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To: Senate Standing Committee on Environment and Communications
Parliament House, Canberra

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National Broadband Network Companies Bill 2010; and Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010

The Internet Society of Australia (ISOC-AU) welcomes this opportunity to comment on these two National Broadband Network (NBN) Bills now before Parliament.

ISOC-AU is the Australian chapter of the global Internet Society, the body that oversees the development of Internet technical standards and a major contributor to global education and policy development.

ISOC-AU's fundamental belief is that the Internet is for everyone. We provide broad-based representation of the Australian Internet community both nationally and internationally from a user perspective and a sound technical base. We also consistently promote the availability of access to the Internet for all Australians. Because the Internet is a central driving factor in the demand for broadband, ISOC-AU has a direct interest in the outcomes of the arrangements that will underpin the provision of the NBN.

ISOC-AU has consistently put forward its objectives, on behalf of Internet users, for broadband access connectivity that is:

- High quality and with high bandwidth;
- As symmetrical in upstream and downstream capacity as possible;
- Accessible to all Australians, wherever they reside or work;
- Meets communications needs of people with disabilities;
- Affordable; and
- Provided in a competitive environment that will give Internet users genuine choice of service and service provider, and provide the market forces to encourage improvements in services and pricing.

We generally support the draft legislation as advancing our objectives for an NBN. Our specific comments on the draft legislation are as follows.

1. National Broadband Network Companies Bill 2010

1.1. NBN Corporations Provision of Wholesale Only Services

ISOC-AU supports the mechanism used in the Bill to ensure that any NBN Corporation is limited to supplying wholesale services. Specifically, limiting NBN Corporations to selling their services only to carriers and carriage service providers, and not providing either content services or non-communications services will ensure that NBN Corporations do not become vertically integrated providers of both wholesale and retail services.

1.2. Government Ownership of NBN Co Limited

Under the legislation, the Government can sell down its now 100% stake in NBN Co after the NBN is fully built and operational. Further, once the Communications and Finance Ministers have declared that conditions are suitable for a sale scheme for NBN Co Limited, there will be a Productivity Commission Inquiry that will have regard to, inter alia,

- equity of access to broadband carriage services in:
 - metropolitan areas; and
 - regional areas; and
 - rural areas; and
 - remote areas;
- competition in telecommunications markets;
- structural features of telecommunications markets;
- power in telecommunications markets, including whether an NBN corporation has a substantial degree of power in any telecommunications market;

While ISOC-AU does not have a firm view on whether NBN Co should be privatised, we are concerned to ensure that, whether NBN Co Limited is in Government or private hands, it does provide all Australians with access to high speed broadband services, wherever they reside and work, and that broadband services are and continue to be provided in an open and competitive environment.

2. Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010

2.1. Layer 2 bitstream service

ISOC-AU has significant concerns with the use of the term Layer2 bitstream service and its definition. There are many different definitions of what is or should be included (or not) in a Layer 2 service, which makes the use of the term very problematic as a differentiator between what is or is not permissible. The definition of Layer 2 requires it be an Ethernet service, yet the term Ethernet is not defined, and there are many possible and possibly desirable variations of providing a Layer 2 service that do not involve Ethernet. We are also concerned (and slightly amused) that a 'superfast' carriage service is defined in technological terms as providing a download speed normally more than 25 megabits per second.

Given the pace of technological change in the ICT industry, it is never appropriate to legislate for specific technologies. Ethernet technologies have only become available and

preferred for consumer broadband access, and robustly defined in international technical standards for broadband access, in the past few years. The current major form of consumer broadband – ADSL – is based on ATM technologies. In future a new successor to Ethernet may be developed that is preferable. Enshrining technical detail in legislation, therefore, may drag on innovation in the future.

The intention of Part 3 of Schedule 1 is to ensure that non-NBN network providers that supply a superfast carriage service are subject to the same wholesale only requirements and the same non-discriminatory rules as NBN Corporations in circumstances where the non-NBN providers would be the only provider of such service. A better way to achieve that outcome is to mandate that, in those circumstances, the non-NBN provider is subject to the same rules that govern NBN Corporations. Specifically, in those circumstances, they should only be allowed to provide services to carriers and carriage service providers, and should not be able to supply a content service or a non-communications service. The regulatory outcome would be the same while avoiding the use of technology specific language.

We submit that the legislation should be redrafted to remove the technology-specific definitions by focusing on specifying the outcomes that are required, not the means to achieve the outcomes.

