

Regulation of Service Providers under the *Telecommunications Act 1997*

The Senate Standing Committees on Environment and Communications is conducting an inquiry into the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures-Access Arrangements) Bill 2010.

The first of these Bills includes in its objectives guaranteeing that National Broadband Network corporations supply service on a wholesale basis.

This paper outlines why the provision as it stands is insufficient and how remedies to the regulation of telecommunications service providers could rectify the deficiencies and provide improved consumer protection.

The Provisions of the Bill

The "other objects" of the National Broadband Network Companies Bill 2010 (the **Bill**) include as subsection 3(2)(a):

to ensure that the supply of an eligible service by an NBN corporation is on a wholesale basis

The mechanism by which the Bill seeks to ensure this object is by restricting the entities to which a National Broadband Network corporation (**NBN Corp**) can supply a service. Except for certain exemptions provided to utilities this is achieved by section 9 of the Bill:

9 Supply of eligible services to be on wholesale basis

An NBN corporation must not supply an eligible service to another person unless the other person is:

- (a) a carrier; or
- (b) a service provider.

The terms "carrier" and "service provider" are defined in section 5 to have the same meaning as in the *Telecommunications Act 1997* (the **Act**).

The terms are defined in section 7 of the Act as:

"carrier" means the holder of a [carrier licence](#).

"carrier licence" means a licence granted under section 56.

"service provider" has the meaning given by section 86.

In turn section 86 provides;

Service providers

For the purposes of this Act, a service provider is:

- (a) a carriage service provider; or
- (b) a content service provider.

Note 1: Carriage service provider is defined by section 87.

Note 2: Content service provider is defined by section 97.

Sections 87 and 97 in turn define carriage and content service providers merely as persons who engage in activities of a specified kind.

There is therefore a very big distinction between “carriers” and “service providers”. Most specifically a carrier is defined as a person who holds a specific licence issued by the Australian Communications and Media Authority (the **ACMA**). On the other hand a service provider is merely a person who engages in certain activities.

Difficulties for NBN Corps

The object of the Bill is to restrict parties to whom an NBN Corp can supply services. This means it is expected that an NBN Corp will require from a prospective customer an attestation of the basis on which a service can be supplied.

This will be easy for a carrier, as the thing that confirms its status is possession of a carrier licence issued by the ACMA.

This is not the same for a service provider. Indeed very little else of the legislative arrangement would create much assistance.

Under the Act service providers are required to comply with the service provider rules laid out in Schedule 2. However, these rules relate to a specific sub-category of service providers, namely those that provide a “standard telephone service”. In this context that means services from which voice calls using telephone numbers can be made. (Standard telephone service has a more limited definition relating to fixed line services in other parts of the legislation).

The *Telecommunications (Consumer Protection and Service Standards) Act 1999* places an obligation under section 127 on some service providers to be members of the Telecommunications Industry Ombudsman scheme (the **TIO**). However, this relates only to carriage service providers who provide “fixed” line voice services, mobile services or internet services and “ a carriage service intermediary who arranges for the supply” of one of these services. A content service provider who was acquiring services from an NBN Corp to provide an IPTV service, a security service, or a metering service would not be required to be a member.

As a consequence an NBN Corp is placed in a difficult position by the Bill of having to decide whether a prospective customer is or is not a service provider. This seems to be giving a corporation an implied regulatory role.

Licencing Service Providers

The Act was crafted in the 1990’s while the thrust of the economy wide competition reforms was still fresh. One specific aspect of these reforms was to address the restrictive nature of many trade and professional licencing regimes.

These kind of licence regimes are designed to provide some consumer protection by guaranteeing the quality of a service that a consumer is really unable to assess prior to purchase. The difficulty with them on competition grounds is that they can be used as effective barriers to entry to the market.

The most common case of it being restrictive is where the industry controls the rules that permit entry. The accusation is made that the standard for entry is set higher than strait consumer protection requires to restrict the number of suppliers in the market.

In the case of the Act the concern appears to have been slightly different.¹ In this case it was concern about potential over-reach by regulators. It was felt that if providers were required to apply for a licence then the regulator could potentially add extra requirements.

