



ATUG submission
Telecommunications Legislation Amendment
(NBN) Bill 2008

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Background

ATUG's views are based on the needs and views of business, government and community users who rely on communications technologies to achieve their goals.

ATUG's comments are based on discussion among our members during a series of forums during 2007 and early 2008 looking at a High-Capacity Future for Australia.

ATUG is keen to see continued co-operation between Federal, State and Local Governments and between government and industry in the development of Australia's communications capability. A number of State and Local Governments are advanced in strategies and plans to encourage the development of high-speed broadband networks for their communities and agencies. The NBN RFP should provide for the possibility of a number of proposals on how to best deliver Australia's NBN.

As well, a number of Federal agencies – DoHA, DEST, AGIMO are examples – are also focused on plans for future service delivery which rely on fast broadband. The NBN RFP should build on this work. The communications spend of these agencies and State Governments will be important to the commercial effectiveness of the NBN investment.

ATUG would like to see the NBN RFP reflect a strong ongoing commitment to robust competition and the long term interests of end-users.

ATUG would welcome an explicit commitment in the NBN RFP for the key policy which has driven decision in the telecommunications sector to date - the long-term interests of end users, and competition as the key mechanism to achieve this policy objective.

Policy choices which limit choice for end users, reduce competition, or result in unaffordable services will mean that Australia's telecommunications services will not be up to world parity with consequences for economic and social development.

ATUG sees the development of an open, non-discriminatory national high-speed broadband network as critical in achieving an appropriate market structure for the communications sector.

The NBN FRP should call for proposals for commercially separated infrastructure as they are the most likely to achieve a competitive market structure for the communications industry.

Existing infrastructure owners will be more effective market participants if the issues of dominance and incentives are addressed with market based incentives.

Based on overseas experience ATUG expects infrastructure-only companies, utility companies to see the opportunity provided to enter the market as a wholesale only provider. This would foster the services and applications sector in the communications industry for the benefit of end users.

All end users in Australia should have access to quality telecommunications services at affordable prices, underpinned by legislation where necessary.

The NBN should deliver universal access to affordable NBN services. The benefits of new communications platforms require that all Australians are able to connect to the NBN and can afford the services.

For end users **ubiquitous** high-speed broadband is the true goal.

ATUG supports commercial investment from private sector sources where this delivers the communications infrastructure that Australia needs. However, in our view there is a role for government in extending and accelerating infrastructure development in markets where commercial indicators do not support investment that is needed for economic and social benefit. The opportunity that Government funding has to change the incentives for investment and industry structure must be maximised in the NBN RFP

Investors in the NBN should be able to earn returns on their investment commensurate with the cost of their investment and risks associated with the NBN.

ATUG supports commercial returns for investors in new networks – ongoing innovation is a key concern of end users. Prices for NBN services should reflect the cost of those services and not claims for losses in rural areas, especially given the size of the proposed Government contribution to the NBN funding.

Neither should prices be based on reductions in margins (from copper networks) which may occur in the transition to the NBN.

With increases in line rentals, contributions from Government funding to accelerate and extend access to fast broadband services and continued high margins on fixed network call services, ATUG remains sceptical about claims for losses in rural areas. There may be other mechanisms to handle any losses legitimately identified. These will be identified during the course of the USO review.

The NBN RFP could consider the use of tax mechanisms (as with the film industry) or accelerated depreciation as mechanisms to encourage the deployment of infrastructure with reasonable returns for investors. It may be appropriate in this context to require the claiming entity to be a structurally separated company.

Regulation for certainty of investment returns may need to be part of the telecommunications future but should take account of the long-term interests of end users and affordability criteria as well as guaranteed returns for investors. ATUG believes Part XIC s152AB (7), which explicitly requires the ACCC to have regard to: "...the risks involved in new investment" provides a suitable mechanism to achieve a balanced outcome.

The NBN RFP should encourage efficient investment in communications infrastructure. The issue of "over-build" must be dealt with through licences and legislation.

ATUG supports the existing telecommunications policy objective of efficient investment, and believes this should be part of the NBN RFP, but questions how inefficient investments can be handled in a policy sense. If companies choose to make inefficient investments it is important that end users are not required to fund such choices through guaranteed rates of return.

