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NBN Co-Telstra service delivery agreements

ACCC assessment

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Executive summary

This report explains the reasons behind the ACCC's engagement with Telstra and NBN Co during the implementation of commercial agreements for Telstra to provide network services to NBN Co during the rollout.

The service delivery agreements were announced on 21 December 2015 and 11 April 2016 and are for the supply of network activation and assurance services and network planning, design, construction and construction management services.

The ACCC recognises that the purpose of the parties entering into the agreements is to bring forward the rollout of the NBN.

However, while it may lead to the faster deployment of the NBN, the agreements potentially introduce impediments to the emergence of more competitive fixed-broadband markets, which is what the NBN is expected to deliver. In this context, it is important to ensure NBN Co's ongoing compliance with its statutory non-discrimination obligations.

For this reason, the ACCC engaged with the parties to ensure that its concerns about potential issues were made known while the details of the agreements were developed.

In particular, the ACCC raised concerns about the potential for the agreements to provide Telstra a "head start" in selling broadband services over NBN-funded infrastructure, preferential service activation and fault handling on the NBN, and greater insight into NBN rollout.

In the ACCC's view, if this was to occur, Telstra would be in a much better position relative to its competitors to offer superfast broadband services, better target its marketing and lower its customer acquisition costs, and better tailor its customer experience on the NBN relative to its rivals.

During this engagement period the parties provided copies of the agreements as well as explanations of how they intend to implement them and otherwise intend to operate their respective businesses in light of these agreements.

As part of this engagement, NBN Co and Telstra identified a number of measures designed to mitigate the potential for Telstra to gain an advantage in supplying broadband services due to its involvement in the agreements. These measures include:

- NBN Co generally installing new HFC connections only after all service providers can order NBN services in an area, to avoid Telstra having a head start in selling HFC services.
- NBN Co setting priorities on activation and assurance work that it allocates to Telstra, requiring Telstra to comply with those priorities and not making available RSP identities on work orders unless the RSP specifically provides this information for Telstra's use in verifying that services have been correctly delivered.
- Telstra providing a "white label" activation and assurance service to NBN Co and requiring that its field workforce follow non-discrimination rules when attending end-user premises.

This has enabled the ACCC to seek input from a number of service providers that operate over the NBN, and has used this input in part to help it reach a view on the scale of any potential advantage that Telstra would likely obtain in practice.

The ACCC's view is that the agreements could still pose a significant risk of distorting or otherwise lessening competition in the supply of broadband services unless all NBN access seekers are equally able to plan the commencement of their services over the NBN, and unless Telstra carries out the activation and assurance work for NBN Co in a way that does not disadvantage other NBN access seekers.

Consequently, the ACCC is working with the parties to ensure appropriate arrangements are now established in order to:

- show the ACCC that the measures that the parties have detailed are being successfully put into practice
- demonstrate to NBN Co access seekers that they receive equivalent activation and assurance outcomes where Telstra is the service delivery partner
- provide all NBN access seekers with additional information concerning the rollout of the NBN, including regular reports that detail progress made in making the NBN available in each service area.

Putting these arrangements in place will also, in the ACCC's view, facilitate a faster resolution to any competition issues that may arise from the service delivery agreements.

1. Overview of the service delivery agreements

The NBN Co-Telstra service delivery agreements were announced on 21 December 2015 and 11 April 2016 and respectively are for the supply of, amongst other things, network activation and assurance services (the Operation and Maintenance Master Agreement, or OMMA) and network planning, design, construction and construction management services (the HFC Delivery Agreement, or HDA).

Telstra is one of three service delivery partners that NBN Co has contracted under an OMMA to provide, amongst other things, network activation and assurance services on its fixed line (FTTP, FTTN/B, HFC) networks. Unlike Telstra, the other OMMA service delivery partners are not also broadband service providers.

Under its OMMA with NBN Co, Telstra is allocated to a number of defined regions, with flexibility for these to be supplemented as the NBN rollout extends into new areas, or reduced, having regard to performance. Hence, the overall proportion of the NBN fixed line footprint for which Telstra will be the OMMA service delivery partner is not rigidly fixed.

Work covered by the OMMA includes activating homes and businesses once an area has been declared Ready for Service (RFS) by NBN Co and end-users are able to order a connection, along with ongoing maintenance and fault remediation activities.

The services under the HDA include design, construction, program management, construction management and scheduling activities concerning NBN rollout within the Telstra HFC network footprint in Sydney, Melbourne, Adelaide, Perth and Brisbane/Gold Coast.

