

June 2008

Australian Government

Department of Broadband,
Communications and the Digital Economy

**Re: National Broadband Network
Request for submissions on regulatory issues**

Next Generation Network Framework

Introduction

Netspace is an Australian owned and operated Internet Service Provider that has been a key part of the competitive telecommunications environment since 1992. Our success to date has in part been due to our core philosophy to make communications technology accessible, affordable and uncomplicated for all Australians to enjoy.

The Government is now contemplating making significant changes to the regulatory framework to facilitate the rapid rollout of a new National Broadband Network. Netspace is as ever keen to be a part of the next technological age, however we are anxious to ensure that the consumer benefits achieved to date through competition don't become a casualty of the rush to get the network built.

Our viewpoint expressed below on regulatory issues is not a purely theoretical one. It is based on experience gained through dealing with all aspects of the current environment including being an access seeker, wholesale customer and retail competitor of Telstra, and being a party to the existing ACCC dispute processes.

Key policy objectives

Netspace viewpoint is that the Government should adhere to sound key policy objectives:

- Promote the long-term interests of end users and improve the efficiency and international competitiveness of the Australian telecommunications industry.
- Enhance Australia's long-term, sustainable prosperity through access to affordable high-speed broadband.
- Enable uniform retail prices on a national basis.
- Give industry scope to compete on the basis of innovation and differentiation that in turn enhances end user choices.

Policy enablers

- Netspace believes that a regulatory regime that promotes encourages and protects competition is essential to achieve these policy objectives.

Shortcomings of the existing regime

Our experience to date has demonstrated that although consumers have benefited greatly since competition was introduced, the existing regime continues to have shortcomings that work to lessen competition, keep prices high, and impede the take up of new services.

- A conflict of interest exists where the network owner is also a retail competitor to the Access Seekers. This is a fundamental constraint that currently manifests itself in a multitude of day-to-day areas when dealing with Telstra. Chief amongst these is that the network owner does not (for its own good commercial reasons) adhere to the principle of equivalence when dealing with itself relative to its wholesale customers. Lack of pricing equivalence and product equivalence is an ongoing issue that has if anything intensified over recent years. Repeated attempts under the present TPA and Operational Separation arrangements to rein in anti-competitive conduct have largely failed. Examples include Telstra's ability to side-step imputation tests and perpetuate lower retail pricing through the guise of "promotions" that in some cases (e.g. half price Broadband offers) endure for years. Similarly Telstra's ability to stifle innovation by limiting functionality (e.g. limiting ADSL upstream bandwidth) or refusing to wholesale (ADSL2+, 3G Mobiles or HFC etc.) seeks only to limit competition through favouring Telstra Retail business objectives whilst ignoring the requirements of wholesale customers.
- The reality we have faced in attempting to gain access to bottleneck monopoly elements of the access network is far from what was expected when competition was first introduced in 1997. At that time it was expected that the regulatory regime would, over time, encourage an increased use of commercial negotiation and less reliance on the intervention of the regulator. Reality has shown that there is still no real incentive for the vertically integrated network owner to negotiate commercially with Access Seekers and hence nearly all access negotiations still end in the ACCC arbitrating in a dispute.
- The arbitration process is too long and subject to gaming by the participants. Furthermore the inequality between the financial resources of the incumbent and most Access Seekers means Telstra can potentially prevail through just outlasting any adversary rather than demonstrating the more persuasive argument. Telstra's willingness to pursue this tactic has been evident lately as it has taken Access Disputes through a number of ADJR actions and has also taken an appeal to the Full Federal Court.
- Binding arbitrations between parties don't flow on to other identical disputes. Parties with identical disputes need to go through the whole process separately. This is not only an unnecessary waste of time and resources, but it also distorts the market as the time lag involved creates artificial arbitrage opportunities. This then further harms competition by allowing some Access Seekers to achieve preferential access terms for extended periods.
- The extended timeframes taken by the ACCC to deliver arbitrations creates artificial arbitrage situations between substitute services and hence drives inefficient investment. For example the extended delay between the ACCC publishing separate pricing principles for ULL, SSS and Wholesale Line Rental, where all three essentially provide alternative platforms to deliver

similar voice and data services, distorts investment decisions and creates inefficiencies as access seekers must switch platforms to achieve short term competitiveness rather than pursue long term investments.

- The vertically integrated network owner with a dominant market position is therefore able to exploit all these shortcomings of the existing regime to perpetuate a climate of uncertainty. This has proven an effective means of reducing competition as it increases substantially the business risk of all Access Seekers and thus deters investment in the creation of competitive new and innovative services.

