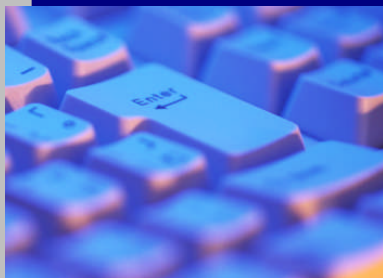


Infrastructure Partnerships Australia is a national forum, comprising public & private sector CEO Members, advocating the public policy interests of Australia's infrastructure industry.



Infrastructure Partnerships Australia

Submission on
Senate Select Committee on the
National Broadband Network
19 August 2008

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Infrastructure Partnerships Australia

Infrastructure Partnerships Australia (IPA) is the nation's peak infrastructure body. Our mission is to advocate the best solutions to Australia's infrastructure challenges, equipping the nation with the assets and services we need to secure enduring and strong economic growth and, importantly, to meet national social objectives.

Infrastructure is about more than balance sheets and building sites. Infrastructure is the key to how we do business, how we meet the needs of a prosperous economy and growing population, and how we sustain a cohesive and inclusive society.

Infrastructure Partnerships Australia seeks to ensure governments have the maximum choice of options to procure key infrastructure. We believe that the use of public or private finance should be assessed on a case-by-case basis. IPA also recognises the enhanced innovation and cost discipline that private sector project management and finance can deliver, especially with large and complex projects.

Our Membership is comprised of the most senior industry leaders across the spectrum of the infrastructure sector, including financiers, constructors, operators and advisors. Importantly, a significant portion of our Membership is comprised of government agencies.

Infrastructure Partnerships Australia draws together the public and private sectors in a genuine partnership to debate the policies and priority projects that will build Australia for the challenges ahead.

1. Introduction

Infrastructure Partnerships Australia (IPA) welcomes the opportunity to make a submission to the Senate Select Committee on the National Broadband Network (NBN).

The focus of IPA's submission is the economic, commercial and regulatory impediments to delivering on the Government's vision of a competitive, cost effective and high-speed NBN. IPA's submission to the Select Committee addresses two key issues:

1. The failure of the current regulatory framework to foster effective competition in telecommunications; and
2. Changes to the regulatory framework which would achieve competition in a NBN environment, safeguard consumers and deliver the Government's vision for Australian consumers and businesses in the global digital economy.

