



Submission to the Senate Select Committee on the NBN

**A Critique of Telstra's Regulatory Model for Broadband
Networks Since 2005**

September 2008

Introduction

The CCC welcomes the opportunity to contribute to the Senate Select Committee inquiry into the national broadband network.

The CCC represents the interests of non-dominant telecommunications carriers in Australia. It has been an active participant in policy discussions in Australia since it was formed as a loose alliance in 2001, and especially since it was incorporated in 2004.

Many of the participants in the Terria consortium are members of the CCC. Some are involved in various ways with other bids being prepared in response to the Government's request for proposals for a national broadband network. However, the CCC is not an advocate for any single bid. Rather, the CCC supports any bid that incorporates structurally separated and pro-competition governance and ownership arrangements that are consistent with the long-held positions of the CCC.

To the extent that the reported positions of the Terria bid and the Acacia Australia bid conform to these principles, they are supported by the CCC. The reports of the conditions under which Telstra has said it will or will not proceed to build a new access network, on the other hand, clearly fall well short of the minimum standards for regulation that the CCC regards as necessary.

This submission details broadly the reasons why the Telstra bid is deemed unacceptable by the CCC.

The CCC would welcome the opportunity to present further material or to appear before the committee at its public hearings if the committee believes the CCC can make a useful contribution to its deliberations.

Exposing the Telstra Regulatory Model – Monopoly Unleashed

Telstra has since 2005 been arguing for a set of regulatory changes that would allow it globally unprecedented market power across all communications markets in Australia. At various times, Telstra has offered different justifications for these changes. The most recent justification it has offered is that they are needed to support investment in an NBN.

Underlying the rhetoric, however, the same demands remain. This reflects that fact that the underlying motive is unchanged – Telstra is seeking to establish an unassailable monopoly over a vast sweep of communications services in Australia, and hobble the ability of the regulator to contain or respond to the misuse of this massive market power.

In short, the Telstra regulatory model proposes a move away from the basic principle that has unpinning economic regulation for decades – that market power must be regulated to allow markets to function to the benefit of consumers and the economy.

Same Cake, Different Icing: The Elements of the Telstra Proposals Unchanged from 2005.

In the Digital Compact that Telstra presented to the Government, and later to the ASX, in 2005, Telstra made no attempt to pretend that it was motivated by anything other than its own business needs in proposing, among other things, that it would build a new broadband access network if the Government removed almost all regulation from Telstra.

In the 2005 presentation, Telstra identified the international trend of declining PSTN lines and revenues for incumbent telecommunications companies, driven by increasing competition. It pointed out that Telstra had largely avoided that decline to date, but warned that the increase in competition from competitors installing their own equipment in local exchanges meant this would increase.

This, Telstra warned, could affect the value of the proposed T3 final privatisation tranche.

Further, Telstra identified the high and rapidly rising fault rates in the Customer Access Network, caused by a lack of investment by Telstra in its monopoly copper network, and the rising cost of this as another threat to the value of T3.

Telstra had previously vigorously denied under investing in the access network, and denied that this had any bearing on the relatively slow (by international standards) broadband take up in Australia.

Telstra proposed to resolve both these problems by building a broadband network that was to be subsidised by the Government directly – with billions of dollars – and indirectly – through the removal of regulation.

Telstra said it would build a Fibre to the Node network in metropolitan areas (leaving regions to be paid for by tax payers) if it was granted a set of regulatory concessions including, inter alia:

- No new declarations of services under existing regulation.
- New infrastructure and services be exempt from regulation
- New rules about how the ACCC could make a declaration of a service that made it almost impossible to declare a service even on existing network infrastructure
- More opportunities for Telstra to challenge the ACCC's regulatory decisions
- The right to have no competitive access to new infrastructure
- A reversal of the onus on Telstra to prove its requests for regulatory relief were reasonable, so that the ACCC had instead to prove that they were unreasonable
- Extremely limited timelines for the ACCC to consider these requests for regulatory relief
- New pricing rules to allow Telstra to charge more for access to its monopoly network and to price discriminate

- The abolition of telecommunications regulatory rules completely from the end of 2008.¹

In summary, Telstra was proposing that it be given unfettered ability to operate any new or upgraded asset with none of the basic regulatory controls being applied, and the removal of those rules from all its network after a short time, even though that network was built by taxpayers over decades before Telstra had been brought into existence.

