

1 Introduction

The Australian Competition and Consumer Commission (**ACCC**) is undertaking a market study into the communications sector. As part of the market study, the ACCC released an issues paper in September 2016 (**the Issues Paper**). As an active competitor in telecommunications markets in Australia, Vocus is directly affected by, and has an interest in, the issues being considered in the ACCC's market study. Therefore Vocus made a submission in response to the Issues Paper (**the Issues Paper Submission**).

The ACCC has considered the submissions received in response to the Issues Paper, and the ACCC has released a draft report (**the Draft Report**). The ACCC has invited comments from interested parties in response to the Draft Report. Vocus welcomes the opportunity to provide a response to the Draft Report.

2 Overview of this submission

In the Issues Paper Submission, Vocus made the point that the ACCC's market study is not an end in itself but is a means to allow the ACCC to better understand where and how the ACCC should focus and use its regulatory powers. In this regard, the Issues Paper Submission identified two issues where, in Vocus' view, ACCC intervention or a revision to the ACCC's current approach is required:

- **NBN Co Connectivity Virtual Circuit (CVC) pricing.** Vocus has considered the ACCC's approach to this issue in the Draft Report. Vocus' key message to the ACCC is that Vocus supports the ACCC's findings and approach to this issue as set out in the Draft Report. Vocus submits that when considering the issue of NBN cost recovery, it is crucial to ensure a level playing field between fixed line and wireless (including mobile) services. This issue is discussed in section 3 below.
- **The regulation of internet network peering arrangements.** Vocus has considered the ACCC's approach to this issue in the Draft Report. Vocus' key message to the ACCC is that Vocus supports the ACCC's findings and approach to this issue as set out in the Draft Report. This issue is discussed in section 4 below.

In addition to the above issues that Vocus identified as requiring immediate consideration by the ACCC, Vocus also wishes to provide its views in relation to the following issues that the ACCC has identified for immediate consideration:

- **Service standards for NBN services.** Vocus' key message to the ACCC is that Vocus supports the ACCC's proposed examination of NBN Co's service levels. Vocus submits that when considering this issue, the ACCC should also consider whether the process for negotiating NBN Co's standard terms should remain confidential. This issue is discussed in section 5 below.
- **Consideration of whether regulation of the market for NBN aggregation services is required.** Vocus' key message to the ACCC is that this market needs to be left alone to develop naturally, and any regulatory intervention in this market (including by means of imposing record keeping and reporting obligations) is unjustified. This issue is discussed in section 6 below.

3 NBN Co CVC pricing

As articulated in the Issues Paper Submission, Vocus' view is that NBN Co's current approach to CVC pricing is problematic both in terms of principle and in terms of practical application. As pointed out in the Issues Paper Submission, in terms of practical outcomes, there is effectively a choice between:

- an approach to CVC pricing that makes access to OTT services that require high bandwidth unaffordable to most Australians, and thereby stifles innovation and leads to poor outcomes for consumers; or
- a fundamental rethink of the approach to CVC pricing which seeks to keep CVC pricing at realistic levels.

The second option above is obviously the preferable option as regards positive outcomes for consumers.

Vocus also submitted in the Issues Paper Submission that:

- In economic terms, it is rational for NBN Co to seek to put its own interests above the interests of RSPs and consumers and to seek an optimal outcome from its perspective.
- Given NBN Co's market power, it would not be wise for the ACCC to simply leave it to the industry to resolve the CVC issue without there being any regulatory fall back in the event that NBN Co offers a solution that unreasonably favours its own interests above the interests of RSPs and consumers.
- It is important that the ACCC maintains an ability to provide regulatory relief should NBN Co fail to adequately resolve the issue. One way that this could be done is for the ACCC not to approve NBN Co's application for variation of its Special Access Undertaking (**SAU**) until the CVC issue has been resolved.
- If it is simply the case that permitting NBN Co to recover its reasonable costs (including a reasonable return on investment) means that access to OTT services that require high bandwidth become unaffordable for most Australians, then the NBN will have failed to fulfil the objective of delivering fast broadband at affordable prices, and a fundamental policy rethink will be required (the obvious elephant in the room is a write down of NBN Co's costs).

