

ACTU

Submission

The National Broadband Network Company Legislation and Access Network

**Australian Council of Trade Unions
July 30, 2009**

Introduction

The Australian Council of Trade Unions (ACTU) represents 2 million employees working across all sectors of the Australian economy. Three Unions represent employees within the telecommunications sector - the Communications, Electrical, and Plumbing Union (CEPU), the Community and Public Sector Union (CPSU), and the Association of Professionals, Engineers, Scientists & Managers, Australia (APESMA). The ACTU, and the telecommunications unions, strongly endorse the Federal Government's proposal to support the creation of a wholesale only, open access Fibre-to-the-Home National Broadband Network (NBN) in the belief that our members, and working families across Australia, will benefit from this initiative as workers, as users of communications services and as citizens. The ACTU and the telecommunications unions believe that this critical piece of infrastructure should serve the national interest by creating jobs for the future.

The ACTU, and telecommunications unions, welcome the opportunity to contribute to the public debate on the legislative framework for the NBN. The legislative framework will be important in codifying the access regime, equivalence obligation, ownership structure, eventual sale of the company and other rights and obligations to be conferred on the company. There is an opportunity for the Government to implement a legislative framework for the NBN Company that promotes and protects the rights of Australian workers and invests in the longevity of Australian jobs and industry.

1. *The optimal access regime for the National Broadband Network, including, for example:*

- *the legislative obligations that should be required to ensure the NBN company operates on a wholesale-only, open access basis*
- *the process for identifying services to be offered*
- *how the prices and non-price terms and conditions of those services should be set, and for how long and*
- *the role of the Australian Competition and Consumer Commission*

We support the government in their objective to create a wholesale-only, open access company for the building and operation of a FTTH network. In order to make the most of the opportunities that a FTTH network will bring, the NBN Company must be prevented from leveraging their near-monopoly power in infrastructure into downstream markets. A genuinely non-discriminatory access regime must be in place, including both service and price equivalence between all access seekers. The issue of equivalence is dealt with in more detail in section 2.

Subject to ensuring that the NBN Company is able to operate as a viable business, we believe that the NBN Company should be able to offer both access to dark fibre as well as bitstream level services, with access seekers being able to purchase either or both forms of service. This will allow retail companies to purchase the services most appropriate to their business models, and to differentiate their product offerings. End-users should be able to purchase the services appropriate to them, whether they be telephony, broadband or Pay TV services, in combination or separately. As iiNet noted in their submission from June 2008, “By designing the network so that access is possible at different levels, opportunities for investment and innovation are optimised. This means not only different versions of the same service, but opportunities for the development of types of services, as yet unseen.”¹ However, we would not support the participation of the NBN Company in retail markets, as this would undermine the promotion of competition in those sectors. Consideration should also be given to extending this prohibition to resale markets.

¹ iiNet Ltd, *Regulatory Submission: On the requirements for an Open Access National Broadband Network*, June 23, 2008.

We support the role of the ACCC in setting the price and non-price terms for those services to be offered. The ACCC has the appropriate knowledge and experience to regulate access to the services that the NBN Company will provide, with expertise in regulating access in telecommunications currently.

The current negotiate-arbitrate model offers neither certainty nor flexibility, with a lengthy and cumbersome process that is not in the interests of end-users. A shift to a model where the ACCC is able to directly set the terms and conditions of access is more appropriate, particularly where there will be a single access provider, and multiple access seekers. Significant costs are involved in the negotiate-arbitrate model, where access seekers and providers engage in long running disputes, the costs of which are ultimately borne by the consumer. These disputes have in some cases taken many years to finally resolve; if the NBN is to be operational within the next 5-8 years then a more expeditious process must be found in order to give certainty to investors and a speedy switch-on of services for consumers.

The model used to determine these terms and conditions should be transparent in the methods and inputs used, with the process open to public scrutiny. This will also need to be sufficiently flexible in the short term to allow adaptation to changing market conditions, and to allow for unexpected difficulties that will inevitably arise in regulating an industry that will have fundamentally shifted in structure.

2. The appropriate equivalence obligation for the company and the services it offers, and how this would operate in practice

Equivalence should be provided to all customers on the principle of the same cost, terms and conditions for the same service. The UK Broadband Stakeholder Group defines open access as that which provides services, “to all interested parties on an equal basis... offering the same products at the same prices (and terms and conditions) to all operators, and provisioned by the same processes.”² The NBN Company should not be able to price discriminate between its wholesale customers unless such

² Broadband Stakeholder Group (UK), *Final Report for the Broadband Stakeholder Group: Models for efficient and effective public-sector interventions in next-generation broadband access networks*, 9 June 2008

discrimination is in the interests of end-users. This will reduce barriers to entry to the telecommunications market, and allow higher quality and greater diversity of offerings at the retail end. This will be particularly important where existing carriers and potential access seekers are also significant minority investors in the NBN Company.

3. The nature of ownership restrictions applied to private sector investors to protect the Government's equivalence objective for the wholesale-only network

We believe that potential access seekers should be subject, as a class of investors, to restrictions on the amount of equity they may hold in the NBN Company. This class of investors could be defined in three ways: any entity seeking to purchase services from the NBN Company, any existing Carrier, and any existing Carriage Service Provider.

