



**Submission by AAPT Limited to the Department of
Broadband Communications and the Digital Economy on
the exposure draft bills: National Broadband Network
Companies Bill and Telecommunications Legislation
Amendment (National Broadband Network Measures –
Access Arrangements) Bill**



Executive Summary

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the following exposure draft bills:
 - o the National Broadband Network Companies Bill 2010 (the **NBN Co Bill**);
and
 - o the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (the **NBN Co Access Bill**)
2. These two bills follow on from and in some cases interact with the earlier Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the **Competition and Consumer Safeguards Bill**) which AAPT supports, aside from the provisions relating to the structural separation of Telstra. AAPT considers that the structural separation of Telstra is a matter that should be left for the Telstra board and Telstra shareholders.
3. AAPT is generally supportive of the exposure draft bills but does have some serious concerns with each of the bills and some suggestions for improvement as detailed below. Specifically, AAPT considers that:
 - o the ability for the Minister for the Department of Broadband Communications and the Digital Economy (the **Communications Minister**) to grant NBN Co a wholesale only exemption should be further limited if not removed altogether;
 - o private ownership of NBN Co should be subject to a more transparent and tighter control;



- NBN Co should not be permitted to supply a service pursuant to a standard form of access agreement (**SFAA**) or, in the alternative (a second best option which is a long way from the preferred option of deleting any reference to a SFAA in the bill), the bill must make it clear that a SFAA does not override an AD, an interim AD or a BRC; and
 - NBN Co's ability to price discriminate between access seekers (**ASs**) should be limited to a maximum level of 5%.
4. The NBN Co Bill prohibits NBN Co from supplying services to anyone other than carriers or service providers, however, the Communications Minister has the power to grant NBN Co an exemption from this condition (the **exemption power**). AAPT considers that this discretion given to the Communications Minister (which, from the bill, appears to be absolute) could undermine one of the main goals of establishing NBN Co in the first place, ie levelling the competitive playing field through structural separation.
 5. AAPT acknowledges that there may be legitimate reasons for including the exemption power, eg for the purposes of safeguarding national security when supplying communications services to government departments or agencies (eg ASIO). Consequently, AAPT considers that if this is in fact the case, the application of the exemption power should be restricted in the bill itself so that it may only be used for the purposes of safeguarding national security in relation to the supply of communications services to these entities. Otherwise the exemption power should be removed from the bill altogether.
 6. The NBN Co Bill also provides that NBN Co must be majority owned by the Commonwealth until 30 June 2018 (unless extended by the Communications Minister) but can then be sold down over a period of five years (unless extended by the Finance Minister). AAPT acknowledges that there are protections in the bill in the form of provisions relating to the unacceptable private ownership of



NBN Co, however, these provisions depend on the Communications Minister developing a set of regulations which is not mandated.

7. AAPT considers that these arrangements may be insufficient to prevent a retail service provider (**RSP**) owning as much as 49% of NBN Co before 30 June 2018 and perhaps even 100% of NBN Co after it is sold. AAPT considers that this could also undermine one of the main goals of establishing NBN Co in the first place, ie levelling the competitive playing field through structural separation.
8. AAPT considers that the NBN Co Bill itself should specify that RSPs are either (in descending order of preference):
 - o not permitted to hold equity in NBN Co;
 - o if RSPs are permitted to hold equity in NBN Co that such holding should be in the form of non-voting preference shares; or
 - o if RSPs are permitted to hold ordinary shares in NBN Co that such holding (either direct or indirect) should be limited to a maximum level of say 20%.
9. The NBN Co Access bill prohibits NBN Co from supplying a service unless the ACCC has declared the service, NBN Co has published a SFAA or the ACCC has accepted a special access undertaking (**SAU**).
10. AAPT is concerned that NBN Co will be allowed to simply publish a SFAA in order to commence supplying a service because a SFAA can be published by NBN Co without ACCC oversight. AAPT considers that this issue is particularly important given the uncertainty that appears to exist in the bill about whether a SFAA will override any access determination (**AD**), interim AD or BRC made by the ACCC relating to that service.



