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Submission in response to ACCC Consultation Paper 'Variation to NBN Co Special Access Undertaking' dated August 2017

1. Introduction

- 1.1 This submission is provided by the Competitive Carriers' Coalition (**CCC**) in response to the ACCC's Consultation Paper 'Variation to NBN Co Special Access Undertaking' released in August 2017 (the **Consultation Paper**).
- 1.2 The revised variation to the Special Access Undertaking (**SAU**) was submitted to the ACCC by NBN Co Limited (**NBN Co**) on 22 June 2017 (the **Revised Variation**). The CCC considers that the Revised Variation does not meet the reasonableness and long term interests of end-users (**LTIE**) criteria set out in sections 152CBD(2)(ca) and 152CBD(2)(cb) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and must therefore be rejected by the ACCC in accordance with section 152CBG of the CCA.
- 1.3 The CCC has previously made detailed submissions regarding the application of the existing SAU price terms to functionally equivalent MTM services in its:
- 1.3.1 *Submission in response to ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016' dated 2 September 2016;* and
- 1.3.2 *Submission in response to ACCC Draft Decision 'Variation to NBN Co Special Access' dated March 2017, dated 28 April 2017.*
- 1.4 The CCC continues to rely on those submissions in the context of responding to the current Consultation Paper, although they are not repeated in full here. This submission responds specifically to additional matters raised by:
- 1.4.1 the Consultation Paper; and
- 1.4.2 the NBN supporting submission *Revised Variation to the NBN Co Special Access Undertaking*, dated 22 June 2017 (the **Supporting Submission**).
- 1.5 In conjunction with this submission the CCC has also obtained independent economic analysis in relation to a number of discrete questions in relation to the current NBN Co pricing model, provided by Frontier Economics. This report '*Comments on aspects of NBN Co's SAU variation: A report prepared for the CCC*' (**Frontier Economic Report**) is provided as an attachment to this submission for reference by the ACCC, and is referred to within this submission.



2. Summary of Submission

- 2.1 In order to accept the Revised Variation, the ACCC must be satisfied that the Revised Variation is reasonable and is in the LTIE. As the CCC has set out in its previous submissions, the CCC does not believe that, in the current circumstances, the ACCC can reasonably be satisfied that is the case. The reasons that the CCC holds this view include the following:
- 2.1.1 The long term value to end-users of receiving an NBN connection under the MTM model is significantly lower than was the case under the FTTP NBN model, and accordingly there is less justification for a price premium to be associated with the service.
 - 2.1.2 All participants in the industry, including NBN Co itself, have recognised that the pricing model set out in the SAU, and in particular the CVC pricing, is unreasonable and unsustainable. In light of this, the ACCC cannot rationally conclude that it is reasonable and in the LTIE to extend these prices to the MTM services.
 - 2.1.3 It is now clear that, as set out in 2.2 of the Frontier Economics Report, CVC demand, take up and revenue far exceeds what was projected by NBN Co at the time the SAU was submitted to the ACCC. Contrary to NBN Co's claims about its incentives, its response has been to capture greater surplus from these transactions and to sell fewer units than is optimal. This is consistent with the findings in section 3 of the Frontier Economics Report.
 - 2.1.4 NBN has, somewhat belatedly and reluctantly, reviewed and amended its CVC pricing, and further industry processes are underway with a view to arriving at a new pricing structure. Acceptance of the Revised Variation would significantly reduce NBN Co's incentive to negotiate and agree a reasonable approach to CVC pricing with industry.
 - 2.1.5 If the industry and NBN Co are unable to arrive at a resolution of this issue, the ACCC has indicated that it may wish to make a regulatory intervention. Its ability to make such an intervention would be substantially reduced by accepting the Revised Variation. This is borne out by the findings of section 4 of the Frontier Economics Report, which illustrates that the constraints built into the Price Review Arrangements in the SAU will place practical limits on the ACCC's ability to contain NBN Co's use of its market power.
 - 2.1.6 There is widespread concern about the pricing and performance of NBN services among consumers, regulators, RSPs, the media and the community at large. In this context, it cannot be appropriate for the ACCC to limit its scope for regulatory intervention, by accepting the Revised Variation, until these concerns have been fully investigated and resolved.
 - 2.1.7 The current pricing structure is stifling competition and innovation and should not be extended to the MTM services, which will now make up the majority of the NBN roll out.
- 2.2 Each of these points is considered in further detail below.



