7 September 2015

by email: infrastructureandaccess@communications.gov.au
The Infrastructure and Access Team
Market Structure Branch
Department of Communications

Dear Sir/Madam

Consultation on Draft Telecommunications Bill

This submission sets out a joint response from the members of the Competitive Carriers Coalition (**CCC**) and Optus (**the Respondents**) to the exposure draft of the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 (the **Bill**). This joint submission addresses areas of common concern between the members of the CCC and Optus. Optus and the individual CCC members may submit additional material on their own account to address areas of individual concern.

The overall concern of the Respondents in relation to the Bill is that many of the proposed amendments appear unnecessary and tend to increase the complexity and uncertainty of the regime without producing any countervailing benefit. There is also a significant risk that the proposed amendments will have unintended consequences. A number of the proposed amendments risk creating opportunities for incumbents to undermine competition in new ways, and in some instances run against the very clear and thoroughly debated principles that were agreed in the legislation creating the NBN in 2010.

Importantly, in many cases the Respondents consider that the 'problems' that the amendments purport to address do not actually exist. Several of the proposed amendments, such as changes to non-discrimination provisions, have been represented as being in the interests of competitive access seekers but these amendments have never been called for or supported by those businesses. Rather, they have been consistently and strongly opposed by access seekers.

Other changes proposed miss the point of the concerns repeatedly raised by competitors about flaws in the regulatory regime, such as the hierarchy between access agreements and access determinations, and instead risk making a bad situation worse.

The changes are proposed in an environment where NBN is far behind schedule and has not resolved its existing proposed product suite. Accordingly, the industry is only stronger in the view it expressed to the Vertigan Panel that changes to the basic rules underpinning NBN should not be considered or undertaken until the rollout of the NBN is much further advanced.

Set out below are the Respondents' comments in relation to specific amendments proposed in the Bill.

Pilots and Trials (Part 3)

Part 3 of the Bill proposes to make amendments to the non-discrimination provisions which apply to NBN Co. These provisions were subject to extensive debate and discussion at the time the NBN legislation was introduced. The Respondents believe that the obligation on NBN Co not to discriminate between RSPs remains an essential and non-negotiable underpinning of the national broadband network project. It is absolutely essential that, as a Government owned and funded entity which controls the critical competitive bottleneck in the communications industry, NBN Co must deal with RSPs in a non-discriminatory manner.

The Explanatory Notes to the Bill state "*if NBN Co or a CSP wishes to test a new service or technology on the NBN, NBN Co is required in accordance with its non-discrimination obligation to make the same service or technology available to all of its customers. This can act as a practical impediment to product development. It can also act as a disincentive to innovation …*".[1] The Respondents take issue with this assertion on a number of grounds. Firstly, the Respondents are not aware of any example of a proposed trial or pilot being impeded by the non-discrimination obligations. Nor are the Respondents aware of any chilling effect on innovation. None of the Respondents have an issue with this element of the legislation as it stands.

Secondly, the Respondents do not agree with the analysis of the non-discrimination obligations set out in the Explanatory Notes. The Respondents do not consider that it would be discriminatory for NBN Co to participate in a bilateral trial at the request of an RSP. The ACCC in its *XIC Non-Discrimination Guidelines* published in April 2012 clearly takes the same view. The ACCC at page 21 and 22 of its Guideline make clear that it considers that non-discrimination requires NBN Co to generally provide equality of opportunity to participate in trials, not that all parties would be entitled to participate in each trial.

Some aspects of the ACCC's Guideline have been criticised as unduly diluting the intent of the non-discrimination provisions in the legislation, in particular the so-called "second limb" test. However, the Respondents consider that the ACCC's analysis in relation to pilots and trials is sound and unobjectionable and is consistent with the non-discrimination provision in the Act. It should also be noted that the Guideline remains currently unchallenged, and must be considered to represent the status quo. Accordingly, it appears extraordinary that the Bill seeks to amend the legislation to take of account of a 'problem' when there is no evidence that such a problem currently exists, on the basis of an interpretation of the current legislation which is at odds with the unchallenged view of the industry regulator.

