

**TELSTRA CORPORATION LIMITED**

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

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## Introduction

This submission provides Telstra's comments on the *Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015* (the **amending Bill**). We support many of the proposed amendments and this submission only addresses those proposed amendments with which we disagree or on which we have proposed changes.

### 1. Merits Review of ACCC decisions

Accountability is the cornerstone of better regulation – and merits-based review of a regulator's decisions is a key accountability mechanism. Merits-based review of regulatory decisions in infrastructure-based sectors builds the confidence and predictability in the regulatory regime essential for major investment decisions, and the competitive benefits that flow from that investment.

This process is a good opportunity to re-introduce merits based review of the ACCC's Part XIC decisions consistent with the advice the Government has received from its own independent reviews. It would bring telecommunications in line with other network-based industries, such as gas and electricity.

The re-introduction of merits-based review was regarded by the Vertigan Panel as one of its most important recommendations<sup>1</sup>:

*...the panel is concerned that the wide-ranging discretions that the regime vests in the ACCC mean that the risks and costs of regulatory error are potentially very high, with virtually no checks and balances in place to curb any resulting harms. As a matter of principle, it is inappropriate, and offensive to the norms of good government, that regulators should be left to regulate themselves.*

*...[T]he absence of appropriate control mechanisms may reduce regulators' incentives to ensure the quality of their decisions, underscoring the importance of ensuring effective oversight of the regulators themselves.*

The Harper Report also endorsed merits based review of access regulation decisions, given the "the costs of making a wrong decision are likely to be high".<sup>2</sup>

A 2012 review commissioned by COAG (**LMR Review**) strongly endorsed the continued availability of merits-based review over the alternative approach taken in telecommunications of no merits-based review<sup>3</sup>:

*The legitimacy of delegated, independent regulation is not a thing that can be taken for granted, as its unravelling in some overseas jurisdictions indicates, and it might reasonably be expected to come under increasing pressures in contexts where energy costs and prices are rising in the face of increasing environmental constraints. Legitimacy is, in turn, closely linked to regulatory certainty: without the confidence and trust of end consumers, a system of delegated, independent regulation is difficult to sustain in the longer term, and regulatory certainty will likely never effectively be established.*

There are no compelling differences between the energy and telecommunications sectors that warrant the ACCC facing substantially less accountability for its telecommunications access

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<sup>1</sup> Independent cost-benefit analysis of broadband and review of regulation, Vertigan Panel report, June 2014, page 59.

<sup>2</sup> Competition Policy Review, Final Report, Part 5, page 439.

<sup>3</sup> Review of the Limited Merits Review: <http://www.scer.gov.au/workstreams/energy-market-reform/limited-merits-review/lmr-review/>.

decisions than for its energy decisions: both sectors involve substantial capital investment and long-lived assets; both require certainty for investors; the network economics are similar, which has led the ACCC to align its telecommunications access costs model to the building block model used in energy; and both involve concerns about monopoly network assets. (If anything, the energy sector is characterised by less facilities-based competition than telecommunications).

The ACCC has generally endorsed merits-based review of its decisions across its different responsibilities. The AER (which forms part of the ACCC) endorsed the recommendations of the LMR Review, emphasising the benefits for more rigorous decision making:

*Utility regulation can only effectively be undertaken as an administrative process by a dedicated, independent and impartial primary decision-maker. As an administrative process, it is appropriate that it be overseen by judicial review and some form of limited merits review mechanism.<sup>4</sup>*

*In the AER's view, the overarching objective of a merits review mechanism... should be to provide an accessible administrative process to identify and correct errors that are material to regulatory determinations.<sup>5</sup>*

Also, in its response to the Harper Review,<sup>6</sup> the ACCC has endorsed:

- merits-based review of decisions under the National Access Regime (Part IIIA) – the general economy counterpart of Part XIC; and
- the ACCC being given the role of primary decision maker on merger authorisations on the basis that its decisions then should be subject to merits-based review.

As debate about institutional arrangements has unfolded through the recent telecommunications and competition reviews, other industry participants have come to support merits-based review of access decisions:

- In the ACMA review, Optus is advocating for a new telecommunications regulator which combines the ACMA and ACCC's telecommunications powers and that "*certain specified economic regulatory decisions (such as service declaration) [made by this new regulator] should also be subject to appeal or review by a suitably constituted and empowered expert panel*"<sup>7</sup>. If merits-based review is appropriate for access regulation by a new regulator, it is as appropriate for decision making by the ACCC if it retains these powers.
- In the Harper review, Vodafone said that "[t]he access and pricing regulator should also be subject to a high level of accountability to promote high quality decision making" and that measures to achieve this objective include "*merits review by the Australian Competition Tribunal of access and pricing decisions including all decisions under Part XIC access regime in telecommunications*"<sup>8</sup>.

