Final Draft

Letter To The Editor

A great deal has been written about the National Broadband Network (NBN) proposals; how it might be provided, what companies may be involved in its supply and their associated views.

This is a healthy, vigorous debate about a national open access broadband network that will positively impact the lives of Australian consumers and drive the next growth engine of an innovative e-Australia. Innovation and positive impact for consumers and businesses alike fundamentally come from effective competition from a range of suppliers.

In such massive infrastructure projects as the NBN it would not be possible to fund competing infrastructures, nor is it a sensible thing to do. Therefore the NBN infrastructure has to be open to all in a way that no one company has an advantage over another.

For the companies preparing to bid for this project the debate has been heated; as one might expect when such large commercial interests are involved.

A great deal has been spoken and written about the case for providing open and equivalent access by the NBN to all potential suppliers of national broadband services. A seemingly endless supply of sponsored learned papers make contrary arguments all based on alleged “facts” and a range of ways forward are proposed.

BT’s interest, as a supplier of services in Australia, and as a company that does provide open and equivalent access to both its traditional and next generation broadband services in the UK, is to provide a set of measured observations. We want to see a vibrant e-Australia, we want to see competition and innovation and we want to see consumer choice and we have practical experience of providing such an outcome in the UK. We have no commercial interest in the NBN bid and it is in that context that our views should be considered.

The UK broadband market is exceptionally innovative and dynamic and central to this is the way in which BT provides services to a vast range of broadband service providers. BT is a functionally separated business that provides services to both itself and other service providers on a fully equivalent basis that is subject to rigorous oversight by the relevant authorities. Not only does BT provide such equivalence for current broadband but also for the next generation broadband services. The provision of equivalence does not stifle our ability or desire to invest; we have just announced a £1.5bn investment programme in next generation broadband with full equivalence. We are amongst the world leaders in this area.

BT is often asked why it does offer such equivalent services to its competitors to enable them to compete on a level playing field; the answer is that all boats rise with the tide and a strong and advanced e-society brings benefits to all who are in that market. And competition is flourishing in the UK market.

BT welcomes the NBN initiative and its broad objectives of lifting all Australian consumers to a new level of broadband enablement through the provision of a fully open access network. It’s a bold move by Government and it is only right that the capital investment in the NBN - which comes from the pockets of taxpayers - will provide an appropriate “return” to those very taxpayers as consumers of NBN services.

Consumers understand that they receive the best service at the best price if they have a choice of suppliers that are competing for their business. Effective competition also encourages competitive innovation that will help fuel the growth of the Australian e-society, ensuring the country remains atop world broadband innovation and penetration rates.

BT’s is firmly of the opinion that the NBN should be required to provide equivalence and that functional separation is a powerful tool that it could employ to ensure consumers receive value for money, choice, variety, and innovative services across the nation. It can do this best by ensuring the infrastructure to deliver these services provides a fair and competitive landscape for a range of competing providers.

If the NBN procurement process can achieve the above then an e-Australia that is looked to for inspiration from across the globe will be a reality. Surely the people of Australia deserve world class broadband services. BT will help in any way it can in providing ongoing advice and support.

Yours

Allen Ma, President BT Asia Pacific

AUSTRALIA'S NATIONAL BROADBAND NETWORK
REGULATORY SUBMISSIONS – BT Global Services

1. Introduction

1.1 The Australian Government has announced that it is committed to investing up to $4.7 billion to build a fibre-based National Broadband Network. As part of this programme, it has also indicated that it is willing to consider changes to existing telecommunications regulations and accept submissions from interested parties.

1.2 BT welcomes the opportunity to make a submission in this important public interest debate. In particular, BT is interested in providing comments and sharing the experience of our company in implementing functional separation and equivalence arrangements to ensure open access to networks.

