

30 March 2010

Mr Stephen Palethorpe
Committee Secretary
Select Committee on the National Broadband Network
Parliament House
Canberra ACT

By email: broadband.sen@aph.gov.au

Dear Mr Palethorpe,

I refer to your letter of 10 March 2010 in relation to the Committee's proposal to give consideration to the Government's exposure drafts of legislation establishing arrangements for the ownership, operations, access obligations and services of the NBN Company (the "exposure draft Bills").

As the Committee would be aware, the Government has sought feedback from stakeholders before proceeding to finalise the form of the exposure draft Bills. Primus Telecom has lodged a written submission with the Department of Broadband Communications and the Digital Economy in response, and I have attached a copy of that submission for your records. While I thank the Committee for its invitation, at this time Primus Telecom is not inclined to comment further on the matter until the Government releases the Bills in a form intended to be introduced into Parliament.

Primus would however note at this time that it supports the Government's principles that NBN Co must offer equivalent access to all customers, that the ACCC should have clear oversight of NBN Co, and that retail service providers should have up-front certainty on prices and terms and conditions of access. Primus observes that these principles are consistent with the regulatory reform measures set out in the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, currently awaiting passage through the Senate. That Bill is aimed at enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards. As Committee members are aware, the competitive industry and telecommunications users across Australia keenly await the passage of that Bill.

Yours sincerely



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Primus Telecom

Submission to the Department of Broadband Communications and the Digital Economy on the exposure draft bills:

- **The National Broadband Network Companies Bill 2010**
- **The Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010**

Introduction

Primus Telecom (Primus) welcomes the opportunity to comment on the draft National Broadband Network Companies Bill 2010 and the draft Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (“the draft NBN Bills”).

By way of background, Primus operates as part of a global facilities-based communications services provider. Primus commenced operations in Australia following the acquisition of an Australian-based telecommunications reseller and when the Australian Government liberalised the telecommunications industry in 1997 Primus obtained one of the first carrier licences and began operating as a fully fledged carrier on 1 July 1997.

Since its origins as a reseller Primus has grown into a substantial full service telecommunications carrier, offering a comprehensive range of voice, data, broadband and web hosting services, targeting both the residential and enterprise sectors. Primus operates its own data and voice networks, with fiber networks deployed in Australia’s five major capital cities. Primus has developed a nationwide communications network through a combination of its own backbone and extensive DSLAM network, and wholesale arrangements in areas outside the Primus Australia infrastructure footprint. Unlike most other large service providers in the industry, Primus has retained 100% of its call centre positions within Australia.

The Draft NBN Bills – Summary

Primus supports the Government’s vision to establish an independent (non-vertically integrated) company to build and operate a new super fast National Broadband Network (NBN).

As the Government is aware, the failure of the telecommunications sector to deliver on its full competitive potential is a direct consequence of the failure to establish a stand alone wholesale services provider. Presently Telstra has commercial incentives to favour its own retail business at the expense of its wholesale business, resulting in delay and denial of service to the competitive industry. These issues have been set out in industry submissions to the Government in response to its consultation paper on *Regulatory Reform for the 21st Century*, and there is no need to detail those matters at this time.

Primus appreciates the Government has undertaken substantial work with these draft NBN Bills. Having regard to the draft NBN Bills, Primus supports the Government’s principles that:

- NBN Co must offer equivalent access to all customers;
- the ACCC should have clear oversight of NBN CO, and

- retail service providers have up-front certainty on prices and terms and conditions of access.

While Primus is supportive of the Government's principles underlying the draft NBN Bills, and the objects of the legislation, Primus notes a few matters set out in the draft NBN Bills that require further limitation or clarification. These matters are:

- Ensuring NBN Co remains an independent and wholesale-only service provider;
- Prescribing for equivalence and rules for determining legitimate discounts, and
- Ensuring appropriate rules guide future ownership arrangements.

