TELECOMMUNICATIONS LEGISLATION AMENDMENT (ENHANCING CONSUMER SAFEGUARDS AND OTHER MEASURES) BILL 2023 [PROVISIONS]

SUBMISSION TO THE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

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Introduction

On 8 February 2024, the Senate referred the Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023 (the Bill) to the Environment and Communications Legislation Committee for inquiry and report by 14 March 2024.

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts welcomes the opportunity to provide this submission to the Committee's inquiry.

The Bill, introduced by Minister Rowland on 7 December 2023, will deliver improved safeguards for Australian consumers when they access broadband and voice services. The key focus of the Bill, as set out in Schedule 1 to the Bill, is to refine the operation of the statutory infrastructure provider (SIP) regime in light of lessons learned since the regime's introduction in 2020. However, the Bill also amends related consumer safeguards, including changes that enhance the enforcement and reporting powers of the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC).

As extensive material on the Bill has been provided in the Explanatory Memorandum, this submission focusses on the key issues and themes that provide further context for the legislation. The department is available to provide the Committee with additional information or background if required.

Background – the SIP regime

The SIP regime took effect on 1 July 2020 and aims to ensure that all people in Australia can access high-speed broadband services, wherever they live or carry on business. The regime provides that NBN Co Limited (NBN Co) is the default SIP for Australia, but other telecommunications carriers can become SIPs for areas where they have installed fixed networks, such as in new developments or, in more limited cases, where they are the major fixed network provider in the area (for example, in a number of suburbs in South Brisbane, where Telstra Limited and Opticomm are the joint SIPs during the transition of the network from Telstra to Opticomm).

The key obligations on SIPs are to connect premises to their networks and provide wholesale services that allow retail providers to supply broadband to consumers with peak download and upload speeds of at least 25/5 Mbps. On fixed-line and fixed wireless networks, the wholesale services SIPs supply must also allow retail providers to supply voice services to consumers. SIPs are also required to publish standard offers for connection and wholesale services on their websites.

As noted in the explanatory memorandum, the majority of proposed changes in the Bill to the SIP regime are mechanical. There are eight more significant changes, to:

- bring private networks for new developments under the SIP regime;
- remove NBN Co's SIP obligations for areas where other SIPs have submitted 'anticipatory notices' once premises are built and occupied;
- give the SIP regime clear effect by removing an exemption for 'declared' services;
- provide stricter rules for the exit of SIPs from a service area;
- clarify that SIP standards, rules and benchmarks can cover service pricing;
- provide that SIP standards and rules can require SIPs to pay compensation if they contravene a standard or rule;
- clarify the ability of the Telecommunications Industry Ombudsman (TIO) to handle complaints involving the connection of services by SIPs; and
- give Ministerial benchmarks priority over the ACCC's or SIP's terms and conditions.

Since the regime took effect on 1 July 2020 the department and the industry regulator, the ACMA, have monitored the performance of the regime. The department consulted all SIPs, as well as industry and consumer groups, during 2022 to seek views on the performance of the regime and options for improving it. The department and the regulator identified a number of areas where the regime could be fine-tuned to provide greater certainty for consumers, industry and the ACMA. These areas included the ways in which SIP service areas are determined, varied or revoked, the ways in which disputes about SIP connections are handled, the effect of SIP standards, rules and benchmarks and the timeframes and notification obligations when SIPs exit a service area. In these areas the department identified that there was some uncertainty about the operation of the regime, which could prevent optimal outcomes being achieved.

For example, there is some uncertainty over the full operational extent of any SIP standards or rules, including whether they can require SIPs to pay compensation to customers if they do not meet a standard or rule. This lack of certainty limits the ability of the Minister to apply standards or rules to SIPs.

Similarly, experience has shown that SIPs may exit service areas with very little notice to NBN Co or consumers. In practice this has not been problematic as SIPs exited service areas where NBN Co already provided services, but a more robust approach is required to deal with circumstances where this will not be the case. This would involve longer notification periods and also requirements to notify end-users and the regulator.

There are also some areas where some aspects of industry activity fall outside the regime, but should be captured by it to provide greater safeguards for consumers. One example is private networks in new developments, which are generally operated in such a way that the person supplying carriage services to the development does not need to have a carrier licence, and therefore cannot currently be regulated under the SIP regime. The department has received a number of complaints about the performance of operators of these private networks, which include complaints about service standards and also about being denied a service.

