



Optus Submission

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

**Draft NBN Companies Bill 2010 &
Draft NBN Measures – Access Arrangements Bill 2010**

March 2010

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Executive summary

- Optus has been a strong supporter of the Government's planned National Broadband Network ("NBN"). In particular, Optus has been a willing advocate for the Government's vision that the NBN has the potential to positively reshape the fixed line telecommunications sector in Australia and deliver significant benefits to Australian consumers and businesses.
- For the NBN to fully realise its potential Optus has always maintained that the NBN would need to be true to the Government's clear commitment that it will be operated as a structurally separated, wholesale-only operation on genuine open access arrangements. Such an approach would avoid the well documented problems we have witnessed in the current fixed line market structure. Moreover, a regime built on these principles has the potential to set a platform for a highly competitive retail market to emerge which in turn is likely to lead to affordable high-speed broadband services and high take-up by businesses and consumers.
- However, Optus has been mindful that these principles need to be backed up by detailed legislative provisions. The present set of draft Bills seek to provide this detail.
- Whilst it is clear that the draft legislation seeks consistency with these important commitments, in many respects the detailed legislation falls well short of the requirements necessary to ensure that these commitments will be met in practice. Optus has a number of concerns with the specific provisions set out in the draft Bills, details of these are set out in this submission. Optus' most material concerns include the following;
 1. The Bill provides NBN Co with significant scope to operate as a retail service provider of telecommunications or content services, either through direct endorsement by the Minister or through its ability to acquire or establish subsidiary operations. This represents a significant and deeply worrying step-back from the Government's clear commitment to operate the NBN Co as a wholesale-only provider when it announced its NBN plans on 7 April 2009.
 2. The arrangements that deal with private ownership and control of the NBN Co are wholly inadequate. Essentially this is an issue that is left to be determined by the Minister at a later date. The prospect remains, therefore, that a retail telecommunications provider could gain an effective controlling stake in NBN Co, which significantly compromises the reform credentials of the NBN;
 3. The equivalence arrangements are very loose and well below the standard Optus and others have argued should apply to the NBN Co. It is arguable whether the proposed equivalence arrangements are any better than the wholly inadequate provisions that apply today. As it stands, Telstra could potentially negotiate special prices in return for an agreement to migrate its 8 million customers to the NBN – it is unlikely that any other carrier would qualify to receive those same terms. Again such an outcome would clearly compromise the competition reform credentials of the NBN; and
 4. Many important aspects relating to the regulation of the NBN have not been addressed in the draft Bills. An example relates to how prices for access services will be determined and approved. It appears that this (and other aspects of the NBN services) will be left to be determined through a Special Access Undertaking process. This is unsatisfactory since it effectively gives NBN Co significant discretion

to write its own regulatory rules. The Government should take the opportunity in the Access Bill to lay down some clear principles as to how important elements of access arrangements on the NBN should be determined. Further, the role of the ACCC in that process should be more clearly defined.

- If these issues are not addressed then it is highly questionable as to whether the Government's vision for a viable and successful NBN at the heart of a reformed and competitive fixed line telecommunications market will be realised. To put this into sharper perspective, access seekers are unlikely to be willing to commit to the NBN or provide confidential information to NBN Co whilst doubts remain about the future of the NBN Co as a prospective retail competitor. Equally, if a single retail telecommunications provider is able to gain a privileged position on the NBN, then the Government's vision of a vigorously competitive high-speed broadband market is unlikely to be realised.
- Optus' comments on these matters should not come as a surprise since they have been extensively ventilated in the numerous public consultations that have been conducted on regulatory reform over the past two years. Many of the recommendations Optus has made in this submission are based on proposals that were initially made in our detailed submission to the DBCDE in July 2009 following its request for submissions on the legislative framework that should apply to the NBN.
- Optus considers that wholesale changes are required to the draft Bills before they should proceed to the legislative stage. A summary of the amendments proposed by Optus and outlined in more detail in this submission is provided below.

Summary of Recommendations - NBN Companies Bill

1. The draft Bill should be amended to remove the discretion of the Minister to make any exemptions to NBN Co's ability to operate as a wholesale-only provider of telecommunications and content services.
2. NBN Co should be restricted to supplying services to carriers only.
3. NBN Co should be restricted to supplying services at Layer 2 and below.
4. Any entity in which NBN Co has a controlling stake should be subject to the present regulations
5. An equity cap should be enforced to prevent a retail telecommunications provider taking more than a 20% stake in NBN Co.
6. Clear rules should be established to prevent a minority shareholder from exercising effective control of the NBN Co in a way that undermines the Government's competition, social and economic objectives for NBN Co.
7. The legislation should set out separation principles to ensure dealings between NBN Co and a related retail telecommunications provider are conducted on genuine arms length terms.
8. Improved enforcement powers are required to prevent breaches of the "undue influence provisions". These should include civil penalties for breach and enabling the courts to make rectification order and compensation payments in terms similar to clause 87 of the Trade Practices act.
9. The Ministerial discretion to include a condition in NBNC's licence to provide or not provide a particular service should only be exercised on advice from the ACCC that the proposed condition is in the long term interests of end-users.

