



Variation to the NBN Co Special Access Undertaking – expiring non-price provisions consultation

Submission by the Australian Communications Consumer Action
Network

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Contents

| | |
|---|---|
| Executive Summary and Recommendations | 4 |
| Endorsed network change provisions..... | 6 |
| Dispute resolution provisions | 7 |
| Product Development Forum provisions | 8 |

Executive Summary and Recommendations

ACCAN thanks the Australian Competition and Consumer Commission for the opportunity to contribute to its consultation concerning the proposed variation to the NBN Special Access Undertaking (SAU) and extension of the expiring non-price provisions. The expiring non-price provisions concern:

- The endorsed network change provisions;
- The dispute resolution provisions; and
- The detailed Product Development Forum processes.

These processes should be refined in order to support stronger service outcomes for consumers. In particular ACCAN believes that there need to be significant reforms to the Product Development Forum provisions to support best practice price setting.

ACCAN does not believe that an extension of the expiring provisions would be reasonable, insofar that it does not promote the long term interests of end-users or the economically efficient operation a carriage service.¹ Accordingly there are grounds for rejecting the proposed extension, on the basis that it does not meet the statutory criteria set out in the *Competition and Consumer Act 2010* (Cth).²

The ACCC is required under the *Competition and Consumer Act 2010* (Cth) to consider whether the proposed variation is reasonable within the meaning of the Act, as well as the counterfactual to accepting the SAU. In the submission of the NBN Co. it has been put forward that the ACCC is not required to assess alternative proposals, options or provisions that may meet the test of reasonableness.³

ACCAN does not dispute this characterisation of the Act, but notes that the submission of the NBN Co. turns upon the argument that the operation of the current provisions has been reasonable, insofar that they have promoted the long-term interests of end-users and efficient use of infrastructure. It is ACCAN's submission that they have not and therefore the application for extension of the provisions should be rejected.

The processes set out in the expiring provisions have not supported the economically efficient use of NBN's infrastructure. This is perhaps best reflected in the adoption of a flat tariff structure for NBN services, with the entry level price being set well in excess of the capacity to pay of a significant number of households.

The consequence is that NBN Co. has exposed itself to a reduced take-up that ACCAN estimates to be in the order of approximately a million households. A reduction in take-up of this magnitude would represent a loss in annual revenue in the vicinity of \$540 million per annum, and represent a considerable blow to the financial viability of NBN Co.

¹. *Competition and Consumer Act 2010* (Cth) s. 152AH(1)(a), s. 152(1)(f).

². *Competition and Consumer Act 2010* (Cth), s. 152AH.

³. NBN supporting submission, p. 8-9.

A poor process has the potential to lead to poor pricing outcomes, and at this stage appears to have done so. Although in the short term the implications of poor pricing will be borne by consumers who will either face financial stress in trying to keep their service, fail to switch to the NBN or cease their service, in the medium term it is NBN Co. that will bear the brunt of pricing failures. Consumers who lack the capacity or willingness to pay for a service will not purchase it, which for NBN Co. will likely mean a material reduction in the revenues that it expects to recover, a failure to meet financial obligations and inevitably insolvency.

The adoption of a tariff structure with a high price floor is also a decision that is in direct defiance of basic economic principles about the pricing of network services. This is problematic not merely at a theoretical level, but because of the material adverse effect that it has on consumers and the NBN.

The Product Development Forum provisions and process have supported the adoption of a flat tariff pricing construct. This pricing construct provides disincentives for consumers and users to take up and use NBN infrastructure services and is accordingly inconsistent with principles of allocative efficiency. As these provisions have supported the adoption of inefficient pricing constructs and precluded the efficient use of telecommunications services there are grounds for rejecting the application to extend the variation.

The provisions concerning endorsed network changes have not promoted prudent or efficient investment in novel forms of network architecture through co-contributions from community groups or consumers. The complexity of the endorsed network change process appears to have prevented consumers and communities from accessing the services that they seek through novel delivery options, despite willingness to pay in order to support a change.