Executive Summary

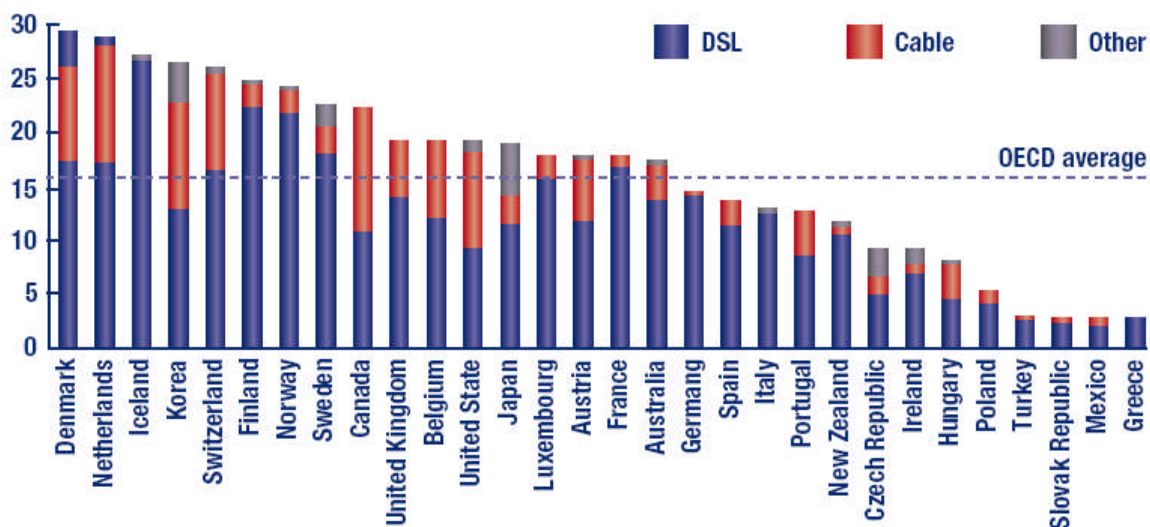
- Infrastructure Partnerships Australia commends the Australian Government on its recognition of the benefits and commitment to delivering a fast and affordable national broadband network. We support the Government's commitment to invest in a fibre-based broadband network, which will allow Australia's businesses and consumers to better engage with the full capabilities of the digital economy.
- The Government has indicated its willingness to consider changes to existing telecommunications regulations, should they be necessary, to facilitate the procurement and operation of the planned NBN.
- Since competition was introduced in telecommunications in Australia, operators in the sector have been subject to rules to prevent anti-competitive behaviour. However, we contend that the current regulatory framework needs significant reform to ensure a 'level playing field' between dominant market participant, Telstra, and other existing and new market entrants.
- Current pricing principles also need significant adjustment to provide an effective framework for negotiation of reasonable terms and conditions for access seekers to the new broadband network.
- IPA submits that the current regulatory and policy framework has demonstrably failed to facilitate an optimal level of competition between retail service providers in the telecommunications market. The regime has consequently failed to deliver the best possible outcome for Australian consumers.
- Due to the relatively small size of the Australian market and the significant capital cost of constructing the proposed National Broadband Network, the roll-out of a competing dual network is most unlikely. It appears inevitable that the NBN will involve a monopoly market structure.
- Failure to deliver a new, competitive market structure that fosters contestability of supply would be at odds with sound policy and will frustrate the social and economic objectives of the Government in investing in the NBN.

- The proposed roll-out of the NBN 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.
- IPA submits there is a demonstrable need for a regulatory framework to ensure a "level playing field" which maintains the neutrality of services over the internet.
- IPA considers the best way to regulate the NBN is to structurally separate the NBN's wholesale and retail operations. Regulatory mechanisms to guarantee access to facilities should be secured beyond legal challenge. It is imperative that Government ensures the NBN operator and access providers are unable to discriminate in favour of their own services over those of other services or applications.
- IPA considers changes to the regulations to deal with access and pricing issues to also be necessary. We suggest that the Government empower the Australian Competition & Consumer Commission (ACCC) to perform critical oversight functions in the NBN environment, such as approving access terms and prices. IPA recommends the Government empower the independent regulator to step in and set access terms that it considers are reasonable in situations where it judges terms for access are unreasonable and/or not in the long-term interests of end-users.