10. The anti-avoidance provisions should be strengthened by requiring that NBN Co has a duty to act in accordance with certain principles such as to enhance retail competition or meet the long term interests of end-users. The courts could be given the power to enforce conduct in accordance with those principles, actionable by both the ACCC or access seekers.
11. Consideration should be given to requiring any proposed sale of the NBN to meet a public interest test, such as requiring ACCC approval that the proposed sale is in the long term interests of end-users.
12. Consideration should be given to ensuring that in the absence of NBN Co infrastructure, fibre access services in greenfield locations are brought under the competition provisions of both the NBN Companies Bill and the NBN Access Bill.

Summary of Recommendations - NBN Access Bill

13. The draft Bill should provide clear guidance about how certain key access arrangements should be determined. As a minimum the draft Bill should set out principles on which access prices should be determined and approved by the ACCC.
14. A clear definition of “equivalence” is required – the Bill should adopt the principle of “equivalence of inputs” as used in the United Kingdom and New Zealand.
15. Tighter rules are required to deal with differential access terms. The concept of “efficiency” should be clearly defined in the legislation to relate to a “demonstrable change in the costs to supply of NBN Co on an Equivalence of Inputs basis”. The term “like circumstances” should also be clearly defined in a way that would prevent a single access seeker gaining a clear commercial advantage on the NBN. “Like” should be defined to relate to a class of “access seekers” and not a “single access seeker”.
16. The Bill should include a clear requirement that the NBN Co is obliged to manage the sale of capacity in order to facilitate the delivery of competing services and encourage contestability.
17. NBN Co should be obliged to publish full copies of all agreements it has entered into with access seekers. Any such agreement should be capable of being declared invalid if objections raised by other access seekers are upheld by the ACCC.
18. NBN Co should be required to make information publicly available about its network, available capacity, its facilities and/or its procedures.

1. Introduction

- 1.1 On 10 March 2010 the Senate Committee on the National Broadband Network called for submissions on the exposure drafts of two Bills relating to the National Broadband Network (the National Broadband Network Companies Bill 2010; and the related Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill) that were recently released for comment by the Government.
- 1.2 Optus welcomes the opportunity to make a submission to the Senate Committee. As will be seen from this submission, Optus has significant concerns with the draft legislation and considers that substantial changes are required before these Bills proceed to the legislative stage.

2. Governance Arrangements for NBN Co

Overview of the Bill

- 2.1 The National Broadband Network Companies Bill 2010 sets out the proposed governance arrangements that will apply to the National Broadband Network Company Limited (“NBN Co”). In particular, the Bill establishes the wholesale only status of NBN Co by providing that it cannot supply services to end-users; either carriage services or content services. However, the Minister will also be given discretionary powers to issue exemption orders in respect of this provision (for example to enable a service to be provided to Government agencies). Before issuing an exemption the Minister, would have to consult with the ACCC – although no obligation is placed on the Minister to follow the advice provided by the ACCC.
- 2.2 The Bill provides that the Commonwealth must retain a 51 per cent equity stake in NBN Co during the build and roll-out of the NBN. Once the NBN is declared operational the Commonwealth’s equity may be transferred within a five year period. There are provisions for the sale to be deferred by the Finance Minister. Provisions are put in place in respect of the sale of the NBN Co after it is declared fully operational.
- 2.3 Provisions are also put in place to enable the Government to transfer up to 49 per cent of its equity prior to the NBN being fully operational to fulfil its commitment to attract private sector investment into the NBN.
- 2.4 The Bill enables Regulations to be made in respect of an unacceptable private ownership or control situation in respect of NBN Co. It is to be presumed that these Regulations would seek to prevent an investor in NBN Co that also controls a retail telecommunications company exercising any undue influence on the NBN Co. The ACCC will be consulted on these regulations and will have responsibility for their oversight.
- 2.5 The Explanatory Notes to the Bill include a comment that the NBN Co will not be prevented from acquiring telecommunications companies, even if they have retail businesses, if such an acquisition could support the early development and roll-out of the NBN. It is noted that NBN Co would still be subject to a wholesale only obligation and transitional details would need to be put in place for NBN Co to divest any such retail operations associated with such acquisitions.

Optus' comments on the draft Bill

Opportunities for the wholesale-only status of NBN Co to be compromised

2.6 When the Government announced its plans to roll-out the NBN, a central commitment in its policy vision was to ensure that *“the National Broadband Network company will be required to offer services on a wholesale-only basis”*. It was made clear at the time that the “wholesale-only” obligation on NBN Co was a very deliberate policy objective aimed at achieving fundamental reform of the fixed line telecommunications market. As the Government made clear:

“The new investment is also the biggest reform in telecommunications in two decades because it delivers separation between the infrastructure provider and retail service providers. This means better and fairer infrastructure access for service providers, greater retail competition, and better services for families and businesses”.¹

2.7 Optus has been strongly supportive of the principle that NBN Co should operate as a wholesale-only entity. It is expected that the NBN will be a bottleneck infrastructure, which will in time carry the majority of Australia’s fixed line voice and broadband traffic. By restricting NBN Co to the provision of wholesale-only services, the Government would avoid the conflict of interest inherent in the vertically integrated dominant access provider. It is the vertical integration of Telstra as both the dominant wholesale and retail supplier that has acted as a significant impediment to competition in the current fixed line market². This is why the NBN Co must operate as a structurally separated wholesale-only operation. When combined with an effective equivalence framework, this structural arrangement for the NBN Co should provide the necessary conditions for vigorous competition to develop in an NBN environment.

