SENATE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and Telecommunications (Regional Broadband Scheme) Charge Bill 2017

Questions on Notice

Department of Communications and the Arts

Hansard Ref: Written

Senator Reynolds asked:

Question 1.

These questions relate to the proposed change to the exemption under subsection 156(4) of the Tel Act for network extensions of less than 1 kilometre.

a. Could the Department outline why the 1 kilometre exemption was introduced and how it operates? What networks are covered by this exemption? How many premises are serviced by these networks?

b. How does the 'close proximity' rule proposed in the CC Bill differ from the existing 1 kilometre exemption?

c. What is the policy rationale for the proposed changes—how will they result in better outcomes?

Answer:

a. In 2011, the Parliament enacted Parts 7 and 8 of the *Telecommunications Act 1997* (the Tel Act). In essence, the provisions provide that non-NBN networks that are built, upgraded or extended after 1 January 2011 and supply superfast carriage services to residential and small business customers must supply a wholesale Layer 2 bitstream and operate on a wholesale-only (i.e. structurally separated) basis.

The legislation included an exemption from the new rules for pre-2011 networks to enable them to be extended by up to one kilometre on or after 1 January 2011 without being subject to the new rules. The 1km exemption was added through amendments in the Senate, with the Supplementary Explanatory Memorandum noting: 'This exemption will clarify that carriers may build minor extensions adjacent to their existing networks without being subject to subsection (2).' That is, the exemption was to provide some practical flexibility in servicing nearby consumers.

In terms of numbers of premises serviced by such networks, we have focussed on the original networks concerned rather than extensions for which there is limited information.

The exemption is available to any networks existing before 2011 and caught by the rules (e.g. operate at more than 25 Mbps). This includes fixed networks operated by Telstra, Optus, TPG, Vocus and other carriers. The two largest pre-2011 networks would have been Telstra's and Optus' HFC networks, which are estimated to have served around 3.2 million premises at that time. However, these networks are being transferred to NBN Co or decommissioned as part of the NBN rollout.

Other significant relevant network assets are owned by TPG, including through its acquisitions of Pipe's business networks and the TransACT networks in Canberra, Geelong, Ballarat and Mildura. In late 2013 TPG announced it would use its Pipe network

to service up to 500,000 premises in five capital cities and the Gold Coast.[1] TPG provided evidence to the Committee that this network currently passes about 115,000 premises. The TransACT networks are estimated by the Bureau of Communications and the Arts Research to pass around 145,000 premises.[2]

Vocus is estimated to currently have high speed networks passing 25,000 buildings,[3] however, the extent to which these networks pre-dated 2011 or service business premises as opposed to residential premises is unclear.

Other smaller carriers like OptiComm, OPENetworks and LBNCo have networks pre-dating 2011 that would be subject to the rules. These are now estimated by the Bureau of Communications and the Arts Research to pass around 200,000 premises,[4] however, the extent to which these networks pre-dated 2011 is unclear.

b. Currently under the Tel Act, persons who control superfast fixed-line networks that came into existence before 1 January 2011 can connect customers in close proximity to those networks and continue to operate the networks on an integrated basis (i.e. not wholesale-only). The close proximity rule differs from the 1km exemption in that it provides for connection to the existing network, not extension of the network *per se*. For example, if the network passed a house it could connect the premises but if the network had to be extended to service a new apartment block nearby, that would be an extension. Judgment may be required in some instances to differentiate between a connection and an extension. This would be a matter for the ACCC as the regulator in the first instance and the court if necessary.

   Proposed section 143F in the CC Bill extends the close proximity rule to include networks built between 1 January 2011 and 1 July 2018. As with the existing close proximity rule, the rule simply allows a carrier to operate networks, including connecting premises, under the separation laws that applied at the time the network was built. This is consistent with the decision to grandfather rules applying to networks when they were established. It does not provide an exemption for extending a network.

c. The CC Bill generally removes the 1 km exemption from 1 July 2018, except for networks that are being transferred to NBN Co under contracts (the Definitive Agreements). It is retained for these on the basis that these will shortly be replaced by the open access NBN.

