

The logo for TransACT, featuring the word "TransACT" in a bold, blue, italicized sans-serif font. The background of the logo area is a blue gradient with abstract, light-colored rectangular shapes.

TransACT Communications Pty Ltd

Submission to the Joint Committee on the
National Broadband Network inquiry into the
Telecommunications Legislation
Amendment (Fibre Deployment) Bill 2011

May 2011

Committee Secretary
Joint Committee on the National Broadband Network
Department of House of Representatives
Parliament House
Canberra ACT 2600

"By Email"

Email: jcnbn@aph.gov.au

Joint Committee on the National Broadband Network inquiry into the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011

TransACT Communications Pty Ltd (TransACT) is pleased to make this submission in response to Joint Committee on the National Broadband Network inquiry into the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011.

Background

On 7 April 2009 the Australian Government (the Government) announced it will establish a new company that will invest up to \$43 billion over eight years to build and operate a National Broadband Network (NBN) delivering superfast broadband to Australian homes and workplaces.

One of the immediate steps the Government announced was that fibre-to-the-premises (FTTP) infrastructure would be required in Greenfield estates that receive planning approval after 1 July 2010.

The rationale behind the government's greenfields policy is to ensure consistency with the overall FTTP NBN policy objectives. It is recognised by a range of stakeholders that it would be counter-productive to have premises built in new greenfield developments, with the latest building technologies and initiatives, connected by antiquated copper wires and not Next Generation Networks (NGNs) connected by fibre, TransACT agrees with this.

It is now more than two years since that announcement and the government has undertaken a number of consultations on the NBN, released an NBN Implementation Study (prepared by McKinsey & Company/KPMG), engaged Nextgen Networks to construct almost 6000 km of new fibre optic backbone transmission links (as part of the government's \$250 million investment in the Regional Backbone Blackspots Program), established NBN Tasmania Limited as a subsidiary of NBN Co, to build and operate the NBN in Tasmania and more recently launched the first mainland NBN services in the regional city of Armidale in northern New South Wales.

While some commentators have said that there is little to show in relation to the number of premises connected to the NBN, since the government's announcement back in April 2009, TransACT recognises and acknowledges the significant task of the government in establishing a company (NBN Co) to build what has been stated as the largest infrastructure project in Australia's history.

TransACT should need no introduction to the Joint Committee as it has been significantly involved in consultation and providing responses to the government and the Parliament on the NBN since its inception, including related policy and legislation. In May 2009 TransACT provided a response¹ to the government's FTTP in Greenfield estates Consultation paper and also to the government's position paper on the subordinate legislation which was to give operational effect to the Fibre Deployment Bill², *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010*, which was introduced into Parliament on 18 March 2010.

TransACT has indicated in previous responses to the government's NBN announcements and policies that it supports in principle the government's vision of building a wholesale-only broadband network offering ubiquitous, open and equivalent access. In TransACT's response to the government's FTTP in Greenfield Estates Consultation paper, TransACT also supported the government's greenfields policy objectives. In fact, TransACT has been an advocate for the installation of fibre infrastructure, particularly FTTP in Greenfield developments, and are now the Preferred Supplier for up to 16,500 premises in the Australian Capital Territory (A.C.T.).

However, On 23 March 2011 the Government introduced legislation, *the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill)*, to ensure new developments are as ready as possible for the rollout of optical fibre infrastructure under the NBN.

The government has stated that the legislation will support its decision to make NBN Co the fibre provider of last resort in new developments and the rollout of fibre generally.

The Bill amends the *Telecommunications Act 1997* (the Act) to do five main things. It:

- enables the Minister to specify new developments in which fixed lines which are installed need to be optical fibre;
- requires passive infrastructure like pit and pipe that is installed to be fibre-ready ;
- imposes penalties on developers that are constitutional corporations that sell property without fibre-ready passive infrastructure;
- enables carriers to seek access to passive infrastructure that is owned by non-carrier; and

¹ http://www.dbcde.gov.au/_data/assets/pdf_file/0006/118635/TransAct_Capital_Communications_Pty_Ltd.pdf

² http://www.minister.dbcde.gov.au/media/media_releases/2010/035

- enables the Australian Communications and Media Authority (ACMA) to make standards for customer equipment and cabling for use with the NBN and other superfast networks.