The Respondents are very concerned carving pilots and trials out from the non-discrimination provisions could give rise to substantial anti-competitive effects and potentially allow NBN Co to engage in action that would give a substantial market advantage to favoured RSPs. Under the proposed amendments, NBN Co could, for example, reach an arrangement with Telstra whereby NBN Co agreed to conduct pilots and trials exclusively with Telstra, and to refuse any requests from other RSPs to conduct pilots and trials. It could also allow NBN Co to use access to pilots or trials as a leverage point in commercial negotiations with RSPs. The amendments to the non-discrimination provisions to deal with pilots and trials do not address concerns of access seekers and nor are Respondents aware of the existence of any current problems in this area.

Access Determinations – Part 4

Perhaps the most significant problem with access determination process under Part XIC of the CCA as it currently stands is the length of time that is taken for the ACCC to conduct inquiries and reach a decision. The issues that the ACCC is required to consider are complex, and the volume and extent of submissions which it is required to consider is extraordinary. It is abundantly clear that delay in this process overwhelmingly tends to favour incumbent players. Equally, the excessive cost of participating in extensive and protracted inquiries can be far more easily borne by parties such as Telstra and NBN Co, and these factors have a disproportionate impact on smaller market participants, which are faced with either a disproportionate cost burden or an inability to fully advocate their case.

The Respondents consider that the proposed amendments in Part 4 of the Bill add unnecessary further complexity to Part XIC, which is already unduly lengthy and complex. These amendments will also tend to exacerbate the tendency to delay and cost in inquiries referred to above. In addition, the Respondents do not believe that these amendments address any current problem. As noted above the ACCC already devotes huge amounts of time and effort to consideration of access determination and is already required to consider a broad ambit of relevant factors. To add additional factors which the ACCC is required to consider is highly unlikely to impact on decisions made by the ACCC, as the

[1] Explanatory Notes at p4

ACCC already consults very widely with all industry stakeholders and is required to take account of a broad range of factors. The proposed amendments will however add a further formal requirement to the decision making process. The Respondents consider that this is a clear step in the wrong direction – towards further complexity and delay.

Access to Facilities – Part 1

Proposed amendments set out in Part 1 of the Bill seek to make clear that it is open to the ACCC to declare facilities access services under Part XIC. The Respondents support this amendment. Part 1 goes on to provide that where facilities access is "supplied, or is capable of being supplied" under the so-called 'definitive agreements', such services will not be a declared service even if that service has been declared by the ACCC.

The Respondent's consider that the proposed new clause 152AQA is unclear as currently drafted. If a wide interpretation were applied to this clause, potentially any access to certain Telstra facilities (such as ducts) could escape the impact of a service declaration as access to such services might be "capable of being supplied" under Telstra's Definitive Agreement with NBN Co. Alternatively, if a narrow view were taken, such that only services actually provided by Telstra to NBN Co were caught by the section, and the supply of the same or similar services to other access seekers is to be treated as a declared service, then the amendment would appear to be unnecessary. This is because, as the Definitive Agreement would fall within the broad definition of an "access agreement" under Part XIC, the Agreement would therefore prevail over any inconsistent access determination to the extent of such inconsistency. This is because of the order of precedence set out inter alia in section 152AY of the Act.

As the Department is aware, the Respondents have long considered that the current order of precedence of documents in Part XIC is unsatisfactory. As a result of disparities in bargaining power, and the excessive length of the inquiry process, it is often the case that access seekers find it necessary to enter into sub-optimal access agreements in order to secure supply of access to a declared service prior to a new and potentially more favourable access determination being made or updated. Accordingly, the Respondents remain of the view that an access seeker should be entitled to receive the benefit of a more favourable access determination, notwithstanding that the access seeker may have found it necessary to previously enter an inconsistent access agreement. This situation arises because declared services are by definition bottleneck services and access seekers are inevitably placed in a position whereby they have no effective bargaining power in negotiating access agreements.

The Respondents consider that this is a crucial and significant reform that would have a substantial positive impact on competition in the market and would go some way to rebalancing current inequities in the market. The Respondents propose amending the current order of precedence of documents set out in section 152AY and other sections of Part XIC by providing that, where a SAU, binding rule or conduct or access determination comes into force after the date on which an access agreement is made, that the SAU, binding rule of conduct or access determination will prevail over the access agreement to the extent of any inconsistency.

The Respondent's consider that this is a far more pressing issue than any of the 'problems' which the Bill purports to address, and one far more worthy of an amendment to the current legislation.

Submitted on behalf of Competitive Carriers' Coalition and Optus