Cost-Benefit Analysis and Review of Regulatory Arrangements for the National Broadband Network

Submission by TPG Telecom Limited (TPG)

to

NBN Panel of Experts (Vertigan Review Panel)

TPG Position Statement

1. The challenge for infrastructure regulation has always been to strike the optimal balance between promoting economic efficiency through access regulation and encouraging infrastructure investment. With the structural separation of Telstra and focus on infrastructure based competition, Australia is headed in the right direction.
2. The key is to have in place a robust regime, which allows competition and innovation to flourish, but has flexibilities imbedded so that the regulator can act in a swift, decisive and targeted manner in the long term interests of end users (LTIE) as required.
3. For the most part, TPG believes the current telecommunication-specific regulatory framework to be broadly appropriate.

Part 1: Part XIC

Question: Should the focus of Part XIC go beyond being about access to services delivered, rather than access to the network itself? In this respect should Part XIC enable the declaration of access to facilities, notwithstanding Schedule 1 to the Telco Act?

4. TPG believes that the current emphasis in Part XIC with a focus on services functionality but with some capacity to enable lower level network access by declaration at the ACCC's discretion is appropriate. A decision as to whether access to dark fibre should be declared requires different considerations to a similar decision regarding access to the ULL. Prima facie, TPG considers that dark fibre access should not be a declared service but TPG believes that the regulator should be left with the discretion to deal with those considerations based on the relevant factors.
5. TPG does not believe that Schedule 1 to the Telco Act precludes a declaration in relation to facilities access under Part XIC. Facilities access can reasonably fall within the description of a service that facilitates the supply of a listed carriage service. However, to the extent that it is unclear that uncertainty should be rectified. Schedule 1 has limited scope and requires negotiate-arbitrate, which may be acceptable on an individual access seeker basis. However, declaration should be an available action for the regulator in circumstances that it deems appropriate.
6. One of the difficulties presented for access seekers under Schedule 1 relates to hierarchy. An access provider may argue that the ACCC has no power to arbitrate due to the existence of a written agreement (reference sections 18(7) and 36(8) to Schedule 1 of the Act). It is clear that access seekers and access providers should be able to agree on terms that suit themselves. However, access seekers may have initially and without negotiation (or without successful negotiation) entered into written agreements with an access provider just so that they can get their business going.

They may have had limited options but to do so. Alternatively, whilst the parties may have negotiated and agreed terms for a period of time, those terms may rollover and the access provider may not negotiate reasonably for a renewal period. If the access seeker then wishes to avail itself of a right to seek arbitration, the access provider may seek to rely on Sections 18(7) and 36(8). Access seekers should not be precluded from disputing terms and conditions and having their dispute arbitrated and sections 18(7) and 36(8) should be modified to make it clear that this is the position. Without it, access seekers may be left with the unpalatable alternative of terminating their agreements so as to be able to avail themselves of the negotiate-arbitrate process. Alternatively, the access seeker should have the right to seek a declaration of facilities access where they are unable to secure reasonable price and non-price terms.

7. For the most part, upfront price and non-price terms of access to services has been a very effective form of regulation in constraining Telstra's ability to extract monopoly rents for declared services. Unfortunately, none of the existing regimes provide for upfront pricing or access terms with respect to non-declared Telstra Facilities like TEBA and Duct access. For these reasons, the functional focus of Part XIC should not be limited to just access to services provided over telecommunications networks.

8. Declaration of telecommunication facilities should be targeted and only be used in clear cases where the ACCC considers that it is necessary having regard to the state of competition.

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

9. There is no need to introduce a framework for express consideration of SMP beyond its current general application. As the consultation paper points out, it is open to the ACCC to determine appropriately how an access determination will operate in respect of particular access providers, as it did for the wholesale ADSL service.

10. Defining the market is something that the ACCC will do as a matter of course, but Part XIC does not require the ACCC to precisely define the scope of the relevant markets in a declaration inquiry. This gives the ACCC flexibility in how it defines market and such flexibility should remain given that telecommunications services and facilities can greatly vary in complexity. Introducing SMP as an express consideration may take away this flexibility.

Question: Do changes to Part XIC need to be made to deal with Vectored VDSL

11. TPG does not believe that fundamental changes to Part XIC are required to address the difficulties of having multiple DSL operators within the same copper cable bundle (**Vectored VDSL issue*)***.

12. In response to some comments in the consultation paper and the press in relation to sole provider/exclusivity clauses:

    - As part of its attempted supply of ADSL2+ services to various buildings, TPG has been unable to complete the supply of services to some customers, having been advised that the buildings have exclusive deals with other carriers.
    - For a short time, TPG included in draft licence agreements with building owners and occupiers a term that required that TPG be the sole VDSL with Vectoring provider. TPG did not intend to inhibit other providers from supplying VDSL or other types of technology, rather to limit the effect of vectoring conflict.
    - TPG has decided that it will not include such clauses in its licence agreements and will not enforce any such terms with building owners/occupiers.