The Bill takes effect on 1 July 2011 or on Royal Assent, whichever occurs later.

In this response TransACT will address some of the points listed above and the issues of:

- Carrier [provider] of Last Resort (COLR);
- Specifications and standards
- Infrastructure competition; and
- Competitive Neutrality.

Joint Committee on the NBN

The Joint Committee on the National Broadband Network (the Committee) has been established to inquire into the rollout of the project until the NBN is operational³.

On 12 May 2011 the House of Representatives asked the Committee to inquire into and report on the [Telecommunications Legislation Amendment \(Fibre Deployment\) Bill 2011](#).

Subsequently, on 13 May 2011 the Committee announced it would inquire into the Bill⁴, inviting interested persons and organisations to make submissions to this inquiry by Friday 20 May 2011. The Committee also announced that it would be conducting a public hearing on the Bill on Monday 16 May 2011 in conjunction with its six-monthly review of the NBN rollout.⁵

The Committee invited the Greenfield Fibre Operators of Australia (GFOA), of which TransACT is a member, to attend the public hearing on 16 May 2011. A copy of the GFOA submission, as tabled at the public hearing, can be found on the Committee's Parliamentary website.⁶

Given the short notice to appear at the public hearing on 16 May 2011 TransACT was unable to attend in person, however, TransACT shares the common messages represented by the GFOA that:

- it appears to be the intent of the Government and NBN Co, that it plans and needs NBN Co to be the monopoly provider of FTTP in Greenfields developments;
- NBN Co is in fact promoting itself as the "Provider of first choice", not "last resort";

³ <http://www.aph.gov.au/house/committee/jcnbn/index.htm>

⁴ <http://www.aph.gov.au/house/committee/jcnbn/bill/media/media01.pdf>

⁵ <http://www.aph.gov.au/house/committee/jcnbn/telbill.htm>

⁶ <http://www.aph.gov.au/house/committee/jcnbn/bill/subs/sub1.pdf>

- the Australian Government is ignoring its own Competitive Neutrality Policy for Government Owned Businesses, like NBN Co. That policy dictates that no competitive advantages should be given to Government Owned Business over private sector competitors by virtue of their public sector ownership, nor by using their fiscal or legislative powers; and
- the Fibre Deployment Bill should not aid to prevent or inhibit private sector competition, impose unknown costs or time burdens on the development industry or force NBN Co network design standards and specifications on the telecommunications industry (such as the GFOA).

Carrier of last resort

TransACT can understand the government's decision to make NBN Co the fibre provider of last resort in new developments and the rollout of fibre generally. The concept of a carrier of last resort (COLR) and retail provider of last resort (RPLR) is not new to TransACT; in fact, it was TransACT who first proposed this concept in its response to the government's NBN Regulatory Reform for 21st Century Broadband Discussion Paper in April 2009⁷, as part of a universal communications service (UCS) framework.

In TransACT's subsequent submission on the government's NBN Fibre-to-the-premises in Greenfield estates Consultation paper⁸, TransACT reiterates its recommendation for a COLR and RPLR, albeit with the opportunity for Universal Service Provider (USP) contestability arrangements in an NBN environment.

In that submission TransACT noted that the OECD had previously taken a favourable view to a competitive tendering approach to universal service provision:

There is accumulating evidence that in competitive circumstances with feasible alternative supply of universal service, competitive tendering or 'reverse auctions', properly designed, can generate incentives to contain costs, to innovate, and to reveal the true cost of delivering universal service thus minimising the subsidy required. The competitive tendering approach can reduce the arguments about the correct cost basis for setting subsidies as well as the 'asymmetric information' problems of identifying the cost of universal service.⁹

TransACT noted that the *CPSS Act* already provides for competition in the supply of universal services for different geographical areas. Accordingly, the Department notes in the USO Issues Paper, that a carrier or carriage service provider could apply to become a competing universal service provider (CUSP) in respect of a contestable universal service area (a CUSP assumes similar responsibilities to a primary universal service provider (PUSP)), such as the USO Co as proposed by the government. In this scenario, end-users

⁷ <http://www.aph.gov.au/house/committee/jcnbn/bill/media/media01.pdf>, page 41.

