

# **nbn** submission to the ACCC – Communications Sector Market Study

21 August 2017

**PUBLIC VERSION**





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## Introduction

On 3-4 July 2017, the ACCC held the *ACCC Communications Sector Market Study Stakeholder Forum* (the **Market Study Forum**) as part of the ACCC's Communications Sector Market Study (**Market Study**).

nbn co limited (**nbn**) appreciates the ACCC's engagement with **nbn** with respect to the Market Study Forum. The Market Study Forum offered an opportunity for industry to provide their perspectives on the operation of the communications sector.

**nbn** wishes to supplement our comments made at the Market Study Forum with additional observations and guidance provided in this submission. **nbn** provides these additional observations in the interests of assisting the ACCC to ensure that the Market Study encompasses the broad range of issues affecting the communications sector and allows the ACCC to focus its ensuing activities in order to have the greatest impact on the long-term interests of end users.

When considering the comments of all participants at the Market Study Forum, as part of its Market Study, **nbn** encourages the ACCC to take a rigorous and evidence-based approach. In this submission **nbn** provides evidence currently available to support its observations and guidance and will seek to provide further evidence to assist the ACCC as requested.

The Market Study presents a significant opportunity for the ACCC to:

- provide information and clarity to investors, market participants, end users and interest groups about the economic factors shaping the sector;
- illuminate the nature and extent of those anti-competitive market forces which structural separation of the industry did not address; and
- inform the regulatory work of the ACCC, but also the policy work of governments and agencies such as the Productivity Commission.

While we appreciate that **nbn** is one aspect of the Market Study that the ACCC may wish to focus on, **nbn** submits that the ACCC should not lose sight of the significant regulatory reforms that led to the current industry structure. We believe that the Market Study risks overlooking the regulated reforms which led to the formation of **nbn**, as well as other issues arising in the market, including downstream markets.

Accordingly, **nbn** urges the ACCC to closely examine the emerging dynamics of the structurally-separated industry in which **nbn** operates, including by accounting for the:

- effect of adjacent markets and substitutable wholesale inputs; and
- operation of downstream markets and the nature and extent of competition issues that persist post-structural separation.

**nbn** submits that the ACCC should focus the Market Study on these issues. Consequently, **nbn** has organised this submission around the following points:

1. **Greater focus is required on participants in downstream markets:** greater focus is needed on differences between participants in the market downstream of **nbn** to properly understand the nature and extent of competition issues that persist post-structural separation;
2. **Greater focus is required on the effect of substitutable inputs on downstream markets:** greater focus is needed on wireless substitutability and other forms of **nbn**<sup>TM</sup> network substitution to properly understand competition in the market and its effect on the long-term interests of end users (**LTIE**); and
3. **Responses to concerns raised about nbn:** **nbn** takes the opportunity to supplement its comments made at the Market Study Forum with some additional observations in response to concerns raised by some members of industry. The details provided in this submission highlight that the most insistent concerns



about **nbn** have been raised by a small number of market participants with commercially rational motivations who have, to date, provided no supporting evidence for their concerns.



# 1. The operation of downstream markets

**nbn** submits that a key focus of the Market Study should be on competition in downstream markets. Given that much work has been undertaken to structurally separate the industry, **nbn** submits that competition outcomes at the downstream level should be the focus of the ACCC's work. In particular, further work is required to understand what pressures are affecting retail margins apart from **nbn**'s wholesale pricing inputs. Although some issues may persist in relation to operators that own backhaul networks and operate in the downstream market, legacy vertical supply concerns have been largely solved by structural separation.

## 1.1.1 Vertical integration beyond the access network

There is currently insufficient analysis of a number of retail market dynamics. It appears, for example, that backhaul providers still have a significant pricing advantage in retail markets as a result of their control over backhaul prices. Specifically, four major suppliers - Telstra, Optus, TPG and Nextgen (now part of Vocus) - control the vast majority of the backhaul market.<sup>1</sup> The ACCC has recognised the importance of a competitive backhaul market, especially one created by non-vertically integrated suppliers, such as Nextgen, for their role in promoting competition at the retail level.<sup>2</sup>

However, the major backhaul providers like Telstra that provide backhaul access are also competing in downstream markets, with the capability to control backhaul access as an input for overall access network costs. Consequently, there is a need to consider if there is a potential for vertically integrated retail providers to create a margin squeeze for their non-vertically integrated competitors in the retail market.

**nbn** would also encourage the ACCC to further consider the issue of backhaul competition in relation to the number of **nbn**<sup>TM</sup> Points of Interconnection (**POI**). While the ACCC previously considered the implications of setting the number of POIs at 121 based on its assessment of backhaul competition from a number of years ago, it may be prudent for the ACCC to reassess the practical outcomes of that decision. It may be that having fewer POIs can reduce access seekers reliance on backhaul networks, thereby reducing the control that the major backhaul suppliers have on this input.

Meanwhile, incumbent retail providers are arguably constraining price competition through legacy market power by simply shifting their ADSL and cable customers straight onto the **nbn**<sup>TM</sup> network without offering a perceived choice. Despite **nbn** avidly executing its obligations to inform end users of their choice of service providers (through "Ready for Service" letters as well as numerous public education campaigns), some retailers are utilising their existing connections to maintain their current end users. For example, it was well publicised that Optus was using high-pressure tactics with end users on its former cable network, telling them that they had only 30 days to transition to Optus' **nbn**<sup>TM</sup> powered services or face disconnection before their **nbn**<sup>TM</sup> Ready for Service letters arrived.<sup>3</sup> Whilst Optus has since apologised and rectified its marketing, that episode shows how legacy issues are playing out in the 'land grab' environment in ways that are outside **nbn**'s control (despite **nbn**'s best attempts to counter such behaviour to avoid the inevitable significant brand damage to **nbn**).

There are other differences between the input costs and strategies of the various retailers that affect their business cases and these have not been properly assessed to date.

<sup>1</sup> Market share for Telstra, Optus and TPG amount to 41%, 14% and 27% respectively. See ACCC, "Communications affordability and the role of efficient markets", (1 September 2015), ACCAN National Conference 2015, Sydney. Available at: <https://www.accc.gov.au/speech/communications-affordability-and-the-role-of-efficient-markets>.

<sup>2</sup> ACCC, "Competition in the Australian Telecommunications Sector: Price Changes for telecommunications services in Australia" (February 2016), pp. 5-6. Available at: [https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202014%E2%80%9315\\_Div%2011%20and%2012\\_web\\_FA.pdf](https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202014%E2%80%9315_Div%2011%20and%2012_web_FA.pdf).

<sup>3</sup> Adam Turner, "Optus threatens disconnection to sign up NBN customers and fast-track HFC cable shutdown", (10 March 2017) *Sydney Morning Herald*. Available at: <http://www.smh.com.au/technology/technology-news/optus-threatens-disconnection-to-sign-up-nbn-customers-and-fasttrack-hfc-cable-shutdown-20170310-quv5ek.html>.