Opponents of merits based review argue that it can be "gamed" to delay regulatory decisions and slow down competition. As set out below, the Vertigan, LMR Review and Harper all concluded that these concerns justified building appropriate safeguards into the review mechanism, but not dismissing the need for merits-based review altogether.

#### **Vertigan:**

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<sup>4</sup> AER Submission, SCER Review of the Limited Merits Review Regime, Section 1.1, page 1.

<sup>5</sup> AER Submission, SCER Review of the Limited Merits Review Regime, Section 1.1, page 1.

<sup>6</sup> ACCC Response to the Harper Review Final Report, pages 18 and 19.

<sup>7</sup> Optus, Submission to Review of ACMA, August 2015, at para 2.47.

<sup>8</sup> Vodafone, Submission on Draft Report, November 2014, page 4.

*...regulatory delay [resulting from merits based review] itself carries cost for both industry and end-users. However, **bad decisions taken quickly are not preferable to ensuring good decisions are taken**, especially given the role those decisions play in determining the future of Australian telecommunications. ..To minimise the potential for unnecessary regulatory costs, uncertainty and delay, merits review should be carefully limited in scope and application, subject to those limitations not undermining the effectiveness of the process of providing independent, transparent and rigorous scrutiny of regulatory decision-making.*

#### LMR Review:

*In contrast [to the ensuring legitimacy of the regulatory regime through accountability], the goals of 'minimising gaming' and 'minimising time delays and costs' of appeal seem to the Panel to be of a lesser order of significance.*

#### Harper Report<sup>9</sup>:

*The Panel notes trade-offs in deciding how limited the merits review process ought to be in competition contexts. A more limited review provides faster, less costly decisions and better incentives to provide all information at first instance; whereas, a full review provides greater scope for considering all available evidence and may increase the likelihood of a correct decision...The Panel considers that a merits review process should maintain incentives to ensure all relevant material is provided to the first-instance decision maker, with the ability for the Tribunal to receive further information that materially bears on the Tribunal's review.*

Telstra notes that neither the ACCC or the Harper Review considered that potential delay should be a reason not to provide for merits-based review of merger clearances and authorisations – although mergers can be very time critical (probably more so than access determinations which have pre-planned, scheduled timeframes).

In conclusion, the Government's own independent inquiries, the ACCC and key industry participants support rights for merits-based review. Telstra encourages the Government to take the present opportunity to begin the process of re-introducing merits-based review rights to align the regulation of the telecommunications sector with other utility sectors, and to promote better regulation to which the Government is committed.

## 2. NBN Line of Business Restrictions

The NBN model of a de facto layer 2 monopoly drives structural change for all industry participants. To re-orientate their businesses around a new services-based model downstream from the NBN, each operator needs to set a new strategic direction; to reconfigure its current products to utilise different inputs; to plan, build and launch new products; to acquire new or modify existing OSS and BSS; and to manage the migration experience for customers.

Clear, fixed boundaries around NBN Co's permitted scope of business are needed for all Retail Service Providers (RSPs) to make the substantial investment required to retool themselves for this new model. Investment certainty is undermined if there is a risk that NBN Co, with its advantages as a Government-owned and funded entity, could encroach into areas of competitive activity.

When the NBN was launched, it was recognised that the line of business restrictions on NBN Co were so fundamental that they should be embedded in legislation to provide investors with the degree of certainty they needed.

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<sup>9</sup> Competition Policy Review, Final Report, Part 5, page 480.

Concerns about NBN Co “mission creep” have grown over time. Its latest corporate plan suggests that there will be a larger than anticipated funding gap between the build costs and the capped funding commitment by the Government. NBN Co is reported to be considering new business directions as it tries to grow revenue. The mooted plans have included providing transmission services between the NBN points of interconnection (PoIs), which would compete directly with private investment in a competitive part of the market. NBN Co is also reported to be considering assisting new RSPs to enter the market, which could risk its RSP neutrality obligations.

In the Vertigan review, the industry consistently opposed relaxation of the statutory line of business restrictions of the type now proposed by the amending Bill. In fact, most participants wanted the current line of business restrictions tightened.

