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Australian Competition & Consumer Commission

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TelSoc Submission on regulatory arrangements under NBN Co's Special Access Undertaking

This submission is in response to the ACCC's discussion paper issued prior to the Roundtable on 18 June 2021 to consider the views of industry and other stakeholders on the regulatory arrangements for the NBN that might be established under a special access undertaking (SAU).

NBN Co has continued to engage with the industry and with other interested parties, including TelSoc, on the issues and options that might be considered to meet various long-term objectives of the industry. TelSoc has made a submission to NBN Co, and it is attached as Attachment B to this submission.

TelSoc (the Telecommunications Association Inc.) has been concerned to promote the telecommunications industry and to achieve the social and economic benefits of sustainable industry arrangements since the inception of its antecedent organisation in 1874. Our specific interests and aims for broadband in Australia were outlined in our report, *Towards a National Broadband Strategy, 2020-2030*, which was publicly released in November 2020 and subsequently published in TelSoc's *Journal of Telecommunications and the Digital Economy*. A copy of the report is also included with this submission.

In the context of a long-term strategy, TelSoc's primary concerns for wholesale broadband regulation are to ensure that outcomes are sustainable; enable timely adaptation to changes in demand and technology; provide the comfort of regular independent review; deliver maximum social and economic benefit; promote end user offerings which have simplicity and clarity of understanding; and, especially, reinforce inclusion and the widest levels of take-up and usage. We see the LTIE as being interpreted somewhat more broadly than the objectives of promoting competition and encouraging the efficient use of and investment in infrastructure; which in themselves may not allow for consideration of matters such as provision for low-income users.

Design Principles

TelSoc generally agrees with the design principles listed in the ACCC's discussion, noting that they are pitched at a broad level.

Principle 1 re the need for access arrangements to support a range of retail service offerings that represent value to different categories of end-users:

NBN Co is a wholesale provider with an undoubted position of strength in the broadband services market. Over the remaining 30-year period of the SAU its market power is likely to change with increased modal and direct competition. This means that the SAU needs to make provision for re-sets at appropriate intervals of, say, 5 years, to ensure that access arrangements continue to support a range of retail offerings.

Price regulation of NBN Co should ultimately be concerned with recovery of efficiently incurred costs plus a risk-adjusted return, and great care should be taken if prices are expressed in value terms (such as CVC charges) that do not directly or materially relate to cost causation.

TelSoc accepts that NBN Co has used CVC charges until now to improve its ability to recover (through retailers) additional revenue from broadband users who more highly value access, with the result that it is able to reduce access charges for other users, thereby maximising take-up across the board. However, that arrangement can quickly lead to: (1) engineering outcomes in the retail market, resulting in RSPs becoming more resellers and less innovative as competitive retailers; and (2) increasing windfalls if the re-set arrangements are inadequate or delayed.

TelSoc's preference is that the SAU should include a clear pathway, over one or more re-set periods, to the reduction of CVC and other value elements in wholesale pricing.

TelSoc also has a clear preference for the wholesale price menu to be simplified and to be exhaustively specified in the SAU and SAU variations. It is a matter of concern if complicated discounting and inclusion arrangements are largely at the discretion of NBN Co, as the regulated operator, and not directly covered in the SAU itself and subject to pre-agreed objective criteria. TelSoc understands why NBN Co has been driven to those arrangements because of various inadequacies with the 2013 SAU, but we would hope that the current process provides the opportunity to move towards a comprehensive and explicit arrangement for the future.

Principle 2 re access seekers having reasonable certainty over access costs over time for a given level of quality:

Some of the comments relevant to Principle 1 apply equally to Principle 2. In particular, TelSoc believes that the criteria that should apply to the establishment, amendment and withdrawal of NBN Co products and prices should be clearly stated in the SAU itself and that off-SAU discretions, arguably necessary in the past, should be avoided for the future.

Principle 3 re the access provider having a reasonable opportunity, but not the guarantee, to earn an appropriate return on its efficient investment and to recover its efficient operating costs:

TelSoc agrees with this principle. Over the long remaining period of the SAU the broadband market will undergo changes that are not reasonably foreseeable by anybody at this stage. In that environment no market participant, including NBN Co, can expect guarantees. In the light of industry changes over the past decade or more, many have suggested that it might be timely to review the recoverable value of the investment in NBN Co at current valuations.