In light of Vocus' concerns about CVC pricing, Vocus welcomes and supports the following actions and recommendations that are proposed in the Draft Report:

- **Proposed recommendation 3:** The ACCC strongly encourages NBN Co and service providers to continue to engage constructively to address issues raised about NBN wholesale access pricing within the existing regulatory framework. This is essential if there are to be improved outcomes for NBN Co, service providers and consumers. The ACCC has delayed its decision on varying the SAU in order to give NBN Co and service providers flexibility to continue their discussions in relation to pricing.
- **Proposed action 4:** The ACCC will carefully examine any outcome of NBN Co's current pricing consultation, including the need for consequential changes to the SAU or other regulatory response to promote positive outcomes for consumers and the market generally.

- **Proposed recommendation 5:** In the medium term, and depending on future developments, the Government consider whether NBN Co should continue to be obliged to recover its full cost of investment through its prices. Further work could be done by the ACCC and the Department of Communications and the Arts to examine this issue and in particular possible options that may provide NBN Co greater flexibility regarding its cost recovery objectives for example direct budget funding arrangements for non-commercial services, debt relief measures or an asset revaluation.

Accordingly, Vocus believes that these proposed recommendations and actions should be confirmed in the ACCC's final report.

Vocus believes that Proposed Recommendation 5 is particularly important in order to avoid market distortions between:

- fixed line technology which under current regulatory policy will be burdened by having to recover the cost of uneconomic broadband services; and
- wireless technology (including mobile) which under current regulatory policy is free from this burden.

From Vocus' perspective, ensuring a level playing field between fixed line and wireless technologies is an obvious elephant in the room, given the increasing substitutability of fixed line and wireless technologies.¹ Vocus believes that the need to ensure a level playing field between fixed line and wireless technologies is something that the ACCC's final report should expressly recommend.

4 Regulation of internet network peering arrangements

In the Issues Paper Submission Vocus submitted that:

- Achieving any to any connectivity depends on the exchange of traffic between the networks of different internet service providers. This requires interconnection. If service providers are unable to obtain interconnection on competitive terms, the result is that entry or expansion in the supply of downstream services will be deterred. It is in this context that the settlement-free peering arrangement between Telstra, TPG, Optus and Verizon (**TTOV**) needs to be considered.
- The TTOV peering arrangement is a prima facie cartel arrangement. Therefore, calls for the ACCC to consider whether such an arrangement is acceptable should be akin to pushing on an open door.
- The imbalance between TTOV and other carriers impedes the ability of other carriers to compete with TTOV and results in Australian consumers of internet services paying higher retail charges.
- It is not just Australian Service Providers that are adversely affected by the TTOV arrangements. Global service providers that have been refused peering by TTOV have also voiced concerns about the cost of interconnecting with Australian networks.

¹ The Draft Report notes that substitution of fixed line services for mobile services has been occurring for a number of years and the substitutability between mobile and fixed line has the potential to be boosted when deployment of 5G begins in two to three years – Draft Report at pp.15-16.

- Concerns about the TTOV peering arrangements are exacerbated by the growth in data usage.

In light of this, Vocus welcomes and supports the following actions and recommendations that are proposed in the Draft Report:

- **Proposed recommendation 11:** TTOV should maintain on their websites a comprehensive set of criteria and any other relevant policies to which they have regard when assessing peering requests from other networks. This would provide prospective peering parties some guidance on the criteria they are required to meet with each of the TTOV networks.
- **Proposed action 12:** The ACCC will assess and report on whether access to internet interconnection services is available on competitive terms to support effective competition in downstream markets, with a particular focus on the market for the supply of services to corporate customers.

Accordingly, Vocus believes that these proposed recommendations and actions should be confirmed in the ACCC's final report.

Vocus submits that when the ACCC is assessing whether access to internet interconnection services is available on competitive terms, the ACCC should specifically consider whether each member of TTOV individually satisfies the criteria for peering with TTOV that TTOV require non TTOV carriers to satisfy.

5 Service standards for NBN services

Vocus notes that the ACCC's market study has uncovered a number of concerns relating to the service levels contained in the terms of access that NBN Co offers to access seekers. The ACCC has identified these concerns as falling within three broad categories as follows:²

- The current service levels do not represent an appropriate baseline to ensure a positive end-user experience.
- There is insufficient recourse to compensation where service levels are not met.
- There is inadequate information flows and coordination between NBN Co, service providers and consumers.

