



Regulatory Issues Framing Paper

Submission by ACCAN to the Panel conducting a Cost-Benefit Analysis and Review of Regulatory Arrangements for the National Broadband Network

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government and advocates availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will work with its broad and diverse membership base to get a better deal for all communications consumers.

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ACCAN's Four Principles for Our Broadband Future

Broadband for all. Policies need to be developed to ensure high-quality, affordable broadband can be accessed by all Australians who want it. Industry and consumers should work together to address market shortcomings, particularly the needs of people with disabilities, and low-income and rural consumers.

No consumer should be worse off during the transition and following the implementation of the National Broadband Network (NBN).

Robust consumer protections and consumer engagement must be maintained.

Services need to be provided in a **competitive and fair market**. The Australian Competition and Consumer Commission (ACCC) must actively and pre-emptively intervene as required to prevent the development of market power or unfair practices.

ACCAN thanks the Panel for the opportunity to provide comment. We will address selected questions from the Framing Paper on which we are able to give input.

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?

ACCAN is satisfied that many of the structural questions raised by this Review have in recent years been the subject of extensive debate and detailed industry consultations. The fundamental policy objectives pursued by government with broad industry and consumer support since 2009 remain policy objectives that accord with ACCAN's priorities:

- structural separation via progressive migration of end-users from Telstra's network onto high-speed wholesale-only non-Telstra networks; and
- a technology upgrade of the broadband infrastructure to substantially resolve non-urban disadvantage, broadband black holes and patchy service quality across Australia.

The pursuit of these goals by government is ultimately about serving the interests of consumers. The consumer interest needs to remain the centre of policy focus, and we need to be mindful that satisfying particular industry interests does not become a goal in itself which displaces the focus on the needs of consumers.

As the Framing Paper raises a variety of questions regarding non-NBN Co networks, we wish to record our general concern at the additional complexity that would be introduced by the expansion of non-NBN Co fixed-line wholesale networks particularly in achieving the objective of structural separation as currently envisaged by Telstra's Structural Separation Undertaking.

Should the panel consider and adopt working assumptions other than the ones outlined on page 5 above?

ACCAN agrees with all the working assumptions outlined and considers them sufficient.

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?

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?

Wholesale rules supporting equity for non-urban Australia

ACCAN's commitment is to geographical equity and ensuring consumers in non-urban Australia benefit from high-speed broadband to the maximum possible extent and as soon as practically possible.

During the first three years of NBN implementation, ACCAN's support for uniform national wholesale pricing was based on it being government's chosen method of supporting broadband equity for non-urban Australia. ACCAN was of the view that although this model would ensure broadband was available to more Australians it would not solve all affordability concerns across the community.

In turn, ACCAN's support for the level playing field arrangements ('anti-cherry picking' provisions) inserted in the Telecommunications Act in 2011 was premised on government arguments at the time that such rules are required to prevent other firms competing with NBN Co selectively in the lowest cost, highest return areas. Government has in the past argued that a market operating in the absence of these provisions would reduce NBN Co's financial returns to such an extent that uniform national wholesale pricing would be impossible to sustain.

Subsidies instead of level playing field arrangements

Uniform national wholesale prices do seem to be a relatively simple mechanism for achieving equity for non-urban areas. If the government is able to create an alternative framework for sustaining broadband equity for non-urban Australia, this could also be a satisfactory outcome in ACCAN's view. This would likely involve a shift in policy focus toward subsidising high-speed broadband wholesale prices in unprofitable areas rather than preventing the emergence of competitors to NBN Co in profitable areas.

If NBN Co is allowed to set higher wholesale prices for non-urban and rural areas to reflect the higher costs there, this should be accompanied by an explicit government policy objective and dedicated policy mechanisms to subsidise NBN Co to equalise the price difference.

Alternatives to level playing field arrangements

It may be useful to revisit the alternative policy options proposed by the NBN Implementation Study in 2010, which included imposing a levy on new superfast broadband networks in low-cost, high-revenue markets, which would be directed at subsidising the provision of telecommunications in high-cost areas. An evaluation of the costs and benefits of such an approach is in the Regulation impact assessments for the original Bill which introduced the level playing field arrangements.¹

¹ *Regulation Impact Statement 4: Measures to provide a level playing field for the provision of superfast broadband across Australia*, Revised Explanatory Memorandum, Telecommunications Legislation Amendment (National Broadband Network Measures — Access Arrangements) Bill 2011, <http://www.comlaw.gov.au/Details/C2010B00281/Revised%20Explanatory%20Memorandum/Text>

ACCAN is concerned at the potential complexity of any such subsidy arrangements under conditions of a multi-technology mix approach where there will be variation across geographic areas in terms of the level of service capability on offer.