- 3. Long term value to end-users under the MTM model does not justify a premium price tag**
- 3.1 The ACCC has specifically requested views on whether the current pricing model under the SAU is reasonable for MTM services, given there is more variability and uncertainty about the speeds that can be achieved.¹ The CCC submits that it is not.
- 3.2 The nature of the NBN roll-out has changed substantially in the time since the SAU was originally approved. The move from a predominantly FTTP network roll-out to a multi-technology mix, represents not just a change in technology, but also represents a fundamentally different value proposition for end users. Under the current NBN model, MTM services will make up the majority of the roll-out.
- 3.3 Under the original FTTP roll-out, the vast majority of Australians were intended to receive the benefit of infrastructure which was:
- 3.3.1 state of the art;
 - 3.3.2 clearly suitable to last them long into the future;
 - 3.3.3 readily upgradable to provide access speeds to meet or exceed any foreseeable demand; and
 - 3.3.4 in virtually all cases, a significant and dramatic improvement over their existing access technology.
- 3.4 Both the price which one might be reasonably be expected to pay for a service, and the long term benefit to end-users from the installation of such a service, is significantly different to the situation under the MTM where the majority of Australians will now receive FTTN services, which are, at best, an incremental improvement on existing services and, at worst, are underperforming in comparison with their previous ADSL services.
- 3.5 The CCC notes that, in response to its own internal review, Telstra recently announced that the speeds its customers were getting on its NBN packages in some cases did not match the service for which they were paying.² A guide released by Telstra to help customers understand the factors that influence their internet speeds on the NBN identifies 'nbn co's technology type to your premises' as one of four key factors which will influence actual performance for end users.³ It explains that estimated maximum line speeds and potential range of actual user speeds is determined by the type of technology available at a premises, and that for FTTN and FTTB services those speeds will be slower / lower quality than FTTP services.
- 3.6 Despite the fact that RSPs are potentially unable to provide consumers with the same level of service for MTM services as they are able to provide for FTTP services (and therefore cannot recover the same price for those services), NBN Co's Revised Variation proposes that the price the RSP pays NBN Co for each service delivery technology should be the same, and the existing Maximum Regulated Price

¹ Consultation Paper, page 6.

² News.com.au, *Telstra admits to overcharging some NBN customers over unattainable speeds, will offer reimbursement*, 12 May 2017, accessed at <http://www.news.com.au/technology/online/nbn/telstra-admits-to-overcharging-some-nbn-customers-over-unattainable-speeds-will-offer-reimbursement/news-story/b852587fea03756db631089aa9308d14>

³ Telstra, *nbn speeds explained*, accessed at: <https://www.telstra.com.au/broadband/nbn/nbn-speeds-explained>



(MRP) which (as discussed below) is already widely acknowledged to be unreasonably high even for FTTP services, should be maintained.

- 3.7 The CCC submits that the MTM and FTTP services are sufficiently different that the ACCC is required to fundamentally reassess the appropriateness of the MRP set out in the SAU if an appropriate pricing model for MTM Services cannot be proposed by NBN Co through revision of the SAU, or otherwise agreed through commercial agreement / industry consultation.

4. The existing SAU pricing model is unreasonable and unsustainable

- 4.1 The existing SAU pricing model, particularly in relation to CVC pricing, has now been widely recognised to be unreasonable and unsustainable. Industry concerns in relation to NBN Co's pricing construct have now been formally recognised by the ACCC in its Consultation Paper⁴ and in public fora. For example, in his recent address to the *Communications Day: Unwired Revolution Conference* on 20 July 2017,⁵ in the context of discussion regarding the ACCC's communications sector market study and apparent reluctance of consumers to take up higher speed NBN services, Rod Sims stated that:

For RSPs the answer was clear. The general view we heard (from both large and smaller RSPs) was that with current CVC pricing, many were reluctant to sell these services.

That is, far from consumers not wanting higher speeds, RSPs were often not seeking to sell them, at least not at prices consumers are willing to pay. We heard their view that \$60 per month is the average price point in the market for NBN services.