2.8 However, as the Bill is presently drafted there are a number of opportunities for the “wholesale-only” status of NBN Co to be compromised. This creates significant uncertainty as to whether the Government’s vision for the future structure of the market will be realised, which will in turn act as a constraint on competition. Put simply, access seekers are unlikely to be willing to commit to the NBN whilst doubts remain about the future of NBN Co as a prospective retail competitor.

Ministerial Exemption powers

2.9 The most obvious and direct way in which NBN Co’s wholesale-only status risks being compromised is that the Bill expressly enables the Minister to exempt NBN Co from this obligation.

2.10 Whilst the explanatory memorandum to the Bill indicates that this exemption is being included to provide flexibility and there has been suggestions that the provision would have limited application – in reality the discretion provided to the Minister is very broad. There are no controls;

- (a) limiting the circumstances in which the Minister might permit an NBN Corporation to offer its own retail service; or
- (b) setting default conditions to protect competition if an exemption is given to ensure the NBN Co’s wholesale and retail businesses are appropriately separated (for

¹ Joint media release New National Broadband Network:
http://www.minister.dbcde.gov.au/media/media_releases/2009/022

² The Government’s Competition and Consumer Safeguards Bill 2009 seeks to address this issue by requiring Telstra to either structurally or functionally separate its retail and wholesale activities.

example, on a functional basis at least similar to what is intended to apply to Telstra).

- 2.11 The explanatory memorandum indicates that this provision could be used to enable NBN Co to provide services directly to Government agencies. This would represent a serious impediment to existing telecommunications companies, such as Optus, from continuing to service a very significant component of the current retail market.
- 2.12 On one view there is nothing to prevent this provision being used to enable NBN Co to directly enter the mass retail market at some future date. Such an outcome would be untenable, since it could result in the NBN Co achieving a more powerful market dominance than Telstra enjoys today. That is, it could result in one monopoly being replaced by an even more pervasive monopoly.
- 2.13 The discretion given in this Bill compromises the Government's stated reform objectives for the NBN and for that reason Optus recommends that this discretion should be removed. NBN Co should be prohibited through legislation from entering the retail telecommunications or content markets at any future date.

Service Restrictions

- 2.14 The restrictions on the services that NBN Co can or cannot offer also appears to open significant scope for the "wholesale-only" status of NBN Co to become blurred or compromised.
- 2.15 A key consideration in this respect is that there are no detailed restrictions on the type of services that NBN Co is able to offer. In developing its service offerings it is important that NBN Co seeks to address areas of actual or potential market failure. It should seek to avoid extending its service offering into areas of the market that either are or are prospectively contestable. In this respect the CEO of NBN Co, Mr Mike Quigley, has repeatedly indicated that NBN Co will seek to limit its role in the value chain by offering a limited set of access services, specifically Layer 1 and Layer 2 access services³. This would specifically rule out NBN Co offering services at Layer 3 and above, where the prospect for improved market contestability would be apparent. Presently, a number of companies provide wholesale Layer 3 offerings to service providers. This wholesale market would appear to have the potential to grow with the roll-out of the NBN as a number of current providers gain access to a broader footprint⁴.
- 2.16 However, there are no proposed legislative restrictions on NBN Co moving up the value chain to offer services at Layer 3 and above. In fact the legislation permits NBN Co to sell capacity directly to content service providers, even though that service provider could be deemed to be itself an end-user.
- 2.17 Optus submits that the wholesale-only requirement should be implemented by restricting NBN Co to;
 - (a) supplying services to licensed carriers only; and
 - (b) supplying services at Layer 2 or below.

Unregulated services

³ NBN Co – Initial Steps, Presentation by Mike Quigley 23 September 2009

⁴ With the exception of Telstra, these current wholesale offerings (which are based on ULLS access) are limited to metropolitan areas.

- 2.18 Under the present definition of NBN Co Limited any company that is not a wholly-owned subsidiary of NBN Co will fall outside the regulatory framework (excepting NBN Tasmania Limited). To illuminate this point, a subsidiary that is 99.9% owned by NBN Co would actually fall outside the present regulations.
- 2.19 This represents a significant gap in the proposed control arrangements for NBN Co. It would provide an obvious opportunity for NBN Co to conduct its activities outside the regulatory regime. For example, the "wholesale-only" and other service restrictions will not apply to:
- (a) an entity created from a public private partnership or joint venture NBN Co enters into with a third party (whether with a State/Territory government or the private sector); or
 - (b) any company in which NBN Co is not the only shareholder, even if NBN Co has a controlling interest.
- 2.20 Similarly, only the provision of eligible services and content services by NBN Corporations is regulated. There are no restrictions on NBN Corporations making any other types of supplies. Again, not restricting NBN Corporation activities to particular functions (for example, to build and operate the NBN and supply capacity to retailers) fails to put in place measures to give effect to the Government's 7 April 2009 statements that the NBN will deliver "*separation between the infrastructure provider and retail service providers*" and be "*wholesale-only*". It also opens the opportunity for significant scope creep in NBN Co's activities. For example, it would not presently be restricted from acquiring spectrum in any future auctions to enable it to enter the mobile services market.
- 2.21 To address these concerns the legislation should ensure that any entity in which NBN Co has a controlling stake should be subject to the present regulations. Further, the activities of the NBN Co should be specifically limited to providing specified wholesale-only access services to deliver fixed line voice and high-speed broadband services.

