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To: Department of Broadcasting, Communications
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By email: nbnlegislation@dbcde.gov.au
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National Broadband Network Company: Legislation and Access Regime

The Internet Society of Australia (ISOC-AU) welcomes this opportunity to comment on the legislative arrangements that we believe should be associated with the National Broadband Network Company (NBNC_o).

ISOC-AU's fundamental belief is that the Internet is for everyone. We provide broad-based representation of the Australian Internet community both nationally and internationally from a user perspective and a sound technical base. We also consistently promote the availability of access to the Internet for all Australians. The Internet is a central driving factor in the demand for broadband and consequently ISOC-AU has a direct interest in the outcomes of the legislation and access regime arrangements being developed for the NBNC_o.

The Government's policy objectives for an NBN were set out in the Government's Request for Proposals in 2008, as follows:

- High quality and bandwidth;
- As symmetrical in upstream and downstream capacity as possible;
- Accessible to all Australians, wherever they reside or work;
- Meets communications needs of people with disabilities;
- Affordable; and
- Provided in a competitive environment.

ISOC-AU strongly supports those objectives for an NBN and believes those objectives must underpin any legislation relating to the NBN, including the NBNC_o.

In our view, there are three main issues in relation to legislative structures for the NBNC_o. The first is the company itself and the need to ensure that it operates to achieve Government policy objectives. The next issue is to ensure that the company fulfils the

Government's policy objective of NBNCo operating on a 'wholesale-only open access' basis. The final area of concern is the competition regime in which the NBNCo will operate.

1. NBN COMPANY OBJECTIVES AND OWNERSHIP

Normal corporate governance arrangements require that the company operates to maximise benefits to the company shareholders and, indeed, it is the duty of company directors to ensure the company does operate for the benefit of shareholders.

This company, however, will be established by the Government, using considerable public resources for the public's benefit, to achieve the policy goals that this Government has articulated. While NBNCo owns a majority shareholding, there will be strong voices on the Board to ensure that the company does operate to achieve the Government's objectives. When the Government sells its interests in NBNCo, however, the Company may seek to maximise benefits to itself and its shareholders above achieving the public benefit intended by Government.

We recommend that NBNCo legislation set out clear policy goals of Government for the NBN (as set out above) so that, regardless of NBNCo ownership, the duty of its executive and directors will remain the achievement of the original Government policy goals for the NBN over maximisation of profit for NBNCo shareholders.

One of the issues identified by Government for NBNCo was 'the nature of ownership restrictions applied to private sector investors to protect the Government's equivalence objective for the wholesale only network'.

The various ownership and control regimes applied to broadcasting services over time demonstrate the difficulty in legislating to prevent too high a concentration of media ownership. However, it is critical that NBNCo not be controlled by an industry participant (or group of industry participants) who would be tempted to act in their own self interest. At the same time, it would be unfortunate if other investors were discouraged from investing in the NBN because of a too complex set of ownership rules.

Proposed legislation for NBNCo should also address concerns set out by the ACCC when it declined to approve FANOC's special access undertaking in December 2007.¹ The likely investors in NBNCo will most likely, as with FANOC, include industry players. Like NBNCo, FANOC would not have provided retail services and no single access seeker would be permitted to have control over FANOC. Nevertheless, the ACCC expressed concerns on whether there was sufficient separation of ownership between the network owners and downstream retail providers. That issue also will need to be addressed in legislation.

We recommend that no one organisation that is a carrier, a carriage service provider or a content service provider, as defined under the Telecommunications Act 1997, be allowed to hold more than a 5% shareholding in NBNCo. The Government should also consider whether it would be necessary to deem a company (where a carrier, carriage service provider or content service provider

¹ ACCC, Assessment of FANOC's Special Access Undertakings in Relation to the Broadband Access Service: Draft Decision, December 2007.

owns a significant number of shares in that company), as also restricted to a 5% shareholding in NBNCo.

2. WHOLESALE ONLY AND OPEN ACCESS

Conceptually, there are three layers of providers. The first is the provider of the basic infrastructure. The second is the provider of products and services, based on the underlying infrastructure. The third covers the service providers (carriage and/or content) that retail products and services to the end user. In the current regime, providers can undertake all three layers of activity. If the Government's aim of a 'wholesale only' open access NBNCo is to be realised, the NBNCo must not be a provider of both wholesale and retail products and services.

The clear policy aim of having a wholesale only open access provider is to remove the incentive on NBNCo from favouring itself over others in the downstream retail market. If that is effectively done, it will remove any incentive NBNCo would have to discriminate between service providers seeking its products and services. That is, if NBNCo is forbidden from offering retail products, it has no incentive to offer its products and services on anything but an equivalence basis. With a strong anti-competitive regime as backup, there will be remedies available to service providers if NBNCo behaves otherwise.

We recommend that legislation require that NBNCo must not provide any of its products or services to customers that are not themselves carriers or carriage services, as defined under the Telecommunications Act 1997, or organizations that provide a similar role in a possible future telecommunications regulatory regime.

3. COMPETITION REGIME

The terms of reference for this inquiry raise two specific issues on the competition regime for the NBNCo. Specifically, comment is sought on:

- the role of the Australian Competition and Consumer Commission
- The optimal access regime for the National Broadband Network, including, for example, the process for identifying services to be offered

We see no compelling reason why a separate body should be created to oversee competition rules in this industry and believe the Australian Competition and Consumer Commission should retain responsibility for oversight of competition rules in telecommunications under the Trade Practices Act.

In our earlier submission on the regulatory framework for the NBN (www.isoc-au.org.au) we made specific recommendations on strengthening the existing competition regime.

The current negotiate-arbitrate model provided for under Part XIC is, quoting from the DBCDE Discussion Paper on the regulatory framework 'ineffective, largely because there is a vertically integrated incumbent that has the incentive to discriminate in favour of its own retail business'. The Paper made several suggestions on how Part XIC could be strengthened, which we supported at the time and still support.

The Discussion Paper also noted that Telstra remains 'one of the most integrated telecommunications companies in the world... More than ten years after competition reforms were introduced, Telstra retains a dominant position in many telecommunications markets.' We recommended that there be a genuine and effective split between the wholesale and retail arms of Telstra to remove Telstra's incentives to favour itself over its competitors in the downstream retail market, and that services provided by Telstra to all access seekers are done on a genuine equivalence and competitive basis.

The Discussion Paper listed key principles for a functional separation regime. If a functional separation regime is to be effective, however, there must be very detailed requirements on Telstra that ensure genuine separation of business units into infrastructure, wholesale and retail units, genuine equivalence of service offerings and sufficient mechanisms of transparency and accountability to ensure functional separation achieves its policy objectives. As we noted in our earlier submission, the undertakings made by British Telecom to the UK regulator, Ofcom, provide an example of the sorts of requirements that have been seen as necessary to ensure that the infrastructure arm of a telecommunications infrastructure provider (in the case of BT, called Openreach) provides all of its customers (including its own retail arm) with an equivalence of inputs, and provides the incentives within its infrastructure arm to do so.²

It will be several years before the NBN is in place. Therefore, the existing competition rules should be strengthened to ensure strong competition in telecommunications products and services as we move into an NBN environment.

We continue to support strengthening of the access regime under Part XIC of the Trade Practices Act, as outlined in the DBCDE Issues Paper on regulation of the NBN. We also continue to support considerably strengthening the current rules for Telstra for Operational Separation to more closely match requirements now on British Telecom for functional separation.

We will be happy to provide any further comments on issues raised in relation to NBNCo legislation.

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² See Ofcom. Final Statement on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002, 22 September 22 2005, pp 57-111.