The view clearly expressed was that the current pricing construct is impacting the market's ability to offer higher speeds. Because of the uncertainty about demand growth and customers' expectations, RSPs are often not selling higher speed services which would require more CVC.

- 4.2 The ACCC has also acknowledged that:

Many other NBN customers, while on higher speed services, experience lower than expected speeds during busy periods due to under provisioning of capacity by their retail service provider⁶

- 4.3 NBN itself has also recognised that current CVC pricing (as enshrined by the MRP within the SAU) is too high, even for technologically superior FTTP services. This has resulted in progressive reductions in the effective CVC price as referenced by NBN Co in its Supporting Submission⁷. However, despite acknowledging that the initial MRPs for CVC enshrined in the SAU are too high, NBN Co is asking the ACCC to rely on the fact that it will continue to be incentivised to reduce these prices over time while it seeks to maintain the MRPs as what it refers to as a 'regulatory backstop'⁸ within the SAU itself. This can only mean that NBN Co considers that it may, at some point in the future, wish to increase prices to the currently applicable MRP or that it wishes to maintain the MRP as a restriction on potential regulatory intervention.

⁴ Consultation Paper, pages 21, 23.

⁵ Sims R, *Communications at the turning point*, Address to Communications Day: Unwired Revolution Conference, 20 July 2017 accessed at <https://www.accc.gov.au/speech/communications-at-the-turning-point>.

⁶ Sims R, *ACCC wants NBN plan advertising overhaul*, 21 August 2017, accessed: <https://www.accc.gov.au/media-release/accc-wants-nbn-plan-advertising-overhaul>.

⁷ Supporting Submission, paragraph 60.

⁸ Supporting Submission, paragraph 57.



- 4.4 In its Supporting Submission, NBN Co has focussed on defending the structure and the incentives within the Revised SAU, rather than whether the MRPs are actually reasonable.⁹ As previously submitted, the CCC considers that the ACCC is unable to accept the Revised Variation unless it is satisfied, in accordance with the criteria outlined in s.152CBD(2) that the revised Variation is reasonable, and is in the LTIE. The CCC submits that, in light of what is now widely accepted as excessive MRPs within the SAU, the ACCC cannot conclude that the application of those same prices to what are proving to be technologically inferior (in terms of reported performance) MTM services is either reasonable or in the LTIE.
- 4.5 At the time it accepted the current SAU, the ACCC noted that “*submissions from interested parties do not express views as to whether the initial CVC Price of \$20 per megabit is reasonable*”.¹⁰ As noted in section 2.1 of the Frontier Economics Report, this pricing was formulated by NBN Co based on expected demand that is 1/22 of current CVC usage. In addition, and in contrast to the position when it made the decision to approve the MRPs in the current SAU, the ACCC now has before it a plethora of evidence that that pricing is neither reasonable or in the LTIE. The ACCC is now being asked to make a decision to apply that pricing to the MTM services, and it must do so in light of all of the evidence and information currently available to it.
- 5. Acceptance of the Revised Variation will impact on the ability to negotiate and agree a reasonable approach to CVC pricing outside the SAU**
- 5.1 As discussed above, NBN Co itself has, somewhat belatedly and reluctantly, reviewed and reduced its CVC pricing. NBN Co has asked the ACCC to rely on its actions on this regard as evidence that the incentives built in to the SAU are working as intended. However, it has not made any attempt (although it would be relatively straightforward to do so) to amend the ‘regulatory backstop’ by updating MRPs within the SAU itself through the current variation process.
- 5.2 As clearly set out in section 3 of the Frontier Economics Report, NBN Co’s claim that the incentives created by the SAU will result in efficient pricing are contrary to both economic theory and lived experience. The analysis set out in section 2.2 of the report clearly demonstrates that NBN has responded to greater than anticipated demand for, and revenue from, CVC by keeping prices higher and selling fewer units than is optimal. With significant market power and few market constraints, NBN Co is able to favour the short term interests of its business over the long term interests of end users.
- 5.3 As noted by the ACCC in its Consultation Paper, industry processes are now also underway with a view to arriving at a new pricing structure. The ACCC has indicated that, in its view, an industry agreed outcome would be preferable to a regulatory outcome.¹¹
- 5.4 However, in the context of these ongoing discussions, acceptance of the Revised Variation by the ACCC would significantly reduce NBN Co’s incentive to negotiate and agree a reasonable approach to CVC pricing with industry through the current consultation process. It would also further weaken the negotiating position of the RSPs within any such process.

