



**Submission to
NBN: Regulatory Reform
for 21st Century Broadband
Discussion Paper**

Rosemary Sinclair

Managing Director

3 June 2009

Background Comments

ATUG is pleased to make a submission to the National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper.

Our submission is based on a series of discussions by members on concerns with the effectiveness of competition in the telecommunications sector.

Our submission reflects ATUG's Board approved Focus Policies for 2009 – attached.

ATUG represents business, government and community organisations that depend on communications services to develop and deliver their products and services to clients and customers. These businesses represent the wider economy interest in efficient and effective outcomes in the telecommunications sector. Members come from all sectors of the economy – financial services, mining and construction, transportation, retail, health, education among others.

Central to ATUG's approach to policy in the communications sector since 1981 is the core role for competition in delivering the best outcomes for end users – choice, price, service quality and innovation. The characteristics of monopoly behaviour – high prices, poor service and delayed innovation – have been in evidence in the market for fixed network services in Australia despite the introduction of open competition in 1997. These problems have implications for businesses competing in other sectors of the economy and internationally, and for government and community organisations trying to deliver services as efficiently and cost effectively as possible.

Over more recent years ATUG has regarded the move from negotiate-arbitrate to negotiate-arbitrate-litigate as further evidence that the current approach to competition regulation in fixed network services is not delivering outcomes in the long-term interests of end users.

Comments by the ACCC Chairman at a recent ATUG conference outline succinctly why the current approach to competition regulation in telecommunications (the negotiate/arbitrate model) is broken:

A regulated access regime is likely to be required to promote competition where infrastructure has strong bottleneck characteristics and other businesses require access to that infrastructure to compete.

The appropriate form of regulation will depend on the extent to which the access provider has market power and the degree to which it is vertically integrated into downstream markets.

Where an access provider has market power as well as a strong incentive to deny access to competitors, an access regime based on the negotiate/arbitrate model may have difficulties delivering timely access on reasonable terms and conditions for the industry.

A few statistics on the operation of the current regime would appear to demonstrate this. Since 1997, the ACCC had been notified of 157

telecommunications access disputes. This is in stark contrast to all other sectors of the economy....

The ability of access providers to propose access terms and conditions in undertaking has likewise failed to expedite or provide greater certainty under the regime.

Mr Samuel concentrates on the impacts of delay and uncertainty on the telco industry. But businesses, government agencies and community organisations buying communications services also feel the impacts of these delays and uncertainties – competition is weak, choice is limited, prices are high, quality is low, innovation is limited. The costs of these impacts go beyond the interests of shareholders in the telco sector and affect the interests of stakeholders throughout economy.

ATUG is pleased that the Government has recognised the deep seated problems in regulating for competition in the fixed network services market and has proposed to move to a complete legal and structural separation of the network in the new fixed network services market – the build of the National Broadband Network. The NBN operator will be structurally separated, will provide wholesale services only and will offer them on an open access, fully equivalent basis. No retail company will be able to control the network in its own interests.

This is a big solution to a big problem – the incentives a vertically integrated owner of a bottleneck fixed network has to deny access and to discriminate against access seekers in favour of its own retail units.

The Government's approach to the NBN operator should be the benchmark for arrangements during the 8 year transition period – separation, open access, equivalence.

Given the certainty now in place about the move to a National Broadband Network, **ATUG is advocating a “set and forget” approach** to the transitional regime for regulating access to fixed network services. The regulatory approach should be determined, incentives and rules put in place, prices determined by the ACCC and practical access arrangements monitored through an independent organisation on the watch for evidence on anti-competitive conduct.

In designing the transitional approach, ATUG would like to see the emphasis on an incentives based approach which can only be achieved by separation of wholesale from retail units. It is only when this is in place that regulatory rules will be effective.

The need for separation is well captured in the High Court decision of March 2008 on the issue of competition and access to the PSTN (fixed) network. The Court decided that the telecommunications access regime set out in the Trade Practices Act did not amount to an acquisition of Telstra's property and said,

“The objects ... in the 1997 Telecommunications Act and in Part XIC of the Trade Practices Act are wider than and different from that narrow self-interest which, statute apart, is all that one participant in a market

would ordinarily consult when striking a bargain with another participant in that market.”

Not only are the objects “wider than and different from” but the core problem as described by the Court as “narrow self-interest” is the problem to be addressed through separation and amendments to the Trade Practices Act during the transition to the NBN, at which point full legal and structural separation of the fixed network will provide the right incentives to support competition.

ATUG expects to participate in discussion about the policy framework and approach to practical implementation of the National Broadband Network to ensure that the long-term interests of end users remain at the core of decisions by the National Broadband Network operator.

In addition, to provide certainty for industry and end users and to ensure the problem of narrow self-interest is addressed during the transition period, ATUG suggests:

- rights to appeal decisions should be truncated
- the market for fixed network services should be treated as a National Market
- regulators should direct industry self-regulation activities related to fixed network services eg broadband switching processes
- ineffective regulatory tools such as Accounting Separation and Telstra’s Operational Separation Plan should be dismantled.

The role of regulators and Government in providing incentives for industry action and behaviour has been reduced in recent years. In the fixed network market, competition has not been strong and now Government has responded with a fundamentally new approach to the development and deployment of Australia’s next generation fixed fibre network.

The implication of this decision is that increased, targeted regulation in the fixed network market will be needed during the transition to the NBN. ATUG’s preference is for action to be focused on Market Structure and Consumer Empowerment.

Government and Regulators including the TIO need to focus on providing strong incentives (rather than more rules) for industry to deliver the right results. If a competitive market is created, and incentives are developed, the need for interventionist action will be reduced.

ATUG detailed comments on the NBN Regulatory Reform Discussion Paper

The rollout of the NBN as a wholesale-only open access network will fundamentally transform the competitive dynamics of the Australian telecommunications sector.

ATUG: The NBN model should be used as the benchmark for regulatory reform during that transition period

However, the overwhelming message from almost every submitter was that the current regime does not work effectively to achieve its goals, and that it is failing businesses and consumers.

