

 <p>Australian Competition & Consumer Commission</p>	<p>3rd Annual Broadband Australia Conference</p> <p><i>Regulation and the Australian broadband sector</i></p> <p>Michael Cosgrave Communications Group General Manager</p> <p>24 July 2008, Sydney</p>
---	---

Introduction

Before I start, like a number of others here today, I will need to make a disclaimer due to the NBN process. The ACCC is providing advice to the Expert Panel, which will be providing a report to Government on proposals. Discussion in this speech on issues arising from regulatory submissions should not be taken as the ACCC having reached any concluded position on issues that are or may be the subject of its advice or Report to the Expert Panel.

At this conference last year, I reflected on the rapid and significant development regarding broadband services. I noted that ten years ago the ACCC would have made scant mention of such services in its Annual report, yet now they are front and centre. That hasn't changed in the past 12 months!

The current broadband environment

The current broadband environment is encouraging from a competition standpoint. We are continually seeing the development of new devices, new price points and improved data caps in broadband services, fuelling demand for and take up of broadband services in Australia.

As at December 2007, 6.14 million Australian households have internet access. The Australian Bureau of Statistics estimates that more than 2.5 million subscribers signed up for DSL broadband

between March 2005 and December 2007.¹ As a competition regulator, what is especially significant about this take-up is that the majority of these households would have had a genuine choice as to who provided their broadband service and on what terms.

In particular, mobile broadband has an increasingly competitive presence in the broadband market. Investment plans of the major mobile providers continue to focus on improving coverage and speed of their networks. Examples are not hard to find:

- Telstra has publicly stated that its Next G network speed will increase up to 21 Mbps during 2008 and up to 42 Mbps in 2009. Handset speed upgrades will presumably follow.
- Optus has announced a 3G network expansion program which should see it reach 98 per cent of the population by December 2009.
- Vodafone is currently rolling out its HSDPA mobile network to 95 per cent of the population, with a completion date of December 2008.

Other smaller players are also continually improving their offerings, such that genuine choice of provider for mobile broadband is becoming a reality for the majority of Australians. I expect the next 18 months will see further significant progress in this evolution.

In this respect I'm not alone - Telsyte forecasts mobile broadband usage will grow by 76 per cent this year in Australia, given the expansion of networks and the release of handsets such as the Apple iPhone and Blackberry Bold.

Now I certainly don't wish to rehash the reams of hype that accompanied the release of the 3G iPhone. But what I think is interesting is that Deutsche Telekom research indicates that on introduction to the German market the 3G iPhone has driven wireless data usage by as much as 30 times higher than other handsets.

New devices sometimes rekindle familiar consumer protection issues. On this note, it would be remiss of me not to re-iterate the ACCC's recent caution to consumers to carefully check mobile phone contracts for fees and excess data charges before signing.

¹ ABS, 8153.0 – Internet Activity, Australia, December 2007, issued 24 April 2008.

New smartphone technology gives a broader range of applications and greater download capabilities, but with this comes the potential for consumers to exceed their phone plan value and incur considerable additional charges.

The take up of fixed-line broadband services is also strong. The ACCC recently released data on the number of line sharing and unconditioned local loop services acquired across the different geographic bands. It provides a snapshot of the copper network as at 30 September 2007. ULLS and LSS take up has since increased from the 640,000 combined services reported in the initial data. This information was obtained under a record keeping rule and the ACCC will continue to publish and consult on data obtained in relation to these services. At last count, around 20 ISPs had invested in DSLAM/MSAN equipment to provide DSL services to consumers. Underlining this trend towards greater LSS and ULLS competition, the ACCC noted in its most recent competitive safeguards report that there were 154 exchanges which contained 5 or more infrastructure providers.²

The ACCC also continues to observe access seekers using unbundled copper to provide innovative and differentiated services to consumers. Recently iiNet reported that nearly 14 per cent [23,000] of iiNet's on-net subscribers are users of the company's naked DSL product and that naked DSL is driving their on-net growth.³ iiNet is not the only company offering naked DSL and the introduction of new products such as this is just one example of ISPs innovating to meet consumers' preferences and demands.

Some ISPs also appear to be widening their network footprints. Macquarie Telecom recently announced an expansion of its business grade ADSL2+ network to 214 new exchanges across the country - equating to a six-fold increase on current numbers. Macquarie's program suggests a confidence in its ability to obtain a commercial return on its infrastructure investments. This follows Telstra's decision earlier this year to 'flick the switch' on ADSL2+ services in 900 additional exchanges. And all of this has happened notwithstanding the commencement of the National Broadband Network process and the inevitable uncertainty that the transition to an NBN creates.

