



**Submission to Senate Select Committee
on the National Broadband Network**

September 2008

TERMS OF REFERENCE

1. That a select committee, to be known as the Select Committee on the National Broadband Network, be established to inquire into and report by 30 March 2009 on:
 - a. the 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; and
 - b. the implications of the proposed National Broadband Network (NBN) for consumers in terms of:
 - i. service availability, choice and costs,
 - ii. competition in telecommunications and broadband services, and
 - iii. likely consequences for national productivity, investment, economic growth, cost of living and social capital.

INTRODUCTION

Primus Telecom (Primus) welcomes this opportunity to make a submission for consideration by the Select Committee on the National Broadband Network (NBN). In this submission Primus takes the opportunity to comment on the regulatory arrangements necessary for the NBN to deliver on its objectives.

Primus is a full service provider in the communications sector, operating a five-city switched network with over 100 points of presence, and has been an active and significant competitor in the industry since deregulation. Over the past 10 years Primus invested considerably in establishing itself as a competitive participant in the Australian communications industry. During that time Primus has installed its own broadband network across more than 250 exchange areas.

BACKGROUND

The significance of broadband to consumer welfare and economic growth is well accepted. Australia has not performed to its full potential, and the Government's initiative to facilitate the deployment of a high speed NBN is designed to address this.

Primus supports a proposal for the Government to partner with the private sector to roll-out a high-speed NBN that delivers improved productivity, drives business competitiveness and maximises consumer welfare and the national interest.

However, as acknowledged around the world, these outcomes can only be delivered through ensuring a truly competitive broadband industry. Whether or not the NBN delivers on its potential is critically dependent on the right decisions being made in relation to, amongst other aspects, network infrastructure and design, the regulatory framework, and the appropriate prioritisation of outcomes.

If the right infrastructure and associated settings are not put in place then the NBN will not deliver on its potential for improving:

1. service availability, choice and costs,
2. competition in telecommunications and broadband services, and
3. national productivity, investment, economic growth, cost of living and social capital.

A key concern shared by Primus and much of the industry is to ensure an effective regulatory framework is in place specifically designed to enhance

competition, in the national interest. In the view of Primus it is critical that access to the NBN is made available to industry participants on fair and reasonable terms, and that the network operator is not able to favour a particular access seeker (or access seekers). These are sound and well accepted principles, and acknowledged as prerequisite to incentivising an outcome that fosters genuine competition and maximises consumer welfare and the national interest.

Historically these incentives have been absent in relation to bottleneck communications infrastructure in Australia. This has held back competition and compromised consumer benefit. It is clear that high speed broadband and naked DSL would have arrived on the market much earlier if someone other than Telstra was in control of the monopoly components of the network. Telstra's control of the bottleneck infrastructure and its publicly announced retail profit agenda has counteracted the incentives that would typically operate to drive the maximum utilisation of the network and the introduction of new and innovative services. The advent of an NBN will present an opportunity to address these shortcomings. The clear solution is to remove any incentives for the NBN operator to engage in anticompetitive or anti-consumer conduct through ensuring it is independent and structurally separated from any retail industry interests.

EXPERIENCE TO DATE - THE FAILURE TO DELIVER ON COMPETITION AND NATIONAL PRODUCTIVITY

In examining the implications for consumers in respect to the NBN it is useful to consider some of the failings to date. Experience over the last 10 years has highlighted impediments to competition and the national interest that stem from the current industry structure, which requires Telstra to begrudgingly supply key inputs to retail competitors. Primus submits that these impediments to competition would not necessarily arise if the network operator was independent and structurally separated from any retail interests.

- **Access to exchanges**

The access regime mandates Telstra to give competitors access to public exchanges. Telstra's obstruction of access to public telephone exchanges has been well publicised. Telstra has impeded broadband competition through delaying and obstructing access seekers from installing broadband equipment (DSLAMS) in public exchanges.

More recently Telstra has also denied access to exchanges stating that these were capped – purporting (as it turned out falsely in many cases) that there was no room in exchanges for competitors to install their own equipment.

This is a clear case where an independent network owner would have encouraged interconnection in order to maximise network utilisation.

- **Obtaining network access terms**

Telstra habitually refuses to reach agreement with access seekers in relation to fair and reasonable terms and conditions of access to the network. For example, to the best knowledge of Primus no access seeker has ever reached genuine agreement with Telstra in relation to ULL pricing, a key interconnection service. To obtain terms of access industry participants must typically notify an arbitration to the ACCC in order for the ACCC to settle the terms. The arbitration process is lengthy and expensive, and subject to gaming by Telstra. At times the ACCC can have more than 40 access disputes on its books, which leads to a lengthy backlog and delay. Some of these arbitrations take more than 2 years to resolve, and by the time a determination is made the parties are in dispute again about the forthcoming period.

- **Wholesale / Retail Price squeezes**

Telstra has a practice of pricing its retail and wholesale services in such a way that insufficient margins are available for competitors to actively or aggressively compete with Telstra retail offerings. This drives down competitive participation in the retail industry. On occasions the wholesale terms are absolutely uncommercial. This is counter to the incentives that would normally drive a wholesale business to profit maximise through expanding utilisation of its wholesale services. The ACCC has issued competition notices against Telstra in respect to price squeeze conduct concerning both broadband and line rental services, however this threat has not been effective in disciplining Telstra.