11. Consequently, AAPT considers that the bill should be amended so as to delete any reference to a SFAA so that NBN Co can only supply services which have been declared by the ACCC or for which an SAU is in operation or, alternatively, the bill should be amended so that it is clear that a SFAA does not override an AD, an interim AD or a BRC.
12. The NBN Co Access Bill also provides that NBN Co has the ability to agree alternate terms to those in an AD, a SFAA or a SAU but must not discriminate between access seekers (**ASs**) unless it aids efficiency and all ASs in like circumstances have equal opportunity to benefit (the **aids efficiency and equal opportunity test**) (or the ACCC has specified grounds for discrimination). The ACCC has oversight of the level of discrimination actually afforded by NBN Co to ASs.
13. AAPT believes that permitting discrimination (with ACCC oversight) is the right way forward, however, AAPT is very concerned about a situation arising (which AAPT considers is possible under the bill as currently drafted) where the two largest RSPs are afforded discounts in excess of say 20% (or perhaps even higher, eg 40% or 50%). This level of discrimination may not get past the aids efficiency and equal opportunity test but there is a risk that it might and if it did AAPT considers that this would severely limit competition in retail markets.
14. Consequently, AAPT considers that the bill should further limit NBN Co's ability to discriminate by imposing a cap on the maximum possible price variation between any two ASs which, in AAPT's view, should be no higher than 5%.
15. 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.

Application of the wholesale only exemption should be further limited

16. Section 9(1) of the NBN Co Bill imposes a condition on NBN Co's carrier licence which prohibits NBN Co from supplying services to anyone other than carriers or service providers, ie NBN Co must supply wholesale services only (the **wholesale only licence condition**).
17. This is consistent with industry expectations and the Government's goal of a structurally separated industry. It also reflects recent comments made by the Government and NBN Co itself.
18. However, section 9(2) of the NBN Co Bill also provides for the Communications Minister to be able to exempt NBN Co from the wholesale only licence condition. AAPT did not anticipate the inclusion of such an exemption power and, based on recent press reports, neither did the rest of the telecommunications industry.
19. Page 4 of the Explanatory Notes For Exposure Drafts of Bills (the **Explanatory Note**) provides two examples when such an exemption power might be used, namely:
 - *to allow NBN Co to offer services directly to certain end-users, for example government agencies; and*
 - *to allow NBN Co to purchase telecommunications companies, even if they have retail businesses, if such an acquisition could support the early development and rollout plan of the NBN. Clearly, NBN Co would still be*



subject to the wholesale only obligation in section 9 and would need to put in place transitional arrangements for divesting any retail operations involved in such acquisitions.

20. However, AAPT notes that the NBN Co Bill itself makes no reference to any specific limitation on the Communications Minister's ability to exempt NBN Co from the wholesale only licence condition and the Explanatory Note will only be referred to in the event there is some ambiguity in the bill itself. AAPT considers there is no ambiguity in the bill which clearly gives the Communications Minister the power to grant exemptions for any number of specified services, for any number of end users and for any reason.

21. AAPT is alarmed by this effectively unfettered power of the Communications Minister and considers that it could put at risk one of the ultimate goals of establishing NBN Co in the first place, ie levelling the competitive playing field through a structurally separated industry. For example, a future Government may decide to try and maximise the proceeds from the eventual sale of NBN Co by granting a number of exemptions to the wholesale only licence condition. While this may well maximise any sale price, it would also dismantle the fundamental basis on which these reforms were built.

22. AAPT acknowledges that there are some limited protections in the NBN Co Bill, specifically:
 - the exemption power is only an option for the Communications Minister which may never be exercised, although AAPT considers that there may well be commercial incentive to exercise such an option prior to any sale of NBN Co;

 - section 9(4) of the NBN Co Bill requires the Communications Minister to consult with the ACCC before granting an exemption, although AAPT



considers that this represents really only a token protection with the requirement to consult representing a very low barrier to any exercise of the power; and

- section 9(2) of the NBN Co Bill defines the exemption itself to be a legislative instrument and consequently will be subject to disallowance by either house of Parliament.
23. In addition, AAPT acknowledges that NBN Co is building a GPON capable of delivering Layer 2 only services and consequently NBN Co may have limited ability to compete in retail markets. AAPT also acknowledges that converting the NBN Co network from Layer 2 to Layer 3 (or above) would involve considerable capital investment by NBN Co, however, AAPT considers that this fact alone is not sufficient to protect against a dismantling of the goal of a level playing field through structural separation.
24. AAPT acknowledges that there may be legitimate reasons for including the exemption power, eg for the purposes of safeguarding national security when supplying communications services to government departments or agencies (eg ASIO). Consequently, AAPT considers that if this is in fact the case, the application of the exemption power should be restricted in the bill itself so that it may only be used for purposes of safeguarding national security in relation to the supply of communications services to these entities. Otherwise the exemption power should be removed from the bill altogether.

