

Chapter 3

Regulatory Revolution Required?

Introduction

3.1 When the government announced the National Broadband Network (NBN) Request for Proposals (RFP), it also announced that submissions would be invited for suggested regulatory changes, in a process running in parallel with the RFP process. The committee sees this as an acknowledgement of the common criticisms received from a broad range of broadband stakeholders regarding the shortfalls of the current regulatory regime. This chapter will explore those criticisms and outline the common themes for regulatory change, and related regulatory issues.

3.2 The overview of the RFP sets the framework for submissions to provide suggestions for changes to the regulatory regime of the telecommunications industry. The submissions to the Department of Broadband, Communications and the Digital Economy (the department) were invited on their website, which stated that:

The Government is prepared to consider changes to existing telecommunications regulations to facilitate the roll-out of this network. ... The Panel of Experts, which will be assessing proposals to roll out the National Broadband Network, will have access to all submissions and will be able to take them into account in evaluating proposals.¹

3.3 Following the 25 June 2008 closing date, the department published all submissions on its website, making them available for prospective proponents to consider when preparing their proposals.

3.4 There are six evaluation criteria against which proposals will be assessed; criterion three refers to assessing any suggested changes to regulation, and is as follows:

the nature, scope and impact of any legislative and/or regulatory changes that are necessary to facilitate the Proposal;²

3.5 The RFP later infers that there may be constraints to the nature of the changes that the government will consider:

1 Department of Broadband, Communications and the Digital Economy (DBCDE), *Request for submissions on regulatory issues*, 2 July 2008, http://www.dbcde.gov.au/communications_for_business/funding_programs_and_support/request_for_submissions_on_regulatory_issues (accessed 18 November 2008).

2 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.4.1.3, p. 6.

...these changes will be limited to those necessary to directly facilitate investment in the NBN, and [those which] will not jeopardise the Commonwealth's other objectives...³

Seizing the unique opportunity to make regulatory change

3.6 The majority of the submissions received by this committee have highlighted that the NBN initiative provides the government and the industry a prime opportunity to address the shortfalls of the current regulatory regime. Many strongly urged the government to make regulatory changes that would prevent duplication of the current regulatory failures. Comments made by Google in their submission are typical of those received by the committee:

...fully embrac[e] this historic opportunity to construct an appropriate regulatory environment ... that does not replicate known problems with the existing regulatory environment.⁴

3.7 Infrastructure Partnerships Australia (IPA) focussed their entire submission to this inquiry on the current regulatory framework and the changes they believe are required to achieve competition in the NBN environment, while safeguarding consumers and delivering on the government's vision. They believe that the NBN initiative:

...provides an opportunity for the Government to consider a new approach to telecommunications' regulation which fosters competitive outcomes, encourages innovation and delivers the greatest social and economic return to Australia's business and domestic consumers.⁵

3.8 Terria acknowledges that, if the NBN was designed to develop the optimum capability for next generation telecommunications, Australia could produce a telecommunications industry that is 'second to none':

This unique opportunity is not simply about technology or consumer, it is first and foremost about setting up an industry environment where competition and, therefore, consumer benefits come first. ... [I]t needs to provide investor certainty and an effective regulatory framework.⁶

3.9 The Vodafone submission is also of the view that, if the new regulatory regime is carefully drafted and implemented, Australia could lead the world in achieving optimal outcomes through a competitive and innovative telecommunications environment:

3 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.5.39, p. 13.

4 Google, *Submission 29*, pp 8-9

5 Infrastructure Partnerships Australia, *Submission 11*, p. 2.

6 Terria, *Submission 12*, p. 4.

The NBN regulatory environment provides a unique opportunity ... for the Government to become a global leader in reforming the telecommunications sector in a manner which enhances economic growth and consumer welfare as well as providing incentives for continued innovation and investment in the sector.⁷

3.10 The inquiry has heard claims that the current regime is in need of a thorough review, particularly in light of the rapid technological developments within the industry over the last decade. In fact, the Western Australian Chamber of Commerce and Industry (WA CCI) believes that because the changes are so significant, with no review of telecommunications legislation occurring over the last ten years, a 'full review of Commonwealth telecommunications legislation' is now justifiable.⁸

3.11 In their submission, iiNet makes the comment that the NBN provides an opportunity to address some of the 'shortcomings inherent in the existing regulatory regime.'⁹ Noting the unique opportunity to address these shortcomings that building the new network provides, iiNet makes the strong statement that:

Critically, the network's construction is not only an historic step, but a major and historic opportunity to set in place an access and regulatory regime that will secure the future growth, innovation and competition in the information, communication and telecommunications sector.¹⁰

3.12 Building on this, iiNet believes that the government should establish a statutory access regime prior to awarding the contract to build the NBN:

... the recent High Court judgement in *Telstra Corporation v The Commonwealth* (6 March 2008) reinforces the critical importance of setting in place a statutory access regime in advance of awarding any consortium the rights to build the National Broadband Network.¹¹

3.13 Emphasising this point, the iiNet submission continues that the success of entire NBN initiative will be measured on the government's ability to establish an appropriate regulatory framework:

The future access and regulatory regime will be a key determinant of the ability of the Federal Government to successfully implement its election policy and deliver on its commitment ...¹²

7 Vodafone, *Submission 9*, p. 13.

8 Western Australian Chamber of Commerce and Industry (WA CCI), *Submission 17*, p. 2.

9 iiNet, *Submission 3*, 'Access Seeker Requirements', 30 March 2008, p. 5.

10 *Submission 3*, 'Access Seeker Requirements', 30 March 2008, p. 3.

11 *Submission 3*, 'Access Seeker Requirements', 30 March 2008, pp 3-4.

12 *Submission 3*, 'Access Seeker Requirements', 30 March 2008, p. 4.

3.14 In evidence given at the Sydney public hearing, Mr Clive Poolman from AAPT also made reference to the NBN providing a chance to make the changes that his company believed are required to the existing regulations. He stated that:

...with the advent of a new network ... there is an opportunity now to do things in a different way, particularly from a regulatory perspective, to enhance and facilitate competition in the market.¹³

3.15 The committee also heard from those who believed that, because of the substantial contribution of public money to facilitate the roll-out of the new network, the government should insist on appropriate regulatory changes that would protect this investment of public money and ensure its objectives are achieved:

...the fact that there will be a public investment in the National Broadband Network will ensure that there is some [government] control over the future of regulatory developments ...¹⁴

3.16 The Western Australian Department of Industry and Resources aired similar views in their submission, also noting that appropriate regulation should not only support the government's stated objectives for the NBN, but would subsequently have a positive impact on investment in the industry:

...regulation has a significant impact on investment incentives. The significant investment being committed by the Commonwealth Government ... at this time presents an opportunity to adjust the current regulatory regime with minimal disruption to market outcomes. If the right changes are made then there is a good chance that a reformed regulatory framework will help to enhance investment signals.¹⁵

3.17 There is a general understanding that while there remains uncertainty in the level of protection offered by regulation for investors, there is no incentive for future investment and innovation, whatever the industry.