The construction activities under the HDA are generally split into in-exchange works and limited upstream field activities, which Telstra will undertake directly, and field construction activities, where Telstra will undertake certain management and coordination activities in respect of NBN Co's 'Multi-Technology Integrated Master Agreement' (MIMA) construction partners. Telstra is not a MIMA construction partner.

Telstra has commenced supplying these services, with the HDA construction program anticipated to reach scale in December 2016. The contract is expected to continue until the conclusion of the NBN build, which is expected in 2020.

These agreements provide Telstra with roles in addition to those already contemplated by the revised Definitive Agreements.

2. ACCC assessment

2.1. Assessment framework

The agreements are subject to the general competition law provisions within the *Competition and Consumer Act 2010* (CCA) as well as telecommunications industry specific provisions relating to anti-competitive conduct in Part XIB. The telecommunications access regime in Part XIC of the CCA is also relevant to the extent that the agreements relate to declared telecommunications services.

The ACCC has considered whether the agreements are likely to substantially lessen competition in markets for broadband services, and whether they would result in discrimination against other NBN access seekers in availability of rollout information, or in the quality of activation and assurance services.

The assessment proceeded on the assumption that the HDA services will be supplied in up to a third of the total NBN footprint. This is the proportion of premises for which NBN Co has

forecast using HFC to deliver access services, and not all of these premises will be within the Telstra HFC footprint. For the purposes of the assessment it was also assumed that Telstra will provide OMMA services in around one quarter of the NBN fixed lined footprint.

In addition, the ACCC has had regard to:

- the high concentration in the national markets for retail and wholesale broadband services, that a significant number of customers tend to stick with their current provider, and hence even a relatively modest increase in Telstra's market share would distort the market and risk entrenching the existing retail market structure.
- NBN service providers' strong dependence on NBN Co for timely and accurate rollout information, and service activation and fault handling for their NBN services.
- other access networks and services available to service providers in the lead up to the NBN becoming available in the HDA areas (although these are typically less capable of supporting superfast broadband services, and/or are of limited availability).

2.2. Specific competition concerns

In assessing the agreements, the ACCC has assessed their likelihood to give rise to the following three particular outcomes, each of which the ACCC believes could give rise to significant competition concerns and/or raise significant questions about NBN Co's ability to meet its non-discrimination mandate.

The ACCC's views, including a discussion of mitigating factors, are set out in section 2.5 below.

2.2.1. Early access to NBN funded infrastructure

Telstra's rights to use NBN funded HFC lead-ins within the existing Telstra HFC footprint risks distorting competition by assisting Telstra to meet early demand for superfast broadband services, and restricting the pool of contestable customers within the NBN switchover period.

This concern arises as Telstra will have increased visibility over the progress of NBN Co investment in the Telstra HFC network as a consequence of providing the HDA services, and may be in a position to use the network before other service providers have an opportunity to do so.

This is because NBN Co intends to further develop Telstra's HFC network infrastructure within the existing footprint and incorporate it into the NBN, including connecting additional lead-ins to premises.

While Telstra agreed in 2014 to transfer key assets which form part of Telstra's HFC network to NBN Co, it can continue to supply pay TV and broadband services over the network consistent with arrangements under its Migration Plan.

Consequently, new NBN HFC lead-ins built within the existing footprint of the Telstra HFC network are potentially available to Telstra from the time that they are made, but only become available to other service providers once NBN starts selling access services in that area.

2.2.2. Preferential service activation and fault handling on the NBN

Preferential service activation and fault handling on the NBN risks distorting competition by skewing demand for NBN broadband services towards Telstra and/or raising customer acquisition and retention costs of competitors.

This concern arises as Telstra, in providing OMMA services to NBN Co, could potentially prioritise the activation or remediation of NBN services where it is the access seeker, and downgrade work requested by its competitors. Telstra technicians could also provide enhanced services for its own retail customers, or promote its own or disparage the retail services of others while attending a customer premise.

2.2.3. Better access to rollout and RFS information

Better access by one service provider to NBN rollout and RFS information can have significant implications for competition in markets for NBN services. It can also have a discriminatory impact on NBN access seekers who are not in a similar position to receive rollout information.

This is because if a service provider had relatively better access to this information it could better plan and execute its own network investments and marketing activities in those locations where the rollout is proceeding to schedule, whereas other service providers may continue to focus their activities in locations where the rollout has been delayed. Similar concerns arise regarding better access by one service provider to NBN rollout information where RFS is unexpectedly brought forward.

