Submission on Exposure Draft Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill

September 2015

Summary

Macquarie Telecom welcomes the opportunity to provide comment on the draft legislation.

Macquarie has grave concerns with several proposed amendments and submits the Bill as it stands should not be presented.

The Bill seeks to address numerous issues. There are some elements where Macquarie supports the intention, but submits the drafting needs to be reconsidered to ensure the measures are well targeted.

The majority of elements of the Bill, however, Macquarie does not support – and there are several it strongly opposes.

Among the problems Macquarie has identified are:

- Many measures do not address actual problems, raising questions as to why legislation is necessary
- While unnecessary, many measures carry a serious risk of creating unintended, anti-competitive consequences
- Proposed changes to regulatory arrangements and processes shift the balance against competitive entrants and in favour of incumbents
- Measures will add red tape, complexity and delay for no good purpose
- Changes to arrangements under which the Australian Competition and Consumer Commission assesses proposals from NBN and other monopoly access providers will unnecessarily constrain the ACCC's ability to regulate
- The package does nothing to address the material problems arising from loopholes in the regulatory regime, which is having a material effect on market conduct to the detriment of consumers and competition.

The particular amendments Macquarie believes should not proceed are discussed in more detail below.

Part 3. Removal of non discrimination provisions in relation to pilots and trials.

The non-discrimination requirements on NBN are at the core of the integrity of the NBN as a wholesale-only, publicly built and owned monopoly access network intended to create a pro-competitive industry structure. The provisions as they are presented drafted represent the result of many months of consideration and detailed debate ahead of the final determination by Parliament about the appropriate approach to this issue.

Macquarie believes non-discrimination remains a non-negotiable condition for the operation of the NBN.

The NBN is intended to create a level playing field by separating ownership of the monopoly access network from competitive downstream markets. Creating opportunities for individual access seekers to gain some unique advantage in their dealing with NBN necessarily results in a situation where incumbents and larger businesses have a greater opportunity to benefit than smaller and new entrant access seekers. Telstra is clearly best placed to take such advantage.

These risks are many times greater under a multi technology mix approach that utilises existing Telstra infrastructure and involves Telstra in planning and rollout decisions to a much greater extent than a fibre to the premise access technology approach.

NBN has repeatedly argued for the dilution of the non discrimination controls, and has claimed it wishes to do this to benefit new entrants and non incumbents. However, Macquarie is unaware of any situation where a competitive carrier has sought changes to the non discrimination requirements.

The rationale given for exempting trials and pilots in explanatory material to this Bill is deeply concerning.

Firstly, Macquarie has been unable to find any examples of pilots or trial proposed by non-incumbents that have been unable to proceed because of the non-discrimination rules. Nor has Macquarie heard any evidence that there is some “chilling” effect arising from the non-discrimination rules preventing access seekers from coming forward with ideas to NBN. Macquarie regards this suggestion as particularly disingenuous as it places opponents to the amendment in the impossible position of having to prove a negative. It is a convenient argument for NBN in continuing to pursue this legislative change in circumstances where it is still unable or unwilling to identify a single instance where it has been unable to proceed with a trial or pilot because of the non discrimination rules.

Secondly, the explanatory material suggests a benefit of introducing an exemption for pilots and trials is that it would allow one access seeker “first mover advantage” in introducing an innovation it develops under a privileged arrangement with NBN. This suggests NBN and the Department have failed to understand that these are exactly the type of circumstances the competitive industry has been at pains to prevent arising. The risk of such an amendment resulting in harm to competition is particularly acute during the crucial and sensitive transition period as the NBN is rolled out.

Thirdly, the ACCC’s non discrimination guidelines specifically outline that pilots and trials can be undertaken within the present legislative framework, but would need to be available to all access seekers rather than being offered under exclusive arrangements.

These guidelines have never been utilised or tested by NBN or any access seeker. Suggestions that this is because of some opaque "chilling effect" are unpersuasive.

