



Draft Telecommunications in New Developments (TIND) policy

ACCC submission to the Department
of Infrastructure, Transport, Regional
Development and Communications

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1. Summary

The ACCC recommends that the government not proceed with two of the proposed changes to its Telecommunications in New Developments (TIND) policy that would remove the price floor for NBN deployment and connection charges as well as the requirement for NBN Co to seek ministerial approval to overbuild existing networks.

These competition protections were established in the government's 2015 TIND policy in response to the Vertigan Review and findings by the Australian Government Competitive Neutrality Complaints Office. In our view, these policy settings continue to play an important role in promoting a competitive market structure in new developments, and thereby drive connectivity to superfast broadband and innovative network services, as well as support a range of competitively priced retail plans for residential and small business customers.

In this regard, developers are now able to choose from a range of network builders that includes NBN Co and ASX-listed corporations. Further, the current policy settings do not appear to impede NBN Co from competing effectively in new developments, with it continuing to win a majority of large-scale developments and a very significant share of all new developments.

On the other hand, we support the government's proposal to cap the price of connections in new developments where NBN Co is not the network operator. A price cap has applied only to connections to the NBN to date. This measure can safeguard against unreasonable cost shifting and better align the interests of developers and future occupants of new developments.

We would also support the government giving further consideration to allowing NBN Co to build point-to-point connections into business sites contained within new developments without first seeking ministerial approval. This would provide greater assurance that large business and enterprise customers can access competitive services at these sites as they can in other areas.

Given the public commitments that NBN Co has provided concerning its conduct in enterprise markets more generally, and which would also apply in new developments, this limited change would be unlikely to reduce incentives for competing network builders to continue to invest in new developments.

In our view, making these limited amendments to the TIND policy will allow the government to better realise its objectives through effective and sustainable competition.

2. Background to the existing policy

The 2015 Telecommunications in New Developments policy was developed in response to the Vertigan Review and findings by the Australian Government Competitive Neutrality Complaints Office (AGCNCO) in 2014. In outlining its proposed approach to the regulation of infrastructure and services in new developments, the Vertigan Review stated:

...the panel is mindful of NBN Co's market power, and the risks it poses to developers, end-users and competitors. Where the developer relies on NBN Co (or the relevant disaggregated NBN company) for infrastructure provision, it would consequently have to be done at prices no higher, and terms and conditions no less favourable, than those established through an approved BCSU [broadband connection service undertaking], as would the connection of customers using that infrastructure. NBN Co's competitors in this market could then compete in the knowledge that those terms and condition had been assessed by the ACCC against competitive neutrality, equity

and efficiency principles. This creates a fair and effective market for the supply of connection services to new estates.¹

Concerns about ensuring competitive neutrality were also reflected in the Review's approach to overbuilding existing networks. In that context it proposed that requiring NBN Co to behave in a competitively neutral manner be enshrined in legislation.²

The AGCNCO found in a 2011 inquiry that NBN Co had *ex ante* potential of not complying with competitive neutrality requirements.³ This followed a complaint by three of NBN Co's competitors in the market for deploying fibre to new housing developments.

The 2015 policy established that NBN Co would apply specified upfront charges when competing to build in housing developments instead of absorbing the deployment costs. The level of the charges were specified having regard to the likely costs incurred by network builders that compete with NBN Co in new developments, rather than via a broadband connection service undertaking approved by the ACCC.

The 2015 policy also replaced the policy position that NBN Co should not overbuild networks in areas that had been declared to be adequately served, with the position that NBN Co could overbuild networks conditional on obtaining ministerial approval.