This will be even more important once the Government has sold its controlling stake in the company. Given the need for certainty for investors beyond the date of Government sale, the caps placed on investment by access seekers must take in to account the possibility of the largest investors holding much less than 50% of the Company, and therefore having the ability to exert control with a much lower shareholding. As such, we propose that any investor in these classes as defined above should be restricted to owning no more than 15-20% of the NBN Company. Should the sale of assets to the NBN Company by any entity within that restricted class exceed that cap, then other mechanisms for compensation must be found, either through cash or debt instruments, or by distributing equity directly to the owners of that entity, rather than the entity itself.

In particular, it will be necessary to ensure that the company is run independently of any owners that are current carriers or associated companies regardless of their shareholdings in the Company. The CEO and management team should report solely to the Board of the NBN, and must not be an employee or serve on the Board of any access seeker entity. The members of the Board of the NBN Company must not be employees or serve on the Board of any access seeker entity. Moreover, those investors within that restricted class should be prohibited from appointing non-independent directors to the Board.

The *ASX Corporate Governance Principles and Recommendations* outline the following as being of concern with regards to Director independence if the Director:

1. is a substantial shareholder of the company or an officer of, or otherwise associated directly with, a substantial shareholder
2. is employed, or has previously been employed in an executive capacity by the company or another group member, and there has not been a period of at least three years between ceasing such employment and serving on the board
3. has within the last three years been a principal of a material professional adviser or a material consultant to the company or another group member, or an employee materially associated with the service provided
4. is a material supplier or customer of the company or other group member, or an officer of or otherwise associated directly or indirectly with a material supplier or customer
5. has a material contractual relationship with the company or another group member other than as a director.³

Given the ongoing public policy debates around the ownership of crucial network infrastructure by retail telecommunications carriers, it will be particularly important to ensure the independence of the Board of the NBN Company from any access seekers who are also significant investors in the Company.

We do not believe that the restrictions as outlined above should apply to investors that are not seeking access to the services operated by the NBN Company. This would not preclude other forms of investment restrictions that the government may consider necessary for unrelated public policy reasons.

4. Arrangements for the Government to sell its stake in the network

The government has indicated that they are intending to sell down their stake in the NBN Company at five years after the NBN is complete and operational. We believe there should be flexibility around the timing and sale process to ensure that the sale

³ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 2nd Edition, 2007

of the Government's stake in the NBN does not harm the long term interests of end-users.

Prior to any sale of Government's stake in the NBN Company, the Government should review the potential impacts of any sale on:

1. The interests of end-users
2. The promotion of competition in the telecommunications industry
3. The quality and diversity of services available
4. The equitable provision of services, particularly to rural and regional Australia, and low-income earners
5. Employment, employment standards, skills and training in the communications sector
6. Innovation and investment in the sector

This review should also include a requirement for the Government to engage in public consultations prior to any sale. The Government must retain flexibility in the timing and process of the sale in order to ensure that the review can be take into account all these issues, and ensure that the full range of social benefits are realised, as well as financial ones.

5. Rights and obligations to be conferred on the new company

We welcome the opportunity to comment on the rights and obligations to be conferred on the NBN Company. Along with a strong legislative framework around the running of the company, there are broader rights and obligations that must be a part of the new company's *modus operandi*. The NBN Company has the obligation to help secure decent working conditions, job and income security for NBN employees and associated businesses, and help ensure that the NBN is a significant ongoing employer in the Australian jobs market. We strongly advocate protecting and creating quality jobs for the new company. International comparisons show that FTTH roll outs create both new opportunities and disruptive challenges in the telecommunications industry with regard to workforce, impacting both employees and the industry at large. As such, we believe that the NBN Company must take a proactive approach to ensure that its

employment practices and those of contractors help develop and secure the highly skilled ICT workforce on which Australia depends.

The ACTU and its affiliated unions are advocating for policy across the whole of government that encourages responsible investment to promote the longevity of Australian industries, both to retain Australian jobs and to secure the long term future of a strong Australian economy. We are advocating a set of National Interest Employment Expenditure Principles (NIEP) that aim to encourage responsible investment in Australian jobs and industries. These are commitments to:

- Protect and create Australian jobs and local content
- Protect job security and workers' rights
- Improve corporate governance and accountability
- Limit executive salaries
- Enforce and make payments conditional

We believe that the construction of the NBN, as a large piece of infrastructure that is critical to Australia's social and economic development, will be an important opportunity for putting these principles into practice and establishing responsible government investment that promotes jobs growth.

We also strongly advocate the Government adopt a Responsible Contractor Policy (RCP) so that Government work contracted out is given to businesses who comply with Federal and State legislation, awards, industrial instruments and codes of practice relating to the performance of work by outworkers. An RCP is particularly important in the case of the NBN where large swathes of workers during the construction phase will not be directly employed by the NBN Company.

We are also advocating for Government investment in skills and training programs to complement the emergence of an NBN workforce, and the associated emerging workforce in the ICT sector. This investment will be not only critical for rolling out a new and complex technology to a majority of the Australian population, but also critical in retraining and reskilling all sections of the telecommunications workforce that participate in the realisation of this project.