



Submission to the Environment and Communications Legislation Committee Inquiry into the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010

February 2011

Introduction

The CCC welcomes the opportunity to comment on the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010.

The CCC supports the two Bills and urges the Senate to support their passage. The Bills establish in law important principles under which the NBNco will conduct its on-going business. Given that the NBNco will be a monopoly provider of fixed line services in most of Australia, it is crucial that effective and clear limits are placed on its ability to leverage market power.

Notwithstanding this general support, the CCC submits that there are two areas where it believes amendments might improve the Bills, consistent with the Government's stated intention to strengthen competition in the telecommunications sector.

Non-Discrimination Principle and Prices

The CCC submits that the prices, terms and conditions of supply from NBNco should be cost reflective and should be offered on a non-discriminatory basis. There is an argument in favour of allowing downstream customers to acquire services at a discount where they have invested to reduce supply costs. Such a provision could encourage investment and increased efficiency. However, it is of paramount importance that any such provision does not in future allow for anti-competitive conduct or advantages larger RSPs against smaller RSPs simply because their size gives them greater bargaining power in negotiations with NBNco.

In the past, the CCC has proposed that exemptions to the Non-Discrimination provision should ONLY occur where:

- There is a measurable and demonstrable efficiency resulting from the particular arrangements in place between NBNco and a particular RSP
- The ACCC approved the arrangement based on it being persuaded that there is a demonstrable and measurable efficiency and the price discount reflects this efficiency
- The ACCC publishes the agreement so that other RSPs can replicate it

Volumes should not be a basis on which discounts are offered. If volumes can be shown to create an efficiency, that is a situation that would qualify under the above proposed arrangement.

The Explanatory Memorandum to the Bills identifies “risk sharing” as a circumstance where different terms of supply might be acceptable. The CCC strongly disagrees. Based on further discussion with NBNco via the Department, the CCC believes risk sharing as understood by NBNco does not represent a measurable efficiency.

For example, NBNco suggests that risk sharing would include circumstances where an RSP provided to meet demand growth forecasts and NBNco agreed to reduce its price per service if those forecasts were met. This is a proposal that appears no different from some of the pricing arrangements employed presently by Telstra, which ISPs regard as an exercise of market power on the part of Telstra. The flip side of these “discounts” is that access seekers are penalised if they fail to meet demand forecasts, even though there is no material difference in costs at any stage of the supply chain whether these forecasts are met or not.

Further, it is envisaged that NBNco will be a monopoly supplier of fixed line services in the fibre to the home footprint. Therefore these are not circumstances where NBNco would be seeking to encourage RSPs to migrate more customers in total from an alternative access network to its fibre access network. There will be no alternative fixed network in the fibre footprint locations. Also, the underlying cost of delivering services would not be expected to vary materially based on the download speed of the services acquired by end users.

The CCC therefore submits that the use of demand forecasts as a basis for “risk sharing” is necessarily subject and therefore would not meet the principle of discounts being matched to measurable efficiencies.

The consideration of this example of a proposed exemption to the non discrimination principle has highlighted for the CCC the practical difficulties of creating a workable exemption principle. By way of illustration, attached is a flow chart that represents the convoluted flow of decision-making processes that would be implied by the provisions as they presently stand in the Bill. The CCC submits that it is clear from this diagram how many opportunities for disputation and imprecise judgement calls would be created.

The CCC therefore submits that the preferable position is for the legislation to prohibit NBNco from making exemptions to the equivalence principle in its supply of access services.

Level Playing Field Provisions

The CCC strongly supports what it understands to be the intention of the level playing field provisions of the Access Bill. The CCC sees these aspects of the Access Bill in the context of Telstra’s actions in relation to the South Brisbane exchange area.

In this location, Telstra announced last year that it intended to replace its existing copper access network with fibre to the home. Telstra wrote to access seekers providing retails service from that exchange to inform them that the wholesale services that they rely on to access customers would be cut off.

However, Telstra has failed to provide access seekers with any guidance as to what, if any, wholesale services it intends to provide to replace the existing wholesale access services, despite many months of requests from these wholesale customers for their needs to be addressed. Many thousands of end user services are affected.

Telstra has previously engaged in similar conduct in Canberra. This raised the very real prospect that Telstra will “cherry pick” the most lucrative geographic locations in Australia for similar treatment, and leave competitors cut off from their existing customers before the structurally separated NBNco deploys its network in these locations. This would leave islands of consumers who did not benefit from the benefits of competition stimulated by structural separation of the NBNco’s network from any retail activity.

Competitive carriers understand that the level playing field or cherry picking provisions of the Access Bill are an attempt to ensure that this does not occur.

However, competitors are concerned to ensure that the provisions are drafted in such a way as to deliver against this intended outcome, while avoiding unintentionally catching other investments, such as investment in new transmission assets, or even upgrades to existing transmission assets.

The CCC and its member companies have been in discussion with the Department of Broadband, Communications and the Digital Economy to determine whether amendments need to be made, and if so what form they should take. These discussions are on going.

NBN Supply of Services