This can lead to lost sales and/or higher costs due to mistimed local marketing activities, such as retail kiosks or sales partnerships with local shops, and mail outs and billboards. It can also make it more difficult for NBN access seekers to optimise their investments in the wholesale market.

The potential for Telstra to have better access to rollout information arises as Telstra has direct visibility over network planning and construction activities as a consequence of providing the HDA services, and hence can make well informed and up to date forecasts as to when the NBN will become available in a given area. Other NBN service providers will not have this same visibility and will be reliant on NBN Co to provide accurate and timely forecasts, which will now be based on construction progress information that it receives from Telstra.

2.3. Intended implementation of the agreements and business operations

NBN Co and Telstra have provided copies of the agreements as well as explanations of how they intend to implement them. The ACCC was also briefed in some detail on how they each intend to operate their respective businesses in light of these agreements so as to mitigate the potential for them to lessen competition. This has allowed the ACCC to consider the scale and scope of Telstra's roles and the competition outcomes that are likely to result from the contracts.

Importantly, the parties have stated that the commercial agreements allow for them to implement an 'accelerated model' to rollout the NBN in Telstra HFC areas, whereby the network design and construction program is optimised so that existing HFC assets are leveraged to release as much NBN footprint as quickly as possible. The parties also state that Telstra personnel will rarely attend customer premises during the construction phase.

The parties have also indicated that the NBN access seeker identity will not be made available to Telstra unless the access seeker specifically provides this information for use by Telstra as part of verifying that services have been correctly delivered, otherwise Telstra will effectively operate a 'white label' service when it is fulfilling those tasks for NBN Co.

NBN Co has also advised that it has recently altered some aspects of its approach to providing rollout information to its current and prospective access seekers, and has pointed to its commercial incentives to support its customers with relevant information during the rollout.

Further details of how the parties intend to implement the agreements that are of direct relevance to the competition concerns are provided in the Attachment.

2.4. Consultation with stakeholders

The ACCC conducted targeted inquiries with industry stakeholders to assist its assessment of this matter. These inquiries were based on summary materials provided to the ACCC by NBN Co and Telstra.

Stakeholders showed a strong interest in participating in the inquiry, with eight of the eleven NBN service providers that the ACCC contacted providing input. Where possible, the ACCC spoke with staff that interact with NBN Co and use NBN rollout information as part of their day to day work (e.g., for business planning or marketing purposes).

Respondents expressed concern that the HDA and OMMA could result in an advantage to Telstra in the supply of NBN services.

Respondents were more accepting of Telstra's role in network planning and design, but less accepting of Telstra taking on other roles under the HDA and OMMA. That said, respondents acknowledged that the intended manner of implementing the agreements would address or lessen some concerns, particularly those concerning early access to NBN funded infrastructure.

The area of greatest ongoing concern for respondents was the potential for the agreements to advantage Telstra in markets for NBN services through better access to NBN rollout information. Respondents remained concerned that Telstra would have a significantly better view of overall technology choice and rollout progress, and additional clarity over RFS dates. Respondents also expressed the view that NBN Co's framework for reporting rollout information would likely need to be adjusted so that it better supports the accelerated model.

A further residual concern for stakeholders is the potential for technicians in the field to depart from the behavioural rules that have been agreed between NBN Co and Telstra.

2.5. ACCC views

2.5.1. Early access to NBN funded infrastructure

The ACCC agrees that implementing the 'accelerated model' for NBN rollout would significantly reduce the risk of Telstra gaining an unfair advantage from the early use of NBN funded infrastructure within the existing Telstra HFC footprint. This is because it significantly reduces the scale of NBN Co's investment in the HFC in the footprint ahead of the NBN becoming available to all NBN access seekers.

This complements the binding regulatory commitments that Telstra previously provided in its Migration Plan not to use NBN funded extensions or infills to its HFC network.

The ACCC intends to monitor the extent to which this model is adopted and how the retail market for broadband services develops as the HFC is rolled out in Telstra HFC areas. In this regard, Telstra has already proposed a suitable form of report to demonstrate the scale of HFC sales it is making in areas where NBN Co has commenced network design and construction, and will volunteer this to the ACCC each calendar quarter.

The ACCC will also monitor the scale of Telstra's use of new HFC lead-ins installed within the existing Telstra HFC footprint under the HDA ahead of the NBN being ready for service.