The NBN process

² ACCC, *Telecommunications competitive safeguards for 2006-07*, May 2008, p. 31.

³ iiNet, iiNet EGM Trading Update, 13 June 2008, p. 2.

The announcement of the NBN process puts us on the cusp of the next major development in broadband services in Australia. What comes out of the NBN process will likely lay the foundations for the telecommunications industry in the next ten years and beyond. Our role as advisor to the Government's expert panel and probity issues mean that I will have to leave my observations fairly general.

I note the conference program originally suggested that one of the topics to be covered in this speech is:

- How would the role of the regulator evolve with the creation of a fibre-to-the-node network?

Good question – and not one I intend to answer in any detail, beyond agreeing that the roll-out of an NBN will clearly require an evolution in the application of regulation.

New technologies, whether it be VDSL or fibre-to-the-home, will shape the competitive environment by changing the economics of service provision and the way companies compete. The changing economics and competitive dynamics of the NBN environment will bring a familiar challenge for a regulator to adapt its application of regulation to new conditions.

Insight into those future matters industry and other interested parties see as most important may be found in the submissions on the regulatory framework already received as part of the NBN process. .

A number of common issues have been raised in these submissions. I don't propose discussing all of these today but clearly some of the hot topics include:

- The structure of the industry and the NBN operator has been raised by most submitters;
- Equivalence of inputs and open access were a common theme, reflecting what was set out in the Government's Request for Proposals document;
- Matters such as duct access and access to backhaul may prove to be of critical importance in the future;

- Transitional issues such as approach to roll-out, availability of currently regulated services and compensation for stranded investment were raised;
- Other issues, such as net neutrality, were mentioned.

To a large extent, submissions have primarily focussed on the debate surrounding the structure of the telecommunications industry and the form this should take for the NBN operator. There have been some spirited exchanges both opposing and promoting a different industry structure.

But the issues raised are not unique to Australia. As plans for the rolling out of fibre networks gather momentum around the world, services providers, governments and regulators also find themselves confronted by similar problems. In that context, it may be useful to consider – whether for guidance, inspiration or caution – how some of these issues are being approached overseas, without forgetting the general caveat that each jurisdiction faces its own particular challenges.

International approaches to structural issues

A good place to start looking at some of these issues is Europe. Like Australia, European broadband penetration has primarily come about through unbundling the local loop – unlike North America where near-ubiquitous cable has been a key driver of broadband penetration and where access to the local loop has consequently been of lesser importance.

The European Regulators Group published a couple of opinions last year on so-called ‘functional separation’ and next generation access. The ERG provided, I think it’s fair to say, a *cautious* endorsement of functional separation. It noted that functional separation can be a supplementary remedy in markets where non-discrimination has been shown to be ineffective in dealing with problems of equivalence in wholesale markets.⁴ But it also noted that in other cases, strengthening non-discrimination obligations can be sufficient to address competitive issues. The degree of separation proposed has to take into account the wholesale products and the organisational structure of the significant market power operator.⁵ That is, it really comes down to the specifics of

⁴ European Regulators Group, *ERG Opinion on Functional Separation*, (07) 44, p. 9. www.erg.org

⁵ European Regulators Group, *ERG Opinion on Functional Separation*, (07) 44, p. 9.

the market. In a practical sense, this is reflected in the fact that functional separation is being embraced and considered by some European countries but left alone by others.

The ERG also noted that the functional separation undertakings entered into by BT in the UK two years ago were not perceived by the financial market as a disincentive to invest.⁶

In the Australian Government's regulatory review process, submissions have mainly looked at structural arrangements in the UK, New Zealand and Singapore. Some support these models and suggest there are aspects that should be used here in Australia, while others argue they're not relevant to Australia but still consider some form of separation appropriate. It's clear further debate is still to come on this issue.

International approaches to NGN regulation

Turning from the structural issue, other submissions stressed the importance of backhaul and access to not only active infrastructure but passive infrastructure, such as ducts.