What not to allow in the new regulatory regime

3.18 Another view made clear to the committee was that the new framework should not provide any form of regulatory 'holiday' for the owner/builder of the network. This seems to be in direct reference to Telstra's submission to the department on their suggestions for regulatory changes to support the implementation of the NBN.

13 Mr Clive Poolman, General Manager Strategy, AAPT, *Committee Hansard*, Sydney, 7 October 2008, p. 56.

14 Ms Teresa Corbin, Chief Executive Officer, Consumer Telecommunications Network, *Committee Hansard*, Sydney, 7 October 2008, p. 65.

15 Western Australia Department of Industry and Resources, *Submission 2*, p. 2.

Telstra's contrary views on regulation

3.19 While Telstra's submission echoes industry calls for significant reform of Part XIB and XIC of the *Trade Practices Act 1974*, it subsequently requests that these sections of legislation should not to apply to the NBN deployment. Some of the suggestions for regulatory changes in the Telstra submission are as follows:

- Existing ULLS and LSS access regulation should be removed within the NBN footprint;
- The access regulation is rolled back in competitive areas;
- New access pricing principles that would move from "cost-based" regulated pricing to "value-based" pricing approach;
- The NBN operator should not be required to provide wholesale versions of its own retail products;
- There is pricing flexibility at retail and wholesale levels, with scope to "experiment to discover demand and price levels"; and
- Ameliorate land access risks for the successful bidder to ensure they can meet the "aggressive build timeframe".¹⁶

3.20 Like other industry participants, Telstra raises throughout their submission that there is a 'fundamental flaw' in the current legislation. However, they believe that the answer lies in softening (or removing) the legislation and weakening the role and the powers of the Australian Competition and Consumer Commission (ACCC), whereas the majority of industry proponents call for regulations and the role and power of the ACCC to be strengthened. Telstra makes the statement that:

The central problem is regulatory uncertainty. The cause of this uncertainty is the excessive discretion vested in the ACCC in both determining its own remit by declaring which services will be regulated and then in determining the terms of access.¹⁷

3.21 Their submission subsequently requests that the current role of the ACCC is significantly reduced, almost removed, so that there is a 'single process',¹⁸ inferring that the ACCC acts to hinder rather than protect the industry and its customers:

The burden to satisfy the ACCC, which can reject an undertaking on fairly arbitrary grounds, is virtually impossible ...¹⁹

16 See Telstra's summary of specific regulatory proposals: Telstra, *Public submission on the roll-out and operation of a National Broadband Network for Australia*, 25 June 2008, pp 20-21.

17 Telstra, *Public submission on the roll-out and operation of a National Broadband Network for Australia*, 25 June 2008, p. 23.

18 Telstra, *Public submission on the roll-out and operation of a National Broadband Network for Australia*, 25 June 2008, p. 22.

19 Telstra, *Public submission on the roll-out and operation of a National Broadband Network for Australia*, 25 June 2008, p. 24.

3.22 These requests by Telstra are precisely what the industry has warned the government not to allow, as noted by Optus in their submission:

The consequences for competition and Australian consumers under [Telstra's regulatory] proposal would be dire. Telstra's position must be rejected.²⁰

Appropriate regulation with consistent application

3.23 While the AAPT strongly criticises the current regime, their submission continues that the solution will not lie in merely increasing the level of regulation:

AAPT submits that it is clear that the current regulatory regime is both inefficient and ineffective. It does little to mitigate the anti-competitive conduct of Telstra as the largest network provider and instead results in an environment fraught with anti-competitive conduct, gaming and uncertainty. ... However, more regulation is not the answer, appropriate legislation is.²¹

3.24 According to AAPT, an 'appropriate' framework for legislation or regulation would be achieved through the alignment of incentives within the appropriate market structure, which in turn would support the key principles of regulation required for the new network.²² AAPT are not alone in their views; however the issue of how the successful bidder should structure its business will be discussed later in this chapter.

3.25 Competitive Carriers Coalition (CCC) believes that regulation should aim to shape the competitive market, given that the NBN will most likely be a natural monopoly. Their submission compares the regulation of the telecommunications industry to that of other basic utilities and their supporting infrastructures:

In areas where there is not substitutability between two [infrastructure providers], we regulate to create competitive retail markets by separating the monopoly deliver[ed] infrastructure from the sale of the actual product. ... We regulate this way because consumers buy services, not wires or empty pipes.²³

3.26 Vodafone points to another shortfall in the manner in which the current regulations are inconsistently applied. Vodafone contends that currently there is a bias towards fixed networks, and that any new regime must be applied equally to all parties. As Australian and global digital economies become increasingly reliant on the convergence of fixed and wireless networks, the regulatory environment will need to support this convergence, rather than favour one technology platform over another:

20 Optus, *Submission 19*, p. 3.

21 AAPT, *Submission 4*, p. 9.

22 *Submission 4*, p. 9.

23 Competitive Carriers Coalition (CCC), *Submission 8(b)*, p. 1.

Australia's future prosperity and the growth of the digital economy will be supported through a combination of fixed and wireless networks. In this environment it is important to avoid a regulatory regime that inconsistently applies the principles on which it is based.²⁴

3.27 The submission highlights this inconsistency with the example where the current regime maintains:

...higher levels of regulation in respect of privately funded mobile networks operating in highly competitive markets, while conceding lower levels of regulation to monopoly infrastructure that has also enjoyed the benefits of Government funding.²⁵

Objectives for devising appropriate regulation

3.28 The government has clear objectives (see appendix 2) that the new broadband network must achieve; it is critical that any new regulations will facilitate achieving these objectives and provide ongoing support to maintaining them.

3.29 In addition to specifying the footprint coverage and speed of the network, these objectives include that the network continues to promote the long-term interests of end-users (LTIE), that it has the capacity to be upgradeable over the lifetime of the project, that it facilitates competition through open access, and that it enables low access cost-based prices while allowing proponents a rate of return on their investment.