ATUG: agrees with this position and would emphasize that the cost of this failure goes beyond the interests of telco shareholders to the costs and loss of benefits to the economy from ineffective competition in the market for fixed network services. The Government has in fact decided that this problem is so intractable as to require the establishment of a new fixed network operator with a “born wholesale” culture

The Government will consider key options for reform, including:

- streamlining access regulation processes, by allowing the ACCC to set up-front access terms for companies wanting access to Telstra and other networks
 - **ATUG:** 12 years experience with the previous negotiate/arbitrate model has not delivered strong competition for end users. A more streamlined approach during the transition is needed.
- strengthening the powers of the ACCC to tackle anti-competitive conduct by allowing it to impose binding rules of conduct when issuing competition notices
 - **ATUG:** current anti-competition provisions do not seem to provide the right incentives for conduct and a speedy way of addressing concerns. Stronger response provisions are needed to set the incentives for competitive conduct.
- promoting greater competition across the industry, including measures to better address Telstra’s vertical integration, such as functional separation
 - **ATUG:** Accounting Separation rules and Telstra’s Operational Separation Plan have not produced effective competition. The NBN will be a legally and structurally separate entity. This is the benchmark for transitional arrangements.
- addressing competition and investment issues arising from horizontal integration of fixed-line and cable networks, and telecommunications and media assets
 - **ATUG:** Accounting Separation rules and Telstra’s

Operational Separation Plan have not produced effective competition. End users do not experience real equivalence between offers from competing operators. The NBN will be a legally and structurally separate entity. This is the benchmark for transitional arrangements. ATUG has seen the benefit of inter-modal fixed network competition in other countries. This should be the aim for Australia.

- improving universal access arrangements for telephony and payphones, and
 - **ATUG:** supports the use of mechanisms such as the Australian Broadband Guarantee for broadband services whereby Government makes an explicit commitment and funds delivery of uneconomic services directly. ATUG is interested in ubiquitous connectivity (voice and high speed internet) as it provides the platform for business and government service transformation in a Digital Economy. Without ubiquitous connectivity, major business and service deliverers will be required to run parallel systems with reduced productivity and innovation outcomes.
- introducing more effective rules requiring telephone companies to make connections and repairs within set timeframes.
 - **ATUG:** an incentive based approach will be more effective during the transition period based around Licence Conditions but with stronger compliance and enforcement tools. TIO powers should be strengthened to ensure individual cases of poor service are rectified. TIO reports could form the basis for decisions on Licence Condition compliance. ATUG does not believe daily payments (for businesses) are an effective tool for addressing service quality issues as the incentives are not sufficiently strong for providers and the administrative costs are too high.

This paper raises a range of options for consideration, some of which would amount to a re-design of existing regulation, while others would lead to the reduction of regulation in other areas.

ATUG: our policy in regard to regulation is that we prefer competition as a stronger tool for delivering outcomes to end users but where competition is not effective, ATUG supports targeted regulatory intervention.

Chapter 1: Introduction

The purpose of this paper is twofold:

- **to outline** the proposed regulatory reforms that the Government will progress to facilitate the rollout of the National Broadband Network, and
- in light of the announcement of the enhanced National Broadband Network, to **consult** on the options for broader reforms to make the existing regulatory regime more effective in the transition period before the network is fully rolled out.

ATUG: understands the purpose of this paper is to focus on regulation during the transition period ahead of the NBN.

Policy goals

In considering changes to the existing telecommunications regulatory regime in the transition to the National Broadband Network, the Government will have regard to its ongoing policy commitment to:

- improving productivity across the economy
- competition
- consumer protection
- rural, regional and remote Australia, and
- reducing unnecessary regulation.

The Government also recognises that community safety and national security objectives are integral to its telecommunications policy settings.

ATUG: These goals capture the important outcomes for telecommunications policy and related regulation. Within the specific policy, legislative and regulatory instruments ATUG would like to see continued commitment to the long-term interests of end users as the core objective. ATUG feels this objective captures the balance needed between the interests of industry and end users for effective regulatory decisions and outcomes. ATUG would not support rebalancing of objectives towards investment or innovation and away from the long-term interests of end users.

Efficient economy and productivity

.... In the transition to the National Broadband Network, the Government is committed to creating the market structure that will maximise the benefits to economic efficiency and productivity of high speed broadband services.

ATUG: supports this objective

Continued commitment to competition policy

Moving to the National Broadband Network environment will fundamentally change the competitive dynamics in the telecommunications sector. In the meantime, the Government wants to ensure that the existing regulatory regime works more effectively, including by removing incentives for discrimination and delays through regulatory gaming, to increase

opportunities for competitive outcomes.

ATUG: strongly supports the focus on effective competition as the preferred outcome and the need for reform to the existing regulatory regime to deal with problems of misaligned incentives and delays. ATUG would emphasize that the outcomes of a more effective regime will be experienced directly by the buyers of communications services – there will immediately be increased choice leading to more competitive prices, quality and innovation. This will be happening at a time when business and other service providers need to manage within tighter economic markets, but with customers demanding more services.

Ongoing commitment to consumer protection

In October 2008, the Council of Australian Governments agreed to a comprehensive consumer policy framework. This included a common objective to improve consumer wellbeing through empowerment and protection, fostering effective competition and enabling confident participation in markets in which both consumers and suppliers trade fairly.

ATUG: endorses the emphasis on consumers (including businesses and other organisations) as effective market participants driving competitive market outcomes through choice. Such participation needs support in specific areas such as broadband switching where industry processes do not currently provide an easy platform for customers to exercise choice between providers. The benchmark arrangements are the Mobile Number Portability arrangements. Delays in introduction of effective broadband switching processes highlight a core problem with industry led code development – the incentive to begin. This is yet another reflection of the difficulty of dominance in the fixed network services market. Regulators need to provide direction to industry to have this problem resolved during the transition to the NBN. This will ensure the market for broadband services is vibrant and innovative, leading end users to develop their own sense of the value of very high speed broadband services.

Ongoing commitment to regional and remote areas

The Government recognises that appropriate telecommunications services are essential so families, businesses, schools and others in regional and remote areas can actively participate in Australian society.

The Government has recently reiterated its commitment to a prosperous and sustainable regional Australia in its response to the Glasson Review.