2.5.2. Preferential service activation and fault handling on the NBN

The ACCC considers that implementing the controls that NBN Co and Telstra have detailed will curb the potential for systemic discrimination against other NBN access seekers in activating and assuring broadband services on the NBN. This is principally as a result of steps to mask the identity of the NBN access seeker, restrict Telstra from undertaking other work when performing OMMA work tickets, and prohibit the use of Telstra branding. Separately, Telstra has withdrawn programs that had been used to reward its technicians for sales leads.

Telstra will not provide enhanced activation or fault handling services for Telstra retail customers while performing OMMA work tickets, e.g., so as to perform both NBN installation and retail activities in one truck roll.

Telstra's intended directions to its technicians concerning how they interact with end-users appear appropriate, although the broad base and dispersed nature of the workforce could work against their effectiveness in practice. The ACCC will monitor complaints of technicians departing from the rules and act should this occur to a material extent.

That said, the ACCC considers it is important for it and NBN access seekers to receive periodic reports to demonstrate whether these behavioural controls are delivering non-discriminatory outcomes. NBN Co has agreed to provide reporting to the ACCC to show the outcomes achieved for Telstra retail customers and the customers of other NBN access seekers when Telstra is the OMMA service delivery partner. The ACCC intends to work with NBN Co to develop a suitable form of this reporting.

2.5.3. Better access to rollout and RFS information

The potential for Telstra to gain a competitive advantage from preferential access to rollout information was a key concern that emerged from market inquiries with NBN access seekers.

This is because of concerns that the HDA agreement will deepen and broaden Telstra's view over the rollout of the NBN, and place it in a significantly better position to monitor developments than is available to other NBN access seekers, who will be dependent on NBN Co's rollout reporting and any public data. The move to the accelerated rollout model further emphasises the benefits of detailed rollout information being provided to NBN access seekers early in the planning and construction cycle.

At the same time, the ACCC considers the contractual restrictions concerning Telstra's use of this information may leave open the potential for Telstra to draw upon information it gains under the HDA to supplement the rollout information that NBN Co reports to its access seekers.

In the ACCC's view the more appropriate mechanism by which to address this issue is for NBN to provide information to other access seekers (actual and prospective) so that they are in a materially similar position to Telstra in planning their business operations.

This is because NBN Co is already looking to leverage its reporting arrangements to pass through to access seekers additional rollout information, and to provide it earlier and more frequently. The ACCC also considers that better rollout reports can appropriately support NBN access seekers in competing in the supply of NBN services, by allowing them to better plan and time their complementary network investments, retail marketing and customer migration activities, to a broadly similar extent as would be open to Telstra under the HDA.

That said, NBN Co will have other objectives during the NBN rollout which could potentially distract it from fully implementing effective reporting on rollout to access seekers. Consequently, the ACCC intends to work with NBN Co so that NBN access seekers can be assured that they will have similar access to rollout information for business planning purposes.

While this issue could conceivably be addressed by Telstra taking on obligations to ring fence information it receives under the HDA, establishing such bright line controls will take time and risks delaying the NBN build.

Nor would bolstering the restrictions on Telstra's use of information promote competition to the same extent, as it is inherently difficult to detect breaches of these types of rules, and significant competitive advantage would be likely to accrue quickly and be difficult to unwind. On the other hand, circulating better rollout information to all access seekers will help raise the tide and place all access seekers in an equivalent position to compete over the NBN.

3. Next steps

The next steps in this matter are for the ACCC to work with the parties to finalise the arrangements for monitoring the practical operation of the agreements. The ACCC considers that this should include oversight of the extent to which NBN Co is able to use the 'accelerated model' in building the NBN in Telstra HFC areas, and regular reports to demonstrate whether equivalent outcomes are observed for Telstra customers and other customers in areas where Telstra is contracted as the NBN activations and assurance partner.

The ACCC will also continue to work with NBN Co to ensure all access seekers have equivalent access to rollout information, before the NBN construction program in the Telstra HFC footprint gains scale from late 2016.