**nbn** considers these issues to be of importance and submits that the ACCC should include them within the scope of its Market Study inquiries. To the extent that these factors are affecting the pricing and other terms of retail services, further regulating or intervening in **nbn**'s pricing and service delivery will not resolve the issue.

### 1.1.2 Aggregators

**nbn** submits that the ACCC should also consider the operation of wholesale aggregators, including some who compete with the downstream service providers they support. At the Market Study Forum, it was suggested that:

- 10% of the market is dependent on information provided by aggregators;
- aggregators do not adequately pass on information such as CVC reports to downstream service providers;
- access by downstream service providers to tools (such as the **nbn**<sup>TM</sup> Service Portal and billing systems) are subject to assistance provided by aggregators; and
- downstream service providers are unable to provide voice continuity for end users porting from the PSTN to VoIP due to limitations of aggregator services.

**nbn** considers that further work by the ACCC is warranted to investigate these concerns and to determine to what extent any other conduct by aggregators may be limiting competition in the downstream market requiring regulatory intervention. Again, **nbn** submits that these issues should be a focus of the ACCC's Market Study and urges the ACCC to closely examine a broad range of influencing factors on competition outcomes in the communications sector.



## 2. The role of substitutable wholesale inputs on retail markets

There is emerging evidence that wireless services are increasingly substitutable with **nbn**<sup>™</sup> fixed line services. Whilst wireless services are currently primarily offered at lower speeds and support lower data transfer amounts, wireless services will increasingly be a viable competitor at the fringes or directly to **nbn**. For example, new entrants are building their business models around the assumption that fixed wireless networks do, and will, compete with **nbn** going forward. There are a number of fixed wireless providers directly in competition with **nbn** such as Spirit Telecom offering high speed residential services,<sup>4</sup> and Superloop's BigAir offering gigabit fixed wireless services.<sup>5</sup> **nbn** can confirm from its own supply of wireless services in outer metro and regional areas that fixed wireless can be a significant substitute for fixed line services. **nbn** is planning to launch new wireless bandwidth profiles that are capable of supporting wholesale speeds of up to 100 Mbps downstream and 40 Mbps upstream.<sup>6</sup>

Despite this, the regulation of wireless services is significantly different. For example, the Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination Joint Inquiry (**SBAS Determination**) and the 2017 Telecommunications Reform Package<sup>7</sup> Regional Broadband Scheme (**RBS**) levy will not apply to wireless service providers. Additionally, the existing Part 8 requirements of the Telecommunications Act also do not apply to wireless services.

Further work is required to understand the extent to which wireless substitution is acting to constrain retail pricing of **nbn**-based services and to ensure regulatory parity.

Similarly, there is increasing international evidence that residential end users are relying solely on mobile for a range of broadband access requirements. For example, in a report released in the United States by the National Telecommunications & Information Administration, the number of households that relied exclusively on mobile data services doubled from 10% in 2013 to 20% in 2015.<sup>8</sup> In Australia, this trend is similar, with 21% of Australians being mobile-only internet users as of December 2014, an increase from 19% in December 2013.<sup>9</sup>

This increase of wireless substitution for fixed line broadband access will become more relevant, especially with 4G and the advent of 5G mobile technology.<sup>10</sup> Already it has become evident that 4G LTE contributed to the increased substitutability of fixed wireless and mobile solutions due to its competitive market proposition and the economies of scale it offered to encourage its deployment.<sup>11</sup> 5G will likely further contribute to wireless advancement and substitutability by 2020 and is expected to be capable of offering premium services with

<sup>4</sup> Spirit Telecom, "Our fibre is faster than nbn, says Spirit Telecom Chief", (27 June 2016). Available at: <http://www.spirit.com.au/our-fibre-is-faster-than-nbn-says-spirit-telecom-chief/>.

<sup>5</sup> Yolanda Redrup, (14 September 2016), "Superloop to be NBN Challenger for business", *Australian Financial Review*. Available at: <http://www.afr.com/technology/superloop-to-be-nbn-challenger-for-business-20160913-grfsiz>. See also BigAir, "Fixed Wireless", (accessed 31 July 2017). Available at: <https://www.bigair.com.au/fixed-wireless-ethernet>.

<sup>6</sup> **nbn**, "nbn bolsters rural internet with **nbn**<sup>™</sup> 100 tier", (30 March 2017). Available at: <http://www.nbnco.com.au/corporate-information/media-centre/media-releases/nbn-bolsters-rural-internet-with-nbn-100-tier.html>.

<sup>7</sup> Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and Telecommunications (Regional Broadband Scheme) Charge Bill 2017.

<sup>8</sup> National Telecommunications & Information Administration, "Evolving Technologies Change the Nature of Internet Use", United States Department of Commerce (April 2016). Available at: <https://www.ntia.doc.gov/blog/2016/evolving-technologies-change-nature-internet-use>.

<sup>9</sup> ACMA, "Australians get mobile", (9 June 2015). Available at: <http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Australians-get-mobile#method>.

<sup>10</sup> Competition Economics Group (CEG), "Economics aspects of the USO, A report for nbn co" (July 2016), 82.

<sup>11</sup> Ovum, "Wireless Broadband Access Market Update", (October 2016), p. 5. Available at: <https://ovum.informa.com/resources/product-content/analyst-white-paper-wireless-broadband-access-market-update>.





speeds of up to 10Gbps through advanced technologies such as millimetre wave transmission, improved coordination between small cell and macro cell architecture and heterogeneous network (**HetNet**) support.<sup>12</sup>

More work is needed to understand the resulting competitive constraints on **nbn** from wireless and mobile services and what that means for competition policy and regulation.

**nbn** submits that the ACCC should also consider the extent to which business-grade and enterprise broadband services in fixed line and fixed wireless markets act as a competitive constraint on, and substitute for, **nbn**, particularly for relatively more profitable services. Fixed line business services are supplied in a highly contestable space, with alternate networks including direct fibre builds competing directly against **nbn** offerings. Non-**nbn** fibre connections by major players such as TPG, Vocus, LBN Co, Opticomm, OPENetworks and Spirit are among many that have been predicted to accrue up to 380,000 active connections by 2022.<sup>13</sup> Similarly, over the last few years, a number of regional wireless broadband providers have started offering wireless business services with features such as committed information rates, symmetrical speeds, uncontended dedicated access pathways and high service availabilities. For example, Spirit and BigAir are already offering symmetrical upload and download fixed wireless speeds.<sup>14</sup>

Where vertically-integrated service providers are supplying business grade and wireless services, and where horizontally-integrated fixed and mobile operators are also some of **nbn**'s largest customers, **nbn** faces the risk of having the access seeker choosing to rely on its own infrastructure instead of accessing the **nbn**<sup>TM</sup> network (depending on where the potential return is greatest). This substitution effect places a significant constraint on **nbn**'s behaviour, and provides strong incentives for **nbn** to develop its products and pricing to meet the needs of RSPs and their end users.

