

Chapter Six

The exposure drafts: Access Bill

Introduction

6.1 The background to the Government's release of an exposure draft of the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (the 'Access Bill') was set out in the previous chapter.

6.2 This chapter outlines the key areas of concern raised by submitters in relation to the Access Bill.

Access Bill

General outline

6.3 The intent of the Access Bill is to 'introduce new access and equivalence obligations relating to the supply of wholesale services by NBN Co, and any wholly-owned subsidiaries'.¹

6.4 As the Explanatory Notes explain, the Access Bill 'follows recent reforms to the telecommunications competition regime introduced through the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the CCS Bill)² which was intended to reform the access regime in Part XIC of the *Trade Practices Act 1974* (Cth) but is yet to be passed by the Senate. Although NBN Co will be subject to that reformed access regime (if the CCS Bill is passed by Parliament), the Access Bill is intended to make additional, specific provision for NBN Co that reflect 'the unique wholesale only nature of NBN Co'.³

6.5 The Access Bill would amend the *Telecommunications Act 1997* and the *Trade Practices Act 1974* as set out in Schedule 1 to the Access Bill.

6.6 In submissions to the committee, little of the Access Bill was contentious. The focus fell on three issues:

- *Scope of access regime.* The access regime provided for in the Access Bill is drafted so as to apply only to 'NBN Co' or an 'NBN corporation'. Proposed

1 Explanatory notes for exposure drafts of Bills, p. 11.

2 Explanatory notes for exposure drafts of Bills, p. 11.

3 Explanatory notes for exposure drafts of Bills, p. 11.

sections 25–26 of the Access Bill would amend the Trade Practices Act to provide that 'NBN Co' and 'NBN corporation' have 'the same meaning as in the *National Broadband Network Companies Act 2010*. If enacted, the effect of these provisions is to limit the access regime only to the activities and assets of NBN Co Ltd, NBN Tasmania, or a company that is a wholly-owned subsidiary of NBN Co.⁴ Some submitters queried whether the access regime should apply more broadly so as to capture any asset forming part of the NBN, regardless of whether it is owned by NBN Co, NBN Tasmania, or a wholly-owned subsidiary.

- *Equivalence provisions.* Under the heading 'No discrimination between access seekers', the Access Bill provides that an NBN Corporation 'must not ...discriminate between access seekers' when complying with its access obligations.⁵ However, this provision is immediately followed by exceptions. The exceptions would enable NBN Co to discriminate on grounds relating to creditworthiness;⁶ or if the discrimination 'aids efficiency' and 'all access seekers with like circumstances have an equal opportunity to benefit from the discrimination';⁷ or if it is discrimination on grounds or in circumstances specified in a legislative instrument made by the ACCC.⁸ Submitters queried what would constitute 'efficiency' for the purposes of the second exception to the equivalence rule, whether such an exception is either necessary or appropriate, and the adequacy of the transparency and monitoring mechanisms overseeing its use.
- *The future of the Universal Service Obligation.* Some submissions argued that the future of the Universal Service Obligation (USO) currently applicable to Telstra in relation to telephony services remains unaddressed. Submitters argued that the Access Bill provides the opportunity for enhancing USO capability to guarantee minimum broadband services to all Australian premises.

Scope of the Access Bill

6.7 A number of submitters proposed that the access regime provided for in the Access Bill should apply more broadly than just to infrastructure owned, and/or services offered, by NBN Co, NBN Tasmania, or a wholly owned subsidiary.

6.8 Ms Lucy Craddock, a lecturer in Business and Property Law at the University of Queensland, put the point succinctly when she recommended that:

4 NBN Co Bill, cl 5, '*NBN Co*', '*NBN corporation*'.

5 Access Bill, proposed subsection 152AXC(1).

6 Access Bill, proposed subsection 152AXC(2).

7 Access Bill, proposed subsection 152AXC(3).

8 Access Bill, proposed subsections 152AXC(4)–(5).

A better definition of what is the 'NBN' for proposed and future regulatory regimes would be one that identifies the NBN by reference purely to the network as constructed, or acquired, or subsumed irrespective of where the creative or economic input came from, or who built it in the first place. Additionally, to capture future as yet unthought-of possibilities for how networks may be constructed, the legislation should include the ability to extend the definition to include networks specified by Ministerial designation.⁹

6.9 The Australian Telecommunications Users Group (ATUG) captured the rationale for the concept when it said that the access regime provisions:

...should apply to any network elements used to provide NBN services (whether by NBN Co or any other company) where those network elements are bottleneck eg fibre deployments in new estates (including existing deployments) and fibre access in multi-story buildings (up the building, not to the building).

6.10 The committee raised the matter with the Australian Competition and Consumer Commission (ACCC) and received the following written response:

The ACCC's view is that an access regime is likely to be required to promote competition where a facility has enduring bottleneck characteristics, and businesses require access to that facility in order to compete. Some telecommunications infrastructure displays the characteristics of an enduring bottleneck — infrastructure where, for a number of reasons, it is more efficient to have all consumers served by a single provider than to have multiple competing providers.

