



Optus Submission

**Senate Inquiry into
NBN Companies Bill 2010 &
Telecommunications Legislation Amendment (NBN
Measures – Access Arrangements) Bill 2010**

February 2011

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1. Introduction

- 1.1 On 25th November 2010, the Government released two Bills to establish the regulatory and governance framework for the National Broadband Network Company (NBN Co);
- (a) The National Broadband Network Companies Bill 2010 (NBN Companies Bill), which sets out the ownership, governance and sale arrangements for NBN Co; and
 - (b) The Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (NBN Access Bill), which sets out the specific access arrangements that will apply to NBN Co to ensure that it provides services on an equivalence of access basis.
- 1.2 On 10 February 2011 the Senate Environment and Communications Legislation Committee called for submissions on these Bills. Optus welcomes the opportunity to make a submission to the Senate Committee on the legislation.

2. Importance of the NBN legislation

- 2.1 NBN Co will be the owner and operator of the only national fixed line highspeed broadband network in Australia. This will give it a dominant position in the supply of wholesale fixed line broadband access services. Retail Service Providers (RSPs) will be dependent upon accessing the NBN and the terms of such access will directly impact their ability to compete and build and maintain viable businesses. It follows that NBN Co's access terms will also have a direct impact on end-customers in terms of the affordability of highspeed broadband services and the utility they will ultimately derive from accessing these services.
- 2.2 Given its unique and dominant position in the value chain it is essential that NBN Co is subject to clear, binding and transparent governance and access arrangements that narrowly define the scope of its activities to offering specified wholesale-access services on genuinely equal terms, with the prices and conditions of access subject to detailed regulatory oversight. It is appropriate that specific legislation is enacted by Parliament to lock-in place these governance and access arrangements.
- 2.3 Optus notes that the Government released Exposure Drafts of the NBN Companies and Access Bills in 2010 and provided the industry with an opportunity to comment on the proposed legislation.
- 2.4 As part of this consultation process Optus raised a number of significant concerns it had with the draft Bills. In particular, we were concerned that the proposed legislation represented a significant step backwards from the Government's previous commitments to operate the NBN as a wholesale-only operator on tightly regulated terms. We expressed the view that we would not support the legislation in its current format. Optus' specific concerns included that;
- (a) Whilst the NBN Co is required to operate as a wholesale only provider, the draft Companies Bill enabled it to offer retail services at the discretion of the Minister;

- (b) The related party provisions were inadequate and provided significant scope for NBN Co to step around its wholesale-only obligation by investing in a retail telecommunications supplier;
- (c) The arrangements relating to private ownership and control of NBN Co were inadequate. Issues relating to the ownership structure of NBN Co were essentially left to be determined by the Minister at a later date, with a clear risk that a retail telecommunications provider could obtain a controlling stake in NBN Co thereby raising a conflict of interest similar to that we have today in Telstra's structure and which the NBN was supposed to eliminate;
- (d) The equivalence arrangements were loosely constructed and were well below the standard Optus would expect to apply to NBN Co. It would be possible for Telstra to negotiate a volume discount on the NBN that no other service provider would qualify for given its scale; and
- (e) A number of the access arrangements or powers relating to the ACCC were not sufficiently well defined, leaving too much discretion to NBN Co.

2.5 Optus is pleased to note that the Government has positively responded to the feedback it has received from the industry and that a number of important amendments have been made to the Bills. These changes go some way to addressing the concerns outlined above;

- (a) The activities of NBN Co have been more clearly constrained to providing only wholesale services;
- (b) Any related company of NBN Co is to be brought within the scope of the wholesale only obligations;
- (c) The potential for an unacceptable conflict of interest to arise in the ownership structure of NBN Co has been somewhat mitigated by the fact that Government will be the sole equity investor in NBN Co until after the network is complete. Further, prior to any Government sale of its investment the future ownership structure of NBN Co will be subject to review by the Productivity Commission and a joint Parliamentary committee; and
- (d) The equivalence arrangements have been improved by increasing the oversight powers of the ACCC, specifically in relation to volume discounts.

2.6 Notwithstanding these changes, Optus considers that some further changes are required to the legislation. These changes are aimed at addressing four remaining concerns we have with the proposed governance and regulatory arrangements that apply to the NBN;

- (a) To further tighten up the price and non-price equivalence obligations that will apply to the NBN and remove any scope for an access seekers to gain a unique advantage on the NBN;
- (b) To more clearly ring-fence the activities of NBN Co to providing clearly defined and specified wholesale-only fixed line access services;

- (c) To improve the level of transparency that will apply to the operations of the NBN; and
 - (d) To more effectively rule out the possibility of an unacceptable private ownership or control situations arising in relation to NBN Co.
- 2.7 Optus has addressed each of these points in more detail below and has provided proposed amendments to the NBN Bills in the appendix to this submission.