Private ownership in NBN Co should be subject to more transparent and tighter controls

25. Division 2 of the NBN Co Bill imposes a condition on the Commonwealth that at least up until 30 June 2018 (unless extended by the Communications Minister) the Commonwealth must not to transfer any of its shares in NBN Co such that



the Commonwealth will no longer (NBN Co must also take all reasonable steps to ensure that the Commonwealth continues to):

- hold or control at least 51% of voting rights;
 - hold at least 51% of the total paid up capital; or
 - be entitled to at least 51% of the rights to any distribution of capital or profits.
26. After 30 June 2018 (unless extended by the Communications Minister), the Government will eventually sell down all its equity in NBN Co within 5 years (unless extended by the Finance Minister).
27. Division 3 of the NBN Co Bill enables the Communications Minister (after consultation with the ACCC) to make regulations which define an unacceptable private ownership or control situation (**UPOCS**), in which case:
- NBN Co is then required to take all reasonable steps to ensure that an UPOCS does not exist in relation to NBN Co with a breach of this requirement exposing NBN Co to a penalty of 500 penalty units; and
 - the Communications Minister, the ACCC or NBN Co may apply to the Federal Court for orders (including divestiture of shares) to ensure that the UPOCS ceases to exist.
28. AAPT is concerned that the UPOCS regulations may never be made as they are not mandated by the bill and even if they were made there will be:
- only a **small penalty for breach** (\$55,000 - based on \$110 per penalty unit) imposed on NBN Co; and



- **the option** (which may or may not be taken up) for the Communications Minister, the ACCC or NBN Co to apply to the Federal Court for orders to ensure that the UPOCS ceases to exist
29. AAPT is concerned that these arrangements may be insufficient to prevent a RSP owning as much as 49% of NBN Co before 30 June 2018 (or as extended) and perhaps even 100% of NBN Co after it is sold. AAPT considers that this would also undermine one of the main goals of establishing NBN Co in the first place, ie levelling the competitive playing field through structural separation.
30. Consequently, AAPT considers that the NBN Co Bill itself should specify that RSPs are either (in descending order of preference):
- not permitted to hold equity in NBN Co;
 - if RSPs are permitted to hold equity in NBN Co that such holding should be in the form of non-voting preference shares; or
 - if RSPs are permitted to hold ordinary shares in NBN Co that such holding (either direct or indirect) should be limited to a maximum level of say 20%.

NBN Co should not be permitted to supply services pursuant to a SFAA

31. Proposed section 152CJA of the Trade Practices Act 1974 (the **TPA**) (a new section to be inserted by Schedule 1 of the NBN Co Access Bill) provides that NBN Co must not supply a service unless:
- the ACCC has declared the NBN Co service;



- NBN Co has published a SFAA (the service then becomes a declared service); or
 - the ACCC has accepted an NBN Co SAU (the service then becomes a declared service).
32. Proposed section 152CJB of the TPA (a new section to be inserted by Schedule 1 of the NBN Co Access Bill) provides that if the Communications Minister mandates an NBN Co service (by carrier licence condition) then NBN Co must (within 90 days) file a SAU to the ACCC or publish a SFAA. If the SAU is rejected by the ACCC or ceases to be in operation then NBN Co must publish a SFAA within 90 days of rejection/ceasing to be in operation.
33. AAPT has serious concerns about NBN Co being able to supply a declared service by simply publishing a SFAA (effectively the equivalent of the industry wide standard form of agreement (**SFOA**)) because it means that NBN Co (a monopoly supplier of access services) can commence selling an access service at prices which have not been subject to any ACCC oversight.
34. AAPT acknowledges that proposed section 152AL(8) of the TPA (a new section to be inserted by Schedule 1 of the NBN Co Access Bill) provides that once NBN Co publishes an SFAA that the relevant service becomes a declared service. Consequently, the ACCC can make an AD, an interim AD (no procedural fairness requirement) or a binding rule of conduct (**BRC**) (no procedural fairness requirement).
35. While this does provide some degree of comfort, AAPT notes that the making of an AD by the ACCC could take some considerable amount of time (at least 6 months and maybe longer, eg more than a year), although AAPT acknowledges that considerable less time would be required for an interim AD or a BRC.