Under the current Part XIC of the *Trade Practices Act 1974* (TPA) the ACCC is able to declare access services provided on bottleneck infrastructure if the ACCC considers doing so will promote the long-term interest of end-users, thereby subjecting the supplier of the services (whether it be NBN Co or other suppliers) to the access regime contained in Part XIC of the TPA.

The telecommunications access regime in Part XIC of the TPA, with or without the incorporation of the amendments made under the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (CCS Bill) and the Exposure Draft of the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (the NBN Access Exposure Draft), is designed to allow for access to declared services supplied by any carrier or carriage service provider over bottleneck infrastructure regardless of whether the underlying infrastructure is leased or owned.¹⁰

9 Ms Lucy Craddock, Lecturer in Business and Property Law, University of Queensland, *Submission 119*, p. 1.

10 Australian Competition and Consumer Commission, answer to question on notice, 14 April 2010 (received 22 April 2010).

6.11 The ACCC also noted in response to a separate question on notice, that 'access to non carrier facilities such as ducts and poles, which could for example be owned by utility companies, is currently provided for under Schedule 3 of the *Telecommunications Act 1997*'.¹¹

Committee view

6.12 In light of the written response provided by the ACCC, the committee does not consider that amendment of the Access Bill is appropriate in relation to the scope of its operation.

Equivalence provisions

6.13 The primary concern of submitters related to the content and proposed operation of the 'efficiency' exception to NBN Co's charter of supplying services on a non-discriminatory basis. Proposed subsection 152AXC(2) would enable NBN Co to discriminate where, in its opinion, the discrimination 'aids efficiency'. An oversight mechanism would be provided by inserting into the Trade Practices Act the following subparagraph after subsection 152BB(1):

(1AA) If the Federal Court is satisfied that an NBN corporation has contravened the rule in subsection 152AXC(1), the Court may, on the application of:

- (a) the Commission; or
- (b) any person whose interests are affected by the contravention;

make all or any of the following orders:

- (c) an order directing the NBN corporation to comply with that rule;
- (d) an order directing the NBN corporation to compensate any other person who had suffered loss or damage as a result of the contravention;
- (e) any other order that the Court thinks appropriate.¹²

6.14 The explanatory notes to the Access Bill explain that the 'concept of "efficiency" is intended to be read broadly and to facilitate normal business options such as offering volume-based discounts, passing on savings arising from capital investments, discrimination based on risk sharing, discounts in response to competitive circumstances, migration incentives and other efficiencies'.¹³

11 Australian Competition and Consumer Commission, answer to question on notice, 14 April 2010 (received 22 April 2010).

12 Access Bill, Schedule 1, Part 1, item 44A.

13 Explanatory notes to the exposure Bills, p. 14.

6.15 Professor Walter Green, Director of the Communications Experts Group, was fairly typical of submitters to the committee in his response to the equivalence provisions:

Equivalent access is an essential feature of NBN Co services. The scale of economies achieved through the Government's investment in the NBN infrastructure must be available to all retail players. Any price discrimination should be based on objectively identified efficiencies that improve or encourage innovation and competition. Volume discounts should be clearly excluded. Volume discounts will enable the current dominance problem to be carried forward into an NBN environment.¹⁴

6.16 Optus¹⁵ and Primus Telecom Australia¹⁶ both submitted that the meaning of 'equivalence' requires clarification in the legislation. AUSTAR United Communications submitted that it should be removed because the efficiency concepts envisaged 'are all ones which can only be offered by retail providers with scale' and that the proposed exemption to the prohibition on discriminatory behaviour is therefore 'likely to reinforce the incumbency of the current players'.¹⁷

6.17 Further, Optus raised concerns about whether the oversight arrangements for regulating how NBN Co interprets and applies the 'efficiency' criteria and discriminates between access seekers are sufficient. Optus submitted that 'the transparency comes after the event – so if equivalence is being breached, what is the remedy?'¹⁸ The problem was outlined as follows:

The Bill seeks to provide some transparency in the circumstances where an access seeker is able to negotiate different terms of access. However, the only transparency requirement that applies in relation to departures from the terms of a standard form of access agreement or any access undertaking is that within seven days after the day on which the access agreement was entered into the NBN must publish certain information on its website.

This raises a significant problem. The disclosure requirement happens after the NBN Co is bound by the terms of its departing supply agreement which is arguably too late. By this time there is no opportunity for third-party objection or for legal intervention. Further, the information which is to be published on the website identifies and describes the differences between the agreement entered into and the standard form of access agreement or access undertaking. There is no obligation to post the actual agreement.

14 Professor Walter Green, Director, Communications Experts Group Pty Ltd, *Submission 126*, p. 3.

15 Optus, *Submission 114*, p. 5.

16 Primus Telecom Australia, *Submission 117*, p. 4.

17 AUSTAR United Communications Ltd, *Submission 116*, p. 7.

18 Mr Andrew Sheridan, General Manager, Interconnect and Regulation, Optus, *Committee Hansard*, Melbourne, 14 April 2010, p. 46.

