

**Panel conducting a
Cost-Benefit Analysis and
Review of Regulatory Arrangements for
the National Broadband Network**

Regulatory Issues Framing Paper

Public Consultation

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Regulatory Issues Framing Paper

Panel's terms of reference and its approach

In December 2013 the Minister for Communications announced a panel to conduct an independent cost-benefit analysis of broadband policy and review the regulatory arrangements for the National Broadband Network.

The panel's terms of reference and further background information are available on the Department of Communications' [website](#).

The panel has been asked to examine and make recommendations on the most appropriate regulatory framework for Australia's future broadband market, and particularly on NBN Co's role in that market.

In the view of the panel, the key regulatory areas for consideration identified in the terms of reference are:

- > the overall structure of the Australian wholesale broadband market, including infrastructure based competition (see terms of reference number 3 in particular);
- > the role of NBN Co in that framework; and
- > the more detailed regulatory settings to apply in that industry structure.

As such, the panel sees its task as making recommendations on both structural as well as more purely regulatory matters. These structural matters may include the role NBN Co plays in the market as a government business enterprise relative to other firms, which is an issue separate from (though not entirely unrelated to) its regulatory treatment.

In relation to the regulation of NBN Co, the terms of reference make particular note of:

- > the long term ownership and regulatory arrangements for NBN Co;
- > operational constraints on NBN Co given its mandate to efficiently build, operate and maintain a wholesale-only access network; and
- > how NBN Co's capital investment, products and pricing should be reviewed and regulated.

In approaching its task, the panel is conscious that issues of market structure are not simply questions of regulatory approach but are fundamentally affected by the economics underpinning the market and by the decisions of participants in the market. That said, the role of NBN Co in the market is itself a key determinant of the future market structure, as is the role of established participants and new entrants. So while the future form of regulation will influence market structure, market structure will also influence regulation.

The panel is also aware that the questions around market structure and regulation are being considered in the context of existing markets and regulation – there is no clean slate, nor is it realistic (or necessarily desirable) to envisage merely turning back the clock. But these structural questions are fundamentally important to the long term

operation of the telecommunications industry, to end-users and, more broadly, to Australia's future prosperity. As such, the panel wants to encourage broad consideration of the questions of the appropriate structural industry models and regulation.

In this context, the panel has set out below a number of working assumptions on which it is proceeding and which will shape its regulatory thinking. To some extent, these are shaped by past statements of the government and NBN Co's Strategic Review¹. However, the panel is also interested in views on the appropriateness of these working assumptions and on whether it should be considering other propositions. A fundamental issue in this regard is the allocation of roles to NBN Co and other industry participants.

Given the nature of the national broadband network (NBN), the panel intends to focus on the regulatory framework for fixed line networks; however, the panel is mindful that these networks need to be considered in the wider context of wireless and satellite networks, and that fixed and mobile services are interdependent in important ways.

The task before the panel is large and potentially wide-ranging. To help inform its work, the panel is releasing this short framing paper to help guide submissions from industry and the public on key principles, objectives, issues and possible ways forward. The panel envisages issuing one or more papers on specific matters during the course of the review, including on the matters that need to be covered in the statutory review of the telecommunications access regime required under s.152EOA of the *Competition and Consumer Act 2010*.

Context for the industry structure and regulatory review

The panel is approaching its task of making structural and regulatory recommendations against the background of a currently anticipated industry structure and its regulatory framework. This involves two basic elements: the industry as it operates now and the industry as it is envisaged to operate following migration to the NBN.

Central to the current operation of the industry, Telstra operates a copper network that services the vast majority of premises². It offers voice and broadband services over that network itself and is required to provide access to that network to competing operators via a range of 'declared'³ services. Access seekers (such as Optus, iiNet, TPG and M2/Primus) use these services in conjunction with their own infrastructure, including DSLAMs and backhaul networks, to provide competing voice, broadband and other services to end-users. Telstra provides access to these declared services according to price and non-price terms and conditions set by the Australian Competition and Consumer Commission (ACCC) in access determinations or as otherwise commercially negotiated. In providing access, Telstra is subject to equivalence and transparency requirements.

1. See <http://www.nbnco.com.au/about-us/media/news/strategic-review.html>.

2. Note there are other networks, such as the Telstra and Optus HFC networks, over which some customers are provided with voice and broadband services.