3. Proposed Amendments to the Bills

Tighter equivalence arrangements

- 3.1 Under the proposed NBN Access Bill, NBN Co is entitled to provide differential terms of access if these differences can be considered to “aid efficiency” and are provided to access seekers in “like circumstances”. There is one exception to this rule, namely that price differences that relate to volumes of services purchased are required to be approved by the ACCC by requiring volume related price differences to be set out in a Special Access Undertaking.
- 3.2 Optus accepts the principle that differential access terms can be justified on the basis that they may promote efficiency and welfare enhancing outcomes. However, given the position of NBN Co in the market it is important that the circumstances in which the different access terms can apply are subject to independent and transparent oversight by the ACCC.
- 3.3 The current provisions of the NBN Access Bill give NBN Co wide discretion to determine the circumstances in which “aid efficiency” and “like circumstances” are to apply. This is not acceptable. It opens the risk for price terms to be offered in a way that tilts the playing field in favour of one access seeker.
- 3.4 An example of this risk is that NBN Co and Telstra are currently negotiating long-term mutual supply agreements. This will likely involve NBN Co leasing access to Telstra’s infrastructure under a long-term agreement and Telstra agreeing to purchase access services from NBN Co. This raises a clear opportunity for Telstra to be given a price discount on the basis that the arrangement will help to underpin the long-term viability of the NBN thereby “aiding efficiency”. Whilst the same terms might be made available to other access seekers in “like circumstances”, in practice no other access seeker is likely to qualify for the discounted access terms because it will not be in a position to provide the same services to NBN Co that Telstra can. Such an outcome would undermine the principle of equivalence and significantly tilt the NBN playing field in favour of Telstra.
- 3.5 Optus submits that issues associated with differential access terms must not be left to the discretion of NBN Co to be determined through backroom negotiations. All differential terms of access must require the formal approval of the ACCC following a transparent public consultation process.

Limiting the scope of NBN Co's services

NBN Co to provide wholesale Layer 2 access services

- 3.6 The NBN Access Bill provides the Minister with the power to impose a Licence Condition on NBN Co either to supply or prohibit it from supplying a specified service. The Explanatory Memorandum indicates that this provision may be used to specify the layer at which NBN Co must offer services to provide an appropriate level of certainty to stakeholders.
- 3.7 However, contrary to the intention outlined in the Explanatory Memorandum, Optus submits that this provision introduces flexibility which creates significant uncertainty about the nature of the services that NBN Co can offer. Absent a clear demarcation line in NBN's activities there is scope for NBN Co's activities to be extended over time. Such an outcome would potentially compromise NBN Co's wholesale-only status and result in NBN Co participating in sections of the market that would bring it into direct competition with its customers.
- 3.8 In developing its service offerings it is important that NBN Co seeks to address areas of actual or potential market failure. It should not be allowed to extend its service offering into areas of the market that either are or are prospectively contestable. An area of specific concern is the ability for NBN Co to move up the broadband value chain over time and to offer services at higher level in the Open System Interconnection (OSI) stack. For this reason it is important for NBN Co to be limited to offering lower level Layer 2 bitstream access services. This would specifically rule out NBN Co offering services at Layer 3 and above, where there is a real opportunity for contestable market supply to flourish. Presently, a number of companies provide wholesale Layer 3 offerings to service providers. This wholesale market has the potential to grow with the roll-out of the NBN as a number of current providers gain access to a broader footprint.
- 3.9 Optus submits that the NBN Companies Bill should be amended to include a specific requirement that NBN Co only supplies services at Layer 2 in the OSI stack.

NBN Co must only provide services to licensed carriers and carriage service providers

- 3.10 Under the current NBN Companies Bill, NBN Co must only supply eligible services to licensed carriers or carriage service providers. However, an exception is made to this rule to enable certain specified utilities (such as gas, electricity, air services and water utilities, etc) to directly source access from NBN Co for the provision of network management type services.
- 3.11 Optus submits that this exemption is not warranted. It is a clear example of the problem of mission creep outlined in the section above. This provision will potentially place NBN Co in direct competition with other Retail Service Providers and is likely to reduce the addressable market for those Retail Service Providers.
- 3.12 Optus recommends that this exemption be deleted. NBN Co should only be able to provide services to carriers or carriage service providers.