⁸ http://www.dbcde.gov.au/data/assets/pdf_file/0006/118635/TransAct_Capital_Communications_Pty_Ltd.pdf

⁹ OECD, "Rethinking Universal Service For A Next Generation Network Environment", April 2006, p.18 [<http://www.oecd.org/dataoecd/59/48/36503873.pdf>].

are entitled to choose between the PUSP and CUSP for the provision of services under the USO.

This approach sits well with TransACT, as one network operator amongst other (existing and new) networks. For instance, it recognises that the NBN will be but one of a number of available networks to deliver universal service therefore allowing for the competitive and efficient use of existing and new networks to that end.

TransACT understands that funding for the provision of universal service in Greenfield developments will now be provided by the government to NBN Co, as part of its equity injection to build the NBN nationally (including fibre in Greenfield developments), whereby the universal service funding would have previously formed part of the USO subsidy provided to Telstra.

On 10 February 2011 the government announced it had reached in-principle agreement with Telstra for the package of measures announced by the government in June 2010 to facilitate the transition to the NBN. These reforms include establishing a new entity, USO Co, which will function from July 2012 to provide funding for the delivery of:

- ensuring all Australians have reasonable access to a standard telephone service (the [Universal Service Obligation](#) for voice telephony services);
- ensuring that payphones are reasonably accessible to all Australians (the Universal Service Obligation for payphones);
- [emergency call handling](#) (Triple Zero '000' and '112') and the [National Relay Service](#);
- migration of voice-only customers to a fibre-based service as Telstra's copper exchanges are decommissioned, and
- the development of technological solutions for continuity of public interest services (such as public alarm systems and traffic lights).¹⁰

On that basis, TransACT understands that specific USO funding for Greenfield developments will no longer be provided to Telstra or NBN Co, as the obligation and cost for providing universal service in new developments will be met by NBN Co and absorbed in their overall build costs being funded separately by the government as part of its \$27.5 billion equity injection. TransACT believes that an applicable percentage of the USO subsidy should still be made available to other service providers based on contestability and universal service arrangements should they assume similar responsibilities to a PUSP, such as NBN Co or USO Co.

During initial consultations TransACT's understanding of how a COLR (such as NBN Co) would operate in the Greenfield's market was to provide infrastructure only where a viable alternate solution from a suitably accredited commercial operator was not available. This process was actually discussed in early iterations of the Greenfield's Stakeholder Group established by the government. Under this scenario, a developer could only seek a solution

¹⁰ http://www.dbcde.gov.au/broadband/national_broadband_network/universal_service_policy

from NBN Co if it could validate through a certification process that no accredited private operator could provide a viable solution which met a predefined list of criteria, including price thresholds.

The original intention of a COLR was proposed by TransACT in the context of the USO, to ensure the delivery of universal service, and to allow viable private sector competition to continue in this market. However, while the government has stated that NBN Co will be the fibre provider of last resort in new developments, it's apparent that NBN Co is actively competing with the private sector to be the 'provider of first choice'.

It has been well publicised that NBN Co has stated that it will now compete with the private sector to provide fibre in new greenfield developments. In fact, NBN Co states on its own website that:

"NBN Co is working with developers to deliver fibre broadband infrastructure into these New Developments. As you would have seen in the NBN Co Corporate Plan, NBN Co plans to connect approximately 250,000 premises in New Developments by June 2013.