1.3 BT is present and operating in Australia through BT Australasia Pty Ltd. Through this entity, BT provides a number of services including telecommunications, IT and systems integration for multi-site corporates. Within the Australia market BT is an "access seeker" and would require open and non-discriminatory access to the new National Broadband Network. It is therefore critical to BT that the appropriate regulatory frameworks are in place to enable such access and ensure equivalence. BT would stress that in the context of the new National Broadband Network, the Australian Government should have as one of its key objectives open and non-discriminatory access. To achieve this objective, the principals of Equivalence of Input (EOI) adopted in the UK Openreach model should be put in place for all operators holding significant market power, including the winner of the current tender process. EOI goes beyond traditional rules of non-discrimination and ensures a truly equal footing for all players. Only if competing providers are able to obtain access to the network at reasonable cost oriented prices, on a non-discriminatory basis, will they be able to offer competitive and innovative services to end-users. Both price and non-price access conditions to the network must be considered and all players must have and be seen to have access on an equivalence of input basis.

2 Background: The Current Market

2.1 Telstra remains the dominant provider of services over the local copper loop in Australia. At the same time, it maintains a significant presence in the downstream market for communications services.

2.2 This position gives Telstra the opportunity and incentive to discriminate against other operators with whom it competes at a downstream level. Some arrangements for the operational separation of Telstra are in place, but these have been characterised as weak [1], and falling short of arrangements in other countries. The combination of upstream dominance and vertical integration has the potential to restrict the growth of competition in the Australian market. This is the conclusion, for example, of a recent report by Ord Minnnett[2]. The report notes that '*the level of alternative fixed network infrastructure in Australia is one of the lowest in the OECD zone*', and that '*the numerous regulatory and policy initiatives over the years to encourage investment in alternative network infrastructure have failed to deliver sustainable infrastructure based*

[1] Cave, M. (2006) 'Six degrees of separation: operational separation as a remedy in European telecommunications', *Communications & Strategy, No 64*, pp 89-104
[2] 'Telstra Corporation: Separation Anxiety', Ord Minnett Company Review, June 2008

competition in Australia', concluding '*Operational Separation and the implementation of an access regime based on full equivalence of access to the incumbents' access network [is] the only possible regulatory remedy to the lack of alternative network infrastructure in Australia.*'

3 The National Broadband Network

3.1 The current proposals for the creation of a Next Generation National Broadband Network represent both a threat and an opportunity from the point of view of the creation of genuine competition in the Australian communications market.

3.2 The NBN represents a potential threat to competition. The deployment of fibre to the node architecture, can threaten, on technical and economic grounds, the continued existence of local loop unbundling as a viable access remedy. Since ULL is one of the cornerstones of the creation of infrastructure competition, there is a risk that the development of a genuinely competitive Australian communications market will become even more remote. Whoever is successful in the current tender process to build the NBN will end up controlling a significant new access bottleneck.

3.3 At the same time, the NBN offers a great opportunity for the creation of genuine open access in Australia. That is because the establishment of the new network enables arrangements to deliver genuine equivalence to be built into the structure from the beginning. Arguments traditionally cited to inhibit the creation of equivalence of access arrangements – i.e. cost and the difficulty of locating an appropriate separation point – will either not apply, or be much less significant. Furthermore, the Government-controlled tender process will establish the contractual arrangements to allow appropriate co-ordination of, and incentive for, investment under the new regime.

3.4 The importance of and the opportunity for building equivalence into new national bottleneck telecoms assets has been recognised in Singapore. The recent tender from the Singapore iDA for the construction of an NBN has built-in detailed arrangements to ensure equivalent access through separation arrangements[3].

3.5 BT recognises and welcomes that the Australian Government has already declared its support for an NBN which delivers genuine open access. Government participation and Government investment in the new network, militates strongly in favour of a truly national broadband network, with access to all access seekers on an equivalent basis.

3.6 As well as encouraging competition, we believe that arrangements guaranteeing equivalence are essential to facilitate the benefits of the new network for end-users. Equivalence provides the incentive to create the best possible utilisation of the network, ensuring maximum uptake. It also enhances the variety of services available and reduces the cost of the communications services delivered over the network to end-users whether they are consumers, small businesses, or large corporations. This last

[3] 'The Next Gen NBN OpCo will play a pivotal role in bringing about a competitive and vibrant broadband market for Singapore, through providing Retail Service Providers (RSPs) with open access to the Next Gen NBN's active infrastructure. For RSPs to have effective Open Access to Next Gen NBN OpCo's active infrastructure, the RFP will require the Next Gen NBN OpCo to be Operationally Separated from other operators. This Next Gen NBN OpCo will also be subject to price control and universal service obligations' from the IDA press release:
http://www.ida.gov.sg/News%20and%20Events/20080407164702.aspx?getPagetype=20

group, the segment of the Australian market which BT particularly serves, has a strong interest in the price and quality of communications when making decisions about investing and locating in a country. Service levels and quality and speed of delivery are particularly important to large enterprise customers. These issues must be addressed in any regulatory framework.

