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14 November 2014

The Hon Mr M Turnbull MP
Minister for Communications
By Email: infrastructureandaccess@communications.gov.au

Dear Sir

SUBMISSIONS – CARRIER LICENCE CONDITIONS

I refer to your letter dated 14 October 2014 addressed to PIPE International Pty Ltd, PIPE Networks Pty Ltd, Soul Pattinson Telecommunications Pty Ltd, AAPT Limited and Powertel Limited, each of which is a subsidiary of TPG Telecom Limited. This submission is made on behalf of each of the addressed carriers.

By way of introductory statement:

(a) Infrastructure based competition in the telecommunications market in Australia should be encouraged and supported by Government.
(b) Carriers with substantial market power or bottleneck infrastructure should be subject to measured regulation to ensure that competition is allowed to flourish.
(c) Such regulation should not result in there being economic signals that would discourage private sector investment in infrastructure based competition. Put another way, the regulation should be as "light touch" as possible to achieve the competitive objective.
(d) Regulatory red-tape is an anathema to the efficient supply of cost-effective services to Australians. Anything which increases costs to business is passed on to consumers. Accordingly, regulators must ensure that red-tape is kept to the barest minimum.

We submit that the current draft of the proposed Carrier Licence Condition (CLC) is a regulatory impost that is inimicable to the principles set out above.

For background, we note the following:

1. TPG is well known as an infrastructure based competitor. We have invested heavily in fibre optic cabling, DSLAM infrastructure, voice switching equipment, international submarine cables, international switching gear and many hundreds of points of presence. The capital investment made by the group over the years is over a billion dollars.
2. The recent extension of our fibre network to buildings (FTTB) was done within the expressly stated intention of the legislation. Considering the wording of Parts 7 and 8 of the Telecommunications Act, it is clear that Parliament decided that entities with significant sunk investments should be able to make use of those investments to compete with NBN.
3. If the draft CLC is declared, it will have the effect of inhibiting TPG from building a competitive cable network as was contemplated in Parts 7 and 8.

TPG has publicly and privately stated its intention to offer a wholesale product to enable wholesalers to make use of TPG's FTTB network. Wholesaling is not new to TPG and we are conscious of, and satisfactorily manage, the need to provide services to wholesale customers that are beneficial to them. We do not have the chequered Telstra history: significant over-recovery of costs, (for example IIC dispute, LSS and ULL charges and many other examples) or anti-competitive conduct (for example, competition notices for peering, wholesale DSL price squeeze and exchange capping). We also have neither the cash reserves, the profitability nor the sheer market domination that create for Telstra the incentive to protect their position against wholesale

customers which in turn leads to the need for appropriate regulatory intervention. Neither do we have the legislative fiat and unfettered access to capital of the NBN Co.

We acknowledge that we are a substantial organisation with 10-12% of the market for broadband, but we are still just a minority player. Our FTTB network will not be devoid of competition. HFC is already in many or most buildings and is itself a competitive threat. Existing ADSL services compete with us. Other VDSL suppliers could install equipment in competition to us. Fibre to the premises and wireless technologies will be competitive forces that will ensure that we will not have substantial market power.

We say all of these things as a precursor to our primary submission:

Submission 1: the draft CLC should not be issued; at least not yet.

We were in the process of developing a wholesale product. The product would have been very attractive to wholesale customers. We had planned to offer a product with the following characteristics:

- VDSL2+ port without any line restrictions (i.e., up to 100Mbps/40Mbps).
- Unlimited backhaul on our fibre network to centralised data centres.
- Price point for monthly recurring charge of $40 (ex GST). Install extra. We have been also considering lower speed products that would have a cheaper price point.

Such products would enable competitors to make use of our FTTB network to offer competing services and would certainly be more attractive than $27 for 25/5mbps including no backhaul on our fibre network.

Once the draft CLC was issued, we were forced to put the implementation of that development work on hold. It would be impossible for us to offer the product at the price point if the CLC is implemented, since the costs associated with compliance with the CLC are huge.

The time for imposing conditions to require the separation that is the object of section 6(2) of the draft CLC is not now. The "fundamental issue" referred to in the penultimate paragraph of page 3 of the Regulatory Impact Statement has not arisen. The time for implementing the CLC is when there is a clear and definable failure in the ordinary operation of the market. That is to say, regulation should only step in when there is a clear market failure that requires rectification. That process (i.e., evidence of market failure) has been in existence in the case of Telstra since competition first started in 1997. Even now, in 2014, Telstra is not subject to the same conditions as the draft CLC would impose on TPG. Surely, if Telstra is given 17 years before it is finally required functionally or structurally to separate, TPG should be given at least the opportunity to show that it will not treat its wholesale customers with the type of disregard that should demand regulation.

If in a few months TPG failed to offer a product with the above characteristics, or was otherwise shown to be unfairly treating its wholesale customers, then an appropriate measure might be considered at that time.

