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Australian Competition & Consumer Commission

Attention:  
Sean Riordan  
General Manager Communications Markets and Advocacy  
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Scott Harding  
Executive Director, Communications Markets and Advocacy  
[Scott.Harding@acc.gov.au](mailto:Scott.Harding@acc.gov.au)

**Dear Mr Riordan, Mr Harding,**

**Commpete Submission on ACCC's Draft Decision on Proposed Variation to the NBN Co Special Access Undertaking**

Commpete thanks the ACCC for the opportunity to comment on its draft decision of 2 May 2023 on the proposed variation to the NBN Co Special Access Undertaking (SAU). Commpete's submission is contained in this letter.

**Introduction**

Commpete is an industry alliance for greater competition in telecommunications markets. Our members are smaller operators and stakeholders in the industry and have challenges that result from relatively smaller scale. However, they are dynamic and innovative in their business operations and are important contributors to the robustness of competition in the sector.

**Summary**

Commpete is pleased with the progress that the industry has been able to make towards resolution of many of the major issues that were identified during the ACCC's 2021 Round Table and other processes in 2022. The extent of the progress is evidenced in the outstanding issues identified in the ACCC's draft decision of 2 May 2023, and the ACCC's proposed treatment of them.

Further, the announcement at the end of 2022 regarding NBN Co's proposal to seek recovery of only 28% (instead of 100%) of the \$44b in accumulated losses recorded in its so call Initial Cost Recovery Account is a reform which Commpete has long been calling for and we iterate our acknowledgement to the ACCC for their work and the Government for giving NBN Co the space it needed to reconsider how these historical costs could be treated to best serve future wholesale pricing, and the NBN in general.

Even though the ACCC has concluded that it must reject the proposed SAU variation of 29 November 2022, it has indicated the sort of amendments that might be included by NBN Co in a further variation, which could lead to ACCC approval. For its part, NBN Co has indicated further amendments that it would be prepared to make should the ACCC reject the current proposed SAU variation. This is progress indeed.

On the other hand, Commpete is concerned about the protracted nature of the total assessment process since the earlier proposed variation was lodged by NBN Co in March 2022. The processes and timescale are particularly difficult for smaller industry stakeholders.

Many of the matters raised in Commpete's submission of 17 February 2023 have been addressed satisfactorily in the draft decision.

Others, such as the removal of CVC price components for all speed tiers at the outset, have not, but we recognise that there comes a time when we need to accept, at least for now, the balance on these matters that the ACCC is prepared to accept. However, there are two sets of issues in particular that Commpete wishes to pursue in this submission – namely (1) the role that NBN Co's standalone credit rating objective might have in ACCC decision making within a future SAU framework; and (2) a series of improvements which appear to have been given little attention but which are important for smaller service providers.

Both are discussed in more detail later in this submission.

Lastly, Commpete considers it necessary to raise the issue of when it is appropriate to abandon the SAU variation process and commence on more direct forms of monopoly regulation by way of declarations.

Recent progress has meant that the industry is now much closer to an acceptable SAU variation. But, as we reflect on what has occurred over the past two years (and before), we need to recognise that monopoly regulation via voluntary undertaking, which gives to the monopoly concerned the discretion about the agenda and timing for inclusion in undertakings, is not a fit-for-purpose way of proceeding for the future. That is a discussion for a later occasion, however.

### **Almost there**

Many of the large issues which required the March 2022 to be withdrawn and for NBN Co to start over in its proposals for an SAU variation, appear to be largely resolved or on the verge of resolution, if NBN Co submits a further variation proposal. This is not to say that those issues, such as manner of withdrawal of CVC charges, adopt the preferred position of some stakeholders, including Commpete, but, rather, that there has been sufficient movement in the context of the variation, considered overall, for the industry to be able to move on.

As a sector, we should have been in this position some time ago. Commpete considers that much of the delay we have been forced to endure was avoidable, and can be attributed to NBN Co's negotiating strategy both within the industry and with the incoming Government over the funding of specific NBN Co programs. However, we are now in a position as a sector, thanks in large part to the approach of the ACCC, where we might contemplate a final resolution and acceptance of a broadly satisfactory SAU variation.

## **Delays have major adverse impacts for smaller service providers**

The delays and resource-intensive processes associated with the current series of SAU variations take their toll, and especially disadvantage smaller stakeholders, such as those who constitute Commpete's membership. This shows up in a number of ways, including:

- (1) The limited resources that smaller service providers have to participate in working groups, negotiations, Round Tables and so on compared with larger stakeholders. Smaller stakeholders have some of the same issues as others, but there are a range of issues that Commpete considered apply more acutely for smaller service providers and need to be specifically identified and pursued by those smaller service providers.
- (2) Negotiating with NBN Co in relation to the terms on which services are provided, is especially important when, as now, substantial terms are found outside the SAU and via discounting offers which place much discretion with NBN Co. Smaller providers know from experience that they are readily ignored by NBN Co. when it is preferred and convenient to do so, not due to credibility of perspectives and knowledge, but due to lack of bargaining leverage resulting from the large disparity and imbalance of power. For smaller service providers, not being able to be always at every negotiating table, when processes are being drawn out, also adds to avoidable uncertainty.