Preventing undue influence of NBN Co

- 2.22 It has always been the Government's stated intention to attract private investment into the NBN. Whilst the draft Bill makes it clear that arrangements will be developed to address concerns that private sector investment into the NBN Co could compromise its wholesale-only status and lead to an "*unacceptable private ownership or control situation*" it does not actually put in place any provisions to deal with this risk. This matter will be left to be determined by later regulations. There is no certainty that these regulations will deal with these issues in an appropriate manner nor that the regulations will ever actually be made. This is a wholly unsatisfactory approach. It is essential that clear rules are put in place upfront to prevent a situation arising that could distort competitive access to the NBN. It is surprising that that such a *laissez faire* approach is being taken on this issue given the recent recognition of the significant competition issues that can arise from a retail/wholesale conflict.
- 2.23 An important consideration in terms of achieving separation in practice will be the ownership arrangements for NBN Co. Whilst the Government has indicated that it proposes to take an initial majority stake in NBN Co, it anticipates other private equity investment in the short term, and that it will sell down its stake in the longer term.
- 2.24 Telecommunications companies will very likely be amongst the private investors seeking to take a stake in the NBN, either through the direct investment of cash or by vending assets to the venture in return for equity. This immediately raises issues around the potential for those interests to be used in a manner which undermines the objective of structural separation. As entities supplying downstream retail services to end-users,

those retailers who have vended in their assets are likely to have a different set of incentives and interests than those envisaged for the wholesale-only NBN. The higher the share of equity taken by an individual retail telecommunications service provider, the more control it may be able to exercise over NBN Co and the greater the risk that the objectives of separation will be undermined.

- 2.25 Whilst the Government's plan to take an initial 51 per cent equity stake in the company may provide an important counterweight to the concern outlined above, there is no guarantee that this will be sufficient. Even a minority shareholder may be able to exercise control of NBN Co if it is able to exercise effective control over the board. Furthermore, the Government has clearly articulated its plans to trigger an automatic sell-down of its interests in NBN Co within five years after the network is built and fully operational. This has the potential to heighten the risks outlined above. For example, a retail telecommunications provider holding a 25 per cent share could be in a position to exercise significant control over NBN Co if the remaining equity was divided up amongst a large number of small holders, as could happen if the Government's equity were sold down through an IPO.
- 2.26 To address these concerns and to ensure that NBN Co is firmly established as a wholesale-only supplier, the legislative framework should include;
- Ownership restrictions both before and after the Government's sell-down of equity;
 - Rules that set out clear protections in relation to the control of NBN Co;
 - Rules to prevent NBN Co from taking a controlling stake in a retail telecommunications provider;
 - Separation rules between NBN Co any related entities; and
 - Monitoring and enforcement powers for the ACCC.
- 2.27 Optus has previously recommended that any investment by a retail telecommunications provider in the form of voting equity should be capped at 20 per cent⁵. That is, any share acquisition that would result in a retail telecommunications provider's voting power in NBN Co increasing to a level higher than 20 per cent must be strictly prohibited by legislation. This is consistent with general corporate law, in which an ownership share above 20 per cent is recognised to raise the very real prospect that the owning entity will gain effective control of the company⁶.
- 2.28 The proposed equity cap should apply for the duration of NBN Co's lifetime and would continue after the sell-down of the Australian Government's stake in NBN Co. Such an approach would be consistent with Senator Conroy's comments shortly after announcing the Government's planned NBN that whilst the Government's 51 per cent stake will be sold down, *"it won't be able to be sold to retail companies in the future"*⁷.
- 2.29 To reinforce these provisions, the legislative framework should also provide adequate protections in relation to the ability for a minority shareholder to exercise control of NBN Co. It is useful to look to The Broadcasting Services Act which deals with the meaning of the phrase "when a person is in a position to exercise control" in Schedule 1. In

⁵ Optus Submission A Legislative Framework for the National Broadband Network, July 2009

⁶ For this reason share acquisitions that would result in a person's voting power in the company increasing to a level higher than 20% are allowed only in the circumstances of a formal takeover bid. Corporations Act 2001, ss.606, 611.

⁷ Stephen Conroy, 19 July 2009, ABC Inside Business interview with Alan Kohler

that Schedule the legislature has recognised that it is possible to control the company by means other than a majority shareholding. In this regard Schedule 1 part 2 (1) (c), (d) and (e) which read as follows:

(1) for the purposes of this schedule, a person is in a position to exercise control of a licence or a company if...

(c) in the case of a non-licensee company -the person, either alone or together with an associative of the person, is in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of the company; or

(d) a person, either alone or together with an associative of the person, is in a position to:

*(i) veto any action taken by the board of directors of the licensee or the company; or
(ii) appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the licensee or the company; or
(iii) exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the licensee or the company; or*

(e) a licensee or the company or more than 50% of its directors:

*(i) act, or are accustomed to act; or
(ii) under a contract or arrangement or understanding (whether formal or informal) are intended or expected to act;*

in accordance with the directions, instructions or wishes of, or in concert with, the person or of the person and an associative of the person acting together or, if the person is a company, the directors of the person."