3.30 Given the commitment of public monies to fund this initiative, the new regime should also be guided by basic public policy principles. An additional consideration should also be the 'social inclusion' focus that the government has placed as a priority in its overall policy agenda. However, Professor Trevor Barr argues that inclusive public policy is actually one of the 'neglected agendas' in this debate. Professor Barr discusses the complex social and cultural factors that affect consumer choice of technology and services and states that consequently:

The best new technologies and services will be those that are created, designed constructed and marketed in ways that will be highly *adaptive* to human needs in user environments of the future.²⁶ [bolded italics copied]

3.31 When discussing the broad principles that should underpin new regulation, Professor Joshua Gans made the comment that:

The Government should view itself as designing a market rather than a regulatory bureaucracy and process.²⁷ [bolding copied]

24 Vodafone, *Submission 9*, p. 7.

25 *Submission 9*, p. 7.

26 Professor Trevor Barr, *Submission 13*, p. 6.

27 Professor Joshua Gans, *Submission 15*, p. 3.

WA Chamber of Commerce and Industry's principles

3.32 The Western Australian Chamber of Commerce and Industry (WA CCI) provided the inquiry with a submission that outlined basic principles that would lead to the creation of a sound regulatory regime for the NBN. The WA CCI stated that when drafting the new framework, the government should aim to achieve a 'reasonable balance between protection and regulatory cost':

Regulatory design should achieve competitive neutrality, transparency and have minimal overlap and duplication.²⁸

3.33 When drafting new regulations, the WA CCI advises that there needs to be an appropriate balance between efficiency and effectiveness of the new regulations, which should foster competition, economic growth, innovation and prime social objectives.

3.34 The WA CCI submission included a discussion paper they had published in 2006, which had determined key principles that government departments could apply to shape and inform regulatory activity. Of the seven basic principles within this discussion paper, the WA CCI notes that five are very relevant to the implementation of the NBN; these five principles are as follows:

1. government intervention should be minimal and the least preferred option for achieving policy outcomes;
2. regulation should be outcomes based rather than process based;
3. regulation should not be overly prescriptive with minimum requirements such as speed limits;
4. regulation should be created with sound social and economic purpose, requiring governments to fully assess all legislative and regulatory proposals against a regulatory impact statement; and
5. the Government should regularly review and remove redundant regulation.²⁹

3.35 The WA CCI 'strongly recommends' that these principles guide the creation of any new regulatory framework for the NBN.

3.36 Within the WA CCI discussion paper was another set of regulation principles that was drafted by the Business Council of Australia (BCA). These principles were drafted by the BCA as a solution to 'curtail the tide of government red tape' and were intended for use by both Commonwealth and state government departments. The BCA principles mirrored those of the WA CCI, and included that:

28 WA CCI, *Submission 17*, p. 2.

29 *Submission 17*, p. 2.

- regulation should be the last, not first, response of Government and the benefits of proposed regulation should always outweigh the costs of administration and compliance;
- regulation should set a framework, not try to cover the field;
- all businesses, whether large or small, should be treated equally; and
- there must be full transparency and accountability around the processes for making and administering regulation.³⁰

3.37 Apart from the suggestions for general principles that would produce an efficient and effective regulation regime for the new network, there was a stated need for the regulatory principles to strive for social benefits, considering the use of taxpayers' dollars to fund the NBN. This view was expressed by iiNet in the submission on regulatory issues that they provided to this inquiry as a supplementary submission:

The General principles that need to be applied to the regulatory improvements are those aimed at a social dividend, that have been in place for some time and are expressed by government policy:

- Promoting competition;
- Promoting long term interests of the end user; and
- Ensuring equitable service provision to all Australians.³¹

3.38 The Communications Expert Group (CEG) stated that having clear policy objectives was one of the key issues for the development of the NBN, with the 'core' objectives incorporating the long-term interests of end-users (LTIE).³²

3.39 The objectives stated within the RFP certainly address several common principles highlighted by submitters and witnesses alike, such as the promotion of the LTIE, facilitating competition through open access arrangements, and ensuring equivalence of price and non-price terms and conditions.

Regulatory certainty a priority issue

3.40 There has been criticism that the objectives within the RFP were not sufficiently specific for prospective proponents attempting to frame their proposals. In particular, criticism was levelled at the government for not putting in place a basic regulatory framework within the RFP on which prospective bidders could build a business model, thus providing greater surety that bids would compete, and be subsequently assessed, on truly equal terms.

30 WA CCI, *Submission 17*, Attachment: 'Regulation and Compliance: A Discussion Paper', WA Chamber of Commerce and Industry, November 2006, p. 18.

31 iiNet, *Submission 4*, 'Regulatory Submission', June 2008, p. 5.

32 Communications Expert Group, *Submission 31*, p. 2.

3.41 Dr Ross Kelso was asked his views on the manner in which the RFP was released without the government providing guidance on the regime under which the NBN might operate:

I totally agree with the sentiment that the cart has been put before the horse; the regulatory arrangement of the framework should have been done first.³³

3.42 At the first Canberra public hearing, the committee heard a similar call from the Executive Director of IPA. When questioned whether IPA believed that any regulatory changes should be completed prior to the RFP being released, Mr Lyon replied:

Of course, ... [w]e would view getting the regulatory frameworks as being fundamental and necessary. ... [Y]ou need to provide a level of regulatory certainty around the future shape of the market. ... We would say that legislation would need to be in place and that certainty will need to be around the future shape of the market and a regulatory regime that exists ...³⁴

3.43 At the Perth hearing, iiNet stated that they believed that the NBN would not provide the right solution for Australia, and also made comment about the lack of a new regulatory framework being in place prior to the RFP being released, and called for a bipartisan approach to resolving the regulatory issues:

...[service providers] will not return to this until they have the confidence to invest back in the sector.

That, again, comes down to the government coming forward – and I mean all of you, both sides – and saying, 'Here is the rule book, guys.' Even of the news is bad for us, at least our investors can make informed choices.³⁵

3.44 Mr Malone was further questioned on whether he believed that it would therefore be preferable to delay the NBN until effective legislation was in place, to which he responded quite emphatically:

I would rather a deferred solution rather than a stupid one. At the moment, you are delivering me a stupid one.³⁶

3.45 Ms Deanne Weir from AUSTAR was also adamant that there should have been regulatory certainty in place prior to the NBN RFP being released:

33 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 18.

34 Mr Brendan Lyon, Executive Director, Infrastructure Partnerships Australia, *Committee Hansard*, Canberra, 8 October 2008, p. 24.

