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**To: Department of Broadcasting, Communications
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By email: regulatory@dbcde@gov.au
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Regulatory Arrangements Associated with the National Broadband Network

The Internet Society of Australia (ISOC-AU) welcomes this opportunity to comment on the regulatory arrangements, including consumer safeguards, that we believe should be associated with the National Broadband Network (NBN).

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. Because the Internet is a central driving factor in the demand for broadband, ISOC-AU has a direct interest in the outcomes of the regulatory arrangements that will underpin the provision of the NBN.

ISOC-AU applauds the Government's commitment of \$4.7 billion to support the provision of high speed broadband throughout Australia, and its appreciation of broadband as critical infrastructure that is fundamental to economic growth and innovation in Australia. ISOC-AU has consistently put forward its objectives, on behalf of Internet users, for broadband that is:

- High quality and speed;**
- Accessible to all Australians, wherever they reside or work;**
- Meets communications needs of people with disabilities;**
- Is affordable; and**
- Is provided in a competitive environment that will give Internet users genuine choice of service and service provider, and provide the market forces to encourage improvements in services and pricing.**

Our specific comments are as follows:

NETWORK TOPOLOGY

Support for Competition

The topology of the network is critical in supporting (or not) a competitive environment. Government objectives for the NBN are that it supports the

provision of competitive, differentiated services. The Evaluation Criteria for the NBN support those objectives with requirements on proposed NBN providers to describe how their network will provide that scope for access seekers to differentiate their services.¹

The NBN, therefore, must be designed and provided in a way that ensures that there is a business case for service providers to provide competing, differentiated services, using a mixture of their own and the NBN network.² The NBN must facilitate interconnection at multiple geographic locations using industry standards and readily available methods for service provision to optimise traffic flows.

Symmetrical speeds

The Government's objectives for the NBN include its ability to support symmetric applications such as high definition video conferencing. ISOC-AU proposes that this objective is expanded so that the NBN support symmetric applications that allow Internet users to fully participate in the online world as providers and consumers of information. Those applications and services may include critical health services and care, rural and remote online learning capacity and a range of business services.

Internet Protocol Version 6 (IPv6)

The NBN must include full capacity for implementation of IPv6, a platform for transition keeping Australia abreast of international developments and for innovation. The fibre network must be seen not only as a provider of 12 Mbits download transmission speed, but, with implementation of IPv6, a platform for innovation that that will create new opportunities for the Australian ICT sector, including:

- Building management – for energy minimisation
- Sensor networks – for environmental monitoring and water management
- Supply chains – e-business
- Emergency services – interoperability
- Consumer electronics – embedded systems
- Automotive industry – vehicle telemetry
- Developing ICT research – for innovation
- Enabling education – for e-learning

COMPETITION RULES

The High Court of Australia has recently made it very clear that owners of Australian telecommunications infrastructure do so subject to Government policy guaranteeing the 'rights of competitors to access and use' another's

¹ Department of Broadband, Communications and the Digital Economy, Request for Proposals to Roll-out and Operate a National Broadband network for Australia, 11 April 2008 (RFP) Objectives 10 and 11, and Evaluation Criteria Clause 1.5.18 and 1.5.19.

² See discussion of the impact of network topologies on competition in OECD, Working Party on Communications Infrastructure and Services Policy: Developments in Fibre Technologies and Investment 3 April 2008, DTSI/ICCP/CISP (2007)4/FINAL Pp 26-27

infrastructure.³ With that very clear judicial support for the Government's competition policy, the NBN provider should not be granted a holiday from any of the competition rules, including Parts XIB and XIC of the Trade Practices Act, and Schedule 1 of the Telecommunications Act, which is also subject to ACCC oversight.

There is also concern about the effectiveness of the competition regime itself. In 2003-4, the Senate References Committee on Environment, Communications, Information Technology and the Arts held an inquiry into competition in broadband services. Their report took evidence from a number of parties including industry participants and regulators, and concluded that the competition regime was not effective and should be reviewed.⁴ It is a conclusion shared by the Productivity Commission in its 2001 Report⁵ and the ACCC in its more recent report on competitive safeguards.⁶ With the Government's policy objective of ensuring that the NBN supports competitive outcomes, the Government should consider reviewing the effectiveness of the telecommunications competition rules into an NBN environment.

OPERATIONAL/STRUCTURAL SEPARATION

One possible scenario is that the successful tenderer - the NBN provider - will not also be the retailer of services using the NBN. In that case, the current competition reforms, possibly revised, may be sufficient to underpin a competitive environment. If, however, the NBN provider is also a retailer of NBN services, additional competition policy measures may be necessary. As the Hilmer report observed:

... Monopoly returns made in the monopoly market may be used to finance otherwise unprofitable prices in the competitive market, potentially driving out or disadvantaging competitors ...

