



**Submission to Senate Select Committee on NBN
NBN Companies Bill 2010
Access Arrangements Bill 2010**

March 2010

ATUG is pleased to provide comments on the NBN Companies Bill 201 to the Senate Select Committee. These comments have also been provided directly to the Department of Broadband Communications and the Digital Inquiry in our submission on the Draft Legislation.

The comments are based on member feedback from a number of forums held during 2009 and into 2010 on NBN related topics.

ATUG has maintained consistent positions through the development of NBN policy and legislation. The 2009 and 2008 positions are also included below.

ATUG comments are highlighted in the Explanatory Notes: **ATUG**

2010 - ATUG NBN Business User Policy Principles

- The Long-term Interests of End Users must remain the focus of NBN policy and regulatory decisions, whether they are made by Government Regulators or by Industry in Self-Regulatory processes

Long-term interests of end users means:

- Promoting competition
 - Ensuring any-to-any connectivity
 - Encouraging economically efficient use of, and efficient investment in infrastructure
- The big benefits from the Government's NBN Policy will emerge when there is over 90% take up of the higher speed services offered over the NBN. Take-up must be encouraged.
 - Business needs for speed, service levels, service security and rapid restoration must be factored into NBN planning – consumer grade is not good enough for business; best endeavours Internet grade is not good enough.
 - Migrating to the NBN should not cause any detriment to business operations. Planning periods must take account of business budget and capex cycles.
 - NBN must be a wholesale only operator BUT if higher level wholesale network services, to support application and content services innovation, are not developed by market players, NBN should be required to supply them.
 - Customer experience must be consistent across the network elements that will comprise the National Broadband Network, whether these elements are owned by NBN Companies or other infrastructure owners.

2009 - ATUG's Board discussions

- End users want an “NBN” - a range of business grade services including access to dark fibre, higher speed service offerings, point to point Gbps options, service/content innovators over L3 wholesale access platforms
- End users want an “NBN that works” – high quality NBN offering reliability, resiliency, redundancy. A “patchwork NBN” comprising different assets may present a problem with end to end quality of service.
- End users want an “NBN that works all the time” – simple, clear provisioning and repair arrangements, seamless migration
- End users want “an affordable NBN” – uniform national pricing with identified subsidies being funded by Government
- End users want more choice and stronger competition – e.g., Network Owners bundling Services and Service Innovators bundling Comms Services; policy must avoid an unintended consequence of reduced competition
- End Users want access to fit for purpose services – including low bit-rate, low cost services for sensor networks, security services

2008 - Key Issues for ATUG in member discussions on the NBN

- **Policy Objectives** – the **Long-term Interests of End Users** and an effectively competitive services (access and content) market place.
- **Affordability** is the key to take-up. Regulation must support the cost effective building of the NBN as well as recognise that effective competition is the strongest tool for delivering affordable prices. An entry level “safety-net” package should also be developed
- **End User Choice** – network design is central to competition and choice. Only designs that promote competition should be accepted. When infrastructure competition is not possible, services competition based on open access and service equivalence at a wholesale level must be ensured.
- **Wholesale Service Equivalence** and effective services competition can only be assured by establishing:
 - clear separation and no ownership conflict between wholesale-only (NBN Company) and retail service providers, and
 - a new pro active, pro competition independent industry based oversight body, with the task of implementing the Open Access and Equivalence Frameworks

- **Customer Experience** in the NBN environment - must be carefully managed to ensure a successful transition and good end user outcomes. Service quality and security standards must be established at a level to reflect the key role of the NBN in the lives of all Australians.
- **Ubiquity** – all Australians must be connected to the NBN. Ubiquity is not only about network availability but also about affordability and accessibility

NATIONAL BROADBAND NETWORK COMPANIES BILL 2010

AND

**TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL
BROADBAND NETWORK MEASURES—ACCESS ARRANGEMENTS)
BILL 2010**

EXPLANATORY NOTES FOR EXPOSURE DRAFTS OF BILLS

(Circulated by authority of the Minister for Broadband, Communications
and the Digital Economy, Senator the Honourable Stephen Conroy)

INTRODUCTION

These exposure drafts have been issued to facilitate consideration of the proposed legislation prior to it being introduced into Parliament. The Government is willing to consider amendments to the legislation if compelling arguments are put forward.

The exposure drafts build upon the Government's announcement on 7 April 2009 that it would establish a company to build and operate a new super fast National Broadband Network (NBN). The new network will use Fibre-to-the-Premises (FTTP) technology, supplemented with next generation wireless and satellite technologies to deliver superfast broadband services.

NBN Co was established on 9 April 2009 to roll-out and operate the network. A key element of the Government's NBN initiative is that NBN Co is to operate as a wholesale only company and provide access to the NBN to all retailers on an open and equivalent basis. While the Government made clear that it would welcome private sector investment in the company, ownership restrictions would be introduced to protect the company's wholesale-only status.

ATUG: support the wholesale-only status of NBN Company. NBN Co is a policy tool of Government to deal with market failure which arises when there is incentive conflict between wholesale and retail divisions within one company. It is for this reason that ATUG is wary about an effective wholesale market for higher level (Layer3) services developing by companies with a direct interest in providing retail services. ATUG wants a "reserve power" for the Minister to require NBN to provide these higher level wholesale services IF the market does not in fact develop a suitable range of higher level wholesale services. NBN policy and legislation must be forward looking to encompass a Digital Economy where a range of service providers develop "networks of services" which are not provided on a retail basis but as part of service delivery eg water level sensor networks, transport management networks, home based health care services, energy demand management networks. ATUG does not see a role for NBN to provide retail services.