- 2.30 These provisions provide an example of the kind of controls that are necessary to ensure that an access seeker is unable to put itself in a position to exercise control over the NBN Co. Considering that these controls are regarded as an important part of the framework for regulation of the media companies it seems unreasonable for the Government to expect that a limit of 49 per cent on non-government ownership of the NBN Co will be effective to ensure government control of that entity.
- 2.31 A related concern relates to the ability of a minority investor to assert its rights in relation to NBN Co. The primary duty of a director of a company is to act in the best interests of all shareholders. When assessing the interests of the shareholders a court will have regard to a "notional shareholder" that might reasonably be regarded as representing the "shareholders as a whole". Accordingly, without a more complete regulatory framework, the directors of NBN Co are not entitled to have specific regard to the social and economic objectives of the majority shareholder.
- 2.32 In looking to interests of the "notional shareholder" it is common to consider a notional shareholder as an investor in the company and to look to the shareholder's financial interests. Accordingly, there is a real risk that the directors of NBN Co will be obliged to act in a way which is favourable to the financial interests of the minority shareholder and inconsistent with the social and economic objectives of the Commonwealth.
- 2.33 A minority shareholder that considers that the directors of the company are failing to discharge their duty towards the "shareholders as a whole", may threaten or take action for oppression in reliance upon section 232 the Corporations Act. Specifically, this provision might be used by a minority shareholder to prevent NBN Co from acting in a

way which, although consistent with maintaining a competitive market, reduces its value or profitability.

2.34 Optus proposes that these significant risks need to be addressed by including the following additional measures in the Bill:

- (a) NBN Co should be subject to an overriding obligation to ensure its services support and facilitate retail competition. This would remove the conflict between the policy objectives of the Government and the duty of directors to maximise value for shareholders;
- (b) NBN Co should be subject to a pricing formula that applies equally to all access seekers and have less discretion in setting the standard form access agreement for particular services. Removing the current level of board discretion will help to ensure that market policy objectives are implemented.
- (c) The Government should prohibit any access seeker from being in a position to exercise control over the NBN. The rules already set out in schedule 1 of the Broadcasting Services Act to enforce the prohibition could be used for this purpose. This would not remove the conflict between the social and economic policy objectives of the Government and the commercial interests of shareholders. However, it would limit the influence that an access seeker is able to exercise over the governance of the NBN Co and help to ensure that it operates independently of its customers.
- (d) Alternatively, a statement of independence principles could be included in the NBN Companies Bill as binding NBN Co. The independence principles might require that NBN Co negotiate at arm's length with any access seeker who is also a shareholder, provides for regulatory supervision and a high level of transparency in relation to such transactions.

2.35 Similarly, rules will be required to prevent NBN Co from taking a controlling stake in a retail telecommunications provider. The explanatory memorandum specifically states that NBN Co will not be prevented from making acquisitions to facilitate the roll-out of the NBN Co, even if these involve the retail activities of the acquired entity. Whilst the explanatory memorandum indicates that NBN Co would still be subject to the wholesale-only rules and additional rules will be required to ensure that it divests itself of such retail operations, no rules have actually been announced. As the Bill is currently drafted nothing prevents NBN Co acquiring a controlling interest in a retail telecommunications provider and continuing to run that operation as a subsidiary. Again, this is a significant oversight that would compromise the "wholesale-only" status of NBN Co. Optus submits that the legislation should prevent NBN Co from making an acquisition in a form that would leave it with a controlling stake in a retail telecommunications provider. This would effectively require NBN Co to divest the retail operations as part of any acquisition.

2.36 Firstly, to the extent that a retail telecommunications provider is able to take an equity stake in NBN Co, then separation rules should be established to place specific and observable obligations on NBN Co to ensure that any dealings with related parties are conducted on a genuine arms length basis. It may not be necessary to set out the detail of these rules in the legislation – but the legislation, as a minimum, should include the following key separation principles;

- Strict separation of employees of NBN Co and any retail supplier;
- Directors and employees of NBN Co are not also employees of any retail supplier;
- There is no temporary transfer or secondment of directors, officers or employees between NBN Co and any retail supplier;

- NBN Co cannot share any premises with a retail supplier;
- NBN Co must establish, maintain and enforce appropriate access controls for its information technology systems such that information about NBN Co's business (other than information which is made publicly available in the ordinary course of its business by NBN Co) may be accessed only by NBN Co's directors, officers and employees;
- The use of Confidential Information provided by an access seeker is restricted to designated authorised purposes; and
- Measures to ensure that any dealings between NBN Co and a related party are transparent.

Stronger Enforcement powers are required

2.37 It will be important to ensure that any of the provisions relating to the structure of NBN Co, its activities and arrangements to prevent undue influence of NBN Co can be adequately enforced. Further, given NBN Co's likely position in the market it will be important for any enforcement powers to have teeth. Consideration should be given widening the existing enforcement powers to include:

- (a) civil penalties for breach, including for aiding abetting; and
- (b) empowering the court to make mandatory orders by way of rectification and compensation in terms similar to clause 87 of the Trade Practices Act.

Other Issues

Ministerial discretion

2.38 The draft legislation appears to provide the Minister with wide discretion relating to services that the NBN Co should or should not supply and over the timing of any sale of NBN Co. Optus submits that this discretion has the ability to undermine market certainty in respect of the NBN.