**nbn** considers that the impacts of horizontally integrated operators on the industry are underappreciated and have not been adequately investigated. In the absence of such investigation, new policy developments risk compounding the regulatory disparity between regulation of **nbn**'s services and those of its competitors. For example, the SBAS Determination exempts small SBAS providers with 12,000 or less fixed line superfast broadband end users from Standard Access Obligations despite being in competition with **nbn**. Additionally, the RBS levy exempts wireless and mobile networks from contributing to **nbn**'s loss-making networks despite those networks often offering services substitutable with services offered by **nbn**.

The extent to which these policy and regulatory disparities act to limit service innovation across the retail market or contribute to "margin squeeze" are not understood and rarely discussed. **nbn** encourages the ACCC, as Australia's economic regulator, to consider these issues and incorporate these issues into the Market Study.

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<sup>12</sup> Ibid, p. 14.

<sup>13</sup> Bureau of Communications Research, "NBN non-commercial services funding options – Final report" (March 2016), at section 6.3.5, p. 65. Available at: <https://www.communications.gov.au/file/22356/download?token=m9wICjAJ>.

<sup>14</sup> Spirit Telecommunications, "Fixed Wireless Business Broadband", available at: <http://www.spirit.com.au/fixed-wireless-business-broadband/>. BigAir, "Fixed Wireless", available at: <http://www.bigair.com.au/fixed-wireless-ethernet>.



## 3. Response to concerns raised regarding nbn

In addition to the matters raised in the preceding two sections, in this section **nbn** has summarised and responded to some of the concerns raised most vocally at the Market Study Forum.

**nbn** submits that these concerns do not warrant further attention in the Market Study context. These are issues on which **nbn** is already making meaningful progress and is acting in accordance with anticipated and appropriate incentives, or are caused or contributed to by matters outside of **nbn**'s control.

### 3.1 WBA 3 negotiations

**nbn** is briefing the ACCC separately in relation to the development of WBA 3 and the status of negotiations with access seekers. [c-i-c]. **nbn** welcomes any further comments on this.

### 3.2 SAU variation

**nbn** is separately addressing with the ACCC the proper scope of the SAU variation process. In the Revised SAU Variation (lodged with the ACCC on 22 June 2017), **nbn** has addressed the three concerns raised by the ACCC in the draft decision to reject the SAU variation. **nbn** believes that there is no good reason for further delay and that the ACCC should proceed to accept the Revised SAU Variation.

### 3.3 CVC Pricing

As one of the main wholesale input costs for access seekers, CVC charges are an obvious target for access seeker concerns. However, a desire by access seekers to reduce their cost base does not of itself mean that there is any reason for regulatory concern.

#### 3.3.1 nbn's incentives are operating in practice

As the ACCC is aware, under the SAU, **nbn** is limited to recouping the actual cost of its investments plus a regulated rate of return, followed by a period in which **nbn**'s revenue is capped at a net present value of zero. The CVC is a key part of the pricing construct that **nbn** has selected to achieve these regulated returns. In doing so, **nbn** is expected to have the opportunity to recover its efficiently incurred costs by ensuring adequate demand for its services, which the ACCC has said allows for appropriate incentives "to maintain, improve, and invest in the efficient provision of services."<sup>15</sup>

Being able to set a fair price is key to ensuring adequate demand and cost recovery. As **nbn** cannot price at levels that would result in it exceeding its permitted return, the pricing construct it uses to achieve that return is primarily a matter for **nbn** and should not be subject to intervention. Indeed, the ACCC has endorsed the two-part tariff adopted by **nbn**.

**nbn**'s incentives to price appropriately to achieve its permitted returns through its CVC pricing are clearly already operating effectively, especially during this current loss accumulation phase. In this phase, the ACCC has recognised that **nbn** will be more likely to be self-motivated "to invest in and operate its network efficiently and to encourage efficient use of its network."<sup>16</sup> A number of factors, including the price caps on **nbn**'s services under the SAU, the unknown level of demand for **nbn**'s services, and the unprecedented losses that **nbn** faces in rolling out the network, together give **nbn** appropriate incentives to achieve this and encourage the take-up

<sup>15</sup> ACCC, "ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012", April 2013, section 5.3.3, p. 102.

<sup>16</sup> Ibid, 5.3.1, p. 99.



of its services, including through appropriate pricing. These factors have already been recognised by the ACCC in accepting the SAU, as being capable of motivating **nbn** “to set new prices efficiently of its own accord.”<sup>17</sup>

Most importantly, these incentives are playing out in practice, as described further below.

### 3.3.2 nbn pricing efficiently

**nbn** acknowledges that access seekers have expressed concerns with the effect of the current price of the CVC on their current business models. **nbn** has just recently released the new access seeker-specific dimension based discount model for discounted CVC pricing. Under this model, the charge has dropped from \$20/Mbps per month to the industry average of \$14.40/Mbps per month, and reaching lows of \$8/Mbps for higher capacity purchases.<sup>18</sup> Whilst it is too early to assess the long-term impact of that model on retail service innovation, initial indications are that **nbn**’s initiative is having the desired effect. The *NBN Wholesale Market Indicators Report 30 June 2017* shows a number of positive changes in access seeker CVC purchasing decisions, at least some of which may be attributed to this discount, including:

- a total 36% increase in CVC capacity purchased by industry;
- an average 10% increase in capacity purchased per service-in-operation across the industry; and
- an increase in small operator purchasing directly from **nbn**, which the ACCC chair has commented is a positive development, permitting those access seekers greater control over CVC dimensioning for their end users.<sup>19</sup>

By introducing these further discounts, **nbn** is showing that its incentives, recognised by the ACCC, are playing out in practice as expected. **nbn**’s actions evidence that **nbn** is engaging with and responding to customer feedback.

**nbn** is also currently undertaking a wide-ranging strategic pricing consultation with the industry utilising the Product Development Forum (**PDF**). It is considering a range of options for the pricing of **nbn**™ Ethernet, including rebalancing the AVC and CVC charges, including a CIR component in every AVC bandwidth profile to ensure quality of retail experiences, and otherwise changing the pricing of the CVC. The ACCC has been separately briefed about the Pricing Evolution Project. This process is ongoing and is proving constructive. **nbn** intends to keep the ACCC informed on an on-going basis about the Pricing Evolution Project and we look forward to updating the ACCC again.

At the time the ACCC accepted the SAU, the ACCC’s view was that **nbn** should be afforded a suitable amount of flexibility “to ensure that the most appropriate regulatory pricing approach is in place.”<sup>20</sup> The CVC provides **nbn** with a pricing construct capable of being adjusted to respond to uncertain elasticities of demand as contemplated by the ACCC.<sup>21</sup>

What the ACCC and the industry are now seeing is exactly what the ACCC predicted in 2013 – pricing innovation (including in the form of price experimentation) and consultation with access seekers about that pricing innovation. **nbn**’s incentives to price efficiently are operating as anticipated and **nbn** will continue to look for ways to align its interests with access seekers’ interests.