⁹ See paragraphs 52, 53, 62, 63.

¹⁰ Draft Decision about the 2012 NBN Co Special Access Undertaking — April 2013 at p. 108 (this reasoning is referenced in the Final Decision in 2013).

¹¹ Consultation Paper, page 6.



6. Acceptance of the Revised Variation would significantly reduce the ACCC's scope for regulatory intervention in the future

6.1 The ACCC has indicated that if a commercial outcome in relation to NBN Co's pricing structure cannot be achieved, it will consider whether:

changes to NBN Co's pricing could be made that would promote more efficient outcomes for NBN Co, RSPs and for consumers.¹²

6.2 In the context of a situation where the existing pricing structure is recognised to be flawed and the ACCC's criteria for acceptance of the Revised Variation are that it must be satisfied that the Revised Variation is both reasonable and in the LTIE, the CCC considers that the ACCC cannot seek to approve the Revised Variation on the basis that intends to consider in the future whether there is scope for it to intervene. As acknowledged by the ACCC itself:

We have limited rights in relation to NBN Co pricing under NBN Co's Access Undertaking.¹³

6.3 The CCC notes the ACCC has specifically asked for views on whether NBN Co's prices can be appropriately considered with the SAU variation in place.¹⁴ The CCC submits that they cannot. Once the Revised Variation has been accepted, the application of the existing price terms, including the MRPs for the MTM services will be enshrined in the SAU. The ACCC's capacity for intervention will then be extremely limited and, as outlined in CCC's previous submissions, even revenue neutral price rebalancing will be of limited utility where the starting position is an MRP which is substantially higher than the prevailing price offered in the market. This position is also clearly supported by section 4 of the Frontier Economics Report.

6.4 The CCC further notes the findings of Frontier Economics, that CVC usage is in fact potentially more than double what was originally anticipated in NBN Co's 2010 corporate plan. One possible explanation for this discrepancy may be substantial uptake of streaming video on demand services (i.e. Netflix and Stan).¹⁵ These changes in consumer behaviour have driven demand for CVC at rates which were not expected at the time the SAU pricing models were being considered. Frontier Economics meanwhile concludes that there is less evidence that there is a need to adjust AVC pricing in response to observed demand trends.¹⁶ Consequently, a rebalancing of the AVC and CVC price is unlikely to address the issues which are currently being observed in the market.

7. In the current environment, it is not appropriate for the ACCC to limit its scope for regulatory intervention

7.1 There is currently widespread concern about the pricing and performance of NBN Co services among consumers, regulators, RSPs, the media and the community at large. In this context, the CCC submits that it cannot be appropriate for the ACCC, or in the LTIE, for the ACCC to limit its scope for future regulatory intervention by accepting the Revised Variation.

¹² Consultation Paper, page 6.

¹³ Sims R, *Communications at the turning point*, Address to Communications Day: Unwired Revolution Conference, 20 July 2017 accessed at <https://www.accc.gov.au/speech/communications-at-the-turning-point>.

¹⁴ Consultation Paper, page 6.

¹⁵ Frontier Economics, Comments on aspects of NBN Co's SAU variation: A report prepared for the CCC, August 2017, at section 2.1.

¹⁶ *Ibid.*, at page 11.



- 7.2 In relation to application of SAU price terms to the MTM services, NBN Co argues that acceptance of the Revised Variation is preferable to the counter-factual where 'the current scope of the SAU is maintained without variation' and therefore the MTM services are subject only to NBN Co's natural incentives and not to the additional incentives, constraints and protections of the SAU. However, the CCC submits that this argument ignores the possibility of a counter-factual where MTM services are regulated under an alternative regulatory instrument, or where the SAU price terms are varied in relation to all services including MTM services.
- 7.3 The CCC submits that a more appropriate course than acceptance of the Revised Variation would be for NBN Co to fully engage with industry and, if necessary the ACCC, to reach agreed outcome on appropriate pricing arrangements, pursuing the consultation processes which are now underway, and to then vary the current SAU to apply such pricing to all of NBN Co's services.
- 7.4 Meanwhile, the ACCC should reject the Revised Variation in its current form until these concerns have been fully investigated and resolved.

