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

Submission to the Inquiry into the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015

I refer to the Department's letter of 12 January 2016 thanking the Senate Environment and Communications Legislation Committee (the Committee) for inviting comment on the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 (the Bill).

After reviewing industry submissions to the Committee's Inquiry into the Bill, the Department considers that a short submission in relation to matters raised in submissions may assist the Committee by providing further information and context on the Bill. This submission is attached.

The Department continues to be available to answer any questions, should that assist the Committee in its inquiry.

Yours sincerely

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Market Structure Branch

27 January 2016

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Origin of the Bill

The Telecommunications Legislation Amendment (Access Regime and NBN Companies Bill) 2015 (the Bill) implements, in part, the Government's response to the independent cost-benefit analysis and review of regulatory arrangements for the National Broadband Network (NBN) undertaken by the panel of experts headed by Dr Michael Vertigan AC (the Vertigan panel).

The Government's response to the Vertigan panel's recommendations is set out in a policy paper released on 11 December 2014 titled, 'Telecommunications Regulatory and Structural Reform' (the Government Response).

The Bill that is currently before the Senate Environment and Communications Legislation Committee (the Committee) for inquiry contains measures that respond to recommendations made by the Vertigan panel to fine-tune the operation of the telecommunications access regime and NBN Co's line of business obligations. Most of the panel's recommendations in this area were made in its *Statutory review under section 152EOA of the Competition and Consumer Act 2010* (CCA) (the Statutory Review).

The changes proposed by the Bill are relatively minor, but helpful in nature. Broadly, they aim to promote greater efficiency, transparency, competition and innovation in the provision of telecommunications services.

The Bill proposes amendments to the *Telecommunications Act 1997* (Tel Act), the *Competition and Consumer Act 2010* (CCA), the *National Broadband Network Companies Act 2011* (NBN Companies Act), and minor consequential amendments to the *National Transmission Network Sale Act 1998* (NTN Act).

The explanatory memorandum to the Bill sets out, in detail, how the measures in the Bill are intended to operate.

A further bill, dealing with more substantive aspects of the Response, is currently being finalised.

Additional information on the Bill

The Department notes that while a detailed explanatory memorandum has been prepared in support of the Bill, the Committee may benefit from additional information and context in relation to some elements of the Bill, which have attracted particular comment from industry.

The Department provides this further information to the committee to assist it in its consideration of the Bill.

Part 1 – Access to facilities and Part 8 – Declared services

Parts 3 and 5 of Schedule 1 to the Tel Act contain an access regime which enables access seekers to gain access to an access provider's network to supply telecommunications services. This access regime enables access to 'facilities', such as mobile phone towers, pit and pipe infrastructure and other facilities of this nature.[1] Access to these facilities is provided through a negotiate-arbitrate model in which access seekers and access providers are expected to contract privately. If they cannot reach an agreement on terms of access, they can apply to the Australian Competition and Consumer Commission (ACCC) for arbitration.

While access to such facilities is provided under the Tel Act, the CCA contains a separate access regime in Part XIC for services that are 'declared' or regulated by the ACCC.[2] About ten services have been declared, a subset of the total number of wholesale services currently available in the market place. Under this regime, the ACCC sets out terms and conditions of access through an 'access determination'. For a service to be declared, it must be an 'eligible service' or a service which facilitates the supply of an eligible service.[3] An eligible service is simply a point to point telecommunications service (this can be over a line, or through the air, such as a mobile phone service). A service that provides an access seeker with access to a telecommunications facility can be a service that facilitates the supply of an eligible service. As a result, access to facilities can be provided either under the Tel Act or through ACCC regulation under Part XIC. The Vertigan panel was concerned that there could be uncertainty about the ability of the ACCC to declare access to facilities under Part XIC and the interaction of such a declaration with the access arrangements under Schedule 1 of the Tel Act.[4]

Part 1 of the Bill proposes changes to the Tel Act and the CCA to clarify that if the ACCC declares a facilities access service which is ordinarily captured by the Tel Act, then that declaration replaces the *ex ante* access rights to that facilities access service under the Tel Act. This means that prices and other terms and conditions of access determined by the ACCC will apply as a baseline, rather than the negotiate-arbitrate approach under the Tel Act. Industry submissions to the inquiry seem to be generally clear on this point. The interaction between Part 1 of the Bill and Part 8, however, may not be as clear.

Part 8 of the Bill relates to Part 1 of the Bill by providing that any agreements between NBN Co and Telstra, or NBN Co and Optus (collectively, the *definitive agreements*), are not affected by the proposed change under Part 1. Part 8 also provides that existing arrangements between NBN Co and other providers are not affected by the changes under Part 1. Industry has raised concerns around unnecessary duplication of regulation, noting for example that the existing regulatory hierarchy under Part XIC of the CCA already ensures that access agreements cannot be affected by subsequent access determinations.

