

xx January 2011

Philip Mason  
Assistant Secretary  
NBN and Fibre Roll-out Regulation  
Department of Broadband Communications Digital Economy

Dear Philip

**Re Telecommunications Legislation (National Broadband Network Measures – Access Arrangements) Bill 2010**

Thank you for the opportunity to meet with yourself and Pip and other staff members of the Department of Broadband Communications Digital Economy (**DBCDE**) on 11 January 2011.

At that meeting AAPT raised a concern with the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (**NBN Access Bill**) and also raised some issues of relatively less significance with the National Broadband Companies Bill 2010 (**NBN Co Bill**).

As a follow up to that meeting, this letter is intended to provide the DBCDE with a description in writing of the concern that AAPT has with the drafting used in Part 3 of Schedule 1 of the NBN Access Bill which amends both the Telecommunications Act (**Telco Act**) and the Competition and Consumer Act (**CCA**).

While AAPT supports the principle described in the Explanatory Memorandum (**EM**) that a supplier which deploys a mass market fibre network in areas before NBN Co should be subject to the same regulatory requirements as NBN Co, AAPT is concerned that the current drafting of the Access Bill itself:

- is too broad and therefore uncertain;
- appears to have the consequence (which AAPT assumes is unintended in view of the EM and our discussions at the meeting on 11 January 2011) of restricting existing service providers (such as AAPT) from conducting their legitimate business operations;
- would harm competition; and
- would not be in the long term interests of end-users.

***The proposed Telco Act changes***

The Access Bill amends the Telco Act by (among other things) the insertion of s141 which effectively provides that a network unit (eg a fibre length) (not owned by NBN Co) forming part of network must not be used to supply a fixed line service if (s141(1) and (2)):

- the network is or is capable of supplying 25Mbps (or more) to customers;
- no Layer 2 Ethernet bitstream service (**L2BS**) is available for supply to those customers using the network;
- the network came into existence or was altered or upgraded and as a result was able to supply 25 Mbps (or more) after 25 November 2010; and
- the network unit is not used wholly to supply a service to a single corporate or government end user.

Penalties of up to \$2.2m apply for breach (s141(4)) and the Minister can exempt (after consultation with the ACCC and ACMA) (s141(5) and (8)).

### *The proposed CCA changes*

The Access Bill amends the CCA by (among other things) the insertion of s152AGA which effectively provides that if a telecommunications network (not the NBN):

- is or is capable of supplying a L2BS;
- is or is capable of supplying 25 Mbps (or more) to customers;
- came into existence after 25 November 2010 or was altered or upgraded after 25 November 2010 and as a result became capable of supplying 25 Mbps; and
- is not used wholly to supply carriage services to a single corporate or government end user,

then the network becomes a designated superfast telecommunications network (**DSFTN**)

The CCA is also amended such that:

- as soon as practicable after the passing of the Access Bill, the ACCC, must declare a L2BS which will only have effect in relation to DSFTNs (proposed new s152AL(4) of the CCA); and
- if a L2BS is a declared service and is supplied using a DSFTN, the supplier (other than NBN Co) must not discriminate between access seekers except on grounds of

creditworthiness or it aids efficiency and all access seekers in like circumstances have equal opportunity to benefit (proposed new s152ARB of the CCA).

### ***AAPT's Concerns***

Firstly, In AAPT's view, the requirement in S152AGA that a telecommunications network is *capable of supplying a L2BS* is not clear, eg is the requirement satisfied even if some significant investment is required on the network owner's part in order to actually supply the L2BS?

Secondly and of greater concern is that the Access Bill amends both the Telco Act (S141) and the CCA (s152AGA), among other things. These amendments have been made (to our understanding and in line with the Explanatory Memorandum) to prevent "Cherry Picking" by FTTH or FTTN operators however AAPT's interpretation of the legislation is that these clauses have the unintended consequence of restricting carriers from legitimately expanding their networks and trying to compete in the business and wholesale markets.

Both amendments refer to upgrades or amendments to networks as well as define the type of customer that can be served using the network and then impose restrictions or conditions on the network operator.

To illustrate our concerns we have provided several examples.

The AAPT network is currently capable of supplying services at speeds higher than 25 Mbps, consequently, s141 and s152AGA would have no immediate application to AAPT.