Under an NBN Co Developer Agreement, NBN Co will cover the cost of fibre infrastructure in all newly approved developments and developers are responsible for designing and installing pit and pipe infrastructure to NBN Co specifications and standards and then transferring ownership of pit and pipe to NBN Co."¹¹

It's evident from this statement that NBN Co's Corporate Plan relies on it being the monopoly provider of fibre in New Developments in order to achieve its forecast returns on investment. On this basis, you would expect that the NBN Co needs to promote itself to the development industry as the provider of first choice. This is contrary to a previous statement by the Minister for Broadband, Communications and the Digital Economy (the Minister), reported by iTnews on 8 July 2010¹², that:

"Communications Minister Stephen Conroy has moved to reassure fibre network builders that it won't run a Government-funded monopoly to compete with them for work."

The Minister was quoted by iTnews as saying:

"We're going to sit down and have a lot of discussions with them because we're not looking to try and create a monopoly provider in that sense."

"There are different ways we might be able to address this and - [NBN Co chief] Mike Quigley has said this - we'll sit down and work with them about the best way to go forward."

¹¹ <http://www.nbnco.com.au/wps/wcm/connect/main/site-base/main-areas/our-services/new-developments/>

¹² <http://www.itnews.com.au/News/219164,conroy-intervenes-in-greenfield-stoush.aspx>; <http://bcove.me/yamdr3sq>

In a statement by the Minister on Fibre in New Developments (the Minister's Statement), issued on 9 December 2010, the Minister said that:

“NBN Co will establish a panel of appropriately qualified and experienced providers who can bid to install fibre on its behalf.

The details of how the BOT arrangements will operate are a matter for NBN Co, and will be set out in tender process documents. “

On 20 December 2010 TransACT, along with other members of the GFOA, were invited by NBN Co to provide submissions to a Request for Proposals (RFP) for a Panel of suitably qualified FTTP solutions providers under a build-operate-transfer (BOT) model.

TransACT was one of a number of providers who responded to the RFP, however, NBN Co subsequently chose to select a single national provider under a build and transfer model, not a BOT model as originally proposed in the RFP, with NBN Co now electing to take ownership for the operation of the network.

While the Bill does not specifically address the issue of COLR, as this is only captured in the Government's underlying policy, TransACT believes that the Fibre Deployment Bill and the Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2011 (Access Bill), together, effectively position NBN Co to be a monopoly provider in new developments.

TransACT recommends that the Committee considers the original intent for the NBN Co as being the 'provider of last resort', in the true sense of that definition, and assesses the impact that the Government's policies and supporting legislation will have on the private sector's ability to continue operating viably in the Greenfield's market, as it has been now for more than 5 years. Should the government elect to enshrine NBN Co as a monopoly provider in Greenfield developments via its policies and overall legislative scheme, that subsequently displaces the private sector from that market, then the government, should compensate affected private sector companies appropriately.

Already we are seeing the a number of issues emerge around the definition and role of NBN Co as provider of last resort and Telstra's role in the overall process. The HIA, in their submission to the Committee¹³, has raised concerns around the process and opportunity for alternate providers to the NBN Co, a lack of clear definition on the scope of the USO as it applies to all projects and transitional issues where developers have been asked to pay Telstra between \$900 and \$1000 per allotment for pit and pipe infrastructure.

TransACT understands that historically there has been three sources of funding to provide FTTP and meet universal service obligations in new developments:

¹³ <http://www.aph.gov.au/house/committee/jcnbn/bill/subs/sub7.pdf>

1. a developer contribution;
2. the USO subsidy, as provided to Telstra; and
3. Infrastructure provider investment.

First, TransACT believes that developers should be required to continue providing a contribution to an acceptable threshold. Under the government's current policy, this is through developers paying for the fibre-ready infrastructure (e.g. pits and pipe), which has been estimated by the government at about \$800 per lot, based on information from a variety of industry sources. The question the development industry should be asking is what the cost will be to them to provide the fibre-ready infrastructure to NBN Co specifications.