2. Background to IPA's submission

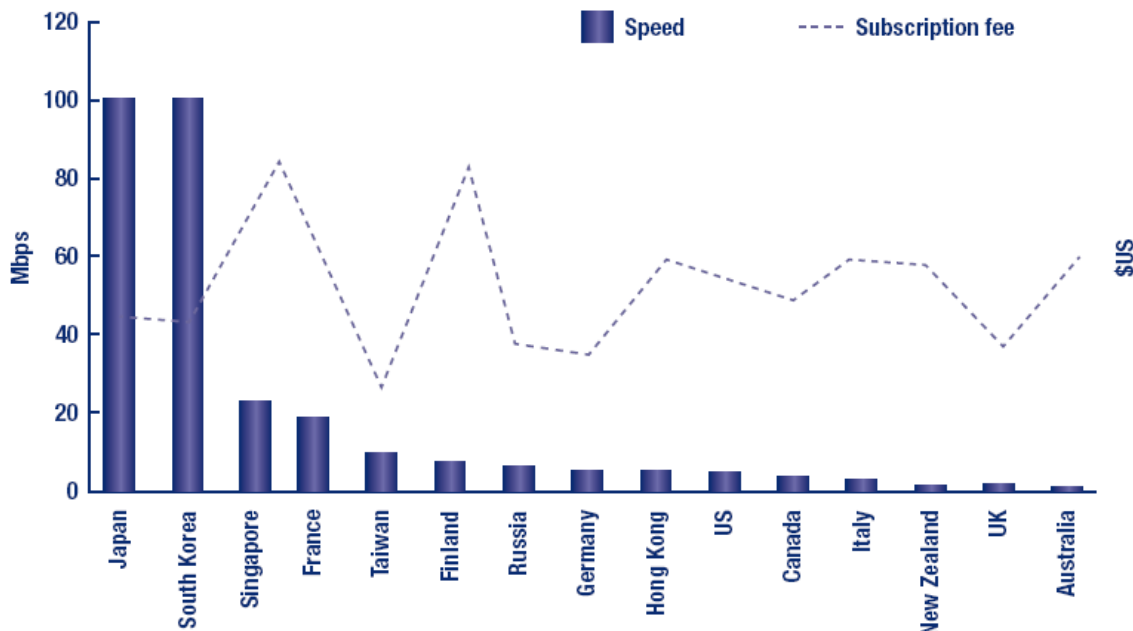
In the 21st century the functions of governments, industry and the Australian population are increasingly reliant on access to electronic information. Australia has long grappled with the need for a high bandwidth telecommunications backbone, but until now, Australia's development in this regard has not been fully realised.

By global standards, the penetration of broadband internet into Australian homes – and the speed of the available service – has been relatively poor. Australia ranks just 17th in the OECD in household penetration of broadband, as reflected in the figure below:



Source: Australia's Infrastructure Priorities: Securing our Prosperity, Infrastructure Partnerships Australia, 2007

Even in homes and businesses that do have access to broadband internet, the bandwidth available is relatively low and the price at which it is available is relatively high. The speed versus price in peer nations is contained in the figure below:



Source: Australia's Infrastructure Priorities: Securing our Prosperity, Infrastructure Partnerships Australia, 2007

On 21 March 2007, then Opposition Leader Kevin Rudd announced a policy which would see \$4.7 billion of public equity invested in a national broadband telecommunications backbone. Mr Rudd committed to deliver a network which;

- Would service 98 per cent of Australia's population;
- Will deliver download speeds up to 40 times faster than those currently available; and
- Deliver the network in partnership with the private sector.

At the time, Mr Rudd stated:

"Nation building for the 21st century lies in building a new national broadband network. It's part of our pathway to the future. Why is this necessary? When you look at Australia in the international comparative data – we have a problem on our hands. We currently have the 17th broadband take-up rate when measured across the OECD, that's the 17th fastest.... when it comes to the measurement of world broadband bandwidth, we are currently lying something like 25th in the world. Against those measures we have a problem in terms of our international economic competitiveness.... unless it's fixed, we're going to face a real problem in term of long-term productivity growth."¹

In confirming the Government's commitment to deliver the NBN, Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy said:

"Strengthening competition and maximising benefits to consumers are key aspects of the project.... The new network will be required to facilitate competition through open

¹ Statement by Kevin Rudd, 21 March 2007, available at <http://www.alp.org.au/media/0307/pclloo210.php>

access arrangements. The network operator must provide for equivalence of access charges and it must allow access-seekers to differentiate their product offerings. These arrangements will ensure that the Network facilitates the delivery of innovative products and services to consumers.”²

Earlier this year, the Federal Government requested submissions from industry and interested groups on regulatory issues associated with the NBN, including consumer safeguards. At that time, Minister Conroy indicated that the submissions received would be taken into account by the Panel of Experts appointed to evaluate proposals from suppliers, with a view to identifying the successful proponent by the end of 2008. That process closed on 25 June 2008.

