

24 February 2011

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

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

AAPT welcomes the opportunity to make a submission to the Senate Environment and Communications Legislation Committee (**Senate Committee**) on the National Broadband Companies Bill 2010 (**NBN Co Bill**) and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (**NBN Access Bill**).

AAPT has two issues with the NBN Access Bill that it would like to raise in this submission, namely:

- the potential for significant discounts to be given by NBN Co to certain access seekers (**ASs**) which could lead to an uneven playing field; and
- the so called *level playing field provisions* which either:
 - do not impose NBN Co equivalent regulatory obligations on a network owner extending its network by building a high speed access network ahead of NBN Co; or
 - appear to inadvertently prevent existing network owners from extending and upgrading their network for other legitimate reasons.

Discounts

In a submission made to the Department of Broadband, Communications and the Digital Economy (**DBCDE**) on the exposure draft bills, AAPT expressed concern about the fact that the NBN Co Access Bill proposed to give NBN Co the ability to discriminate between ASs if it aided efficiency and all ASs in like circumstances would have equal opportunity to benefit (the *aids efficiency and equal opportunity test*). The ACCC had oversight of the level of discrimination actually afforded by NBN Co to ASs.

In that same submission, AAPT expressed concern about a situation arising where, for example, the two largest Retail Service Providers (**RSPs**) were afforded discounts in excess of say 20% (or perhaps even higher, eg 40% or 50%). AAPT noted that while this level of discrimination may not get past the *aids efficiency and equal opportunity test* there

was a risk that it might and that if it did AAPT considered that this would severely limit if not completely destroy competition in retail markets.

Consequently, AAPT urged the DBCDE to limit NBN Co's ability to discriminate by imposing a cap on the maximum possible price variation between any two ASs to a maximum of 5%.

This recommendation was not adopted by the DBCDE in the current version of the NBN Access Bill which was presented and read into Parliament for the first time in November last year.

However, the NBN Access Bill was amended such that any discounts given on the condition that the AS acquires (or agrees to acquire) a particular volume of services (*volume discounts*) must only be given if they pass the *aids efficiency and equal opportunity test* **and** they are given in accordance with an accepted SAU.

AAPT acknowledges that this does tighten the constraints on offering volume discounts, however, AAPT is still concerned that a significant risk remains of the situation arising where a small number of RSPs are afforded discounts in excess of 20% or higher.

This is an issue of critical importance to the industry because volume discounts that heavily favour the two biggest players, for example, in a disproportionate way will lead to market distortions, and an entrenchment of what is already a very skewed industry structure. Such an outcome is not in the best interests of Australian residential or business consumers.

If price discrimination is considered to be beneficial on economic grounds (and AAPT accepts that many economists do argue in favour of it) then AAPT considers that the simplest and safest way to avoid the negative outcome detailed above is to impose a 5% cap on the extent of the discrimination permitted.

The level playing field provisions

While AAPT supports the principle described in the Explanatory Memorandum (**EM**) that accompanies the NBN Access Bill which provides 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) 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.

AAPT has met with and written to the DBCDE on this issue and the DBCDE has indicated that it is currently considering the matter and in particular whether amendments will be required to ensure that the provisions are clear in their operation and appropriately targeted. The DBCDE also indicated that they hope to be in a position to consult on the amendments before the end of February.

Please find attached the letter which AAPT sent to the DBCDE in January 2011 detailing its concerns with the *level playing field provisions*.

Best regards