- **The case of high speed broadband (ADSL2+)**

As well documented, Telstra rolled out ADSL2+ services in more than 900 new exchanges as a consequence of Government concession, but refused to permit wholesale access to this high speed broadband service. It is clear that a structurally separated network owner in a similar position would have offered that service to wholesale customers.

- **Information asymmetry**

Telstra has an advantageous position in the retail market because of the competitor information available to its wholesale arm. Much of this information relates to customer data and is commercially sensitive. The well-accepted failure of operational separation gives no comfort to industry competitors that this information is appropriately protected from

disclosure. These concerns would clearly not arise with an industry structure whereby the network operator did not have its own retail agenda, and therefore no conflicting interests.

THE KEY REGULATORY REQUIREMENTS FOR AN NBN

As noted earlier, Primus supports a proposal to partner with the private sector to roll-out a high-speed NBN that delivers improved productivity, drives business competitiveness and maximises consumer welfare and the national interest. However, in order to appropriately capture the benefits available from the deployment of the NBN, Primus considers the following key regulatory proposals must be put in place.

- **Rules enforcing the right structure in the industry - “structural separation”**

Under operational separation the people who run both wholesale and retail arms are appointed and are responsible to the same overarching management and board. In making decisions they know what is in the interests of their company and what is required of them to protect its interests, even at the expense of other competitors and consumers.

Structural separation, on the other hand, eliminates the incentives to engage in anticompetitive conduct. The interests of an independent structurally separated company are not aligned with the interests of any particular retailer, but with retailers and consumers generally. An independent network has a commercial interest in maximizing traffic on the network and therefore encouraging innovation in services.

- **Rules mandating equivalent access terms, and prohibiting discrimination**

To ensure a level playing field it should be mandated that the network operator must offer equivalent rights of access to wholesale customers. While this is less of a concern with a structurally separated operator, there still remains potential for large retailers to unduly negotiate better terms. While these may at times be justified by efficiency arguments, in the absence of such justification they distort the efficiency of the retail offerings, perpetuating discrimination against other industry participants and new entrants.

- **New processes for determining published reference tariffs and non-price terms and conditions for all network services**

As noted above, the current process for obtaining access pricing is wasteful and inefficient, taking many years to resolve and requiring each access seeker to fund its own litigious and lengthy dispute. Primus considers the ACCC should be empowered to determine price and non-price terms of access before the relevant regulatory period commences, in the context of a single and open industry inquiry. This would provide access certainty and permit the industry to plan ahead.

Access tariffs should be based on efficiently incurred cost and should seek to promote the long-term interests of end-users. The returns allowed on any investment in the NBN need to be reasonable having regard to the desire to promote affordability. The permitted return should not overstate the level of risk associated with the investment.

- **Specification of minimum available cornerstone services.**

An initial regulatory inquiry should define a set of minimum services that must be offered by the network operator. Primus would anticipate a suite of voice and broadband access services being made available. There must be specific consultation around these services with industry participants (wholesale customers) having a right to inform the process.

- **Oversight and arbitration processes**

In the event of dispute with the network operator in respect to network operational decisions, or decisions impacting on services, or disagreement around the nature of the services offered, a wholesale customer should be entitled to lodge a complaint with an oversight group or arbiter. That arbiter could be charged with determining a fair and reasonable outcome in the event of such dispute. The ACCC broadly exercises similar arbitration powers, and Primus sees no reason why the ACCC should not exercise this function in the NBN context.

- **Commitment to parts XIB and XIC**

In addition to making decisions about specific NBN regulatory tools it will be necessary to retain the relevant protections contained in Parts XIB and XIC of the TPA.

- **“Outside in” deployment and**

Suitable regulatory rules should be introduced in recognition that many consumers already obtain competitive offerings of the minimum 12Mbps downlink transmission speed sought by the Government. Any deployment should initially be prioritised to target areas that do not

achieve these speeds. There is a need to undertake a national audit of services currently available to prioritize urgent provisioning of services to underserved areas. Broadband poor areas should be rectified ahead of everything else, and this must be one of the key objectives and considerations of NBN.

CONCLUSION

Primus supports a proposal for the Government to partner with the private sector to roll-out a high-speed NBN, on condition the key decisions are made in consideration of the objective of fostering a competitive industry that will deliver benefits to consumers and the national interest.

To deliver these benefits it is essential that the NBN provides for genuine "open access". Experience in Australia and from around the world demonstrates that this can only be delivered if the network is independently owned and operated such that the operator of the network has no conflicting interests that could compromise decision making in relation to access and the operation of the NBN.

Whether or not the NBN delivers on its potential is critically dependent on the right decisions being made in relation to the regulatory framework. Primus welcomes debate around this key aspect and encourages the Senate Committee to reach an informed and objective conclusion in respect to the need for structurally independent operation of the NBN wholesale network.

Primus Telecom
12 September 2008