3. Part XIC of the *Competition and Consumer Act 2010* establishes a telecommunications-specific regime for providing access to carrier's networks. Under Part XIC the ACCC 'declares' services to which access must be provided.

Under the existing approach, it is envisaged that NBN Co will displace Telstra as the main provider of the fixed broadband access network, offering faster wholesale services in doing so and operating its network on an open access, wholesale-only basis. Given its national coverage and open access arrangements, it is envisaged that most retail providers would use NBN Co's network to service the mass market. Although vertical integration is neither a necessary nor sufficient condition for discrimination (as highlighted by the fact that restrictions on discrimination have been imposed on NBN Co), the broad assumption seems to be that vertical separation would blunt the incentives for anti-competitive conduct in dependent markets, such as those for retail services and applications.

Once the NBN Co network is in place, Telstra would operate as a retail service provider on the NBN in the same way as other retail service providers. As part of that transition, Telstra would progressively implement structural separation of the customer access network servicing its voice and broadband offerings in the mass market.

Other firms can invest in telecommunications infrastructure of their own. There are a range of competing infrastructure investments, particularly in central business districts, inner suburban areas, on trunk routes and in the provision of mobile and satellite services. However, Parts 7 and 8 of the *Telecommunications Act 1997* require superfast fixed line networks built or upgraded after 1 January 2011 servicing residential and small business customers to operate on a wholesale only basis and to offer access seekers a Layer 2 bitstream service on a non-discriminatory basis at a price regulated by the ACCC. In some instances where networks built before 1 January 2012 provide NBN-consistent outcomes, they have been recognised as 'adequately servicing' those areas, meaning NBN Co need not build in those areas.

Special arrangements with structural and regulatory implications also apply in new real estate developments. These arrangements are set out in the Fibre in New Developments Policy Update of June 2011⁴. In simple terms, developers fund pit and pipe infrastructure of an adequate standard as a condition of their developments being serviced. Developers can choose any provider they wish to provide other telecommunications infrastructure, such as cabling and electronics. If a developer does not choose another provider, NBN Co or Telstra (developments of fewer than 100 lots but with some exceptions) are infrastructure providers of last resort and service the estate according to their respective responsibilities. Because NBN Co does not impose upfront charges on service developments, there is an incentive for developers to use NBN Co rather than alternative providers, inhibiting alternative providers' ability to compete in this market. (This situation prompted a complaint in 2012 to the Commonwealth Competitive Neutrality Complaints Office.) NBN Co's Strategic Review noted that there are issues in respect of NBN Co's role in new developments and suggested some policy changes to address those challenges. There may also be other policy changes that should be considered, including potentially expanding the roles for other players.

4. See www.communications.gov.au/policy_and_legislation/fibre_in_new_developments

Working assumptions

The panel is currently proceeding on the basis of a number of working assumptions about the objectives of policy and regulation. These assumptions are as follows:

- > broadband services providing defined minimum upload and download data rates should be generally available to all end-users, along with such other broadband products as market participants (including NBN Co, in the case of wholesale products) choose to provide. The Government has expressed a policy objective of ensuring universal access to minimum download data rates of 25 Mbps (assuming the NBN Co fixed wireless and satellite programs are delivered as promised). The NBN Co Strategic Review has proposed an approach that would provide 50 Mbps to around 90 per cent of the fixed line footprint by the end of 2019;
- > regardless of where they reside or carry on a business, end-users should have access to designated services at an affordable price, with any subsidies inherent in that supply being as transparent and efficiently delivered as reasonably possible;
- > NBN Co will operate on a commercial basis and is a key mechanism to ensuring that the government's broadband policy objectives are met;
- > NBN Co will primarily operate at Layer 2 in the service stack to provide scope for downstream innovation and product differentiation;
- > rollout of the NBN will achieve the structural separation of Telstra in respect of retail fixed network services supplied in the mass market;
- > any restrictions imposed by policy, statute or regulation on commercial investment in and supply of telecommunications services should be no greater than needed to promote the long-term interests of end-users and should be subject to periodic, transparent and independent review to ensure their benefits exceed their costs;
- > there should be no restrictions on retail level competition, other than those needed to provide for end-to-end connectivity and to protect consumers (where such protection is reasonably necessary);
- > in so far as a network owner has a substantial degree of market power, there should be safeguards against behaviour that provides advantages to its own upstream or downstream operations over those of competing providers that cannot reasonably compete without access to its network; and
- > in respect of each of the areas noted above, regulation should be no more intrusive or burdensome than needed, and should be proportionate, transparent, predictable and accountable in its operation.