These concerns have led the ACCC to include proposed action 6 in the Draft Report as follows:

We propose to examine the non-price terms of access, particularly the service standards being proposed for access to NBN services, and the impact that these may be having on delivering positive consumer experiences on the NBN. The allocation of responsibility for connections and service faults between NBN Co and service providers is an issue that will affect consumer experiences, especially where consumers suffer detriment.

In particular, we will examine whether there are appropriate incentives for NBN Co to remedy service failures and consider the adequacy of compensation available to service providers to enable them to provide appropriate consumer redress. As NBN Co is moving from the rollout

² Draft Report – p.136.

phase to delivery of services, risk allocation must also shift to ensure services are delivered to consumers that meet expectations of quality.

We will consider whether the proposed allocation of responsibility is appropriate and whether regulatory intervention is necessary, for example, by including service level terms within NBN Co's regulated terms of access.

Vocus agrees that proposed action 6 is justified, and Vocus supports inclusion of this proposed action in the final report.

One additional aspect that Vocus believes the ACCC should consider relates to the process of negotiation of commercial terms between NBN Co and access seekers. Negotiation of NBN Co's Standard Form of Access Agreement (i.e. the Wholesale Broadband Agreement (**WBA**)) is currently subject to a confidential process. Although Vocus acknowledges that negotiations relating to the development of new or enhanced NBN products may require a confidential process, Vocus believes that making the consultation process for the WBA confidential is unjustified, given that NBN Co is a Government business enterprise that is obliged not to discriminate against access seekers. In Vocus' view, confidential negotiations can increase NBN Co's ability to simply brush aside well founded concerns of access seekers – i.e. NBN Co's market power means that one on one negotiations are unlikely to achieve much. Whereas if the WBA is subject to a public consultation process, this will allow the ACCC to more easily identify areas, such as the inadequacy of service levels, where there is common ground among access seekers, and this will make it more difficult for NBN Co to simply use its market power to brush aside such concerns.

6 The ACCC's approach to the NBN aggregation market

As identified in the Draft Report, Vocus is currently active in the NBN aggregation market as a supplier of NBN aggregation services.³ Vocus does not believe there is any justification for regulatory intervention in the NBN aggregation market. Given that the NBN rollout is not complete, and the existence of underlying issues with the NBN as identified in the Draft Report,⁴ Vocus believes that the NBN aggregation market is developing reasonably well. In this regard, the Draft Report correctly identifies that since the start of 2016, the number of wholesale NBN aggregation services has been growing steadily.⁵

Vocus notes that in the Draft Report at the outset of the ACCC's consideration of the NBN aggregation market, the ACCC states (emphasis added):⁶

*In relation to NBN wholesale aggregation services, currently the key non-price differentiation appears to be whether the services are Layer 2 or Layer 3. As set out in Table 4.10, there is not a significant amount of non-price differentiation occurring other than on this basis. **However, we note that these are relatively new services and their development requires supporting business cases (including demand), capital investment and time.***

In Vocus' view, this is a reasonable position for the ACCC to adopt. This position is reflected in the following draft finding in the Draft Report:⁷

³ Draft Report – p. 82.

⁴ Including the issues relating to NBN pricing and service standards discussed in this submission.

⁵ *ibid.*

⁶ Draft Report – p. 85.

⁷ Draft Report – p. 142.

NBN wholesale aggregation services currently support a small number of all retail broadband services on the NBN. The market for NBN wholesale aggregation services may not fully mature until after the network [is complete] but there remains the potential for this market to grow and provide competitive constraint in the provision of downstream services on the large service providers.

Vocus submits that it would have been reasonable for the ACCC to simply have left things there. However, the ACCC goes on to consider perceived concerns relating to the NBN aggregation market, notwithstanding that the rollout of the NBN is not yet complete, and, in doing so, the ACCC forms the view that further consideration needs to be given to whether regulatory intervention is required.

While Vocus acknowledges that it may be appropriate for the ACCC, as part of its market study, to undertake an analysis of the NBN aggregation market (which includes consideration of any concerns expressed by respondents to the market study), Vocus submits that the perceived concerns relating to the NBN aggregation market identified in the Draft Report do not justify giving any further consideration to whether the NBN aggregation market should be regulated. To be clear, Vocus' reference to 'regulation' includes record keeping and reporting obligations, as such obligations are not without cost, and impose a regulatory burden.