<sup>17</sup> Ibid, 5.4.2.2, p. 121. See also *ibid*, 5.3.1, p. 100 and 5.3.3, p. 120.

<sup>18</sup> Bill Morrow, “Why are data speeds sometimes lower than what consumers were expecting? Is nbn to blame with its infamous CVC charge?”, (31 July 2017), p. 2. Available at: <http://www.nbnco.com.au/content/dam/nbnco2/documents/is-nbn-cvc-charge-to-blame-position-paper-170731.pdf>.

<sup>19</sup> *NBN Wholesale Market Indicators Report 30 June 2017* released by the ACCC on 11 August 2017. Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/reports>. For Mr Sims’ comments, see Geoff Long, “ACCC data shows telcos upped CVC capacity on NBN by 10% last quarter” *Communications Day*, 14 August 2017, p.4.

<sup>20</sup> See above, note 19, section 5.3.3 at 103.

<sup>21</sup> *Ibid*, section 5.4.2.3 at 123.



### 3.3.3 Countervailing power of customers

In assessing access seekers' calls for intervention on CVC pricing, in addition to considering **nbn**'s economic incentives to price efficiently, the ACCC should consider the countervailing bargaining power that access seekers can and do exercise in negotiations with **nbn** and the extent to which such countervailing power obviates the need for concern. [c-i-c].

**nbn** considers that some of the factors leading to access seekers' bargaining power are as follows:

- the high buyer concentration in **nbn**'s customer base — [c-i-c] — is an effective source of countervailing power. A concentrated customer base such as **nbn**'s (as opposed to a diluted base containing many equally distributed buyers) has been demonstrated in studies to empower customers' buying power from a monopolist due to their combined ability to control demand more aggressively;<sup>22</sup> and
- **nbn** is not immune from competition, or the threat of entry by direct competitors, and is already subject to competition, as further discussed in section 1 above.

The Market Study presents a timely opportunity for the ACCC to consider the effect of all relevant forces currently operating in the market, including the presence of any countervailing power and the extent to which it offsets or prevents monopoly power.

### 3.3.4 Consequences of undue attention on nbn pricing

**nbn** has only two revenue streams of any significance: **nbn**<sup>TM</sup> Ethernet AVC and CVC. This is unlike other regulated entities, including the incumbent in the telecommunications sector, which have a range of regulated and unregulated revenue streams. Therefore, pricing of the CVC cannot simply be reduced without significantly adverse implications for **nbn**'s business case. If regulated prices are set too low, **nbn** and its shareholders would be forced to socialise such losses to the detriment of Australian taxpayers.

Likewise, access seekers who claim that CVC prices should be lower without identifying alternative revenue models or acknowledging the impact of such pricing decisions on **nbn**'s cost recovery are simply arguing in favour of increasing their own profits at the cost of the Australian taxpayer. While this is commercially rational behaviour by such access seekers, their assertions need to be tested, and **nbn** understands that the ACCC will be doing this.

The effect of access seekers' arguments to lower CVC prices even further is to require **nbn** to fund the 'race to the bottom' pricing that has occurred in the downstream market whilst access seekers embark on an aggressive marketing campaigns to retain and attain market share. In most circumstances these RSP marketing campaigns have "focused on price with little mention of data speed or quality during the peak of the day,"<sup>23</sup> and have driven down prices for internet plans to a price which may not reflect what end users are prepared to pay.<sup>24</sup> The fact that Telstra has managed to increase its 41% market share in ADSL and cable to an **nbn**<sup>TM</sup>

<sup>22</sup> See Engle-Warnick, J, & Ruffle, B.J. (April 2002) "Buyer Countervailing Power versus Monopoly Power: Evidence from Experimental Posted-Offer Markets", Nuffield College Economics Working Papers (2002-W14), Oxford, UK. Available at: [http://www.nuff.ox.ac.uk/economics/papers/2002/w14/buyer\\_power\\_nuf.pdf](http://www.nuff.ox.ac.uk/economics/papers/2002/w14/buyer_power_nuf.pdf).

<sup>23</sup> Bill Morrow, "Why are data speeds sometimes lower than what consumers were expecting? Is nbn to blame with its infamous CVC charge?", (31 July 2017), p. 2. Available at: <http://www.nbnco.com.au/content/dam/nbnco2/documents/is-nbn-cvc-charge-to-blame-position-paper-170731.pdf>.

<sup>24</sup> Sid Maher, "NBN chief Bill Morrow asks who will by the \$49bn debt", (14 August 2017), *The Australian*. Available at: <http://www.theaustralian.com.au/national-affairs/nbn-chief-bill-morrow-asks-who-will-by-the-49bn-debt/news-story/8fe4e66edbea363e60d8d49a7b4611db>.



network market share of 47%, 54% and 58% for fibre-to-the-premises (**FTTP**), fibre-to-the-building (**FTTB**) and fibre-to-the-node (**FTTN**) respectively, is a testament to how this strategy is paying off.<sup>25</sup>

In response to Telstra's increased market share, other RSPs have introduced price reductions in order to stay competitive. For example, some RSPs are advertising 'super-fast broadband' with actual speeds of 12 megabits per second download speeds and a 1 megabit per second upload speed.<sup>26</sup> Despite research suggesting that end users are willing to pay for higher speed broadband, it appears that for some RSPs, "market share gains are higher priority than profit margin or quality of service."<sup>27</sup>

### 3.3.5 Willingness to pay and margin squeezes

Capacity-based charging is a new wholesale pricing construct in Australian fixed-line access networks as compared with the historical charging structure on the legacy copper network. However, the concerns raised by some participants in the Market Study Forum, regarding the uncertainty created by CVC prices, is overstated. Access seekers already set data caps at a retail level and enforce them. This has primarily been achieved by 'throttling' speeds for end users when their caps are exceeded. Therefore, whilst the CVC charge may be a new input cost, it is not an unquantifiable or unmanageable cost for retail providers. Even if it contributes to relatively lower margins (noting again that CVC charges are not the sole determinant of access seeker margins), this would only be the temporary result of the 'land grab' phenomenon that is currently occurring in the downstream market as access seekers fight for market share during **nbn**'s rapid expansion phase.<sup>28</sup>

There was some suggestion in the Market Study Forum that CVC charges are resulting in a 'margin squeeze'. **nbn** is statutorily prohibited from participating in the retail market and cannot compete with its access seekers in the retail market. Accordingly, **nbn** cannot be creating a margin squeeze. If one exists, it is created by participants in the retail market who have some level of market power which allows them to set a ceiling on prices which is profitable for them but not for others.

If there is no third party creating a margin squeeze, **nbn** does not understand why access seekers are not evolving new service offerings to better reflect the cost of the new CVC wholesale input cost. **nbn** strongly suggests that this should be a clear focus of the ACCC's attention rather than **nbn**'s pricing. Over the last 6 months, for example, the dominant access seeker, Telstra, has reduced its retail price by over 20% on **nbn**'s most popular plan.<sup>29</sup> It stands to reason that if the CVC is truly putting uniform downward pressure on all access seekers' margins, access seekers would uniformly seek to adjust their prices accordingly.