- TPG believes that competition should be permissible and that there should be a law that restricts the enforceability of any restrictive covenant that a building owner/manager may have accepted.
- In relation to the question of ownership of the base building copper, TPG believes that legislative effort is required to confirm that the copper or other telecommunications infrastructure between a unit and the MDF is beneficially owned by the owner of the unit (as opposed to being an indivisible part of common property) and is usable for connectivity by any carrier at the request of the occupant of the unit (be it the owner or the tenant).

13. The concerns around Vectored VDSL are technical and should only have a bearing on competition policy to the extent that a technical solution is not available to address any difficulties. Technical solutions may already be available and will develop over time.

14. As TPG has previously submitted to the Vertigan Review Panel, infrastructure based competitors investing their own capital and who are working within the confines of Parts 7 and 8 will bring speedy and positive outcomes for end users and should not be regulated unless there is evidence of an anti-competitive effect. It is in these types of circumstances, where it is important to consider the balance between promoting economic efficiency through access regulation and encouraging infrastructure investment.

Declaration

Question: How is the LTIE test operating? Could it be revised? If so what criteria would need to be changed or added and is there a need to more precisely define the market in order to inform what is in the LTIE?

15. TPG is sees no reason to adjust the LTIE test.

Question: Should services be declared on an enduring basis for more certainty? Are review mechanisms effective?

16. TPG is broadly satisfied with the operation of Part XIC in the context of setting the duration of declarations and the review mechanisms for those declarations. TPG considers that declaration on an enduring basis generally is not appropriate or desirable in technological and competitive environments that are evolving.

Standard form of access agreements

Question: The panel is seeking views on whether SFAA processes work effectively and, if not, how they could be improved.

- TPG has no particular views about the current operation of SFAA processes other than to say that the hierarchy arrangement complicate the process of deciding on contracting. However, to the extent that an SFAA results in the creation of an access agreement that is effectively forced onto an access seeker (in that the access seeker has no commercially acceptable option but to enter into the access agreement), that access agreement should rank lower in the hierarchy. If Part XIC requires amendment to cover this scenario, TPG considers that it should be amended.

Standard access obligations

Question: Do the SAOs need to be revised? If so, what should the SAOs cover?

17. TPG does not believe there is a need for more detailed SAOs and agrees with the view that mandating equivalence in service delivery could result in regulatory requirements that are more cumbersome, but not necessarily more effective. Where greater levels of equivalence are required for a service proposed for declaration, appropriate inquiries and industry consultation should take place to weigh the regulatory costs against the anticipated LTIE gains (as was undertaken before the equivalence and transparency arrangements in Telstra's structural separation undertaking were implemented).

Question: Do Category B SAOs need to be applied to other access providers that are wholesale-only.

18. The NBN Co is a unique organisation. It is, at least initially, funded by taxpayers and benefits from legislated competitive advantages. It is different to other access providers who may have wholesale-only obligations. Those entities and their shareholders have assessed the risks and made an election to invest capital in the market. They should not have the same constrictions as the NBN Co.

Question: The panel is seeking views on whether the non-discrimination provisions applying to NBN Co and superfast network operators should be retained, relaxed or repealed.

19. TPG considers that the non-discrimination obligations should remain a fundamental requirement for NBN Co. TPG does not accept that a lack of vertical integration would result in there being limited discrimination against certain RSPs. The telecommunications market has been long dominated by larger players. With the "new world" presented by the NBN, those larger players should not be given better terms than smaller participants.
20. TPG does not accept that the requirement to collect access agreements and publish statements of differences represents a significant burden on the NBN Co or the ACCC. Those requirements create the necessary disincentive to discriminatory agreements.

Question: Do anticipatory exemptions have an ongoing role to play and, if so, whether the existing arrangements can be improved?

21. TPG considers that the status quo is appropriate.

Access Determinations

Question: Are access determinations still an effective method in setting access terms and conditions. Would a reference offer model better promote investment or would it merely increase disputation? Is the application of the access determination process to NBN Co where a service is declared through an SFAA or SAU reasonable?

22. TPG considers that generally, the access determination model has been beneficial for the industry in terms of establishing certainty and consistency across all participants. There are difficulties with the application of non-price terms. Typically, the acquisition of a service from Telstra involves many features, including IT systems interfacing and other operational matters. These matters are typically not covered by the non-price terms. As a result, the access seekers capacity to be able to rely on the access determinations (as opposed to acquiring and contracting the Telstra version of the service), presents risks

for the access seeker.

23. As a result of this, access seekers have effectively been corralled into entering an access agreement to acquire a Telstra version of the declared service even though, for some elements of those services, the pricing might be higher than might be available under the access determinations.