Not surprisingly, Telstra's proposal was rejected by the Government.

Telstra then embarked on a public and political campaign to try to force the Government to accept these changes.

It is important to remember that the point of leverage that Telstra used at the time to try to force the Government to accept this package was the implication that it would not support further privatisation. Telstra's head of public policy went so far as to notoriously say he would not recommend Telstra shares to his mother as a demonstration of this attitude.

In 2006/07, Telstra took a case to the High Court in an attempt to achieve the removal of regulation through judicial means, having failed through political means.

The High Court soundly and firmly rejected Telstra's arguments. It made clear that the Telstra network had always been subject to requirements to allow competitive access, even before the corporate entity Telstra was created by the Federal Government. It said Telstra's arguments against regulation were "synthetic".

The regulatory submission from Telstra to the Federal Government in 2008 repeats exactly the same demands, albeit with some slight changes of emphasis reflected a changed political environment and the parallel National Broadband Network bidding process.

Rather than putting these demands in terms of protecting the value of Telstra for the purposes of the T3 privatisation tranche, Telstra now describes these as necessary conditions if there is to be investment in faster broadband in Australia.

Beneath this veneer, the regulatory formula it proposes is unchanged.

In 2008, Telstra proposes, *inter alia*:

- Regulation for existing network to be radically scaled back
- Existing regulatory rules to be phased out completely over time
- The exemption of new infrastructure from the existing regulatory arrangements
- The right to have no competitive access to new infrastructure except for limited services proposed and defined by Telstra

¹ A declaration is where the ACCC determines that an access service must be made available to competitors because it cannot be efficiently replicated, such as the rules requiring Telstra to rent to competitors on request use of the copper access lines connecting Australian homes to the telecommunications networks.

- New pricing rules allowing Telstra greater ability to exploit market power and increase margins for itself via a move from cost-based regulated pricing to “value” based pricing.
- The ability for Telstra to price discriminate
- Guaranteed prices for 15 years (check)
- ACCC powers to be weakened across the board to reverse the onus of proof for regulation onto the Commission
- The ACCC to be excluded from regulatory decision making once the NBN agreement is reached with the Government.

As is apparent, the basic demands have not changed from those that were wholly rejected in 2005.

In short, Telstra is presenting the most self-serving, anti-consumer, anti-competition model for future communications regulation that could be imagined.

When the telecommunications regime was introduced in 1997, it was expected regulation of Australian telecommunications markets would be able to be wound back over time.

It was expected that the relationships between participants would, over time, move to a more commercial basis that would require less intervention.

The opposite has been the experience and this is due almost entirely to Telstra’s systematic and persistent leveraging of its market power to frustrate the development of fair competition as intended by successive Governments.

The Telstra Myths Laid Bare

To accept that Telstra should be freed from regulation through its preferred formula of regulatory holidays and freedoms without departing from the basic principle that market power should be regulated, one needs to accept one of three self-evidently absurd and disprovable propositions. Either:

1. Telstra has no market power, or,
2. If regulation is removed, it will lose market power, or
3. That it does not do any harm that Telstra has market power.

Telstra has attempted to prove each of these propositions through various forms of tortuous logic at different times.

Despite the enormous resources that Telstra has spent in the past three years to try to make the obvious absurdity of these propositions seem acceptable, they simply do not bear even rudimentary analysis.

Myth 1: Telstra has no market power?

The first proposition – that Telstra does not have market power – is so absurd that Telstra rarely tries to explicitly make the argument anymore. Instead it implies the argument by saying that there are plenty of other providers of various communications services.

Given the amount of energy Telstra has devoted to creating FUD around its market power, it is worth remembering the basic source of Telstra market power and how it is expressed.

Rod Shogren, ACMA member and former ACCC commissioner, recently provided the following succinct and timely analysis to an ACCC conference. In summary, he argues that Telstra's own belligerent conduct in relation to the NBN demonstrates that Telstra believes it has enduring market power and is trying to exercise it.

“The present existence of market power in the wireline local loop is undeniable. One carrier, Telstra, owns the vast majority of all the access lines in Australia. The impact of that market power is moderated by regulation, e.g. rights of access to those lines under certain terms and conditions through the access provisions of the Trade Practices Act.

But the existence of the underlying market power is clear. That market power may be strengthened by the joint ownership and provision of carriage services and Internet access, and by the ownership of content, especially if the content is exclusive, and especially if it is accessible only via the Internet access service (BigPond) linked to the carriage service.