In the discussion paper also released on 7 April 2009, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, the Government indicated that it would introduce legislation that establishes:

- governance, ownership and operating arrangements for the wholesale only NBN company; and
- the access regime to facilitate open access to the NBN for retail level telecommunications service providers.

ATUG: Given the patchwork nature of the National Broadband Network (with components provided by a number of players in delivering an end to end service to end users), ATUG would like to see the access regime applied to NBN Companies also applied to other network owners where the facilities provided by those companies have "bottleneck" characteristics. An example would be fibre networks in Greenfields areas or networks in CBD building where despite multiple

fibres in the street, building access cannot be secured due to riser congestion.

The Government also announced that it intends to sell down its interest in NBN Co within five years after the NBN is built and fully operational, consistent with market conditions and national and identity security considerations.

With these clear policy objectives as the starting point, during July and August 2009 the Government held a consultation process on the NBN legislative framework. More than thirty submissions were received and published on the website of the Department of Broadband, Communications and the Digital Economy. The Department has also consulted with the advisers to the Implementation Study on the NBN and NBN Co Limited.

Overall, submissions strongly supported clear obligations on NBN Co to offer equivalent access to all customers, along with clear oversight by the Australian Competition and Consumer Commission and up-front certainty on prices and terms and conditions of access.

ATUG: Equivalent access is an essential feature of NBN Co services. The scale economies achieved through the Government's investment in NBN infrastructure must be available to all retail players. Any price discrimination should be based on objectively identified efficiencies and not simple volume. ATUG does not want the current dominance problem carried forward into an NBN environment. ATUG members want to see increase choice for "national" buyers as a result of Government investment in NBN – unwarranted price discrimination may have the unintended consequence of limiting choice in the market for national services such as banks, government agencies, health providers.

NATIONAL BROADBAND NETWORK COMPANIES BILL 2010

OUTLINE

The National Broadband Network Companies Bill 2010 (the NBN Companies Bill) establishes the regulatory framework covering the ownership and operations of NBN Co, and the arrangements for the sale of the Commonwealth's stake in NBN Co. It should be read together with the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (the Access Bill) and Part XIC of the TPA, as proposed to be amended by the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the CCS Bill).

There are seven parts to the NBN Companies Bill. Part 1 comprises of the preliminary sections, including commencement, objects and definitions. Part 2 deals with the operations of NBN Co Limited (NBN Co), NBN Tasmania Limited and any additional wholly-owned subsidiaries of NBN Co and sets out rules about the supply of services by NBN Co, including that NBN Co must supply eligible services on a wholesale basis. Part 3 deals with the ownership and control of NBN Co and sets out Commonwealth majority ownership provisions and arrangements for terminating those provisions and introducing an NBN Co sale scheme. Division 3 of Part 3 establishes a head of power for the Communications Minister to make regulations concerning unacceptable private ownership or control situations, along with enforcement measures. Part 4 sets out reporting obligations on NBN Co while the Commonwealth majority ownership provisions are in force. Part 5 establishes an anti-avoidance mechanism which states that NBN Co must not enter into, begin to carry out or carry out a scheme for the sole or dominant purpose of avoiding the application of any provision of the Act. Part 6 provides for the making of injunctions in relation to breaches of the Act. Finally, Part 7 sets out miscellaneous provisions, including provision that NBN Co is not a public authority and that the *Public Works Committee Act 1969* does not apply to NBN Co.

ATUG: supports Section 3, the Objects Clause:

- (1) The main objects of this Act, when read together with Part XIC of the Trade Practices Act 111974 are as follows:
 - (a) to provide a regulatory framework for NBN corporations that promotes the long-term interests of end users of carriage services or of services provided by means of carriage services
.....

These matters are explained in further detail below.

Operations of NBN Co

Section 5 of the NBN Companies Bill provides that an NBN corporation is defined as:

- a. NBN Co Limited; or
- b. NBN Tasmania Limited; or
- c. a company that is a wholly-owned subsidiary of NBN Co.

This section also defines a ‘wholly-owned subsidiary’ as having the same meaning as in the *Corporations Act 2001*. Therefore, any subsidiary company that is wholly-owned by NBN Co would be included in this definition.

This definition is also provided for in the application of the Standard Access Obligations (SAOs) in the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010.

ATUG: understands the definitions above but would make the point that from an end user perspective a NBN service may be delivered through a number of network elements, some of which may be owned by NBN Co, some of which may be owned by other organisations. ATUG wants to see end to end service choice and quality. NBN Company has been clear about the limits of its task. Discussions with ATUG indicate that NBN’s task is to construct an access network (GPON Mbps for residential, options for business grade services, Point to Point Gbps, case by case, for business and Government) and to ensure contestability in backhaul transmission where this does not exist. Switching and Core Network Services are to be provided by Network Service Providers. Retail Services are to be provided by Retail Service Providers. Where NBN can acquire suitable assets they will use these rather than build. ATUG wants to be sure that the NBN Access Regime applies to all elements of NBN services (where these are bottleneck facilities), not just those delivered by NBN Co.

