



Submission on the Vertigan Review Telecommunications Regulatory Arrangements Consultation paper

April 2014

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1 INTRODUCTION

The Nextgen Group (Nextgen) welcomes the opportunity to make this submission on the Vertigan Review's 'Telecommunications Regulatory Arrangements Consultation Paper' to the Expert Panel.

The contents of this submission reflect Nextgen's view on how the industry structure will develop in coming years. As detailed in our earlier submission to the Vertigan Review, the essence of our view about the appropriate structure for Australia's telecommunications sector is that:

- Structural separation is realised;
- The existing POI architecture is retained;
- The rollout model, and associated regulatory framework, supports NBN Co's commerciality over time;
- Participation in the market is consistent with the principles of competition policy, and there is appropriate regulation in place; and
- There is a competitive market, which operates — and is overseen — in the LTIE.

With its focus on both Part XIC and certain provisions in the *National Broadband Network Companies Act 2011* (The NBN Companies Act), the current consultation paper canvasses a number of fundamental regulatory issues, with certain structural issues also being captured.

Nextgen supports the review of both Part XIC and the NBN Companies Act, as this provides an opportunity to gauge both their current effectiveness and capacity to meet future industry dynamics in light of the ongoing policy changes with respect to the rollout of the NBN, and by extension NBN Co.

In general terms Nextgen is supportive of the amendments which were made to Part XIC in 2010 and 2011. In reflecting on market developments, regulatory processes and regulatory outcomes since this time, Nextgen is of the view that the main issues for consideration by the expert panel are the hierarchy of terms, the ability of the regulatory framework to appropriately constrain NBN Co's market power and the ongoing need for — and role of — independent regulatory oversight to ensure the market is characterised by healthy competitive dynamics and outcomes which are in the LTIE.

The context for consideration of the issues above is that of a multi-technology rollout model¹, which is significant as this new direction adds an additional layer of regulatory and structural questions to the matters which are being considered by the expert panel. To date, most public commentary about the implications of the new policy direction has been focussed on TPG's intentions to build competing FTTB infrastructure. While this is an important issue, we are of the view that there are other more substantive issues which have not yet been explored and will prove more difficult to resolve. Foremost amongst these is the proposed usage of existing HFC infrastructure. How this infrastructure fits into the current NBN Co SAU, the access provisions which will apply to it and HFC's overall reconciliation with the established POI architecture are all unknown.

It is our view that the implications of a transition to a multi-technology model — some of which are identified above, but many of which are still unknown — augment the case for reordering the hierarchy of terms so that access agreements no longer have primacy over regulatory instruments and that options for recourse to the ACCC exist. Furthermore, it is also submitted that the main barrier to improving the effectiveness of Part XIC is the current NBN Co SAU, which sits within the Part XIC framework.

In order to create an environment which fosters competitive dynamics and enhances the LTIE we submit that there is a clear need to revisit the current NBN Co SAU and alter its position in the hierarchy of terms.

Nextgen would be happy to discuss any element of this response with the expert panel in greater detail if desired, and looks forward to ongoing participation in the review process.

¹ Confirmed by the revised Statement of Expectations, issued to NBN Co on the 8th of April, 2014.

2 RESPONSE

This section sets out our responses to some of the questions raised in the Consultation Paper.

2.1 Part 1: Part XIC

Subsection: Functional focus of Part XIC

Question: Should Part XIC give greater emphasis to lower level service functionality? Should Part XIC more clearly specify the ACCC's powers in relation to directly regulating access to facilities?

Nextgen believes that the status quo, whereby the ACCC has discretion about the reach of Part XIC, is appropriate. This approach can enable access to lower level service functionality where this promotes the LTIE. That said, Nextgen would not support the declaration of dark fibre, as this has no direct proximity to end-users and cannot be resold to end-users directly.

In terms of facilities access, Nextgen believes there is scope for a general streamlining of the various measures which currently exist in relation to facilities access. Part of this streamlining could entail clearer specification of the ACCC's powers in relation to facilities within Part XIC. The transition to a multi-technology model for the NBN is likely give rise to new questions concerning facilities access, underscoring the need for regulatory clarity in this area.

Subsection: Part XIC and the concept of 'significant market power'

Question: Should Part XIC focus on parties with significant (or a substantial degree of) market power (SMP) rather than be of general application as it is at present?

Nextgen is of the view that the current, general application of Part XIC should be retained. We believe that altering Part XIC to focus on parties with SMP would result in numerous disadvantages, including the possibility of parties without SMP but still in possession of 'sway' creating their own monopolies by locking lock others out of certain market segments, eroding the 'any-to-any' aspect of the current declaration criteria and reducing choice for end users.

Subsection: Declaration

The LTIE test

Questions: Does the LTIE test need to be revised? Do the associated criteria need updating? Should greater emphasis be given to the promotion of investment, and should different categories of investment be given greater weight? Is any-to-any connectivity still relevant?