Even if substitutes were available and market entry were easy, the current dominance of one provider would mean that there is, at present, strong market power in the provision of broadband services. That market power could be simply the legacy of a prior statutory monopoly that for some reason has not yet broken down.

Or it could be due to natural monopoly characteristics in the local loop. In that sense the source would matter not at all to the fact of the existing market power. However, in the absence of natural monopoly characteristics, if substitutes are available and market entry is not too difficult, we would expect the power to diminish reasonably quickly. That is why we have to consider what will happen over time.

Is the current market power likely to be sustained?

What will happen over time depends on technical engineering matters such as economies of scale and scope, and combined economic and technical matters such as the availability of substitutes.

Telstra has stated publicly that only it can provide the ultra-high speed broadband speeds that it says customers will demand.

Prior to the government initiatives of the last year to invite proposals for the building of a broadband network, Telstra had said that it would roll out FTTN only if it were given a regulatory holiday.

This sounds awfully like sustained market power. If we accept those claims, then that's the end of the story, for now and for some considerable time into the future. (Emphasis added)

Myth 2: Removing regulation will remove Telstra's market power

Telstra's second argument is that it only has market power because of regulation, and that removing regulation will cause that market power to diminish. There are two versions of this argument that Telstra uses. The first is that Optus specifically should be made to invest more in its HFC cable by losing regulatory rights, and that this will provide sufficient competition. The second is that anyone who wants to be able to compete with all the services that Telstra wants to deliver over an FTTN network should build a second (or third, or fourth) access network.

"Let them eat cable" Deregulating Telstra will force HFC investment

Telstra has recently been demanding that regulation requiring it to provide access to its wireline network be removed in order to force Optus to invest more so it can use its HFC cable instead. Telstra argues that Optus's use of the regulated ULLS copper service proves that regulation is stopping investment.

There are many problems with Telstra's argument.

Firstly, the Optus HFC network was overbuilt by Telstra precisely in order to ensure that Optus did not have an economically viable alternative access network to Telstra's copper. Professor Martin Cave, who has more recently supported Telstra's demands that Optus be denied access to the Telstra wireline network where it has a cable network, previously described the motives of Telstra thus:

"The well-known precedent in Australia of Telstra's Foxtel network is an illustration of a predatory access investment. As the chairman of Telstra then acknowledged, the investment was expected (or intended) to lose money in the supply of broadcasting services, but to be profitable overall by virtue of defending the company's telephone revenues from a competitor which sought to provide both telephone and broadcasting services on a single network." (Emphasis added)

That Telstra succeeded in undermining the Optus investment in the 1990s surely does not provide a valid reason for Telstra to now claim that it should receive immunity from

regulation of the very source of market power it successfully protected by means of predatory investment!

Secondly, Telstra claims that Optus's actions prove that the price of DSL access established by the ACCC is too low. However, Telstra has failed to make this case in any challenge it has made to the ACCC. Further, Telstra has advocated the same pricing methodology be used in New Zealand, arguing that, if anything, access prices should be lower.

If there is no evidence (other than Telstra's unsupported assertions) that the ULLS is under priced, this therefore suggests that broadband over DSL is simply superior to broadband over cable. This is further borne out by the apparent preference of Telstra itself to put its customers on DSL even when the cable is available.

This undermines Telstra's argument implies that the cable, and in some instances, wireless access services, are viable substitutes for wireline access networks of the type proposed under the NBN process.

Thirdly, Telstra is proposing a model whereby consumers would at best have a choice of two integrated suppliers of communications services, Telstra, via copper on which regulation will be wound back to the point where Telstra can do almost anything it likes with pricing, and Optus via unregulated cable.

This is consistent with the arguments that Telstra chairman that the form of competition that Australia should be allowing is only facilities based competition, which would require duplication of network assets at all levels.

But what about those companies that have been the pioneers of ADSL2+, such as Internode, iiNet, AAPT, Primus and Netspace who would be effectively cut off from the regulated access to the Telstra-owned bottleneck? Who will explain to their customers why they are back to a choice of Telstra or Optus?