An issue for developers with this approach is that the Bill does not specify a price cap (\$) on what their maximum liability will be to provide the fibre-ready infrastructure. (Note: The original draft legislation had price thresholds, albeit possibly too high drawing a raft of criticism from the UDIA and property developers). Based on NBN Co's more stringent design guidelines this cost would most likely be much higher than the \$800 referred to in the EM, however, without that clarity it remains an open check book.

Secondly, historically Telstra received a USO subsidy of which a percentage would have been attributable to providing universal service (e.g. a standard telephone service) to Greenfield developments. As TransACT understands, that specific USO subsidy for Greenfield developments will no longer be provided to Telstra or NBN Co, as the obligation and cost for providing universal service in new developments will now be met by the NBN Co and absorbed in their overall build costs being funded separately by the government as part of its \$27.5 billion equity injection.

Under the government's current policy model TransACT believes that an applicable percentage of the USO subsidy should still be provided to the private service providers based on contestability and servicing arrangements should they assume similar responsibilities to a primary universal service provider (PUSP), such as NBN Co or USO Co (who assume the USO from July 2012).

Thirdly, Infrastructure providers, such as Telstra, TransACT, the GFOA and others, have also invested commercially to provide FTTP in new developments. However, the level of investment was typically based on a required commercial rate of return. This is why in almost all cases, that TransACT is aware of, the service provider required a developer contribution in order for the investment to be viable and provide a commercial rate of return.

Under the government's policy, it is providing this investment initially through a \$27.5 billion equity injection to the NBN Co. However, it is in effect using its fiscal (\$27.5 billion) and legislative powers (Access Bill, NBN Co Bill and Fibre Bill), contrary to its own Competitive Neutrality policy, to create the NBN Co as the monopoly provider of FTTP in new developments.

A workable amendment that is worth consideration by the Committee would be to:

- Re-introduce a price threshold on developers for fibre-ready infrastructure (e.g. \$800, as per the EM), which would place no additional financial burden on them;
- allow developers to choose any infrastructure service provider (NBN Co or private providers) to provide the total end-to-end solution, i.e. Fibre-ready facilities, optical fibre lines plus any other FTTP infrastructure required to meet the requirements of the development; and
- provide private infrastructure providers with a predefined percentage of the USO subsidy where they assume the responsibility of universal service provider for a new development.

Note: Giving the developers the opportunity to only require one provider to service their development reduces a huge amount of complexity, particularly if they select NBN Co. However, NBN Co, like any other provider, would need to fund the fibre-ready costs over and above the price threshold as specified in the Bill. This has to be more attractive to developers as it provides them with certainty on their cost liability, they would only need to work with one infrastructure provider for their total solution and it reduces their overall risk.

In this instance, if the NBN Co has a backlog of developments in their pipeline and are unable to meet developer's timeframes, the developers will have the opportunity to seek an alternate provider solution.

In the Committee's recent public hearing the Hon Mr Malcolm Turnbull MP ask the Secretary of the DBCDE, Mr Peter Harris:

"Why would a developer choose to use one of the greenfield companies rather than wait for NBN to do the work for him or her?"¹⁴

Mr Harris responded by saying:

"I think simple practicality might be a very good reason for doing this, as long as the developer is conscious of the standard, if you want to get your development done super swiftly. It is true today with Telstra that there is a queue."

- | |
|--|
| <ul style="list-style-type: none">• TransACT recommends that the Committee should consider these impacts when not only assessing the adequacy of the Fibre Deployment Bill, but also in the context of its six monthly review of the NBN rollout.• TransACT believes that the Fibre Deployment Bill should include amendments which clarify and define the role of the NBN Co as the provider of last resort. |
|--|

¹⁴ <http://www.aph.gov.au/hansard/joint/commtee/J32.pdf>, page 37.

Fibre Ready facilities

TransACT agrees with the principle of providing fibre-ready facilities in a project area of a real estate development project, where that facility is required to support the future deployment of optical fibre lines. As TransACT understands, the deployment of fibre to new developments is generally supported by developers, the telecommunications industry and all sides of politics.

