



Submission to  
Senate Environment and Communications  
Legislation Committee

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

December 2015

## INTRODUCTION

1. Optus welcomes the opportunity to provide comments on the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 to the Senate Environment and Communications Legislation Committee.
2. The amendments set out in the Bill are in response to recommendations of the Vertigan Review, which proposed legislative changes that in general terms aimed to improve the clarity, certainty and timeliness of decision making by the ACCC and to clarify certain obligations in respect of NBN Co.
3. A number of the changes are uncontroversial and Optus supports these measures. This includes the measures to:
  - a. Better coordinate the interaction between the facilities access regime in the *Telecommunications Act* and Part XIC of the *Competition and Consumer Act*;
  - b. Facilitate access to in-building cabling in connection with the provision of a declared service;
  - c. Ensure greater consistency in the application of fixed principles by the ACCC;
  - d. Authorise NBN Co for competition law purposes to continue to offer a limited number of Points of Interconnection and to be able to bundle services while rolling out the network; and
  - e. Apply a single definition of 'eligible service'.
4. However, a number of the recommendations go beyond technical changes aimed at providing clarification and improving certainty and timeliness of decision making; they appear to materially alter existing checks and balances within the regulatory arrangements.
5. This includes measures to suspend NBN Co's non-discrimination principles and amendments that will limit the decision-making discretion provided to the ACCC— particularly when making decisions that are likely to relate to NBN Co. Whilst Optus acknowledges that these amendments reflect the recommendations of the Vertigan Review, the changes do not appear to address any identifiable problems with the existing regulatory arrangements and they were opposed by a number of industry players. None of these changes are likely to produce better outcomes for the industry or consumers of communication services.
6. Optus proposes the following amendments to the Bill:
  - a. Delete the provisions in Part 4 Section 17 that add further matters the ACCC must take into account in issuing an access determination.
  - b. Delete the provisions in Part 5 that limit the ACCC's ability to vary a Special Access Undertaking.

- c. Delete the provisions in Part 3 that would “turn-off” NBN Co’s non-discrimination obligations in respect of pilots and trials.
  - d. Delete section 30 and 22B of Part 7 dealing with the Line of business restrictions.
7. The balance of this submission discusses Optus’ concerns with the above amendments in more detail.

## CONSISTENCY OF ACCC DECISIONS

8. The Bill makes changes that seek to ensure consistency in how the ACCC treats NBN Co and other access providers when setting prices in access determinations. It does so by requiring that when setting prices the ACCC has regard to the interests of;
- a. NBN Co, when setting access determinations that apply to non-NBN Co access providers; and
  - b. Non-NBN Co access providers, in the case of access determinations that apply to NBN Co.
9. Whilst the amendments respond to recommendations of the Vertigan Review, they appear to go beyond the specific concerns raised by the Vertigan Review. The specific concern raised in the Vertigan Review was the need to ensure that NBN Co is not treated more favourably than other access providers.

*The ACCC needs to ensure its approach to access determinations does not treat NBN Co more favourably than other providers. In setting access charges in an access determination, the ACCC should therefore be required, along with other factors, to take account of the manner in which it sets charges for NBN Co.<sup>1</sup>*

10. The proposed amendments clearly go further than ensuring that an access provider is not disadvantaged as compared to NBN Co, since it also requires the ACCC to ensure that NBN Co is not disadvantaged compared to other access providers.
11. On a cursory consideration the proposed amendments appear fairly benign and the objective of achieving consistency in access determination does not appear unreasonable. However, it is not clear what problem these amendments are seeking to address since no issue has arisen to date to warrant these changes. Further, it seems unlikely that the ACCC would adopt an inconsistent approach between different access providers that are providing similar services.
12. On deeper consideration it is possible to envisage circumstances in which these provisions interfere with or constrain the decision making of the ACCC to the detriment of consumers. As a minimum, they appear to open the scope for further debate as to appropriate approach to setting access prices. This is likely to add complexity and delay in the ACCC’s decision making processes. More significant is the possibility that these provisions might be used to limit or frustrate the ACCC’s decision making powers by encouraging legal challenges to those decisions.