To see the model that Telstra is advocating in practice, one need only look to the US. Some parts of the US have withdrawn regulation from the copper where there was strong cable competition and the result has been a collapse in consumer choice and the wholesale market to the extent that an increasingly number of commentators are arguing that the policy was mistaken, and political pressure is growing for regulatory intervention to stop the US's slide down international broadband ranking.²

One respected international analyst has described the result in the US as follows.

“In the U.S., the suppression of competitive market entrants leads, not to monopoly, but rather (for the foreseeable future) to duopoly. More precisely, it

² J Scott Marcus Is the U.S. Dancing to a Different Drummer? WIK-Consult GmbH, Bad Honnef, German WIK wholesale market paper

leads to a series of non-overlapping geographically specific duopolies for wired broadband services at the retail level in most parts of the United States, and to continued decline in an already patently ineffective wholesale market for wired broadband access.³”

This course of regulatory action would be most perilous in light of the limits on substitutability of cable broadband for DSL apparently implied in the preference of both Telstra and Optus to invest in FTTN rather than upgrade to their HFC networks.

Fourthly, Telstra is conspicuously silent about its own HFC cable, which duplicates both the footprint of the Optus HFC cable and the footprint of the Telstra copper wireline network that Telstra now wants to replace with FTTN. As discussed above, Telstra’s own conduct in proposing to build a new network to upgrade the performance potential of the copper network rather than investing in its unregulated cable network, suggests it regards the wireline network as inherently superior to cable, and not substitutable. This is especially noteworthy in the light of Telstra’s repeated claims that regulation is a barrier to investment. It faces no access regulation to its HFC cable network, yet has spent millions on fighting existing wireline regulation rather than simply doing to its HFC network what it demands Optus should be forced to do. Why?

“Build your own, this one is ours only”

Telstra’s argument that it should be allowed to build an FTTN to which there should be no genuine open access for competitors (see below) is based on the proposition that competitors should be forced to build duplicate access networks.

If the evidence of the HFC experience in Australia was not enough to demonstrate that this is a fanciful proposition, there is a clear consensus from independent regulatory authorities that the prospect of duplicate deep fibre access networks flies in the face of the economic and market evidence.

This is reflected in the quotes below from the European Regulators’ Group and Dr Taylor Reynolds from the OECD’s telecommunications group.

*“[next generation access network] investments are likely to reinforce the importance of scale and scope economies, thereby reducing the degree of replicability, potentially leading to an enduring economic bottleneck.” **European Regulators Group***

*“The success of business models depends on penetration rates but many markets will be unable to support more than one new rollout.” **Dr Taylor Reynolds - OECD***

Even Telstra’s own paid consultant, Prof Henry Ergas, wrote in a submission to the ACCC on another issue in August 2008 that:

³ *ibid*

“(It seems highly unlikely that any actual entry would take the form of replicating Telstra’s copper pair network”⁴

If the basic access network is not going to be replicated, surely that suggests that it is an enduring monopoly? It seems it is sometimes convenient for Telstra to claim that the telecommunications access network will not be replicated, and sometimes it appears that Telstra finds it convenient to argue the opposite.

The CCC believes that the overseas experience and the cable TV network experience in Australia makes clear the true Telstra agenda. The experience in power markets with gas and electricity shows that it is viable for networks that deliver partially substitutable services to compete viably. It is also viable for retailers selling either gas or electricity to compete with each other by sharing access to the delivery networks.

Equally, though, no one would consider it sensible to build two or more power lines or two or more gas pipes to every home before consumers were able to have a choice of retail provider.

Conversely, two identical cable networks were built in Australia in the 1990s and about \$2.5 billions in investment was eventually written off. This occurred because the second network builder, Telstra, was investing primarily to protect existing revenues from its telecommunications network and therefore did not have to make sustainable revenues and profits from the HFC network.

Why then would two or more identical FTTX networks make sense? Competition between FTTX, cable, wireless or other technologies for some services might be viable, but only because they would have some differentiation potential.

The cable experience shows that the only investment in an identical network that makes economic sense is a predatory investment by an incumbent willing to sacrifice capital to protect monopoly power and revenues. This is not in the interest of the broader economy.

This issue is also discussed in other CCC submissions to the inquiry.

Myth 3: It does no harm that Telstra has market power

The third and final leg of the Telstra argument that Australia should abandon the principle of economic regulation to control market power as it pertains to Telstra is to suggest that it does no harm that Telstra has market power.