3.7 Going beyond the process to establish open access in the new network, and whatever specific arrangements are put in place in that regard, BT believes that the creation of a genuinely competitive communications market is dependent on the opening up of bottleneck assets through the establishment of equivalence of input for appropriate products for operators with significant market power. Indeed, the success of the NBN may be dependent on the establishment of appropriate separation remedies for the Australian market as a whole and not just the new NBN. This avoids the creation of a '2-tier' regulatory model, with one rule for legacy assets, and another for next generation networks. In this context, we note that the Singapore Government is currently consulting on the introduction of functional separation as a remedy in Singapore for SMP operators, irrespective of the network used to deliver products[4].

3.8 In what follows, we describe how equivalence of access in a national market is being achieved in the United Kingdom through BT's Undertakings to Ofcom.

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[4] www.ict.sg/.../Policies_and_Regulation_Level2/20080417153248/ConsultNGAN17Apr08.pdf -

4 BT Openreach – The UK experience[5]

4.1 BT's own experience in the UK has been well documented and BT has shared with both industry and government in Australia that experience over the past several months. In 2004 the Regulator in the UK (Ofcom) announced that it would be undertaking a strategic review of the telecommunications sector in the UK. The Telecommunications Strategic Review (TSR) took place over a number of phases with public input throughout. The core finding by Ofcom following the TSR was that competition was restricted in wholesale markets for access and backhaul services. Furthermore, as BT had substantial wholesale market power and was a vertically integrated provider with a presence in the directly related retail markets, this combination gave BT the *ability and the incentive* to discriminate against downstream competitors who were also wholesale customers. Ofcom then turned to BT to propose a solution to address the issues that were identified or face a potential investigation under the Enterprise Act.

4.2 In February 2005 BT proposed detailed Undertakings which were refined between February and June 2005 between BT and Ofcom. Public consultation then took place starting in June 2005 and the Final Statements and Undertakings were issued in September 2005 taking into account the consultation responses.

[5] More information can be found About BT's Undertakings to Ofcom at http://www.undertakingsbulletin.com or Ofcom's site: http://www.ofcom.org.uk/telecoms/btundertakings/

4.3 The key elements of the Undertakings are:

- Product equivalence
- Same products and services for BT's downstream activities and for BT's wholesale customers in areas defined as being "bottlenecks" such as Access, Backhaul, and bitstream
- Equivalence of Inputs for BT's downstream divisions and BT's wholesale customers for such products, including the:
  - same supply time scales, terms and conditions, including. price and service levels
  - use of the same systems and processes
  - same service, system, and process reliability and performance
  - same controlled access to and sharing of commercial information relating to product, service, systems, process, network coverage and capabilities
- Information sharing "walls" between up and down-stream product divisions within BT
- Effective, transparent and public accounting separation obligations
- A clearly separate (from other business units) upstream business unit with:
  - transparent, forceful obligations – public, published, monitored and reported targets
  - separate staff, management, and remuneration incentives
  - specific obligations with respect to commercial and customer information confidentiality
  - monitoring and oversight by an independent Equality of Access Board
  - governed by a independent management Board

- Effective regulation to ensure enforcement including:
  - open to directions from Ofcom and/or court enforcement
  - reference to the Competition Commission
  - third party actions for damages

4.4 Overall this approach has been successful. There has been a significant increase in Wholesale Line Rental, Carrier Pre-Selection and importantly, Local Loop Unbundling (LLU) with more than 20 operators now offering LLU services, and more than 20,000 LLU orders being processed per week.

5 The Australian Market

5.1 It is important to keep in mind that the Openreach model was a UK model designed to address the UK market. The Australian market is not the same and there are a number of variations within the context of this consultation which should be kept in mind.

