

# **AUSTAR United Communications Limited**

**Submission to the Environment and Communications Legislation  
Committee Inquiry into:**

- (i) the National Broadband Network Companies Bill 2010; and**
- (ii) the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010**



**24 February 2011**

**To: The Environment and Communications Legislation Committee**

**By email: [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)**

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## 1. Introduction

AUSTAR United Communications Limited (**AUSTAR**) welcomes the opportunity to provide comments to The Environment and Communications Legislation Committee (**the Committee**) on the draft Bills which establish a regulatory framework for NBN Co Limited (**NBN Co**), namely:

- National Broadband Network Companies Bill (**NBN Companies Bill**) and
- Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (**NBN Access Bill**).

## 2. Background on AUSTAR

AUSTAR is Australia's second largest subscription television provider, supplying digital television services to more than 760,000 subscribers, or 2.3 million Australians. AUSTAR is listed on the Australian Stock Exchange (ASX: AUN), has 700 company employees, and has annual revenue in excess of \$700 million.

AUSTAR's business is focused entirely on regional Australia; the company provides subscription television services to consumers in the regional areas of New South Wales, Victoria, Queensland, and South Australia and to all areas of the Northern Territory and Tasmania.

Competitive access to broadband infrastructure remains a critical issue for the future productivity of Australia and as a regional provider, we are all too aware that this need is vastly increased in regional parts of the country.

As previously articulated in submissions to the Department of Broadband, Communications and the Digital Economy (**the Department**) and various Senate committees, AUSTAR commends the Government's decision to address this issue by deploying the National Broadband Network (**NBN**).

The NBN will help to address the current digital divide between metropolitan and regional Australia by providing ubiquitous telecommunications and broadband services throughout the country, at same or similar price points as offered in metro areas.

The availability of competitive communications products and services to regional Australia is AUSTAR's ultimate goal. As such, we have a keen interest in gaining access to the wholesale services to be offered by NBN Co in regional Australia – on the same terms and price points as all other Retail Service Providers (**RSPs**).

### 3. Executive Summary

AUSTAR believes that transparency and equivalence of the NBN Co process are imperative to achieve the policy objectives of the NBN. We fully support the Government's previously stated position that NBN Co be a wholesale-only company that will provide equivalent access to all access seekers, thereby fostering competition and product innovation for consumers. We are deeply concerned at modifications potentially allowing a break out from the Standard Form of Access Agreement (**SFAA**) under the "aids efficiency" banner and oppose these being retained in the NBN Access Bill, as we believe these threaten the policy objectives.

AUSTAR does not support NBN Co being granted the ability to offer volume-based price discounts to individual RSPs. Such discrimination may well facilitate and perpetuate market conditions that mirror the very situation that NBN Co has been tasked with remedying.

If the Government ultimately approves the ability of NBN Co to amend its SFAA to account for circumstances that may be deemed to be in the Long Term Interests of End-Users (**LTIE**), then we urge the Committee and Government to consider a revised approach, outlined in Section 4 of this submission, prior to seeking the passage of the NBN Access Bill through Parliament.

AUSTAR has no material comments on the form or content of the NBN Companies Bill.

### 4. NBN Access Bill

AUSTAR broadly supports most of the key principles set out in the NBN Access Bill.

However, as the fundamental premise of the NBN is to fundamentally change the competitive framework of the Australian telecommunications industry, AUSTAR believes transparency and equivalence are required. Equivalence can only be achieved if the cost of buying a service from NBN Co is uniform for all RSPs. This outcome will require:

- No break out from the SFAA; and
- A minimization of commercial arrangements struck outside the SFAA giving an individual RSP a direct or indirect cost benefit over others.

In its current form, the NBN Access Bill identifies three circumstances in which NBN Co can negotiate variations in the SFAA with various RSPs and Access Seekers:

- (i) If there is a reasonable risk of non-compliance by the RSP;
- (ii) On grounds or circumstances specified by the ACCC; and
- (iii) If the break out "aids efficiency".

AUSTAR is deeply concerned that the amendments incorporated into the most recent draft of the NBN Access Bill have ignored concerns raised by the broader industry in the most recent consultation by the Senate Select Committee on the Exposure drafts of the NBN Companies Bill and NBN Access Bill. These concerns included the likelihood that allowable discrimination by NBN Co in its commercial agreements with individual RSPs can take the form of volume-based

price discounts, in order to 'aid efficiency'. Virtually all of the scenarios that we have considered where we believe this principle could be put into practice only serve to benefit the largest, incumbent RSPs. Implementing this provision will lead directly to anti-competitive outcomes for the rest of the industry, as the current market conditions will simply prevail, a situation that not only contradicts the NBN's stated policy objectives, but will also not meet LTIE.

It is our strong view that a regulatory regime that favours incumbency will severely inhibit the development of a truly competitive and innovative telecommunications and media industry. Certainly the worst possible outcome the Government, the industry (apart from a certain few) and consumers is that the existing structure of Australia's broadband market will be carried on and effectively transferred from the legacy copper network to the NBN world.