   Removal of the 1 km exemption was recommended by the Vertigan panel and adopted by the Government. The panel was concerned that the exemption advantaged carriers with pre-2011 network over those who build networks after 2011, especially those with larger network footprints, and enabled carriers with pre-existing networks to roll out large extensions which were not subject to wholesale-only requirements, designed to protect residential consumers. Experience has shown that such networks can form local access bottlenecks that restrict consumer choice.

[1] http://www.afr.com/news/special-reports/tpg-fibre-plan-challenges-nbn-20130916-j0e5e.
[2] *NBN non-commercial services funding options. Final report* (2016) p.65.
[3] https://www.vocus.com.au/our-network/australia.
[4] *NBN non-commercial services funding options. Final report* (2016) p.65.

SENATE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and Telecommunications (Regional Broadband Scheme) Charge Bill 2017

Questions on Notice

Department of Communications and the Arts

Question 2.

Telstra argued that proposed section 156A of the Tel Act (which seeks to capture circumstances where, on or after 1 July 2018, the use of a line changes from wholly or principally supplying services to non-residential customers to residential customers) 'will be difficult to apply in practice'. Telstra argued that the provision would be difficult to apply because network operators have limited direct knowledge of rebuilding or alteration works being undertaken by owners of buildings connected to their networks, and that the nature of the service plans that are supplied at such premises may not change. Could the Department respond to this evidence?

Answer:

The principle underlying the separation arrangements is that networks servicing residential customers should be wholesale-only (i.e. structurally separated) on the basis they can constitute access bottlenecks that inhibit retail competition. This principle is given effect through section 142C ('Supply of eligible services to be on a wholesale basis – lines that come into existence on or after 1 July 2018'). The provisions Telstra has queried seek to preserve this principle for residential customers who may reside in converted business premises. The provisions relate to 'edge cases' and are not expected to be heavily used. It is also worth noting that as part of its structural separation, Telstra is generally expected to exit the market for supplying infrastructure for residential broadband. It is unclear why, then, Telstra would wish to service residential customers in a building that has changed use. If Telstra were to service such customers, it is not clear why it should not do so on a separated basis like any other carrier.

Proposed section 156A is intended to capture changes in the use of buildings and thus the types of occupants they house so as to protect residential customers. A network may have already been used to supply superfast networks before 1 July 2018, for example to business or government customers. A building that housed such a customer may experience a change in use, or be refurbished for new residential premises. Proposed subsection 156A(1) clarifies that in this case, even if there is no actual change to the local access line used to supply superfast carriage services to the premises, the line must be operated in accordance with the wholesale-only rule in section 142C. Proposed section 156A(1) needs to be read with proposed section 143H which provides an exemption to the wholesale-only requirement as found in proposed section 142C for networks marketed exclusively as business networks.

The CC Bill recognises that it may be difficult for carriers to have knowledge of changes in building use and hence allows some incidental change in use on a network where a network operator may not know, or could not reasonably have been expected to know, that such change had occurred. Such change in use is accommodated by paragraph 142C(1)(c), which casts the wholesale-only obligation on local access lines that are used, or proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers. Where a carrier operates lines targeting business customers, for example, and a business customer on any line becomes a residential customer, the carrier would not have to comply with subsection 142C(2) if the line was still principally used to supply superfast carriage services to business customers. As set out in the answer to question 3 below, where a line services a single customer and that customer becomes a residential customer, the carrier would be exempt from subsection 142C(2) if the total number of residential customers serviced by the network is minor.

