

Dissenting Report from Labor and the Australian Greens

Summary

1.1 Labor and the Australian Greens do not support the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 in its current form. This bill is a misguided and ideological attempt by Government to roll back a number of competition- and consumer-friendly reforms underpinning the National Broadband Network (NBN).

1.2 For the most part, the proposed measures are unnecessary, retrograde and/or add complexity to regulatory decision-making processes. Worse, many of the proposed measures compromise fundamental elements of the level playing field underpinning the NBN, and may have a detrimental impact on competition and consumer outcomes.

1.3 Industry and consumer advocates have raised significant concerns with measures in this bill, pointing in particular to the risk of consumer detriment from the proposed measures. The Government has ignored these concerns in its majority report.

1.4 Parts 1, 2 and 6 of the bill appear to be non-contentious. The Government has the option of splitting these measures out of the bill and introducing them separately if it wants to expedite passage.

Relevant background

1.5 This bill attempts to codify a number of recommendations of the so-called Vertigan Panel. The Vertigan Panel conducted three reviews into the NBN during 2013/14:

- a statutory review under section 152EOA of the *Competition and Consumer Act 2010* (delivered June 2014);
- an "independent" cost benefit analysis of broadband (delivered August 2014); and
- a review of regulation (delivered October 2014).

1.6 While in opposition, then shadow Communications Minister, the Hon Malcolm Turnbull MP said:

We are going to do a rigorous analysis, we will get Infrastructure Australia to do an independent cost benefit analysis.¹

1 Interview with Allie Coyne, *IT News*, 16 August 2013, at: <http://www.itnews.com.au/news/turnbulls-nbn-policy-detailed-enough-to-escape-costing-353616>

1.7 The Vertigan Panel was assembled by the former Communications Minister, Mr Malcolm Turnbull, in December 2013. Instead of appointing Infrastructure Australia as promised, Mr Turnbull appointed former Liberal Party staffers, Liberal Party advisors and noted and strident critics of the NBN to conduct his cost benefit analysis and review of regulation, with predictable results.²

1.8 The Senate Select Committee into the National Broadband Network subjected the Vertigan Panel's "independent" cost benefit analysis of broadband to rigorous scrutiny in early 2015. The Senate Select Committee identified a number of fatal shortcomings in the cost benefit analysis.³ These included an absurdly pessimistic quantification of technical household demand—15 megabits per second by 2023—that relied on a study conducted by a UK firm known for its (uniquely) pessimistic view of future broadband demand, rather than demand forecasts from reputable firms (e.g. CISCO). The Senate Select Committee also noted that 'incredibly, the [Vertigan] Panel inflated NBN Co's [fibre operating expenditure] assumptions by 180 per cent compared to only 12 per cent for the MTM, despite the low OpEx costs of fibre compared to legacy technologies'.⁴

1.9 The Senate Select Committee concluded that 'the Cost-Benefit Analysis is a deeply flawed and overtly political document. It is not credible and is not a reliable basis upon which to make decisions about the NBN'.⁵

1.10 Since the Senate Select Committee conducted its analysis of the Vertigan Panel's cost benefit analysis, developments have borne out its conclusion. The Vertigan Panel based its cost assumptions for the Government's NBN on the cost models developed by NBN Co for the 2013 *Strategic Review*.⁶ These cost models have since been proven hopelessly wrong, as the cost of the Government's second rate NBN has blown out from the ~\$41 billion assumed in the December 2013 *Strategic Review* to the up to \$56 billion assumed in NBN Co's August 2015 *Corporate Plan 2016*.⁷

2 Senate Select Committee on the NBN, *Second Interim Report*, 19 March 2015, pp. 63–67, at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Broadband_Network/NBN/Second_Interim_Report

3 Senate Select Committee on the NBN, *Second Interim Report*, pp. 95–96.

4 Senate Select Committee on the NBN, *Second Interim Report*, pp. 67–68.

5 Senate Select Committee on the NBN, *Second Interim Report*, p. 95.

6 Vertigan et al., *The costs and benefits of high-speed broadband*, p. 27, at: https://www.communications.gov.au/sites/g/files/net301/f/Cost-Benefit_Analysis_-_FINAL_-_For_Publication.pdf

7 NBN Co *Strategic Review* (December 2013), p. 17, at: <http://www.nbnco.com.au/content/dam/nbnco/documents/NBN-Co-Strategic-Review-Report.pdf>; NBN Co *Corporate Plan 2016* (August 2015), p. 31, at: <http://www.nbnco.com.au/content/dam/nbnco2/documents/nbn-corporate-plan-2016.pdf>

1.11 In June 2014, the Vertigan Panel concluded its statutory review of the legislative and regulatory arrangements underpinning the NBN. It found that:

Overall, the review found a high level of satisfaction among stakeholders with the 2010-11 changes to the legislative framework and its operation.⁸

1.12 Despite this finding, a few months later when handing down its Market and Regulatory Review, the Vertigan Panel recommended wide-ranging, ideological and retrograde changes to the legislative framework underpinning the NBN.