3. Recommended policy objectives

Our view is that the Government's TIND policy should focus on the delivery of the following key efficiency and consumer objectives:

- Promote connectivity to superfast networks – the policy should primarily militate against the risk of premises in new developments not having access to modern, superfast broadband networks, and the risk of new developments being delayed while waiting for network infrastructure to be deployed.
- Encourage cost efficient provision – the policy should support network infrastructure being deployed in an efficient, least-cost manner that allows land/dwelling prices and network charges to be minimised.
- Encourage dynamic efficiency and innovation in network build and service provision – the policy should support continual improvement in network build and service provision, so that developers and occupants can access higher value services.
- Allow for reasonable wholesale prices and service standards – there is assurance that wholesale access arrangements and service standards will support occupants to access superfast broadband services that are of good quality and priced at a reasonable level.
- Support choice in retail markets between low cost and premium offerings – the policy should encourage the supply of retail plans in new developments ranging from less expensive, basic plans to higher-priced, premium offerings.

¹ M. Vertigan (Chair), *Independent cost-benefit analysis of broadband and review of regulation - National Broadband Network Market and Regulatory Report*, Volume 1, August 2014, pp. 94, 96.

² *Ibid*, pp. 131-133.

³ Australian Government Competitive Neutrality Complaints Office, *NBN Co*, Investigation No. 14, November 2011, p. 38.

4. Market structure

NBN Co is the predominant builder and operator of fixed line superfast broadband networks in both brownfield and greenfield (new development) areas, with 10.166 million premises ready to connect and 6.494 million premises activated, as at 2 April 2020.⁴

In brownfield areas, NBN Co faces very limited network competition from other fixed line operators. This competition is limited to point-to-point fibre networks in business districts, and multi-point networks of limited reach, including Telstra's South Brisbane network and TPG Group's Fibre-to-the-Basement network, and Hybrid Fibre Coaxial and VDLS2 networks in regional Victoria and the ACT.

On the other hand, the ACCC understands that there are approximately ten alternative fixed line superfast network operators that compete with each other to build in new developments, although this number is reducing by way of supply side consolidation. For instance, NBN Co acquired TPG/TransACT's larger networks serving new developments and more recently the Uniti Group acquired OPENetworks, Pivit, LBN Co, Clublinks and Capital Fibre.

As a consequence, a market structure for new developments is emerging with three larger, experienced suppliers consisting of NBN Co, Opticomm and Uniti Group, with each required to maintain effective corporate governance and operating models as a government business enterprise or ASX-listed entity.

As per Table 1 below, which shows the respective number of lots planned or passed for each of these three operators, Opticomm and Uniti Group have been able to establish a footing in the new developments market of around 25 percent of total lots. As a consequence, there are promising signs that the emerging market structure will support effective competition between network builders notwithstanding that NBN Co still retains a commanding share of the market.

Table 1 Indicative greenfield lots passed and planned by major networks

Network provider	Residential lots	Other lots	Total lots
Opticomm	224,001	23,746	247,747
Uniti*	113,098	5,233	118,331
NBN Co (greenfield)	nr	nr	1,100,000
NBN Co (brownfield)	nr	nr	9,900,000

Notes: Data varies by reporting date and level of comprehensiveness and should be regarded as indicative only. *Uniti data is for LBN Co and OPENetworks. nr = not reported.

Source: For non-NBN networks - DITRDC's Telecommunications in New Developments dataset available on its website. For NBN Co from Corporate Plan 2020-2023, Table 3, p. 49, excluding wireless and satellite.

5. Promoting competition for the market

In our view, effective competition between networks builders is the best means by which to promote the long-term interests of end-users within new developments. Consequently, we consider it important that the TIND policy should continue to promote a market structure that allows this competition for the market to develop into the future.

⁴ NBN Co Weekly Progress Report available at <https://www.nbnco.com.au/corporate-information/about-nbn-co/corporate-plan/weekly-progress-report>

In our view, this form of competition mitigates the risk of connectivity concerns re-emerging that previously affected early residents of new developments, as well as encouraging the development of innovative service offerings. In this regard, competing network builders have incorporated television, security and other network services into their product offerings in new developments since entering the market.

Competition amongst network builders, and targeted regulation, is also leading to competitive product and pricing outcomes for broadband end-users in new developments.