If needed, we could offer as an alternative to the CLC, an undertaking to release that wholesale product within a specified period of time. We would be happy to discuss with you the terms of such an undertaking at your convenience.

The remaining submissions should be understood as being in the alternative to Submission 1. That is, if the Minister is not minded to accept Submission 1, the following submissions should be considered.

Submission 2: the draft CLC creates a time frame that simply cannot be met

The design of the draft CLC is the following:

(a) If TPG wishes to keep selling retail FTTB services it must meet certain requirements; and

(b) Those requirements must be met by 1 January 2015, an impossibly short time frame for compliance.

The requirements are onerous including:

- Establish two new corporations.
- Find and appoint directors for the two new corporations.
- Appoint new senior managers to each of the two corporations (noting that this will require that the functions of existing senior managers be split into two and therefore

that it will not be simply a case of taking existing employees and putting them into the two companies).

- Reallocate TPG's entire work force so that no function of the wholesale corporation is performed by an employee of the retail corporation.
- Establish new and separate email, billing, operational support, and accounting systems. This will involve purchasing new licences, new hardware, new network links, development work, project management and many other things that take time.
- Establish two separate customer support/complaint management teams and systems.
- The establishment of two separate provisioning systems.
- The establishment of two separate access and security systems.
- The establishment of two separate disaster recovery systems.
- The creation of a new B2B interface.
- The publication of contract and pricing information on websites.
- The creation of systems, processes and procedures to ensure that the non-discrimination obligations are met.

We note that the above requirements amount effectively to structural separation rather than functional separation. We also note that many of the obligations appear to extend beyond the obligations that even Telstra has been required to meet under its structural separation undertaking. TPG believes that the above requirements would amount to a regulatory burden that is higher than the burden placed on any of the so-called "incumbents" of any telecommunications market in the world. It does seem unreasonable that TPG should be required to meet such obligations when all it has been doing is undertaking fair and legal competitive activity. Furthermore, the carrier licence condition goes beyond anything that the ACCC would have power to order following a declaration process.

However, Submission 2 is about timing.

What is plain is that no company, even one without an existing business to run, could possibly meet all the requirements within 6 weeks or less. We submit that no party could achieve all of the requirements within 2 years.

If the timeframe remains short and the CLC is declared as drafted, TPG will be legally restricted by the CLC from continuing with its contracts for FTTB Services with its many existing retail customers.

Submission 3: the draft CLC appears to discriminate unfairly against TPG

The definition of designated telecommunications network excludes a specified HFC network, which is a network that uses optical fibre to a node and coax cable to the premises of end users.

Obviously the largest HFC network is the Telstra network that runs Foxtel and Bigpond broadband. Optus and Transact have HFC networks.

It is not clear to TPG what difference there is between TPG's FTTB network and any of those HFC networks. All were built with private money and in accordance with law. Why should there be one rule for TPG's network and a different rule for the HFC networks.

It seems to TPG that the draft CLC has an inbuilt discriminatory outcome that would not be a fair or reasonable exercise of the discretion given under section 63 of the Telecommunications Act. TPG submits that if the draft CLC is to be imposed on TPG, it should be imposed on all carriers who supply a superfast broadband service, including those that offer them over an HFC network.

Submission 4: the draft CLC should not apply to existing FTTB Network

TPG has been operating lawfully to create the FTTB network. It has entered into contracts to supply many customers with services with terms that are 6 or 18 months.

If the CLC is to apply at all, it should apply only to FTTB network that is constructed after the commencement date of the CLC.

Submission 5: the objectives of the draft CLC do not demand functional separation

The purpose of the draft CLC is to require TPG to offer wholesale services and to offer them at a reasonable price so that competitors can compete with TPG retail. The draft CLC nominates a specific offering that TPG must meet: 25/5 for $27 per month. TPG can offer that price and could offer it to the wholesale market by the first quarter of 2015.

So why wouldn't a reasonable exercise of the discretion simply be initially limited to sections 6(3) and 6(4)? Competitors will be in a position to compete and customers will benefit.

Linked to Submission 1, an appropriate and reasonable course could be to impose the requirements of 6(3) and 6(4) and wait to see whether 6(2) is required.

Submission 6: the objectives of the draft CLC do not demand all the requirements of section 6(2) and drafting issues

The requirements of section 6(2) of the CLC identified below are onerous and greater than those imposed on Telstra in its structural separation undertaking or indeed on NBN Co; they are excessive and unnecessary to the objective of a "functional separation".