Some participants in the Market Study Forum claimed that it was demand elasticity for retail broadband access services which was preventing changes to retail prices. **nbn** observes that simple uniform increases in prices (as has occurred in electricity) are not the only option available to retail service providers in the communications sector. Broadband and related access services provide the opportunity for significant differentiation to manage costs and increase profits, including sophisticated bandwidth management, differentiated plan capabilities, and/or encouraging off-peak use by some end user segments. Opportunities for managing costs will likely increase with the increased convergence in the capabilities of mobile and fixed broadband access networks.

In any case, **nbn** disagrees with the simple assertion of demand elasticity. [c-i-c].

<sup>25</sup> Tony Boyd, "Telstra's dominance of broadband is increasing on the NBN", (12 July 2016), *Australian Financial Review*. Available at: <http://www.afr.com/brand/chanticleer/telstras-dominance-of-broadband-is-increasing-on-the-nbn-20160712-gq3t07>.

<sup>26</sup> Bill Morrow, "Why are data speeds sometimes lower than what consumers were expecting? Is nbn to blame with its infamous CVC charge?", (31 July 2017), p. 2. Available at: <http://www.nbnco.com.au/content/dam/nbnco2/documents/is-nbn-cvc-charge-to-blame-position-paper-170731.pdf>.

<sup>27</sup> Ibid, p5.

<sup>28</sup> Bill Morrow, "Why are data speeds sometimes lower than what consumers were expecting? Is nbn to blame with its infamous CVC charge?", (31 July 2017), p. 5.

<sup>29</sup> Ibid.



It is possible that retail offers are relatively static because retail margins are contracting appropriately under competitive pressures. In this regard, it is important to recognise that margin *squeeze* is not the same as margin *reduction*. Given the reduced need for retail service providers to invest in access network equipment, and the consequential reduction in the associated risk they are bearing, it is appropriate that there would be some shift in value captured by **nbn**. This trend can be observed in other communications markets too. Internationally, retail service providers are facing reduced margins in many vertically separated jurisdictions with many different market dynamics.

In Singapore for example, most layer 3 telecoms operators have become vertically integrated with layer 2 services due to reduced margins at both layers. Singapore's Next Generation Broadband Network (**NGNBN**) created a level playing field for retail competition and quickly led to the increase from two to four major broadband access suppliers. But just as in Australia, the race to gain a first mover advantage on the new broadband access network rapidly descended into a race to the bottom. In Singapore, the new contenders MyRepublic and M1 were at the front of the pack, but serious questions have arisen about the sustainability of their pricing and the value erosion created by offering gigabit speeds at very low prices before applications are available to take full advantage of such speeds, thereby limiting retail service providers from later introducing value-reflective pricing when applications do become available to use the full capabilities of the network.<sup>30</sup>

In the meantime, incumbents' margins have been quickly reduced, compared with historical xDSL and cable margins. One executive has suggested that they are losing money on current pricing for fixed broadband access over the NGNBN to maintain market share. Even new entrants with lower cost bases are risking future growth by charging at prices that do not account for the need for future network investment.<sup>31</sup>

### 3.3.6 Common misunderstandings about the effect of CVC pricing

At least one access seeker has claimed that lower speeds on multi-technology mix (**MTM**) networks justify the removal of the CVC. Such an argument conflates speed with usage. While slower speeds can result in lower usage, one simply cannot consider the CVC a speed-based charge.

The ACCC already has data that usage on MTM networks is significantly higher than on legacy copper networks. In April 2016, end users on the **nbn**<sup>TM</sup> network consumed around 35% more data than non-**nbn** end users.<sup>32</sup> This increased usage is supported by the **nbn**<sup>TM</sup> network versus only 0.23Mbps of network capacity per end user on Telstra's ADSL network.<sup>33</sup> At a conceptual level, this means that the same value proposition on which a capacity-based charge is based applies to MTM networks as well as to **nbn**'s original fibre-to-the-premises, wireless and satellite networks. Further, tools made available to access seekers enable them to ensure that CVC capacity is acquired at an appropriate level for the AVC bandwidth throughput that can be achieved.

In addition, any speed issues on MTM are likely to be far more short-lived than the period over which **nbn** expects it will need to recover its initial losses through a CVC charge. As the ACCC is aware, network speeds in the FTTB and FTTN footprints remain affected by the co-existence of legacy services during the co-existence period with Telstra.

<sup>30</sup> **nbn**, "Singapore's Gigabit dream arrives – but with a catch", (10 February 2015). Available at: <http://www.nbnco.com.au/blog/industry/singapores-gigabit-dream-arrives-but-with-a-catch.html> and IG, "Singapore telcos – no more same boring story", (28 August 2014). Available at: <https://www.ig.com.sg/market-news-and-analysis/highlights-and-market-themes/2014/08/28/singapore-telcos--no-more-same-boring-story-18949>.

<sup>31</sup> See, eg, Standard Chartered, "Singapore Telecoms", *On the Ground* (24 February 2014). Available at: [https://secure.myrepublic.com.sg/about-us/reports/SingaporeTelcos\\_Fibre.pdf](https://secure.myrepublic.com.sg/about-us/reports/SingaporeTelcos_Fibre.pdf).

<sup>32</sup> In April 2016, this amounted to 112GB used per month compared to 83GB per month. **nbn**, "Aussies watching 13 billion hours of online content a year", (6 April 2016). Available at: <http://www.nbnco.com.au/corporate-information/media-centre/media-releases/aussies-watching13billionhoursofonlinecontentayearabs.html>. Note that in March 2017, the amount of data being used per month on the **nbn**<sup>TM</sup> Network has increased to 148GB. **nbn**, "Aussie binge boom continue to grow", (28 March 2017). Available at: <http://www.nbnco.com.au/corporate-information/media-centre/media-releases/Aussie-binge-boom-continues-to-grow.html>.

<sup>33</sup> ACCC, *Communications Report 2015-16*, (February 2017), p. v.





Subject to continued testing and trials, **nbn** is currently also planning to deploy G.fast technology in the future for its fibre-to-the-curb (**FTTC**), FTTB and FTTN networks, which has the potential to significantly increase wholesale speed capabilities above 100Mbps per premises.<sup>34</sup> To date, **nbn** has trialled wholesale FTTB speeds above 600Mbps using G.fast on 100m of 20-year old copper lines,<sup>35</sup> whilst operators in other jurisdictions such as BT and Deutsche Telecom are capable of using G.fast and other technologies like Super Vectoring to deliver speeds of up to 300Mbps to end users on FTTN technology.<sup>36</sup> Further technology paths also exist beyond G.fast and **nbn** is actively exploring these technologies as they become available.

Accordingly, any speed concerns that an access seeker may have as a reason for removing CVC charges are not supported by existing data, are likely to be short-lived and, in any case, are being actively addressed by **nbn**.