The provisions are not operating in the long term interest of end users, nor promoting the efficient use of infrastructure. Accordingly there are sound legal grounds for rejecting the application for the extension of the endorsed network change provisions as they fail to meet the legal test required under the Act.

With respect to the dispute resolution provisions ACCAN considers that the provisions have failed to promote the long term interests of end-users as they have not supported resolution of conflicts between service providers and NBN Co, nor service improvements through better processes. Accordingly, ACCAN considers that there is a legal basis to reject the request to extend the operation of the dispute resolution provisions.

Endorsed network change provisions

The endorsed network change provisions provide a process for the modification of network design features. ACCAN notes that the endorsed network change provisions have not been utilised since their drafting in 2013. Although supportive in principle of the provisions as a mechanism to allow consumer groups and retail service providers to inform NBN about the potential for changes to the design and delivery of services, ACCAN considers that the provisions have been ineffective.

In principle a framework that supports greater consultation and input on the potential for different delivery technologies and designs could promote prudent and efficient investment in infrastructure, where end-users expressed a willingness to pay for design changes. However, in practice the information and technical knowledge required of end-users to engage with this process is beyond the capacity of end-users.

ACCAN is supportive of provisions being embedded in the SAU that support efficient long term investments. The contention that the endorsed network design process has promoted efficient investment in and operation of the NBN is difficult to maintain, in the absence of any indication that the provisions have supported investment decisions.

The failure of the process to be used over a period of five years is indicative that the current process is unduly complex and is of limited use to either retail service providers or end-users. This view has been echoed in ACCAN's consultation with service providers who indicated that the complexity of the provisions acted as a deterrent to their use.

The usefulness of the network design provisions in their current format should be contrasted with the prevalent use of permitted variation processes to change network design features. In the course of ACCAN's consultation on the expiring provisions we were advised that the almost all design changes had been processed via the permitted variation process and that this had become the default process for design changes.

In some instances the validity of adopting network design changes in this way was questioned by those consulted, and concerns were raised as to whether permitted variations were the appropriate avenue through which to endorse network changes. ACCAN has not been advised of any adverse outcomes arising as a result of the usage of permitted variations processes. However, it is concerning that this mechanism has potentially been preferred due to its simplicity rather than legitimacy.

The revision of the endorsed network change provisions is strongly supported by ACCAN. A careful and considered refinement of the provisions to simplify and clarify procedures would support the use of this process to encourage prudent and efficient investments and the long-term interests of end-users. In the absence of any change ACCAN considers it unlikely that the provisions will provide a framework for efficient investment going forward.

In summary, the provisions do not appear to be supporting dynamic efficiency through prudent and efficient investments, nor the long-term interests of end-users who may benefit from investment. Accordingly ACCAN does not consider that the endorsed network change provisions would meet the statutory criteria for extension.

Dispute resolution provisions

As noted by the ACCC there have so far been no disputes that have led to the use of the dispute resolution provisions set out within the SAU. These provisions provide for an independent process of mediation and arbitration of a dispute between an access seeker and NBN Co.

ACCAN has been advised that there are several reasons driving service providers' reluctance to use the mechanism. These range from the availability of more efficient alternatives through staff and senior management engagement, to concerns over the potential for a formal dispute to result in NBN Co. using its market power to engage in retaliatory conduct.

The failure of access seekers to use the formal process set out in the SAU in light of the material volume of consumer complaints concerning the migration process is indicative that there are limitations to the formal mechanism. It would seem improbable that in the preceding five years that there have been no matters or disputes between a single access seeker and NBN Co. on a matter that warranted mediation or arbitration. This is noting that over this period there have been just fewer than 100,000 complaints made concerning NBN services to the Telecommunications Industry Ombudsman since the 2012/13 financial year.⁴

Rather, it appears that access seekers are weighing the relative merits of using the formal process and engaging in mediation or arbitration and finding them lacking. As a consequence retailers are opting to attempt to resolve disputes with NBN Co. through private negotiations or alternatively engaging with media in order to place pressure on NBN Co.

In light of the information provided to ACCAN, the core weakness of the dispute resolution processes is that they are concerned with matters of minor operational significance. The dispute resolution provisions do not concern matters of material interest to service providers, including pricing and product design. The incentive to use these processes is therefore weak.

