

Business  
Council of  
Australia



# **Business Council of Australia**

**Submission to the**

**Senate Select Committee on the National Broadband  
Network**

**on the**

**Exposure drafts for the National Broadband Network  
Company**

**March 2010**

The vision of the Business Council of Australia is for Australia to be the best place in the world in which to live, work, learn and do business. We have set an aspiration for Australia to be in the top five countries in the OECD by 2012, measured by GDP per capita. Australia's economic infrastructure will make a key contribution to realising that goal.

The BCA welcomes this opportunity to comment on the exposure draft legislation *National Broadband Network Companies Bill 2010* and the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010*.

Investment that raises the speed, quality and coverage of high-speed broadband provision in Australia has the potential to contribute to innovation, productivity and economic growth in the coming decades. Australia's telecommunications policy framework should encourage competition and efficient investment to meet the long-term needs of consumers as technology and market conditions evolve in the years ahead.

The draft Bills broadly set out the proposed governance and access arrangements for the NBN Company ("NBN Co."), an organisation that will play a key role in this sector's future development.

The legislation can lay a stronger foundation for realising the productivity benefits from high speed broadband by more clearly defining the scope of NBN Co. operations, by providing for the strict observance of competitive neutrality and by strengthening the reporting requirements for NBN Co.<sup>1</sup>

The key points in the submission are:

- The proposal to allow NBN Co. to expand its operations in retail and wholesale telecommunications markets under ministerial discretion is a departure from

---

<sup>1</sup> The BCA supports the application of the Commonwealth's policy guidance to the development of NBN legislative frameworks as set out in *Governance Arrangements for Commonwealth Government Business Enterprises 1997* and *Australian Government Competitive Neutrality Guidelines for Managers*, February 2004.

earlier policy announcements and is not supported by a strong policy rationale or business case. Significant uncertainty will be created in the sector if ministerial discretion is legislated, with the potential for lower private investment, a less efficient market and detrimental outcomes for business and household users of telecommunications products. Ministerial discretion in relation to NBN Co. activities should be removed from the legislation. Instead, the legislation should more clearly define the NBN Company's 'wholesale only' operations.

- The legislation should reflect the government's commitments to competitive neutrality. This will provide assurance to Australia's wireless and fixed line network operators that NBN Co. will not receive unfair advantage due to its public ownership.
- Any future minority shareholders in NBN Co. should also have access to information that is to be provided to the government under the proposed legislation.
- The government should now release the NBN implementation study publicly and in full. It is disappointing that the implementation study was not made publicly available to inform this consultation process.

### *Context*

The government's policy settings in the telecommunications sector should be designed to raise productivity from the use of information and communications technology in Australia.

This requires a clear, rational and stable policy framework so that companies are encouraged to invest and compete to bring leading-edge telecommunications products to businesses and households at affordable prices and in the most efficient manner.

The implementation of a fibre to the premise network by NBN Co. will have a significant impact on competition and investment in the sector. It is important to clearly define the NBN Company's role.

Australia's policy settings in the telecommunications market have undergone a number of major changes in recent years. The draft bills propose yet further substantial alterations to policy settings by allowing the NBN Co. to potentially expand its activities in wholesale and retail markets beyond the original 'wholesale only' project scope.<sup>2</sup>

The interests of consumers will best be served and productivity gains will be higher if the government's fibre-to-the-premise investment addresses a clearly identified case for government intervention and then complements the activities of private companies throughout the wider telecommunications market. Companies need a level of stability in the policy framework, and fewer surprises, in order to make the long-term investments needed to bring new and better telecommunications products to market. Uncertainty around the role of NBN Company, particularly given its public ownership, will raise investor uncertainty. Clearly, if policy settings have the effect, intended or otherwise, of companies deferring or withholding investments, it will take longer for new technologies to get to market and Australia's productivity will fall behind.

The ministerial discretion proposed in this legislation changes the NBN Company's role in the market, at least as understood from earlier announcements by the government and NBN Co., and creates significant uncertainty over its future operations.

The BCA in its earliest comments on the NBN proposal called on the government to clarify its policy goals regarding wholesale market competition and future private investment in the telecommunications sector during the transition to the NBN and beyond. The BCA has also consistently called on the government to provide publicly and in full a cost-benefit analysis that sets out the investment case for the NBN rollout, including the broader consumer, productivity and economic benefits from this government investment.

We made these comments because rigorous policy development is critical to ensure that government regulation and spending measures in the telecommunications sector are

---

<sup>2</sup> The government has consistently stated that the NBN would be 'wholesale only'. The CEO of NBN Co., Mike Quigley, recently indicated that NBN Co. would provide a layer 2 bitstream service between end user premises and a number of points of interconnect (see M. Quigley, presentation to the 'Realising Our Broadband Future' conference, Sydney, 10 December 2009 at [www.broadbandfuture.gov.au](http://www.broadbandfuture.gov.au)).

supporting private investment, productivity and economic growth and not diverting resources to inefficient means.

The government has now received an implementation study on the national broadband network and it is hoped that this document will answer questions around the net benefit of the NBN, the government's role as owner and regulator of the NBN and on the future market structure.

The BCA urges the government to now release the NBN implementation study publicly and in full. It is disappointing that the implementation study was not made publicly available ahead of this consultation process and that the analysis in the study could not be drawn upon to inform responses to the proposals in these Bills.

The BCA supports regular public reporting and a high level of transparency for the NBN Co. operations while it is in majority government ownership.