In these Explanatory Notes, references to NBN Co should generally be taken to apply also to any wholly-owned subsidiary of NBN Co, including NBN Tasmania Limited. The exceptions are the sale and ownership provisions in the NBN Companies Bill, which apply only to NBN Co Limited, and any existing legislative provisions which do not apply to subsidiaries of Commonwealth-owned companies (such as some reporting obligations under the *Commonwealth Authorities and Companies Act 1997* (CAC Act)).

Section 9 provides that NBN Co must not supply an eligible service to another person unless the other person is a carrier or a service provider. This section ensures that NBN Co will only supply services on a wholesale basis, thereby enshrining in legislation one of the key elements of the Government’s NBN announcement.

ATUG: NBN can be limited to wholesale services without customers being limited to carriers or service providers. Alternatively the obligations on carriers and service providers not selling retail services to the public could be reviewed to allow other organisations to become carriers for the purpose of buying wholesale services from NBN Company.

Section 9 also provides that the Communications Minister may exempt a specified eligible service from this rule, subject to conditions (if any) specified by the Minister. This exemption power provides important flexibility including, if appropriate, to allow NBN Co to offer services directly to certain end-users, for example government agencies. The Communications Minister is under an obligation to consult with the ACCC before exempting a service under this section.

ATUG: supports this provision on the basis that the services are wholesale services rather than retail services for reasons outlined earlier.

Section 10 provides that NBN Co must not supply a content service. A content service is defined at section 15 of the *Telecommunications Act 1997* (Tel Act) and covers services such as broadcasting services, on-line information services or on-line entertainment services. Section 10 clarifies the obligation that NBN Co must supply only wholesale services.

Section 11 provides that a carrier licence held by NBN Co is subject to a condition that NBN Co must comply with any applicable rules in section 9 or 10. Any breach by NBN Co of the rules at sections 9 and 10 would therefore be dealt with as a breach of carrier licence, and the enforcement mechanisms under the Tel Act would apply.

The Government's clearly stated policy is that NBN Co is a wholesale-only company. However, the Government considers that NBN Co should not be prevented from purchasing telecommunications companies, even if they have retail businesses, if such an acquisition could support the early development and rollout plan of the NBN. Clearly, NBN Co would still be subject to the wholesale-only obligation in section 9 and would need to set in place clear transitional arrangements for divesting any retail operations involved in such acquisitions. NBN Co will need to notify the Commonwealth of any proposed acquisitions, including acquisition of a significant shareholding, as part of its reporting obligations under the CAC Act and under Part 4 of the NBN Companies Bill. Consideration could also be given to amending NBN Co's constitution to require it to seek approval from shareholders for any significant acquisitions.

Section 15 states that a condition of NBN Co's carrier licence may be to require it to comply with proposed section 152CJB of the *Trade Practices Act 1974* (TPA) in relation to a specified eligible service that is supplied, or is capable of being supplied, by NBN Co. Such a service would be a mandatory service, and would be specified by the Communications Minister following consultation with NBN Co and the ACCC (as provided for in section 16). Section 152CJB of the TPA (to be inserted by the Access Bill) would require NBN Co to either lodge a special access undertaking (SAU) or to publish a standard form of access agreement (SFAA) in relation to a service specified in NBN Co's carrier licence for this purpose. This would also mean that a mandatory service under this section would be treated as a declared service and therefore subject to the SAOs.

Section 15 also makes it clear that a condition of a carrier licence held by NBN Co may prohibit NBN Co from supplying a specified carriage service to carriers or service providers.

Section 15 clarifies that the Communications Minister may deem services that NBN Co must or must not supply, using the power, under section 63 of the Tel Act, to place a condition on NBN Co's carrier licence. Should the Government consider that NBN Co is not supplying a specific service that may have socially beneficial outcomes, or conversely that its supply of a service may hinder the development of competition, this section allows the Government to intervene to ensure that services are supplied or not supplied.

Any licence condition made by the Minister to require NBN Co to supply, or not to supply, a service may declare that the carrier licence condition applies in the circumstances or for the duration specified in the instrument.

Should the Minister make a condition of NBN Co's carrier licence prohibiting the supply of a specified service, the ACCC would not be able to declare the service under section 152AL of the TPA. Section 152CJG of the Access Bill makes clear that, if a prohibition is in place, NBN Co is taken not to be capable of supplying the service.

The Government has announced that its objective is to connect 90 per cent of homes, schools and workplaces with FTTP infrastructure that is capable of providing broadband services with speeds of 100 megabits per second. The remaining premises will be connected with next generation wireless and satellite technologies that will be able to deliver 12 megabits per second or more to people living in more remote parts of Australia.

Under section 63 of the Tel Act, the Communications Minister may declare that a carrier licence is subject to conditions. Historically, the Government has established coverage obligations on a carrier by placing a condition on its carrier licence. For example, this mechanism was used in relation to Optus' network roll-out and Telstra's CDMA switchover.

ATUG: would support the clear statement of Government policy in coverage obligations on NBN Co. Ubiquitous access is a clear ATUG position. Unless there is almost ubiquitous access and uptake, business will not invest in the process changes which could be enabled by NBN services.