ATUG: the need for regional and remote Australia to have access to advanced communications services includes participation in economic activities and efficient delivery of business and government services in these areas. ATUG's work in regional areas has been driven by our members interests in national networks of operations in banking, retailing, mining, transport, manufacturing supply chains and services businesses. The opportunity for more efficient delivery of government services, the opportunity for job

creation for sustainable regions and the development of the services sector in regional areas all depend on ubiquitous connectivity.

Chapter 2: Regulatory environment for the National Broadband Network and the rollout of fibre

To facilitate the rollout of the National Broadband Network, the Government will establish a company to build and operate the National Broadband Network on a commercial basis. The Government will introduce legislation that establishes:

- governance, ownership and operating arrangements for the wholesale only National Broadband Network company, and
- the access regime to facilitate open access to the National Broadband Network for retail level telecommunications service providers.

The intention of this chapter is to outline the Government's approach to these issues, which will be informed, amongst other things, by the Implementation Study for the National Broadband Network. The Government will be conducting separate consultation on these measures.

ATUG: understands that the current Discussion Paper is focusing consultation on reform to the existing regulatory regime during the transition period. However, the proposed NBN arrangements highlight the core problems with the existing regime and provide guidance for the approach that should be established during the transition phase. Rather than use the next 8 years to delay change in the sector, the approach to be taken by the NBN operator should be used as a benchmark to accelerate change in the sector in the direction of the NBN environment. This will provide stronger competition for end users during the transition period and make the inevitable change to the NBN environment easier.

National Broadband Network access regime

ATUG: The benchmark elements of the NBN regime are:

- The National Broadband Network Company will be required to offer services on a wholesale only basis.
- Legislation will prevent it from providing retail services.
- Operating as a wholesale only provider, the National Broadband Network Company will have no incentive to engage in anti-competitive behaviour, such as unfairly discriminating between retail providers. This will promote equivalence.
- The National Broadband Network will be required to operate on an open access basis.
- It will be required to provide nondiscriminatory and fair access to all wholesale customers

- Access to the National Broadband Network will be provided to all retailers on an equivalent basis.
- The ACCC will oversight access to the National Broadband Network and the National Broadband Network Company's operations.

ATUG: These benchmarks should be used in the development of the transitional arrangements for telecommunications regulation over the next 8 years.

Consultation process

The Government is not seeking feedback on the changes outlined in this chapter as part of this process. They have been included to inform consideration of the options for change during the transition to the National Broadband Network environment as set out in Chapters 3 and 4.

ATUG: notes the further consultation planned for NBN governance, ownership and operation, NBN access regime, and Facilitation of fibre roll-out.

Chapter 3: Telecommunications competition framework

Competition is the most effective means of ensuring high quality services are delivered to consumers at affordable, sustainable prices through the most efficient providers.

ATUG: agrees that competition is the most effective tool

Part XIC access arrangements

The exercise of the regulatory powers of the ACCC in Part XIC, including the powers to declare services, determine terms of access, accept undertakings and grant exemptions, is governed by consideration of the long-term interests of end-users. In deciding whether something is in the long-term interests of end-users, the ACCC must consider whether it is likely to promote:

- competition
- any-to-any connectivity (i.e. communication between users of services over different networks), and
- the efficient use of, and investment in, telecommunications infrastructure.

ATUG: the long-term interests of end user must stay as the core objective of the exercise of regulatory powers by the ACCC. The current list of requirements for consideration must remain as the key benchmarks for assessing decisions on telecommunications access issues. In particular, competition and any-to-any connectivity have new relevance in converging communications markets.

Deficiencies in the regulatory process

Stakeholders' main areas of concern have been that the negotiate arbitrate model is very slow, cumbersome and open to gaming (obstruction), and that Part XIC does not provide sufficient regulatory certainty for investment.

Key stakeholders have indicated that the current access regime is ineffective largely because there is a vertically integrated incumbent that has the incentive to discriminate in favour of its own retail business.

ATUG: *'The Trade Practices Act reflects a policy and regulatory philosophy (negotiate, arbitrate, litigate) seemingly suitable in 1997 but self evidently not workable in 2008.'*—Australian Telecommunications Users Group

Critics argue that Part XIC is stifling investment in new telecommunications infrastructure. Investment in new telecommunications infrastructure is an important driver of Australia's economic and social advancement.

'The national priority must be to invest in infrastructure ... that can stimulate an economy-wide uplift in wider business productivity and competitiveness. Such dividends have direct and lasting economic and social benefits, driving prosperity for Australian families ...'—Telstra

ATUG: does not agree with this point. The national priority must remain the long-term interests of end users.

Options for reform

Option 1—Retain the current Part XIC processes—including the negotiate-arbitrate model—but make them work more effectively

Option 2—Replace the Part XIC negotiate arbitrate model with a streamlined regulatory process

ATUG: supports a streamlined regulatory process. Experience since 1997 suggests there is no further room for adjusting the negotiate/arbitrate model. The problems stemming from vertical integration and market dominance will not be addressed by a “retain/tweak” approach as canvassed in Option 1.

In view of the benchmark approach in the NBN environment ATUG supports a model with increased power for the ACCC during the transition period to obtain clearer, quicker outcomes on decision relating to access in the fixed network wholesale market. ATUG supports the process outlined in the Discussion Paper Option 2.

Beyond ACCC decision making and with particular regard to non-price terms and conditions for access, the implementation of processes (including information system development, monitoring and reporting) to ensure an effective wholesale market is a task requiring a degree of industry co-operation that has not been seen for some years.

Successful management of the transition period will require strong

incentives to be put in place for an industry-led body to focus on this task of implementing and monitoring the wholesale market to ensure on a day to day basis that is delivering open access and equivalence. This organisation must be transparent in monitoring, reporting and taking action where necessary to achieve these goals. The role of the existing formal regulators, ACCC and ACMA and the Minister in providing an incentive framework to ensure this will be important.

Anticompetitive conduct provisions

Part XIB prohibits a service provider with a substantial degree of market power from engaging in conduct which has either the **effect or purpose** of substantially lessening competition. This test for anticompetitive conduct is broader than the test for misuse of market power in Part IV which requires the **purpose** of substantially lessening competition.

There is a strong argument that it is necessary to retain and improve Part XIB given the existing industry structure in telecommunications.