However, the practicality of efficiently implementing a fibre-ready (and optical fibre line) requirement is fundamental to ensuring that the property development industry, NBN Co and competitive infrastructure providers have clarity, certainty and confidence in the process and the supporting legislation as a key enabler to provide this.

The Bill currently sets out obligations for the installation of fibre-ready facilities under Division 2, Subdivision A of the Bill. These obligations do not currently provide or refer to any industry codes or standards, as endorsed by an industry body such as the Communications Alliance (CA) and administered by the ACMA or other carrier specifications or guidelines. TransACT understands that the CA are currently working on such codes or standards, but these have yet to be finalised.

It is TransACT's view, that the following provisions have been included in numerous Sections and Subsections of the Bill as a default measure, pending finalisation of any industry codes or standards, as referred to above, being available.

- (2)(b) the conditions (if any) specified in an instrument under subsection (4) are satisfied.
- (4) The Minister may, by legislative instrument, specify conditions for the purposes of paragraph (2)(b).

These provisions appear at proposed sections 372B, 372C, 372E and 372F. These provisions are also supported by section 372W (Fibre-ready facility) under Division 6 of the Bill.

Of concern to TransACT is the potential for the Minister, under these provisions, to specify NBN Co specifications or guidelines by legislative instrument. This would impose inflexible and anti-competitive requirements on infrastructure competitors of the NBN Co. The whole industry would then be bound by law to provide fibre-ready facilities as set by only one of many providers, stifling innovation and creating an anti-competitive and unlevel playing field. This in itself would be a contradiction to the level playing field provisions that the government has previously introduced through the Access Bill and been passed by the Parliament.

While TransACT would prefer to see CA industry endorsed codes or standards applied in the Bill, it understands that timing may preclude that from occurring. However, should a

default measure be required, TransACT believes that an appropriate default position should be to specify that:

- (2)(b) the conditions (if any) specified by a registered (and/or certified) carrier under subsection (4) are satisfied.
- (4) A registered (and/or certified) carrier may, by written notification or agreement, specify conditions for the purposes of paragraph (2)(b).

In this instance, if a developer chooses to select the NBN Co as their preferred supplier then it would be expected that the developer would need to comply with the NBN Co's specifications or guidelines (conditions).

If a developer chooses to select an alternate provider to the NBN Co, as their preferred supplier, then it would be expected that the developer would need to comply with the alternate provider's specifications or guidelines (conditions). In this instance, these guidelines are well established, as existing FTTP infrastructure providers have been deploying fibre-ready facilities and optical fibre lines successfully and adhering to relevant CA (previously ACIF) codes for more than five years now.

Developments of less than 100 premises

In the Minister's Statement the Minister announced that:

For infill developments of less than 100 premises, Telstra will continue to be responsible for delivering infrastructure and services, pending NBN Co being ready to provide a fibre service in that area that is capable of connection to the premises.

Telstra has agreed that it will generally provide copper infrastructure. However Telstra can choose to provide fibre and in some limited circumstances, for example, because of the short timeframe between construction and the rollout of fibre, Telstra may provide high quality wireless services as an interim solution. Telstra will work to determine which interim solutions will be appropriate in specific circumstances. It will take into account considerations including the timeframe for which the interim solution is required, the infrastructure solution that delivers the best service quality, the customer's location and requirements for voice or broadband.

However, in this instance it is Telstra who is able to determine the type of infrastructure and solution that it will deploy.

For new developments with less than 100 premises, NBN Co states:

“Developers with new developments with less than 100 premises will need to request broadband infrastructure from Telstra or any other telecommunications providers.”

This process has the potential to create a ‘digital divide’ between developments with less than 100 premises and those with more than 100 premises, both during and after the roll out of the NBN. It also creates an anti-competitive and unlevel playing field for other infrastructure and service providers.

It seems that Telstra could determine unilaterally that it will service a development with a fibre-to-the-node (FTTN) or fibre-to-the-building (FTTB) solution, or even a mobile voice and broadband solution, which would prevent other service providers from accessing those networks given they are not regulated. This would further entrench Telstra as the monopoly provider in these markets, while also giving it first mover advantage to acquire the end-users as Telstra Retail customers, pending migration to NBN Co’s fibre network.