Commonwealth majority ownership and arrangements for the transfer of the Commonwealth's equity

Part 3 of the NBN Companies Bill sets out a range of measures to give effect to the Commonwealth's commitment to sell down its stake in NBN Co within five years from when the network is built and fully operational, subject to market circumstances and security considerations.

Sections 18 and 19 make clear that the Commonwealth must retain majority ownership of NBN Co until such time as a declaration is made by the Communications Minister, which will have the result that the Commonwealth majority ownership provisions will cease to have effect. These clauses give effect to the Commonwealth's policy to retain majority ownership of NBN Co until it is built and fully operational. The Bill provides in subsection 19(2) a number of outcomes that would result in NBN Co no longer being majority owned by the Commonwealth. If NBN Co intentionally engages in conduct which contravenes the majority ownership provisions a penalty is provided for in section 20 (under the *Criminal Code Act 1995*, where a law creating an offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element).

Section 21 provides that the Commonwealth majority ownership provisions cease to have effect when the Communications Minister makes a declaration under

paragraph 22(1)(c) or 22(2)(a). Section 22 provides that the Minister must initially declare, by 30 June 2018, that the National Broadband Network (NBN) should be treated as built and fully operational.

The declaration that the NBN should be treated as built and fully operational must be tabled in each House of Parliament within 15 sitting days of that House after making the declaration.

While the Government's clear intention is for the NBN to be rolled-out within eight years, the section allows the Communications Minister to extend the time to make a declaration. In such a case, the Communications Minister must make a subsequent declaration that a period of no more than 12 months is a 'declared pre-termination period'. The Communications Minister may continue to declare a declared pre-termination period (with each period being no more than 12 months) until he or she can declare that the NBN should be treated as built and fully operational.

Sections 24 and 25 are designed to deliver the Government's commitment that the Commonwealth will transfer its remaining equity in NBN Co to other persons within five years after the network is fully built and operational. The Finance Minister must, within five days of the Communications Minister declaration, declare either that conditions are suitable for entering into and carrying out an NBN Co sale scheme, or, if conditions are not suitable, a 'declared sale deferral period'. The Finance Minister can extend or further extend the five year period for a period of no more than 12 months. In deciding whether to extend the period, the Finance Minister must have regard to:

- a. NBN Co's governance arrangements;
- b. NBN Co's business record;
- c. market conditions;
- d. such other matters (if any) as the Finance Minister considers relevant.

Declarations must be tabled in each House of Parliament within 15 sitting days of that House after making the declaration.

If the Finance Minister has declared under section 25 that conditions are suitable for the transfer of the Commonwealth's remaining equity in NBN Co to other persons, an NBN Co sale scheme must be brought forward for the selling down of the Commonwealth's remaining (majority) stake. Prior to the NBN being built and fully operational, the Commonwealth may transfer up to 49 per cent of its equity, as long as it maintains a majority stake. Section 23 makes it clear that an NBN Co sale scheme may be entered into and carried out before or after the Commonwealth majority ownership provisions cease to have effect.

The remainder of Part 3 of the NBN Companies Bill sets out provisions relating to an NBN Co sale scheme. These provisions are based on legislation for earlier sales of Commonwealth owned companies, notably Telstra Corporation and Medibank Private. They provide for a broad range of mechanisms to be set in place for the transfer, or progressive transfer, of the Commonwealth's equity, including the use of sale-scheme hybrid securities. Consistent with the *Telstra (Dilution of Public Ownership) Act 1996*, the *Telstra (Transition to Full Private Ownership) Act 2005* and the *Medibank Private Sale Act 2006*, but with amendments to reflect NBN Co's specific circumstances, provision is also made for the following in relation to an NBN Co sale scheme:

- exemption from stamp duty (section 28);
- authorisation of borrowing (section 29);
- appropriation of costs (section 30);
- assistance given by NBN Co or the Board of NBN Co including reimbursement of expenses (sections 31, 32 and 33);
- the Commonwealth to be bound by the chapters of the *Corporations Act 2001* relating to continuous disclosure, fundraising and financial services and markets as they related an NBN Co sale scheme, along with provision for the Commonwealth to have Chinese wall arrangements (section 34);
- limiting the rights of creditors in relation to a reduction in NBN Co's share capital (section 35);
- the alteration of NBN Co's constitution (section 36);
- the shareholder Ministers altering NBN Co's constitution (section 37);
- the use by the Commonwealth of information obtained from NBN Co or the NBN Co Board for a purpose in connection with an NBN Co sale scheme (section 38);
- the Finance Minister, on behalf of the Commonwealth, entering into an agreement with NBN Co relating to the protection of information (section 39); and
- NBN Co's obligations to disclose information (section 40).

Private ownership and control of NBN Co

Division 3 of Part 3 of the NBN Companies Bill creates a head of power for the making of regulations in relation to an unacceptable private ownership or control situation, in relation to NBN Co. The ACCC will be responsible for overseeing Division 3 of Part 3.

The Government welcomes private investment in NBN Co so long as it does not compromise the wholesale only model. The Government will set out any necessary ownership controls to protect this wholesale only model in regulations. In the absence of regulation, the Government's policy can be implemented through its 100 per cent ownership of NBN Co.