35 Mr Michael Malone, Managing Director, iiNet Ltd., *Committee Hansard*, Perth, 6 November 2008, p. 33.

36 Mr Malone, iiNet Ltd., *Committee Hansard*, Perth, 6 November 2008, p. 33.

...we think it is actually very critical that there be proper regulatory rules. That is one thing that concerns us about how this is played out – that the regulatory rules have not been set prior to the tenders being called for ...³⁷

3.46 Criticism was also made in relation to there being no regulatory regime to guide the actual assessment of the NBN tenders. At the Melbourne public hearing, Mr Kevin Morgan commented to this effect:

You have to have an objective set of criteria to assess a tender if you do not want to end up in the courts.

How can you possibly objectively assess a tender where the key regulatory inputs are not known? Regulation goes to the issue of risk and you cannot build a business case without understanding the risk because no-one will give you money. ...Unfortunately, I have to say this process is fatally flawed. ...

Until you have regulatory reform this cannot go ahead. Until you have set regulatory rules you cannot go ahead.³⁸

3.47 There are also strong calls for the regulation to incorporate or even mandate some form of separation within the owner/operator of the NBN. The issue of restructuring the industry is pivotal within the NBN debate, and will be discussed later in this chapter.

Conclusion

3.48 The committee considers that the government should have provided a regulatory framework within the RFP; this would have provided proponents with greater certainty in building their business case for the NBN, while also providing a legal framework for the assessment of proposals.

Telstra's current conflict of interest

3.49 Despite the almost universal criticism of Telstra's vertical integration that facilitates its abuse of the strong market position it holds, the committee heard from a number of people who identified an almost 'catch-22' situation for Telstra.

3.50 Being now totally owned by shareholders, Telstra is bound by commercial law to ensure that it acts in the best interests of its shareholders. Conversely, Telstra is the owner of telecommunications infrastructure, which provides essential services for Australian homes and businesses. As a service provider, Telstra is also bound by legislation to serve the best interests of its customers. As an example of these comments, Adam Internet stated in their submission that:

37 Ms Deanne Weir, Group Director, AUSTAR United Communications Ltd, *Committee Hansard*, Sydney, 7 October 2008, p. 13.

38 Mr Kevin Morgan, *Committee Hansard*, Melbourne, 28 October 2008, p. 85.

It is unreasonable to expect a listed corporate entity to put the interests of its competitors, the broader industry or Government policy ahead of its fiduciary obligations to its shareholders.³⁹

3.51 The WA Chamber of Commerce and Industry also recognised this in their submission:

...a conflict of interest arises when a monopoly carrier is required by law to provide network access to its retail competitors, and is also required by law to maximise the return to its shareholders.⁴⁰

3.52 Although the WA CCI welcomes the government's commitment to constructing the NBN as an open access network and to implement regulatory reform to achieve this, the submission continues:

...the Chamber does not believe that an open access network goes far enough [and] considers the structural separation of the wholesale and retail infrastructure of the NBN to be an effective model.⁴¹

3.53 The WA CCI also submits that by separating the wholesale and retail units, the government will actually 'reduce the need for long term government regulation.'⁴²

3.54 Although Telstra's motive for its anti-competitive behaviour has been generally acknowledged, this fact does not change the impact this behaviour has on the industry and Australian consumers alike:

While Telstra's anti-competitive activities can be seen as rational attempts to protect its market share, these actions are clearly not in the national interest. The national interest is best served through competition in the telecommunications sector.⁴³

3.55 The committee heard on a number of occasions the opinion that this conflict of interest cannot be resolved unless the vertical integration of Telstra's business operations and units is further separated. Witnesses expressed concern that without this separation, Telstra would continue to place the interests of its shareholders above the interests of its customers and the Australian people, and ultimately affect the ability of Australian businesses to compete internationally.

39 Adam Internet, *Submission 25*, p. 7.

40 WA CCI, *Submission 17*, p. 3.

41 *Submission 17*, p. 3.

42 *Submission 17*, p. 3.

43 Infrastructure Partnerships Australia, *Submission 11*, p. 5.

Conclusion

3.56 The committee concludes that omitting to specify the structure of the new network has caused confusion and uncertainty among potential bidders and industry stakeholders.

Failures of the current regime

3.57 The extent of the failure of the current regulatory regime can be highlighted by the fact that even Telstra, which holds unrivalled market power in the Australian telecommunications industry, has called for a complete review of the legislation. The submissions to the inquiry are mostly general in their areas of criticism, although a number have given considerably detailed descriptions of legislative amendments that would be desirable. This Interim Report will report on the general areas of failure of the current regime, with the final report providing more in-depth examination of those changes.

Original intent of the legislation

3.58 When the government first offered shares in Telstra, significant changes were made to the *Trade Practices Act 1974*; the objective of these changes was to facilitate competition in the telecommunications industry through the application of general competition law principles combined with telecommunications specific access regulation. This regime was introduced in 1997, leaving Telstra as a vertically integrated entity, on the assumption that the ACCC could exercise effective control over Telstra with the aid of telco-specific powers. Part XIB of the new regime was to deal with any future abuses of market power while Part XIC was to regulate access to services. However, that assumption was soon proven to be misguided:

With over eleven years experience, we now know that these provisions have proved inadequate to control Telstra and to provide a genuine level playing field for competitors seeking to compete with Telstra in the provision of fixed line services.⁴⁴

'Gaming' the regime

3.59 The practice of 'gaming' the regulatory system was a common complaint to this inquiry. Under Part XIC, access seekers are to 'negotiate' access terms, conditions and prices with Telstra. However, the concept of negotiation is reliant on two parties striving for a win/win outcome; negotiation is *not* possible if one side, particularly the side with the market power, is not motivated to even come to the negotiating table. Many have commented that this negotiate/arbitrate model is an abject failure because of this:

44 Optus, *Submission 19*, p. 22.

The negotiate/arbitrate model under Part XIC has proven to be a failure. It has provided Telstra with both the incentive and the means to game the system to its advantage.⁴⁵

3.60 Optus elaborates on how Telstra is able to frustrate the decision making process, succinctly summarising statements made by others, as follows:

- (a) It employs a take it or leave it approach to commercial negotiations, which are treated merely as stalling devices. It rarely engages on issues and blatantly uses information asymmetries to undermine the negotiating process.
- (b) The undertaking process is used as a means to undermine the ACCC's price signalling processes and delay arbitral decisions.
- (c) The arbitral process is stymied by constant questioning of the due process and issues of jurisdiction.⁴⁶

3.61 The gaming process utilised by Telstra can cause significant delays to access seekers, which are consequently unable to provide terms and conditions of access, or even basic pricing of access, to their potential customers, who are often subsequently wooed to Telstra.

