

24 February 2011

Committee Secretary
Senate Environment and Communications Legislation Committee
PO Box 6100 Parliament House
Canberra, ACT, 2600

“By Email”

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Dear Committee Secretary,

Inquiry into the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010

Thank you for the opportunity for TransACT Communications Pty Ltd (TransACT) to make a submission on the Inquiry into the:

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

Access Bill

From its introduction, the Access Bill requires owners of superfast networks that are rolled out, upgraded or altered, to offer a wholesale service on an open and non-discriminatory basis.

On 20 December 2010 the Government also announced, in its Statement of Expectations (the Statement), a proposed amendment to the Access Bill which will include a wholesale-only requirement, as well as the requirement to offer a Layer 2 service on an open-access basis, for all new fibre networks built after 1 January 2011 for residential and small business purposes.

While TransACT shares the Government’s vision of an NBN, TransACT can’t ignore the potential impacts of the Government’s NBN legislation and policy announcements on its business. The legislation as drafted currently before the Parliament has significant implications and is potentially damaging in its current form for TransACT’s current and future business model.

Of most concern to TransACT are:

- the “level playing field” provisions in the Access Bill and their retrospective date of effect;
- the associated “wholesale-only” amendment announced in the Statement of 20 December 2010;
- the impact of the Fibre Policy for new developments;
- the details and potential impacts associated with the introduction of a levy to prevent opportunistic cherry picking;
- the potential NBN Co overbuild of TransACT’s existing networks; and
- the ability for NBN Co to offer volume discounts that would favour the larger service providers, such as Telstra, and the potential for NBN Co “mission creep” into different layers in the OSI stack (e.g. Layer 3) and moving into Retail or other contestable markets.

TransACT understands that the intention of relevant provisions of the Access Bill (level playing field) is to address opportunistic “cherry-picking” and create a level regulatory playing field in which NBN Co could operate.

However, TransACT is not a new entrant into the telecommunications market and has been building and operating advanced fibre broadband networks in specific geographic areas for more than 10 years in the Australian Capital Territory (ACT) and the areas of Geelong, Ballarat and Mildura in regional Victoria (through its subsidiary Neighbourhood Cable Pty Ltd).

As such, TransACT does not consider it would fit into the category of an opportunistic cherry-picker and are seeking appropriate amendments to the Access Bill, or Ministerial exemption that would allow TransACT to continue its *modus operandi*.

At this time it is unclear what the criteria for Ministerial exemption/s are and whether TransACT is likely to be granted any such exemption/s should the Access Bill be passed in its current form.

TransACT also has concerns associated with the requirements to adhere to the relevant provisions of the Access Bill (if passed) having retrospective effect. While the relevant provisions of the Access Bill are not yet law and it would therefore not be an offence to presently install or upgrade a network that doesn’t meet the relevant Layer 2 bitstream, wholesale-only provisions, it is TransACT’s understanding that if it decides to do so post 25 November 2010, it runs the risk that should the relevant provisions of the Access Bill be passed in substantially the same form as they currently appear – TransACT will be subject to the penalties set therein.

This creates an additional degree of uncertainty for TransACT when looking to grow its business and make viable investment decisions now. Although the Government has stated that to provide a period for industry to adjust to these requirements, the provisions set out in Part 3 of Schedule 1 to the Access Bill would commence on

Proclamation or otherwise 12 months after the Access Bill receives Royal Assent, that degree of uncertainty still remains.

TransACT has been an advocate for the provision of FTTP to new developments and has been doing so on a competitive and commercial basis since 2006 in the ACT. TransACT is now contracted or under agreement to provide FTTP to approximately 15,000 premises across the ACT providing the residents and businesses with state-of-the-art telecommunications infrastructure.

The addition of the wholesale-only requirement, announced on 20 December 2010, makes it even more difficult for TransACT to continue deploying new fibre networks and competitively compete against NBN Co. The cost to TransACT to separate its wholesale and retail arms would be significant while also creating a major disruption to TransACT's normal business operations.

For a company of TransACT's size it will be difficult to compete with a Government Business Enterprise, in the form of NBN Co, under the same terms and conditions (level playing field) when NBN Co is being funded with an expected \$27.5 billion in government equity and aided by the introduction of Government legislation that protects NBN Co's interests.

In order to ensure that the provisions in the Access Bill create a true level playing field and do not have unintended consequences on a business such as TransACT, we ask that the Committee give due consideration to the issues highlighted in this response.

TransACT recognises that the Government and NBN Co has a momentous task ahead to build the next generation of telecommunications access network that will service Australia well into the future and provide a platform to transform the Digital Economy.

TransACT will continue to consult constructively with the Government to ensure that efficient and effective outcomes can be achieved that meet the Government's NBN vision and don't unduly affect TransACT's business. This includes continuing to seek appropriate clarification, amendment and/or Ministerial exemption for provisions within the Access Bill and related policy to achieve mutually desired outcomes for the Government, NBN Co, TransACT, its customers and the Community.

Companies Bill

TransACT has indicated in previous responses to the Government's NBN announcements and policies that it supports the Government's vision of building a wholesale-only broadband network offering ubiquitous, open and equivalent access. In fact, TransACT's original mission some ten years ago was to build a high-speed open-access broadband network, which today is now accessed by ten Internet Service Providers (ISPs) offering differentiation and choice to end users.

However, there are fundamental concerns within the industry of NBN Co “mission creep”. It is clear that there is a strong advocacy that the NBN Company operates at Layer 2 within the Open System Interconnection (OSI) model on a structurally separated, “wholesale-only” basis and does not move into retail or other contestable and competitive markets.

TransACT already has concerns about the potential impacts of the Access Bill on existing infrastructure providers such as TransACT. The recent inquiry by the Australian Competition and Consumer Commission (ACCC) into the NBN Points of Interconnection (POI) is as an illustration of the potential impacts of NBN Co deployment plans on existing competitive and commercial markets. This also highlights the need for tight regulatory restrictions and ACCC and Parliamentary oversight. NBN Co’s original recommendation for a 14-point POI plan would have meant significant “mission creep” from NBN Co’s original charter, and would have resulted in significant overbuild of alternative competitive fibre infrastructure.

TransACT supports an approach where the legislation provides more detail and transparency on the Ministerial exemption process, the powers of the ACCC as part of that process and how more stringent Parliamentary oversight may be included.

Equivalence - What is the true definition of “Equivalence of Access”?

It could be construed to mean that all access seekers have access to the same products and services, on the same price and non-price terms and conditions, without exception.

However, not unlike the Ministerial discretion contemplated in the draft legislation that would allow NBN Co to potentially operate in the retail market, the legislation also allows discrimination (exemption) under the following circumstances:

- where the discrimination is on grounds relating to creditworthiness;
- where the discrimination aids efficiency; and
- where all access seekers with “like circumstances” have an equal opportunity to benefit from the discrimination.

TransACT addressed its concerns about equivalence obligations and the need to ensure that effective third party regulator [ACCC] review is both stringent and transparent, in its previous submission to the Department of Broadband, Communications and the Digital Economy (the Department) in March 2010, which can be found at:

http://www.dbcde.gov.au/data/assets/pdf_file/0007/127654/TransACT_Communications_Pty_Ltd.pdf

TransACT also believes that any differentiation on price would need very careful scrutiny and approval by the ACCC, given that the application of volume discounts may become a contentious and anti-competitive issue in an NBN world.