Options for reform

ATUG: regards Part XIB (anti-competitive conduct) provisions as essential to the delivery of effective competition in the telecommunications sector. ATUG supports the “effects” test in Part XIB as more relevant to the telecommunications sector than the Part IV “purpose” test.

ATUG: Given the core problems of vertical integration and dominance in the fixed network service market, ATUG would support specific provisions directed at this market such as empowering the ACCC to issue binding rules of conduct. This could include notice (rather than consultation) before issuing of a Competition Notice given the reality that the ACCC that is the party most likely to proceed with legal action and that options are available to revoke the notice or settle the claim should the conduct in question change.

Separation arrangements for Telstra

Existing arrangements

As noted in chapter 1, the Telecommunications Act requires a review of the operational separation framework to be conducted (before 1 July 2009). Details of the review and questions relating to it are at Appendix A.

ATUG: has responded to these questions at Appendix A.

Background

Telstra’s level of vertical integration raises concerns about the extent to which it has the ability and the incentive to favour its own retail business over its wholesale customers when providing access to various services.

Addressing vertical integration to promote equivalence

Equivalence is where a vertically integrated operator provides wholesale services on equivalent terms and conditions to its own retail business and its wholesale customers. Equivalence relates to both price and nonprice terms and conditions such as service provisioning and availability of information about the network, and is considered an essential factor in promoting retail level competition.

In practice, despite extensive monitoring and reporting requirements on Telstra, it is extremely difficult to verify that this approach delivers genuine equivalence. At a 2008 Senate Estimates hearing the ACCC stated:

'We continue to receive complaints of conduct that suggest that the objective of equivalence, which was the objective of the regime, is not being achieved. There have been some instances of conduct since the regime's inception which, while it is not clear they breach the operational separation plan, do not promote the objective of equivalence which was the fundamental objective of the plan in the first place.'—ACCC

Options for reform

During the rollout of the National Broadband Network the existing regime, including measures to promote equivalence, will remain important for promoting outcomes in the interests of consumers and businesses.

Option 1—Strengthening the current operational separation regime that applies to Telstra

ATUG: does not support this option. Further comments are in the section on Operational Separation.

Option 2—Functional separation

The Australian Telecommunications Users Group stated that:

'Equivalence in wholesale services together with effective services competition can only be assured by establishing: clear separation between wholesale and retail units...'—Australian Telecommunications Users Group

The key principles behind an effective functional separation regime could include:

- *Arm's length transactions between business units*
- *Creation or designation of discrete organisational divisions*
- *Price equivalence measures*
- *Nonprice equivalence measures*
- *Equivalence of information*
- *Governance arrangements*
- *Effective enforcement provisions*

Questions

- What are the appropriate structural arrangements for Telstra during the transition to the National Broadband Network?
- Could measures be put in place to make the existing operational separation regime work more effectively? If so, what are they?
- If functional separation is adopted, what would be the key elements of such a framework? What would be the appropriate boundaries for separation?

ATUG: is pleased that the Government has recognised the deep seated problems in regulating for competition in the fixed network services market and has proposed complete legal and structural separation of the network in the new fixed network services market – the build of the National Broadband Network. The NBN operator will be structurally separated, will provide wholesale services only and will offer them on an open access basis. No retail company will be able to control the network in its own interests. This is a big solution to a big problem – the incentives a vertically integrated owner of a bottleneck fixed network has to deny access and to discriminate against access seekers in favour of its own retail units.

ATUG: The Government's approach to the NBN operator should be the benchmark for arrangements during the 8 year transition period – separation between network wholesale and retail units, open access, equivalence.

ATUG: Given the certainty now in place about the move to a National Broadband Network **ATUG is advocating a “set and forget” approach** to the transitional regime for regulating access to fixed network services. The regulatory approach should be determined, incentives and rules put in place, prices determined by the ACCC and practical access arrangements monitored through an independent organisation on the watch for evidence of anti-competitive conduct.

ATUG: In designing the transitional approach ATUG would like to see an emphasis on an incentives based approach which is only achieved by separation of network wholesale from retail units. It is only when this is in place that regulatory rules will be effective.

ATUG: The need for separation is well captured in the High Court decision of March 2008 on the issue of competition and access to the PSTN network and it derives from the incentives which apply where wholesale and retail units are linked. The Court decided that the telecommunications access regime set out in the Trade Practices Act did not amount to an acquisition of Telstra's property and said,

“The objects ... in the 1997 Telecommunications Act and in Part XIC of the Trade Practices Act are wider than and different from that narrow self-interest which, statute apart, is all that one participant in a market would ordinarily consult when striking a bargain with another participant in that market.”

ATUG: Not only are the objects “wider than and different from” but the core problem as described by the Court as “narrow self-interest” is the problem to be addressed through separation and amendments to the Trade Practices Act during the transition to the NBN. Under the NBN full legal and structural separation of the fixed network will provide the right incentives to support competition.

ATUG: Obligations, Structures and Systems must be established to ensure Wholesale Service Equivalence among all retail competitors. Independent oversight of Wholesale Service Equivalence Obligations must be provided with public reporting.

Horizontal separation

In the past, concerns have been expressed by a range of stakeholders that Telstra’s control of the copper fixed line telephone and cable networks has reduced the development of facilities based competition in Australia in comparison to other countries.

Quite simply, the entry of powerful telecommunications service providers into the media sector could reinforce their power in the carriage sector and extend their power to the content sector with negative consequences for content providers, competitors, consumers and the wider community.

Possible options for reform

Option 1—Possible cross-media restrictions to apply in the future

Option 2—Require divestment of Telstra’s hybrid fibre coaxial network
If Telstra was required to divest its hybrid fibre coaxial network restrictions would also need to be placed on its future activities to prevent reintegration.

Questions

- What restrictions, if any, should be imposed on future Telstra investment in the Australian media and communications sector?
- Should Telstra be required to divest its hybrid fibre coaxial network?

ATUG: shares the ACCC concerns about the use of content to create new “bottlenecks” which stifle competition. End users do not want “walled gardens” where choice is forced between communications packages on the basis of exclusive content arrangements. If the vertical integration and dominance concerns are dealt with effectively through separation between wholesale and retail, concerns about migrating dominance from carriage to content may be mitigated. In any case, the development of the NBN over the transition period will in ATUG’s view open up an increased range of content services over an increased range of platforms and devices. If a bottleneck emerges, this should be dealt with under the Trade Practices Act.