Improved transparency for the NBN

- 3.13 As indicated earlier in this submission, NBN Co will be the dominant wholesale supplier of fixed line highspeed broadband network in Australia. It will have an unprecedented level of market power, which means that access to the NBN must be tightly regulated. To ensure that regulation can be effective and that industry has full confidence in the regulatory process it will be necessary to ensure that NBN Co is subject to appropriate reporting obligations to ensure that there is proper transparency of its operations.
- 3.14 Optus submits that improvements are required to the reporting obligations that apply to NBN Co. In particular, Optus recommends that NBN Co should be required to:
- (a) Prepare and publish financial accounts in line with public company reporting obligations
 - (b) Prepare regulatory accounts consistent with Regulatory Accounting Framework determined by the ACCC, which currently applies to existing carriers (such as Telstra, Optus, VHA etc); and
 - (c) Prepare and publish reports outlining performance with agreed industry performance standards.

Private ownership and control of NBN Co

- 3.15 The NBN Companies Bill confirms that the Government will be the sole equity investor during the roll-out of the NBN. It also sets out a process for the Productivity Commission and a joint Parliamentary committee to examine issues related to the future ownership structure of NBN Co prior to the future sell-down of the Government's equity stake in NBN Co.
- 3.16 These provisions provide some level of comfort that, at least in the short-term, the wholesale-only obligations that apply to NBN Co are unlikely to be compromised by a retail telecommunications provider gaining a controlling equity interest in NBN Co.
- 3.17 However, these provisions do not rule out this possibility arising in the longer term. Given that one of the driving reasons for the NBN roll-out is to solve the competition issues arising from Telstra's vertically integrated structure then Optus submits that the Bill needs to go further than it does in preventing an unacceptable private ownership situation arising.
- 3.18 Optus submits that, consistent with the recommendations of the McKinsey/KPMG Implementation Study, a 15% equity limit should be placed on any investment by retail telecommunications service provider in NBN Co.

APPENDIX

Proposed Amendments to National Broadband Network Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill and the National Broadband Network Companies Bill

NBN Access Bill

Issue	Drafting to achieve recommendation
Tighter equivalence obligations	<p>In Item 50 of Schedule 1 of Part 1, in section 152AXC(4)(a), omit section 152AXC(4)(a) and substitute with:</p> <p>"(a) the discrimination is of a minor nature or the Commission determines that the discrimination aids efficiency in accordance with the process outlined at subsection (5A);".</p> <p>After section 152AXC(4), insert:</p> <p>"(5A) For the purposes of subsection (4A)(a), the discrimination will be deemed to aid efficiency if:</p> <p>(a) an NBN corporation gives the Commission a description of the contemplated discrimination and details of how the discrimination is expected to aid efficiency; and</p> <p>(b) the Commission approves the discrimination in writing.</p> <p>(5B) The Commission may issue guidance on what constitutes a difference in terms of a "minor nature"."</p>
Provision of Layer 2 services	<p>In the Telecommunications Legislation Amendment (National Broadband Network measures – Access Arrangements) Bill 2010:</p> <p>- at Item 79 insert in the proposed clause 152CJA (1) after the word "unless" the following words "the service is a Layer 2 bitstream service and:"</p> <p>- at the end of the proposed clause 152CJA (1) insert:</p> <p>For the purposes of this subsection (152CJA(1)), a Layer 2 bitstream service has the meaning given in the Telecommunications Act 1997.</p>
Reporting obligations on NBN Co	After section 85 of the National Broadband Network Companies Bill 2010, insert:

(85A) (1) In the exercise of its powers under section 151BU of the *Competition and Consumer Act 2010*, the ACCC must, as soon as practicable, make rules (in this clause called the regulatory accounting framework) requiring NBN Co to keep and retain records, and to prepare reports consisting of information contained in those records, that presents and compare the outcomes of NBN Co's performance for supply of wholesale services in accordance with a customer grouping (if any) determined by the ACCC, in writing, in respect of key performance indicators determined by the ACCC, in writing, for price and non-price terms and conditions.

The regulatory accounting framework must require NBN Co to prepare the reports mentioned in subclause (1) each quarter.

(2) The regulatory accounting framework must require NBN Co to provide the reports mentioned in subclause (1) to the ACCC as soon as practicable but in any event by 2 months after the end of each relevant quarter.

