23rd February 2011

The Chairman
National Broadband Network Companies Bill 2010; and Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir / Madame

Re: National Broadband Network Companies Bill 2010; and Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010 Inquiry

Thank you for the opportunity to lodge a submission regarding the National Broadband Network Companies Bill 2010; and Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010.

I would like to address the following points:
1. Introduce myself
2. Public verses private ownership of communications infrastructure
3. Issues with technology choice
4. Legislation cherry picking provisions
5. The effects of the uncertainty created by the NBN decision
6. The destruction of private capital
7. Collateral damage caused by over reaching legislation
8. An industry observation

1. Please let me introduce myself. As a person with 30 years experience in designing building and maintaining rural and regional communications networks including but not limited to the re pit pipe and cabling of many rural towns in Queensland as part of the rural automation program in the 1980's to the design installation and maintenance of the first and only rural brown field fibre to the home network in Australia and as someone that has been running an Internet service since 1996 I would like to share some of my experience with you.

2. Also as some one who has worked with Telecom Australia as a government owned enterprise and as a publically listed corporation may I say that the business efficiency was more efficient under private ownership. I feel the same applies to the current NBNco versus private enterprise. To give an example the NBNco trial deployment in Tasmania reportedly cost $7400 per home passed. My company built a

small trial site and the cost per home passed of a brown field deployment was $1300 per home passed (100% underground) which also included training costs.

3. Then there is the issue of technology choice. NBNco has chosen ATM based equipment as their technology choice. There are also Ethernet based FTTH options and vendors which offer symmetrical access options. Then there is the issue of vendors. One of the worlds leading FTTH vendors Enablence has had staff based in Australia since 2005 and have been a large supplier of equipment to green field or new estate solution providers since 2005. This market segment will be severely affected by this legislation. That will set back the competition and innovation to a point it will most likely never recover from. Which solution to be deployed should be left up to the network builder not specified by legislation. The reason ATM is chosen is because ATM equipment is used as a legacy solution in the PSTN voice network, yet I do not know of any equipment on the market today that uses ATM as a home or business networking solution. All home and business networks use Ethernet based equipment. On this basis I would recommend Division 5A Technical standards relating to layer 2 bitstream services is struck out and this be left to the market.

4. With regard to the cherry picking provisions Schedule 1 part 3 pages 47 to 69 inclusive this should be struck out. I don't believe I have even seen such a capital and competition destroying piece of legislation in my working life. Given the McKinsey report stated that NBNco could compete then please let it. It is the only way to ensure the efficient use of capital.

Also In Section 3, 152ARA Layer 2 bitstream services to be supplied on a non-discriminatory basis. There seems to have been a change from the original draft where there was not to have been any price access discrimination. Given that the NBN is being built to overcome the issues raised by access seekers regarding Telstra's reported favorable pricing between its wholesale and retail divisions to access seekers who preferred to use Telstra's infrastructure. It is puzzling that such a change would be made when it in fact it will benefit Telstra more than any other carrier. The other issue that is puzzling is that the current NBN model will further entrench Telstra dominance due to the fact that Telstra will be able to bundle pay TV and mobiles with the NBN product to shut out other carriers. I would recommend that the original objective be reinstated and the Schedule 3 item 50 152AXC (4) be changed to "NBN must not discriminate between access seekers on any basis including but not limited to volume, number, quantity or amount of goods and services or something similar. The question was asked at an NBNco industry briefing on the connectivity for smaller ISPs, with the answer being an adamant "smaller ISPs need to use a wholesale aggregator" to connect to the NBN. So much for the NBN not discriminating between access seekers. This evidence suggests NBNco is already discriminating.

It is worth noting the NBN decision was thought out to address the issues raised by those access seekers that built their business plans on using others networks to reach their customers. In the discussion that has followed the infrastructure based network owners have not been considered. In fact the NBN legislation mentioned above has killed any

investment in new infrastructure. It is actually worse than that, the cherry picking provisions are delaying decisions on new network builds. There is also the issue of preventing network owners from upgrading existing infrastructure. It must be remembered that many network builds are built with some future planning considerations. Therefore the cherry picking and technical standards sections of the proposed legislation have the effect of denying infrastructure based carriers the ability to extract revenue from their investments without any compensation. In my case I have installed communications pit pipe and conduit over the last 6 years and I am currently offering services over some but not all of this infrastructure. The passing of the bill mentioned above will strand much of my infrastructure and there is no compensation being offered even though my ability to expand and utilise that infrastructure will be effectively taken away.

What worries me is that there may be more such poorly drafted bills that will also attempt to prevent private companies from servicing customers which I do not know about. This is going to be a common issue from now until the NBN is either built or the certainty that business requires is delivered. Ten or eleven years of uncertainty will not serve the Australian community at large.