ACCAN has also been advised that the dispute resolution provisions appear to be framed as applying to bilateral contracts or agreements, which are simultaneously banned under the terms of the SAU non-discrimination clauses. Accordingly some service providers questioned the relevance of the processes to the substance of their disputes.

In the course of ACCAN's consultation it was suggested that a standardised or default contract could be created with service provider and NBN input in order to address service gaps. Where issues emerged service providers would be able to request a revision of the standard terms, with ACCC oversight and arbitration as a regulatory backstop, as a potential alternative to the current arrangements under the SAU.

ACCAN supports the consideration of such a mechanism as a potential method for resolving many of the impasses and gaps that arise in the delivery of services to consumers. As part of this process ACCAN believes that there is a considerably stronger role for the ACCC to play in dispute resolution between NBN Co. and industry through the variation of the SAU.

⁴. Telecommunications Industry Ombudsman, *Annual reports*, <<https://www.tio.com.au/publications/annual-reports>>.

Product Development Forum provisions

ACCAN is a member of the Product Development Forum (PDF), which aims to promote innovation in NBN Co's development of products. While we appreciate the opportunity to represent consumer interests, we consider the Forum has significant limitations and is in need of revisions to its processes in order to continue to maximise its usefulness.

The problems associated with the PDF stem from both its process for developing pricing and product constructs, and its rules which preclude oversight by key regulators including the ACCC and external consultation through confidentiality requirements. The PDF process is approximately as follows:

1. NBN develops a pricing or product construct;
2. This product is put out for closed comment via a consultation paper to members of the PDF;
3. Minor refinements may be made by NBN after reviewing feedback;
4. A follow up informal consultation occurs;
5. A final product construct is released by NBN Co. reflecting largely the position outlined in the original paper with no reasons given for the adoption of the construct.

The PDF process creates several issues, including limited accountability for the pricing and product decisions reached by NBN Co. In addition to the lack of accountability, the rules of the PDF preclude regulatory oversight and input in pricing decisions and impose strict confidentiality requirements on participants. ACCAN believes that there are several issues with the process including:

- A lack of accountability as to the basis of the decisions reached concerning pricing and product design;
- A lack of transparency;
- Failure to articulate the constraints NBN Co. faces.

Consultation processes in place in other utility and network infrastructure industries are considerably more robust than those in place under the PDF provisions.

Best practice processes

At a fundamental level sound process is defined by reference to how it supports the resolution of problems and issues, achievement of objectives and consideration of alternatives and options in pursuit of these objectives.

The core problem to be resolved in the PDF process is how to design prices and product features that promote the efficient delivery of services and meet NBN's financial obligations. The objective of the process is to meet these revenue requirements in a way that maximises the benefit of the NBN to the Australian public.

The design of the process should therefore be focused on potential options for resolving this problem. The current approach is to consult on a given option or solution that may or may not be effective in resolving either the fundamental financial problem that NBN Co. faces or achieving the objective of efficient service delivery.

The adoption of an open forum approach to pricing and product development is reflective of best practice. This model is used by the Independent Pricing and Regulatory Tribunal, Essential Services Commission of Victoria and the Australian Energy Market Commission.⁵ These pricing processes involve:

- 1) Public release of consultation papers including detailed guidance provided concerning the substance of the revenue constraints ;
- 2) Receipt of public submissions;
- 3) Public hearings;
- 4) Publication of a draft report;
- 5) Further submissions;
- 6) Publication of a final report.

Although not all pricing processes involve all of the above steps, the price setting process is similar. This is because the process outlined above provides for rigorous public scrutiny of price setting, full consideration of all potential pricing options and a contest of pricing models. ACCAN believes that this best practice approach to price setting and can be adopted with some modification under the terms of the SAU.