Some access seekers also claimed that **nbn** plans to increase CVC prices over time. This is simply incorrect. **nbn**'s corporate plan assumes increased use of the network and falling per-unit CVC prices in real terms over time.

### 3.3.7 Inappropriate benchmarks for pricing constructs

At least one access seeker has also sought to compare **nbn**'s pricing construct with pricing constructs on next generation access networks in other jurisdictions such as in Singapore and New Zealand. **nbn** confirms that it has regard to market practice on pricing for telecommunications services both domestically and internationally, including the comparison pricing alluded to in the Market Study Forum. These benchmarks are amongst the data being considered as part of the pricing initiatives referred to in section 3.3.2. However, the direct comparisons suggested between **nbn**'s pricing and those of other operators are inappropriate because of a number of differences between jurisdictions, including rollout coverage, the scale of initial losses to be recovered by pricing decisions and market structures.

**nbn** has a mandate to ensure that all Australians have access to fast broadband as soon as possible, at affordable prices and at least cost.<sup>37</sup>

Under the current Statement of Expectations, the Government expects the network will provide peak wholesale download data rates (and proportionate upload rates) of at least 25 megabits per second to all premises, and at least 50 megabits per second to 90 per cent of fixed line premises as soon as possible. The overall cost of this endeavour is \$49 billion,<sup>38</sup> to be recovered primarily through **nbn**<sup>TM</sup> Ethernet AVC and CVC charges.

As the ACCC will be aware, part of the losses that **nbn** will make relate to the build and supply of non-commercial fixed wireless and satellite networks and services.<sup>39</sup> The Bureau of Communications Research (**BCR**) estimated the net present value (**NPV**) loss for fixed wireless and satellite services to FY2040 is approximately \$9.8 billion, using a post-tax nominal discount rate of 6.46 per cent—which loss, in FY2015 real terms, represents a per-month subsidy of approximately \$110 for each satellite premises activated and \$105

<sup>34</sup> **nbn**, "DSL Upgrade paths: The difference between G.fast and XG.FAST", (14 July 2017), accessed 28 July 2017. Available at: <http://www.nbnco.com.au/blog/the-nbn-project/the-difference-between-g-fast-and-xg-fast.html>.

<sup>35</sup> **nbn**, "nbn<sup>TM</sup> technology 101: What is FTTB?" (28 April 2017), accessed 28 July 2017. Available at: <http://www.nbnco.com.au/blog/the-nbn-project/nbn-technology-101-what-is-fttb.html>.

<sup>36</sup> **nbn**, "Setting the facts straight on Fibre-to-the-Node" (8 March 2017), accessed 28 July 2017. Available at: <http://www.nbnco.com.au/blog/the-nbn-project/setting-the-facts-straight-on-fibre-to-the-node.html>.

<sup>37</sup> See *NBN Co Ltd Statement of Expectations* (Revised) issued 24 August 2016. Available at: <https://www.communications.gov.au/publications/nbnstatementofexpectations>.

<sup>38</sup> Parliament Budget Office, "National Broadband Network – Impact on the Budget, Report no. 04/2016", December 2016. Available at: [http://www.apb.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Budget\\_Office/Reports/Research\\_reports/Report\\_042016](http://www.apb.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/Reports/Research_reports/Report_042016).

<sup>39</sup> Bureau of Communications Research, "NBN non-commercial services funding options: Final report", Department of Communications and the Arts (March 2016), p6.



for each fixed wireless premises activated.<sup>40</sup> **nbn** will have to recover the bulk of fixed wireless and satellite losses from its own fixed-line customer base, where it faces long-term and declining price caps.<sup>41</sup>

Neither the New Zealand UFB partners nor the Singapore NetCo (the Layer-1 passive infrastructure company, NetLink Trust) are subject to a requirement to supply networks or services on a non-commercial basis to a scale anywhere commensurate with **nbn**'s mandate. Under New Zealand's UFB initiative, fibre will be deployed to 75% of the population by 2019 and extended to 85% of the population by the end of 2024. New Zealand's population is highly concentrated, with approximately 34% in Auckland alone.<sup>42</sup> In Singapore, the geographic distribution of the population allows for a nationwide fixed national broadband network the size of a single city.<sup>43</sup> Consequently, fixed-line services in New Zealand and Singapore are not required to be a source of significant persisting subsidies, making the wholesale pricing constructs from these jurisdictions unsuitable for direct comparison.

The structure of the Australian market also does not compare with either jurisdiction:

- in New Zealand, Chorus provides both regulated and unregulated services, including over the legacy copper network to which no mandatory disconnection obligation attaches, enabling it to earn revenue on its copper assets during the construction of (and before having any end users on) its UFB network and manage the margin impacts of the transition to fibre through future pricing flexibility on the legacy copper network; and
- in Singapore, retail service providers are generally vertically integrated with OpCos, which allows them to earn unregulated revenue from retail supplies and limits some of the pressure on retail margins based on service providers' ability to internalise some wholesale input costs.

Therefore, whilst it is tempting to look at other broadband projects around the globe, the significant differences in respect of such things as their rollout obligations, the geographic spread of the population and the relevant market structure limit their comparative utility for pricing purposes.

### 3.4 **nbn**'s service levels

**nbn** understands that access seekers' comments about **nbn**'s service levels in the Market Study Forum primarily centred on a concern about **nbn**'s focus on the end user service experience and achievement of service level timeframes, rather than the setting of those timeframes themselves.

The service level timeframes contained in the WBA for both activation and assurance activities are set by the practical limitations of the rollout (including managing **nbn**'s costs appropriately) and **nbn** does not expect material changes to those service levels during the rollout period. **nbn** is also mindful of the proposed Statutory Infrastructure Provider (**SIP**) reforms currently before Parliament. The obligations that the SIP reforms ultimately impose on **nbn** will influence future changes to **nbn**'s service levels.

Service activation and assurance issues faced by end users have a direct reputational impact on **nbn**. For the same reasons as set out above at section 3.3.2 in respect of pricing efficiency, **nbn** has every incentive to improve end user experiences related to the **nbn**<sup>TM</sup> network and the incentives are playing out in practice. Consistent with these incentives, **nbn** has, and continues to, expend significant effort on improving service delivery through several initiatives.

<sup>40</sup> Bureau of Communications Research, "NBN non-commercial services funding options: Final report", Department of Communications and the Arts (March 2016), p7.

<sup>41</sup> Ibid, p7.

<sup>42</sup> Approximately 1.6 million residents in Auckland out of 4.7 million total New Zealand population. See Stats NZ, 'Population – Estimates and Projections – National Population estimates – tables' as at 2016, (accessed 28 July 2017). Available at: <http://www.stats.govt.nz/infoshare/>.

<sup>43</sup> Singapore is a small (700km<sup>2</sup>), densely populated city-state requiring approximately only 1.2 million connections for its NGNBN.