1.13 The industry response to the Vertigan Market and Regulatory Report was scathing. The Competitive Carriers' Coalition released a statement calling on the recommendations to be 'binned', noting that:

After deliberating all year, the Vertigan panel has recommended that Australia look to emulate 1970s US telephone industry policy to promote investment in 21st century broadband networks...most of the Vertigan recommendations represent nothing more than rehashed, discredited theoretical arguments promoted by opponents of regulatory reform and the NBN.⁹

1.14 The industry response to the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 has also been scathing. In a number of cases, industry has pointed to the risk of consumer detriment from the proposed measures. The peak telecommunications consumer body in Australia, the Australian Communications Consumer Action Network (ACCAN), has raised similar concerns about the risk of consumer detriment from the proposed measures.

1.15 Government members of the committee have completely ignored these concerns and recommended that 'the bill be passed' without amendment.

Particulars of the bill

1.16 Part 3 proposes to relax the non-discrimination obligations on NBN Co in relation to pilots or trials. The non-discrimination provisions prohibit NBN corporations from discriminating between access seekers in the supply of services. They are an important part of the level playing field underpinning the NBN.

1.17 Industry agrees. Optus calls the principle of non-discrimination 'an important foundation principle'.¹⁰ Macquarie Telecom calls these obligations 'absolutely

8 Vertigan et al., *Statutory review under section 152EOA of the Competition and Consumer Act 2010*, Cover letter, at: https://www.communications.gov.au/sites/g/files/net301/f/3%20Section_152EOA_Report.pdf

9 Competitive Carriers' Coalition, 'Vertigan Recommendations Should be Binned', *Media Release*, 2 October 2014, at: <http://www.ccc.asn.au/vertigan-recommendations-should-be-binned/w1/i1001527/>

10 *Proof Committee Hansard*, 5 February 2016, p. 4.

fundamental' and 'non-negotiable'.¹¹ The Competitive Carriers' Coalition calls them a 'core element' in restraining market power which 'should not be changed'.¹²

1.18 It is unclear why the Government wants to relax these provisions. A case for change has not been made. Worse, the risks posed by relaxing the non-discrimination provisions far outweigh any imagined benefits. As the Competitive Carriers' Coalition puts it:

The proposal to dilute the non-discrimination requirements in order to allow NBN to do exclusive deals for "pilots and trials" is highly risky, unnecessary and supported by no persuasive evidence that there is a problem in existing rules.¹³

1.19 ACCAN is equally concerned. ACCAN notes in its submission that the proposed amendments 'do not appear to add any benefit to consumers' and 'may result in anti-competitive behaviour in the industry'.¹⁴

1.20 Parts 4 and 5 of the bill add to the matters the ACCC is required to consider when making access determinations, and restrict the ACCC's decision-making powers in relation to Special Access Undertakings. The effect of these measures will be to add complexity and delay to the ACCC's decision-making processes, to the detriment of consumers.

1.21 Non-incumbent telecommunications providers are all opposed to these provisions. Optus notes in relation to Part 4 that:

...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.¹⁵

1.22 ACCAN is similarly alert to the potential for consumer detriment, noting that Parts 4 and 5 'appear to restrict' the ACCC's ability to 'make markets work for consumers'.¹⁶ ACCAN also noted that it was:

...not convinced that the problems triggering these proposed amendments currently, or will in the future, exist. The amendments are likely to add further complexity to the telecommunications regime and increase the amount of time it takes for the regulator to arrive at, and implement, decisions.¹⁷

11 *Proof Committee Hansard*, 5 February 2016, p. 16.

12 Competitive Carriers' Coalition, *Submission 4*, p. 4.

13 Competitive Carriers' Coalition, *Submission 4*, p. 4.

14 ACCAN, *Submission 6*, pp. 1–2.

15 Optus, *Submission 2*, p. 3.

16 ACCAN, *Submission 6*, p. 2.

17 ACCAN, *Submission 6*, p. 2.

1.23 Part 7 of the bill contains proposed amendments that would modify the line of business restrictions imposed on NBN Co and the provisions relating to conduct that NBN Co is authorised to engage in for competition law purposes.