Nextgen believes that the general construct of the LTIE test is robust, and the associated criteria are reasonable.

In terms of using the test as a means to promote investment (or different categories of investment), Nextgen is not supportive of this idea, as the natural extension would seem to be some type of regulatory holiday or similar.

As the owner and operator of a substantive fibre optic backhaul network (i.e. upstream infrastructure), Nextgen is of the view that any-to-any connectivity remains a relevant — indeed fundamental — consideration. This view is based upon the clear complementarity between upstream and downstream infrastructure in the context of providing telecommunication services to end users.

Duration of Declaration

Questions: Are there services which should be declared on an enduring basis? How effective are review mechanisms for declarations?

Nextgen is not supportive of enduring declarations. Where there are some services capable of exhibiting enduring bottlenecks we believe the most important consideration is the capacity for these to be declared, with declaration when appropriate, rather than an enduring declaration per se.

It is our view that a period of three to five years is the appropriate duration for a declaration, with existing review mechanisms being an appropriate means for determining if the circumstances which warranted declaration in the first instance have ongoing validity or not.

Subsection: Standard forms of access agreements

Question: Do SFAA processes work effectively and, if not, how could they be improved?

Nextgen has a number of reservations about the SFAA processes. Foremost amongst these is the fact that SFAA's are outside the regulatory hierarchy and are capable of being issued on a 'take it or leave it basis' by NBN Co, without recourse to the ACCC. This type of situation has recently played out with NBN Co's Wholesale Broadband Agreement (WBA). Based on this experience Nextgen believes there is a case for SFAA's to be incorporated in the regulatory hierarchy even if the flexibility they provide is somewhat compromised.

Subsection: Standard access obligations

Non-discrimination requirements

Question: Should the non-discrimination provisions applying to NBN Co and superfast network operators be retained, relaxed or repealed?

In general terms Nextgen is of the view that the non-discrimination provisions applying to NBN Co and other superfast network operators should be retained.

In considering this issue we have identified two broad scenarios where a relaxation, of some kind, might be warranted in certain circumstances.

The first scenario is the 'Community' scenario, whereby a community (be it a rural town, a regional centre or a new metropolitan area development) seeks to co-invest with NBN Co in expediting the rollout of the NBN in a given geographical area. The key issues with this scenario are:

- It could introduce an element of uncertainty into the rollout schedule;
- It could give rise to equity-type questions, as those with access to resources would potentially be serviced ahead of those without similar resources, despite NBN Co's status as a publicly funded service provider; and
- It would arguably complicate NBN Co's ability to provide detailed one-year and three-year construction plans to access seekers as required under the SAU — this is the main industry impact of this scenario, as it could impact investment plans.

The second scenario is the 'carrier' scenario, whereby a carrier seeks to co-invest with NBN Co to support (and possibly expedite) the provision of core infrastructure in one or more geographical areas, for the purpose of their commercial activities **and** those of NBN Co. The main issues with this scenario — which are more substantive than those associated with the scenario above — are the potential for such co-investments to lock-out competing carriers, resulting in reduced choice for end users in the areas which will directly benefit from the new infrastructure and/or the erosion of structural separation outcomes. However, in recognition of the benefits that new core infrastructure (for example, fibre backbones) can facilitate, Nextgen could be supportive of carrier co-investments being permitted provided these did not create any distortions within the market. Such an outcome could be facilitated, for example, by a continued requirement for structural separation among market participants, and the use of equivalent, open-access provisions or wholesale only requirements where co-investments with NBN Co are made.

Subsection: Access determinations

Effectiveness of access determinations

Questions: Do access determinations remain an effective method in setting access terms and conditions? Is the application of the access determination process to NBN Co where a service is declared through an SFAA or SAU reasonable?

Nextgen is supportive of the access determination model, and considers this preferable to a 'reference offer' model which would undo earlier work focussed on achieving a 'level playing field' for access.

Nextgen is also supportive of the proposition for the access determination process to apply to NBN Co where a service is declared through an SFAA or SAU, although this is not currently possible due to the hierarchy of terms. As outlined later in this submission, Nextgen is of the view that the changes to the rollout of the NBN associated with the adoption of the multi-technology model draw into question the potential for NBN Co's 2013 SAU to deliver the outcomes it was expected to. Indeed, compared to the earlier FTTP model, the multi-technology model may well result in fundamental structural implications for Australia's telecommunications sector. Correspondingly, competitive dynamics within the market will also be altered. This situation of uncertainty underscores the need for the close regulatory oversight of the

NBN and NBN Co, which in turn will require changes to the current hierarchy of terms and in all likelihood NBN Co's current SAU.

Subsection: SAUs

NBN Co use of SAUs

Question: Should NBN Co be permitted to make SAUs in relation to declared services?