(3) In the exercise of its powers under section 151BUDA of the *Competition and Consumer Act 2010*, the ACCC must make available to the public copies of the reports mentioned in subclause (1) as soon as practicable but in any event by 1 month after the date on which the ACCC receives the reports.

(4) The copies of the reports mentioned in subclause (1) must be accompanied by a statement by the ACCC (including such qualifications, if any, as the ACCC considers necessary) as to the accuracy of the reports; and the extent to which the reports comply with:

- (i) any relevant record-keeping rules made by the ACCC (whether for the purposes of this Direction or otherwise); and
- (ii) any direction given by the ACCC under clause 8.

(5) In specifying the manner and form in which the reports mentioned in subclause (3) are to be prepared according to the regulatory accounting framework mentioned in subclause (1) and must contain such auditing and certification requirements that the ACCC considers necessary to ensure that the reports are accurate and comply with:

- (i) any relevant record-keeping rules made by the ACCC; and
- (iii) any direction given by the ACCC under clause 6.

6 The ACCC must give a written direction to NBN Co requiring NBN Co to take such action as is specified in the direction to inform the public, including access seekers, in a manner that the ACCC considers appropriate, that copies of the reports that NBN Co is required to provide to the ACCC under sub-clause (3) or copies of extracts from those reports that the ACCC has decided are to be made available to the public, are so available.

	<p>(85B) Together with the reports that NBN Co is required to give under section 36 of the <i>Commonwealth Authorities and Companies Act 1997</i>, NBN Co must also provide a report setting out details of:</p> <p>(a) each of the matters referred to in section 80(1) and section 82(6) of this Act;</p> <p>(b) performance of the NBN Co against any standard in force under section 117D of the <i>Telecommunication (Consumer Protections and Service Standards) Act 1999</i>; and</p> <p>(c) performance of the NBN Co against any applicable industry code or standard in force under Part 6 of the <i>Telecommunications Act 1997</i> pertaining to the year of the report and NBN Co's future operations."</p>
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NBN Companies Bill

Issue	Drafting change
Ownership of NBN	<p>Omit section 69(1) and substitute with:</p> <p>"(1) For the purposes of this Act, an unacceptable private ownership or control situation, in relation to NBN Co means:</p> <p>(a) a situation where a person is in a position to exercise control of NBN Co as defined in subsection (1B) (<i>Acquirer</i>); and</p> <p>(b) any other situation specified in the regulations.</p> <p>(1B) For the purposes of this section 69, whether a person is in a position to exercise control of NBN Co shall be determined under Schedule 1 to the <i>Broadcasting Services Act 1992</i> except that in making such determination:</p> <p>(a) the definition of <i>associate</i> in subsection 6(1) of the <i>Broadcasting Services Act 1992</i> shall not apply; and</p> <p>(b) the definition of <i>associate</i> in subsection (1C) applies instead.</p> <p>(1C) For the purposes of this section, an associate of Acquirer is:</p> <p>(a) a partner of Acquirer; or</p>

	<p>(b) if Acquirer or another person who is an associate of Acquirer under another paragraph receives benefits or is capable of benefiting under a trust – the trustee of the trust; or</p> <p>(c) a person (whether a company or not) who:</p> <ul style="list-style-type: none"> (i) acts, or is accustomed to act; or (ii) under a contract or an arrangement or understanding (whether formal or informal) is intended or expected to act; <p>in accordance with the directions, instructions or wishes of, or in concert with:</p> <ul style="list-style-type: none"> (iii) Acquirer; or (iv) Acquirer and another person who is an associate of Acquirer under another paragraph; or <p>(d) another company if:</p> <ul style="list-style-type: none"> (i) the other company is a related body corporate of Acquirer for the purposes of the <i>Corporations Act 2001</i>; or (ii) Acquirer, or Acquirer and another person who is an associate of Acquirer under another paragraph, is or are in a position to exercise control of the other company. <p>Note: For control of a company, see subsection (1B).</p> <p>(1D) However, for the purposes of determining whether a person is in a position to exercise control of a company, persons are not associates of each other if the Commission is satisfied that:</p> <ul style="list-style-type: none"> (a) they do not act together in any relevant dealings relating to the company; and (b) neither of them is in a position to exert influence over the business dealings of the other in relation to the company."
Exemption from requirement for NBN Co to only supply to a Carrier/Service provider	Omit Division 2, Part 2, sections 10 to 16 (inclusive) and substitute each with "Not used".