



**Australian
Competition &
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Commission**

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Ms Alison Kelly
Secretary
Senate Select Committee on the National Broadband Network
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

By email: broadband.sen@aph.gov.au

Dear Ms Kelly

**Re: Inquiry into the National Broadband Network proposal and related
concerns Questions on Notice**

I refer to the Senate Select Committee's email dated 19 March 2009, seeking responses to the questions placed on notice to the Australian Competition and Consumer Commission (ACCC) by the Senate Select Committee on the National Broadband Network.

Please find enclosed the ACCC's responses to these questions on notice.

Yours sincerely

Ed Willett
Commissioner

ACCC – Additional Questions on Notice

Question One

In the ACCC's November discussion paper on the Fixed Services Review, the ACCC stated the view that the ULLS service description should not be varied to ensure that the sub-loop access falls within the definition of the declared ULLS. Argument received by the ACCC in early 2007 was that variation would provide certainty of access to the sub-loop for a FTTN provider.

1. Given those arguments, and the current environment of an imminent NBN build, why has the ACCC taken this position?

Question Two

It has been argued that functional/operational separation improves transparency but that structural separation removes the incentive to act anti-competitively.

1. How workable would functional separation be as a first step towards structural separation?
2. Should the ACCC be granted divestiture powers (to use as a last resort) as a component of alternative regulatory arrangements aimed at improving the ACCC's ability to identify and prosecute anti-competitive behaviour?
3. Would the deterrence factor of the greater transparency afforded by functional separation be sufficient to 'guarantee' that this behaviour would not occur, or would at least reduce the cost and length of litigation?
4. Is there an alternative solution that would provide an increase in transparency and remove the incentive for anti-competitive behaviour?

Question Three

Do you believe the ACCC has a role to play in regulating telecommunications infrastructure investment?

Question Four

Telstra has suggested that the ACCC's decisions in relation to declaration and price setting should be subject to merit review. What is your position?

Question Five

Given concerns about regulations lagging behind technological advances, what is the best way of ensuring that redundant regulations can be quickly identified and removed or other aspects of the regulatory regime streamlined on an ongoing basis?

Question Six

What lessons can be leveraged in the Australian context from international experience of regulatory change and separation within the telecommunications industries?

Question Seven

Given the support for the NBN to be operated as a wholesale business only, is there any reason why it could not be owned by government?

1. What implications could government ownership of the NBN have for future investment?
2. Could the NBN operate as a government owned utility which is leased or franchised out to various access providers who would act as wholesale suppliers?

Question Eight

What role should the ACCC and ACMA have in an NBN environment? Would there be any advantage in a merging of regulatory bodies to reflect the increasing convergence of NGN technologies?

Answer:

Question One

In the ACCC's November discussion paper on the Fixed Services Review the ACCC concluded that:

- "There was no need at that point in time to vary the current ULLS declaration for the purpose of addressing the sub-loop issue.¹ The current declaration would enable access to the sub-loop in the case where Telstra was to deploy a FTTN network. In the case of a third party fibre build, the current ULLS declaration may need to be amended to address the sub-loop issue. However, any variation to the current ULLS declaration in the absence of legislative amendments would likely have no material effect on the ability of non-incumbent operators to deploy a FTTN network.
- Regardless of FTTN developments, the ULLS declaration may need to be varied to address the neutrality issue.² The ULLS Position Paper included a proposed variation to the ULLS declaration to deal with the neutrality issue. Significantly, the ULLS Position Paper noted that there was a degree of uncertainty around when such a variation would be required."³

Question Two

1. Further to the evidence I gave on 3 March 2009 the issues of functional / structural separation and transitional arrangements are part of the Government's deliberations of the NBN proposals. The ACCC is cognisant of the need to ensure that any response it may provide to the Senate Inquiry would not undermine the integrity of the Government's decision making process. Hence the ACCC will not be able to provide any comment beyond that which is currently in the public domain.
2. This question is an issue of policy and hence is a matter for the Government.
3. The outcomes (such as any deterrence effect) that a particular functional separation model may deliver will depend on a number of factors such as the features of the model and the manner in which it is implemented

¹ The sub-loop issue centred around allowing access seekers to install equipment at 'nodes' including access on an individual copper line by line basis (access to sub-loop unbundling) as well as a right for one alternative provider to access a 100% of the copper lines along with the ability to install equipment at 'nodes' (sub-loop access) if an FTTN network is deployed.

² The neutrality issue centred around whether to change the definition of communications wire from 'copper' based wire to 'metallic' based wire to encourage a more technically neutral service description. This issue encompassed the dependence of the current ULLS definition on the presence of a device – the customer access module (CAM) which may be redundant in the event of a deployment of an IP core network.

³ ACCC, *Fixed Service Review Discussion Paper*, November 2008, pp.54-56 The reference to the 'ULLS position paper' refers to the ACCC *inquiry into possible variation for the service declaration for the ULLS Position Paper* December 2007

4. The ACCC has previously stated that a vertically separated model may reduce the incentive for the access provider to discriminate (in favour of its own retail markets) and potentially engage in anti-competitive behaviour.

Question Three

Yes, the ACCC's role in regulating access to telecommunications infrastructure is set out in Part XIC of the *Trade Practices Act 1974* (the Act) Furthermore, in making any decision to regulate access to telecommunications infrastructure, the ACCC is bound by the objectives of Part XIC of the Act.

Question Four

Whether or not merits review is allowed for certain processes is an issue of policy and hence is a matter for the Government.

Question Five

This question is an issue of policy and hence is a matter for the Government.

Question Six

As the ACCC has previously advised, regulatory change associated with next generation telecommunications networks are confronting governments and regulators around the world. However, other overseas experiences provide only limited insights as to the effectiveness of separation, due to the relatively short periods they have been implemented. The ACCC considers it is nonetheless useful to consider how these issues are being approached, without forgetting the general caveat that each jurisdiction faces its own particular challenges.

Question Seven

1. This question is an issue of policy and hence is a matter for the Government.
2. This question is an issue of policy and hence is a matter for the Government.

Question Eight

This question is an issue of policy and hence a matter for the Government.