For example, this year **nbn** launched Project Future of Customer Experience (**Project FoCX**). This is a strategic customer experience program designed to shift end user and RSP satisfaction by:

- clarifying the roles and responsibilities between **nbn** and RSPs; and
- providing clearer communications to end users to reduce confusion about topics like migration and disconnection, speed and the roles and responsibilities of each of **nbn** and the RSPs.

Initiatives launched as part of Project FoCX and focused on the above objectives have included a national television advertising campaign which launched on 23 July 2017 with six advertisements and the '101 booklet' which will launch in August. This booklet will be distributed to homes across Australia and included as a lift-out in several major newspapers and act as a guide to the **nbn**<sup>TM</sup> network.

### 3.4.1 Technology-specific service activation initiatives

**nbn** has developed a range of technology-specific activation processes to pursue improvements for different MTM technologies.

For FTTB and FTTN, **nbn** has created a "commitment model". For installations which require **nbn** only to jumper new services at **nbn**'s node or basement MDF (as applicable), access seekers can specify a date by which they would like **nbn** to complete the installation. Access seekers can then plan their own installation and activation activities assuming that **nbn** services will be in place within agreed timeframes, permitting a single end user visit for professional installation of customer premises equipment or end user self-installs. This also reduces the burden on end users, removing a requirement for the end user to be available at the premises when **nbn** is conducting its installation activities, and therefore removing a potentially cumbersome co-ordination between **nbn**, the access seeker and the end user to set and manage changes to appointments.

**nbn** has also launched retail service provider self-installs for some jumpering activities on the FTTB and FTTN networks, allowing access seekers the option to further streamline their end user service activation processes by themselves conducting both **nbn** and access seeker network configuration and physical installation, with **nbn** providing supporting logical network configuration and service activation on-demand.

For the hybrid fibre-coaxial (HFC) network, **nbn** is planning to launch self-install for access seekers and end users, having undertaken trials. This model will permit: **nbn** to conduct a professional installation, access seekers to conduct their own professional installation, end users to conduct self-installations with **nbn** sending out network termination devices (NTDs) or end users to conduct self-installations with access seekers co-ordinating NTD delivery logistics to align with their own residential gateway deliveries. Each of these variants requires its own processes and logistical support. For example, each of the access seeker professional installation option and the end user self-installation with access seeker NTD delivery option requires complex logistical alignment between **nbn** and access seekers. The parties must agree property rights and risk allocations for NTDs stored in access seeker warehouses, access seekers must forecast NTD orders and manage recovery and return of faulty devices, assets must be tracked and registered by **nbn**, and **nbn** plans to offer financial incentives to reflect avoided costs. Access seekers must be on-boarded to deal with the more complex models of service activation. Nevertheless, the range of options is intended to ensure that **nbn** will cater for all access seekers, large and small, and all end user cases, including those which are sufficiently complex to warrant an **nbn** professional installation the first time.

For the satellite network rollout and activation, **nbn** has created another specialised installation and activation regime. Sky Muster<sup>TM</sup> services were made available across all of rural and regional Australia simultaneously. This permitted **nbn** and access seekers to provide next generation broadband access to some of the most under-served Australians as soon as possible. But it also created a formidable challenge, requiring **nbn** to deploy a very specialised and limited workforce across some of the most challenging geographies anywhere. To manage this challenge, **nbn** modified its usual ordering, installation and activation process to allow **nbn** to take greater control of the end user appointment-setting and management functions. After some teething problems that reflected the scale of this 'once in a generation' challenge, **nbn**'s continuing investment in the end user experience has shown marked improvements in experiences across the satellite network. Compared to previous



satellite services, **nbn**'s satellite network is achieving end user speeds that are between 3-5 times faster, with 4-6 times more data allowance for the same price as others.<sup>44</sup> At the same time, all other operational performance metrics have improved, with the Net Promotor Score increasing by 16 points,<sup>45</sup> and end user satisfaction scores for installation services increasing to over 80%.<sup>46</sup> These improvements correlate with an Ovum report that concluded that **nbn**'s satellite network is world-leading.<sup>47</sup>

Each of these technology-specific installation and activation processes has required complex IT and process customisation changes by **nbn** and its subcontractors, the development and negotiation of contractual terms with both subcontractors and access seekers, and on-boarding for access seekers so that they understand when appointments are necessary or not, and what processes they need to implement to manage end user, access seeker or **nbn** availability changes. **nbn** has undertaken these substantial investments primarily to improve the end user experience using direct end user feedback, workforce experience and extensive access seeker consultation.

As part of its WBA 3 offer, [c-i-c].

### 3.4.2 Assurance improvements

Relatively early in the network rollout, **nbn** released and has continued to improve, a range of self-service test & diagnostic tools for access seekers that are designed to improve end-to-end fault isolation and handling. This assists in ensuring that the right service provider in the service delivery chain manages assurance concerns for end users from their first interaction with their retail service provider. A visual representation of the diagnostic capabilities **nbn** offers (depicted in the context of downstream business services) is set out below:

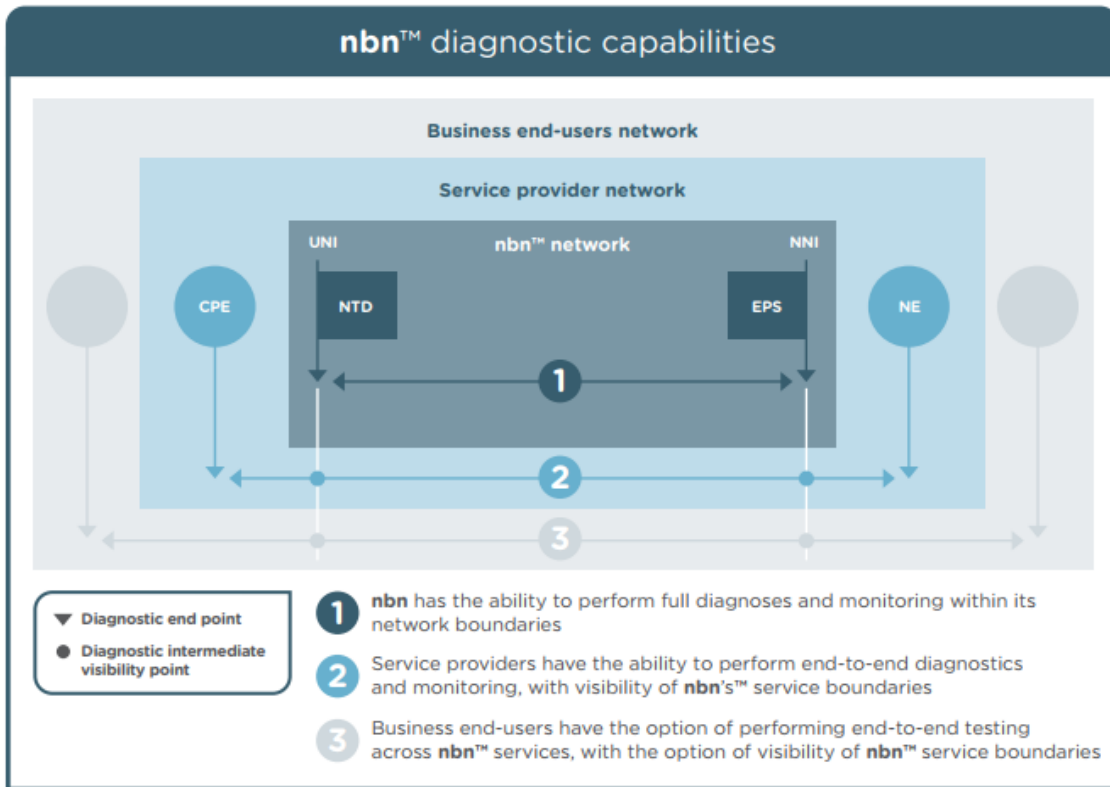
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<sup>44</sup> John Simon, NBN Co, Keynote speech to the Australasian Satellite Forum, 2 May 2017.

