



Australian Government

**Department of Broadband,
Communications and the Digital Economy**

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Australian Competition and Consumer Commission
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Dear Mr Home

ACCC's Draft Decision on NBN Co Limited's Special Access Undertaking

I am writing to provide the Department of Broadband, Communications and the Digital Economy's view on a number of key issues arising from the Australian Competition and Consumer Commission's (ACCC) Draft Decision on NBN Co Limited's (NBN Co) Special Access Undertaking (SAU) and its Consultation Paper on its proposed Notice to Vary the SAU. This submission focusses on broader issues rather than the detail of the ACCC's Draft Decision and Consultation Paper.

As indicated in our earlier submission, a key consideration for the Government is that NBN Co should be able to recover its significant investment inclusive of a reasonable return over the life of the investment. The Department therefore welcomes the ACCC's acceptance that NBN Co should be able to recover its efficient costs of supply over the term of the SAU (including a normal commercial return) (p.102 of Draft Decision). This is a principle that is also broadly accepted by industry players in their submissions. I also note the ACCC's comment that even if it were to use its powers under Part XIC, it is required to take into account particular matters specified in Part XIC, including NBN Co's legitimate business interests (p.13 of Draft Decision). The Commission's acceptance in principle of the duration of the SAU, the Long Term Revenue Constraint Methodology (including the Initial Cost Recovery Account), appropriate fixed principles and its view that any price rebalancing should be revenue neutral is welcome and the Department looks forward to seeing this reflected in the proposed Notice to Vary the SAU. In this context, it will be important to ensure that individual variations to the SAU in these important areas (e.g. in respect of the mechanism for the formulation and assessment of replacement modules over time) do not undermine one of the core functions of the SAU.

As noted previously, another key issue for the Government is the affordability of services on the NBN, both in terms of facilitating a smooth transition to the NBN from legacy platforms and in providing services into the future. The Department therefore welcomes the ACCC's acceptance of the majority of NBN Co's initial prices, and particularly those directed at the mass consumer market. In this context, the Department also understands the Commission's concern to ensure that it has a role in the future to scrutinise NBN Co's prices through its proposed price review and rebalancing mechanism. The ACCC's proposed oversight role in relation to product withdrawal and prices will also be important safeguards in this regard. While future pricing affordability will be a key policy consideration, the ACCC's proposed regulatory safety net is nevertheless understandable.

The ACCC's proposal that a price review and rebalancing power be conferred on it is of considerable significance. In the event of concerns about NBN Co pricing levels, and particularly the balance between Access Virtual Circuit (AVC) and Connectivity Virtual Circuit (CVC) pricing, NBN Co as the network operator should first be afforded the opportunity to review and restructure its own pricing, with an NBN Co pricing proposal then being subject to ACCC review and decision. This recognises that it is NBN Co that is engaging directly with its customers and is best positioned to understand the impact of price changes on the demand for its services and to balance these with its operational needs and revenue plans. The balance of pricing between different products for a company is closely related to its operational needs and the ACCC would need to be assured that there was a material distortion of the market before intervention in these operational matters was warranted.

The Department considers that there are incentives for NBN Co to come to constructive commercial agreements with access seekers due to its ownership, its wholesale only, non-discriminatory and open access status, and ongoing changes in market dynamics as a result of the structural separation of Telstra. The ACCC itself acknowledges there are strong incentives on NBN in this regard, particularly during the Module 1 period. However, the Department also recognises the ACCC's concern that these incentives may change over time and the future is inherently uncertain. The Department therefore understands the ACCC's position that there should be sufficient opportunity for recourse to the ACCC if it is needed, consistent with the role given to regulatory arrangements under Part XIC.

Having said this, the ACCC has correctly concluded in its draft report that robustly negotiated commercial agreements should be preferred over regulatory intervention. The Government has undertaken significant reforms to the telecommunications industry, including the structural separation of Telstra, amending the *Competition and Consumer Act (2010)* (CCA) and, not least, the establishment of NBN Co as a wholesale-only, open access non-discriminatory carrier. As indicated in our previous submission, the Department would be concerned if, despite the significant structural and regulatory change wrought in the industry, that parties seek to rely on regulatory intervention, over commercial processes. Therefore, it is important that commercial negotiations are genuine and not viewed by industry as a mere prelude to regulatory intervention.

As the ACCC notes, the prospect of a "regulated outcome can, in and of itself, enhance the likelihood of commercial agreement being reached" (p.15 of Draft Decision). While maintaining reserve powers for the ACCC to intervene where necessary will provide positive incentives for NBN Co and its customers to engage with each other in good faith, access seekers should not negotiate on the basis that if they are not wholly satisfied with the outcome then they can seek and automatically receive ACCC intervention. This would also, in itself, discourage access seekers from entering into genuine commercial negotiation with NBN Co. Part XIC is premised, first and foremost, on commercially negotiated agreements, with regulatory measures taking a lower priority. This should be reflected in the ACCC's decisions as to whether to take regulatory action under Part XIC.

To ensure this is the case, we consider it will be important for the Commission to apply suitable thresholds to its intervention in the market place. We do not consider this should be a matter for the SAU but rather something to be reflected in the ACCC's normal mode of operation. In this regard the ACCC could consider whether it would be useful for it to issue guidelines that would assist in establishing an appropriate environment. This could include guidance on expectations in terms of evidence and other pre-requisites for ACCC action. Under the recent amendments to Part XIC, the ACCC has considerable discretion as to whether it takes regulatory action.

Where the ACCC decides to make access determinations or binding rules of conduct in relation to services provided by NBN Co, it has proposed, as one option, that these should

be able to operate alongside any standard form of access agreement (SFAA) offered by NBN Co. Defaulting to the statutory arrangements is necessarily consistent with the legislation and less liable to raise unforeseen difficulties and has merit on this basis. However, unlike the situation which would prevail if there were overarching access agreements, it could lead to a potentially complex operating environment for NBN Co and access seekers to navigate. There may therefore be a need to monitor the practical operation of such an approach with a view to identifying potential opportunities for future streamlining.

In section 2.2 of the Consultation Paper the ACCC appears to propose, amongst other things, that the SAU be varied to require NBN Co to supply services, ancillary services, product components and product features as specified in binding rules of conduct or access determinations (pp.19-20). It is not clear that it is the intention, but the Department would be concerned if such specification was seen as a substitute for the regulatory service declaration process set out in Part XIC.

The Department is also unclear from the Draft Decision on the rationale for the ACCC's proposal that NBN Co should not be able to supply the User-Network Interface (UNI), AVC, CVC and Network-Network Interface (NNI) as a bundle (p.215 of Draft Decision). Nor is the Department persuaded that NBN Co's use of services with incidental Layer 3 awareness should be subject to stricter oversight under the SAU (p.74 of Draft Decision). At a minimum, the case for these proposals should be made clearer. In relation to the supply of Layer 3 services, under section 41 of the *NBN Companies Act 2010* the Parliament has empowered the Minister to prohibit NBN Co providing specified services if appropriate.

The ACCC Draft Decision proposes a variation to the SAU whereby NBN Co would involve one or more consumer advocacy groups in wholesale level decision-making. While consumer advocacy groups have made, and will continue to make, an important contribution to the development of telecommunications policy in Australia, we note the apparent inconsistency of end-user involvement in wholesale commercial processes. A key element of the structural reform is that parties need to assume full responsibility for their roles. Retail service providers must necessarily engage with end-users and it would seem more appropriate to encourage effective engagement at this level.

I trust that the above points are of assistance to the ACCC when considering its proposed Notice to Vary the SAU.

Yours sincerely,



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