[1] An example would be Optus and Vodafone being able to get access to Telstra's mobile phone towers to attach their own telecommunications facilities.
[2] The ACCC is required to keep a list of declared services on its website: http://registers.accc.gov.au/content/index.phtml/itemId/777921
[3] Section 152AL of the *Competition and Consumer Act*
[4] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 20

The agreements cited in Part 8 of the Bill do not constitute access agreements. Paragraph 152BE(1)(c) of the CCA qualifies that an access agreement can only be made in relation to a declared service. The facilities access services to which the definitive agreements or other agreements apply are not currently declared services.

The proposed changes therefore ensure that arrangements already established through the definitive agreements, or other existing agreements between NBN Co and another carrier, are unaffected in the event that a facilities access service to which those agreements apply, is captured through future declaration.

Part 3 – Pilots and trials

The CCA applies strict non-discrimination provisions to prevent NBN Co, or other providers supplying a specific declared service, the Local Bitstream Access Service (LBAS) (collectively, 'access providers'), from discriminating between access seekers, except in very limited circumstances.[5] The Vertigan panel noted, however, that the current non-discrimination obligations have the potential to curb the ability of access providers to take advantage of certain economic efficiencies.[6]

As an example, the Vertigan panel found that the non-discrimination provisions applying to access providers may reduce access seekers' incentives to develop innovative service offerings, knowing that whatever an access seeker negotiates with the access provider will have to be offered to on the same terms to their competitors.[7] Accordingly, the panel recommended that the CCA should be amended to enable access providers to discriminate where it aids efficiency or is otherwise authorised by the ACCC.[8]

In response, the Government indicated that given the significant structural changes currently taking place in the industry broader relaxation of non-discrimination obligations would be considered as part of the Productivity Commission's review of NBN arrangements that is required, under the NBN Companies Act, when the NBN is determined to be built and fully operational. In the interim, however, it would introduce legislation to enable access providers to undertake pilots and trials free of their non-discrimination obligations.[9] Such pilots and trials could promote innovation by allowing NBN Co and other relevant access providers to differentiate and develop new service offerings of their own volition or in response to access seekers' requests.

Part 3 of the Bill implements this measure. It establishes that the non-discrimination provisions in the CCA do not apply to access providers when:

[5] For example, where an access provider has reasonable grounds to believe that an access seeker is not creditworthy or where an access seeker has repeatedly failed to comply with the terms and conditions of access.

[6] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 48

[7] Ibid

[8] Ibid, p49

[9] *Telecommunications Regulatory and Structural Reform policy*, p 16

- a person engages in a pilot or trial of a new eligible service or enhanced declared service[10]; and
- the duration of the pilot or trial is no longer than 12 months (or a longer period as agreed to by the ACCC); and
- the ACCC is notified of the conduct in advance; and
- the notice is published on access provider's website until the end of the trial.

The Vertigan panel noted that changes to NBN Co's non-discrimination obligations may give rise to concerns from smaller providers that NBN Co would favour larger customers.[11] It also noted however, that it was difficult to say whether this would occur as there are incentives for NBN Co to favour both larger providers and smaller providers, depending on the outcome it is seeking.[12]

It will be possible for any access seeker to take advantage of the proposed pilot and trial provisions to develop innovative services. There is nothing in their construction that favours any particular access seeker. Innovation in the telecommunications sector has often been driven by smaller firms. In all instances, innovation should be encouraged for its own benefit and to foster competition and efficiency.

Given concerns about the pilot and trial provisions favouring particular access seekers, the proposed provisions contain a number of pro-competitive safeguards. In particular, they ensure that any pilot or trial is a legitimate pilot or trial and is only for a limited period of time. This will provide access seekers with time to develop and refine new services, while limiting any first-mover advantage.

Moreover, the mechanism is highly transparent. In order to comply with the proposed changes, an access provider must provide detailed information to the ACCC in advance of the activities that it proposes to undertake as part of the pilot or trial. While the ACCC is not required to authorise the pilot or trial in advance, it will be able to review and investigate the pilot or trial further if it has any concerns based on the information that is provided to it.

Additionally, the requirement for access providers to publish a notice specifying the nature of the pilot or trial gives other industry participants the opportunity to review the details of the pilot or trial and determine whether there are competition concerns that ought to be reviewed in a judicial context.