Section 41 provides that regulations may make provision in relation to an unacceptable private ownership or control situation by conferring a power on the ACCC to make a decision of an administrative character. Before any regulations are made under this section, the Communications Minister must consult the ACCC. Section 41 states that NBN Co must take all reasonable steps to ensure that an unacceptable private ownership or control situation does not occur. NBN Co commits an offence if it engages in conduct that contravenes this rule, with a penalty of 500 penalty units (under the *Criminal Code Act 1995*, where a law creating an offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element).

The enforcement of the private ownership and control rules is based on similar provisions in the *Telstra Corporation Act 1991*. Section 43 provides for the Communications Minister, the ACCC or NBN Co to seek remedial orders from the Federal Court. Section 44 provides that regulations may be made which require a person to keep and retain records, where the records are relevant to a NBN Co ownership and control matter, and give information to the Communications Minister, the ACCC or NBN Co that is relevant to a NBN Co ownership or control matter.

General provisions

Division 4 of Part 3 of the NBN Companies Bill sets out general provisions. Section 47 provides a definition of interest in a share that will be used in relation to the NBN Co sale scheme, and may also be used in relation to private ownership and control of NBN Co. This definition is based on similar provisions on the *Telstra Corporation Act 1991*, the *Airports Act 1996* and the *Medibank Private Sale Act 2006*.

Section 48 provides for the extra-territorial application of Part 3 both within and outside Australia. This will ensure that the enforcement of the Part can take account of actions carried out overseas.

Section 49 provides that Part 3 does not apply to NBN Co unless it is a corporation to which paragraph 51(xx) of the Constitution applies (foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth power) or carries on, proposes to carry on, or has the object of carrying on, a business that consists of or includes the supply of a carriage service. This section clarifies that the Bill relies on both the corporations and communications powers in the Constitution to regulate the ownership and control of NBN Co.

NBN Co's reporting obligations

Part 4 of the NBN Companies Bill reproduces reporting obligations previously placed on Telstra under the *Telstra Corporation Act 1991*. These obligations are largely present already in the *Commonwealth Authorities and Companies Act 1997* (CAC Act), however the relevant provisions in the CAC Act only apply to wholly-owned Commonwealth companies. As a result, if the Commonwealth transfers part of its stake while the Commonwealth majority ownership provisions are in force, the CAC Act would cease to apply. Therefore this provision has been included to ensure reporting obligations will apply to NBN Co, NBN Co's wholly-owned subsidiaries, and members of the Board while the NBN is not wholly owned – but is majority owned – by the Commonwealth. This provision would cease to have effect at the end of the majority interest sale day for NBN Co (section 59).

The reporting obligations on NBN Co include:

- providing financial statements (section 52);
- notifying the Communications and Finance Ministers of significant events (section 53);
- keeping the Communications Minister and the Finance Minister informed of the operations of NBN Co and its subsidiaries, and giving the Ministers such reports, documents and information in relation to those operations as the Ministers require (section 54); and
- preparing a corporate plan for NBN Co and its subsidiaries at least once a year, covering a period of at least three years and not more than five years, and also keeping the Ministers informed about changes to the plan (section 55).

Anti-avoidance

Section 60 of the NBN Companies Bill provides that NBN Co must not, either alone or together with one or more other persons, enter into, begin to carry out or carry out a scheme if it would be concluded that NBN Co did so for the sole or dominant purpose of avoiding the application of any provision of the Act in relation to NBN Co or any fully-owned subsidiary corporations. A contravention is grounds for obtaining an injunction under Part 6.

This is a standard provision in similar Commonwealth legislation dealing with the sale of Commonwealth entities and establishing ownership controls on those entities. For example, a similar clause can be found in the *Airports Act 1996* and was also in the *Telstra Corporation Act 1991*.

Injunctions

Part 6 of the NBN Companies Bill provides that the Federal Court may grant injunctions in relation to contraventions of the Act.

Miscellaneous

Section 67 of the NBN Companies Bill is based on a similar clause that was previously in the *Telstra Corporation Act 1991*. This provides that NBN Co is taken, for the purposes of the laws of the Commonwealth, of a State or of a Territory, not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth, and not to be a public authority or an instrumentality or agency of the Crown, and not to be entitled to any immunity or privilege of the Commonwealth except so far as express provision is made in the Act or any other law of the Commonwealth, or by a law of a State or Territory.

Section 68 provides that the *Public Works Committee Act 1969* does not apply to NBN Co or any wholly-owned subsidiaries of NBN Co. NBN Co will operate as a commercial enterprise and is unlike other Government Business Enterprises (GBEs) in that the Government has announced that it will seek private investment in the company in the short term, and sell its majority stake within five years of the network being built and fully operational. Given these differences, some obligations that apply to GBEs or Commonwealth owned bodies should not apply to NBN Co. Accordingly, the *Public Works Committee Act 1969* should not apply to NBN Co (consistent with arrangements that apply to Australia Post and that previously applied to

Commonwealth-owned carriers such as Telstra, the Australian Overseas Telecommunications Corporation and Aussat). It should also not be taken to be a public authority or to have been constituted for a public purpose.

Section 71 is a standard provision in Commonwealth legislation and provides that the Communications and Finance Ministers may delegate their powers under the Act to the Secretary of their Department, or an SES employee or acting SES employee in their Department. However, the Communications Minister will not be able to delegate the power to make declarations under section 22 that the NBN should be treated as built and fully operational, or to declare a deferral period. The Finance Minister will also not be able to delegate his declarations in relation to conditions being suitable for the carrying out of an NBN sale scheme under section 24. Furthermore, the Finance Minister will not be able to delegate the declaration that conditions are suitable for the transfer of the Commonwealth's equity in NBN Co to other persons (section 25).