The NBN Access Bill, as currently drafted, will allow NBN Co to negotiate individually with RSPs to vary the terms and conditions set out in an SFAA, SAU or an access determination, "subject to ACCC oversight". By this, the Explanatory Memorandum notes that NBN Co must lodge its access agreements with the ACCC, which could take action "if it considered that the non-discrimination rule has been breached".

AUSTAR is concerned that in this form, the NBN Access Bill is not structured to give the ACCC full responsibility for ensuring that the Government achieves its policy objectives.

Should it be deemed necessary that some exceptions to the SFAA are indeed necessary, AUSTAR recommends consolidating ACCC oversight of permissible exceptions to the SFAA, and changing the order through which ACCC oversight is exercised, by:

- i. Removing the new, untested, 'aid efficiency' criterion for permissible discrimination
- ii. Requiring that the ACCC publishes principles on allowable discrimination that do not lessen competition (to give industry and NBN Co certainty)
- iii. Giving the ACCC a right of approval over proposed discriminations to be granted by NBN Co to certain RSPs *before* they are published by NBN Co (based on the LTIE – an established and tested criterion)
- iv. Allowing the ACCC, in exercising this right of approval, to pre-authorise certain kinds of departures from the SFAA on the basis that they do not lessen competition and promote the LTIE (to give industry and NBN Co certainty)
- v. Allowing NBN Co and RSPs to negotiate other departures from the standard form, subject to ACCC approval of those changes

This approach gives full responsibility for protecting the pro-competition impact of the NBN to the ACCC and importantly, gives certainty to industry and consumers.

## **5. ACCC powers to monitor, and rectify, the abuse of existing market power to deny a level playing field, and protect incumbency, during the migration from copper to fibre**

While not specifically addressed in either Bill, AUSTAR encourages the Committee to consider and ultimately recommend that the ACCC be granted additional remit (if not currently enabled to do so) in order to ensure that a level playing field is established during the migration of services onto the NBN. This may be captured under its existing responsibility (to review and approve both Telstra's Structural Separation Undertaking and NBN Co's Special Access Undertaking pursuant to their deal being consummated), but for completeness we wanted to raise some concerns for the Committee's consideration.

The existing fixed-line customer relationships of incumbent telecommunication providers create a serious competitive advantage in the migration from copper to fibre services if carried through from copper to fibre.

This type of market structure, and its effect on competition, is a reality in regional Australia today. A complete lack of competitive DSLAM infrastructure (less than six percent of all exchanges contain competitive infrastructure) in the regions has led to poor product innovation, less price-based competition and lack of credible consumer choice in service providers. By way of example, Goldman Sachs estimated in August 2009 that in regional markets, Telstra's combined fixed-line broadband market share for both retail and wholesale services was more than 60 percent higher than in metropolitan markets with competitive DSLAM operators.

The manner in which NBN services are first marketed and/or made available to consumers will be an important determinant of the future shape of competition in Australia's telecommunications market. The first-in marketing advantage will be significant regardless of whether initial to-home deployment is on an 'opt-in' or 'opt-out' basis. The RSP fulfilling the initial customer order for an NBN equipment install will enjoy substantial marketing advantages over other RSPs, regardless of how many ports remain available to other RSPs.

Unless steps are taken to supplement the regulatory rules, it is logical that existing market incumbents are likely to enjoy this advantage, solely as a legacy of being incumbent network owners or service providers, and notwithstanding best marketing efforts by prospective competitors and the operation of the 2010 telecoms regulatory reforms,.

Incumbent network owners or service providers have existing, information-rich relationships with their fixed line customers. This legacy advantage translates into the potential for incumbents to make pre-emptive offers to customers, such as selective bundled discounted offerings with lock-in terms or period agreements.

This advantage may well be further aggravated by the ordering and provisioning process that is ultimately adopted by NBN Co. Based on a consultation paper it put out in November 2010 titled "Connecting to the National Broadband Network (Fibre Network)", AUSTAR is concerned that the NBN Co may utilise a system of first in time queuing of orders, and levying penalties on RSPs if connection forecasts are not ultimately matched to orders – a process which would substantially advantage incumbent operators in the following ways:

- Forecasting can be achieved with greater certainty due to the ability to ‘lock-in’ existing customers with attractive, pre-emptive offers; and
- Less jeopardy is risked upon missing initial forecasts, as existing customer relationships can be leveraged

AUSTAR recognises that incumbents should not be unduly constrained from vigorous competition, including price based competition. The focus of our comments is the particular advantage that incumbent network owners or service operators have over smaller competitors and new market entrants. AUSTAR and other prominent organizations are likely to be looking to utilise the NBN to build relationships with customers, provide innovative services and improve the existing market structure.

We strongly encourage the Government to take a proactive approach to ensuring that business rules adopted by the NBN Co are forensically examined and that anti-competitive conduct from RSPs is rigorously monitored, to ensure that the NBN policy delivers a true level playing field that can facilitate and deliver true change in Australia’s telecommunications market.

## 6. Conclusion

We would welcome an audience with the Committee to expand further on the comments we have raised in this submission. Please do not hesitate to contact me as per the details below.

Yours sincerely,

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