If the ACCC formed the view that an access provider was not undertaking a legitimate pilot or trial, it could take court action under the Tel Act for breach of the carrier's licence condition. [13] The ACCC could also apply to the Federal Court for an injunction to immediately prevent a carrier from engaging in the infringing conduct.[14] Another party, for

[10] Currently access providers are prohibited from discriminating between access seekers when developing "new eligible services" and "enhanced declared services" (see sections 152ARB and 152AXD of the CCA).
[11] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 49
[12] Ibid, pp 49-50
[13] See page 60 of the Explanatory Memorandum to the Bill for further detail.
[14] It could apply for an injunction through either Part 30 of the Tel Act, for breach of NBN Co's carrier licence conditions, or through section 80 of the CCA, for breach of the anti-competitive conduct provisions of the CCA, or section 152BB of the CCA (for breach of NBN Co's non-discrimination obligations).

example, an access seeker that is not a part of the pilot or trial, could also take legal action for breach of conditions of NBN Co's non-discrimination conditions[15], and apply for an injunction to prevent the illegitimate conduct.[16]

The Department notes that the Vertigan panel, in its discussion of the issue, recommended that the ACCC undertake an *ex ante* assessment of the pilot or trial before it could go ahead.[17] Such upfront authorisation was carefully considered by the Government during the drafting and consultation process for the Bill. The view was taken that upfront authorisation by the ACCC could slow innovation and add to the regulatory burden without significantly enhancing pro-competitive safeguards.

Ultimately, the provisions which are proposed in the Bill aim to strike a balance between facilitating efficiencies in the market, encouraging innovation, and providing appropriate safeguards against anti-competitive conduct.

Part 4 – Access Determinations

Part 4 of the Bill proposes to codify ACCC consultation processes in relation to interim access determinations (IADs) and binding rules of conduct (BROCs). Industry has put forward two general views in relation to these changes: firstly, that they do not go far enough and that merits review of such decisions should be introduced; and secondly, and in contrast, that codifying existing practices adds unnecessary red tape and potential uncertainty into regulatory processes and may in fact delay outcomes by providing additional grounds for legal challenge of regulatory decisions.

Merits review was considered in detail by the Vertigan panel. It recommended that when the ACCC makes decisions of enduring impact, these decisions should be subject to regulatory oversight.[18] The Government response to this recommendation was that existing arrangements that limit merits review should not be changed until the NBN rollout is complete, but that alternative models of review could be considered in advance of this date.[19] This reflected the Parliament's past decision to limit merits review under Part XIC due to significant concerns about gaming conduct in the past.

The changes proposed by Part 4 aim to achieve a balance between providing industry with greater certainty that the ACCC will follow requirements of procedural fairness, and the real concern that that the regulator's decisions can be gamed with broader industry and economic detriment. The Department notes that when merits review did exist for Part XIC decisions, six ACCC undertaking decisions were appealed to the Australian Competition Tribunal, and all of those appeals were unsuccessful. The ACCC noted in its submission to the Vertigan panel that the repeated challenges to arbitrations and undertakings are highly resource-intensive and time-consuming.[20] In this context, the Parliament previously limited merits

[15] Section 45 of the CCA
[16] Sections 80 or 152BB of the CCA.
[17] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 50
[18] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 60
[19] *Telecommunications Regulatory and Structural Reform policy*, p 17
[20] *ACCC submission to the Independent Cost Benefit Analysis Review of Regulation Telecommunications Regulatory Arrangements Paper (s.152EOA Review)*, p 19

review. Given the industry is still in a state of transition during the rollout of the NBN rollout, the Government's view is now is not the appropriate time to reintroduce merits review, although it is open to considering alternative approaches.

The requirement for the ACCC to consult simply codifies an important element of the ACCC's processes when it comes to making a decision in relation to an IAD or BROC. These changes are intended to promote confidence in the regulator's decision making processes and will ensure consistency in approach for all access providers. Given that they simply provide some greater certainty that the ACCC will follow minimum procedural fairness requirements, they should neither be seen as delaying regulatory decisions nor as adding any additional red tape to access determination processes.

Part 5 – Special access undertakings

The Vertigan panel considered that when the ACCC gives a carrier a notice to vary a special access undertaking (SAU), that notice should be limited to changes which are necessary to satisfy it that the SAU is reasonable.[21] Part 5 of the Bill aims to implement this recommendation. The Vertigan panel's recommendation responded to concerns raised by NBN Co that the SAU process, which it was recently involved in, was delayed because the ACCC required variations that were not, strictly speaking, necessary for it to be satisfied that the SAU was reasonable.

Industry has claimed that the proposed changes respond only to the self-interested concerns of network owners, such as NBN Co, who may have difficulty satisfying ACCC requirements.

