

SENATE SELECT COMMITTEE ON THE NATIONAL BROADBAND NETWORK

Questions on Notice

Further hearings into the National Broadband Network

Melbourne, 14 April 2010

1) Restrictions on NBN customers: *Optus submits NBN Co should be restricted to supplying services to “carriers only”.¹ Section 9(1) currently enables NBN to also supply “service providers”.*

(a) What would be the rationale for restricting NBN’s customer base?

Why should s 9(1) not be expanded so that all application service providers and retail providers, whether carriers or otherwise, can access NBN services?

Optus Response

It is important to be clear about the future position of NBN in the market. Because of the economics of fibre deployment, the NBN will provide the only fibre connection into the majority of homes and businesses in Australia. It will be a bottleneck infrastructure from which NBN Co will derive huge market power. Care must be exercised, therefore, in deciding where NBN Co is able to operate in the market. Optus has been clear, for example, that it should not be capable of offering retail based services because of the potential for NBN Co to use its market position to undermine its competitors.

However, we are strongly of the view that NBN Co should also be prevented from extending its service offering into other areas of the market that either are or are prospectively contestable. One such area is for the wholesale supply of Layer 3 services. Layer 3 services can be characterised as those services which would involve not only the use of the layer 2 access infrastructure, but also the building of the necessary infrastructure and support systems (such as voice and data switching, backhaul capacity, business support systems and customer service) to provide services to and between end users. Ideally, NBN Co would provide an access service to carriers, who would then provide this additional functionality to offer wholesale access to retail service providers.

Optus notes that a number of companies supply wholesale Layer 3 services, based on ULL copper access as well as direct fibre access to major corporate and government premises, to downstream retail service providers today. This wholesale market could be replicated and indeed expanded with the roll-out of the NBN as a number of current providers gain access to a broader footprint.

If NBN Co is not excluded from this part of the market there is a clear risk that it will dominate this area of the market and remove any opportunity for wholesale competition. Such an outcome is likely to stifle choice, innovation and may lead to higher prices for end-users.

¹ Optus, *Submission 114*, p. 4.

For completeness, Optus also notes that a number of important obligations that apply to carriers in providing telecommunications services, such as the Customer Service Guarantee, do not apply to Service providers. A requirement that NBN Co supplies services to carriers only will achieve a necessary consistency in ensuring that all customers of the NBN Co are required to meet these obligations to serve the needs of their end customers.

2) Wholesale-only service exemptions: *Optus submits the discretion to exempt NBN from the wholesale-only requirements (s9 (2)) should be abolished.*²

(a) Are there any circumstances in which it is desirable that the NBN provide a retail service, for example where retail service providers do not develop a sufficient service? If so, is the appropriate response to confine as opposed to abolish the discretion?

Optus Response

NBN Co should be precluded from providing any retail based services. If there is a demand for a service then retail services providers will seek to meet that demand.

(b) If not, what should be the appropriate policy response where the market fails to deliver retail services that meet the government's stated policy objectives of ubiquitous service and service availability in high-cost regional and remote areas?

Optus Response

If the Government considers there is a likelihood of a failure on the service side then a better option would be to develop solution(s) that are independent from the NBN Co to guarantee service provision. As an example, Government could provide subsidies to encourage retail delivery of a relevant service (as is the case today for the ABG). Such an approach would have the advantage of being targeted, limiting market intervention and retaining the opportunity for competitive supply of that service. It would be better to have several retail service providers seeking to supply a service (albeit with a subsidy) than a single monopoly supplier.

Why would NBN Co's provision of a low-cost basic access service be injurious to competition?

Optus Response

The provision of a low cost basic access service by NBN Co would require NBN Co to invest in significantly more infrastructure than is required to provide layer 2 wholesale access services. NBN Co will need to establish all the elements to support a retail service including layer 3 switching, providing capacity for interconnection and backhaul between the wholesale POIs and the necessary business support systems and customer service to establish the service. This will both add costs to the NBN Co network as well as providing NBN Co with a commercial imperative (particularly when privatised) to realise the value of these assets. This will place them in the same vertically integrated position with a monopoly access asset as Telstra is in today with the copper network. As noted in our response to

² Optus, *Submission 114*, p. 3.

question 1 above, such an approach is likely to kill off the prospect for wholesale competition developing on the NBN.

3) Scope of restrictions: *Optus submits any entity in which NBN Co has a controlling stake should be subject to the present regulations.³ Should the restrictions apply to all elements comprising the NBN regardless of NBN Co ownership or where the original investment came from?*

Optus Response

For clarification the restriction proposed by Optus would only apply where NBN has a “controlling stake in an entity” such that it could materially influence the operation of that entity. In such a scenario, the related party should be subject to the regulations set out in each of the Bills. For example, such a related entity would be precluded from offering retail based high speed broadband services. In practice, however, the provisions of the Bills would only apply to the extent that they are relevant to the activities of that entity.

4) Public disclosure of NBN agreements: *to what extent would a requirement that NBN publish full copies of all agreements it has entered into with access seekers (as suggested by Optus⁴ disadvantage NBN Co vis-à-vis other wholesale service providers? In particular, how would this affect competition between NBN and Optus for the wholesale supply of satellite services?*

Optus Response

As indicated in answer to question 1 above, NBN Co should be restricted from supplying services where there is a prospect for competitive wholesale supply to emerge. If this position is adopted then the problem identified in the question would not emerge.

In any event, it would be wrong to presume that normal commercial practices should apply to NBN Co, since it will be in a unique position, operating as a Government licensed monopoly.

³ Optus, *Submission 114*, p. 4.

⁴ Optus, *Submission 114*, p. 5.