Nextgen does not support NBN Co having the ability to make SAUs in relation to declared services. As outlined above, Nextgen is of the view that the hierarchy of terms needs to be revisited so that the option for regulatory recourse in respect of an SAU exists.

SAU Criteria

Questions: Do the criteria for assessing the SAU achieve the balance sought or should they be amended? If they are amended, then to what end should this be?

The criteria for assessing NBN Co's 2013 SAU did achieve the balance sought. Rather than reconsidering the criterion on which this assessment was based, Nextgen submits that there is a more pressing need to revisit the SAU which was established as the basis upon which the SAU was developed has changed significantly.

Subsection: Access agreements and hierarchy of terms

Question: Is the hierarchy of terms set correctly? If not, how should it be set?

Nextgen does not believe that the hierarchy of terms is set correctly. Specifically we are of the view that it is inappropriate for access agreements to have ongoing primacy over regulatory instruments and there is a need for greater regulatory oversight of NBN Co than what current arrangements provide. Our concerns in these areas have been accentuated by recent policy developments, including formal adoption of the multi-technology model. We also believe that questions exist about the ability of the current SAU to accommodate the new circumstances which the industry faces.

Based on the sentiments above, it is submitted that the hierarchy of terms should be BROCs, SAUs, access determinations and finally access agreements.

Were this ordering to apply we anticipate that a further period of assessment would be needed to ascertain the overall practicality of the altered arrangements. Central questions in this context would be the capacity of BROCs to manage the new demands placed upon the current NBN Co SAU by the new policy framework and the practical reconciliation of any changes resulting from regulatory oversight of access agreements such as the WBA. In considering these questions the ongoing appropriateness of NBN Co's current SAU may also need to be explored. Were NBN Co to try and tweak their current SAU in order to accommodate the changed circumstances which it now faces, we anticipate that this could be a drawn out process and a source of further uncertainty in the industry.

NBN Co's SFAA and the legislative hierarchy

Questions: Can the current use of SFAAs by NBN Co be improved and if so, how? Does NBN Co's position in the market place mean its SFAA should formally be reflected in the hierarchy? Does NBN Co's potential market power mean there should be scope for access seekers to have recourse to the ACCC in relation to NBN Co access agreements?

Nextgen believes it is anomalous for SFAA's to sit outside the legislative hierarchy and that there should be scope for access seekers to have recourse to the ACCC in relation to NBN Co's access agreements.

Subsection: Possible alternative approaches to Part XIC

Question: Should the panel consider a fundamentally different approach to regulating access to telecommunications services?

In light of changes to the rollout model for the NBN announced by the Government, Nextgen anticipates that there will be a fundamental role for Part XIV in regulating access to telecommunications services within Australia in the years ahead. As such, we do not support a move away from the use of Part XIC of the adoption of a fundamentally different approach.

As outlined in this submission we are of the view that there is scope for making various amendments to the current regulatory arrangements in order to improve the operation of Part XIC, including:

- Reordering the hierarchy of terms so that access agreements no longer have primacy over regulatory instruments, and options for recourse to the ACCC exist; and

- Incorporating SFAA's into the hierarchy of terms in recognition of NBN Co's market power, and their propensity to exercise this.

While the proposed amendments above have the potential to improve the effectiveness of Part XIC, we believe there are questions about the ongoing appropriateness of NBN Co's current SAU (which sits within this framework), as the basis upon which this was developed no longer exists. In our view formal adoption of the multi-technology model is accompanied by a suite of new structural questions, which will have a bearing on the level of competitive dynamics within the market and by extension the outcomes realised by consumers. Many of these questions, as noted in the introduction, relate to subsequent policy and strategy changes.

2.2 Part 2: Rules about operations of NBN Corporations

Subsection: Supply of eligible services on a wholesale-only basis

Question: Is the general requirement that NBN Co only supply carriers and service providers an effective means of giving effect to its wholesale only obligation?

Yes. This requirement should be reaffirmed in future revisitation of NBN Co's SAU, noting it also aligns with NBN Co's non-discrimination provisions.

Subsection: Restricting NBN Co to the supply of Layer 2 services

Question: Should NBN Co be limited by law to operating at the lowest possible layer of functionality in the OSI stack, this primarily being Layer 2 although potentially being Layer 3 in some instances?

Nextgen would be supportive of a move to place limits on NBN Co's operations in law. This would provide a degree of certainty for all parties within Australia's telecommunication sector, enabling investments to be made in the pursuit of business objectives without the risk of any future competition from NBN Co as a result of some change in NBN Co's strategy or direction. More generally restrictions on NBN Co's supply of services would confirm its status as an enabling entity, which left questions about end-user service provision to retail service providers. A new NBN Co SAU could also affirm any limitations placed upon NBN Co's operations.

3 CONTACT DETAILS

Nextgen's contact details in respect of the Vertigan Review are as follows:

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Nextgen is happy for the above contact details to be included in any summary of our submission that is published by the Panel.