Macquarie strongly submits that the case for change to the non discrimination rules has not been made out and, in the absence of a demonstrated, forward looking problem, the risks of making the proposed amendments are too great.

Part 4. Changes to Access Determinations

Proposed changes to the processes the ACCC must follow in access determinations and binding rules of conduct do not reflect any demonstrated problem, but do add red tape, risk creating further delay and complexity to an already highly bureaucratic process, and, in so doing, create further barriers to smaller stakeholders participating in these important regulatory processes.

The Commission's determination processes are already effectively inaccessible to smaller participants, as is evident from the present reviews into fixed line services and domestic transmission services. The volume and extent of submissions from the parties – notably Telstra – are so extensive that it is impractical for all but two or three of the largest business in the industry to review all the material.

The binding rules of conduct power was intended to provide the Commission with a tool to apply where there was a need for immediate action to address a situation where anti-competitive actions were identified and causing immediate harm.

The proposed requirement that the Commission consult with such persons as it deems appropriate does nothing other than reflect what the Commission has always done, and is required to do in discharging its present responsibilities. On the other hand, such an amendment would give the Commission a signal that it was expected to be even more conservative in its decision making processes.

Another of the proposed changes to Access determinations relates to requirements that the Commission treat access providers consistently. This appears to have arisen from a concern raised by the Vertigan review that the NBN would be treated more favourably by the Commission than other access seekers. Again, Macquarie is aware of no specific instance where this is suggested to have occurred.

However, the Draft Amendments appear to go further, suggesting the Commission must have regard to the method it uses in NBN determinations when making determinations relating to other access seekers, and vice versa. While this, on its face, seems unremarkable, it is again a solution in search of a problem, and therefore must raise concerns about unintended outcomes.

At the very least, it would almost inevitably lead to more complexity and red tape in Commission processes, increase uncertainty and potentially reduce the Commission's flexibility in making decisions tailored to the specific circumstances it is attempting to address.

Part 5 Variations to Special Access Undertakings

The proposed amendments limiting the ability of the Commission to vary SAU to changes that are necessary to satisfy the Commission that the SAU is "reasonable" are unnecessary, and seriously risk

undermining the flexibility that the Commission needs to deal with complicated and extensive undertakings.

The SAU submit by NBN in 2010 was subject to extensive and detailed analysis and consideration by the industry and the Commission and only through the diligent work of the Commission was an undertaking acceptable to access seekers eventually concluded.

While these processes might be frustrating for monopoly access providers, the Commission's ability to assess undertakings as a whole is the only means by which their market power can be effectively be addressed.

The proposed amendments shift the flexibility and discretion to the regulated monopolist and away from the independent competition umpire, a situation destined to achieve nothing but weakened competition over time.

Part 7 Line of Business Restrictions

The proposed amendments to remove restrictions on NBN's lines of business are difficult for Macquarie to assess in the absence of a clearer understanding of what NBN is presently precluded from doing.

If NBN is so constrained that it is, for example, unable to dispose of earth moving equipment or excess fibre, the restrictions are clearly excessive.

However, the rationale for the line of business restrictions – to constrain NBN from entering and undermining competitive markets – remains a keystone element of the regime. Further information about the problem NBN presently faces is necessary before a judgement can be made about the proposed amendments.

Outstanding Areas of Policy Concern

Macquarie Telecom believes the amendments overlook a far more pressing area of concern, that of the present hierarchy or order of precedence in Part XIC. The unequal bargaining power between access seekers and the monopoly access network owners means access seekers are often forced to accept terms of supply that lock them in to positions of unfair disadvantage before an access determination process is concluded. Yet the present hierarchy of agreements and regulatory mechanisms means that they can find they are unable to available themselves of the prices, terms and conditions the Commission determines as being reasonable once they have signed a supply agreement.

Macquarie believes amending the order of precedence such that a determination or binding rule of conduct prevails of a pre-existing access agreement would be a far more valuable and pro-competitive reform than anything in the present legislation.