3.62 The provisions of Part XIB were to provide an alternative mechanism for the ACCC to use in cases where there was a need for efficient and effective enforcement action to address anti-competitive behaviour. However, these have also proved to be ineffective over the years. Optus claims that the provisions are 'far too weak', in addition to being expensive to pursue. According to Optus:

Telstra can enjoy months and even years of benefit from anti-competitive conduct before a matter is investigated and sanctions imposed.⁴⁷

3.63 Not only are they ineffective, but even when an anti-competitive notice is applied, Telstra is able to ignore it for months, and even then is only required to pay a small monetary amount, which Optus likens to a 'minor speeding ticket type fine'.⁴⁸ This has resulted in the ACCC signalling an unwillingness to use its powers under Part XIB. According to Optus, this is due to the fact that the ACCC's powers to regulate access are:

...often ill-defined and limited by various rights of appeal. ... The legal strait jacket within which the ACCC has to operate is demonstrated by the ACCC's recent revelation that it is currently involved in 47 legal actions initiated by Telstra.⁴⁹

45 Optus, *Submission 19*, p. 22.

46 *Submission 19*, p. 22.

47 *Submission 19*, p. 23.

48 *Submission 19*, p. 23.

49 *Submission 19*, p. 24.

3.64 These claims are in sharp contradiction to the claims made by Telstra in their submission to the department requesting regulatory changes. According to Telstra, it is the ACCC which is the cause of delay in the decision making process, and consequently Telstra calls for the powers of the ACCC to be curtailed and indeed for their role to be all but eliminated in the decision making process.

3.65 In an attempt to address the emerging increase of anti-competitive behaviour, Telstra was required in 2005 to implement operational separation. However it seems that these requirements have also been ineffective. The ACCC itself was asked whether it believed that the current form of operational separation had proven effective for promoting equivalence between Telstra and its competitors; their response was:

...probably no. We continue to receive complaints of conduct that suggest that the objective of equivalence, which was the objective of the regime, is not being achieved.⁵⁰

3.66 The Competitive Carriers Coalition makes the comment that, after years of unsatisfactory policy advice, the industry now has little confidence that the department fully understands the 'needs and motivations of non-Telstra businesses'. Using as an example the 2005 amendments that required Telstra to operationally separate, the CCC submits that:

Warnings, both public and private, by the non-Telstra industry that the proposed arrangements would fail completely were ignored by the Department. These warnings have subsequently been completely vindicated.⁵¹

More than a new regime required

3.67 As previously mentioned, stakeholders have highlighted that open access must be supported by appropriate changes to regulation, with many advocating structural changes to the industry itself to prevent anti-competitive behaviour by what will undoubtedly become a powerful monopoly provider. Although the definition of open access may appear to be reasonably clear within the RFP, the fact that the advocated restructure of the industry is not assured as a component of the NBN is a cause for concern.

3.68 This concern was exacerbated when Telstra openly stated that it will not be a part of the NBN process if structural separation is a mandated prerequisite. During their appearance before the committee, Telstra reiterated their media statements to this effect, categorically stating that:

50 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission (ACCC), *Estimates Hansard*, Senate Standing Committee on Economics, 5 June 2008, p. 58.

51 CCC, *Submission 8*, 'Submission in Response to the Minister's Invitation for Comments on Telecommunications Regulation', p. 22.

Telstra's position is that if further separation is part of the NBN then we are not in a position either to build or to bid for the NBN.⁵²

3.69 At the Canberra public hearing, representatives of the Competitive Carriers Coalition discussed at length the disadvantages of the current industry structure and its close relationship with the availability open access. Mr Matthew Healy stated that:

... it is the structure of the industry rather than simply the regulatory settings that we have at the moment that makes it difficult, if not impossible, to have open access. ... It is not so much the regulatory settings as it is the structure of the industry that militates against an open access arrangement.⁵³

3.70 At the same hearing, representatives from the Terria consortium, which is one of the major proponents for the NBN, also tied the achievement of open access to the structure of the successful owner of the NBN. Mr Michael Egan, Terria's Chairman, made the statement that:

If the national broadband network is to fulfil its potential, it must be an assured open access network ... and we believe that will happen only if the NBN is properly regulated ... [and] is an independent network not controlled by any retailer or group of retailers, and not providing its own retail services.⁵⁴

3.71 Mr Michael Simmons continued this line of association when he added that:

Terria's position on open access is that all access seekers would have equivalent both non-price and price access terms in accessing the network and that would be guaranteed by having a separated and independent network between the network owner-operator and all access seekers.⁵⁵

Options for separation

3.72 There was a general consensus that any new regulations that underpin the NBN should ensure that any operator/owner of the new network cannot participate in anti-competitive behaviour. This is reinforced by the objective of the NBN which states that there is to be open access to the network and that the NBN regime facilitates and supports competition and innovation in the telecommunications sector.

3.73 Many have made calls for the network owner to be structurally separated from any downstream retail business units. The common thought is that this would be the most effective way to ensure true open access, and would actually reduce the need for

52 Mr David Quilty, Group Managing Director, *Committee Hansard*, Canberra, 11 November 2008, p. 5.

53 Mr Matthew Healy, Chair, CCC, *Committee Hansard*, Canberra, 8 October 2008, p. 2.

54 *Committee Hansard*, Canberra, 8 October 2008, p. 32.

55 Mr Michael Simmons, Managing Director, Terria, *Committee Hansard*, Canberra, 8 October 2008, p. 33.

regulations. This is because, if the NBN owner has no retail interests, then its business imperative will be to its own interests and business performance, which will consequently drive incentives to maximise the use of the network by access seekers. As Optus comments in their submission:

This change in incentives ... can be expected to flow through to a more competitive and diverse broadband market. This in turn will deliver very tangible benefits to customers in the form of lower prices and more innovative services.⁵⁶

3.74 Mr Paul Budde echoed this sentiment in the closing statement of his submission:

Sound infrastructure based (structural) regulations based on open networks will also reduce the currently high level of regulations required for the services carried out over this infrastructure.⁵⁷

3.75 In a report commissioned by Optus, the statement is made that if the owner is vertically separated, this automatically removes the incentives for the owner to act in an anti-competitive manner. Where there is less incentive for such behaviour, it follows that there will be a reduction in the amount and extent of regulation that would be required for the NBN. The report builds on this concept, stating that:

Structural separation greatly reduces the job of regulating the monopoly network because the regulator no longer has to deal with the efforts of the network owner to 'get around' the access regulation and transfer its monopoly to the competitive part of the market.⁵⁸

3.76 However there are other comments that not only is the operational separation model implemented under current Australian regulations not effective in even reducing, let alone eliminating, anti-competitive behaviour, the model used in Australia is not as effective as others in use internationally:

...current arrangements in Australia for dealing with non-discrimination and the leverage of market power are weak and do not constitute the robust models of functional or operational separation applied in New Zealand and the UK.⁵⁹

3.77 It is perhaps beneficial at this point to summarise the variations in the degrees of vertical separation, which range from full vertical integration through to full structural separation. The table below has been taken from the report within the Optus submission, authored by the Competition Economists Group, *Structural Separation*

56 Optus, *Submission 19*, p. 28.

57 Paul Budde Communication, *Submission 1*, p. 4.

58 Optus, *Submission 19*, Attachment: Competition Economists Group, 'Structural Separation for a National Broadband Network: A report for Sing-Tel Optus', May 2008, p. 2.