Schedule 1 - Key changes to the SIP regime

The Bill addresses these various issues. An exposure draft of the Bill was released in August 2022, and the department received a number of submissions on the draft. These were generally supportive of the changes to the SIP regime, but sought some greater focus on the way in which private networks would be regulated. The department amended the provisions and also took the opportunity to add some further refinements to the existing drafting. The department engaged with organisations that had provided a submission prior to the Bill's introduction in December 2023, including advising how their submission had been considered by the department.

This section addresses some key highlights of the proposed changes to the SIP regime.

Private networks

The Bill models new provisions on the existing obligations that apply to carriers to declare provisional nominated service areas when they have installed telecommunications network infrastructure under a contract in a new development. However, the conditions that apply are different, given that the obligations fall on the subset of carriage service providers (CSPs) who do not own or operate network units (and are therefore not required to hold a carrier licence). The key conditions are that a CSP either controls the relevant facility, or is an associate of the controller, or that the CSP has entered into a contractual relationship with the person responsible for the

development. These reflect the complex arrangements that are witnessed in developments serviced by CSPs using private networks.

Under the proposed changes, CSPs who meet one of the conditions will be required to declare a provisional nominated service area, and then become the SIP for the area, and therefore subject to requirements to connect premises and supply wholesale services. They will also potentially be subject to Ministerial standards, rules or benchmarks that may be made applying to some or all SIPs.

Removing an exemption for declared services

The Bill repeals and replaces the existing subsections 360Q(2) and (2A). These currently confer an exemption for SIPs who supply services that are declared, under Part XIC of the *Competition and Consumer Act 2010*. The exemption might be interpreted as displacing the SIP supply obligations where declared services are being supplied, whereas in fact the SIP obligation should only be displaced where the declared services being supplied also meet the SIP obligation to supply wholesale services with peak download and upload speeds of at least 25/5 Mbps.

The Bill proposes to replace the exemption with a new power for the Minister, by legislative instrument, to adjust the SIP supply obligation in appropriate circumstances, so that a SIP must continue to supply a service but in accordance with the supply obligation as adjusted by the instrument. In effect, by meeting any conditions specified in the instrument the SIP would be deemed to be meeting the obligation.

As noted in the explanatory memorandum, this power is required to address circumstances in which SIPs may face a temporary impediment to meeting the SIP supply obligation. In these circumstances, it will generally be preferable for consumers to receive a service below the standards set out under the SIP supply obligation, rather than receive no service at all. Further, there will be the opportunity for the Minister, through a determination made under the proposed new power, to ensure the relevant SIP is subject to appropriate accountability and transparency in addressing the issue.

A circumstance where the Minister could make a determination is where NBN Co services are unable to meet the 25/5 Mbps requirement due to degradation of copper lead ins. NBN Co has a program of work targeted at addressing these underperforming lines, including overbuilding them with fibre in areas where upgrades to the fibre-to-the-node network are providing access to fibre-to-the-premises technology. However, it will not be feasible for the company to address all of these underperforming lines in the short term.

A determination to adjust the SIP supply obligation to allow NBN Co to supply a lower speed service in these circumstances would ensure that affected premises continue to receive a service, and also be used to impose accountability and transparency requirements on NBN Co.

Removing NBN Co's obligations in other SIPs' areas

Under the current SIP regime, when a carrier enters into a contract to service a new development, the carrier needs to provide the ACMA with an 'anticipatory notice'. This is intended to provide transparency of who the SIP will be for the development. However, the carrier does not become the SIP for the development until it has installed telecommunications network infrastructure in the development. This has at times resulted in a gap during which houses may be constructed and occupied, but the carrier has not yet completed its network. Technically, NBN Co as the default SIP would be required to meet any service requests from the occupants of the houses, even though it does not have network infrastructure in the development and was not expecting to service it.

To address this situation, the Bill creates a new concept of an 'anticipated service area', which is the area subject to an anticipatory notice given to the ACMA by a carrier. The carrier becomes the SIP for the anticipated service area as soon as a single premise has been built and occupied in the area. This ensures that the carrier that has been contracted to service the development will take responsibility for it.

The Bill also creates the concept of a 'pending service area'. This is intended to reflect edge cases, where an existing building or buildings within an anticipated service area is currently being serviced by NBN Co. NBN Co should continue to service those buildings until the carrier has completed its network rollout. At that point in time the carrier would take on SIP responsibilities for all the buildings in the anticipated service area.