<sup>45</sup> NBN Co, "Broadband for the Bush 2017 nbn™ Sky Muster™ Satellite Update", (June 2017), p. 7. Available at: <http://broadbandforthebush.com.au/wp-content/uploads/2017/06/6.-Gavin-Williams-Session-2-Speaker-3reduced.pdf>.

<sup>46</sup> Ibid.

<sup>47</sup> Ovum, "Satellite Broadband: A Global Comparison", (28 April 2016), p. 4. Available at: <http://www.nbnco.com.au/content/dam/nbnco2/documents/Satellite%20Broadband%20-%20A%20Global%20Comparison%20-%20FINAL.pdf>.



As a reflection of **nbn**'s commitment to meaningful service assurance performance, **nbn** is proposing to offer the [c-i-c].

In addition to these major initiatives, at any given time, **nbn** is exploring multiple initiatives to improve the end user experience of **nbn**™ powered services. For example, [c-i-c]. **nbn**'s customer experience metric, end user satisfaction score and Net Promoter Score need to be understood in context given the significant challenges of rolling out a national network at great velocity and scale, **nbn** has recorded a consistently positive customer experience metric, end user satisfaction score and Net Promoter Score.<sup>48</sup>

### 3.4.3 Appointments generally

In addition to the specific activation-related appointment experience initiatives detailed in section 3.4.1, **nbn** has committed to support end users rescheduling their appointments directly with **nbn** installers and to promptly notify retail service providers (via the Service Portal or B2B Access) with details of any appointment reschedules. This not only minimises the possibility of miscommunications but also provides the end user with a better installation experience.

### 3.4.4 Access seekers' influence on end user experiences

**nbn** submits that any investigation by the ACCC into end user experiences on the **nbn**™ network should focus not only on **nbn**, but also on varying experiences of end users of different retail service providers and issues in the retail market that may be adversely affecting end user experience, such as the operational challenges which some providers may be facing as a result of rapid retail market consolidation.

<sup>48</sup> For example, see "**nbn** Annual Report 2015-16", <http://www.nbnco.com.au/content/dam/nbnco2/documents/nbn-annual-report-2015-16.pdf>, p26, and nbn co limited, "Media Release - Strong result continues **nbn**'s momentum to full year targets", <http://www.nbnco.com.au/content/dam/nbnco2/documents/nbn%20half%20year%20financial%20results%202016%20-%20media%20release.pdf>, (5 February 2016).



### 3.5 The Product Development Forum

One industry participant shared its view that the PDF was deficient and did not provide for adequate consultation. **nbn** notes that this view is not shared by the broader industry.

**nbn** agrees with both the industry consensus and with the ACCC's preliminary comments on the issue, that the PDF is operating well and is an appropriate mechanism for the development of commercial constructs.

In developing the SAU, **nbn** had regard to the benefits of customer engagement, principally through the PDF operating as a transparent and constructive process that puts customers in the centre of **nbn**'s product development and improvement processes.<sup>49</sup>

Beyond the stated purpose of the PDF,<sup>50</sup> there are a number of other benefits of utilising such a consultative engagement process, including reducing any information asymmetry whilst allowing for vertical co-ordination and flexibility.<sup>51</sup> To the first point, the PDF substantially reflects normal information exchange in a well-functioning market. To the second benefit, the PDF facilitates better co-ordination of services to the needs of customers. Many international precedents in other industries attest to this benefit, and the flexibility and long-term certainty they produce. For example, gas transmission providers in North America have negotiated with their customers over a number of issues, crafting contractual trade-offs and solutions for commercial concerns in a manner that could not have been achieved by a traditional regulatory decision making process in practical terms. German airports are similarly able to negotiate details of their agreements with airlines and are able to amend the details creating flexibility which would otherwise not be open to a regulator.<sup>52</sup> In support of a consultative process, such as the PDF, over a strict regulatory dependence model, Professor Stephen Littlechild has stated:

*"Experience with greater customer involvement in other jurisdictions, including ex post regulation as applied in the Australian airport sector, is that companies and customers get to know more about each others' preferences and abilities to provide services. Moreover, relationships within the industry improve. Instead of spending time and money to knock down the arguments of the other side, efforts are devoted to finding mutually advantageous ways forward."<sup>53</sup>*

As has been stated previously, **nbn**, the majority of the industry, and the ACCC itself have recognised that the PDF process is operating beneficially for interested parties as intended.

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<sup>49</sup> NBN Co, 'Supporting Submission NBN Co Special Access Undertaking' (26 September 2012), at 5.6.1, p. 89. Available at: <https://www.accc.gov.au/system/files/Supporting%20Submission%20-%20NBN%20Co%20Special%20Access%20Undertaking.pdf>.

<sup>50</sup> See for example, *ibid* at 5.6.1, p. 92.

<sup>51</sup> *Ibid*, B.2-B.3, pp 205-206.

<sup>52</sup> *Ibid*, B2,3, p. 206.

<sup>53</sup> See J Doucet and S Littlechild, *Negotiated Settlements: The development of legal and economic thinking* (2006) at p 11 quoting G Palast, et al *Democracy and Regulation: How the public can govern essential services* (2003) at 96 (<http://www.eprg.group.cam.ac.uk/wpcontent/uploads/2008/11/eprg0604.pdf>).



## 4. Conclusion

The Australian communications sector is undergoing a period of significant change. While **nbn** plays a significant role in such change, it is but one aspect in a complex and dynamic industry.

The market in which **nbn** operates and the market forces which affect it are continually evolving, requiring a commitment to a curious, rigorous and evidence-based approach to fully understand them.

The ACCC has the opportunity and the ability to examine the unique market dynamics of the Australian communications sector today and what forces are actually at play in the context of a structurally-separated industry.

In this respect, **nbn** encourages the ACCC to focus the analysis of its Market Study on:

- the behaviour of participants in downstream markets; and
- the effect of substitutable inputs on downstream markets,

being matters that have, up until now, been left unexamined yet are of genuine concern, rather than spending more time entertaining unsupported assertions made by a few vocal industry participants.