ATUG: has always supported the development of efficient infrastructure based competition. If a strong Separation and Equivalence Framework is developed and implemented, ATUG would not see divestiture of the HFC cable network as a necessary condition for an effective period of transition to an NBN environment

Facilities access regime

Under Schedule 1 to the Telecommunications Act, carriers are required to provide other carriers with access to certain facilities such as exchanges, pillars, ducts and towers. This is known as the facilities access regime. If the parties are unable to agree upon the terms of access then they must be determined by an arbitrator or, if the parties cannot agree on an arbitrator, by the ACCC. The ACCC has made a facilities access code governing access to mobile towers and underground facilities.

With the rollout of the enhanced National Broadband Network, there is the potential that these provisions will be relied upon to a greater extent in the future.

To address these concerns, the present arrangements could be amended to make the framework consistent with Part XIC. Alternatively, the facilities access regime could be integrated within Part XIC.

Questions

- Would making the facilities access regime consistent with Part XIC improve its operation?
- Should the facilities access regime be integrated within Part XIC? If not, why not?

ATUG: Regulation will be needed to encourage the co-ordinated use of existing fibre assets, access to ducts, poles, pits and other physical plant, access to rights of way and other means to ensure efficient construction of the NBN. Carrier immunities and powers from State and Local Government town planning law may have to be reinstated to enable timely and affordable services.

ATUG: prefers access arrangements for the transition period and for the NBN to be supported through the Trade Practices Act to avoid legal battles of interpretation.

ATUG: An independent body should be given the role of ensuring Equivalence is implemented in a timely way. This new body would go beyond developing “industry rules and codes” to the successful practical implementation of Facilities Access as well as Wholesale Service Equivalence arrangements. Regulators may need observer status.

Spectrum allocation

The availability of spectrum has been essential in encouraging competition between different technologies, as well as different service providers of mobile services.

The Government's National Broadband Network policy includes the provision of some broadband services using next generation wireless and satellite technologies to ensure 100 per cent of the Australian population is able to access superfast broadband services.

Spectrum may need to be reserved at appropriate frequencies to deliver superfast broadband services using wireless and satellite technologies in areas that will not be covered by fibre optic to the home and workplace. This has been supported by the Australian Telecommunications Users Group which has stated that:

'Spectrum should be made available for broadband in regional and remote areas to ensure access to [National Broadband Network] services in a timely and cost effective way.'— **Australian Telecommunications Users Group**

The Government recognises that these future demands will place pressure on the available spectrum.

Competition limits have been imposed on existing carriers in other jurisdictions and in Australia in the past. Some countries have a policy to encourage competition between different technologies and have arrangements to limit concentration of platforms in the hands of existing carriers.

Questions

- Given the changes to the telecommunications industry resulting from the rollout of the National Broadband Network, are competition restrictions necessary to limit access to valuable spectrum?
- How can the Government encourage competition between different technology platforms?

ATUG:

- Spectrum should be made available to support high quality wireless broadband services for end users. There is interest by end users in wireless broadband services where these are available and possible. Satellite services provide more limited functionality and are more expensive than wireless services.
- This spectrum should not be allocated on an auction basis where ABG funds are being used to extend or accelerate the delivery of broadband services. ABG funds are being used in non-commercial markets to provide services. These markets cannot support high spectrum fees which may result from an auction process.

- More spectrum should be made available for regional and remote broadband services ahead of the roll-out of the NBN services. The NBN plan is for services to be delivered over a five (now 8) year build period. Until NBN services are available ABG services will be needed and users should have a choice between satellite and wireless broadband services wherever possible.
- ATUG's preference is for licences to be allocated in such a way as to promote sustainable competition and innovation. Auctions should not be used where they raise significant barriers to entry or could cause anti-competitive outcomes. The global experience of 3G auctions has been to delay the development of these networks as business cases had to be built to recover very large licence fees. From ATUG's perspective this is not in the long term interests of end users, however attractive it might be in the short-term to government or regulators
- ATUG would like to see "use it or lose" provisions applied where large amounts of spectrum are allocated. Administration of such provisions should be flexible to take account of commercial and market realities but spectrum "hoarding" should not be permitted.

Chapter 4: Telecommunications consumer safeguard framework

The chapter addresses issues relating to, and potential areas of reform for, key consumer safeguards including:

- Universal Service Obligation
- Customer Service Guarantee
- Network Reliability Framework
- retail price controls
- priority assistance
- access to emergency calls, and
- regulatory obligations in relation to carrier licence conditions, enforcement of consumer safeguards, and regulatory reporting.

Universal access

Broadly speaking, stakeholder comments and concerns raised through the Universal Service Obligation Submissions and the Glasson Report about the current arrangements can be divided into the following categories:

- scope of the universal service obligation—both the services covered and the limitations of the obligation
- funding—both the amount and mechanism, and
- payphones, including enforcement issues.

Questions

- How should the universal access regime be funded? Should the burden fall on one carrier or should it be spread further?
- How should any intangible benefits from being the Universal Service Provider be taken into account?
- If industry funding is preferred for universal access, should smaller carriers be required to contribute? If not, what should be the threshold revenue for exempting such carriers?

ATUG: USO submission from October 2007

ATUG's interest in the development of the USO scheme is driven by our members' (business, government and community sectors) interests in the availability of ubiquitous, fit for purpose, affordable communications services and any-to-any connectivity to underpin service delivery and growth strategies.

End user demand for telecommunications services has grown strongly over the last 15 years. End users have shown significant preference for mobile voice services and strong demand for broadband services at the right price. Demand for fixed line voice services is declining in absolute terms year on year.

End user demand is no longer “one size fits all” but depends on purpose and ability to pay. End users are more comfortable with choice than 10 years ago, with some users never having had a Telstra supplied service and many users never having had a “standard telephone service”.

The importance of communications capability to economic development, and specifically to regional development is now well understood. Any-to-any connectivity (whether for voice or internet access) is more than a social safety net, it is the underpinning of an inclusive, well functioning economy and society.