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<sup>1</sup> Independent cost-benefit analysis of broadband and review of regulation; Statutory review under section 152EOA of the Competition and Consumer Act 2010, page 55

13. As an example of this latter risk, Optus points to the recent intervention by the Department of Communications in the ACCC's consultation on the draft Final Access Determination for fixed line access services. In a submission to the ACCC the Department challenged the ACCC's proposal to reduce legacy copper access prices because of alleged impacts on price relativities with NBN access prices:

*As set out in earlier submissions to the FLS FAD inquiry by the Minister for Communications and the Minister for Finance and the Department, the Government considers that the FLS FAD outcome should give the highest possible priority to pricing stability. This includes the price of fixed line services relative to the price of NBN services and the smooth migration of customers from legacy networks to the NBN...the ACCC does not appear to have given adequate consideration to price stability and the impact such a significant price decrease would have on migration to the NBN.<sup>2</sup>*

14. If the provisions set out in the Bill applied today it is likely that the ACCC would have to give greater weight to such arguments and its ability to reduce access prices for legacy fixed line services to better reflect the costs of supply would, therefore, be constrained.
15. Given the above risk it is difficult to see how access seekers and consumers would benefit from the proposed amendments. It is timely to remember that the objective of the Competition and Consumer Act is to promote the long term interests of end-users; not promote the interests of NBN Co.

#### *Optus recommendation*

16. Optus does not, therefore, support these amendments. The first best solution is to delete these provisions from the Bill on the basis that they are not required and do not address any specific identified problem. To the extent that NBN Co issues are relevant to an ACCC pricing decision then it is likely that the ACCC would have regard to that matter. There is in short no need to spell this out in legislation.
17. As an alternative to deletion, the amendments could be re-drafted to make it clear that the ACCC is required to have regard to consistency between NBN Co and other access providers only in relation to pricing decisions for services that are supplied in the same wholesale market(s) as NBN Co services.

### **CHANGES TO ACCC VARIATION POWERS OVER A SPECIAL ACCESS UNDERTAKING (SAU)**

18. The Bill aims to make two changes in respect of the powers for the ACCC to make variation notices to an SAU. The proposed changes would;
  - a. Limit the variations to matters that are necessary to satisfy the ACCC that an SAU is reasonable; and
  - b. Provide the party submitting the SAU with flexibility in how to respond to an ACCC variation notice.

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19. Optus recognises that these amendments reflect recommendations of the Vertigan Review. However, again it is unclear what specific problem the changes aim to address. They do not respond to any systemic problem with the variation notice powers which were only recently put into the CCA.
20. The variation power was inserted into Part XIC in response to address concerns that the undertaking process was not working effectively and was in part being used to delay and frustrate the regulatory decision making process. The Explanatory Memorandum to the Bill implementing the changes noted that:

*Voluntary access undertakings were intended to provide an opportunity for increased certainty for access providers, as well as the flexibility to develop their own terms of access for approval by the ACCC. However, certain stakeholders have argued that, instead of the undertaking provisions being used to provide certainty, they have been used to create delays in regulatory processes, and have resulted in a situation where 'serial' undertakings are lodged (i.e. repeated undertakings with only minor changes made from previous submissions, even when it is clear that the terms proposed will not be acceptable to the ACCC; this simply delays the process of reaching a proper outcome).<sup>3</sup>*

21. The proposed amendments are likely to undermine the efficacy of this regulatory tool and may have some adverse consequences for the industry and consumers. The history of undertakings in telecommunications suggests that they tend to be broad in their scope, dealing with a range of price, non-price, operational and regulatory arrangements. The most recent example of this was the NBN Co SAU which sought to settle broad components of NBN Co's products, pricing, service assurance arrangements and the regulatory oversight processes that would apply to each of these components for a thirty year period.
22. With such a broad scope it was important for the ACCC to have flexibility to negotiate and ultimately insist on changes to the NBN Co SAU. Absent this flexibility it is by no means clear that an SAU that was capable of being accepted would have been achieved.
23. The NBN Co SAU also demonstrates that with a broad ranging undertaking it is important for the ACCC to have the discretion to insist on changes that individually might not be critical to the concept of reasonableness, but which on a cumulative basis do set the threshold test for reasonableness.
24. In proposing changes to an SAU it is also important for the ACCC to have the right to be prescriptive. Giving the access provider the legislative flexibility to "interpret" the ACCC's variation notice is likely to open the scope for the process to be abused. Under the current process there is nothing to prevent the access provider seeking to negotiate changes to how a variation notice is implemented. If these changes are reasonable then they are likely to be accepted. However, discretion should rest with the independent regulator. It should be noted that an undertaking will likely replace or constrain the application of independent regulation. The independent regulator ought to have full discretion to assess such an undertaking.