2.39 The Minister may include in an NBN Corporation's carrier licence conditions a requirement mandating or prohibiting provision of a service. This power appears to be unrestricted, since there are no limits on the circumstances in which the Minister might mandate or prohibit the offering of a service. Accordingly, these provisions could be used to:

- (a) mandate NBN Corporations to supply unprofitable services; or
- (b) prevent NBN Corporations from supplying services to a particular carrier or carriers.

2.40 This appears to be a significant departure from the Government's 7 April 2009 characterisation of NBN Co Limited as an independent commercial enterprise that will "*operate at arm's length from Government*". The possibility of a future Government taking advantage of this power has the potential to create unwelcome market uncertainty. It would be appropriate to provide some oversight in the application of this power. This could require that this heads of power can only be exercised on advice from the ACCC that its exercise is in the long term interests of end-users.

2.41 In respect of the provisions dealing with the Government's intention to sell its stake in NBN Co, the draft Bill gives the Minister significant discretion over the timing of any such sale. The period in which the Government must sell its shares in NBN Co commences when the Minister declares that in his or her opinion "the national broadband network

should be treated as built and fully operational". However, the trigger for commencing the 5 year sale period is in effect at the Government's sole discretion. Specifically, there are no criteria specified for determining if the NBN is "built and fully operational". The Minister may declare the network "built and fully operational" whether or not it is in fact complete.

- 2.42 The potential for a future Government to sell the network that is not fully complete raises some broader policy considerations. Such a sale could have significant consequences for the market, consumers and taxpayers. Consideration should therefore be given to requiring any proposed sale of the NBN to meet a public interest test, such as requiring ACCC approval that the proposed sale is in the long term interests of end-users.
- 2.43 Finally, Optus is also concerned that the draft legislation gives the Minister the ability to delegate to the Secretary of the Department, an SES or acting SES employee in the Department all of the Minister's powers except the declaration of whether the NBN should be treated as built and fully operational. To the extent that discretionary powers are retained following amendments to the Bill, such powers should not be capable of being delegated.

Anti-avoidance provisions

- 2.44 The anti-avoidance provisions included in the draft legislation that are designed to prohibit NBN Co from avoiding the application of the NBN Companies Bill is weak. In order for the anti-avoidance provision in section 60 (1) to apply anti-avoidance must be the "sole or dominant purpose". This sets an unreasonably high bar in circumstances where it may be difficult to characterise the purpose of particular conduct.
- 2.45 Optus submits that these provisions should be strengthened by requiring that NBN Co has a duty to act in accordance with certain principles, such as . to enhance retail competition or meet the long term interests of end-users. The courts should be given the power to enforce conduct in accordance with those principles, actionable by both the ACCC or access seekers.

Third party roll-out of fibre

- 2.46 Optus notes that the legislation does not consider the possibility of a third party building a fibre access network (for example under the requirements for rolling out fibre to greenfields from July 2010). It is entirely possible that NBN Co would decide not to overbuild in that area in which case customers would have no guarantee of competitive access to services. Consideration should be given to ensuring that in the absence of NBN Co infrastructure, fibre access services in greenfield locations are brought under the competition provisions of both the NBN Companies Bill and the NBN Access Bill.

Summary of recommendations

1. The draft Bill should be amended to remove the discretion of the Minister to make any exemptions to NBN Co's ability to operate as a wholesale-only provider of services.
2. NBN Co should be restricted to supplying services to carriers only.
3. NBN Co should be restricted to supplying services at Layer 2 and below.
4. Any entity in which NBN Co has a controlling stake should be subject to the present regulations under this Bill.
5. An equity cap should be enforced to prevent a retail telecommunications provider taking more than a 20% stake in NBN Co.
6. Clear rules should be established to prevent a minority shareholder from exercising effective control of the NBN Co in a way that undermines the Government's competition, social and economic objectives for NBN Co.
7. The legislation should set out separation principles to ensure dealings between NBN Co and a related retail telecommunications provider are conducted on genuine arms length terms.
8. Improved enforcement powers are required to prevent breaches of the "undue influence provisions". These should include civil penalties for breach and enabling the courts to make rectification orders and compensation payments in terms similar to clause 87 of the Trade Practices act.
9. The Ministerial discretion to include a condition in NBN Co's licence to provide or not provide a particular service should only be exercised on advice from the ACCC that the proposed condition is in the long term interests of end-users
10. The anti-avoidance provisions should be strengthened by requiring that NBN Co has a duty to act in accordance with certain principles, such as to enhance retail competition or meet the long term interests of end-users. The courts should be given the power to enforce conduct in accordance with those principles, actionable by both the ACCC or access seekers.
11. Consideration should be given to requiring any proposed sale of the NBN to meet a public interest test, such as requiring ACCC approval that the proposed sale is in the long term interests of end-users.
12. Consideration should be given to ensuring that in the absence of NBN Co infrastructure, fibre access services in greenfield locations are brought under the competition provisions of both the NBN Companies Bill and the NBN Access Bill.