Stricter rules for SIP exit

Currently, if a SIP becomes aware that it will no longer be able to fulfil its obligations in a SIP service area, then the carrier has two choices. The carrier can give up the area and NBN Co, as the default SIP, would be responsible for the area. Alternatively, if the SIP has arranged with another carrier to take over its networks in the area, then that other carrier can become the SIP.

In practice, both outcomes have been seen during the years since the SIP regime took effect. For example, Frontier Networks gave up a number of its SIP areas and NBN Co has taken over SIP responsibilities in those areas. By contrast, Telstra has sold its Velocity networks, which constitute some 123 SIP areas, to Opticomm, and both have been made joint SIPs for the areas until the transition of Telstra's customers to Opticomm's control is complete, at which time Opticomm alone will be the SIP for the areas.

As noted above, there are some notification requirements when SIPs exit their service areas, but these are limited. SIPs must notify the Secretary of the department, and the ACMA, as soon as practicable after becoming aware that they will no longer be able to fulfil their SIP obligations (or that another carrier is willing to assume those obligations). Experience has shown that notifications can be provided very late, such as the day before the SIP proposes to cease providing services. The Bill addresses this by providing longer notification periods – 12 months where the SIP expects NBN Co to assume SIP responsibilities, and 90 days in the case where the SIP has arranged with another carrier to take over SIP responsibilities. These changes would provide greater certainty for consumers and industry, and make it less likely that there will be service disruptions.

The Bill also provides powers for the ACMA to make rules, by legislative instrument, to impose additional notification obligations on SIPs. SIPs must comply with the rules. SIPs will also need to notify their customers when an exit is likely to result in a change to, or a disruption of, services supplied in the area.

Schedule 2 – ACMA remedial directions

Currently, Part 20A of the *Telecommunications Act 1997* (Tel Act) requires developers to arrange for functional fibre-ready facilities (such as pit and pipe) to be installed in proximity to a building lot or building unit before the lot or unit is sold or leased.

Although the obligations in Part 20A are generally observed, there has been a small but persistent level of non-compliance with the requirements. In such circumstances, the owners of houses, or the SIP, can be required to remediate the facilities, or, in a number of cases, install such facilities. This can often be expensive. For example, a case was reported in the Western Australian Parliament of the owners of three houses in a development who were required to pay $10,000 each so that fixed-

line telecommunications could be delivered to their homes. This is clearly a very high cost burden in an environment where the cost of living is a key concern.

Currently, if the ACMA becomes aware of non-compliance with Part 20A, it has limited enforcement powers. It can take court action against a developer, but cannot (as elsewhere in its enforcement arsenal) issue a remedial direction or seek an undertaking from a developer. In many cases the non-compliance may be limited to one or a few premises, such as when an existing property is subdivided by an owner-builder who was ignorant of the law. In this case court action may not be a proportionate response to the contravention, and in any event would not save a consumer or a SIP from needing to pay to have functional facilities installed.

Accordingly, Schedule 2 to the Bill would provide powers for the ACMA to issue remedial notices to developers who do not install functional fibre-ready facilities in developments. The ACMA may issue a remedial notice if it reasonably believes that a person is contravening, has contravened, or is likely to contravene a designated civil penalty provision under Part 20A. The ACMA notice may require the person to remedy the contravention, prevent the likely contravention from occurring, or remedy the things or operations causing the contravention or likely contravention.

This will further encourage developers to install fit-for-purpose pit and pipe and also address the high cost burden for people who, through no fault of their own, are faced with needing to pay for functional facilities to be installed.

Schedule 3 – ACMA reporting powers

Schedule 3 to the Bill enhances the ACMA's ability to identify carriers and carriage service providers in public reports regarding their performance on a range of specified matters. It also allows the Minister for Communications to expand this range of matters, if needs be, over time. The current specified matters include customer service; faults and service difficulties and rectification; customer appointment keeping; complaints handling; and customers experiencing financial hardship.