Attachment - Table of competition measures to be implemented

Pertaining to the HFC Delivery Agreement

Measures to address concerns	Relevant competition concerns
NBN Co will use an 'accelerated model' to rollout the NBN in Telstra HFC areas, whereby the network design and construction program is optimised so that existing HFC assets are leveraged to release as much NBN footprint as quickly as possible.	This 'accelerated model' is intended as a direct mitigation of the potential risk that Telstra gains an unfair advantage from use of NBN funded improvements to the Telstra HFC network prior to them becoming available to other service providers at NBN ready for service (RFS).
Telstra will follow design rules and overall thresholds set by NBN Co for each service area module (SAM) when specifying the network design documentation to be used to serve individual premises.	This limitation on Telstra's discretion when providing planning and construction related services under the HDA is intended to mitigate the potential for Telstra to be advantaged by a NBN design that best meets its particular objectives.
Most field work during the construction will be performed by MIMA contractors, and it will only be in exceptional cases that Telstra personnel will attend customer premises during the construction stage.	This is intended as a direct mitigation of the potential for construction contractors to promote Telstra services or favour Telstra customers when connecting premises during the NBN rollout.
Telstra is restricted in using for retail purposes some of the information it will receive under the HDA relating to the NBN rollout.	This is intended to deter Telstra from using information that it learns pursuant to the HDA for planning or marketing retail broadband services.
NBN Co is considering modifying its approach to reporting to access seekers on the NBN rollout and RFS dates, and will continue to work with its customers via account managers to understand and respond to the needs of individual RSPs, etc.	This is intended to improve visibility for NBN access seekers over the NBN rollout and progress towards forecast RFS dates.
Telstra does not intend to undertake large-scale, out-of-the-ordinary investments in its HFC exchange equipment in the lead up to the network being handed over to NBN Co.	This is intended to mitigate the risk that Telstra would benefit to a significant extent from NBN Co's investment in the capacity of the access component of the Telstra HFC network ahead of the network being handed over.
Telstra will provide the ACCC with confidential reports that show the number of HFC new connections, and SIOs by HFC distribution area, on a quarterly basis.	This reporting is intended to provide the ACCC with visibility of whether out-of-the-ordinary demand for Telstra HFC services is emerging in areas subject to HDA activity.
NBN Co will develop an effective means for the ACCC to monitor the number of new lead-ins that have been installed and accessed by Telstra ahead of RFS.	This is intended to provide the ACCC with visibility of the extent to which the 'accelerated model' is being adopted, and the scale of Telstra's early access to NBN funded lead-ins.

Pertaining to the Operation and Maintenance Master Agreement

Measures to address concerns	Relevant competition concerns
NBN Co will issue work tickets to Telstra (as an OMMA service delivery partner) without identifying the end-user's RSP (unless the access seeker specifically provides this information for use by Telstra), and Telstra will not seek to identify which work tickets relate to Telstra's retail customers.	These measures are intended to directly mitigate the potential for Telstra to prioritise its own NBN work tickets it receives from NBN Co as the OMMA service delivery partner.
Telstra will not provide enhanced activation or fault handling services for Telstra retail customers while performing OMMA work tickets, e.g., so as to perform both NBN installation and retail activities in one truck roll.	This is intended to directly mitigate the potential for Telstra to provide services to its own retail customers while performing OMMA work which would not be available to end-users of other service providers.
Telstra will not retain end-user personal information that it obtains under the OMMA.	This is intended as a direct mitigation that Telstra will be advantaged by more up to date customer databases and more informed customer relationship management systems
When undertaking OMMA work, Telstra technicians will report progress directly to NBN Co; will not market or sell services nor use Telstra branding on their uniforms or vehicles; and not ask about the end-user's RSP or provide an opinion on Telstra services or the services of another RSP. As part of this, technicians are not permitted to use Telstra online applications used for reporting potential sales leads.	This is intended to directly mitigate the potential for Telstra to gain a competitive advantage by having greater insight into the progress of particular NBN work tickets, market retail broadband services or benefit from brand association with the NBN.
NBN Co will work closely with Telstra (and other OMMA delivery partners) to model their field workforce capability in each area so as not to allocate more activation and assurance tickets under the OMMA than the available workforce is reasonably estimated to be able to complete. NBN Co will specify on the day priority of these work tickets and monitor compliance with those priorities.	This is intended to provide a direct mitigation of the potential for Telstra to be advantaged by prioritisation decisions it makes where demand exceeds contractor capacity on a given day.
NBN Co will develop reporting to show the outcomes achieved for Telstra retail customers and the customers of other NBN access seekers when Telstra is the OMMA service delivery partner.	This reporting framework is intended to demonstrate whether Telstra retail customers are obtaining better outcomes than the customers of other NBN access seekers where Telstra is the OMMA service delivery partner.