#### **iinet<sup>10</sup>**

*iiNet submits that the wholesale only requirements need to be tightened ....*

#### **Macquarie<sup>11</sup>**

*In order to focus on its core activities of supplying wholesale-only services, NBN Co faces restrictions on the scope of services it may provide and the investments it may make. At this stage, Macquarie does not see any need for changing the existing arrangements.*

#### **Nextgen<sup>12</sup>**

*Nextgen would be supportive of a move to place limits on NBN Co's operations in law. This would provide a degree of certainty for all parties within Australia's telecommunications sector...enabling investments to be made in the pursuit of business objectives without the risk of any future competition from NBN Co as a result of some change in NBN Co's strategy or direction.*

#### **Optus**

*The Government established the NBN as a single national broadband network that will be used by all RSPs. The creation of a government-owned monopoly reverses the underlying trend of the past two decades with competition policy objectives shifting focus away from infrastructure-based competition. Should the NBN Co monopoly extend beyond the boundaries of natural monopoly, there is a risk that the costs of NBN Co will be incurred without any offsetting efficiency benefits<sup>13</sup>.*

*Optus supports continued application of (sections 17 to 19) on NBN Co in restricting the categories of services NBN Co is able to offer. These provisions would be strengthened if the limitation for NBN Co to supply layer 2 services...is introduced.<sup>14</sup>*

#### **TPG<sup>15</sup>**

*TPG considers that the competitive environment amongst RSPs over the NBN will predominately be about service. The expectation of a competitive RSP market will only be met if NBN Co is not limiting the RSP's scope to establish attractive products for end*

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<sup>10</sup> iinet, Response to Framing Paper, page 15.

<sup>11</sup> Macquarie Telecom, Response to Consultation Paper, 14 April 2014, page 12.

<sup>12</sup> Nextgen Group, Response to Consultation Paper, April 2014, page 7.

<sup>13</sup> Optus, Response to Consultation Paper, paras 2.23 and 2.24.

<sup>14</sup> Optus, Response to Consultation Paper, paras 2.36.

<sup>15</sup> TPG, Response to Consultation Paper, page 8.

*users. We consider that NBN Co should therefore operate at the lowest possible level of the OSI stack.*

*NBN Co should continue to be prevented from supplying content services, non-communications services, and non-communications goods except where the goods are used to supply an eligible communications service.*

#### **Vodafone<sup>16</sup>**

*Structural separation of NBN Co is fundamental...NBN Co should remain as open access and wholesale only. NBN Co should remain focused on the supply of telecoms services at wholesale. The status quo should be maintained.*

The proposed amendments inserting section 22B will give the Minister an open-ended power to substantially alter or expand NBN Co's remit. The Explanatory Memorandum seeks to provide some assurance by saying that<sup>17</sup>:

*For the avoidance of doubt, the Bill also makes clear that no change is intended to section 9 – the requirement on NBN Co to operate on a wholesale-only basis – as this is fundamental to the structural and competition reforms NBN Co is designed to bring about.*

But this does not address all the ways the proposed amendments could be used to expand the reach of NBN Co's activities:

- The wholesale-only restriction only applies to “eligible services” which are defined in the CCA as carriage services or services that facilitate a carriage service.<sup>18</sup> The ‘non-communications services’ or ‘non-communications goods’ which a regulation made under the amended section 22B could permit NBN Co to supply may not qualify as “eligible services” and so are not restricted to the wholesale-only rules. Under the proposed amendment, NBN Co could, for example, be authorised to provide systems integration services to large corporates, advice on retail product development by RSPs, provide services to digitalise information and manage databases to verticals such as the health sector, or operate data centres.
- In any event, the Minister could override section 20 to permit NBN Co to invest in a third party which supplied retail communications services because the wholesale-only restriction in section 9 only applies to NBN Co and its related bodies corporate or entities NBN Co controls. In other words, NBN Co could do indirectly what it is not permitted to do directly by investing in retail providers. While this is already an issue with section 20 where NBN Co's interests fall short of control, section 22B would allow the safeguards that do exist in section 20 to be further weakened.

The option for Parliament to disallow a regulation is an inadequate substitute for a legislative amendment to change NBN Co's remit. Any such departure from a fundamental aspect of the NBN policy should be fully debated through Parliament. Using the pathway of legislative change to deal with expansion of NBN Co's remit is, as the Explanatory Memorandum notes, more difficult, but given the fundamental significance of this issue, it should be more difficult.

Alternatively, there could be a more limited scope through the making of regulations to make minor adjustments to NBN Co's line of business restrictions as unintended issues emerge, such as the example given in the Explanatory Memorandum of NBN Co's problems in selling surplus goods. That flexibility could be achieved without a large, open-ended power as is proposed in the

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<sup>16</sup> Vodafone, Response to Consultation Paper, pages 18-19.

<sup>17</sup> page 7.

<sup>18</sup> Section 152AL(1).

amending Bill. For example, before making any regulation expanding NBN Co's business scope, the Minister could be required to:

- consider factors such as the impact on competition, the legitimate business interest of other providers, consistency with the policy of NBN Co being a wholesale only provider; and
- only then make an adjustment in NBN Co's scope of business which is of a minor or non-material nature.

Further, the proposed section 22B should not apply to section 20 at all. Section 20 is already broad enough to provide NBN Co with flexibility when investing in third parties: NBN Co currently is permitted to invest in third parties where "the investment is related to the supply or prospective supply of eligible services by the NBN corporation".