Many of the submissions received by the Government under that process argued in favour of structural separation of the network’s wholesale and retail operations and for improvements to competition and performance in the backhaul network. IPA supports both of these views.

On 25 June 2008, the Senate Select Committee on the National Broadband Network was established to inquire into the Government’s NBN proposal. The Committee will report on the Federal Government’s proposal to partner with the private sector to upgrade parts of the existing network to fibre to provide minimum broadband speeds of 12 megabits per second to 98 per cent of Australians, on an open access basis.

Other issues for the Select Committee include: the implications of the NBN for consumers in terms of service availability, choice and costs; competition in telecommunications and broadband services; and the likely consequences of the NBN for national productivity, investment, economic growth, cost of living and social capital.

3. Submission

IPA commends the Federal Government’s recognition of the social and economic benefits access to fast and affordable broadband can offer. IPA supports the Government’s vision of a high-speed NBN which delivers minimum speeds of 12 Mbps to 98 percent of Australians - as part of a plan to stimulate productivity, economic growth and provision of services. IPA endorses the policy objectives underpinning the vision.

The Government has demonstrated its leadership – and its commitment - to delivering a world-class broadband network through the allocation of \$4.7 billion in public monies for the NBN roll-out. We welcome the Government’s explicit commitment to partner with the private sector for the delivery of this critical national infrastructure.

The National Broadband Network will represent the single largest investment in broadband infrastructure in the nation’s history. A competitive, affordable network will allow Australian consumers and businesses to better harness the benefits and opportunities offered by the global digital economy.

The opportunities presented by the Government’s plan to develop the NBN are twofold;

- (a) It provides an opportunity to build critical national infrastructure to ensure the future prosperity of all Australians; and

² Senator Stephen Conroy, Address to Australian Technology Users Group Conference, 12 March 2008, available at http://www.minister.dbcde.gov.au/media/speeches/2008/address_to_atug_conference

- (b) It delivers an opportunity to address obstacles in the existing regulatory telecommunications regime which stymie competition and/or pose an obstacle to the Government's objectives in developing the NBN.

To deliver the maximum social and economic benefits from the development of an NBN, the Australian Government must retain a clear-minded focus on delivering a robust, competitive market structure. A competitive market which engenders contestability and fosters competition will ensure the greatest number of Australian consumers and businesses will have affordable access to the National Broadband Network. IPA submits that significant regulatory reform toward a more competitive environment will be critical to achieve the policy objectives and realise the full benefits of a nationwide, high speed telecommunications backbone.

3.1 Failures of the current regulatory regime

- 3.1.1 Since competition was introduced to Australia's telecommunications market, operators in the sector have been subject to multifaceted regulations to limit potential anti-competitive behaviour. For instance, the incumbent network operator, Telstra, is required to maintain operational separation between its divisions for retail, wholesale and network services. The objective of this requirement is to allow Telstra to obtain legitimate benefit from its vertical integration in the market while ensuring it cannot discriminate in favour of its own retail activities over those of its wholesale customers.

In practice, the current regulatory framework has faced significant challenges to ensure a robust, competitive market between a vertically integrated, operationally separated Telstra and other market participants. Pricing principles have similarly faced challenges in providing an effective, competitive framework for the negotiation of the necessary terms and conditions to encourage the strongest and most competitive market.

Limited self-regulatory mechanisms and unduly complex processes in the existing regulatory framework have led to concerns that Telstra leverages its market power, derived from control of the physical network infrastructure, to limit competition and consumer choice.

Telstra's vertical integration enables it to undermine retail competition in a way that the current regulatory framework cannot control. Telstra can refuse to sell services to its retail competitors. It can provide higher performance standards to its retail customers than wholesale customers and it can squeeze retail-wholesale prices.