To prevent any such anti-competitive conduct by Telstra, the Bill should be amended to include provisions that ensure these developments are serviced by copper from the local telephone exchange wherever reasonably possible. This would ensure the ULLS is available to other service providers during the transitional period, prior to the NBN Co fibre deployment.

In an instance where TransACT, or another provider, could provide a solution other than a Telstra copper solution, it may be inhibited from doing so. For example, if a development was less than 100 premises but deemed by NBN Co to be within its long-term fibre footprint, TransACT would not be able to provide a Superfast carriage service, unless it was a Layer 2 bitstream service provided on a wholesale-only, open access basis, as required under the Access Bill. In this scenario, a development may only receive a copper ADSL solution of less than 25 Mbps, until NBN Co upgrades it to fibre at some future stage, when it could be receiving a Superfast carriage service from another provider during that interim period

Similarly, TransACT, or another provider, could also not install a Superfast carriage service to a development of less than 100 premises, even it was deemed by NBN Co to not be within its long-term fibre footprint, unless also meeting the level playing field requirements of the Access Bill, even though NBN Co will not be providing a fixed-line Superfast carriage service to that development.

TransACT recommends that the Fibre Deployment Bill, in conjunction with applicable provisions in the Access Bill, should be amendment accordingly to address these issues. It may be possible to address this issue through additional exemptions.

Specifications and standards

As stated in the previous section, the Bill currently sets out obligations not only for the installation of fibre-ready facilities but also for the deployment of optical fibre lines.

The Bill does not currently refer to any specific industry codes or standards, as endorsed by an industry body such as the Communications Alliance (CA) and administered by the ACMA. However, the Explanatory Memorandum (EM) does state, in relation to proposed section 372B, that:

“Conditions could be specified, if necessary, by reference to external documents such as industry codes and standards or other specifications by virtue of section 589 of the Act.”¹⁵

This provision would also be applicable to proposed sections 372C, 372E, 372F and 372W in the Bill. TransACT understands that the CA are currently working on such codes or standards, but these have yet to be finalised.

It is TransACT’s view, that the following provisions have been included in numerous Sections and Subsections of the Bill as a default measure, pending finalisation of any industry codes or standards, as referred to above, being available.

- (2)(b) the conditions (if any) specified in an instrument under subsection (4) are satisfied.
- (4) The Minister may, by legislative instrument, specify conditions for the purposes of paragraph (2)(b).

As stated previously, TransACT is concerned about the potential for the Minister, under these provisions, to specify NBN Co specifications or guidelines by legislative instrument, thereby imposing inflexible and anti-competitive requirements on infrastructure competitors of the NBN Co.

While TransACT would prefer to see CA industry endorsed codes or standards applied in the Bill it understands that timing may preclude that from occurring. The EM also supports this position stating that:

“It is envisaged, and considered preferable, for these matters to be addressed in industry codes and/or technical specifications determined by the industry. However, in the absence of codes or standards determined by an industry body, the Minister could use this power to specify relevant requirements, including

¹⁵ http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4533_ems_8674d24c-a054-4adb-9335-e8139105e64e/upload_pdf/353705.pdf;fileType=application%2Fpdf, (Fibre Deployment Bill EM, page 21).

potentially by reference to the specifications of a particular carrier (e.g. an NBN corporation).”¹⁶

In this instance the specifications of a particular carrier (e.g. an NBN corporation) should include the specifications for all registered (and/or certified) carriers, not just an NBN corporation.

TransACT believes that should a default position be required, it would be appropriate to consider amendments to propose sections 327B, 372C, 372E and 372F as follows:

- (2)(b) the conditions (if any) specified by a registered (and/or certified) carrier under subsection (4) are satisfied.
- (4) A registered (and/or certified) carrier may, by written notification or agreement, specify conditions for the purposes of paragraph (2)(b).

In this instance, if a developer chooses to select the NBN Co as their preferred supplier then it would be expected that the developer would need to comply with the NBN Co’s specifications or guidelines (conditions).

