of the NBN Companies Act do not apply, any regulations could be worded to make it clear they do not enable the retail supply of a service. As previously advised to the Committee, in all instances, any regulations making changes to NBN Co's line of business restrictions would be subject to scrutiny and disallowance by the Parliament.

My comments on this matter as recorded in the Hansard should therefore be read in this light.

2/. Scope for prospective supplier to take advantage of pilots and trials

I also took on notice a question from Senator Back in relation to whether any person could take advantage of the proposed changes to NBN Co's non-discrimination requirements, allowing it to conduct pilots and trials. I can confirm that the pilots and trials provisions would be available to anyone that is an 'access seeker'. An 'access seeker' is defined in section 152AG of the CCA as any person who supplies a carriage service, or is proposing to supply a carriage service. The provisions in Part 3 of the Bill would therefore be available to such persons wishing to pilot or trial a new product with NBN Co.

3/. Supplementary submission of the Competitive Carriers' Coalition (11 February 2015)

In a supplementary submission on 11 February 2016 the Competitive Carriers' Coalition (CCC) has taken issue with my extrapolation of an analogy Mr Foreman used. I was trying to explain the intended benefit of the proposed pilot and trial provisions. Even as a wholesale-only company operating at the lowest practical layer of the network stack, there is scope for NBN Co to develop new products. This is already reflected in section 152AXD of the CCA which sets the non-discrimination rules for product development by NBN Co and NBN Co's commitment to a product development forum, as set out in its Special Access Undertaking. I was simply trying to point out that if NBN Co, whether of its own volition or at the request of a customer, wanted to pilot or trial a new product, NBN Co currently faced strict requirements under its non-discrimination obligations that made this difficult and that could act as a barrier to innovation, even at its level of operation. I was not envisaging product development by NBN Co would be at a level where it could be undertaken by customers. The Department's concern is with NBN Co's ability to undertake pilots and trial at low levels where required. I agree with the CCC's view that more innovation will take place at higher levels and by service providers rather than NBN Co. That is what is intended with the NBN model, which the Department has played a large part in developing. The concern, however, is that innovation at lower level by NBN Co could be unnecessarily constrained, and this should not be the case, particularly where there are safeguards to protect competition.

If further clarification is required in relation to any of the above matters, or other measures in the Bill, please do not hesitate to contact me.

Yours sincerely

Philip Mason
Assistant Secretary
Market Structure Branch

12 February 2016