While not all RSPs operate in new developments, a broad range of retail broadband plans are available over Opticomm and Uniti Group networks, including from nationally recognised brands and niche firms. To date retail prices on these networks have been broadly similar or sometimes better than those available on the NBN.

As an example, Exetel is a nationally recognised brand that supplies retail services over a large number of networks in new developments, as well as achieving a number of accolades for its offers on the NBN.⁵ Exetel offers plans with headline speeds of 12 Mbps, 25 Mbps and 100 Mbps on the Opticomm and Uniti networks, and 25 Mbps, 50 Mbps and 100 Mbps on the NBN. Its cheapest monthly plan price is lower when supplying over Opticomm and Uniti Group networks than when supplying over the NBN, as is its price for 100 Mbps plans.⁶

6. Continuing role for competition measures

The 2015 policy contains important measures designed to encourage private firms to enter and compete to supply network services in new developments. These measures appear to have assisted private firms to establish a minority footing in the market, while not excluding NBN Co. Hence, the settings appear to have been successful in promoting efficient competition.

In reference to Table 1 above, competing network builders serve around 25 percent of lots passed or planned. We understand that NBN Co supplies a majority of lots even when only large-scale, more-profitable developments are taken into account.

While acknowledging the continuing benefit of NBN Co acting consistently with competitive neutrality principles, the draft revised policy proposes to remove the key measures that were established in the 2015 policy to achieve this. Namely, the requirement for NBN Co to maintain a specified floor price for deploying and connecting services in new developments, which provides direct assurance that NBN Co will not submit bids that private firms could not match on commercial terms, and the requirement to seek approval before overbuilding existing networks.

Instead, the draft revised policy proposes to require that records are kept regarding any decision NBN Co makes to overbuild another network. In our view, this appears much less effective in assuring compliance with competitive neutrality principles. It would likely also be cumbersome to implement properly.

The draft revised policy also places some emphasis on the government's expectation that NBN Co would operate in a commercial manner. However, NBN Co's commercial interests could well extend to foreclosing sustainable competition in new developments.

⁵ Exetel's website (<https://www.exetel.com.au/>) indicates that it won the Canstar Blue NBN provider of the year 2019, the Money magazine best value NBN broadband plan of 2019, the Whistleout best unlimited NBN provider 2019 and the Finder award for best NBN 50 plan. It also typically achieves high performance metrics in the ACCC's Measuring Broadband Australia reports.

⁶ Exetel website (<https://www.exetel.com.au/>) accessed 19 May 2020.

In this regard, NBN Co has a different cost structure to private firms and, in competing for new developments, can take on additional risk of losses from individual developments, and/or accept longer payback periods. Importantly, NBN Co's advantages in the market go beyond scale economies or other significant efficiencies. Unlike its competitors in new developments, it is able to take advantage of its effective monopoly in most brownfield areas and its lower costs of finance due to government ownership.

Further, the contestable market appears to lack depth, given that new development sites added annually number only in the low hundreds of thousands, and NBN Co already wins around three quarters of these sites. The market is even thinner when looked at based on the number of development projects rather than sites. Subdued economic conditions would further heighten the risk of private firms being excluded from the market.

Consequently, we consider that it is premature to consider replacing the current competition safeguards, which have had some constraining effect on NBN Co's ability to exercise its market power since their introduction in 2015.

7. Targeted regulation to deal with residual issues

While it is possible that firms would lose tenders in other new developments if they do not have a reasonable track record in both building and operating networks, it is unlikely that this alone would provide strong incentives to act reasonably in resolving individual consumer issues that arise on existing networks. Consequently, we consider that there is an ongoing role for targeted regulation of network services in new developments regardless of the network operator.