3. Access Arrangements

Overview of the draft Bill

- 3.1 The draft Bill essentially makes the NBN Co subject to the provisions of the existing access regime, which in turn are subject to a current Competition and Consumer Safeguards Bill. In addition, the draft Bill sets out alternate mechanisms under which the NBN Co will be required to 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;
 - The Minister can make a condition of NBN Co's carrier licence that it must supply a specified eligible service that NBN Co is not currently supplying, and NBN Co must give a SAU or formulate an SFAA in relation to that service; and
 - The ACCC may 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.
- 3.2 The Bill also sets out important provisions that require NBN Co to offer services on a non-discriminatory basis. This is designed to give effect to the Government's commitment that services will be provided on an equivalent basis. However, the draft Bill enables NBN Co to negotiate different terms with different access seekers subject to a requirement that those different terms should be offered to all that can meet them. Specifically these provisions are designed to permit differentiation that aids efficiency on the condition that all access seekers with "like circumstances" have an equal opportunity to benefit from the discrimination. This could include discounts based on volumes, risk sharing, and migration incentives.
- 3.3 The ACCC will be required to publish guidance on equivalence arrangements and what will constitute "like circumstances".

Optus' comments on the draft Bill

Lack of certainty over key access terms

- 3.4 The draft Bill clearly brings the NBN Co under the Part XIC and Part XIB provisions of the existing access regime. In principle this is a sensible approach but it does increase the importance of having the current Competition and Consumer Safeguards 2009 Bill passed to deliver significant and necessary improvements to the existing regime.
- 3.5 However, one consequence of this approach is that it is envisaged that many of the details about how terms and conditions of access will be set – such as access prices – are not addressed in the draft legislation since these are expected to be set out in a Special Access Undertaking. This is a significant deficiency in the Bill.
- 3.6 Effectively this will amount to giving NBN Co significant discretion to write its own regulatory rules. This is not appropriate for a network of such scale and significance for the future of the fixed line market. Optus submits that the Government should take the opportunity to set out much clearer guidance about how certain access arrangements

should be determined. It would then be incumbent upon NBN Co to develop special Access Undertaking that is consistent with these principles.

- 3.7 Central to this is the need for clear rules on how access prices for the NBN should be determined. Access pricing has been a contentious issue which has seen the provisions of Part XIC of the Trade Practices Act tested to its limits in the past decade. The lack of precision in Part XIC about how access prices should be determined has contributed to a high degree of uncertainty under the present regulatory framework and resulted in divisive regulatory activity and litigation between access providers, access seekers and the regulators. These problems will be well known to the Government as they have been well ventilated in the recent consultations on regulatory reform.
- 3.8 The legislation provides an opportunity to set clearer and more prescriptive guidance as to the appropriate methodology for setting access prices. Specifically Optus suggests that the legislation sets out the following key principles in respect of pricing of services on the NBN;
- Prices should be set on the basis of a Regulated Asset Base (“RAB”), which should be roll-forward from period to period to the next;
 - The RAB should reflect the actual prudently incurred costs to NBN Co of rolling out the network;
 - Once established the RAB should be ‘rolled forward’ into future regulatory periods so that prices for the next period can be determined to take account of additional prudent capital and operating expenditure and allowing for depreciation of those assets according to their economic life; and
 - Prices under the RAB should be approved by the ACCC, including application of prudence tests to NBN Co’s capital and operating expenditure.
- 3.9 Whilst the Competition and Consumer Safeguards Bill 2009 includes additional flexibility for the ACCC to specify a fixed principle (such as the roll-forward of an asset base) that is to apply from one access determination period to another, the provisions in that reform Bill fall short of the clarity required over such an essential determinant of access pricing.

Equivalence arrangements

- 3.10 Ensuring that access seekers have equivalent access to services on the NBN is a fundamental building block to establishing an environment for robust and sustainable competition on the NBN. The Bill seeks to give effect to the Government’s commitment to ensuring that NBN Co will provide services to access seekers on an equivalent basis. Specifically, the proposed section 152AXC (1) places an obligation on NBN Co not to “discriminate between access seekers”. However, having established the principle of non-discrimination, the proposed section 152 AXC (3) makes it clear that discrimination will be permissible where such “discrimination aids efficiency”.
- 3.11 The explanatory memorandum indicates that the term “aids efficiency” will be interpreted broadly with a wide range of examples cited as likely to meet this test. Optus is concerned that as the Bill is presently drafted, the principle of equivalence will not be met in practice. The proposed equivalence regime is unlikely to be any more effective than the weak arrangements that apply in the present regulatory framework.
- 3.12 Firstly, the non-discrimination is not sufficiently well defined to meet an appropriate equivalence standard that is required for NBN Co’s operations. As indicated in Optus’ previous submissions NBN Co should be under a statutory obligation to provide access

services on an “equivalence of inputs” basis (similar to the arrangements that apply in the UK and New Zealand). Rules should require that NBN Co has an obligation to:

- supply the same service to all access seekers;
 - in the same time frame;
 - on the same terms and conditions (including price and quality of service);
 - by means of the same systems and processes (including operational support processes);
 - providing the same product information about a service provided to all access seekers; and
 - in relation to any other aspect of access to, or use of, NBN Co's assets, the same treatment that is provided to any other access seeker in like circumstances.
- For the purposes of the above, “the same” should be defined to mean;
 - trivial differences; and
 - differences relating to:
 - credit-worthiness;
 - matters of national security and law enforcement, or any other security requirements specified by the Minister by legislative instrument;
 - occupational health and safety requirements;

3.13 Secondly, whilst Optus supports the concept that there should be scope for some differentiation, such that different access terms could apply for different access seekers, nevertheless the circumstances in which this could apply should be very tightly prescribed. For example, any price differences must be based on clear demonstrable differences in the cost of supply, which have been pre-approved by the ACCC. Providing discounts to the provider that can commit to the largest volumes without reference to any changes in NBN Co's cost inputs would simply perpetuate the price discrimination that can arise in the present access regime.