Currently, the ACMA is limited in the information it can publish. It can only publish information that identifies the performance of individual providers where the relevant providers have given consent, or if the information is already publicly available. This has generally meant it has been limited to publishing disaggregated statistics and summaries, which do not allow the public to identify and compare the performance of providers. This amendment will improve transparency and accountability. It facilitates the ACMA's capacity to shine a light on providers who are not meeting customer expectations or performance indicators. Conversely, the new powers would enable the ACMA to highlight good performance and those providers delivering exceptional services to their customers. Carriers and carriage service providers will be encouraged to improve their performance, while consumers will have access to more useful information about providers.

The proposed changes in Schedule 3 also allow for the more efficient sharing of information with the department on request, for the purpose of advising the Minister for Communications.

Concerns have been raised by some members of the telecommunications industry about expanding the ACMA's powers in this way. However, the changes are supported by NBN Co as well as the Australian Communications Consumer Action Network (ACCAN), the TIO and the ACMA.

The Communications Alliance has questioned whether proposed new reporting powers for the ACMA are necessary given other reporting arrangements already in place – for example:

- the TIO reporting the top 10 recipients of TIO complaints annually

- Communications Alliance's *Complaints in Context* report which provides TIO complaints figures (for the top 10 recipients of complaints) as a proportion of their 'services in operation'
- the naming of providers in reporting about enforcement action published by the ACMA and the ACCC; and
- the Measuring Broadband Australia program, through which the ACCC publishes detailed information on the performance of NBN services (for example, speed and outages).

The department acknowledges the value of the information provided in these reports, but notes that the reports do not provide a complete picture. For example, TIO complaints data reporting reflects complaints escalated to the TIO after a customer has not been able to resolve their complaint with their provider. This is distinct from internal dispute resolution reports prepared by the ACMA which draw on data collected directly from providers, but do not currently name those providers. Existing reports do not cover individual provider performance regarding the support they provide customers experiencing financial hardship, or customer service more broadly, or faults and service difficulties and rectification, customer appointment keeping or various other relevant matters.

The department considers that there is fundamental value in the provision of more, high quality data to consumers. We think the ACMA, as telecommunications regulator, should be empowered to provide the high quality data it receives to consumers.

The ACMA is a professional regulator with a deep knowledge of the sector, and data analysis and publication expertise. In considering the new powers, it is important to note that the proposed amendments do not expand the ACMA's ability to collect information, and do not expand on the scope of matters that the ACMA can report on. The proposed changes do not compel the ACMA to publish any specific information. The changes only empower the ACMA to identify the performance of service providers in its reports, if the ACMA sees value and benefit in doing so. The power would be discretionary, enabling the ACMA to decide what data to publish and the manner in which it does so.

It is expected that the ACMA would take a rigorous approach to its reports, and consult industry and other relevant stakeholders in relation to its reports as appropriate.

It is commonplace for regulators to have the power to identify the performance of providers in their reports in other sectors such as superannuation and energy. The department considers that the clear public benefit arising from the amendment outweighs the arguments raised by some members of the industry.

Schedule 4 – Universal service areas

Schedule 4 provides powers for universal service providers to be determined in relation to specific areas of Australia. Currently, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSS Act) sets out the universal service obligation (USO), with Telstra Limited as the Primary Universal Service Provider (PUSP) for Australia. The TCPSS Act provides that there can be multiple PUSPs in Australia. However, the TCPSS Act does not provide for specific areas of Australia to be determined to be universal service areas, with a specified carrier responsible for providing voice services within the area.

This creates a situation where there may be difficulties in the future in determining a carrier other than Telstra to be the PUSP for a specific area. For example, if Norfolk Island is fully integrated into

the Australian telecommunications regulatory framework, then Telstra would currently automatically become the PUSP for Norfolk Island. However, it does not have any network infrastructure on the island, and so may face difficulties in delivering the USO there.

The Bill therefore provides powers for the Minister to determine specific universal service areas, with a specific carrier as the PUSP for a determined area.

Schedule 5 – Technical amendments

Schedule 5 makes technical amendments to implement the original policy intent of amendments to the Tel Act enacted by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*. The technical amendments empower the ACCC to issue infringement notices equivalent to those that can already be issued by the ACMA. By virtue of the amendments, the ACCC's power to issue infringement notices will be dependent upon an ability to issue guidelines (as is also the case with the ACMA). The changes would also set the maximum penalties ($10 million) that were intended to apply to breaches of carrier separation rules and the anti-avoidance measures relating to the Regional Broadband Scheme. These changes are important for empowering the ACCC and the ACMA to enforce the requirements efficiently and effectively.