2.2. Technical Standards for Layer 2 Services

A new Division 5A of Part 21 of the Telecommunications Act will require the ACMA to make technical standards about Layer 2 bitstream services. Currently, ACMA's powers to make technical standards are confined.¹ It is not clear from the amending text whether the standards envisaged in the new Part 5A are also confined to those matters listed in s. 376, or whether this amendment significantly expands the power of ACMA to make technical standards. We submit that the interactions between this new Division 5A and s. 376 should be clarified.

2.3. Grounds on which Discrimination is Permissible

Aids Efficiency

Both NBN Corporations and, in circumstances set out in Part 3 of Schedule 1, non-NBN Corporations must not discriminate in the provision of declared services. However, one of the grounds for an exception to that prohibition is if the discrimination 'aids efficiency', as long as all access seekers in similar circumstances can benefit from the same treatment. The Explanatory Memorandum states that the concept of efficiency

...is intended to be read broadly and to facilitate normal business options such as offering volume-based discounts, passing on savings arising from capital investments, discrimination based on risk sharing, discounts in response to competitive circumstances, migration incentives and other efficiencies.

We suggest that 'efficiency' is too broad and imprecise a word to be used on its own, as a justification for discrimination between access seekers. The current wording does not identify whether the NBN Corporation, the access seeker(s), or end-users should be the beneficiary of the extra efficiencies for the discrimination to be permitted. This wording also appears to allow price discrimination by an NBN corporation including if that price

1 Under s. 376 of the Telecommunications Act 1997, ACMA can only make standards regarding integrity of network, the health and safety of individuals using, operating or working on the network of facility, equipment to access emergency services or the interoperability of customer equipment with network.

discrimination would result in a reduction in competition. Further, if the grounds for favourable price discrimination are due to scale economies of the access-seeker, then it is likely that such discrimination would result in a decrease in competition and an unbalanced playing field, contrary to the Government's policies. If 'efficiency' is retained as a justification for discriminatory practices, it should be followed by examples that confine its use to the circumstances listed in the Explanatory Memorandum.

ISOC-AU submits that, rather than 'aiding efficiency', a more appropriate benchmark for permissible discrimination is whether it could result in a decrease in competition between access-seekers, including access-seekers of different circumstances and scale to that requesting the discrimination, **and** whether the change is in the long-term interests of the end-user. The end-user should always be the primary beneficiary of any efficiency gains achieved through discrimination as, by definition, discrimination may result in a net decrease in competition.

Volume discounts

In particular, one of the listed grounds for allowing discrimination is where the access seeker acquires a particular volume, quantity or amount of goods. Such a discount would only normally be commercially justified if the volume or quantity of requests was presented to the NBN corporation in a manner that allowed them to be processed in a way that provided the NBN corporation with a reduced cost to service the bulk volume, compared to the cost of servicing them individually. With the NBN corporation's commitment to extensive IT systems automation and flow-through provisioning, it is difficult to conceive of a scenario where the costs to service a bulk-lot of requests for some service would be sufficiently lower than servicing the same number of requests individually. Accordingly, justification for discrimination on these grounds should be scrutinized carefully on a case-by-case basis before being permitted, and we submit that the ACCC is the appropriate body to oversee and approve or disapprove in each case.

2.4. Appeal Rights

Previously, parties to access discussions could appeal to the ACCC to mediate and, as necessary, arbitrate when agreement could not be reached. That facility is no longer available. Therefore, the draft legislation should require that both Standard Forms of Access Agreement and Special Access Undertakings for declared services provide an appeal mechanism for parties who believe they have been unfairly discriminated against.

3. Ensuring Competition

Some concerns have been expressed that, with NBN Co providing only Layer 2 services, smaller players will need to obtain higher level services from aggregators. Specifically, if there is only one or a few larger service providers that are also aggregators, smaller providers will be both dependent on and competing against that larger provider or providers - in effect, reinstating vertical integration by a few, just one layer up.

At this early stage, it is premature to suggest legislative change. However, we believe that there should be a review by the ACCC or other appropriate body such as the Productivity Commission within a few years (by 2015). The review should examine whether there is effective competition in the telecommunications market, and whether or not these access arrangements with the NBN Corporation, and related aspects such as the locations of Points of Interconnect, have resulted in a substantial increase in competition compared to the current industry structure, as desired in the Government's Statement of Expectations.