In this regard, the following regulation is already, or soon to be, in effect:

- The NBN access regime under Part XIC of the CCA
- The LBAS/SBAS⁷ declarations and regulated pricing that provide for RSP access to a minimum 25/5 Mbps wholesale bitstream service to help underpin retail competition on these networks. The ACCC is scheduled to review these access arrangements before July 2021.
- The level playing field rules under Part 8 of the *Telecommunications Act* that provide for wholesale access and vertical separation requirements, also to help underpin retail competition.
- The new Statutory Infrastructure Provider (SIP) wholesale service standards ensure reasonable connection and fault handling times and performance levels to support retailers to provide competitive service quality. Under the new SIP legislation, the Minister will also have the power to impose licence conditions on Statutory Infrastructure Providers.

This regulation can be used to address a range of risks that end-users in new estates might otherwise face, ranging from non-competitive prices or service quality, to long wait times for activations and fault repair.

We note that there have been concerns that some NBN retailers choose not to supply in some new developments. In our view, provided a broad range of basic and premium offers from established retailers are available over the network, end-users in new developments will still be well placed to find a competitive retail offering that meets their needs. We note

⁷ Superfast Broadband Access Service; Local Bitstream Access Service.

that there is effective competition on NBN Co's fixed wireless and satellite networks even though some national retailers do not operate, or no longer accept new orders, on those platforms.

In this regard, in addition to Exetel (discussed above), two TPG Group RSPs, iiNet and Internode, and iPrimus offer retail services over the Opticomm network.

That said, we would expect the number of retailers that choose only to supply fixed line services over the NBN to reduce as markets continue to mature. In this regard, we consider that choice of retail provider has improved and will continue to do so as a result of consolidation amongst competing network builders. Improvements in fixed wireless and mobile technology will also allow those end-users in new developments with strong brand allegiance to continue to access their retailer of choice over those platforms.

Consequently, we do not recommend making specific policy adjustments to benefit NBN Co that would further limit wholesale competition in an attempt to bring forward retail supply by additional retail service providers in new developments.

8. Amendments to the policy to further promote effective competition

Notwithstanding the above points, the 2015 policy could be amended to further boost competition and customer outcomes in two respects.

The draft revised policy proposes a new price cap of \$500 for end-user connection charges in new developments where NBN Co is not the network operator. NBN Co's connection charges are already subject to a price cap. The introduction of this price cap has the potential to reduce the risk of cost shifting between developers and future end-users in new developments. Importantly, this would also better align the interests of developers and residents in the choice of network builder.

There is at least the potential for some developers to select a builder on the basis of minimum cost to the developer even though this would result in end-users in future facing a higher connection charge or receiving lesser value from their broadband services. Capping the occupant's out of pocket charges for a network connection is a means to effectively mitigate this risk by ensuring that all costs and charges are transparent and considered when choosing the network builder.

Secondly, the policy could be amended to allow point-to-point fibre builds to connect large business and enterprise end-users within a new development that is served by another network operator. In our view, there is potential for more large businesses to locate within new developments, and this change would provide greater assurance that they could access specialist services that they require. There is also greater potential for effective competition to supply such businesses to emerge in new developments, as has already developed in other localities such as business districts.

Further, facilitating this competition by way of point-to-point overbuild services would be unlikely to make existing networks uneconomic to operate or risk competition outcomes more generally in the market. This is because on the one hand the extent of any such overbuild is likely to be limited, but importantly NBN Co has now made a number of public commitments regarding its method of operation in large business and enterprise markets which would also cover these builds.

This would mean the following delineation:

Residential - Retain requirement to seek ministerial approval to overbuild residential greenfield developments because duplication by NBN Co of existing equivalent high-speed broadband infrastructure is likely to:

- (i) be inefficient
- (ii) deter future investment by competing private infrastructure providers
- (iii) result in no benefit to consumers if they can already obtain an NBN-equivalent service in terms of quality and price.

Enterprise – Remove requirement to seek ministerial approval to deploy point-to-point fibre to enterprises in new developments on the basis that NBN Co will meet its public commitments regarding its method of operation in these markets, including;

- (i) utilising spare capacity on existing third party fibre tails where feasible
- (ii) costing its enterprise fibre builds on a stand-alone commercial basis
- (iii) complying with its NDOs and other statutory obligations.