59 Optus, *Submission 19*, Attachment: Competition Economists Group, 'Structural Separation for a National Broadband Network: A report for Sing-Tel Optus', May 2008, p. 7.

for a National Broadband Network: A Report for Sing-Tel Optus. The lowest degree of vertical separation shown is accounting separation; the highest is structural or ownership separation:

Table 1: Forms of vertical separation.

Rating	Type of organisational separation	Features
7	Ownership separation	Full structural separation – may involve club ownership of bottleneck
6	Legal separation (separate legal entities under common ownership)	Legal separation (which may or may not embody elements of functional separation)
5	Functional separation with localised incentives and/or separate governance arrangements	Variants on functional separation
4	Functional separation	
3	Virtual separation	Variants on accounting separation
2	Creation of wholesale division	
1	Accounting separation	

3.78 Accounting separation involves the organisation compiling separate profit and loss statements and balance sheets for all separate entities within, and can be accompanied by the creation of a special, separately named wholesale unit. This appears to be the current form of separation under which Telstra, and its wholesale subsidiary, BigPond, operate.⁶⁰

3.79 Virtual separation requires organisations to establish retail, access and wholesale divisions, creating service level agreements intended to ensure that no discrimination occurs. In practice it will necessitate new training for the workforce to ensure that employees respect the new but virtual divisions within the company.

3.80 Functional separation will see the provision of incentives for senior managers in the separated entity, and/or separate governance arrangements. The next step would be legal separation, seeing the creation of a separate board and the filing of separate statutory accounts.⁶¹

⁶⁰ Optus, *Submission 19*, Attachment: Competition Economists Group, 'Structural Separation for a National Broadband Network: A report for Sing-Tel Optus', May 2008, pp 12-14.

⁶¹ Optus, *Submission 19*, Attachment: Competition Economists Group, 'Structural Separation for a National Broadband Network: A report for Sing-Tel Optus', May 2008, pp 12-14.

3.81 The greatest degree of vertical separation is structural separation, where there is separate ownership of the separated assets.⁶²

3.82 The mammoth policy question facing the department is to what degree should the regulations mandate separation for the new network operator. There are those who believe that structural separation is not the only answer or in fact may not be necessary, as long as the appropriate regulations are in place:

...strictly speaking, [structural separation] is not absolutely necessary. It is desirable ... but it is not absolutely necessary. If you set up the correct regime, you can achieve open access without structural separation.⁶³

3.83 However, Dr Kelso later gave the constraint that if structural separation was not implemented, the new regime would need to clearly prescribe the conditions of open access, which he explained as similar to everyone having the right to use the roads in Australia:

The Trade Practices Act does not prescribe open access. Open access means a right of access. Under Part XIC of the Trade Practices Act we do not have a right of access.⁶⁴

3.84 A form of functional or operational separation would be another alternative, although some believe this to be a less effective model which would most likely require a comparatively greater degree of regulatory control:

Operational separation simply does not work. A value chain where the supplier of a critical service to a market also competes with each of its customers in that market is simply dysfunctional.⁶⁵

3.85 Vodafone has submitted that their preference would be for structural separation to be implemented as an NBN component, and concedes that functional separation would be an inferior alternative:

Vodafone considers that the only viable alternative to structural separation (albeit less suitable) is to implement a model of full functional separation ... similar to that which has been implemented in the United Kingdom ... and will be implemented in New Zealand.⁶⁶

3.86 Optus agrees with the fact that operational separation would not be as effective as structural separation, stating that:

62 Optus, *Submission 19*, Attachment: Competition Economists Group, 'Structural Separation for a National Broadband Network: A report for Sing-Tel Optus', May 2008, pp 12-14.

63 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 21.

64 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 22.

65 Axia NetMedia Corporation, *Axia Submission to the Australian Competition and Consumer Commission: Suggested Regulatory Priorities and Approaches for the Australian National Broadband Network*, 25 June 2008, p. 2.

66 Vodafone, *Submission 9*, p. 15.

The operational separation arrangements that apply to Telstra are wholly ineffective.⁶⁷

3.87 Both the department and the minister have claimed that the government does not favour any model of separation, and that the RFP remains non-prescriptive to allow the greatest level of flexibility for proponent network design. At the Canberra public hearing, Mr Colin Lyons from the department commented that:

... the request for proposal is an outcome focused document, not a mechanism focused document. It does not prescribe that certain structures or mechanisms are essential to achieve particular outcomes.⁶⁸

Conclusion

3.88 The committee supports the general consensus that any new regulations that underpin the NBN should ensure that any operator/owner of the new network cannot participate in anti-competitive behaviour.

*Is **no** regulatory change an option?*

3.89 The committee heard from the Canadian telco company, Axia NetMedia, at a Canberra public hearing; this organisation gave a totally new perspective on the issue of separation. The Chief Executive Officer of Axia NetMedia, Mr Art Price, explained that the degree of separation depends on the objective of the network implementation, and based the following explanation on examples where Axia NetMedia had rolled out a new broadband infrastructure in three international locations, each with varying demographics and geographic issues to overcome.

3.90 According to Mr Price, the issue comes down to a simple principle that has been applied in all three initiatives. This principle is: 'Competing With Your Customer Does Not Work'.⁶⁹

3.91 Mr Price explained that, wherever you have the network owner also supplying network services, they are automatically placed in a position where they need to compete with the very customers on whom they also rely for business, which in the case of the NBN would be all access seekers. This naturally leads the network operator to favour their own services in pricing and conditions of service over those of their 'customers'. As Mr Price said:

The practical thing is that the owner of [a non-vertically integrated] network needs to survive based on the success of their customers, as opposed to surviving based on their customers failing, and the success of the [vertically

67 Optus, *Submission 19*, p. 24.

68 Mr Colin Lyons, Deputy Secretary, National Broadband Network Taskforce, DBCDE, *Committee Hansard*, Canberra, 8 October 2008, p. 58.