Vocus submits that as a matter of principle imposing any regulatory burden on a nascent market is likely to hinder its development and therefore be counterproductive. This would not constitute good regulatory practice.

The remainder of this section of Vocus' submission:

- engages with the perceived concerns that the ACCC identifies in the Draft Report which the ACCC considers give rise to the need for further consideration as to whether the NBN aggregation market should be regulated; and
- identifies the Draft Report proposed actions and recommendations relating to the NBN aggregation market which Vocus believes are problematic and should not be included in the ACCC's final report.

6.1 Perceived concerns relating to the NBN aggregation market

There are three concerns identified in the ACCC's analysis of the NBN aggregation Market:⁸

- the pricing of NBN aggregation services, including concerns that NBN price discounts are not being universally passed through;
- the limited extent of differentiation between NBN aggregation services and the ability to use them to provide differentiated downstream products; and
- delays in NBN wholesale aggregation products coming to market compared to equivalent retail services.

Each of these concerns are considered in turn.

⁸ Draft Report – p. 139.

Pricing of NBN aggregation services

As regards the pricing of NBN aggregation services, the ACCC states (emphasis added):⁹

As outlined in section 4.4, the evidence we have suggests that NBN Co's pricing changes, particularly the recently introduced discount model based on each retail service provider's dimensioning decisions, are not being universally passed through to downstream service providers. [...]

We note that this may be a timing issue, as NBN Co's retail service provider based discount was only introduced in June 2017. [...]

*Some responses to our survey indicated the prices for NBN wholesale aggregation services appeared similar to the retail prices that their wholesale provider has in the market, which would be suggestive of a price squeeze. While we are concerned NBN Co's pricing changes are not being passed through, reflecting **the anecdotal concerns expressed to us, we do not have firm empirical evidence to demonstrate that this is the case.** [...]*

*Reflecting the above concerns, we propose to consult about the need to more formally and systematically collect NBN wholesale aggregation pricing information via a RKR. The purpose of this is **to enable us to understand whether NBN Co's price changes are being passed through and if so to what extent.***

Vocus submits that if allegations are being made that providers of NBN aggregation services are engaging in unlawful price squeezes, the appropriate regulatory response is for the ACCC to investigate these specific allegations and the service provider(s) concerned, rather than seeking to impose a regulatory burden on all service providers simply to allow the ACCC to form a view on whether these allegations are well founded. This is particularly the case given that the ACCC has itself identified that delays in passing through price discounts could simply be nothing more than a timing issue. In Vocus' view, the existence of multiple competitors in the market would be a sufficient counter balance to any attempted price squeezes.

Differentiation between NBN aggregation services

As regards the extent of differentiation between NBN aggregation services, the ACCC states (emphasis added):¹⁰

*Some of [the issues relating to the limited extent of service differentiation] **may reflect inherent limitations of network services supplied over a shared wholesale network, and others may reflect that we are in a stage of transition with the NBN.** However they could impact the extent to which tier 2 and 3 service providers can effectively compete in the supply of retail fixed line broadband services.*

*At this stage, **we consider that the market may continue to evolve and address some, or all, of the above limitations.** This may occur as demand for these services increases, enabling aggregation providers to develop business cases which support further investment in network infrastructure and related systems and processes. [...]*

⁹ Draft Report – pp. 139-140.

¹⁰ Draft Report – p.141.

*Given the importance of these services, **we propose to monitor their development in order to understand whether they evolve to address the limitations noted above.** We will also seek to understand any commercial and technical issues that limit the ability of NBN wholesale aggregation service providers to supply more differentiated services that address the above concerns. An outline of the information we propose to consult on the need to seek **via a RKR**, as noted above, is set out below.*

Vocus respectfully submits that in the context of:

- the causes of the identified issues potentially being deeper issues that apply to the NBN more broadly; and
- the potential for the market to solve these issues given time,

the ACCC imposing regulation on the market simply to monitor progress does not represent good regulatory practice. Good regulatory practice would give the market a reasonable opportunity to develop and to solve teething issues itself (at a minimum this would require waiting until after the network rollout is complete) before giving consideration to whether any regulatory burden is justified.