- Establish new corporations to run wholesale and retail operations and the flow on requirements of new directors and senior managers and other flow on requirements.
    - Why should TPG be required to establish new companies? We already have a retail company (TPG Internet) and a wholesale company (AAPT Limited) which does also supply to business, enterprise and government customers. Some functions are performed by common teams (e.g., some accounting functions, network engineers and provisioning staff) but support, sales and billing are separate.
    - Telstra is not required to have separate companies under its structural separation undertaking.
    - If, as we submit, new companies are not required, we also do not believe that it should be necessary to separate functions of those teams who provide services for both AAPT and TPG. Systems can be put into place to ensure that wholesale end users and retail end users are treated the same by those teams. If necessary, those systems can be discussed with you in the context of some kind of undertaking.
- Establish separate business, communications and operational support systems:
    - This is an unreasonable burden. Email, accounting and operational support systems are not cheap and they require capital to build and maintain.
    - What is the competitive concern to which this requirement is directed? Whatever the concern, it could surely be achieved without the heavy financial and operational burden of this requirement.
- Establish separate business to business interface for ordering.
    - AAPT has an existing B2B interface called Frontier that wholesale customers use to order services. We do not believe that we should be required to establish a new B2B system so the requirement should be modified to permit the use of an existing system.
- Section 6(f) either creates an unintended issue of interpretation or is intended to go further than just FTTB.
    - Eligible services are any carriage service: voice, internet, IPTV, private networks, domestic transmission, international transmission, international IP, ethernet, and many other services.
    - TPG primarily submits that the services that should be captured are the layer 2 wholesale service (i.e., the layer 2 connectivity over the FTTB network) rather than all eligible services.
    - The section could be read as requiring that, as soon as a CSP is using the FTTB, all services that TPG supplies to that CSP need to be moved into the wholesale operation.

- If that is the intention, that is a step that is unreasonable. TPG is a current supplier of many services to CSPs and it should be clear that we are permitted to continue to supply those services on current arrangements.
- However, if the intention is that the eligible services should only be those that traverse the FTTB network, then the section should be rewritten:

> (f) the offer and supply of eligible services, that traverse the designated telecommunications network, to a person who is a carrier or a carriage service provider ~~using the designated telecommunications network~~ must be effected through the wholesale company.

- Section 6(h) creates a red tape burden that is unnecessary.
  - TPG likes simple business. The pricing we propose for our wholesale product would be the only pricing available. We would happily give an undertaking that all wholesale customers would receive the same price for the layer 2 service. Section 6(i) requires that in any event. The reporting requirements in 6(h) are unnecessary red-tape.
  - Similar to section 6(f) there is a drafting question that is raised in that we are required to publish the information about all carriage services (i.e., all eligible services) "on the designated telecommunications network". It is not clear that this is limited to services that will traverse the FTTB network.
  - Further we do not understand why TPG should be obligated to disclose, for example pricing, terms and conditions for its IPTV, voice or internet services.
  - We believe that wholesale customers will have products and pricing that will enable them to compete with TPG retail. If it becomes apparent that they are not able to do so, then steps can be taken at that time. To take those steps now is premature.
  - The requirement should be limited to the pricing for the underlying layer 2 connectivity. Other pricing and terms and conditions should not need to be disclosed every 6 months or at all.
- Definition of designated telecommunications network
  - Based on the regulatory impact statement, we believe the intention is that the designated telecommunications network is only that part of the network that creates the layer 2 connectivity between a residential customer and the TPG core network.
  - However the definition is ambiguous because of the word "incorporates". It is impossible to ascertain where the designated telecommunications network starts and stops and it could be read to capture the entire TPG network, including its inter-capital fibre and DSLAM network (all of which are part of the TPG network).
  - It is important to be clear about this question for the purposes of ascertaining the eligible services for the purposes of section 6(f), (g), (h) and (i) (assuming our submissions above are not accepted).
  - In order to make the definition clear, TPG submits that the following changes should be made:

> ***designated telecommunications network*** means ~~a~~ that part of a fixed-line telecommunications network ~~(or part of a network)~~ between the specified carrier's point of interconnect and a residential end user premises ~~which~~that:
> (a) incorporates local access lines or parts of local access lines necessary for the provision of carriage services; and
> (b) is used to supply superfast carriage services; and
> (c) is not :….

A definition of point of interconnect would be required but it is intended to be a reference to the specified carrier's point of presence at which wholesale customer equipment may be interconnected with TPG equipment.

- Definition of Layer 2 Wholesale Service
  - It should be noted that TPG's FTTB deployment only extends to the MDF in a multi-dwelling unit. A Department of Communications briefing note to Strata

Managers recently highlighted that TPG's network could not include the copper network up the riser and into the premises. Accordingly, our network boundary point will have to be on the network side of the MDF. This is effectively the same as Telstra's ULL service. Therefore, references to user-network interfaces and voice ports in the CLC cannot technically apply to the FTTB network.

- Accordingly, the network termination point for the MDF will be a Krone block on the A-Side of the MDF. A reference to a "data port" and "voice ports" on a "network termination device" is therefore confusing.

In conclusion, we acknowledge the need for fair and reasonable regulations at appropriate times. We have already brought 100Mbps technology to thousands of Australians for very favourable pricing. It would be disappointing for TPG and those customers if those services were forced to stop, which would be the impact of the CLC if implemented in its current form.

Thank you for considering our submissions favourably.

Yours faithfully

TONY MOFFATT
General Counsel