Debate on access to active infrastructure has included discussion on the appropriate type of access product. There are different views emerging about whether some kind of wholesale broadband access product (such as a bitstream service) will be the most likely. In a recent speech, Ofcom's Ed Richards proposed that Ofcom wanted to focus on an appropriate wholesale route to competition over a fibre network – what they call “active line access”. This could encompass a suite of wholesale products that allows other providers to innovate and differentiate well above that which is associated with a simple resale model.⁷

Alternatively, the OECD has noted that “[w]holesale broadband access, much as bitstream access in xDSL markets, can provide some service competition, but, is insufficient in the long run in providing effective competition”.⁸ Emphasis in Europe outside the UK has been on access to passive infrastructure, such as ducts, which is not something that has received much coverage in Australia previously, but is undoubtedly worth considering.

⁶ European Regulators Group, *ERG Opinion on Functional Separation*, (07) 44, p. 9.

⁷ Ed Richards, CEO Ofcom, Speech at Intellect Conference 2008, *Serving Consumers: Competition, Innovation and investment through the next phase*. 3 July 2008.

⁸ OECD, *Convergence and Next Generation Networks – Ministerial Background Report*, 17-18 June 2008, p. 23.

The ERG's paper on regulatory principles for next generation access notes that it may be 'very difficult' for an alternative operator to provide backhaul to all street cabinets by itself. Therefore, it may be necessary to oblige the relevant incumbent party to provide SDF-backhaul and/or duct sharing.⁹

In countries such as France, Spain and the Netherlands, duct access is already a reality in some areas. Germany is also considering it as a solution to backhaul for sub-loop unbundling. All of these regulators, however, recognise that competition based on this form of access is unlikely to be attractive to all access seekers in all locations.

Sub-loop unbundling has also been considered an access option by KPN in the Netherlands but serious doubts have been expressed there – notably by independent consultants - about its commercial viability. As Ed Richards notes:

These deep infrastructure forms of competition will focus on dense metropolitan areas; and the physics means that there is likely to be room – literally – for a very limited number of competitors.¹⁰

The work of the regulatory agencies and the ERG has fed into the agenda of the European Commission (EC), which has put forward some reasonably firm views on the appropriate regulatory approach. As recently as June, EC Commissioner, Viviane Reding, noted that in moving to Next Generation Access Networks, it was the EC's view that it would be "a fatal mistake" to deviate from the pro-competitive approach of the current framework.¹¹

But a discussion about regulatory access issues for a future VDSL or fibre network is not complete without considering the risk involved in such a network. Ofcom has been very clear that if operators are going to make investments in new infrastructure that are inherently more risky than developing the existing infrastructure, then operators need to know that the regulatory

⁹ European Regulators Group, *ERG Opinion on Regulatory Principles of NGA*, (07) 16rev2. pp. 38-39.

¹⁰ Ed Richards, CEO Ofcom, Speech at Intellect Conference 2008, *Serving Consumers: Competition, Innovation and investment through the next phase*. 3 July 2008.

¹¹ Viviane Reding, Speech 08/355, *Europe's way to the High Speed Internet: why effective network competition is the freeway to the future*, ECTA Annual Conference, Brussels, 25 June 2008, p. 4.

framework will allow them a rate of return commensurate with the risk involved.¹²

Similarly, ACCC Chair Graeme Samuel has previously said:

The ACCC has always said that the party willing to undertake the risk of significant, new investment should be appropriately rewarded, and that the costs of efficient new investment should be recognised.¹³

Clearly the debate is starting to coalesce around a number of issues, and many of these have been raised in the submissions to the NBN regulatory process. Equally clearly, both here and overseas, regulatory responses to common and unique issues are still developing. Australia's particular challenges will include addressing population density and distance issues. But it is possible that - in the course of the RFP process - Australia may well be at the forefront of confronting some of these broader issues.

Conclusion

There has been rapid growth and development in Australia's broadband industry in the last few years in terms of the number of competitors, infrastructure investment, faster speeds, greater coverage and new products.

The NBN process promises a new wave of infrastructure investment, technological change and product innovation. And as we are starting to see, it is raising a range of issues about industry structure, competition, regulation, investment, and importantly, about consumers.

The ACCC has a role to play in advising the Expert Panel, and ultimately the Government, to find the right balance among these matters. As such, the process provides an opportunity to ensure the foundations are securely laid for a healthy competitive broadband industry in the future, which continues to benefit the country's millions of telecommunications users.

¹² Ed Richards, CEO Ofcom, Speech at Intellect Conference 2008, *Serving Consumers: Competition, Innovation and investment through the next phase*. 3 July 2008.

¹³ Graeme Samuel, Speech, ATUG Annual Conference 2008, *Regulatory Update for 2008*, 13 March 2008, p. 6.