Telstra has been able to block market entry of innovative technologies that threaten its business. Telstra switched on ADSL 2+ for its customers long after the capability had originated - and then only when competitors offered these products. Other companies were left to innovate while Telstra stifled competition by wholesaling access at rates so high that competitors could not make a return relative to Telstra's retail price.

- 3.1.2 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.

Uncertain conditions and obstacles to effective competition in the Australian telecommunications market have significantly inhibited investment in physical infrastructure by access seekers, resulting in little infrastructure-based competition at a retail level.

- 3.1.3 IPA submits that the current regulatory and policy framework has failed to facilitate an optimal level of competition between retail service providers in the telecommunications market. The regime has consequently failed to deliver the best possible outcome for Australian consumers.

Moreover, IPA considers the current regulatory framework to be unsuitable for regulating the National Broadband Network.

- 3.1.4 The continuation of the existing regulatory regime in the context of the NBN would ultimately block achievement of the policy goals underpinning the Government's vision of a \$4.7 billion high-speed broadband network delivering minimum speeds of 12 Mbps to 98 percent of Australians.

3.2 Regulatory changes advocated by IPA

- 3.2.1 The case for reform of the telecommunications sector has been widely recognised for some time. Labor's former Communications spokesperson, Lindsay Tanner, described the need for such reform as follows:

"The primary reform challenge in telecommunications is to achieve a clearer definition of Telstra's role, and to ensure that the regulatory regime enables it to fulfil its obligations. To achieve better and cheaper services for consumers, full access to communications services in regional Australia and greater innovation and investment in our communications networks, we need to re-examine the entire structure of the telecommunications sector."³

Even the current Minister for Communications and the Digital Economy, Senator Stephen Conroy, acknowledged this need while in Opposition:

"It is becoming increasingly clear that the current telecommunications regulatory regime is at the end of its useful life and that serious reform is now necessary."⁴

With the imminent roll-out of the NBN, the Government has a timely opportunity to adopt a new approach to telecommunications regulation.

- 3.2.2 IPA submits that the internet must be maintained as an open platform if Australian consumers and businesses are to fully realise the opportunities of a global digital economy. In order to maintain the neutrality of services over the internet in the context of the proposed NBN, the Government must develop a regulatory framework which ensures a truly "level playing field" and maintains the neutrality of services over the internet.

The importance of such neutrality is internationally recognised. The Seoul Declaration released following the OECD Ministerial Meeting in Korea on 18 June 2008 called on

³ Lindsay Tanner MP, Shadow Minister for Communications, "Reforming Telstra", 2002, p.35.

⁴ Minister for Communications and the Digital Economy, Senator Stephen Conroy, Media Statement, June 2005.

OECD members “to oppose discriminatory practices by network providers against particular applications, devices or content.”⁵

- 3.2.3 The combined effect of the small size of the Australian market and the high fixed costs associated with building the network infrastructure required to deliver high-speed broadband services at minimum speeds of 12 Mbps to 98 percent of Australians, means duplication of the network is unlikely.

It would appear inevitable that the NBN will involve a monopolistic market structure. Opportunities for facilities-based competition in the NBN environment will also be limited.

Regardless of the final identity of the network provider, IPA sees an essential need to separate ownership of this new network from downstream retailers.

- 3.2.4 Structural separation has been the default approach for reform of markets in the gas and electricity sector in Australia and overseas. While the approach has been criticized in some quarters, in hindsight, the reform of these markets has had clear economic benefits. IPA submits that the same approach should be applied to telecommunications.

The Australian Competition and Consumer Commission has also come out in support of this approach for reform in the telecommunications sector. The ACCC has said:

“A vertically separated ownership model could reduce incentives for the access provider to discriminate between downstream users of the access service and, therefore, facilitate strong and effective competition between access seekers in retail markets.”⁶

All State and Territory governments endorsed this approach in the Fifteenth Online and Communications Council Communique on 21 May 2008:

“The state and territory Ministers expressed their strong preference for a solution [regarding the NBN] to be operated by a genuine wholesale provider that is separate from any retail service provider.”⁷

In international markets including Singapore, Britain and New Zealand, there is an identifiable trend to separate incumbents in telecommunications.