In this context ATUG proposed a new approach to Universal Service. An approach which sees end user choice and preferences built into a new Australian Communications Guarantee scheme. This scheme should comprise an Australian Voice* Guarantee (AV*G) and an Australian Broadband Guarantee. Voice* in this context means voice and voice equivalent service.

The new policy would build on the Australian Broadband Guarantee:

“The Australian Broadband Guarantee is about making a broadband compact with the Australian population – that we will give you subsidised access to a broadband service now if you can’t get one.”

ATUG: Communications Service Standard

The issues mentioned in the Glasson Report provide a comprehensive list of the information end users need to know to make effective choices between providers. In ATUG’s view, if a competitive market structure is developed, information is available which supports informed choice and consumer switching between providers is made easy (as with Mobile Number Portability) then we could expect providers in the market to compete based on service characteristics, quality and price without the need for Ministerial specification of individual service characteristics.

In regard to broadband services – as the economy begins to rely on NBN services, a “best endeavours” basis will no longer be an adequate service level. But a competitive market should be delivering higher quality services without regulatory intervention.

In regard to mobile services, poor quality performance can be dealt with by customers switching between service providers.

It may be that an enhanced role for the TIO and a more open and responsive relationship between the TIO, industry and ACCAN as in Connect.Resolve may be a more up to date way of ensuring good service quality in the communications market.

Funding

Significant difficulty has emerged in costing models for universal service delivery and access pricing principles for declared services following disagreement over universal service costs and recovery levies, and separately over costs for rural service provision. Claims are made that reducing margins mean reduced ability to carry cross subsidies for USO services. On the other hand, line rentals have risen significantly in the period since the USO funding model was determined. There seems no prospect of industry resolving this issue in a way that ensure affordable services for end users.

ATUG's preference is to "draw a line in the sand" and develop an incentive based funding scheme using targeted government funding.

Previous concerns about reliability of Government funding which led to preference for an industry funding model have largely been displaced by Government provision of funds over many years for service improvement and accelerated delivery over the last decade.

Uncertainty has increased over industry's ability to fund the USO and in some cases willingness to do so.

End users see Government as the final point of responsibility for communications services where commercial provision does not occur:

- Commercially provided options should be included if these meet customers needs eg mobile services.
- Beyond areas of existing commercially provided infrastructure, Government should provide individual direct subsidies to commercial operators to encourage service provision, as with the ABG.
- In remote areas, Government should subsidise provision of service to whole areas through tender processes, as in the Extended Zones tender.

Connections and fault repair

Customer Service Guarantee

The Customer Service Guarantee is designed to provide service providers with an incentive for meeting timeframes for new connections, repairs and keeping appointments, at the level of the individual customer. It applies to all service providers when they supply standard fixed line telephone services for residential and small business consumers.

Questions

- Does the Customer Service Guarantee need strengthening? If so, what changes should be made?
- Should working days be replaced with calendar days in repair timeframes?
- Should the service disruption criteria be tightened? If so, what mechanism should be put in place?

ATUG: sees the need for a Customer Service Guarantee as evidence of market failure in the fixed network services area. Without competition there is no incentive for Telstra to maintain service quality at an appropriate standard. The Government has addressed this fundamental issue with the formation of the NBN to deliver fibre to the premises to 90% of Australian premises over the next 8 years.

ATUG: Service Quality Mechanisms developed for the legacy copper network need to take account of the reality of the transition to the NBN. It may be more effective for NBN planning and deployment to reflect copper network trouble spots than for increased CSG type requirements to be developed and enforced. In the transition period, consumer protection by way of Licence Condition with more significant penalties may provide a more effective incentive for industry than the monitoring, reporting and individual penalty payment requirements that currently exist. For small business in particular, the payment of small penalties after problems have been experienced is not a preferred mechanism. What is needed is expedited attention to having problems resolved. This could occur through the TIO.

ATUG: Beyond copper network parameters for Time to Connect and Time to Repair, service quality and security standards must be established during the transition period to an NBN at a level to reflect the key role of the NBN in the lives of all Australians.

Network Reliability Framework

At a network level, a carrier licence condition requires Telstra to remediate infrastructure which causes unacceptable levels of faults to household and small business fixed line customers. This arrangement, known as the Network Reliability Framework, is a consumer protection aimed at improving reliability across Telstra's fixed line network and ensuring noneconomic services receive a reasonable level of fault repair priority.

Questions

- Does the Network Reliability Framework need strengthening? If so, what changes should be made?

ATUG: Service Quality Mechanisms around the legacy copper network need to take account of the reality of the transition to the NBN. It may be more effective for NBN planning and deployment to reflect copper network trouble spots and for alternatives such as

mobile or wireless service to be put in place ahead of the NBN than for increased NRF type requirements to be developed and enforced.

Retail price controls

The Minister for Broadband, Communications and the Digital Economy may determine that charges for specified Telstra retail services are subject to price controls.

In its 2008 *Review of Australia's Consumer Policy Framework*, the Productivity Commission recommended that the Government remove all retail price regulation applying to telecommunications products and services on the basis that such services are already fully contestable.

Questions

- Should the Government continue to regulate Telstra's retail prices for voice telephony services in the transition to the National Broadband Network?
- If price controls should be continued, which services should be included?
- What individual services or groups of services should be capped in price controls?
- Should retail price controls be used in conjunction with the wholesale access regime (e.g. to regulate fixed to mobile prices)?
- In the longer term National Broadband Network environment, will retail price controls be required? If so, what form should they take? What services should they cover?

ATUG: An ongoing Retail Price Control regime is required during the transition to the NBN environment to:

- Manage possible future increases to line rental prices. Telstra in its TEA cost model and ULLS undertaking has suggested the cost of ULLS is \$46. If so, the cost of line rental will be higher than that, with a real prospect of retail prices continuing to increase over \$30 during transition to the NBN. Accounting separation reports indicate continued strong margins on call services. Retail Price Controls will be needed to ensure an affordable fixed voice services package for end users. As line rental increases, call prices should decrease. The Retail Price Control regime is the only way to ensure this happens.
- Ensure pass through of reductions in mobile termination rates as part of fixed to mobile call retail prices as suggested by the ACCC.
- Ensure pass through of reductions in wholesale prices for international mobile services – voice, data and SMS/MMS
- Ensure an entry level package for NBN services

Community safeguards

Access to:

- a priority assistance service for people with a life threatening medical condition, and
- emergency services

are important community safeguards relating to people's safety. The operation of these arrangements is a critical public safety issue for the transition to the National Broadband Network.