A shift in approach could be a benefit to some inner urban consumers, as in these areas some infrastructure-based competition may emerge. This may be positive insofar as these other networks could offer new, innovative services to the market. However the cost of multiple infrastructure rollouts also affects the retail price that eventually flows on to consumers.

Experience suggests infrastructure-based competition is not a realistic way to deliver choice for consumers anywhere except perhaps in some parts of the dense inner urban cores. Dual HFC rollouts in the 1990s have been widely viewed by the firms involved as financially ruinous and unlikely ever to be repeated.² Submissions from industry have repeatedly indicated infrastructure-based competition is unlikely to become a widespread reality in Australia.³

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?

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.

ACCAN has never advocated for a particular broadband delivery technology. We agree that all the above elements are essential characteristics of a service on an NBN-comparable network. We would add the capacity to deliver an upgrade path for higher upload speeds which will become increasingly important, particularly for small business.

² For example: Fletcher, Paul. *Wired Brown Land*, UNSW Press, 2009.

³ For example: Competitive Carriers Coalition [submission](#) to ACCC Assessment of Telstra's SSU and draft migration plan, 29 September 2011; Optus [submission](#) in response to the ACCC's Draft Determination on the Application for Authorisation of the HFC Subscriber Agreement between NBN Co Limited and SingTel Optus Pty Ltd and other Optus entities, 13 June 2012
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ACCAN is satisfied that the Layer 2 bitstream service requirement and the other technical obligations on non-NBN networks now existing under the Telecommunications Act will ensure a minimum standard of service over all fibre networks.

However we are concerned about whether various other technologies with varying service capabilities can be adequately regulated to provide the same minimum outcomes for consumers into the future. We would be seeking a better understanding of how government might create a “credible, transparent and predictable upgrade path” (including for NBN-comparable networks should they exist) – particularly how government would determine whether a particular level of service was acceptable or deserving of upgrade.

Essential service characteristics

As part of a multi-technology mix approach there will be various technologies, either NBN-controlled or simply NBN-comparable. We believe that minimum performance characteristics and minimum speeds should be required irrespective of ownership. We would be seeking from government further consultation on what these minimum speeds and performance characteristics might be.

ACCAN is not necessarily concerned with whether a network is controlled by NBN Co or not, but rather with the material impact on the quality of retail service that consumers can receive at their premise and the prices and range of the products on offer.

Where particular technologies are deployed – for example HFC or FTTN – that differ in capability from FTTP there will not necessarily be a material detriment felt by most consumers immediately taking into account current applications and usage patterns. However ACCAN is concerned that over time a patchwork of first and second class broadband availability will emerge as applications emerge that use higher speeds.

This is of particular concern for small and medium-sized business in non-urban Australia. Business is more likely to require, for example, high upload speeds. In an economy that is increasingly global and online, non-urban business will find it increasingly hard to compete if they do not have high-quality infrastructure available to them.

Should responsibility for the economic regulation of telecommunications remain with the ACCC?

The ACCC should remain in charge of economic regulation for the telecommunications sector.

It has been recognised since the Hilmer Report of 1993 that an integrated, economy-wide regulator was a preferable institutional arrangement. Apart from reduced administrative costs and economic benefits, of key importance for consumers is that the regulator not be ‘captured’ by a particular sector or industry.⁴

Having the single body with the national competition and consumer remit has been proven to work well. The ACCC has been an active and effective regulator and guardian of the consumer interest. It

⁴ National Competition Policy Review, 1993, p.325-29

brings a depth of expert competence and understanding of the effect on consumers of all its decision-making on highly technical and specialised matters in the wholesale telecommunications space. These are matters that in the absence of the ACCC would far more likely be decided without effective consideration of consumers' interests.

ACCAN strongly rejects any suggestion that the role of the ACCC should be performed by any other agency – currently existing or newly created.