These matters are addressed in more detail below. Primus also notes that the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the "Competition and Consumer Safeguards Bill") currently awaits passage through the Senate. While the Government is right to pursue the legislative framework in respect to NBN Co, Primus submits that the failings of the current industry structure need to be addressed as a priority and Primus urges the Government to pass that legislation at the earliest opportunity. At this time Primus and others in the industry are not on a level playing field with Telstra, and are regularly subject to delay or denial of service. The Competition and Consumer Safeguards Bill contains a number of amendments to *The Trade Practices Act 1974* that when passed will deliver real and measurable competition outcomes for consumers and businesses across Australia.

Ensuring NBN Co remains an independent and wholesale-only service provider;

The draft NBN Bills provide that unless an exemption applies, NBN Co may only provide services to carriers or service providers. This is clearly a fundamental condition of NBN Co's operation, enshrining the principle of separation, and ensuring the industry structure is not compromised and that the competitive industry can maximise benefits to consumers.

Primus notes the draft legislation proposes that the Communications Minister may exempt a specified service from this rule, on consultation with the ACCC.

Two key concerns requiring clarification emerge in relation to this exemption power. Firstly, there is a lack of detail about when the Communications Minister could make such a determination. Primus suggests the Government establish specific criteria or guidance around the making of such a determination. Secondly, to ensure a wholesale arrangement is not artificially constructed to undermine the 'wholesale only' principle, the Government should impose further rules defining when a "carrier or service provider" can acquire services from NBN Co. For example, a company should actively provide services to the end-user market and have a standing offer available for acceptance in order to be characterised as a service provider.

Prescribing for equivalence and rules for determining legitimate discounts

The draft NBN Bills provide that the NBN Co may agree alternative terms and conditions with a customer, and provides NBN Co with substantial discretion to determine the basis for discounts. Primus submits that discounts based on genuine cost savings can be supported, but discounts or other favourable conditions or treatment should only be offered if they do not distort competition in the retail market.

Any such discrimination must be assessed against the short and long term impact on competitors and competition. Historically there has been particular concern about abuse of market power and predatory conduct in the industry given it is dominated by an incumbent that has the scale and pricing power to deter and compromise sustainable competition.

In this respect it is not clear what is meant when the Government suggests discounts could be offered in respect to competitive circumstances and migration incentives. While cost savings would be a legitimate basis for discounting, the concept of migration incentives and discounts in respect to competitive circumstances seem to suggest substantially more latitude. Furthermore, the draft NBN Bills determine that all access seekers with like circumstances have an equal opportunity to benefit from the discrimination. In practice it is not clear this drafting approach will achieve the objective of equivalence given the nature of Telstra, which is unique in Australia, and also the world. It would seem Telstra, given its share scale, could have access to discounts and concessions which could put it in a significantly better position than others industry participants.

The rules guiding future ownership arrangements.

The draft NBN Bills provide for subsequent regulation to detail what is meant by an unacceptable private ownership or control situation. Primus submits that these conditions are critical to ensuring an open and competitive industry, and should be set out clearly in legislation. Of particular significance are rules around ownership or control that maintain independence of operation and enshrine the concept of a level playing field.

Obviously the best outcome for the sake of competition is that a customer of NBN Co should not be able to acquire an ownership interest in NBN Co, unless that customer is able to justify there would be no conflict of interest, or opportunity to exercise influence, whether implicit, perceived or otherwise. Indeed, it could be suggested that service providers would likely only invest in NBN Co if it saw some strategic advantage in doing so.

Primus urges the Government to ensure NBN Co will operate, and continue to operate, independent of undue influence of any individual retail service provider.

Conclusion

Primus supports the Government's decision to establish a company to build and operate a NBN, and believes that vision will lead to wide ranging benefits for residential and business consumers across Australia. These benefits will initially manifest in terms of service availability, choice and cost, but ultimately will also ensure that Australian society and the Australian economy can capitalise on the digital age and opportunities.

While Primus is supportive of the Government's proposed draft NBN Bills, Primus notes a few matters that require further limitation or clarification, and appreciates if the Government could give these matters further attention.