



**Australian
Competition &
Consumer
Commission**

GPO Box 3131
Canberra ACT 2601

23 Marcus Clarke Street
Canberra ACT 2601

tel: (02) 6243 1111
fax: (02) 6243 1199

www.accc.gov.au

Your ref: 50105
Contact officer: Michael Cosgrave
Contact phone: (03) 9290 1914

12 November 2014

Dear Mr Martin

Re: Independent Audit: NBN Public Policy Process

I refer to your letter of 9 October 2014 to the Australian Competition and Consumer Commission's (ACCC) Chairman, said to be on behalf of a number of unidentified investors, regarding the ACCC's role in the NBN policy process. The letter has been passed to me for response. In the letter you identify a number of findings in the report of the Independent Audit: NBN Public Policy Process (NBN Policy Audit) related to the scope and substance of the ACCC's advice. Those findings are used to support assertions that the ACCC sought to unduly influence NBN policy and used subsequent regulatory proceedings to achieve a preferred structural outcome. The ACCC categorically rejects these assertions.

The ACCC does not agree with the findings of the NBN Policy Audit that it 'overstepped its authority' by advising the Panel of Experts that Fibre to the Node (FTTN) was not a stepping stone to Fibre to the Premises (FTTP). It does not accept the panel's characterisation of that advice as 'technical', or that its advice was 'unsolicited.' On the contrary, the ACCC was acting entirely consistently with both the Australian Government's RFP objectives and the ACCC's remit as an advisor to the government as part of that process.

I note that there are three grounds for the ACCC's input into the assessment of the merits of FTTP and FTTN network deployments.

Firstly, the RFP documentation specified a wider role for the ACCC than pricing and competition issues, requiring the ACCC to provide:

...ongoing advice on proposals, including advice on issues such as wholesale access services and prices, access arrangements, proposed legislative or regulatory changes and the likely impact of Proposals on pricing, competition and the long-term interests of end-users in the communications sector.

I note that the long-term interests of end-users (LTIE) has a specific and well understood meaning in the *Competition & Consumer Act 2010* (CCA). The CCA defines promoting the LTIE as achieving the following objectives:

- Promoting competition
- Achieving any-to-any connectivity
- Encouraging the economically efficient use of, and investment in, infrastructure.

The ACCC considers the RFP contemplated the ACCC's role as encompassing the provision of economic advice on the efficient use of and investment in infrastructure, including the efficient investment and upgrading of the different network technologies that were being envisaged by the RFP.

Secondly, I note that the RFP specified that the proposals provide for sufficient network capacity and future upgrade paths. Having regard to this objective, the different technical capabilities and potential for performance upgrades of FTTN and FTTP networks was a matter clearly within the scope of the ACCC's advice in the RFP process.

Thirdly, the ACCC's advice that FTTN was not a stepping stone to FTTP did involve a competition issue. The ACCC's advice noted that

The investment of significant public funds into nodes could serve to delay FTTH if the successful proponent is not under significant competitive pressure and can therefore delay further investment until its node costs are recovered.

That advice identified a potential economic and competition issue regarding the efficiency of future network investments and upgrades, as influenced by the market and regulatory structures for the NBN. Evidence from contemporaneous international technical literature that you note, specifically, the Analysys Mason report,¹ did not have regard to the competition matters upon which the ACCC was advising.

The ACCC did not provide 'technical' advice. Advising on the efficiency of different options for investment requires a degree of understanding of technology and cost issues. In formulating its advice, the ACCC necessarily relied on technology and cost information provided in proposals it had before it from firms operating in the industry that had the necessary technological expertise and insight into cost structures.

As confirmed in the NBN Policy Audit report² the ACCC did not 'endorse' the adoption of FTTP over FTTN for the NBN. The report refers to a technology questionnaire sent to the ACCC by the Department of Broadband, Communications and the Digital Economy. In responding to that questionnaire, rather than endorsing any particularly choice of technology, the ACCC expressed the view that

In ranking these technologies, it is important to note that many are capable of providing the same end user experience in terms of speed, reliability and upgradeability – from a technical perspective, they can therefore be very similar. Which technology is the most suitable for providing services of different speeds, in different regions and climates, and its upgradeability, is ultimately a question of the economics – that is, which technology can achieve the desired goal at the lowest cost.

¹ Analysys Mason, Final report for the Broadband Stakeholder Group, *The costs of deploying fibre-based next-generation broadband infrastructure*, Final report, 8 September 2008.

² Independent Audit: NBN Public Policy Process, pp. 76-77.

In response to your request for the ACCC to publish all of its advice to government in this matter, I note that consistent with long established practice, any release of confidential advice to government is a matter for government. I do however propose to place this correspondence together with your original letter on the Commission's website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Cosgrave', with a horizontal line extending to the right.

Michael Cosgrave
Executive General Manager
Infrastructure Regulation Division