⁵. The Essential Services Commission of Victoria provides detailed guidance when commencing a price review, an example of which is located at:

<<https://www.esc.vic.gov.au/water/water-prices-tariffs-and-special-drainage/water-price-reviews/goulburn-murray-water-price-review-2020>>; similar processes are undertaken by the AEMC, see:

<<https://www.aemc.gov.au/sites/default/files/content/de5cc69f-e850-48e0-9277-b3db79dd25c8/Final-determination.PDF>> and IPART see <<https://www.ipart.nsw.gov.au/Home/Industries/Water/Reviews/Metro-Pricing/Prices-for-Central-Coast-Council-from-1-July-2019>>.

The process of consultation should be proportionate to the substance of the matter in consideration.⁶ The consultation process adopted by economic regulators across Australia is considerably more rigorous than that currently adopted by NBN Co. and is commensurate with the material impacts of price-setting.

While not seeking to impose an undue burden on NBN Co. when consulting on matters of minor technical modifications, it is simultaneously absurd that pricing decisions with implications in the hundreds of millions or billions of dollars are undertaken via the same process. Pricing decisions with material financial and economic consequences should be subject to a process that is commensurate and proportionate to the potential impact.

Accountability

As NBN Co. runs the PDF it has significant control over the processes and procedures adopted. Accountability for the final design of pricing and product features fundamentally resides with NBN Co.

NBN Co. does not provide reasons, evidence or a rationale for the decisions that it reaches with respect to pricing or product features beyond general assertions that the approach adopted is in keeping with its financial, regulatory or policy objectives.

These objectives can be achieved in any number of ways. Multiple pricing approaches have been proposed in the past by ACCAN, external pricing experts and retail service providers. Despite the presentation of various pricing options none of these appear to have been considered in a genuine fashion.

As NBN Co. does not provide reasons for the decision that they adopt, PDF participants are not in a position to identify errors of process, the reasonableness of the assumptions adopted in the development of models and the likely impact of NBN pricing decisions.

This is problematic as NBN Co.'s assumptions about demand for services under different pricing scenarios, consumers' willingness to pay and price elasticity are based on internal research and modelling. Therefore any errors that may arise in the development of these assumptions will have a material effect on the setting of prices.

The pricing constructs adopted by NBN Co. thus far do not assuage ACCAN's concerns about the assumptions and research that NBN Co. is using to underpin their pricing decisions. For example, we are aware of research on consumer willingness to pay that has considerable divergence from that used by NBN Co. If NBN Co. was required under the terms of the SAU provisions to provide relevant information, outline its assumptions and provide reasons for its decisions, discrepancies or errors may be identified.

In the absence of accountability measures such as this it is likely that any errors stemming from NBN's reliance on internal research and empirical information will not be identified or

⁶. OECD (Organisation for Economic Co-operation and Development) 2012, *Recommendation of the Council on Regulatory Policy and Governance*, Paris.

rectified. As noted above this may have material implications on the setting of prices, with significant implications on consumer outcomes and the long-term financial viability of NBN Co.

Accordingly ACCAN considers that in order to promote the long-term interest of end-users and the efficient usage of NBN infrastructure that the adoption of an open-forum format for the PDF is essential. If NBN Co. is developing pricing models based on erroneous research inputs and assumptions then the risk of poor pricing outcomes is exacerbated.

Transparency

The PDF is operated as a closed forum with strict confidentiality requirements. Although appreciative of the need for some information to remain commercial in confidence, as noted other pricing and product development processes occur in public forums with considerably greater transparency.

We do not consider that the forum has been effective in addressing the material concerns of many of its members concerning the revision of pricing and product constructs. Although appreciative of the need for some information to remain commercial in confidence in many instances the confidential nature of the consultation process has precluded effective engagement by ACCAN.

As a closed forum, the operation of the confidentiality requirements prevents ACCAN from engaging with our member organisations on matters that directly impact their interests. There are several consequences that flow from this, including difficulty in ensuring that members' views are fully reflected in ACCAN submissions and decreased trust in the PDF process.

As a membership based peak body representing the diverse interests of consumers, it is often difficult to reconcile these views in the absence of consultation processes on individual proposals or issues. Although ACCAN strives to put forward submissions that are fully reflective of our members' and consumers' interests in the PDF, confidentiality requirements can make this difficult.