Section 72 has been inserted to provide a Constitutional safeguard in the event that the operation of the Act involves an acquisition of property. This Constitutional safeguard ensures that any acquisition of property as a result of the operation of this Act or any regulations made under this Act is made on just terms.

**TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL
BROADBAND NETWORK MEASURES—ACCESS ARRANGEMENTS)
BILL 2010**

OUTLINE

The Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (the Access Bill) amends the *Trade Practices Act 1974* (the TPA) and the *Telecommunications Act 1997* (the Tel Act) to introduce new access and equivalence obligations relating to the supply of wholesale services by NBN Co, and any wholly-owned subsidiaries, including NBN Tasmania Limited. The provisions are aimed at providing certainty for customers of NBN Co that it will offer open and equivalent access to services, thereby enhancing competitive outcomes in the Australian telecommunications industry.

ATUG: these provisions should apply to any network elements used to provide NBN services (whether by NBN Co or any other company) where those network elements are bottleneck eg fibre deployments in new estates (including existing deployments) and fibre access in multi-story buildings (up the building, not to the building).

The Access Bill follows recent reforms to the telecommunications competition regime introduced through the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the CCS Bill). That Bill is intended to reform the access regime in Part XIC of the TPA to reduce delays and opportunities for gaming and provide upfront certainty on access prices and terms and conditions. NBN Co will be subject to this reformed access regime, but specific amendments are introduced by the Access Bill to reflect the unique wholesale only nature of NBN Co. These amendments need to be read together with the CCS Bill.

By making NBN Co subject to the telecommunications access regime, as reformed by the CCS Bill, the Government will promote industry certainty and competitive outcomes.

The Access Bill sets out three mechanisms, which need not be mutually exclusive, under which NBN Co provide services:

- NBN Co can publish a Standard Form of Access Agreement (SFAA) in relation to a service, or give a Special Access Undertaking (SAU) to the ACCC in relation to the provision of access to a service;
- if the Minister makes a condition of NBN Co's carrier licence that it must supply a specified eligible service that NBN Co is not currently supplying, NBN Co must give a SAU or formulate an SFAA in relation to that service; and
- the ACCC may, under proposed subsection 152AL(8A), declare a service that NBN Co has not indicated it will supply, but which the ACCC considers, after consultation, would be in the long-term interests of end-users to supply.

As stated on page 5, the Minister may also make a condition of NBN Co's carrier licence that it must not supply a specified service, and this licence condition would then override the ACCC's power to declare that service.

Once an SAU is accepted and services are offered, or once an SFAA is published, the services are considered to be declared services for the purposes of Part XIC of the TPA. NBN Co cannot supply a service unless it has either been declared by the ACCC or a SAU or SFAA is in place in relation to that service.

These amendments made by the Access Bill include specific SAOs for NBN Co. Furthermore, an obligation is imposed on NBN Co to offer services on a non-discriminatory basis, meaning that access seekers in like circumstances will be able to obtain equal access to services on the same terms and conditions. NBN Co will be able to negotiate with access seekers to vary the terms and conditions set out in a SFAA, SAU or an access determination if this aids efficiency, or on grounds or in circumstances specified by the ACCC in a legislative instrument. If NBN Co does agree to vary terms and conditions set out in a SFAA, SAU or access determination, the resulting agreement would be an access agreement under section 152BE of the TPA (as inserted by the CCS Bill). Within seven days of an access agreement having been reached, NBN Co must publish a statement on its website, identifying the parties to the agreement, describing the differences, and if relevant, the differences that aid efficiency or are authorised by the ACCC and what access seekers must do in order to be able to benefit from the same changes to the access agreement. NBN Co will then need to lodge the resulting access agreement with the ACCC (under reforms made by the CCS Bill).

ATUG: negotiations which move away from the non-discriminatory provision of services should be reviewed by the ACCC to ensure that the discrimination is based on efficiencies and will be in the long-term interest of end users. ATUG does not want the dominance problem that has bedevilled the fixed line market to be transferred to the fibre service market simply because of volume. The scale efficiencies delivered by NBN Co should be available to all wholesale customers (and hence to their retail customers) equally. Discrimination should be based on objectively identified efficiencies. Disclosure of any such agreements will provide a transparency safety-net and ATUG supports this.

The Access Bill also makes a number of consequential amendments to Part XIC of the TPA, sections 25 and 155 of the TPA, and to several clauses of the Tel Act.

The arrangements set out in this Access Bill are integrated with the proposed legislative obligations on NBN Co that are set out in the National Broadband Network Companies Bill 2010. The two Bills will be introduced to Parliament as a package.

A number of key concepts are explained in further detail below.

Category B SAOs

The Access Bill establishes that the current SAOs in section 152AR of the TPA will not apply to NBN Co. The current SAOs are designed for access providers who also supply retail services, making them inapplicable to a wholesale only company. The Access Bill proposes to establish two categories of SAOs, category A and category B. Category A SAOs are those currently set out at section 152AR and apply to access providers other than NBN Co. Category B SAOs apply to NBN Co and are set out in proposed section 152AXB, inserted by this Access Bill.