3.14 The present provisions of the draft Bill are far too loose in this respect. The concepts of “efficiency” and “like circumstances” are not defined. Whilst the ACCC is expected to provide guidance on these concepts it is not clear that such guidance will be enforceable. The explanatory memorandum indicates that it is not intended that such flexibility would provide a single access seeker with a “systemic” advantage. However, the drafting does not reflect this statement. Under the current draft provisions it would be entirely possible for Telstra to negotiate special pricing in return for an agreement to migrate 8 million customers to the NBN. Whilst such terms would notionally be on offer to other access seekers “in like circumstances”, no other access seekers would qualify to receive those terms (as they do not have 8 million fixed line customers). Such an arrangement would significantly compromise the anticipated competitive benefits that the NBN will bring to the fixed line sector. In an extreme scenario, Telstra might be able to re-entrench its current retail dominance of the market.

3.15 Optus submits that the concept of “efficiency” should be clearly defined in the legislation to relate to a “demonstrable change in the costs to supply of NBN Co on an **Equivalence of Inputs** basis”. Further, “like circumstances” should also be clearly defined in a way that would prevent a single access seekers gaining a clear commercial advantage on the NBN. “Like” should be defined to relate to a class of “access seekers” and not a “single access seeker”.

3.16 A third issue relates to the ability of NBN Co to supply services that may only be required or capable of being used by a single access seeker. Under the draft legislation NBN Co

is entitled to offer any eligible service provided it formulates a standard form of access agreement that relates to access to the service. It is conceivable that a service with particular characteristics may have technical and cost advantages for a major NBN access seeker such as Telstra. The formulation and offering of such a service could have major anti-competitive effects because of the cost advantages it might bestow upon a single access seeker. The NBN Co should, therefore, be limited to providing generic set of voice and high-speed broadband access services.

- 3.17 Finally, NBN Co is entitled to decline to provide access where to do so might prevent;
- (a) A service provider (or the NBN Corporation) who already has access to the declared service from obtaining a sufficient amount of service to meet its reasonably anticipated requirements; or
 - (b) A person from obtaining by the exercise of a "pre- request right" a sufficient level of access to meet the person's actual requirements.
- 3.18 This provision appears to expressly permit NBN Co to pre-sell and/or commit levels of capacity that preclude competition by subsequent access seekers. The mention of a "pre-request right" in the Access Bill is of particular concern. It is defined as "... a right under a contract that was in force at the time when the request was made". This seems to contemplate the sale of options over capacity that is capable of preventing new access seekers from obtaining a service.
- 3.19 Optus submits that the Bill should include a clear requirement that the NBN Co is obliged to manage the sale of capacity in order to facilitate the delivery of competing services and encourage contestability.

Other Issues

Transparency relating to non-standard terms

- 3.20 The Bill seeks to provide some transparency in the circumstances where an access seeker is able to negotiate different terms of access. However, the only transparency requirement that applies in relation to departures from the terms of a standard form of access agreement or any access undertaking is that within seven days after the day on which the access agreement was entered into the NBN must publish certain information on its website.
- 3.21 This raises a significant problem. The disclosure requirement happens after the NBN Co is bound by the terms of its departing supply agreement which is arguably too late. By this time there is no opportunity for third-party objection or for legal intervention. Further, the information which is to be published on the website identifies and describes the differences between the agreement entered into and the standard form of access agreement or access undertaking. There is no obligation to post the actual agreement. Accordingly, the descriptive information may not be sufficient to enable other access seekers to negotiate identical terms.
- 3.22 Optus submits that NBN Co should be obliged to publish full copies of all agreements it has entered into with access seekers. Any such agreement should be capable of being declared invalid if objections raised by other access seekers are upheld by the ACCC.

Transparency of Network Information

- 3.23 The regulatory framework does not contain any provisions requiring the NBN Co to publish information about its network, available capacity, its facilities and/or its procedures.

- 3.24 This information will be required to facilitate network planning and the provisioning of competitive facilities. NBN Co should, therefore, be required to make relevant network information publicly available to access seekers.

Summary of recommendation

13. The Bill should provide clear guidance about how certain key access arrangements should be determined. As a minimum the Bill should set out principles on which access prices should be determined and approved by the ACCC.
14. A clear definition of “equivalence” is required – the Bill should adopt the principle of “equivalence of inputs” as used in the United Kingdom and New Zealand.
15. Tighter rules are required to deal with differential access terms. The concept of “efficiency” should be clearly defined in the legislation to relate to a “demonstrable change in the costs to supply of NBN Co on an Equivalence of Inputs basis”. The term “like circumstances” should also be clearly defined in a way that would prevent a single access seeker gaining a clear commercial advantage on the NBN. “Like” should be defined to relate to a class of “access seekers” and not a “single access seeker”.
16. The Bill should include a clear requirement that the NBN Co is obliged to manage the sale of capacity in order to facilitate the delivery of competing services and encourage contestability.
17. NBN Co should be obliged to publish full copies of all agreements it has entered into with access seekers. Any such agreement should be capable of being declared invalid if objections raised by other access seekers are upheld by the ACCC.
18. NBN Co should be required to make information publicly available about its network, available capacity, its facilities and/or its procedures.