SENATE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and Telecommunications (Regional Broadband Scheme) Charge Bill 2017

Questions on Notice

Department of Communications and the Arts

Question 3.

a. Telstra expressed concern that proposed section 143H of the Tel Act 'does not reflect the commercial reality that almost every network will have mixed uses'. Telstra argued that the section should focus on how the network is used, not how it is marketed. Has the Department considered Telstra's concerns?

b. Telstra argued that the word 'exclusively' in the phrase 'the network is marketed by the carrier exclusively as a business network' in proposed paragraph 143H(1)(b) should be either omitted or replaced with a lower threshold, such as 'wholly or principally'.

   i. The concept of 'wholly or principally' is used elsewhere in the proposed amendments to Part 8. Why is the word 'exclusively' used for this provision?

   ii. Has the Department considered Telstra's drafting suggestion? What implications might arise if the drafting were to change from 'exclusively' to 'wholly or principally'?

Answer:

a. The Department considered Telstra's submission on the exposure draft of the CC Bill in preparing the Bill as introduced into the Parliament. The Department also met Telstra to discuss Telstra's concerns.

   Consistent with the answer to question 2, Telstra's concerns fail to recognise the underlying policy that networks servicing residential customers should be wholesale-only (i.e. structurally separated) and that any carriers wishing to market (and operate) a network as both a business and residential network should undertake structural or functional separation for local access lines used to service residential customers.

   Again, as part of its structural separation, Telstra is generally expected to exit the market for supplying infrastructure for residential broadband. It is unclear why, then, Telstra would wish to service residential customers. If Telstra were to service such customers, it is not clear why it should not do so on a separated basis like any other carrier.

b. i. The CC Bill seeks to balance the importance of ensuring residential customers living in areas serviced only by business networks are not prevented from accessing broadband services with the potential gaming by carriers to use networks to service both residential and business customers. The CC Bill provides an exemption for a network that is exclusively marketed as a business network and allows for a minor number of residential customers. This exemption acknowledges that there may be a small number of cases where the customer has changed but the carrier operating the network is not aware of the fact. The exemption is deliberately worded to be made available for networks that are marketed exclusively as business networks on the basis that the policy position in the Bill is that local access lines used to supply superfast carriage services to residential customers should generally operate under structural or functional separation.

   As such the current drafting actually provides operational flexibility. That said, the provisions again relate to 'edge cases' and are not expected to be heavily used.

   ii. If the exemption was changed so that a network that 'wholly or principally' serves business customers is exempt from separation rules, then carriers would be able to roll out

substantial integrated local access networks where only a bare majority of customers (50% plus one, for example) need to be business customers. This would not be consistent with the policy objectives of the legislation.

As noted in the answer to question 2, paragraph 142C(1)(c) provides flexibility so that local access lines that are principally used to service business customers would not be subject to separation requirements.

It should be noted that the Minister can set additional conditions under proposed subsection 143H(2) and this provides a mechanism to further clarify the operation of the exemption and to deal with any misuse of the exemption, if required.

Question 4.

These questions relate to the exemption from the obligation to provide voice-capable services if the services are provided by satellite.

a. If at some point in future, the government decides that satellite services should be subject to SIP obligations, would amending legislation be needed to achieve this?

b. Have amendments been considered to give the Minister the power to exempt satellite services by legislative instrument, rather than providing a complete statutory carve out? What are the advantages and disadvantages of such an approach?

Answer:

a. Yes.

b. Drafting to allow subordinate legislation to require a SIP's satellite broadband services to support voice has been considered. The approach has not been adopted at this time because potential satellite users have expressed concerns about the robustness of such services and, in this context, it was considered the matter should be explored further.

The main advantage of such an approach would be that if satellite was found, in due course, to offer a suitable and cost-effective platform for voice and this was acceptable to stakeholders, it could be added to the regulatory framework by instrument and without statutory amendment. (Any such instrument would normally be disallowable.) The main disadvantage of the approach is that, as mentioned, potential satellite users could be concerned they would be made to use a voice solution that had not be proven to be robust.