5. It is worth noting that due to the NBN decision; there currently exists a great deal of uncertainty in the communications sector. This has resulted in lower capital expenditure and as a result some of the contractors have not had the continuity of work to sustain their businesses. Some carriers are also trying to divest their networks, thus lowering competition and innovation.

Some of the uncertainty relates to

Having to build any networks to the NBNco specification and the access requirement to supply NBNco access at a price that NBNco will determine.

To my knowledge the NBNco specification has not been publicly released yet Secondly the price at which access will be provided has not been published as well

Given that NBNco are going to take 12 to 20 years to build the NBN what measures are to be put in place to allow customers to access services in the meantime. What incentives are there for current Telco's to provide services when the "The Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010" threatens to make such investments unviable?

NBNco plan on rolling out a wireless network between now and 2013, but they are not going to (based on their industry briefings) offer this network to those in their proposed fibre network coverage area nor are they going to supply business grade services via this network

POI connectivity is to any combination of 120 locations. POI connections will not be redundant. Much, all the critical parts of the current communications network are built with redundancy. Can the country afford the downtimes associated with a network failure?

6. The Question that no one seems to want to answer is, why are we going to destroy private Telco capital because we need a fibre to the home network capable of speeds in excess of 12 megabits per second when it is ok to offer contended 12 megabits per second wireless services to those not in the fibre foot print? In fact, in the wireless areas the maximum speed down will be 12 megabits and the maximum uplink speed will be 1 megabit. The minimum has not been specified by NBNco

Why should the above legislation be passed to allow a government owned entity to basically be a new PMG.

7. The collateral damage caused by legislation is that politicians believe they have all the answers. They rely too heavily on advisors that do not have expertise and then get things very wrong. Consider this. I don't know how many times I have heard the phrase the "old copper". The background behind it is that someone with a vested interest has stated it, it has then been repeated many times then it becomes an accepted fact, when in fact it was false from the start. As someone that has expertise in this area, the facts should be represented in this way.

Fact: The most fault free part of the local loop is in many cases the oldest part of it. There are extremely few faults in main cables between the exchange and the DA pillars. These main cables are installed much deeper than most other services, go through concrete manholes etc.

Fact: I can tell you with authority that many of the CAN faults are due to poor repair processes and maintenance practices. Why because many of the repair staff aren't backed up with timely and appropriate support. To give an example or examples. How many times do you see driving down the road a slave cable with a temporary joint in a plastic bag? In a lot of cases you only see the yellow guards with grass growing up through them? Why? Well what happens is someone cuts a cable because they didn't ring dial before you dig, drives over a pit in a vehicle and breaks the lid damaging the cable, a tree comes down over the cable etc etc etc. A Telstra faulty gets a job and an expectation of a timeline in which the fault will be cleared. He or she drives out locates the damage, rings his dispatcher and is told to make the site safe get the customers back on the air and fill in a report for a contractor to come and do the proper repairs. There is a budget which controls how many of these jobs find a contractor. The joints sit in plastic bags in the sun which either act like a sauna and condense water or break down and let the rain and storm water into the cables. This can be changed by employing a "fix it the first time policy" which is cheaper to deploy, however this does not work well with

the appointment time based system used by Telstra and “legislated” by the government under the customer service guarantee legislation. Fix it properly the first time also requires access to resources which doesn't sit well with staff planning in relation to appointment systems. Ie to fix a handset fault is a finite amount of time whereas to fix a customer cable may require machinery and additional hands on deck that can require the job is 2 hours to 2 days depending on what is required. The question then comes down to who is really responsible Telstra or the careless person that didn't pot hole or get dial before you digs, or the tree clearing policy that prevented preventative maintenance. FTTH will face the same issues, however the repair timeframes will be longer. This is what I refer to as collateral damage by legislation. I can only ask that when such legislation is being considered that the appropriate parties with real experience are consulted. In the case of NBN this has not happened. As one of the very few companies (2 maybe3) to roll out a Brownfield FTTH service in Australia I would have thought some contact would have been sought. I am not aware of any other FTTH providers in the Greenfield space that have been contacted either.

Then we have the line “the slow copper”. There are currently trials where there are 300 megabits per second being offered over copper.

Which raises the question “why destroy private capital to build a network in areas where the current copper is capable of 12 megabits per second” Why isn’t the focus on delivering solutions to those that do not have the magical 12 megabits per second?

Then there is the issue of what customers want. Many want cheap access not necessarily fast access and mobility is becoming demanded.

There is also an article that has been published on zdnet which backs up some of my comments above.
<Quote>
Reference
http://www.zdnet.com.au/nbn-s-tilted-playing-field-339307868.htm

No helping hand for competitors
The proposed NBN Bill has some new provisions dealing with carriers who seek to compete with the NBN head-on by offering a fixed-line high-speed broadband service.

