

AUSTAR United Communications Limited

**Comments on the Exposure Drafts of NBN Co Legislation
NBN Companies Bill
Access Bill**



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To: Department of Broadband Communications and the Digital Economy

By email: nbnlegislation@dbcde.gov.au

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1. Introduction

AUSTAR United Communications Limited (**AUSTAR**) welcomes the opportunity to comment on the exposure drafts of the Bills which establish a regulatory framework for NBN Co Limited (**NBN Co**), namely:

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

2. Background on AUSTAR

AUSTAR is one of Australia's leading subscription television providers, supplying digital television services to more than 740,000 customers in regional and rural Australia. AUSTAR also offers internet and mobile telephone services.

AUSTAR provides services to consumers in regional areas of NSW, Victoria, Queensland, and South Australia and to all areas of the Northern Territory and Tasmania. Our television, mobile and dial-up internet products are made available to consumers in all of these areas; our fixed wireless broadband product is currently available in two regional markets.

Competitive access to broadband infrastructure remains a critical issue for the future productivity of Australia, in particular within AUSTAR's regional footprint.

As previously articulated in a number of submissions to the Department, AUSTAR commends the Government's decision to pursue the deployment of a national broadband network. AUSTAR believes this project will help to address the current digital divide between metropolitan and regional Australia by supporting the availability of ubiquitous telecommunications and broadband services throughout the country.

The availability of sustainable and competitive communications products and services to regional Australia is AUSTAR's ultimate goal. As such, we have a keen interest in gaining access to the wholesale services to be offered by NBN Co in regional Australia.

3. Executive Summary

As a retail provider of entertainment and communications services specifically to regional Australia as opposed to metropolitan markets, and as a potential access seeker on the NBN, AUSTAR has some specific concerns in relation to two aspects of the NBN Companies Bill and Access Bill:

- The power of the Communications Minister to exempt a specified eligible service from the wholesale only obligation set out at section 9(1) of the NBN Companies Bill.
- The right for NBN Co to discriminate between access seekers where the discrimination aids efficiency (proposed section 152AXC of the *Trade Practices Act 1974 (TPA)*).

AUSTAR has fully supported the Government's clearly stated position that NBN Co be a wholesale-only company and the Government's commitment that NBN Co will provide equivalent access to all access seekers. The principles expressed above clearly compromise the Government's previous stated policies and provide disincentives for access seekers to invest in and build competitive broadband solutions, especially in less populous markets, such as regional Australia.

We urge the Government to reconsider these two elements of the Bills prior to their introduction to Parliament.

4. NBN Companies Bill

As currently drafted, section 9(2) of the NBN Companies Bill provides unfettered scope for the Government to allow NBN Co to provide retail services in direct competition with retail providers accessing wholesale services on the NBN. We note that it is conditioned on an obligation to consult with the ACCC before exempting a service from the wholesale only obligation however there are no other restrictions on the Minister's power.

The Explanatory Note to the exposure drafts of the Bills clearly states that the purpose of section 9(1) (which limits NBN Co's supply of services to carriers or service providers) is to enshrine one of the key elements of the Government's NBN announcement – that NBN Co will only supply services on a wholesale basis. However section 9(2) clearly provides a far-reaching exemption mechanism for this principle.

The exemption provision directly conflicts with Government stated policy and is likely to result in a severe reduction in the development of competitive retail services on the NBN. Any retail provider building an investment case for a retail broadband / communication service via the NBN will now be faced with immense regulatory uncertainty with regard to its capacity to effectively compete with a retail service provided by NBN Co, the network provider.

Although there are clearly other strict regulatory controls over the NBN and its provision of access to service providers in the Access Bill, including the obligation to supply services on a non-discriminatory basis, this provision has now been watered down through the carve out for discrimination based on efficiency (see section 5 below). As has clearly been the case for many years with Telstra, vertical integration will give an immense advantage to the network provider at a retail level. NBN will be entitled to discriminate in favour of itself on the basis of efficiency and no other access seeker will be in "like circumstances" in order to equally benefit from the discrimination.

Notwithstanding the above, once retail services become an element of NBN Co's business, the commercial incentives for NBN Co (as a vertically integrated provider) to discriminate increase. Discrimination may be less explicit than pricing discrimination and can often be harder to regulate, such as the speed of access to information. These risks significantly increase once the Commonwealth divests its ownership in NBN Co. For the same reasons that the Government is proposing the structural separation of Telstra, NBN Co should not be entitled to operate on a vertically integrated basis in any form.

The regulatory uncertainty posed by the inclusion of this exemption provision could stall the development of multiple retail services on the NBN and challenge the viability and sustainability of NBN Co's core business as a wholesale provider of network services.

5. Access Bill

AUSTAR supports the key principles set out in the Access Bill, and in particular welcomes the Government's proposal that NBN Co cannot offer services that are not declared or subject to an accepted standard form of access agreement or a special access undertaking. As such all services will be subject to the Category B standard access obligations (supply and interconnection) and in particular the obligation to supply a service on a non-discriminatory basis.

As previously submitted by AUSTAR, the principle of equivalence in the supply of services by NBN Co is a fundamental element of the access regime. This is particularly the case once Government ownership is divested. We acknowledge that the principle is a complex one in practice where the access provider is a commercial entity driven by commercial incentive (as will be the case with NBN Co) however to compromise on the equivalence requirement is, we believe, a huge step back for regional Australia.

As currently drafted, the obligation on NBN Co to provide services on a non-discriminatory basis is limited by the exemption set out at proposed section 152AXC(3) of the TPA which states that NBN Co is not prevented from discriminating between access seekers where "*the discrimination aids efficiency*" and "*all access seekers with like circumstances have an equal opportunity to benefit from the discrimination.*" The Explanatory Note gives further detail on this principle by clarifying that access seekers may want to receive different terms to promote their own investment and service differentiation. It states that:

"the concept of "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."

The concepts listed above, although attractive from a commercial and competitive perspective, will merely reinforce the status quo and severely reduce the likelihood of market entry by

smaller retail players. This will prejudice the development of innovative and competitive communications solutions for consumers in regional Australia and reinforce the existing digital divide. Economies of scale are clearly not available in the less populous regions of Australia. The efficiency concepts envisaged are all ones which can only be offered by retail providers with scale - they clearly discriminate in favour of the existing incumbents, Telstra and Optus. Volume discounts obviously favour players such as Telstra. However other concepts, such as discrimination based on risk sharing, also favour the larger providers, who are in a much better position to self-insure against risk than smaller providers.

AUSTAR believes the exemption to discriminatory behaviour proposed in the Access Bill is likely to reinforce the incumbency of the current players and should be removed from the Access Bill.

6. Conclusion

We welcome the opportunity to comment on the exposure drafts of the NBN Companies Bill and Access Bill.

If you would like to discuss any of the issues raised in this submission or require any further information, please do not hesitate to contact me as per the details below.

Yours sincerely,



Deanne Weir
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