If a developer chooses to select an alternate provider to the NBN Co, as their preferred supplier, then it would be expected that the developer would need to comply with the alternate provider’s specifications or guidelines (conditions). In this instance, these guidelines are well established, as existing FTTP infrastructure providers have been deploying fibre-ready facilities and optical fibre lines successfully and adhering to relevant CA (previously ACIF) codes for more than five years now.

The proposed amendments above should also be replicated in proposed section 372W as follows:

372W Fibre-ready facility

- 5 For the purposes of this Act, each of the following is a ***fibre-ready***
 6 ***facility***:
- 7 (a) an underground fixed-line facility that:
 - 8 (i) is used, or for use, in connection with an optical fibre
 - 9 line; and
 - 10 (ii) satisfies such conditions (if any) as are specified in a written
 - 11 notification or agreement made by a registered (and/or certified)
 - 12 carrier;
 - 12 (b) a fixed-line facilities that:
 - 13 (i) is used, or for use, in connection with an optical fibre
 - 14 line; and

¹⁶ Fibre Deployment Bill EM, page 27.

- | | |
|----|--|
| 15 | (ii) is specified in a written notification or agreement made by a |
| 16 | registered (and/or certified) carrier ; and |
| 17 | (iii) satisfies such conditions (if any) as are specified in a |
| 18 | written notification or agreement made by a registered |
| 19 | (and/or certified) carrier . |

TransACT believes that these amendments to the Bill would not inhibit the intention of this provision to ensure that the fibre-ready facilities that are installed in these developments will permit fibre to be installed at a later time in a quick and efficient manner, at lower cost and with minimum inconvenience to the community.

Infrastructure competition and competitive neutrality

TransACT understands that while this Bill only addresses the requirements to ensure fibre-ready facilities and optical fibre lines are installed in new developments, the impacts of this Bill, the government's overarching NBN policies and initiatives and other supporting legislation, which has already been passed by the Parliament, significantly affects the competitive landscape for future fixed-line infrastructure competition in Australia.

The Commonwealth Competitive Neutrality Policy Statement, June 1996, states:

Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.¹⁷

For a relatively small private sector company (such as TransACT) 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.

Competitive neutrality requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector.¹⁸

The pure fact that the Government is legislating in the interests of protecting the business and deployment plans of its own business (NBN Co Limited) and supporting NBN Co with the Government's fiscal powers, to the tune of approximately \$27.5 billion in Government equity, goes directly to the heart of using its legislative and fiscal powers to advantage their own businesses over the private sector.

¹⁷ <http://www.treasury.gov.au/contentitem.asp?pageId=&ContentID=275>, (Commonwealth Competitive Neutrality Policy Statement, June 1996, page 4).

¹⁸ Commonwealth Competitive Neutrality Policy Statement, June 1996, page 5.

How can a relatively small private sector company compete fairly and on a level-playing field with that?

The Commonwealth Competitive Neutrality Policy Statement, June 1996, continues to state that:

If governments do advantage their businesses in this way, it will distort the competitive process and reduce efficiency, the more so if the government businesses are technically less efficient than their private sector competitors. Private competitors also regard such advantages as simply inequitable, as is illustrated by the number of complaints about this issue made to the Independent Committee of Inquiry into National Competition Policy.¹⁹

In this context, TransACT believes that the Committee needs to consider not only the potential impacts of specific provisions within the Fibre Deployment Bill, but the greater impact of how this piece of legislation, together with the government's overall NBN policy framework, looks to enshrine the NBN Co as the monopoly provider of fixed-line services in Australia potentially displacing the private sector from the market.

TransACT recommends that the Joint Committee on the National Broadband Network should consider these impacts when not only assessing the adequacy of the Fibre Deployment Bill, but also in the context of its role to conduct a six monthly review on the effectiveness of the NBN rollout.

§

¹⁹ [Commonwealth Competitive Neutrality Policy Statement, June 1996, page 5.](#)