In their Regulatory Submissions both the Consumers' Telecommunications Network and the Australian Telecommunications Users Group identified that access to emergency call services should be maintained in the National Broadband Network environment.

ATUG: In general terms, ATUG sees the NBN and the transition period as a time to review all arrangements which require Telstra to provide social safety net or industry administration support services. National Emergency Services arrangements should encompass the provision of emergency call services. Consumers and businesses (with OHS obligations) will need to be properly informed by service providers about the capability of their voice service in regard to emergency service access. IPND management functions should be moved to the ACMA.

Legacy services and the National Broadband Network

There are a number of services—such as traffic control systems, fire alarms and security systems—which are currently provided over Telstra's copper network. In the longer-term, consideration may need to be given to whether the establishment of the National Broadband Network has implications for the supply of these services.

Question

- Will the National Broadband Network raise issues for legacy services on Telstra's network? Why? If, so how should they be dealt with?

ATUG: believes there will be a range of special services that will need to be migrated to an NBN environment. This one the reason for our suggestion in June 2008 of a practically focused organisation – NBN Australia. With the Government's announcement of NBN Company, the name needs to change but the need for practical focus – implementing access arrangements for competitors and ensuring migration of special services for end users – remains. The experience with CDMA closure provides an example of the sort of practical issues which will arise even with good planning by industry.

Opportunities for red tape removal

Telstra has previously raised a number of regulatory measures which it considers to be red tape which could readily be removed. These are included in its submission to the Productivity Commission's *Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* available on the Productivity Commission's website.

Questions

- Are there any broader implications from the proposals raised by Telstra, in its submission to the Productivity Commission?
- Should the proposals raised by Telstra in its submission to the Productivity Commission proceed?
- Will directory assistance services, including printed directories, be required in an increasingly online world and, if so, how would necessary services be best provided?

ATUG: all suggestions should be looked at on their merit in the context of an effectively competitive market with Government taking direct responsibility for social safety net issues.

Customer Service Guarantee reporting

In the transition to the National Broadband Network environment it may be possible to remove unnecessary reporting requirements. Currently, under the Customer Service Guarantee there are extensive reporting requirements. These include quarterly and annual reporting requirements for new service connections, fault repairs, appointments, compensation and extreme failures.

ATUG: Many reporting requirements reflect an ineffectively competitive market. If market structures are fixed then issues such as the requirement for a specific CSG should be overcome by the working of an effective market place. To the extent that this does not happen ATUG suggests there is a role for the TIO working with industry to ensure Customer Satisfaction is high and reporting to industry and regulators on service standards performance. Recommendations for enforcement and other actions should be part of the TIO's mandate.

Enforcement

More effective requirements for consumer safeguards

Earlier in this chapter issues were raised about whether the ACMA's informal monitoring benchmarks for carrier performance against the Customer Service Guarantee, and priority assistance should be made enforceable requirements subject to civil penalties (i.e. fines).

Level of penalties

The maximum penalties for contravention of a carrier licence condition or

service provider rule are currently \$10 million for each contravention. The Government is considering whether the level of those penalties should be increased.

Range of enforcement powers

Currently the ACMA has a range of enforcement powers available to it. If it considers that a provider is engaging in conduct that is in contravention of the Telecommunications Act or the Consumer Protection Act.

Questions

- Should the ACMA's informal monitoring benchmarks for carrier performance against the Customer Service Guarantee and priority assistance be made enforceable requirements subject to civil penalties?
- Should the level of penalties be increased?

ATUG: an effective, incentives based approach to those matters considered essential to Consumer Protection is preferable. The use of TIO mechanisms for resolving problems in the first instance, Licence Conditions, more relevant penalties (perhaps % of revenue base) and streamlined enforcement procedures would create stronger incentives for industry.

The role of regulators and Government in providing incentives for industry action and behaviour has been reduced in recent years. In the fixed network market, competition has not been strong and now Government has responded with a fundamentally new approach to the development and deployment of Australia's next generation fixed fibre network.

The implication of this decision is that increased, targeted regulation in the fixed network market will be needed during the transition to the NBN. ATUG's preference is for action to be focused on Market Structure and Consumer Empowerment.

Government and Regulators including the TIO need to focus on providing strong incentives (rather than more rules) for industry to deliver the right results. If a competitive market is created, and incentives are developed, the need for interventionist action will be reduced.

Chapter 5: The bigger picture

If Australia is to enjoy the benefits of the digital revolution, we must provide a framework that nurtures, not stifles, innovation and investment.

The Government therefore intends to consider in 2011 whether to look again at its overall approach to regulation in a convergent environment. A key theme in these considerations will be the scope for winding back industry specific regulation once the National Broadband Network is firmly established as an open access, wholesale only, national network. This could include the ongoing roles for Part XIB and XIC and wider consumer protection arrangements. The Government will further engage with the community on this issue at this time.

ATUG: is concerned at suggestions that change the focus of policy and regulation in communications from the long-term interests of end users to promoting investment and innovation. Effectively competitive markets by their very nature will promote investment and innovation. Experience in Australia of the stifling of both investment and innovation has stemmed directly from the core problems of vertical integration and dominance in fixed network markets.

ATUG: prefers competition and so supports the withdrawal of regulation where competition is strong. However, our experience of the last 12 years of competition and regulation in fixed network markets suggests the need to see the NBN market in operation before regulations supporting competition are withdrawn.

ATUG: suggests that there is a need to review regulation beyond the communications and content sectors to ensure widespread use of broadband services and applications in a NBN based Digital Economy. The Productivity Commission should be charged with identifying barriers in sectors preventing the development of an effective Digital Economy e.g., the recent review by the PC of the Health sector should be updated from the perspective of enabling more efficient health service delivery based on a national broadband network. Issues would include the role of Medicare in supporting take-up of digital economy health services, the need for proper security identification and authentication to enable record keeping to be more efficient and cost effective. There would be many other examples where a PC review of efficiency should include those matters which need to be addressed to ensure the development of a fully effective Digital Economy.