5.2 Firstly, unlike in Australia, the UK Openreach model was designed to address existing bottlenecks in the access and backhaul network. It was not designed to address a newly built network. Secondly, the model was implemented on a voluntary basis by BT through legally binding undertakings. Although it is not necessary to have a voluntary settlement, it may impact the structure of such an arrangement and therefore the structure and legal basis for such an arrangement will need to be adapted to address the current situation in Australia. Finally, BT would note that in the context of the implementation of BT Openreach no public funds were being invested into a new network rollout as it happening with the National

Broadband Network. This may impact the exact regulatory structure as the government has an even greater interest in ensuring the network which public money will fund is available on an open and non-discriminatory basis.

5.3 Given that Australia is not the same as the UK; it would not be possible to simply apply the structure that has been used in the UK. However, it can play an important role in guiding debate. The principle and objectives should remain the same even if the exact structure may differ.

5.4 Regardless of which party is successful in the current tender process, there is a need to ensure that operators of the NBN are not in a position to discriminate again any downstream (retail) arm. At least parts of the network are likely to be bottleneck facilities with little or no competing infrastructure. However, all operators hoping to provide services to end users are likely to require access to the network at some level and the ability to obtain fair and cost effective access is essential. Traditional regulation has relied on behavioural safeguards, such as the regulation of the prices, terms and conditions of "bottleneck" (non-competitive) elements or services offered and prohibitions on anti-competitive conduct such as price squeeze to guard against operators using their market power to thwart competition.

5.5 However, in the case of a vertically integrated operator, it may not have the right commercial incentives to provide quality wholesale inputs to their competitors, and may act in a manner that disadvantages their competitors with respect to their own downstream businesses or their affiliates. Furthermore, the complexities of service provisioning mean that discrimination could take place but be difficult to prove.

5.6 More robust safeguards such as an operational separation model similar to Openreach would help to remove or dilute the commercial incentives and ability of a vertically integrated operator to favour its downstream affiliates and discriminate against competitors that may be reliant on it for an upstream input. However, the detail of any separation arrangement is important and the obligations imposed on the operator and the rights conferred on the access seekers as well as the sanctions to enforce them are all critical elements in an effective regime.

5.7 Functional separation is part of but not the entirety of a regulatory solution to address open access. It must be accompanied by true equivalence if there is to be an effective incentive to provide fit for purpose wholesale services on a non-discriminatory basis. It must put everyone on an equal footing as regards to access, service provision, quality of service and timing and it must create absolute transparency.

5.8 BT would stress the need to adopt provisions covering all the key elements of Openreach which have been set out above. Of particular important is ensuring that the measures are legally binding with strong enforcement and ensuring that there is adequate and independent oversight to ensure compliance. BT would also highlight the importance of ongoing industry participation as the exact rules and regulations are clarified in order to ensure that the model that is put in place is fit for purpose and addresses the needs of all stakeholders in the marketplace.

6 Other Considerations

6.1 BT would also like to highlight some of the other areas where regulation will be essential in assuring the success of NBN and the whole of the Australian telecommunications market.

6.2 Competition must continue to be developed and promoted through cost based wholesale pricing and low barriers to entry. Regardless of whether or not the winning operator of the NBN is a vertically integrated service provider or not, cost based pricing will be essential to enable take up by a wide range of users. Regulation will need to ensure that the operator will not be in a position to charge monopoly rents. There must also be robust service level commitments and measurement of other non-price factors to ensure that end users are provided with fit for purpose and high quality services.

7 Conclusion

7.1 BT would submit that imposing a robust form of operational or functional separation which adequately addresses the incentive of operators to discriminate should be an essential part of the new regulatory regime in Australia. Only with an effective regulatory regime that guarantees equivalence of input will the end users in Australia be able to fully benefit from the Government's investment in the NBN.

7.2 BT would also encourage the Government to continue to consult throughout the process of rolling out the NBN. Ongoing industry and stakeholder consultation will be essential to maximise the benefit of the new network. Issues on USO, emergency services, legal interception and other areas require ongoing consultation. Public consultation on deployment, products, standards and interoperability needs to be undertaken as well to ensure vendors and providers understand the technology used in the deployment of the new network and that the ultimate experience for end-users is positive.

7.3 BT is grateful for this opportunity to provide comments and remains available to answer any questions or provide any additional information that would be of assistance.