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<sup>3</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 Explanatory Memorandum, page 49

25. Optus considers that the proposed amendments in this Bill will be counter-productive. They are likely to add to the delay and uncertainty of settling future SAU's and they will almost certainly re-open the scope for regulatory gaming. On this basis Optus does not support adoption of these provisions of the Bill.

*Optus recommendation*

26. Delete the provisions in Part 5 that limit the ACCC's ability to vary a Special Access Undertaking.

**RELAXING NBN Co's NON-DISCRIMINATION OBLIGATION FOR PRODUCT TRIALS**

27. The Bill introduces a number of amendments related to pilots and trials conducted by NBN Co. These essentially seek to "turn-off" the non-discrimination provisions that would otherwise apply to the conduct of such pilots or trials.
28. The Explanatory Memorandum to the Bill indicates that the changes are required because the current non-discrimination provisions act as an impediment to product development and discourage innovation by RSPs.
29. Optus is sceptical of this justification; there is no evidence we are aware of that suggests the non-discrimination obligations have operated either to restrict NBN Co's product development or to discourage innovation. Further, Optus notes that the issue of non-discrimination was hotly contested when the NBN legislation was considered and Parliament made specific amendments aimed at reinforcing the principle of non-discrimination and ensuring that it applies on a consistent basis to all of NBN Co's activities.<sup>4</sup>
30. Optus considers that the principle of non-discrimination is fundamental to the level playing field credentials of the NBN; it should apply as equally to pilots or trials as it does to NBN Co's ongoing service provision. Enabling NBN Co to discriminate by limiting participation in pilots or trials could give a single RSP a significant first mover advantage in the market. This could have adverse competition impacts, especially where significant systems, processes or commercial arrangements need to be put in place to bring a product or service to market.
31. The issue is given heightened sensitivity by the fact that NBN Co is in the process of ramping up customer migration and undertaking a significant technology shift to fibre to the node; both these objectives are highly dependent on NBN Co's close cooperation and coordination with Telstra. As the current owner of substantial components of the legacy infrastructure that NBN Co needs to access, Telstra has significant intellectual property that it could leverage to exploit a first mover advantage in this migration period if discrimination is permitted by the proposed amendments.
32. Further, it is not clear that these provisions are consistent with NBN Co's priority which is to roll-out the network and meet its basic coverage and service objectives. Encouraging RSP to

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<sup>4</sup> Optus notes that parliament removed a number of provisions that carved-out exceptions to the non-discrimination obligation.

bring new product ideas to NBN Co is only likely to distract NBN Co from achieving its core objective of connecting broadband to households.

*Optus recommendation*

33. In summary, Optus does not support the proposed amendments that would “turn-off” NBN Co’s non-discrimination obligations. We recommend that the amendments are removed from the Bill.
34. As an alternative to complete removal, Optus would support the following changes to the amendments:
  - a. Delay their application until the roll-out of the NBN is complete; or
  - b. Provide scope for NBN Co to limit participation in pilots/trials only to the extent that it can demonstrate to the ACCC’s satisfaction that it faces practical constraints in offering broader industry participation.

**LINE OF BUSINESS RESTRICTIONS**

35. The Bill includes an amendment to enable the current line of business restrictions on NBN Co to be relaxed through regulations so that it can expand its activities into other business activities.
36. Again it is unclear why the proposed change is required. NBN Co was established to specifically address a market failure relating to the provisions of last mile access for high speed broadband services; it should remain focused on that purpose. Optus does not believe that sufficient grounds have been advanced to support these proposed amendments.
37. We are also concerned that this change is being proposed at a time when NBN Co is already pushing the boundaries of its remit with reports that it is; seeking ACCC support to develop a POI backhaul service; considering new satellite services; and, is in discussions with airlines about developing inflight communications services.
38. For completeness, Optus notes that it does not object to the amendment that seek to clarify that NBN Co can dispose of non-surplus communication goods, but it should not be used to expand the role of NBN Co into telecommunications markets which are competitive and adequately served by commercial entities.

*Optus recommendation*

39. Delete section 30 and 22B of Part 7 dealing with the Line of business restrictions.