69 See for example, *Committee Hansard*, Canberra, 24 November 2008, pp 1 and 4.

integrated] incumbent is actually better if they keep those retail services themselves.⁷⁰

3.92 Mr Price advocates that Axia aims to completely reverse this objective, so that the survival of the operator/owner depends on the survival of their customers. This will automatically create the incentive for the operator to attract the greatest possible volume of business – i.e. access seekers – to utilise the new network, with the consequence of creating competitive marketing tension that is beneficial to the network operator, to its customers, the access seekers, and particularly to the benefit of the long term interest of end users:

...to get a high performing end result and choice for the end users, the party who has the next generation network should not be competing with its own customers.⁷¹

3.93 In the implementation of their solution for broadband in the state of Alberta, Canada, Mr Price noted that the state has no jurisdiction for regulating broadband infrastructure and operation. An astounding revelation in the evidence given by Mr Price was that, as there was no jurisdiction for creating new regulation, Axia merely applied this principle of the operator not competing with its customers.

3.94 Axia NetMedia has succeeded in providing 100 per cent of the state's population with access to a high technological solution, with high service quality levels, yet *without* any regulation being applied to the sector. By merely adhering to the above principle, they have been able to create an environment where the market thrives and there is no need for regulation:

That is quite different than saying the incumbent must structurally separate. ... if you think of the three places we did this, the government did not require the incumbent in any of those places to structurally separate, but they got a structurally separated outcome ... from a party other than the incumbent.⁷²

3.95 When examined more closely, the application of this fundamental principle actually addresses many of objectives or principles that were cited earlier in this chapter, including the following:

- Professor Joshua Gans' view that the government should create regulations that design a shape the market environment;
- The WA Chamber of Commerce and Industry's comment on the need to design regulation that will achieve competitive neutrality and transparency, and that government regulations should be minimal and be outcomes based rather than process based;

70 Mr Arthur Price, Chairman and Chief Executive Officer, Axia NetMedia, *Committee Hansard*, Canberra, 24 November 2008, p. 9.

71 Mr Price, Axia NetMedia, *Committee Hansard*, Canberra, 24 November 2008, p. 7.

72 Mr Price, Axia NetMedia, *Committee Hansard*, Canberra, 24 November 2008, pp 7-8.

- The Business Council of Australia's similar view that regulation should be the last, not first, response of government; and
- iiNet's view that regulation should promote competition, promote the long term interest of end users and ensure equitable service provision to all Australians.

3.96 The Axia NetMedia principle underscores the previously stated views that separation of the operator from upstream retail services will reduce, or indeed remove the need for regulation.

A flawed process?

3.97 Criticism of the timeframe for the assessment and evaluation of the proposals has already been discussed in chapter 2. However, in the context of the regulatory changes that have been called for to support the new network, this timeframe is highlighted again in this chapter.

3.98 When the government announced the Request for Proposals in April 2008, it also announced that the general public and the industry was invited to provide the department with submissions on regulatory changes that might facilitate and underpin the smooth implementation and operation of the NBN. Submissions closed on 25 June 2008 and were published on the department's website, so that prospective bidders could augment their proposals with the suggestions for change. The response by the public, and in particular the industry, was substantial, with over eighty submissions, many of which had multiple supplementary attachments.

3.99 While the government did invite suggestions for regulatory changes, and has published them, criticism of their actions comes on two levels. Firstly there is the criticism that the timeframe not only for the assessment of proposals, but for the legislative and parliamentary processes required to make the changes to the regulations and legislation, is inadequate. Secondly, there is the call for public consultation, or at least consultation with the industry, on any drafted changes to legislation or regulations, prior to the legislation commencing the usual course through parliamentary process.

Lack of time

3.100 The RFP states that the rollout of the network will commence early in 2009; however, with the closing date for proposals being pushed back until 26 November 2008, and the required eight week evaluation of those proposals, this date will obviously not be met. Although the government has been criticised for this delay, this is not the main concern of the industry.

3.101 The criticism levelled by the industry is that the government should now actually further delay the roll-out of the NBN to allow time for consultation on the proposed regulatory changes:

I would recommend ... for the government to issue a discussion paper based on its assessment of the submissions on the regulatory framework and this discussion paper then be open for public evaluation. ...⁷³

3.102 The industry is very cognoscente of the time taken to draft legislation, and the need to allow for its passage through due parliamentary process. There is genuine concern that if the government endeavours to meet the timeframe it set as an election commitment, there will be insufficient time to enable thorough consideration of all issues raised in the regulatory submissions to the department.

3.103 The strong preference expressed to this inquiry is for sufficient time to be taken to enable the appropriate regulation and/or legislation to be drafted, to ensure that the government 'gets it right' the first time, rather than draft ineffective regulations that would hinder the progress of the NBN implementation, and may well require ongoing amendments to support the operation of the NBN. As the Australian Telecommunications Users Group notes in their submission:

If more time in the planning and coordination phase is needed ... that time should be taken.⁷⁴

3.104 In fact, at the Brisbane hearing, Dr Kelso took this further by saying that the restriction of the assessment period to eight week is not critical and should be extended:

...I would say that the eight-week and six-week time lines ... are really not that critical. There is nothing urgent about implementing this national broadband network. Things can slip by for a few more weeks, a few more months or whatever.⁷⁵

Time in context of the contract

3.105 A key objective of the RFP quite clearly states that the time required for the completion of the NBN rollout to 98 per cent of all Australian homes and businesses is five years:

[the NBN] is rolled out and made operational progressively over five years from the date of execution of a contract between the Commonwealth and the successful proponent.⁷⁶

At the time of writing this Interim Report, the government remained firmly committed to a five year completion schedule, as stated in the RFP.

73 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 19.

74 Australian Telecommunications Users Group, *Submission 7*, p. 4.

75 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, pp 18-19.

76 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.3.7, p. 5.

3.106 Given that this time commences on the signing of a contract, at the Senate Estimates hearings in October the minister was also questioned in relation to the timing of the contract signing once the successful bidder had been announced.

3.107 Senators on this committee questioned whether it was feasible for any contractor to commence work on the build of the NBN when the terms and conditions, i.e. the regulatory framework, had not been finalised. In the context of the RFP, should the successful bid be conditional on changes to regulation and/or legislation, then passage of those changes must be subject to parliamentary scrutiny. Consequently any 'successful' bid that was based upon changes to legislation may actually fail if the legislation is not passed. Logically then, contract negotiations could not be confidently completed to the satisfaction of either party until required changes to legislation was passed.