The different decision made in relation to carriers was due to the requirement of carriers to fund both the regulatory regime (through carrier licence fees) and the Universal Service Obligation (through the USO Levy). The only restrictions the Act places on persons seeking to obtain carrier licences is that they are not persons who previously failed to pay these charges. This includes limiting the ability of someone to be a director of a carrier who was previously a director of a carrier that did not pay its charges.

There was at the time the Act was initially passed the addition of a requirement for carriers to also lodge Industry Development Plans. This provision has since been repealed.

At the very least licencing service providers should encompass similar provisions, however they should be provisions in relation to other entities. In particular, debts owed to the TIO or to an NBN Corp by a previous service provider should be sufficient to exclude a person from being a director of a new service provider.

Consumer Protection

Finally, the telecommunications industry has had very low barriers to entry. The TIO recently made this observation to the ACMA inquiry *Reconnecting the Customer*. He concluded:

A more structured regime where service providers are licensed to sell and distribute products and services, may help to address the inconsistent or unsatisfactory approaches to service delivery. Licensing conditions that include adherence to industry codes of practice, approved IDR processes and mandatory membership of the TIO may also serve to bolster the effectiveness of the co-regulatory regime and lead to improved consumer outcomes in a range of areas, not least of which would be customer service and complaint handling.²

More recently the Australian Communications Consumer Action Network (ACCAN) CEO Teresa Corbin called on the ACMA to introduce a "complaint handling standard".³ However, the current provision of the Act on compliance with standards (section 128) specifies that this is a "civil penalty provision" and the consequence is a fine. There is no direct mechanism to require ongoing compliance as a condition of conducting ongoing business.

Conclusion

The provision in the Bill to restrict an NBN Corp to a wholesale role places an undue burden on the NBN Corp to determine the status of a person claiming to be a service provider. The direct licencing of service providers would remove a pseudo-regulatory role from the NBN Corp.

The move to licence service providers will aid in consumer protection.

¹ This discussion is based on discussions with former officers involved with the development of the legislation.

² Telecommunications Industry Ombudsman. Submission to the ACMA Public Inquiry 'Reconnecting the Customer.' September 2010 Available at http://www.acma.gov.au/webwr/_assets/main/lib311946/telecommunications_industry_ombudsman-reconnecting_the_customer.pdf

³ ACCAN. Media Release 'Record telco complaints: 671 people per day call Ombudsman for help' 25 Feb 2011. Available at http://www.accan.org.au/news_item_full.php?id=131&PHPSESSID=cf0932004af64539ec24ec1953726364

About DigEcon Research

Purpose

DigEcon Research is a stand alone research body. Ultimately, its pursuit is policy research, the focus of which is the meaning and significance of the Digital Economy. This policy research encompasses both economic and social research.

Researching the significance of the Digital Economy

The concept generally referred to as the Digital Economy is frequently discussed but there is little shared meaning in the term. A key definitional issue is whether the Digital Economy is something yet to happen or in which we are now embedded.

DigEcon Research focuses on the analysis of social and economic change rather than an analysis of a notionally static "Digital Economy". Analysis of the change as it occurs should highlight those areas where there is genuine policy choice rather than merely a need to adapt policy to changes that have already occurred.

Before Thomas Kuhn popularised the idea of "paradigms" J.K.Galbraith railed against the "conventional wisdom". There is no denying that what Kuhn called "normal science" or the repeated application of existing theory to new problems results in most practical developments. It is equally true that the application of existing theory to problems they were not designed for results in, at best, vacuous solutions and, at worst, wildly dangerous outcomes.

The Digital Economy challenges the fundamental concepts of neo-classical economics. It also challenges most of the precepts of how societies are organised. In this context policy research needs to focus on what is different, not on what is the same. The Digital Economy is not just a matter of means of production but about the fundamental structures of social organisation.

Work program

This research is designed both to inform policy makers and to assist those who would seek to influence policy makers or to make business decisions. DigEcon Research however does not provide strategy recommendations nor undertake policy advocacy on behalf of any party.

A key element of the research will relate to the direct regulation of the converging industries of telecommunications, media, consumer electronics and information technology. However, the agenda encompasses the wider economic and social policy issues.

The scope of the research agenda will ultimately depend upon the researchers who wish to participate in what is more an idea than an entity.

In the crowded Australian research field there are a number of "bodies" that share some of the objectives of DigEcon Research. DigEcon Research aspires to contribute to the work of these and any other researchers in the field.