A Broadband Future for Australia

- Netspace believes delivering on the key NBN policy objectives without undoing the critical competition gains achieved since deregulation is the key challenge for Government.
- A new regulatory framework is required to repair the current shortcomings and foster healthy and effective competition through the transition to the NBN and beyond.
- Only through vigorous and robust competition can the consumer benefits of the NBN roll out be fully realised.

Essential policy framework elements

- Transition arrangements between current and future networks need close attention. A vertically integrated owner of the NBN has a strong incentive to use the disruption of the network rollout to undermine retail competition and favour its own retail customers. Regulation must protect existing customers and their services and provide fair and equitable transition arrangements. Wide industry consultation will be necessary to ensure that the needs of all wholesale customer and their respective end user requirements can be adequately accommodated through the transition period.
- Consumer choice is a key pillar that underpins competition. Consumers demand not only choice of provider but also the freedom to take different services from different providers. In the future the NBN will be used to support –
 - Delivery of basic PSTN
 - Delivery of non-real-time data like email and web browsing
 - Delivery of real-time services like video broadcasting and video Conferencing
 - Delivery of Business Grade Service packages and Residential Grade Service packages

End users must be able to be connected to different service providers and obtain each of these services independently. Regulation must ensure that the owner of the NBN maintains the obligation at the wholesale level to provide unbundled access, as is the case today.

- For customers to exercise choice and take advantage of competition they must be able to freely move their services between providers. Under the current ULL and SSS environment, customer transfers processes can be costly and cumbersome or in some cases non-existent. Furthermore the vertically integrated network owner with a dominant market position has a

strong commercial incentive to keep it that way. This point is illustrated today by the fact that Telstra refuses to include its retail customers in the DSL/SSS transfer process. Regulation must ensure that; the NBN network owner invests upfront in fast and efficient customer transfer processes and systems, that the charges levied reflect the efficient costs incurred, and that all retail services providers must fully participate.

- Competition drives benefits not just at the retail end of the services delivery chain but also through multiple intermediate wholesale levels. The NBN regulatory framework must recognise the importance of sub-wholesaling to the health of the industry as it provides the ability for smaller players to establish and prosper through the launch of innovative new services. A one-size-fits-all approach inevitably puts all product development decisions in the hands of the network owner's retail businesses, which in turn limits the ability of wholesale customers to differentiate their products from each other. Regulation must provide a mechanism whereby wholesale customers can exercise control over key operational parameters of the network necessary to support their own business needs. At a minimum regulation must mandate for interconnection to the NBN at local, regional and national aggregation levels allowing alternative backhaul providers to construct retail and wholesale service offerings using, in part, their own infrastructure.
- Dispute resolution mechanisms need to be strengthened and streamlined. All parties should have strong incentives to resolve disputes quickly through cost effective and efficient process. Where appropriate the regulator should have price setting abilities to apply the terms and conditions achieved in key resolutions to all Access Seekers with a minimum of delay.
- Monitoring needs to be in place to ensure that a vertically integrated network owner doesn't engage in a retail-wholesale price squeeze. The regulator needs broad powers to detect and remedy any such activity quickly. The reliance in the past on theoretical cost models has been shown to be inadequate so new regulation has to ensure greater transparency is available to assess true costs.









The outlook if we get this wrong.

- Australia is currently poised at the cross-roads in the development of its next generation communication infrastructure. Ineffective or misguided regulation at this juncture that ignores the lessons of the past and doesn't seek to adequately address the shortcomings of the current regime, will inevitably leave Australia in a worse position than we are in today.
- The biggest single factor that will determine the success of the NGN in achieving Government policy objectives, more so than any technology or network choices, will be the quality and effectiveness of the regulation that protects and stimulates vigorous competition. Only through such competition will Australia enjoy the greatest level of innovation necessary to drive the best possible services at the lowest possible prices.
- The alternative outlook if we get this wrong is a Broadband wasteland where coverage is limited and services are priced out of reach of all but the most privileged users. Such an outcome will do nothing to achieve the Government's key policy objectives. More likely it will harm our international

competitiveness and do nothing to raise our standard of living, or help us to create a sustainable future for our children.

Conclusion

- An objective assessment done on the current health of the Australian broadband industry would show mixed results. The report card has two distinct sides to it. On one side where the regulatory and economic conditions have allowed competitors to roll out competitive infrastructure, consumers have received great benefits. On the other where Telstra remains in control of the network, little or no progress has been made.

Assessment Criteria	Areas where competition exists	Areas where Telstra maintains monopoly control.
Availability of High-speed ADSL2+		
Availability of uncapped upstream speed services.		
Availability of DSL without requiring phone line rental. (Naked DSL)		
Low priced high download plans		

- Without effective regulation that addresses the current shortcomings, the consequences for Australia of a Next Generation Broadband Network, built and owned by a vertically integrated organisation are more of the same.

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