To do this, Telstra seeks to employ the tactic its management has described as “change the conversation”. In this context, this means avoiding discussion about the high prices

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<http://www.accc.gov.au/content/item.phtml?itemId=840731&nodeId=32197ee4acd23e130aaa68f157f3e15c&fn=Telstra%20Ergas%20depreciation%20report,%20Aug%2008.pdf>

Australians pay for telecommunications services, while instead talking about the high costs Telstra claims it incurs in delivering services in Australia.

It's not our fault prices are high – Australia is Big

Telstra has claimed that the reason for high prices in Australia is that the population nationally is widely spread and there are areas of low population density.

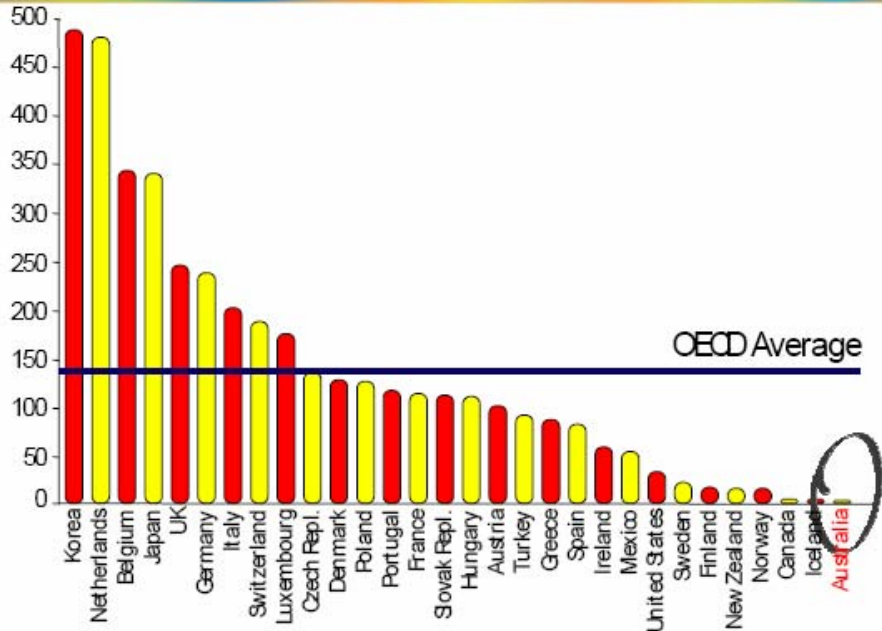
Telstra's own presentations demonstrate that this is nonsense. Telstra has recently presented a slide of the most-to-least dense populations in the OECD. The country most like Australia in its population and economic characteristics is Canada.

If it was true that lack of population density explained high prices, Canada should show the same pricing characteristics. In fact, Canadians have some of the lowest prices in the OECD.

The following three tables demonstrate the point.

The first is a table the Telstra has used to illustrate the low population density in Australia. Canada's population density can be seen to be comparable.

The second and third are the prices of a comparative bundle of fixed line voice services for business. The question immediately arises: why does Canada enjoy prices for basic business fixed line voice services substantially below the OECD average, when Australia is the third most expensive in the OECD?



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Finally, there is counter evidence to suggest that Telstra enjoys and exploits market power in ways that even its counterparts in the rest of the developed world do not.

The following table is drawn from a report prepared for Optus comparing the prices for various retail broadband packages, based on the amount of data downloaded.

It demonstrates that Telstra for these services too is able to price services well above the incumbents in Canada. In fact, it is clearly the king of high prices of all of the incumbents compared.

Comparison of Incumbent ISP package price Australian rankings versus Canadian
 Rankings: source Spectrum Value Partners

Product Type	Australia Ranking	Canada ranking
Ultra Low (200MB)	11 th	6 th
Low (500MB)	17 th	4 th
Medium (2GB)	18 th	5 th
High (10GB)	18 th	4 th
Ultra High (30GB)	18 th	3 rd

Number of operators 18

Note: Excludes bundled offerings, DSL contracts are 12 months, user has a fixed line

Prices and The NBN: The High Prices Behind Telstra’s Rhetoric

“Telstra will give Price Certainty” – by stapling prices to the ceiling

Telstra, having spent years accusing the ACCC of forcing it to sell “below cost”, has invented a new terminology to give legitimacy to its desire to be allowed to set unregulated prices for services delivered over an NBN – “value-based pricing”.