36. In addition, it is not clear whether a SFAA will constitute an access agreement under proposed section 152BE(1) of the TPA (inserted by Schedule 1 of the Competition and Consumer Safeguards Bill) and therefore it is not clear whether a SFAA will trump:
- an AD or interim AD under proposed section 152BCC of the TPA (inserted by Schedule 1 of the Competition and Consumer Safeguards Bill); or
 - a BRC under proposed section 152BDB of the TPA (inserted by Schedule 1 of the Competition and Consumer Safeguards Bill).
37. Consequently, AAPT considers that the bill should be amended so as to delete any reference to a SFAA so that NBN Co can only supply services which have been declared by the ACCC or for which an SAU is in operation.
38. In the alternative (and AAPT considers that this is very much a second best option which is a long way from the preferred option of deleting any reference to a SFAA), the bill could be amended so that it is clear that a SFAA does not override an AD, an interim AD or a BRC.

NBN Co's ability to price discriminate should be limited to 5%

39. Proposed section 152AXC of the TPA (a new section inserted by the Schedule 1 of the NBN Co Access Bill) provides that NBN Co can agree alternate terms to those in an AD, a SFAA or a SAU but must not discriminate between ASs unless:
- it is on grounds relating to creditworthiness;
 - it aids efficiency and all ASs in like circumstances have equal opportunity to benefit; or

- the ACCC has specified grounds for discrimination in a legislative instrument (after public consultation).
40. Proposed section 152BEB of the TPA (a new section inserted by the Schedule 1 of the NBN Co Access Bill) provides that if NBN Co has published a SFAA, a SAU is in operation or the ACCC has made an AD but NBN Co then agrees alternate terms with an AS, NBN Co must within 7 days publish a statement:
- identifying the parties;
 - describing the differences; and
 - describing what ASs must do in order to have like circumstances in order to benefit from the same terms.
41. NBN Co must also register access agreements with the ACCC which could take action if it considered that the non-discrimination rule was being breached.
42. Page 14 of the Explanatory Note states that *it is well accepted that in certain circumstances differentiation on price and/or non-price aspects can aid efficiency, innovation and investment. As a result, the Access Bill permits differentiation that aids efficiency, on the condition that all access seekers with like circumstances have equal opportunity to benefit from the discrimination.* The Explanatory Note then goes on to state that *'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.*



43. AAPT agrees with the approach that terms of access for a service determined by the ACCC should be available to all ASs on request but that the parties should be free to negotiate and agree alternate terms and conditions. AAPT considers that it is critical for a healthy downstream wholesale market that ASs with greater network reach or with higher total spend should be able to leverage those efficiencies and have them reflected in the price of the services acquired.
44. Consequently, AAPT believes that permitting discrimination (with ACCC oversight) is the right way forward, however, AAPT is very concerned about the situation arising (which AAPT considers is possible under the bill as currently drafted) where the two largest RSPs are afforded discounts in excess of say 20% (or perhaps even higher, eg 40% or 50%) while other RSPs have to make do with far smaller discounts if any at all.
45. While very high levels of discrimination may not pass the aids efficiency and equal opportunity test there is a risk that it might and AAPT considers that this would severely limit competition in retail markets.
46. One option that AAPT considers would help address this issue would be to amend the bill such that the negotiation of alternate terms of access is permitted (as proposed) so long as the difference between the negotiated price and the price determined by the ACCC is not greater than 5%.
47. This is an issue of critical importance to the industry because of the fact that the industry is currently comprised of a large number of smaller players and a very small number of very large players. 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.