Aside from merely constraining ACCAN's capacity to consult, the operation of the confidentiality agreement diminishes the insights that NBN may be able to obtain via the PDF process. ACCAN's membership is broad and captures many groups that may be affected by product and pricing changes, and who may be in a position to provide grassroots insights into the likely effect of NBN proposals.

The operation of the confidentiality requirements associated with the PDF also precludes ACCAN from publishing the contents of our submissions on proposals or issues raised by NBN Co. A consequence of this approach is that consumers and members cannot observe that ACCAN has put forward a submission on a matter that concerns them.

Accordingly ACCAN does not support the proposed extension of the expiring non-price provisions relating to the Product Development Forum. In order for these provisions to meet the statutory test significant revisions would be required.

ACCAN believes that the adoption of an open and public process would allow for the full and appropriate consideration of community, industry and consumers views on NBN prices and build confidence in the price setting process. Confidence in the process through which prices are set is low and ACCAN considers that the adoption of a public process, with full ACCC oversight, would promote confidence, acceptance and support of NBN pricing.

Constraints

PDF processes currently consider pricing and product development in an environment devoid of context and constraints. Although these constraints are important contributors to the final decision made by NBN Co. they go unmentioned in consultation papers.

ACCAN is aware that there are fundamental factors (e.g. obligation to earn a commercial return) that drive the determination of product design and pricing outcomes. NBN Co. has financial obligations to meet under the terms of the Statement of Expectations. In order to meet these obligations NBN Co. has to generate enough revenue to make its debt repayments and pay a dividend to the Australian government.

However, instead of examining these issues head-on in their consultation papers, NBN Co. has failed to adequately outline the implications of their revenue requirement. As a consequence despite being a fundamental factor in the determination of prices, neither ACCAN nor industry are in a position to put forward options that may be beneficial to consumers and meet the financial targets NBN faces.

The result has been a process of pricing development that occurs in a vacuum, with pricing policy being set by internal NBN revenue targets which are undisclosed to PDF participants who are therefore unable to contribute in a genuine way to price setting. The alternative approach would be to define what the revenue requirements were for particular markets – such as domestic consumer markets or enterprise markets - and then use this constraint to inform the design of product offerings (at various prices).

Instead, the internal constraint is a figure known only to NBN and prices are put forward as a notional way to satisfy that revenue requirement. This creates a problem of path dependency, with the pricing construct being put forward by NBN Co. becoming the anchor of price discussions and submissions with alternative models failing to be considered as a result.

This approach has led to the adoption of inappropriate pricing constructs, such as flat rate pricing of \$45 for speed tiers, an approach unsupported by economic theory and out of reach of many households. The adoption of a flat tariff is also in defiance of basic economic principles like demand elasticity, and reflects the unrealistic assumption that the capacity of all households is homogenous.

The adoption of this pricing approach implies either intent not to provide services for different segments of the residential consumer market, or a fundamental failure of NBN price modelling and research. As the former would appear to be inconsistent with the obligations of

NBN Co. under the terms of the statement of expectations, then the latter appears the more likely scenario.

Rectifying the issue of weak empirical research and questionable assumptions can be best achieved through the creation of an open, public and accountable forum for setting prices with ACCC oversight. Although the ACCC is not in a position to consider alternative institutional arrangements in the course of this determination, considering the counterfactual scenario without the PDF provisions, it is unforeseeable that there would be no process or provisions to address these issues.

Accordingly the position put forward by NBN Co. that the ACCC may only consider a counterfactual in which there is no framework for price setting and product development, or one in which the existing provisions are rolled over, misstates the relevant counterfactual. Rather the counterfactual to be applied should be one in which there are no PDF provisions, and in which NBN Co. and all parties must create a process to resolve questions of product design and pricing, and create a new process to do so.

ACCAN considers that in light of the pricing outcomes achieved via the PDF process, that there is a sufficient legal basis to reject the application for the extension of the non-price terms of the SAU. The operation of the PDF provisions as currently drafted is unlikely to be in the long term interests of end-users, nor promote the efficient use of NBN infrastructure. Accordingly the application to extend the non-price expiring provisions of the SAU should be rejected by the ACCC.