



Mr Rod Sims  
Chairman,  
Australian Competition & Consumer Commission  
360 Elizabeth Street  
Melbourne, Vic 3000

Thursday, 9 October 2014

Dear Mr Sims,

### **Independent Audit: NBN Public Policy Processes**

I write on behalf of a number of long term value investors to seek the Commission's response to key findings of the 'Independent Audit: NBN Public Policy Processes' related to the ACCC's role in that process. These investors have made significant long term investments in the telecommunications sector and are concerned about the role played by the ACCC in the NBN policy process, in the lead up to this process as well as its related ongoing role in telecommunications regulation.

There are several findings of the Independent Audit of concern to investors:

"The ACCC overstepped its authority by advising the Panel of Experts that Fibre To The Node was not a stepping stone to Fibre To The Premises." (page ix)

That this was "unsolicited advice", there was no compelling reason why the ACCC decided it was in a position to make such comments and that the ACCC lacked the competence to make these comments. (page xxvi and xxvii)

The previous government's NBN Mark II announcement of April 2009 said that the Panel of Experts had encouraged it to invest in optical fibre and "The Australian Competition and Consumer Commission has also endorsed the use of FTTP as a superior technology to Fibre to the Node." (page 76)

The Independent Audit also notes the ACCC's unsolicited advice was not borne out in the international literature at the time, prevailing industry views or the proposals made in NBN Mark I. What then was its advice based on?

The Audit says its "concern about the appropriateness of the ACCC's role is further elevated by a speech given by the Chairman of the ACCC in May 2009, after the Government had announced its NBN Mark II policy. The speech appears to provide strong advocacy of a technology and policy position ... In that speech, the ACCC Chairman referred to NBN Mark II (that is FTTP broadband) as 'the most momentous policy initiative in the Australian telecommunications sector... The Chairman went on to suggest that 'perhaps of even greater significance is the opportunity provided by the announcement to address long standing structural issues in the industry'. He commented that 'the NBN project raises the opportunity to undo the mistakes made by previous governments that decided to leave Telstra in control of both the copper network and its retail operations. The ACCC considers these decisions to



have been fundamental errors that have had very serious implications for the development of competition in the telecommunications industry.' " (page 75)

The implication of the Audit findings and the speech of May 2009 is that the ACCC knew, or should have known, that its advice in favour of FTTP was both wrong and inappropriate but it gave it anyway in order to help bring about a preferred structural outcome for better or worse. This is a view widely held among those long term value investors with a good knowledge of the sector.

In relation to the third point above, the Independent Audit also notes the misuse of information provided to governments has important implications in discouraging expert contribution and "it diminishes the standing of those important statutory institutions with the public, standing which is essential if they are to perform their functions appropriately" (page 77). The ACCC confirmed to the Independent Audit that it did not endorse the use of FTTP for the NBN. However it let the claimed 'endorsement' stand for over four years without refuting it. Why was the Commission not concerned to refute that endorsement earlier?

The Independent Audit report was tabled eight weeks ago but there has been no response from the Commission despite the serious concerns raised about its role. Does the Commission agree with these findings of the Independent Audit, or not? If not, that would seem to be a matter of ongoing concern for public policy and investors' ability to rely on the ACCC as an independent regulator in this sector. Otherwise, if the Commission agrees with these findings, what is its response, what has it done or what will it do to remedy the matters raised?

The Independent Audit covers the period from April 2008 to May 2010. The report notes that "no new significant regulations applying to the NBN were put in place during the Audit period" (page 94). However it made several points of interest to investors about the subsequent regulatory policy process. Notably, that "regulatory uncertainty continued during the first year of NBN Mark II (including) in relation to how certain Telstra assets would be regulated ... ." It also notes that the Telstra NBN negotiations "occurred over a lengthy period extending well beyond the period of this Audit (and...) have significant regulatory ramifications, as it embodied the effective structural separation of Telstra." (page 95).

The findings of the Independent Audit in relation to the ACCC raise significant implications for the ACCC's independence in its subsequent role in these telecommunications regulations given its erroneous views on the ongoing role and value of copper in an NBN model (whether genuine or contrived) and the extent to which it was prepared to go to promote a preferred structural outcome. These include: its adjustments of the copper access pricing model both prior to and after legislated changes in the access regime; its arbitrary revaluation of the copper given its views on FTTN and FTTP, both in the context of Telstra's negotiation with NBN Co and the 2011 FAD for fixed line services; its views on previous recovery of value; its recommendation to limit NBN PoIs and so limit backhaul competition; its acceptance of both the Telstra-NBN agreement and Optus-NBN agreement; and its review and authorisation of the NBN SAU with entry level access prices benchmarked to copper prices.

We think the ACCC's approach to these regulations in the NBN implementation period has significantly distorted industry outcomes as well as returns and investment performance in the telecommunications sector. This has created disincentives to invest in certain



telecommunications infrastructure and over-stimulated the behaviour of access entrepreneurs. This has extended to the point where some access seekers claim benefits that derive from asset ownership even where they have no title and have taken no related investment risk. It may well have lulled some RSPs into strategies that undermine their prospects should a more competitive setting emerge following the Government's consideration of recommendations of the Vertigan panel.

These issues are ongoing as evidenced by submissions to the current FAD on fixed line services. Indeed, the extent of claims made has clearly been encouraged by the position taken by the ACCC on the value of the copper network and industry policy. A clearer, stronger, more principled and arms-length regulatory position would have limited the potential for such egregious claims and led to more efficient industry outcomes and investment performance.

There is a clear implication that, from the time the ACCC took a degree of responsibility for NBN policy, and through its ongoing unchecked endorsement, the ACCC had a conflict of interest in taking a series of decisions that seemed to favour the NBN at the expense of long term investors. The question is, what should be done about this both to protect the standing and reputation of the ACCC as an institution and to reassure investors that their investments in the sector aren't further undermined to help achieve an ongoing regulatory preference?

We ask the Commission to be fully transparent about its role and contribution in the events covered by the Independent Audit into the NBN Public Policy Processes and in related events before and after the period covered in the audit. Specifically, we ask the Commission to publish:

- minutes of meetings (or notes taken) on broadband policy in the NBN context;
- all the advice that the ACCC provided to the government in relation to NBN policy; some of this has been provided previously under our Freedom of Information request but much was withheld; and
- any material on how the prospect of the NBN was considered in subsequent regulatory decisions.

Yours sincerely,

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