Delays in wholesale products coming to market

As regards delays in NBN wholesale products coming to market, the ACCC states (emphasis added):¹¹

*We acknowledge that although services provided over aggregation services make up only around four per cent of the NBN end-user market, a number of service providers rely on NBN wholesale aggregation services to supply retail broadband services, making it a critical wholesale input. This is particularly the case in the rollout phase of the NBN when there is active competition for customers as they transition off the legacy networks and onto the NBN. However, **we recognise that there will be a period of time between when NBN Co makes new services available, and they are supplied at the retail level, in comparison to when they are made available at the wholesale level.** This reflects that providers need to establish the business case supporting the wholesale product including the business support systems and then develop and test it before moving into implementation and delivery phase. [...].*

*While **this may be a transitional issue as NBN Co releases new products and services during its rollout phase,** we **propose to monitor it to understand whether it is creating significant barriers to entry for service providers and diminishing competition in the supply of retail fixed line broadband services.** An outline of the information we propose to consult on the need to seek **via a new RKR**, as noted above, is set out below.*

Again, Vocus respectfully submits that imposing regulation merely to monitor progress of a market that the ACCC acknowledges is in nascent form does not represent good regulatory practice.

6.2 Problematic proposed recommendations and actions

Vocus submits that the following proposed recommendations and actions in the Draft Report are problematic:

- **Proposed action 7:** The ACCC will consult on the need to obtain information from industry via a record keeping rule to monitor the supply of wholesale aggregation services to determine

¹¹ Draft Report – p. 142.

whether regulatory intervention is required. To the extent the market does not evolve, and the information we collect points to a lack of competition, we will consider (following further consultation) the publication of competitive benchmarking information.

- **Proposed recommendation 8:** In the absence of a genuinely competitive wholesale aggregation market NBN Co should consider provision of transitional products or pricing measures, for no longer than the NBN build period that facilitate the entry of smaller or niche service providers to provide a further competitive dynamic.

The reasons why Vocus believe that proposed action 7 is problematic are set out in section 6.1 above.

As regards proposed recommendation 8, Vocus submits it is problematic for three reasons.

First, NBN Co entering the market during the build period to solve perceived issues with the market is inconsistent with the ACCC's draft finding noted above that the market for NBN wholesale aggregation services may not fully mature until after the network is complete - i.e. whether the market is 'genuinely competitive' cannot reasonably be assessed until after the network build has been completed.

Secondly, it is not clear what is intended to happen to the new NBN services once the network build has been completed – i.e. will NBN Co simply withdraw them, and the niche service providers that are assumed to require them (who, it is assumed, cannot be serviced by existing market participants – hence the need for NBN Co to enter the market) will withdraw the market?

Thirdly, and most importantly, NBN Co's entry into the market would have the likely effect of diminishing not increasing existing competition in this market – i.e. the advantages that NBN Co enjoys from being a Government funded owner of the network would make it likely that other providers of wholesale NBN services would be unable to compete against NBN Co.

The need to avoid NBN Co competing against access seekers is something that has been considered by the ACCC in the context of consideration of the SAU. This issue, and the view the ACCC formed on it, is neatly summarised as follows (emphasis added):¹²

*In relation to whether or not the service offered is a Layer 2 bitstream service, the service description for the NBN Access Service states that the service includes “some Layer 3 awareness referred to in clause 1A.2.6”. Telstra has raised concerns regarding the Layer 3 aspects specified in the terms and conditions for the supply of the service. While Telstra does not consider the functionality in clause 1A.2.6 to be problematic, it submits that it is important to ensure that the SAU does not leave scope for the introduction of further Layer 3 functionality. The ACCC agrees with this view. While some Layer 3 functionality is required for the supply of voice and multicast services, it is important that NBN Co’s service description does not give it discretion to offer a broader range of Layer 3 products than is required. This is because **it could result in access seekers competing with NBN Co in the supply of Layer 3 capability — if this were to occur, NBN Co may have an incentive and the ability to discriminate against access seekers in its supply of Layer 2 services (in favour of supplying to itself), with subsequent implications for competition.** The ACCC considers that the Layer 3 functionality should be limited to that specified in clause 1A.2.6.*

¹² ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, April 2013 – at p.74.

6.3 **Conclusion on the need for regulation of the NBN aggregation market**

For the reasons given above, Vocus submits that there is no basis for imposing a regulatory burden on the NBN aggregation market, and doing so would represent a departure from sound and orthodox regulatory practice. Vocus therefore urges the ACCC to omit proposed action 7 and proposed recommendation 8 from the ACCC's final report.

Vocus Group Limited 8 December 2017