3.108 In this discussion at Estimates, Senator Minchin asked the minister:

What we are putting to you is that there is no way on earth that a final contract can be signed to allow the rollout of the NBN until the proponent and the government know the outcome of the legislative process that you wish to put in place or that is required to be put in place ...⁷⁷

Although the minister attempted to remain non-committal throughout the discussion, he did state that:

...the only reason there would be any uncertainty about the regulatory framework once we have reached an agreement is if your party decided to block it in the chamber.

...let us be clear: we will reach an agreement and we will put forward – depending on the outcome of that [agreement] – any regulatory changes.⁷⁸

3.109 A subsequent question from Senator Birmingham sought further clarification on this, when he asked:

...does that mean that you intend to negotiate a contract with the successful bidder and put a package of regulatory framework changes on the table in the Australian Senate on a take-it-or-leave-it basis because of that contract you have negotiated?⁷⁹

3.110 The minister then replied:

77 Senator the Hon. Nick Minchin, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 18.

78 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 18.

79 Senator Simon Birmingham, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 19

We are not going to be negotiating with your good selves about this once we have reached an agreement with the successful bidder.⁸⁰

3.111 As stated at the commencement of this chapter, the NBN has afforded the government an historic opportunity to correct failures of the current regime. By rushing the legislative process, government would not only severely jeopardise this opportunity, but may also place at risk the validity of any contract signed on the premise of regulatory changes that must face the full scrutiny and approval of parliament.

Conclusion

3.112 The committee encourages the government to effectively utilise this historic opportunity for regulatory change.

Lack of true 'consultation'

3.113 The other area of criticism by many is the consultation process itself. The submission process in the NBN initiative could be described as extensive, with submissions requested by the department on:

- the design of the RFP;
- the design of instruments for the provision of industry information to assist proponents with their bids;
- suggestions for regulatory changes; and
- how to address the provision of services to the remaining two per cent of Australian homes and businesses that may not have access to the NBN.

3.114 Notwithstanding the extent of the submission process, the criticism has been that this process is purely a one-way transfer of information. As it now stands, the government has merely asked for advice from the industry and the general public; it has given no undertaking to comment on that advice or to provide a summary of the advice that the government considers relevant to the ongoing RFP process. The RFP document merely states that:

The Commonwealth will publish regulatory changes proposed by the successful proponent which have been agreed by the Commonwealth.⁸¹

3.115 Giving evidence in Brisbane, Dr Kelso drew attention to the lack of opportunity for public consultation:

80 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 19.

81 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.5.41, p. 14.

The submissions are to be evaluated by the expert panel, and who knows what their conclusion shall be? ... The only time at which there will be public exposure about the regulatory framework will be when parliament resumes next year and presumably changes to the legislation will be sought.⁸²

3.116 Dr Kelso went on to compare this process with historical examples of major changes to the telecommunications industry, including the move away from the government monopoly of the Post Master General's Department and the creation of the then government-owned Telecom Australia:

Until now, all the changes that the telecommunications have undergone ... have been supported by significant public disclosure and discussion.⁸³

3.117 Vodafone highlights the importance of the structure of the regulatory regime in their submission, making a strong statement that the government should go much further to facilitate and consider industry discussion of all proponents' suggested regulatory changes, not just those of the successful bidder, to inform the final decision making process:

...the Commonwealth should provide an opportunity for interested parties to review and comment upon the changes to the existing regulatory regime proposed by various proponents, prior to the Expert Panel making its final decision.⁸⁴

3.118 Generally, if the government is to create any new regulatory regime, it would follow that the affected industry, in this case the telecommunications sector, would be afforded the opportunity to review and discuss what the government may be considering and thus the opportunity to provide true input to the regulatory process. However, the RFP suggests that the government may (or may not) discuss with only the successful bidder their proposed regulatory regime before coming to an agreement with them on the changes, which will subsequently be announced to the rest of Australia. It makes no mention of discussing changes that are put forward by all proponents.

3.119 This does not mitigate the claims made earlier in this chapter that the process lacks transparency and accountability. Without allowing two-way consultation, the government could stand accused of merely playing lip-service to the consultation process, albeit via multiple calls for submissions.

Possible legal challenges

3.120 Given that the NBN will become such a significant component of Australia's infrastructure, the stakes are high and competition could be fierce for the right to be

82 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 18.

83 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 19.

84 Vodafone, *Submission 9*, p. 24.

the provider of this infrastructure. The CCC has taken the criticism of the RFP process one step further, and believes that the department has placed too much emphasis on commercial issues within the process, rather than following 'best practice processes' for the development of the policy and regulation:

Under the law of the land today, no proposed investment that seeks, through an undertaking to the ACCC, what is in effect a license to operate a monopoly ... would ever be negotiated in private. ...

Yet the Department has consistently placed its concerns about the commercial aspects of the NBN process above the need to ensure public scrutiny and input to decision-making around the regulatory issues.⁸⁵

3.121 This issue takes on additional importance in the context of the discussion earlier in this chapter regarding the signing of any contract that may be contingent on the passage of as yet undisclosed regulatory changes. The cancellation of a contract due to the failure of legislation could provide additional grounds for a legal challenge.

3.122 The CCC submission highlights further flaws in the process, noting that:

...the Department appears to have given some participants in the RFP process the impression that they are constrained in what they can provide by way of response to the call for regulatory submissions. This raises serious risk of legal challenge.⁸⁶

3.123 The CCC submits that the NBN will impact on the business of every current Australian fixed-line communication company, and that as such:

...the likelihood of legal challenges against any decision are high.⁸⁷

Conclusion

3.124 The committee believes that it is in the interest of the government, the industry and the Australian people to ensure that delays to the timeframe for implementation of the NBN are kept to a minimum. Notwithstanding this, the committee considers that the government should incorporate appropriate and timely opportunities for consultation with the industry on suggested regulatory changes.

3.125 The committee also believes that the government could easily remove several avenues of possible legal challenge by incorporating industry consultation into the process, even at this late stage.

85 CCC, *Submission 8*, 'Submission in Response to the Minister's Invitation for Comments on Telecommunications Regulation', p. 20.

86 CCC, *Submission 8*, 'Submission in Response to the Minister's Invitation for Comments on Telecommunications Regulation', p. 21.

87 CCC, *Submission 8*, 'Submission in Response to the Minister's Invitation for Comments on Telecommunications Regulation', p. 21.