Appendix A: Review of operational separation

Section 61A of the *Telecommunications Act 1997* requires the Minister to cause a review of the operational separation regime to be conducted before 1 July 2009.

Questions

- How have the existing accounting and operational separation arrangements affected competition?

ATUG: there has been no discernable increase in competition in the fixed network market after the introduction of accounting and operational separation. At the time of the introduction of the Telstra Operational Separation Plan ATUG sought the inclusion of feedback mechanisms and external evaluation of progress under the Plan. These suggestions were not taken up so Operational Separation in Australia had not been a transparent regulatory tool.

- Will these arrangements continue to be needed before, during or after the rollout of the National Broadband Network?

ATUG: would prefer to see the “hard work” done on effective practical separation of wholesale activities from retail activities in the fixed network market. If this is done, there will be no need for arrangements that are already regarded as ineffective by industry, the regulator and Government.

- In what markets does Telstra hold a substantial degree of market power? Do the operational separation arrangements adequately deal with the risks created by market power?

ATUG: business user experience is that Telstra holds a dominant position in the fixed network services market. This is confirmed by Financial Analysts reports of the sector and ACCC annual reports on Competitive Safeguards in the telco market. Operational Separation does not seem to have reduced the effects of this dominance since its introduction in 2005.

- What technological developments (apart from the National Broadband Network) might reasonably be expected to have a significant impact on competition in telecommunications markets?

ATUG: the NBN will be the most significant development in the fixed network market – providing a legally and structurally separated, wholesale, open access company. Developments in mobile and wireless services will complement but not substitute for fixed network broadband services because of performance requirements.

- How do the operational separation arrangements affect Telstra’s commercial incentives for supplying wholesale eligible services?

ATUG: since operational separation was introduced ATUG members have reported a decrease in wholesale products on offer through competitor companies and an increase in prices through the wholesale division.

- What are the costs and benefits of the operational and accounting separation regimes?

ATUG: has had no visibility on the costs for Telstra and the ACCC and has not seen the benefits that were proposed for both schemes in terms of stronger competition in the fixed network services market. ATUG notes recent ACCC Chairman's comments:

"By imposing accounting and operational separation regimes in recent years, the government has attempted to ensure access seekers can purchase essential inputs on equivalent terms and conditions as those enjoyed by Telstra's own retail division. However, these measures have been ineffective in constraining Telstra's incentives and ability to discriminate against access seekers."

- How could the effectiveness of the current arrangements be improved? Would the options to enhance the current operational separation requirements described in chapter 3 improve confidence in the current arrangements?

ATUG: has concerns with Option 1 in Chapter 3 as it continues to focus on a rules based approach to regulation and avoids the more effective incentives based approach that lies at the heart of the NBN Company development.



2009 Focus Policies

ATUG's Vision

To be regarded by business users of information and communications (metro, regional and rural) as the best members' organisation in Australia to provide:

- an independent, end-user voice to Government, Industry, Regulators and Media on policy and service issues that affect business end users of communications services,
- well researched information and good networking opportunities for members

ATUG Prefers Competition

ATUG works to ensure effective, globally competitive, sustainable communications markets develop in Australia because of the benefits to end users – choice, quality, prices, and innovation.

Core features of effectively competitive communications markets are technology neutrality, affordable fit for purpose services, any-to-any connectivity, inter-operability, accurate customer information, quick transfer processes, accurate billing and well coordinated service support.

ATUG supports targeted regulation where competition is not working

Where markets are not effectively competitive, ATUG supports targeted regulatory intervention. The telecommunications specific provisions of the Trade Practices Act are currently still important. The effects test in Part XIB (Telecommunications Industry) and the "long-term interests of end-users" objective in Part XIC (Telecommunications Access Regime) are key underpinnings to effective regulatory action.

ATUG supports the development of the National Broadband Network.

- **Policy Objectives** - the Long-term Interests of End Users and an effectively competitive services market place.
- **Affordability** is the key to take-up. Regulation must support the cost effective building of the NBN as well as recognise that effective competition is the strongest tool for delivering affordable prices. An entry level "safety-net" package should also be developed.
- **End User Choice** – network design is central to competition and choice. Only designs that promote competition should be accepted. When infrastructure competition is not possible, services competition based on open access and service equivalence at a wholesale level must be ensured.

- **Wholesale Service Equivalence** and effective services competition can only be assured by establishing:
 - clear separation between wholesale and retail units and
 - a new pro active, pro competition independent oversight body, NBN Australia, with the task of implementing the Open Access and Equivalence Frameworks
- **Customer Experience** in the NBN environment must be carefully managed to ensure a successful transition and good end user outcomes. Service quality and security standards must be established at a level to reflect the key role of the NBN in the lives of all Australians.
- **Ubiquity** – all Australians must be connected to the NBN. Ubiquity is not only about network availability but also about affordability and accessibility. When all Australians are connected to the NBN, the real potential of this for productivity, growth and innovation will be open to end users in every sector of the economy and community, and in all regions of Australia.

ATUG works for cost based prices for International Mobile Roaming services

ATUG wants cost based prices for International Roaming services – voice, SMS and data.

Current retail prices do not reflect true costs and deter the use of services that businesses need for competitiveness, growth and innovation. End users have no power to negotiate prices with suppliers. A global economy needs global communications services at reasonable prices. Industry suggested “work arounds” are seen as very second rate strategies by end users who want full value and true mobile convenience when traveling.

ATUG works on issues to drive better value for members

- Telco contracts should support benchmarking;
- Broadband speeds should be more accurately described to customers,
- Broadband switching delays should be reduced,
- Mobile call drop-put rebates should be re-instated;
- Mobile calls should be billed per second

ATUG works for increased end user confidence on the Digital Economy

ATUG members are concerned at the higher costs and reputational risks to businesses from increased incidents and threats from malicious use and criminal use of the online environment. ATUG supports continued effort by government, regulators but calls for a stronger action by industry to address security issues, and to ensure the robustness, survivability and security of communications networks especially in an NBN environment. ATUG will work with industry and government to raise awareness among its members and with SME and home based business users of measures that are available to them to deal with these threats.