The panel welcomes views on whether these assumptions are appropriate and/or whether there are other assumptions and policy objectives pertinent to the terms of reference the panel should consider or adopt.

The panel recognises that there are inherent tensions between some of these assumptions, reflecting inevitable trade-offs between policy objectives. Therefore, the

panel also seeks views on the relative importance of each of these assumptions, or any other assumptions that are identified.

Key issues

The panel sees the underlying policy issues that the government wants to address as being:

- > how best to ensure end-users have ready access to affordable and fast broadband and affordable and reliable voice services – this includes the issue of servicing rural and remote areas in a cost-effective manner; and
- > how to ensure competition and contestability work effectively and efficiently where they can, while also ensuring regulation acts as a back-stop or alternative where market forces, left to their own devices, will not adequately meet consumer needs.
- > how to encourage innovation and diversity in products and services, particularly in areas or markets that are less competitive.

In considering these issues, and assessing the degree to which alternative options would maximise efficiency, empower consumers and promote innovation, the panel is mindful of the substantial risks inherent in entrenching monopoly power at the fixed network layer, though it is equally mindful of possible, and in some areas probable, practical constraints on the extent and efficacy of infrastructure competition. The panel notes that throughout the OECD area, policy-makers remain strongly committed to the goal of promoting infrastructure competition in telecommunications.

The panel also notes that were NBN Co to retain the role envisaged for it of primary wholesale provider of fixed network services, that need not imply that NBN Co builds, owns, operates and/or maintains all of the underlying fixed networks over which those services are provided.

Clearly, these are questions that need to be considered taking full account of Australian circumstances and of the overall objectives of telecommunications policy. The panel therefore solicits views with respect to:

- > by whom relevant services are best provided – for example, NBN Co and/or other providers; and
- > how should any non-commercial or uneconomic services be funded, and what are the implications of alternative funding options for the design and functioning of the markets in which telecommunications services are provided?

In considering the key issues, the panel intends to examine the implications of alternative market structures, while not losing sight of the constraints that are present in the existing environment.

Regulatory arrangements

Australia is unusual in vesting responsibility for economic regulation of telecommunications in a generalist body whose responsibilities include administration of the competition laws. Originally, the decision to transfer those powers to the ACCC was based on the view that telecommunications-specific provisions would merge over time into the national access regime established under Part IIIA of then *Trade Practices Act*. However, no such confluence has occurred nor seems likely to occur, though it may well be that some aspects of the current telecommunications provisions will eventually be substantially streamlined.

In the light of those considerations, and of the broader factors determining the efficient allocation of functions in a regulatory system, the panel would welcome views on whether the current allocation of responsibilities should remain or alternatively, what alternative approach would be preferable.

NBN Co specific issues

Once the way forward on these broader structural questions is clearer, the panel sees the next tranche of issues as relating to the more specific rules that should apply to NBN Co's operations.

Some key issues in this area include:

- > how NBN Co's wholesale-only obligation is defined;
- > whether NBN Co should be subject to a strict non-discrimination obligation;
- > whether NBN Co should be excluded from particular markets;
- > whether NBN Co should be restricted to Layer 2 services;
- > the process for eventual privatisation; and
- > the ability of retail operators to invest in NBN Co long term.

Some of the other issues that may arise in this context are:

- > NBN Co's points of interconnection⁵;
- > NBN Co's pricing objectives and their wider competitive implications;
- > statutory authorisations for NBN Co wholesale pricing arrangements⁶; and
- > the costs, benefits and form of regulatory accounting for NBN Co.

At this stage, however, the panel sees these issues as secondary to its questions about broader industry structure.

5. The ACCC reported on POI arrangements in 2013, noting some concerns on the part of regional and satellite retail providers.

6. Dr Ric Simes of Deloitte Access Economics reported on the operation of these authorisations in late 2013, noting there may be aspects that warranted review in a broader regulatory review.