24. The resolution of this issue may not be simple but perhaps non-price terms should include an obligation on an access supplier that if they supply a similar service to the declared service, the corresponding operational and IT systems shall be used in connection with the supply of the declared service.

25. TPG considers that reference offer models may present a useful structure for access providers who are presenting new services to the market. Reference offers should not be available for services that are currently being covered by access determinations.

Question: Should the criteria for making an access determination be revised and, if so, to what end?

26. TPG considers that the status quo is appropriate.

Question: Stakeholder views are sought on whether the ACCC should have the power to specify different terms and conditions for different access providers and access seekers.

27. TPG believes the ACCC should continue to have the power to determine how determinations apply to individual access providers and access seekers or classes of such and agrees that this is a more efficient approach than the previous model of providing exemptions from the SAOs.

Question: Should the methodology for determining wholesale prices be specified in legislation? If so, should this be at a high level (e.g. cost based approach) or a more detailed level (e.g. building block methodology)? Should use of the Ministerial pricing determination to provide guidance to the ACCC be encouraged? Should specific guidance be provided to the ACCC, for example, on how to take account of embedded cost subsidies when determining prices? Should the ACCC consider non-price factors such as positive and negative externalities?

28. TPG considers the risk of political interference militates against the attractiveness of ministerial pricing determinations. Otherwise, TPG considers that it is important that the ACCC retain a relatively high degree of flexibility to consider the issues in determining wholesale pricing. As is currently the case, submissions as to the appropriate process and model can be made and decided upon by the ACCC. Where limitations of a particular model are found (and there are always some limitations), they can be reviewed at the next appropriate time. TPG would therefore not support additional legislative direction.

Question: Should access determinations be subject to merits review?

29. TPG is satisfied with the status quo and does not believe access determinations should be subject to merits review, given the extensive consultation that is conducted prior to each determination.

Question: Should the making of interim access determinations be subject to procedural fairness?

30. No. The status quo is appropriate.

Binding rules of conduct (BROC)

Question: Should the power to make BROCs should be removed, retained or expanded?

31. The status quo is appropriate. The ability of the ACCC to make a BROC should remain and they should not be subject to merits review or procedural fairness, otherwise their effectiveness is likely to be undermined.

Special Access Undertaking (SAUs)

Question: Should ordinary access undertakings be reinstated and, if so, what are the reasons why they would be more effective in promoting regulatory certainty than was previously the case?

32. TPG considers that the status quo is appropriate.

Question: The panel welcomes views on whether the fixed principles concept serves a useful purpose, and if so, whether it should be given a legislative form to provide greater certainty for the ACCC and infrastructure providers.

33. TPG considers that the status quo is appropriate

Ministerial pricing determinations

Question: The panel is interested in views that support the use of Ministerial pricing determinations and the circumstances in which they could be used without the independence of the regulator being undermined.

34. TPG believes the power to make a Ministerial pricing determination should be repealed or retained as a reserve power only.

Access agreements and hierarchy of terms

Question: Should access agreements continue to have primacy in the regulatory framework?

35. Please refer to earlier comments. In general, access agreements should take precedence but there may be circumstances as outlined earlier where this is not appropriate.

Question: Can the current use of SFAAs by NBN Co be improved and if so, how? Does NBN Co's potential position in the market place mean its SFAA should formally be reflected in the hierarchy? Does NBN Co's potential market power mean that there should be scope for access seekers to have recourse to the ACCC in relation to NBN Co access agreements? Or are additional processes needed to ensure access seeker concerns can be effectively addressed before they enter into access agreements with NBN Co?

36. TPG considers that processes can be improved by giving:
    - the SFAA a formal place in the hierarchy, logically below access determinations; and
    - access seekers the ability to obtain regulatory recourse while an access agreement based on an SFAA is in effect (as described above).

Part 2: Rules about operations of NBN corporations

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

37. Yes.

Question: Should NBN Co continue to be eligible to supply services to specified classes of utilities?

38. No. The telecommunications market will be condensed and competitive. No class of customer should be removed from the addressable market by being effectively handed

to NBN Co.

Question: Are there circumstances where NBN Co might be perceived as needing to deal directly with end-users and, if so, the rules that would apply where it was permitted to do so?

39. NBN Co should not be dealing directly with end users.

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? The panel wants to understand stakeholder reasons why this limitation should or should not apply and views as to the benefits or risk involved.]

40. TPG considers that the competitive environment amongst RSPs over the NBN will predominantly be about service. The expectation of a competitive RSP market will only be met if the NBN Co is not limiting the RSP's scope to establish attractive products for end-users. We consider that the NBN Co should therefore operate at the lowest possible layer of the OSI stack.

Question: Should specific restrictions on NBN Co in relation to the supply of goods and services should be strengthened or relaxed and if so, why?

41. NBN Co should continue to be prevented from supplying content services, non-communications services, and non-communications goods except where the goods are used to supply an eligible communications service.

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