- 3.2.5 IPA considers the best way to regulate the NBN is to structurally separate the NBN's wholesale and retail operations. Regulatory mechanisms guaranteeing access to facilities should be secured beyond legal challenge. It is imperative that Government ensures the NBN operator and access providers are unable to discriminate in favour of their own services over those of other services or applications.
- 3.2.6 In addition to developing a regulatory framework which delivers true and effective structural separation, changes to the regulations are needed to deal with access and pricing issues.

⁵ See <http://thepublicvoice.org/events/seoul08/seoul-declaration.pdf>

⁶ Graeme Samuel, ACCC, Regulatory Update for 2008, Speech to Australia Telecommunications Users Group Annual Conference, Sydney, 13 March 2008.

⁷ See http://www.occ.gov.au/releases/fifteenth_online_and_communications_council_communique

The experience of the Australian Competition & Consumer Commission, as with its existing responsibilities for competition and economic regulation of telecommunications, well qualifies the body for performing critical oversight functions in the NBN environment. While the ACCC would require more resources to perform such functions, there are natural synergies for the organisation in such a role given its considerable experience regulating other industries that have well-functioning, albeit regulated, markets, such as the gas and electricity sectors.

- 3.2.7 IPA suggests the Government reform the regulations to ensure access terms and prices are subject to approval by the independent regulator, the ACCC. IPA considers that the ACCC should have an active role in setting prices in the telecommunications sector and be directly involved in setting the initial prices for access to the new NBN. IPA further submits that later changes to prices should also require ACCC approval.
- 3.2.8 Finally, IPA recommends the Government empower the independent regulator to step in and set access terms that it considers are reasonable in situations where it judges terms for access are unreasonable and not in the long-term interests of end-users.

4. Conclusion

Infrastructure Partnerships Australia commends the Federal Government on its commitment to developing a high-speed NBN with minimum speeds of 12 Mbps to 98 percent of Australians. The Government's focus on investing in this infrastructure in partnership with the private sector as part of a plan to stimulate productivity, economic growth and provision of services is both welcome and timely.

Infrastructure Partnerships Australia recognises that the delivery of better broadband services is critical to sustaining and enhancing Australia's economic growth and ensuring consumers and businesses fully benefit from all the opportunities offered by the global digital economy. The high expectations of the community in terms of the services to be delivered by the potential NBN mean that the Government must ensure the greatest number of Australian consumers and businesses have affordable access to the NBN.

IPA submits that significant regulatory reform towards a more competitive environment will be critical if the Government is to achieve its policy objectives and realise anticipated benefits from the NBN initiative. Furthermore, we respectfully suggest that the imminent roll-out of the NBN provides a timely opportunity for the Government to adopt a new approach to the regulatory framework for telecommunications in Australia.

As it appears inevitable that the NBN will involve a monopolistic market structure, it is essential for the NBN's regulatory framework to ensure a truly "level playing field" and maintain the neutrality of services over the internet.

IPA considers the best way to regulate the NBN is to structurally separate the NBN's wholesale and retail operations. It is imperative that Government ensure the NBN operator and access providers are unable to discriminate in favour of their own services over those of other services or applications.

IPA submits that changes to the framework governing access and pricing are also desirable. To this end, we suggest that the Government empower the ACCC to take a more active role in setting prices in the telecommunications sector. IPA submits that the ACCC should be directly involved in setting prices for access to the new NBN.

IPA also recommends empowering the independent regulator to step in and set access terms that it considers are reasonable in situations where it judges terms for access are unreasonable or not in the long-term interests of end-users.

If you would like to discuss the IPA submission, please don't hesitate to contact our National Manager, Policy – Ms Joanne McCafferty on (02) 92402053.



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