Accordingly, the descriptive information may not be sufficient to enable other access seekers to negotiate identical terms.¹⁹

Committee view

6.18 The committee believes that the Access Bill should set out examples of 'efficiency' criteria which might be considered by NBN Co for the purposes of determining whether an exemption to the prohibition on non-discriminatory service supply might be appropriate. The committee also believes that the Access Bill should clearly provide that volume considerations cannot qualify as 'efficiency' criteria.

6.19 The committee shares Optus' concerns that the current retrospective oversight provisions are inadequate. The committee believes that, where NBN Co proposes to grant access to an access seeker on favourable terms on the grounds that the discrimination 'aids efficiency', such an agreement should not take effect until granted ACCC approval. The committee acknowledges that ACCC approval arrangements will need to be carefully considered so as to balance the needs of respecting commercial confidentiality and maintaining sufficient scope for flexibility in negotiations with a sufficiently rigorous and transparent oversight mechanism.

Recommendation 21

6.20 That the Access Bill be amended so as to provide guidance on what is meant by 'efficiency' for the purpose of the equivalence provisions. The amendments should also ensure that volume considerations cannot be counted as matters which 'aid efficiency' for the purpose of obtaining an exemption to the non-discrimination obligations on NBN Co.

Recommendation 22

6.21 That the Access Bill be amended so that ACCC pre-approval is required of any agreement to which NBN Co is a party and under which an access seeker is granted access on discriminatory terms on the basis of the 'efficiency' exception.

Future of the Universal Service Obligation

6.22 In chapter five the committee recommended that the NBN Co Bill be amended to expressly require that NBN Co meet a minimum service obligation. A minimum service obligation is not the same as a Universal Service Obligation. Telstra is currently subject to a Universal Service Obligation to provide telephony services. A Universal Service Obligation on NBN Co to provide broadband would differ from the proposed minimum service obligation in that the former would constitute an enforceable obligation on NBN Co to provide a specified level of retail broadband services to end users, whereas the minimum service obligation would only require that NBN Co have and maintain the capability to connect every Australian premises to the

19 Optus, *Submission 114*, p. 19.

NBN (leaving it to retail service providers to actually service end users with retail services and applications).

6.23 The Access Bill does not currently require the NBN Co to provide services in fulfilment of a Universal Service Obligation to supply broadband services to end users. That is perhaps unsurprising given the intention that NBN Co be a wholesale-only service provider that does not provide retail broadband services to customers. However, the exposure drafts of the Bills also do not address the future of Telstra's USO to provide telephony services once the NBN becomes operational, nor whether there will be an enhanced USO in the future which includes both telephony and broadband services. The two matters are linked because presently Telstra's USO relating to telephony services is related to its ownership of the ubiquitous copper network. It is highly probable that the foreshadowed commercial arrangements between NBN Co and Telstra concerning the copper network and other Telstra-owned assets and infrastructure will impact on the future of any USO to provide telephony and/or broadband services.

6.24 A number of submitters commented on whether the exposure drafts of the Bills should be amended to create a Universal Service Obligation in relation to the supply of broadband services to end users.

6.25 The Northern Territory Government stated that the Northern Territory 'relies heavily upon the USO for the provision of even the most basic telecommunications facilities' and that '40 per cent of the population of the Northern Territory would find it prohibitively expensive to obtain basic telephony if not for the cross-subsidisation provided by the USO'.²⁰ In light of that background, the Northern Territory Government submitted that the NBN project 'provides the opportunity for enhancing USO capability to include broadband as well as telephony'.²¹

6.26 In a similar vein, the Australian Communications Consumer Action Network stated that it 'sees a role for NBN Co in the delivery of basic, low-band width services, possibly in fulfilment of a USO obligation placed on the wholesaler'.²²

6.27 The Australian Telecommunications Users Group (ATUG) went further, arguing that it:

would prefer to see explicit commitments for ubiquitous access in the NBN Co Act. ATUG would like to see a Universal Service Obligation on providers at the retail level, and explicit Government policy and subsidy programs for non-commercial markets (if any) to ensure 100% take-up as with the Digital Switchover Plans.²³

20 Northern Territory Government, *Submission 123*, p. 1.

21 Northern Territory Government, *Submission 123*, p. 1.

22 Australian Communications Consumer Action Network, *Submission 122*, p. 6.

23 Australian Telecommunications Users Group, answer to question on notice, 16 April 2010 (received 28 April 2010), p. 3.

Committee view

6.28 The committee acknowledges the critical importance of this issue.

6.29 The committee urges the Government to clarify its intentions as to the future of Telstra's USO in relation to telephony services, and whether it proposes to create a universal service obligation for the supply of broadband services.

Recommendation 23

6.30 That the Government make public its intentions as to the future of Telstra's USO in relation to telephony services.

Recommendation 24

6.31 That the Government make public its intentions as to whether and how there will be a future universal service obligation to provide broadband services, and the associated cost implications for the Australian people.