The following sections address specific issues raised by the bills of interest to the BCA.

#### *Operations of NBN corporations*

The draft National Broadband Network Companies Bill 2010 provides for the Communications Minister to exempt NBN Co. from the requirement for NBN Co. services to be provided on a wholesale only basis. While the minister will be required to consult with the Australian Consumer and Competition Commission, the scope to use the discretionary power to expand NBN Company's operations appears to be unlimited.

The ministerial discretion included in the draft legislation potentially allows NBN Co. to offer fully integrated wholesale services and direct supply to end-users. It therefore allows NBN Co. to expand its product offer further into the value chain, a significant departure from both the original policy intent and from the understanding in the industry and wider community about the NBN Company's function and operation in the market.

The change in policy has no obvious supporting rationale nor an assessment of the net benefits from this greater level of government intervention in the market. It is also puzzling that the government would take action to remove vertical integration in the fixed line sector only to then replicate the same integrated structure within a government

business. Furthermore, the suggested ministerial discretion lacks proper safeguards and will create uncertainty for competing private investors as long as it is in place.

The expansion of NBN Company's scope of operations and the inclusion of ministerial discretion should be removed from the draft legislation. Instead, the legislation should provide better clarity around the NBN Company's role in the market. That is, as far as can be ascertained from the government's statements to date, it should clearly define NBN Company's role to help meet the government's policy objectives by increasing bandwidth in the access network and enable other market participants to offer high-speed broadband products to end-users.<sup>3</sup>

### *Competitive neutrality*

Competitive neutrality principles agreed by all governments at COAG in 1995 state that government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership, unless it is demonstrated that the benefits exceed the costs.<sup>4</sup> Competitive neutrality imposes a set of obligations on all Government Business Enterprises (GBEs) in relation to taxation, debt and regulatory neutrality, full cost attribution and setting prices to earn a commercial rate of return.

The Commonwealth's competitive neutrality policy guidance advises that the management of NBN Co. will be required to comply with the following:<sup>5</sup>

- Taxation neutrality – factor taxation in to the cost base, and therefore prices, of NBN Co. activities in order to maintain tax neutrality between the NBN Co. and its competitors or potential competitors

---

<sup>3</sup> The government's policy objective is to provide broadband speeds up to 100 mb/s to 90 per cent of end user premises and 12 mb/s to the remaining 10 per cent.

<sup>4</sup> Council of Australian Governments, Competition Principles Agreement – 11 April 1995 (as amended to 13 April 2007).

<sup>5</sup> Australian Government, *Competitive Neutrality Guidelines for Managers*, February 2004.

- Debt neutrality – adjust the NBN Co. cost base, and therefore prices, where money is borrowed at a rate that reflects the credit risk of the Australian Government as a whole rather than a rate reflecting the credit risk of that type of business activity
- Regulatory neutrality – adjust the NBN Co. cost base, and therefore prices, by an amount equivalent to any advantage NBN Co. accrues by not being subject to similar regulatory arrangements and obligations as its competitors
- Rate of return – ensure that the prices of NBN Co. products are at least sufficient to earn a commercial rate of return overall and over a reasonable period of time.
- Cost allocation – ensure that prices charged reflect full cost attribution for the NBN Company's business activities.

Strict observance of the competitive neutrality policy will provide greater assurance that NBN Co. is not receiving undue advantage as a result of government ownership, and will help to encourage investment by other market participants. It will, of course, also support a more efficient market and greater competition as envisaged when the policy was announced.

Investors in complementary and substitutable products, including other fixed-line network operators and Australia's fast-growing wireless networks, should not be put at a competitive disadvantage to a new government-owned business. The government should reflect these commitments to competition policy and competitive neutrality in the legislative framework for the NBN Co. to guard against either any change in policy or relaxation of the observance of the policy throughout the period of the network build and in the lead-up to its eventual divestment.

*Minority shareholders in NBN Co. should have access to same information as ministers*

The government's stated intention is for private investors to hold a minority interest in NBN Co. in the period leading up to its eventual complete divestment. On current estimates this is likely to take place in around thirteen years (or sometime around 2023) but there is no firm commitment to this timetable. The legislative framework for NBN Co,

therefore needs to more explicitly detail the rights of minority shareholders over this period.

Part 4 of the draft National Broadband Network Companies Bill sets out that the ‘Communications Minister and the Finance Minister may give NBN Co. a written direction requiring NBN Co. to give the Communications Minister and the Finance Minister a specified financial statement or statements for a specified period or for each specified period’. Other reporting requirements in the draft legislation include notifying the Communications Minister and the Finance Minister of ‘significant events’ and preparing a corporate plan annually.

The explanatory notes state that these provisions are to be included in the Act because the relevant reporting obligations under the Commonwealth Authorities and Companies Act 1997 will not apply if NBN Co. becomes only partly owned by the government, as is intended.

The Bill does not, however, explicitly set out the rights to information for any future minority non-government owners of NBN Co. The government’s guidelines say that “where the Commonwealth decides to move to, or adopt, partial ownership of a GBE the GBE governance arrangements should apply to the maximum extent possible, consistent with minimising the risk of a potential oppression action by minority shareholders under section 260 of the Corporations Law.”

For the avoidance of any doubt, the Bill should set out the basis on which minority equity owners can request access to any information provided by NBN Co. to the government. In principle, all information provided to the Ministers for Communications and Finance should also be provided to minority equity holders.