In Commpete's view, it is now more imperative than ever that the ACCC should use whatever powers of suasion it can muster to move to a final draft and complete the assessment and approval of the subsequent (and hopefully final) variation proposal with maximum expedition.

## **Standalone investment grade credit rating objective**

Commpete agrees with the conclusions that the ACCC has reached in the draft decision, which was supported by most of the submissions earlier in the year. In its 17 February 2023 submission Commpete stated that "the future regulation of the NBN monopoly is in the public interest and cannot be made contingent on the irrelevant considerations of credit rating agencies".

NBN Co has also recognised that the credit rating objective is problematic and has suggested that it is prepared to modify the principle, as follows:

- "The ACCC would be required to set annual ICRA drawdown amounts to provide NBN Co with a reasonable opportunity to transition to and maintain a standalone investment grade credit rating in the shortest timeframe practicable. This requirement would be subject to avoiding price shocks, and would be assessed by reference to quantitative financial metrics consistent with a standalone investment grade credit rating with a stable outlook from one or more established and reputable rating agencies.
- "The ACCC, when setting the Forecast Nominal ABBRR, would be required to have regard to the principle that revenues should allow a prudent and efficient operator in NBN Co's position (and with benchmark efficient capital structure) a reasonable opportunity to maintain a stand-alone investment grade credit rating with a stable outlook." (Draft decision, page s 23 and 24)

The ACCC's comments on these proposals seems to encourage them, even though it has not committed itself to acceptance if they are included in a future proposal for SAU variation. This is unfortunate, even though we can understand why the ACCC might be seeking a modified approach.

Commpete remains of the view that attaining a credit rating of any sort is a matter for NBN Co and is not a relevant consideration which the ACCC should take into account in its decision-making within the SAU framework. It is not a consideration that is contemplated in the CCA. The fact that some of the matters

that the ACCC needs to take into account are also matters that corporations and credit rating agencies take into account is not a sufficient or relevant linkage for inclusion as a principle for SAU-related decision making.

The better approach is to delete all reference in the SAU to the credit rating objective and leave resolution of the issue to NBN Co and the rating agencies. To do otherwise creates an entirely avoidable risk of the ACCC's future decisions in the context of this SAU being open to judicial review. That is an uncertainty that all stakeholders and the ACCC can well do without.

### **Specific relief of value to smaller service providers**

In our submission to the ACCC on 17 February 2023, Commpete noted that there were a number of charges that lacked justification and should be removed as part of the SAU variation. Because these charges make it particularly difficult for smaller service providers to attract new customers, they inhibit competition and are not in the LTIE. The charges include the "Service Transfer" and "Non-Infrastructure Transfer" fees that NBN Co levies on each AVC transfer between RSPs. The fees are not cost related and are in effect administrative taxes levied each time an end user switches retail providers.

In the draft decision of 2 May 2023, the ACCC has not given this issue much consideration at all. It states at page 5: "We encourage NBN Co to take two actions before we make a final decision on an SAU variation. The first is to provide assurances that it will quickly resolve the ongoing competition concerns with its network-to-network interface charges, which smaller retailers continue to raise as impediments to expanding their operations over the NBN and competing more directly with incumbents. The treatment of the NNI charge will also assist new entrants into the market.

In its letter, NBN Co's states it is considering options to address these concerns, with a view to providing an update following this draft decision. The other is for NBN Co to publish its initial pricing roadmap and supporting worksheets for the first regulatory cycle." Commpete acknowledges the recent announcements by NBN Co in relation to these items. However, the 'Service Transfer' and Non-Infrastructure Transfer' fee is yet to be addressed, and we urge the NBN Co and ACCC to include treatment of this in the SAU variations by removing these charges.

Around the time of NBN Co's inception, a 2012 JP Morgan report provided a benchmark to Government on what success would look like for the delivery of a National Broadband Network. It stated with an effective competition policy and a healthy advanced economy, smaller businesses (i.e., the challengers outside the Big-3) would move to occupy 30% market share. This would 'level the playing field'. There have been many hurdles in which smaller providers have endured during this period, however it is pleasing the challengers have grown to approximately 22.5% market share. Removal of the switching fees would be an example of a final item and will help expedite reaching this original goal of the NBN.

### **Next steps**

NBN Co is under no legal or other obligation to make a further SAU variation proposal, but there is every indication from NBN Co that it will do so. Delay in the total SAU variation process has created uncertainty and disadvantage amongst stakeholders generally, and especially amongst smaller RSPs, who do not have the resources to engage in these processes for extended periods.

It is therefore imperative for the ACCC to encourage NBN Co to respond with maximum expedition and to manage the remaining process components before a, likely, final acceptance in the same manner.

Having said that, Commpete recognises that the ACCC has shown admirable leadership in helping the industry to distil and resolve many of the larger issues involved in the regulation of critical long-term operation of monopoly infrastructure. There is no aspect of this task that is easy.



Commpete will continue to support the ACCC's efforts to achieve a robust and just outcome that meets LTIE objectives.

Yours sincerely,

Michelle Lim  
Chair, Commpete Inc.