1.24 If the Government wants to exempt certain conduct relating to NBN Co's line of business restrictions, it should be open and transparent about it. For example, Labor and the Australian Greens do not object to the proposed amendment that would enable NBN Co to dispose of surplus non-communications goods. The broad-based regulation making power is a different beast entirely, and it is entirely unsurprising to Labor and the Australian Greens that the telecommunications industry is united in opposition to this measure.

1.25 Telstra notes in its submission in relation to Part 7 that:

[NBN Co's] 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.¹⁸

1.26 Labor and the Australian Greens agree with this observation. When Mr Malcolm Turnbull first announced his NBN in April 2013, he said that it would cost \$29.5 billion in required funding, and would be funded entirely out of public equity.¹⁹ In December 2013, when Malcolm Turnbull conceded his first, \$11 billion dollar blow-out, he said that the extra \$11 billion dollars would be funded out of private debt.²⁰ And in August 2015, when Malcolm Turnbull admitted to his latest, up to \$26.5 billion dollar blowout, he said that up to \$26.5 billion could be sourced from private debt markets.²¹

1.27 Labor and the Australian Greens note the alarming record of massive cost blowouts on Malcolm Turnbull's watch, and the inclination of his Government to seek new revenue streams to plug the haemorrhaging brought about by his egregious mismanagement of this critical infrastructure project.

1.28 The National Broadband Network is signature Labor policy. It was conceived and designed to upgrade Australia's essential communications infrastructure for the 21st century, and fix decades of market failure in the wholesale monopoly that is Australia's fixed line access network. The Government has not made a case to extend

18 Telstra, *Submission 5*, p. 5.

19 Liberal Broadband Policy, pp. 8 & 15, at: <http://lpa.webcontent.s3.amazonaws.com/NBN/The%20Coalition%E2%80%99s%20Plan%20for%20Fast%20Broadband%20and%20an%20Affordable%20NBN.pdf>.

20 NBN Co, *Strategic Review*, p. 112.

21 NBN Co, *Corporate Plan 2016*, p. 70; Transcript - Press Conference Sydney, 24 August 2015, at: <http://www.malcolmturnbull.com.au/media/transcript-press-conference-sydney-24-august-2015>

NBN's remit beyond the natural monopoly access network. It is unclear what the Government is proposing to achieve with the proposed measures.

1.29 Part 7 of this bill also attempts to reflect in legislation the Government's policy of axing universal national wholesale pricing and replacing it with wholesale price caps. Labor and the Australian Greens note the Department's testimony in relation to this measure:

The authorisations are not actually being repealed; what is being changed is to make clear the basis on which the authorisations are enduring. The idea is that the authorisations continue to be needed so that nbn co can roll out the network as it has designed and is constructing it. As it was originally enacted, the bill was tied to delivery of uniform national wholesale pricing, even though that was a policy requirement as opposed to a legislative requirement. Because the network is now being built in that way it continues to have to be built in that way...Basically, via the bill we are changing the rationale for the authorisations.²²

1.30 Universal national wholesale pricing is a reform introduced by the former Labor Government. It means that Australians living in regional and rural Australia pay the same wholesale price for equivalent services as people in our big cities.

1.31 The Government has announced that it will axe universal national wholesale pricing and replace it with price caps.²³ This means that Australians living in the bush may pay more for essential communications services than people living in our big cities. Labor does not support the Government's move to axe universal wholesale pricing, and is at a loss as to why the National Party is supporting the Liberal Party to implement this policy change.

1.32 Part 8 of the bill proposes amendments that would provide that facilities access services supplied under certain existing agreements between NBN Co and Telstra, and NBN Co and Optus (known as the definitive agreements), are not declared services to the extent that they are supplied under those agreements.

1.33 Labor and the Australian Greens question the need for these measures. As the Competitive Carriers' Coalition points out, 'under the law as it now stands, any commercial agreement between parties relating to a declared service takes precedent over any ACCC pricing or access decision'.²⁴

22 *Proof Committee Hansard*, 5 February 2016, p. 29.

23 Australian Government, *Telecommunications Regulatory and Structural Reform*, December 2014, p. 5, at: https://www.communications.gov.au/sites/g/files/net301/f/Telecommunications_Regulatory_and_Structural_Reform_Paper_-_11_December_....pdf

24 Competitive Carriers' Coalition, *Submission 4*, p. 6.

Recommendation 1

1.34 Labor and Australian Green Senators recommend that the bill not be passed.

**Senator Anne Urquhart
Deputy Chair
Australian Labor Party**

**Senator the Hon Lisa Singh
Australian Labor Party**

**Senator Scott Ludlam
Australian Greens**