The Department disagrees with this assessment of the changes. The proposed changes respond to genuine concerns raised by NBN Co and are intended to provide a useful discipline on the regulator. They clarify that when the regulator proposes changes to an SAU to enable it to be accepted, it should identify which changes are essential and which are desirable. The SAU process is complex and resource intensive. This change improves the efficiency and timeliness of the process. Access providers should not be required to implement changes that are not essential to the regulator's decision in relation to whether it will accept or reject an SAU.

Industry has also claimed that the proposed changes give the ACCC less flexibility in requesting changes to an SAU. The Department considers the changes improve the operation of the framework, by making it clear the ACCC should focus on what is essential, but can also raise changes it considers useful or desirable. Ultimately, the ACCC will still determine the scope and substance of changes required in relation to SAUs and the person submitting the SAU would still need to vary the SAU so that its changes satisfied the object, if not the letter, of the ACCC's requirements.

Part 7 – Line of business restrictions

The NBN Companies Act sets out fundamental line of business restrictions on NBN Corporations. These restrictions ensure that NBN Co is focused on its core business of rolling out the NBN to provide better broadband and a platform for retail competition and limit its

[21] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 69

ability to exercise market power through participation in downstream markets – such as the supply of retail internet services – and by operating in horizontal markets.

The Vertigan panel noted that these restrictions can have unintended consequences. In its submission to the Vertigan panel, NBN Co noted that currently it can only sell goods to another person if the goods are supplied in connection with the supply or prospective supply of an eligible service. This means that NBN Co can only sell surplus non-communications equipment (like vehicles or office furniture) to a company to which it also supplies an eligible service. This unnecessarily limits NBN Co's ability to operate commercially by limiting the subset of companies to which an NBN corporation may dispose of surplus assets.

NBN Co also advised that it has had to consider the restriction on non-communications services in the context of encouraging early migration from legacy networks to the NBN. One solution to encourage early migration which NBN Co explored but did not progress, related to providing some end-users with a coupon or voucher to be redeemed from a participating service provider to allow the end-user to obtain a price discount which the provider could in turn claim from NBN Co. NBN Co advised the Vertigan panel that at least one access seeker claimed that by issuing the coupon, it would be in breach of its regulatory obligations by supplying a non-communications service.[22] It is these types of activities, which may have broad public benefit, and which are at the margins of NBN Co's current operational mandate, which the Government may wish to enable by way of regulation.

Part 7 of the Bill therefore proposes two changes to the line of business restrictions. First, it provides flexibility for an NBN corporation to dispose of surplus non-communications goods to a person to whom it does not supply an eligible service. This is specifically addressed as it is an identified problem that needs to be resolved.

Second, the Bill provides that regulations may be made stipulating that:

- section 18 (restriction against the supply of non-communications services),
- section 19 (restriction against the supply of non-communications goods), or
- section 20 (restriction on investment activities)

do not apply. As noted in the explanatory memorandum to the Bill, this change would enable the Governor-General to make regulations enabling NBN Co to supply non-communications goods or services, or make investments that are currently restricted.[23] Such regulations could be conditional and could relate to specific circumstances.

Industry has voiced a number of concerns with this regulation making power. The main thrust of these concerns is focussed on potential NBN scope, or 'mission' creep. That is, a general concern that NBN Co will begin competing in new markets, and against current industry participants in those markets.

The Vertigan panel found merit in NBN Co's argument that there could be developments that arise in the future which warrant modification of the constraints that apply to NBN Co, and that it should be possible to deal with these developments through regulations, rather than

[22] *Submission of NBN Co to Expert Panel in response to the Consultative Paper for the Purpose of Section 152EOA of the Competition and Consumer Act,* p 30

[23] *Explanatory Memorandum to the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015*, p 66

amendments to the NBN Companies Act.[24] It went on to note that regulations are subject to rigorous development processes and are subject to disallowance by either house of Parliament. The process of making regulations is also highly transparent, with all tabled regulations publicly available for scrutiny.

The telecommunications sector is highly dynamic. Companies must be able to respond to changes in the market, and where appropriate, flexibility should be available to governments and regulators to facilitate this responsiveness. The Department notes concerns raised by industry, but also notes that the proposed regulation-making power is limited, dealing for example with ancillary aspects of NBN Co's activities. Importantly, the Bill proposes no changes to the prohibitions on NBN corporations from supplying retail services (section 9 of the NBN Companies Act) and content services (section 17 of the NBN Companies Act). The regulation making power will provide some flexibility to deal with unintended consequences, should they arise, given the wide range of existing restrictions on NBN Co. The difficulty for NBN Co in disposing of surplus assets is simply one known identified example; should similar examples be identified in the future the regulation-making power could be used in a public and transparent manner to deal with them, subject to usual Parliamentary scrutiny.

[24] *Independent cost-benefit analysis of broadband and review of regulation, Review under Section 152EOA of the Competition and Consumer Act*, p 85