If, for example, AAPT builds a new fibre tail extension to its network to connect to a single building or to a business park after 25 November 2010 in order to supply:

- services (eg voice and/or data services) to business customers in that building or business park; and/or
- services (eg transmission services) to downstream carriers or carriage service providers (**C/CSPs**) in order for the downstream C/CSPs to provide services (eg voice and/or data) to customers in that building or business park,

then, based on a direct reading of s141 and the proposed CCA changes, AAPT would not be able to use that fibre tail (or any other network unit forming part of the AAPT network) to supply fixed line services unless AAPT also developed and supplied over its network a L2BS (or the Minister granted AAPT an exemption after consultation with the ACCC and the ACMA).

AAPT considers that this would place an unacceptable restraint on AAPT (and other network owners in a similar position), would harm competition and would not be in the interests of end users.

Other examples of a network alteration, upgrade or extension which AAPT considers could conceivably trigger s141 with the same detrimental consequences include: extending the size of an existing fibre loop and building fibre connectivity to a point of interconnect (**POI**) (eg an NBN Co POI).

There are likely to be other examples but hopefully the examples set out in this letter are sufficient for the DBCDE to reconsider its drafting approach.

If the DBCDE considers that s141 or the changes to s152AGA would not operate in this way because the network alteration, upgrade or extension has not altered the capability of AAPT's network to provide 25 Mbps then AAPT concedes that this may alleviate the concern. However, if s141 is to be interpreted in this way then in AAPT's view it would also not operate to prevent the owner of a network which is already capable of offering 25 Mbps from building a FTTP network (which is simply an extension of their existing network) ahead of NBN Co and offering services over that FTTP network without also offering a L2BS.

Consequently, AAPT considers that the amendments to s141 and s152AGA either has the unintended consequence referred to above or it does not have the desired effect of imposing restraints on existing network owners rolling out a FTTP network ahead of NBN Co.

### ***The Explanatory Memorandum***

The EM notes (on page 13) that :

*..... difficulties could arise for the delivery of the Government's NBN policy objectives as a result of NBN Co being subject to strict regulatory requirements while competing against other, less regulated, providers of superfast broadband. In particular, the Study noted the scope for competing providers to target high-income and low-cost, high-density areas, operate as vertically-integrated providers and advantage themselves over independent retail service providers (RSPs) on the NBN, and ignore technical specifications employed by NBN Co. This could mean that where other providers rolled out superfast networks in advance of the NBN, these would not deliver consumers in those areas the same benefits as the NBN. Moreover, by cherry-picking high-value markets such providers could undermine NBN Co's ability to deliver the Government's policy objectives for the NBN nationally. ....*

In support of the changes to the Telco Act and the CCA discussed above, the EM notes (on page 14) that:

*In summary, these requirements will mean that mass market fixed-line access networks which supply superfast carriage services with a download transmission speed normally of more than 25 Mbps, must offer a Layer 2 bitstream service. The supply of this service is then subject to the key access, non-discrimination and transparency obligations set out in the Access Bill.*

AAPT supports the principle that a supplier which deploys a mass market fibre network in areas before NBN Co does should be subject to the same regulatory requirements as NBN Co.

However, AAPT has real concerns that the drafting proposed in the Access Bill either fails to deliver on this principle or has the unintended and undesirable consequence of restricting carriers from legitimately expanding their networks and trying to compete in the business and wholesale markets.

Consequently, AAPT urges the DBCDE to reconsider its drafting approach on this issue with the intention of better aligning the actual clauses of the Access Bill with the EM and the Federal Government's Statement of Expectations for NBN Co released on 17 December 2010.

AAPT acknowledges the significant challenges that confront those who have to draft legislation of this nature and therefore does not want to pretend that it has any quick fix solution to this issue.

However, AAPT considers that it may be worth investigating an approach that limits the application of the relevant clauses to a *mass market roll-out* and/or a *roll-out for residential and small business purposes*. Alternatively, an approach which defines *network* and what constitutes an *extension* or *upgrade* to an existing network might be used. Finally, an approach which more specifically targets the relevant activity instead of one which appears to relate to networks in a more general way may be preferred.

AAPT would welcome the opportunity to review any amendment proposed by the DBCDE in this regard.

Best regards