8. The current pricing structure is stifling competition and innovation

- 8.1 The CCC submits that there is already clear evidence that the current pricing model under the SAU is stifling innovation and severely restricting the ability of RSPs to differentiate their product offerings on the basis of speed and capacity. This is because current pricing structures make any CVC offering other than the bare minimum uneconomic.
- 8.2 If the market were functioning appropriately on a competitive basis it would be reasonable to expect to see growing innovation and competition in relation to both cost and service delivery between RSPs delivering NBN services. This is not being observed in practice.
- 8.3 Instead, the current CVC pricing appears to be stifling competition and innovation, as noted by Rod Sims in recent media commentary and public speeches¹⁷:

We are concerned, however, that the uncertainty generated by the charging structure is having an adverse effect on competition and consumers in this emerging market, and we will have to look closely at our regulatory options if the industry can't resolve this uncertainty.¹⁸

- 8.4 This is having a consequential effect on the quality of service being obtained by end users:

Currently around 30 per cent of NBN customers have been sold low-speed plans, with many not realising their internet speeds may not be any better – and in some cases worse – that existing ADSL services.¹⁹

As noted by the ACCC there is a risk that these issues will continue, and may be magnified, as the NBN rollout continues and usage increases.²⁰

¹⁷ ABC news, *NBN: Sick of meaningless and evasive broadband spruiking? So is the ACCC*, 21 August 2017, accessed: <http://www.abc.net.au/news/2017-08-21/accc-criticises-nbn-plan-ads-as-meaningless-and-dreadful/8828918>.

¹⁸ Sims R, *Communications at the turning point*, Address to Communications Day: Unwired Revolution Conference, 20 July 2017 accessed at <https://www.accc.gov.au/speech/communications-at-the-turning-point>.

¹⁹ ACCC, *ACCC wants NBN plan advertising overhaul*, 21 August 2017, accessed: <https://www.accc.gov.au/media-release/accc-wants-nbn-plan-advertising-overhaul>.

²⁰ Consultation Paper, page 5.



- 8.5 There are a range of regulatory interventions and investigatory processes currently being initiated and contemplated by the ACCC in relation to NBN service delivery, pricing and advertising in response to a groundswell of consumer dissatisfaction. Were the market operating effectively, such that RSPs were able to compete effectively on the basis of price and quality of service (i.e. speed and capacity), the CCC submits that such interventions would not be necessary.
- 8.6 NBN Co states in its Supporting Submission that RSP specific discounts create greater scope for competitive differentiation of downstream services based on service quality (and trade-offs between price and service quality)²¹. The CCC submits that this is not being observed in practice at all, and in fact the reverse is true (i.e. little differentiation is being observed and there is growing evidence that RSPs are pushing customers to lower speed plans due to the constraints of NBN Co's pricing model).
- 8.7 The experience of other jurisdictions which have rolled out next generation networks (such as New Zealand and Singapore) has been that there has been an influx of new retail competitors. However, in Australia the emergence of new retail players has been relatively muted. It is highly likely that this lack of new entry has been a result of the difficulty of providing product differentiation and making a return on investment when faced with making fixed price offers to customers but facing an increasing cost base due to unreasonable and uncompetitive CVC charges as usage increases. The relative lack of new entrant retail operators on the nbn contrasts unfavourably with the entry of retail players (such as Coles, Woolworths and Aldi) into the mobile resale market.
- 8.8 In a number of areas, NBN Co also focusses on the theoretical benefits and the potential for pro-competitive outcomes of the discounts it is currently offering and pricing structure it is adopting (i.e. that these 'seek to' or 'encourage' or 'promote' certain outcomes)²². Again, the CCC submits that these arguments ignore (a) what is actually happening in practice in the market; and (b) the criteria for approval of the Revised Variation under the CCA.

9. Conclusion

- 9.1 As detailed in its previous submissions, the CCC does not believe that the Revised Variation meets the reasonableness and LTIE criteria set out in sections 152CBD(2)(ca) and 152CBD(2)(cb), and submits that the Revised Variation must therefore be rejected by the ACCC applying section 152CBG of the CCA.

²¹ Supporting Submission, paragraph 63.

²² Supporting Submission, paragraph 82, 83.