It must be remembered that the allegations by Telstra that it is forced to sell below cost have been repeatedly tested by the Australian Competition Tribunal and rejected. Further, Telstra argued in New Zealand in favour of the Total Service Long Run Incremental Cost methodology for establishing regulated prices, the same methodology the ACCC uses in Australia. This methodology allows for a full recovery of costs, including a contribution to overheads, in regulated prices. It is explicitly not marginal cost pricing, despite Telstra’s often repeated claims.

Telstra now proposes something that it calls “value” pricing of new services. The CCC submits that this is a fundamentally dishonest concept that is simply intended to disguise the fact that where Telstra has market power, it wants to be able to set prices wherever it likes for various services.

This becomes more clear when one considers that Telstra has separately claimed that it wants to lock in prices for 15 years to mitigate its “risk”. Telstra has tried to paint this as a virtue by suggesting it will give pricing certainty to consumers.

In fact, Telstra is seeking to “anchor” prices in Australia to the ceiling. Numerous studies, including those from the OECD have demonstrated that Australians are paying among the highest prices for basic services in the world. (See above)

Prices in Australia are high because Telstra has been able to exploit its market power. Telstra proposals for “value-based prices” and a 15 year price lock in, and its false promise of “anchor prices”, are a recipe for Australians to continue to be the most

disadvantaged consumers of telecommunications services in the developed world until at least the 2020s.

Telstra's version of Open Access Is a Con

Telstra has recently been cynically claiming that it would propose an open access network. Telstra is using this terminology only because this is what the Government has required.

However, it has actually described a regulatory model that meets NONE of the basic conditions of open access and accepted by the rest of the industry.

Again, Telstra has not departed from the regulatory formula it first presented in August 2005, which is based on the radical deregulation of incumbent telecommunications companies in the US since 2001.

Under this model, the only competition is between vertically integrated networks, where there are multiple connections from everyone home to the core networks.

Telstra spokesman Phil Burgess confirmed that this was Telstra's view of how competition would work under its regulatory model in September when he said:

“Sol expects that there will be competition. We expect that if we build the NBN someone else will come along within 18 to 24 months and build another NBN network at least in the urbanised parts of the country.”

As recently as 23 June 2008, in a special media briefing, Donald McGauchie described his belief that Australia should move:

“(A)way from “open access” type requirements, in which competitors can free ride or cheap ride on incumbents’ networks, to one based on competition between fully vertically and horizontally integrated rivals, and especially between the telecommunications companies, with their copper based networks, and the cable television companies, with their hybrid fibre coax networks.”

In other words, Australia should have unregulated, massively powerful geographic duopolies rather than genuine competition.

Despite repeatedly failing in its claims before the courts that Telstra is forced to provide below cost access to its network, and recording profit margins that outstrip its international peers, Mr McGauchie continues to use the discredited claim about “free riding competitors” as the basis of his demands for Telstra to be freed of its legal obligations to provide access its monopoly network elements.

Mr McGauchie went then so far as to laud a system where:

“(T)he incumbent telecommunications companies are simply not required to provide third party access to the high speed networks that they are building”

This is exactly what Telstra has been demanding since 2005. It refuses to accept even the judgment of the High Court that rejected its arguments comprehensively.

There is no question that Telstra’s proposed regulatory arrangements presented to the Government in June are designed to deliver exactly such a situation. Telstra’s tissue thin claims that it proposes open access do not bear scrutiny of the comments that Telstra has made in other places.

For example, Telstra has clearly said it does not intend to supply itself access to a new network on the same terms as other customers. This was made abundantly clear in July by Telstra’s head of wholesale, Kate McKenzie, in an interview with Alan Kohler in Business Spectator.

Alan Kohler: So Kate, if Telstra builds the fibre-to-the-node network under the NBN (national broadband network), will you be managing it?

Kate McKenzie: Well, I’ll certainly be selling access to wholesale customers and hopefully I’ll then be selling a lot more access to a lot more customers. I guess one of the important motivators for the building of the FTTN (fibre-to-the-node) network is that at the moment only about 20 per cent of customers can actually get 20 megabytes of speed. The other two thirds in metropolitan regions can’t even get 12 megabytes and more than 50 per cent of people in the country can’t get 12 megabytes, so I would hope that if that were to come to pass there would be many more broadband services to be sold.

AK: And will you be selling access to Telstra retail as well?