A second concern can arise where there is a vertical relationship between the two activities, particularly when access to the natural monopoly element is essential for effective competition in the downstream or upstream market.... In this case, integration of the natural monopoly element... and a potentially competitive activity,,, raises concerns that control over access to the monopoly element may be misused to stifle or prevent competition in the potentially competitive sector. (Hilmer) (1993:219)⁷

Operational/Functional Separation

In 2005, the Government imposed Operational Separation requirements on Telstra. As the Government explained at the time, the aims of the operational

³ Telstra Corporation Limited v The Commonwealth [2008] HCA 7 (6 March 2008) at paragraph 52.

⁴ The Senate Environment, Communications, Information Technology and the Arts Reference Committee, Competition in Broadband Services, August 2004. See pages 72-79.

⁵ Productivity Commission (2001) Telecommunications Competition Regulation: Inquiry Report, Report No. 16, September, Chapter 9

⁶ ACCC, Telecommunications Competitive Safeguards for 2005 – 2006, May 2005, p. 55

⁷ Hilmer, Professor Frederick G, (Chairman) National Competition Policy: Report by the Independent Committee of Inquiry, Canberra, 25 August 1993.

separation regime were to ensure equivalence in inputs by Telstra (equivalence in the services it provides to itself and its customers, including price and non-price terms and conditions) and to provide the correct incentives to the to-be-separated groups within Telstra.⁸ Increasingly, Operational (or functional) separation is seen as a way of ensuring that a vertically integrated former monopolist does not favour itself – as against its competitors - in the provision of services.⁹ The undertakings made by British Telecom to the communications 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.

If the NBN provider is also a provider of services using its NBN, Operational Separation requirements, reviewed against overseas best practice, should be imposed to ensure the NBN is provided in a way that ensures competitive outcomes.

Structural Separation

There are also arguments for structural separation – legally separating the entity that provides infrastructure/whole sale services from the retail provider of services to customers. As iiNet argued in its recent submission to the Expert Taskforce, the existing network owner is required by law to provide network access to its retail competitors, but is also required by law to maximise the return to its shareholders. And it views those obligations as mutually exclusive.¹⁰ Indeed, the Senate Committee on Competition in Broadband, looking at the competitive environment of a vertically integrated Telstra, specifically recommended that:

*... the Productivity Commission be tasked to undertake a full examination of all the options for structural reform in Australian telecommunications, including but not restricted to, the structural separation of Telstra.*¹¹

⁸ Telecommunications Legislation (Competition and Consumer Issues) Bill 2004 – Explanatory Memorandum, pp 1-2, and 17.

⁹ See, for example the European Commission, Proposal For a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, Brussels 13.11.2007 COM(2007) 697 final 2007/0247 (COD)

Brussels, 13.11.2007. See also the Undertakings made by British Telecom to Ofcom to achieve functional separation in Office of Communications, Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002, September 2005, p57 ff.

¹⁰ iiNet Ltd, Access Seeker Requirements for the Expert Panel Assisting the Minister for Broadband, Communications and the Digital Economy, 30 March 2008, p. 7.

¹¹ The Senate Environment, Communications, Information Technology and the Arts Reference Committee, Competition in Broadband Services, August 2004, Recommendation 3, p. 101.

USE OF GOVERNMENT FUNDS

Government funds should be used in such a way that maximises industry investment in new networks. For much of urban Australia, there is a strong business case for the provision of broadband services, without additional Government support. However, there are areas that do not have access to broadband networks, including some parts of urban areas, plus significant areas of rural and regional Australia, where Government funding could be used to maximise industry investment in the provision of broadband services.

RURAL AND REMOTE

The Government's first stated objective for the NBN is that it cover 98% of the Australian population. That leaves a significant part of geographical Australia that will not receive fibre. The Regional Telecommunications Independent Review Committee is due to report on the adequacy of telecommunications services to Australians in regional, rural and remote Australia. Outcomes of that report (and a further review in 3 years time) should be taken into account by the Government and NBN provider to maximise the provision of fibre in Australia.

AFFORDABILITY AND CONSUMER CHOICE

To a significant degree this issue is addressed by ensuring that the NBN is provided in a competitive environment, with the additional requirement of low access prices for competitors.

There should also be a clear transition strategy, maintaining existing infrastructure for some considerable time, to allow customers to choose when they transition to NBN services, acquiring the level and quality of service that meets their needs at an affordable price. End-users should be able to access at least the same services with the same service providers at the same or lower prices as they have currently chosen to subscribe to.

CONSUMER PROTECTION

There are a range of consumer protection measures that are currently in place, through legislative provisions, legislative determinations and codes of practice. The NBN provider should not be exempt from any of the relevant protections. Some of the consumer protection measures may need to be reviewed and updated, however, to ensure they continue to be effective for the new underlying network architecture.

OPEN AND TRANSPARENT PROCESSES

As much as possible, the outcomes of this process should be open and transparent to the public. The basic outline of what the NBN provider has agreed should be publicly available. The Government should also regularly and publicly review the NBN provider's compliance with tender requirements.

The Government has already stated that submissions made to this inquiry will be publicly available. Given that the timeline for the submission of tenders has been extended, the Government should also consider releasing what it sees as its preferred option(s) for regulatory arrangements of the NBN provider, giving added certainty to prospective tenderers.

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