Optic fibre rings in capital cities has been a point in case in the past – while companies may wish to build multiple unique infrastructures, users should not see price rises as the way of ensuring returns for inefficient investments.

Cable over-build for Pay TV deliver is another case where concern with efficiency was overtaken by concern for market dominance.

It will be important that market offers such as bundles are not allowed to effectively limit choice for end users.

The NBN RFP should ask for network designs that facilitate competition at the retail and service layers.

ATUG believes the NBN RFP should put emphasis on such proposals which offer network design characteristics which support open access and competition.

Over many years Australia's telecommunications sector has struggled with the need for regulated access to fixed services. A number of opportunities were missed to create structurally separated entities (network co/services co), to use cable as a competing infrastructure (overbuild permitted), to prevent leverage from fixed market dominance into the mobile and Pay TV markets.

The best outcome for end users would be to have choice between fixed copper network access, cable access, wireless, mobile and fibre access.

The opportunity has arisen once more for increased competition through a more effective industry structure – the NBN RFP must reflect this.

Equivalent access - the NBN RFP should require that the new high-speed broadband network operator is not operating in the downstream market.

Discussions about the NBN RFP have called for "equivalence". ATUG sees no evidence of the degree of industry co-operation required to implement genuine equivalence for the service and retail sectors. The Office of the Telecoms Adjudicator in the UK offers a model of industry co-operation in the implementation of "equivalence"

The NBN RFP should require proposers to outline the reality of "equivalent" access in their model. Undertakings such as those that underpins the BT Openreach model should be required as part of the NBN RFP.

The work DBCDE has done with the OPEL agreement, the WA Government with its State Broadband Network, the NSW Government with its contract with Soul which requires open access, TransAct's experience as a 'born wholesale' operator, Brisbane City Council's VISTA project, Albury Wodonga City Council's wireless mesh project all provide local experiences of the reality of

newer access arrangements. These experiences could inform the Panel's consideration of NBN RFP access arrangements.

Overseas, ATUG understands that recently KPN in the Netherlands has agreed to provide access to its fibre network to competitors and that the City of Amsterdam has also had relevant experience in securing open access high speed broadband infrastructure for its residents. Singapore and New Zealand have both adopted separated structures as between infrastructure and service layers. These overseas examples should also be reviewed in more detail.

The Trade Practices Act should apply to the NBN

ATUG is concerned at suggestions that Part XIB and XIC of the Trade Practices Act will not apply to the new network and that an alternative regulatory scheme would apply.

In ATUG's view the current provisions around access and anti-competitive conduct should apply to the new infrastructure. The specific requirement to take account of risk in investment contemplates the type of new investment contemplated by the proposed network.

As far as ATUG understands there is no precedent in other industries for new investment to be exempted in this way from the Trade Practices Act.

Given the experience in developing the applications of Parts XIC and XIB, (an ongoing task), a new scheme would create a greater deal of uncertainty than using but updating the existing provisions for Special Access Undertaking and the acceptance of risk in pricing principles.

The model of negotiate, arbitrate, litigate should be updated to achieve more certain and speedy outcomes – using new pricing principles and ACCC oversight of industry implementation through an Australian version of the UK OTA. The model adopted by the French regulator in regard to something similar to “special access undertakings” is relevant – where a price is put forward which is not reasonable in the regulators view, the regulator has the right to set a reasonable price for access.

The assessment process and timing is very ambitious

While appreciating the need for speed in delivering NBN access to end users, ATUG still regards the timetable proposed as too ambitious given the importance of the objectives, the proposals and the assessment.

From ATUG's perspective the real focus is Australia's communications infrastructure for the coming decades. Given experience in other jurisdictions, it seems to ATUG that the time allowed to comment on and develop important regulatory considerations is too short.

There should be an Open Process for consultation:

The opportunity to comment on the Draft RFP through public consultation should be provided to all interested stakeholders. The NBN RFP will have significant public interest implications and commitment to an open and transparent process should provide an opportunity for comment on the legislative and regulatory change proposals are clear.