Any network owner who builds a fixed-line network capable of supplying data services at download speeds of more than 25Mbps, or any network owner who upgrades or extends its fixed-line network from now on to make it capable of those speeds, cannot supply a fixed-line high-speed broadband service on that network unless it also offers a "Layer 2 Bitstream" service on the network.

The Layer 2 Bitstream service has to be offered on the same open-access wholesale arrangements as applied to NBN Co. The draft Bill calls this new

or upgraded network a "super-fast telecommunications network".

Access will have to be provided on the same transparent, equivalent and non-discriminatory terms as applied to NBN Co: any departures from standard terms must be made public and be based on efficiency; any discounts that will be offered must be in a special access undertaking, and the terms must be non-discriminatory.

However, there are some stings in the detail. A special access undertaking can only be lodged with the ACCC for a service that is not yet declared. As soon as the ACCC declares the service (which the Bill requires it to do almost immediately and irrevocably), no one can lodge a special access undertaking for this Layer 2 Bitstream service.

So, if you want to be able to offer volume discounts (to be able to match or better any discounts NBN Co offers), you will need to lodge the special access undertaking setting out those discounts very soon (before the ACCC declares the service). That will be difficult if NBN Co does not lodge its special access undertaking first.

It will be impossible if you only decide to build or upgrade after the service has already been declared. So, NBN Co is unlikely to face competitively priced services on these competitive networks.

Also, it is not possible to discriminate in favor of yourself. So if you supply a Layer 2 Bitstream service to yourself, you will not be able to give yourself better terms than you give to your other customers. This removes a key incentive for investing in such a build or upgrade.

Ignoring the obligation to supply the Layer 2 Bitstream service will attract multimillion-dollar fines.

Rather than making sure there is a level playing field for the NBN, it seems the playing field is tilted in favour of making such a build or upgrade as unattractive and difficult as possible. With the Bill to be debated in the House of Representatives and the Senate early next year, now is the time to act for those seeking a more level playing field.

<End quote>

8. Industry Observation. Why is the industry in the situation it is today?

From an industry point a view it is because of a failed regulatory environment. NBN will further fail the Australian public for the following reason. While the NBN will prevent

any party building a competitive position in the fixed line space, it ignores the issues of bundling where a party can use either or their competitive advantage in another related area such as, mobiles, and pay TV. There is also the issue of companies controlling some Pay TV or content such as sporting content. There are other examples.

Some examples of where government intervention in the market has stifled the market.

When the industry was developing in or around 1998 the government paid Telstra to provide local call dialup access Australia wide. Telstra was allowed to use a lower cost access model than other sections of the industry which effectively stopped a broader dial infrastructure roll out. This effectively took the legs out from under the industry and it took time to recover.

In 2004 when broadband was an issue the government set up the HiBIS scheme. It was so successful that it in turn kept running out of money and providers were getting encumbered with equipment and the DCITA / DBCDE kept changing the rules. Satellite was given a free run whereas other technologies were disadvantaged. The industry went from 47 to 3 DBCDE registered providers not counting satellite providers. It simply became to risky to deal with DBCDE

In 2007 to present we have had 3 years of little or limited rollouts due to the uncertainty due to NBN marks 1 and 2

These are just 3 examples, there were a number of others as well

The other issue in regional Australia has been the lack of spectrum released by the ACMA. This is a major part of the problem.

In essence the industry has never been able to get to its feet without Governments interfering in a negative way. Now we have a NBN bill which is going to punish any Telco that competes with the NBN. It is more concerning that it is likely that the parliament will pass such a capital destroying piece of legislation. More importantly the damage such a piece of legislation will do to the market may well be fatal for any of the smaller Telco's. As such the innovation that has been happening over the last 6 years will be lost.

If the NBN has such a good product and is able to compete in the market place as the McKinsey report stated then there should be no need for such a retrograde piece of legislation.

The minister keeps stating that the market has failed, although the question that needs to be asked of him is, why is it that he thinks the market has failed because it hasn't built the NBN in a 3 year election cycle timeframe, when his

same NBNco has already taken 3 years and will take a further 12. In fact the market has delivered continual improvements from 1996 to 2007-8 before the NBN sledge hammer was used to slow or kill any further upgrades. What is true is that there are sections of the market that are unprofitable and the market needed assistance to address the issues. Can the minister then explain why he and his department ignored calls for changes to the ABG guidelines to address the misuse of ABG funds to destroy any alternative to satellite broadband in those unviable areas? Can the minister explain why the wireless industry has been and continues to be starved of spectrum for many years? It is clear to me that the market has not failed, but rather the regulatory environment and the actions of the minister and his departments. This whole sorry mess should go to the independent productivity commission to prevent any further industry damage.

Yours Sincerely

Tim McCullagh
Manager

HaleNET