There are two category B SAOs, which provide the basic prerequisites of access – guaranteed supply and interconnection. The first SAO is a requirement to supply a declared service. This SAO requires NBN Co, if it supplies, or is capable of supplying, a declared service, and is requested to do so by a service provider, to supply a service to the service provider in order that the service provider can provide carriage services and/or content services (subsection 152AXB(2)). NBN Co is not required to provide access to a service if it would prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements, or NBN Co from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements (subsection 152AXB(3)).

The requirement to supply services on request (subsection 152AXB(2)) must be read together with the rules relating to the supply of services by NBN Co (proposed Division 6A of Part XIC, described below) which provide that NBN Co must not supply an eligible service unless the service has been declared by the ACCC under proposed subsection 152AL(8A) to be a declared service, or NBN Co has published an SFAA in relation to the service, or the ACCC has accepted an SAU in relation to the service. A service provider therefore cannot compel NBN Co to provide a particular eligible service by requesting NBN Co to provide the service. NBN Co can only provide the service if the service has been declared by the ACCC, or if there is an SFAA or a SAU that relates to the service. Furthermore, NBN Co is not required to lodge an SAU or to formulate an SFAA in relation to a particular service if a service provider requests it to do so. The only time NBN Co is required to lodge an SAU or to formulate an SFAA is if the Minister makes a condition of NBN Co's carrier licence that it must supply a specified eligible service.

The phrase 'capable of supplying' in subsection 152AXB(2) is consistent with the phrase 'capable of being supplied' used in existing subsections 152AB(2) and 152AL(1) of the TPA. The phrase covers a situation in which NBN Co has indicated it proposes to offer a service, as it has an SAU or a SFAA in place, but has not yet commenced supplying that service. It does not cover situations where it is technically feasible for NBN Co to supply a service, but NBN Co has not announced an intention to supply a service. These provisions cannot be used by an access seeker to compel NBN Co to supply a service it is not supplying.

NBN Co is also not required to supply a service if it would not be technically feasible to supply the service. There is no intention that access seekers should be able to demand that NBN Co upgrade or change its networks to permit the supply of services that NBN Co is not otherwise supplying, or capable of supplying.

The exemption under paragraph 152AXB(3)(a) gives protection to the reasonably anticipated usage of a service provider who already has access to a declared service. It ensures that NBN Co cannot withdraw services already being supplied simply because it does not have sufficient capacity to supply the service to other access seekers.

The exemption under paragraph 152AXB(3)(b) gives protection to the reasonably anticipated usage of NBN Co. NBN Co should not be required to supply services if this means not having enough capacity remaining for its own internal supply. For example, if NBN Co's networks are near capacity and a request to supply a service

would mean it was no longer able to perform its own internal network monitoring and communications, then it could use this exemption.

The second SAO requires NBN Co, if requested to do so by a service provider, to permit interconnection of the facilities it owns or controls with the facilities of the service provider for the purpose of enabling the service provider to be supplied with declared services in order that the service provider can provide carriage services and/or content services.

Both of these obligations do not apply if there are reasonable grounds to believe that an access seeker would fail, to a material extent, to comply with the terms and conditions on which NBN Co complies, or on which NBN Co is reasonably likely to comply, with that obligation. They also do not apply if there are reasonable grounds to believe that an access seeker would fail to protect the integrity of a telecommunications network or the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

Declared services to be supplied on a non-discriminatory basis

Proposed section 152AXC requires that NBN Co must not, in complying with any of its category B SAOs, unfairly discriminate between access seekers. This obligation gives effect to the Government's commitment that NBN Co will provide equivalent access to all access seekers. Equivalence here would require NBN Co to provide equal access to services on a standard set of terms and conditions.

However, NBN Co will be able to negotiate with access seekers to vary these standard terms. The Access Bill builds upon the approach set out in the CCS Bill, so that NBN Co may enter into an access agreement (in relation to a SFAA, SAU or an access determination) under section 152BE that records these varied terms so long as the variation is permitted under proposed section 152AXC. Access seekers may want to receive different terms to promote their own investment and service differentiation. It is well accepted that in certain circumstances differentiation on price and/or non-price aspects can aid efficiency, innovation and investment. As a result, the Access Bill permits differentiation that aids efficiency, on the condition that all access seekers with like circumstances have an equal opportunity to benefit from the discrimination.

Some other minor grounds for differentiation are also permitted, such as on grounds relating to creditworthiness, or on grounds or in circumstances specified in a legislative instrument made by the ACCC.

The non-discrimination clause here reflects the similarly worded clause in section 44ZCA of the TPA. The concept of 'efficiency' is intended to be read broadly and to facilitate normal business options such as offering volume-based discounts, passing on savings arising from capital investments, discrimination based on risk sharing, discounts in response to competitive circumstances, migration incentives and other efficiencies.

Section 152AXC is not intended to allow NBN Co to differentiate its price and/or non-price terms in such a way that only a single access seeker may benefit from the differentiation. For example, volume discounts could not be structured in such a way as to limit their availability to a single carrier. The Government's policy intention is

that differentiation in price and/or non-price terms should not confer a systemic advantage on an access seeker.