Questions

In light of the discussion above, the panel is seeking stakeholders' initial views on the following structural questions:

1. What broader structural model or models for the industry should the panel consider? Why? Should the panel be considering significantly different industry scenarios to those outlined above? If so, what are those scenarios and why should they be considered?
2. Should the panel consider and adopt working assumptions other than the ones outlined on page 5 above? How should the assumptions be prioritised and trade-offs assessed?
3. Should NBN Co continue to be subject to wholesale-only (structural separation) and open access requirements? If so, to what extent and under what circumstances, if any, should those obligations apply to other market participants?
4. Should all market participants, including NBN Co, be subject to the same regulations to the greatest possible degree or are specific regulations that do not apply across the board necessary and justifiable in some areas? To the extent to which there should be specific regulations, what is the purpose, nature and scope of the differences?
5. To what extent should competitive neutrality between NBN Co and other market participants be ensured and if so, how?
6. Where providers other than NBN Co supply fixed network services, should there be provisions that ensure consumers secure particular outcomes, for instance by comparison to those generally available from NBN Co?
7. Where an infrastructure provider other than NBN Co delivers outcomes comparable to those delivered by the NBN, what obligations or restrictions should apply on NBN Co? For example, should NBN Co be prevented from overbuilding that network?
8. Were NBN Co to be restricted in supplying services in areas serviced to a specified standard by other network operators, what undertakings, if any, should those operators be required to give about their ongoing performance? Noting links with question 3 in relation to wholesale-only and open access requirements, would it be sufficient to rely on Part XIC processes to secure access to services on these networks, or on Part XIC processes that were further refined?
9. What are the essential characteristics that service provided over a network other than NBN Co's should have to meet for those services to be seen as operating on an NBN-comparable basis? For example, should it include the following elements:
 - i) ability to support certain minimum broadband speeds;
 - ii) provision of wholesale services on an open access basis (possibly involving structural separation or some equivalent method of ensuring non-discrimination) and support for retail level competition;

- iii) an obligation on at least one provider to service all customers within a service area;
 - iv) acceptable performance characteristics – for example in terms of latency, jitter, loss and network availability;
 - v) price structures and levels that provide affordable access;
 - vi) credible, transparent and predictable upgrade paths to higher speeds;
 - vii) the ability to support voice services and the various legacy services; and
 - viii) clear and reasonable timeframes for connection and service restoration.
10. To what extent should the provision of non-commercial services by NBN Co be funded through cross-subsidies, and if so, what safeguards, if any, should apply to those cross-subsidies?
11. Were it not feasible or sustainable in a competitive market for NBN Co to earn sufficient revenue to enable it to cross-subsidise uneconomic customers, how should services to those customers be provided and funded?
12. What approach should be taken in new developments? Do they raise particular structural regulatory issues?
13. Should responsibility for the economic regulation of telecommunications remain with the ACCC?

Overall, the panel is most interested in stakeholders' views as to what should be the preferred structural model overall and why.

In putting forward such models, however, stakeholders should also have regard to their practical implementation, including issues of cost and service migration.

Stakeholders should also feel free to raise such other issues and proposals they believe are relevant, particularly in relation to how the panel should tackle the task before it. Stakeholders should note the panel's intention to consult further on more detailed issues.

How to make a submission

Submissions should be lodged with the panel by **12pm (AEST) 14 March 2014**.

Submissions can be lodged in the following ways:

Email: NBNReview@communications.gov.au

Post: NBN Regulatory Review
Department of Communications
GPO Box 2154
CANBERRA ACT 2601

Submissions must include the respondent's name, organisation (if relevant) and contact details. Submissions with no verifiable contact details will not be considered.

Respondents should be aware that submissions will generally be made publicly available, including on the website of the Department of Communications (www.communications.gov.au). The panel reserves the right not to publish any submission, or part of a submission, which in the view of the panel contains potentially defamatory material, or where it considers it appropriate to do so for confidentiality or other reasons.

All submissions will be treated as non-confidential information unless the respondent specifically requests the submission, or a part of the submission, is kept confidential, and acceptable reasons accompany the request. Email disclaimers will not be considered sufficient confidentiality requests. Note that submissions will generally be subject to the *Freedom of Information Act 1982*.

The *Privacy Act 1988* establishes certain principles with respect to the collection, use, and disclosure of information about individuals. Any personal information respondents provide to the panel through their submission is used only for the purposes of consideration of issues raised in this paper. Respondents should clearly indicate in their submission if they do not wish to have their name included in any summary of submissions that the panel may publish.

Queries about the submission process can be directed to **NBNReview@communications.gov.au**.