KM: *That’s not the way we do it.* I would certainly be selling access to wholesale customers of Telstra and we would be *having a specifically designed wholesale product set* that suits the needs of wholesale customers and a lot of thought and effort is going into the development of those products as we speak.⁵ (Italics added)

Ms McKenzie is describing arrangements whereby any company other than Telstra that wishes to be able to reach a customers’ home will be forced to buy an access “product” from Telstra: a product that *Telstra itself does not buy*. In fact, Telstra explicitly demands that it should be able to supply services to itself and itself only, beyond that limited wholesale service that it will design.

⁵ <http://www.businessspectator.com.au/bs.nsf/Article/INTERVIEW-Kate-McKenzie-GM82Z?OpenDocument>

Further, despite the “thought and effort” Ms McKenzie says is going into designing the access product that all wholesale customers will be forced to use, the CCC is aware of no efforts by Telstra to involve those customers in the design of this “product set”.

In other words, Telstra intends to continue with the lopsided access arrangements that have failed in Australia, and which failed in the UK and New Zealand, forcing fundamental regulatory reform there.

Telstra’s version of “open access” clearly means that everyone except Telstra will be offered a one size fits all, single FTTN wholesale access product designed without their involvement.

Telstra, on the other hand, will not “buy” access services to support all of its retail offerings over the network. The cost to it of providing a retail service over the NBN will be completely opaque, even though it will use exactly the same infrastructure as its competitors, because it does not intend to allow regulation of many of the retail services it offers.

There will be no arm’s length dealing between the retail and wholesale businesses of the type that is a fundamental element of any genuine open access arrangement designed to deliver true equivalence of access to the monopoly network. Even if Telstra puts in place such an arrangement for a token access service, it is quite clear that it intends to offer services at a retail level that others will not be allowed to replicate.

This does not only create price discrimination. It creates a raft of non-price discrimination problems. The problems in the market today demonstrate them quite clearly.

For example, Telstra has made an art of maximizing the inconvenience that customers suffer when they wish to move from Telstra to another service provider,. Telstra has a long history of being the last to join, or in some cases refusing to be a party to, the systems developed by the industry to allow customers to easily move their services from one provider to another.⁶

In the UK, BT behaved in the same way until functional separation was introduced and BT was required to buy bottleneck access products at arm’s length from its new Open Reach division, just as its competitors do.

Telstra has recently made much of concerns that emerged in the UK after functional separation of BT was introduced. There was a period when customer satisfaction fell after the introduction of functional separation.

⁶ Customers wishing to transfer their broadband service from one provider to another can often suffer minimal disruption because companies have agreed to use automated processes to transfer lines and services. This is typically not the case for customers transferring from Telstra BigPond because BigPond avoids participating in these industry processes wherever it can. The result is that a customer moving a broadband service from Telstra BigPond to a competitor may face a period of weeks during which they are cut off.

Telstra does not explain that the reason for this was that when BT was forced to use the same products as its competitors, it quickly found that the products did not support the retail services that BT had been able to provide from its previous position of privileged access to the network.

In other words, this disruption was evidence of the functional separation of BT doing exactly what it was supposed to do – exposing and ending discrimination and inequity that was preventing competition from developing as it should and frustrating consumers wishing to exercise choice. It forced the raising of the standards for the delivery of access services for *all* customers.

Conclusion

The CCC submits that the proposals Telstra is advocating in 2008 differ only rhetorically from those it presented in 2005. No responsible policy maker could accept such a set of propositions in 2008, just as they did not in 2005.

On the other hand, the NBN process represents an opportunity to resolve the failures in the competitive structure of the Australian telecommunications market. That will mean both lower prices and better services for consumers, and should mean a dilution of the inflated margins and market share that Telstra continues to enjoy.

For this reason, Telstra is sparing nothing in the money and resources it is devoting to preventing pro-competition reform.

Policy makers should see the Telstra effort to force radical regulatory removal in the context of the evidence that structural reform is not an option if Australia is to recover from its position as the bottom of the class in the developed world for the prices of communications services today.

It is not enough to simply resist Telstra's demands to roll back regulation. The regulatory arrangements in place today have failed to deliver, and will be woefully inadequate to deal with market power in an NBN world.

Only structural separation of the new network will provide a robust basis for effective competition.

The CCC would be happy to provide any further information to the committee or to participate in public hearings, if requested.

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