ATUG: the dominance problem (to which NBN Policy is a response) should not be transferred into the NBN environment

NBN Co will be able to define what constitutes 'like circumstances'. NBN Co may, for example, set out its approach to discounting when it submits a SAU in relation to a service. Consistent with the CCS Bill, NBN Co must lodge access agreements with the ACCC, which could take action if it considered that the non-discrimination rule had been breached. The ACCC will also publish guidance on equivalence and non-discrimination issues. For example, the ACCC can set out its approach to defining 'like circumstances'. The ACCC would refer to that guidance in assessing a SAU or making an access determination.

ACCC not compelled to make an access determination

The Access Bill includes a proposed amendment to subsection 152BCK(1). This subsection was inserted in the TPA by the CCS Bill. The proposed amendment clarifies that the ACCC is not compelled to make an access determination in relation to a SFAA offered by NBN Co, but can do so if it considers it necessary. This amendment is necessary because all services supplied by NBN Co will be treated as declared services. Otherwise, under sections 152BCI and 152BCK (inserted by the CCS Bill) the ACCC would have been compelled to hold a public inquiry and make an access determination in relation to a declared service.

Publication by NBN Co of statement about access agreement

Proposed sections 152BEBA, 152BEBB and 152BEEC supplement the provisions in relation to access agreements being inserted in the TPA by the CCS Bill. These sections will require NBN Co, if it has entered into an access agreement with an access seeker with different terms and conditions from those set out in a SFAA, SAU or access determination, to publish a statement on that agreement on its website within seven days of the agreement being entered into. The statement must identify the parties to the agreement and describe the differences between the terms and conditions set out in the agreement and the terms and conditions set out in the SFAA, SAU or access determination. If the differences have been agreed because they aid efficiency, the statement must identify the differences that are authorised by subsection 152AXC(3), and describe what access seekers must do in order to be able to benefit from the same changes to the access agreement.

Similarly, if an access agreement picks up discrimination authorised on grounds, or in circumstances, specified in a legislative instrument made by the ACCC, the statement must identify the differences that are authorised.

The requirement to publish a statement is intended to promote transparency, which is a fundamental bulwark of equivalence. If access seekers are to know what variations to standard terms are available, and to judge whether they are in like circumstances and able to receive those varied terms, they need to be provided with sufficient information to form a view.

ATUG: supports this commitment to transparency. It is essential to effective delivery of equivalence which has been a key issue for ATUG.

That said, there is a balance between transparency and legitimate commercial sensitivities. For this reason, NBN Co will not be required to publish the entire access agreement, although it must, under proposed section 152BEA (inserted by the CCS Bill), lodge the access agreement with the ACCC. If it was required to publish the actual agreement this could reveal commercial-in-confidence information. If this information was to be revealed there may be no incentive for any access seeker to seek differentiated terms, which could result in less innovation and efficiency. The proposed statement therefore is intended to provide a practical solution.

As NBN Co will be required to lodge access agreements with the ACCC, the ACCC will be in a position to judge whether NBN Co has offered similar varied terms to access seekers in like circumstances and could take action if it considered that NBN Co had breached the non-discrimination rule in section 152AXC.

Supply of services by NBN Co

Proposed Division 6A of Part XIC sets out several new sections dealing with the supply of services by NBN Co. Section 152CJA establishes that NBN Co must not supply an eligible service unless:

- the service has been declared by the ACCC under subsection 152AL(8A); or
- NBN Co has published an SFAA that relates to access to the service on its website; or
- a SAU relating to the service is in operation.

The section also establishes that NBN Co only needs to comply with a request from an access seeker for a service if NBN Co has published a SFAA that relates to access to the service.

This section establishes that NBN Co cannot offer eligible services that are not subject to public offers and to the Category B SAOs. As a result, all services offered by NBN Co will be published and offered on a non-discriminatory basis.

Proposed subsection 152CBA(3A) amends the provisions dealing with SAUs to make it clear that NBN Co must agree to be bound by the obligations referred to in section 152AXB (i.e., the Category B SAOs) and the terms and conditions specified in the SAU in relation to the Category B SAOs. It is not envisaged that a SAU or SFAA must comprehensively list all terms and conditions of service. Some terms and conditions may be worked out later (for example, terms and conditions dealing with operational issues). In this case, the additional terms and conditions could, for example, be contained in an access agreement between NBN Co and its customer (or in documents appended to that access agreement, such as operations manuals).

Section 152CJB should be read together with section 15 of the NBN Companies Bill. Section 15 provides that the Minister may make a condition of NBN Co's carrier licence specifying services that NBN Co must supply. Section 152CJB establishes that, in the event such a condition is made, NBN Co must, within 90 days after the carrier licence condition comes into force, formulate a SFAA that relates to access to the service and publish that SFAA, or give the ACCC a SAU in connection with the provision of access to the service. This section establishes the process for compliance with the requirement to provide a service in accordance with a condition of carrier licence made under section 15.

Under section 152CH of the TPA, the Communications Minister may make a Ministerial pricing determination setting out principles dealing with price-related terms and conditions relating to the SAOs. This legislative mechanism could be used, if required, to establish a uniform wholesale pricing obligation for NBN Co.

ATUG: Uniform national pricing of NBN wholesale is key to ubiquitous access and take-up of services and to increased competition and choice in national markets. ATUG supports the Ministerial pricing power.