Other pricing matters – low-income broadband product

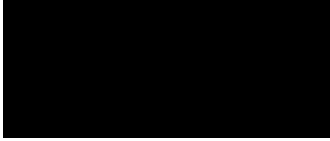
TelSoc considers that this issue should not be one for NBN Co to solve alone through its SAU, nor one that is left to the ACCC. The issues of affordability and digital inclusion are matters relating to broader social policy, and also matters that might be partly addressed through retail competition and regulation. However, we are apparently left with the current SAU process (or, as NBN Co has said, other targeted measures) as the only immediately available means of addressing the matter. The policy quandary might be stated thus: Benefits to low-income and other disadvantaged groups in the community might be denied if the SAU process does not enable or encourage the industry to frame products that could materially assist adoption and usage by those groups on affordable terms, but using the SAU process to do this may have the effect of reducing the pressure for other, perhaps more appropriate, measures to be considered in the broader context of social policy.

TelSoc considers that it is better to be effective than pure about such matters and encourages NBN Co with the assistance of the ACCC and the industry to devise low-income products and other affordability measures in the SAU. TelSoc accepts that the definition of these products may include speed and capacity constraints. In the shorter term, at least, such products will need to be funded by the industry accepting lower than preferred returns on those products at both wholesale and retail levels.

A summary of TelSoc's submission in relation to each of the ACCC's 7 specific questions in the discussion paper is included as Attachment A to this submission. Attachment B is TelSoc's submission to NBN Co.

TelSoc would welcome the opportunity to elaborate on any aspect of this submission, initially through the undersigned.

Yours sincerely,



Dr Jim Holmes, President
TelSoc (Telecommunications Association Inc)



Attachment A

Summary of TelSoc responses to Specific ACCC Questions

Question 1: We have outlined three high level principles to use in assessing whether particular NBN access product and pricing arrangements would promote the long-term interests of end-users. What additions, deletions or refinements would you recommend?

Response: We generally agree with all three principles but with the additions (1) that criteria for pricing decisions should be explicit, objective and covered by the SAU itself; and (2) that NBN Co as a wholesale provider with market power should be recovering based on costs not on value, and that the SAU should include a pathway towards that outcome. We also consider there is the possibility of a fourth principle along the lines: The LTIE should be interpreted beyond conventional access arrangements to support the social and economic benefits of broadband services, which may entail variations in application of the other principles such as in consideration of products for low-income users.

Question 2: What ideas do you have so that NBN Co and access seekers can have reasonable certainty over their wholesale average revenues per user and access costs respectively?

Response: TelSoc believes that the criteria that should apply to the establishment, amendment and withdrawal of NBN Co products and prices should be clearly stated in the SAU itself and that off-SAU discretions, arguably necessary in the past, should be avoided for the future.

Question 3: What suggestions do you have to preserve the breadth of retail products that are in market in the event that volumetric CVC charges were to be withdrawn or scaled back? Please consider how support for unique maximum speed products, diverse busy hour speeds, voice only and low data quota products could best be provided in such a wholesale pricing model.

Response: Volumetric CVC charges should be reduced and eventually withdrawn from the SAU over one or two re-set cycles, and the pathway to withdrawal should itself be made clear in the SAU. Apart from our response to Question 5, TelSoc leaves the details of other support mechanisms raised in this question to the industry participants to suggest.

Question 4: Should we consider regulatory controls to safeguard against discounts again becoming the principal means by which NBN access products and pricing are implemented? What form could these take?

Response: Yes. The SAU should be comprehensive and include objective and complete criteria for product and price variations. These can be re-set when the SAU is reviewed and re-set.

Question 5: Do you support a cheaper broadband product for low-income earners? What form should it take and how should it be funded?

Response: Yes. A full and complete assessment of the issues and addressing the problem is a matter for broader social policy initiatives, but, for now, the shorter-term might be best addressed through the specification of low-income products in the SAU with appropriate constraints in terms of eligibility. Funding will need for now to be through industry cross-subsidy.

Question 6: Regulatory controls can conceivably take the form of direct controls over certain price related access terms, along with more flexible arrangements for other prices. For instance, some individual tariff items could be specified in a regulatory instrument while other tariff items could be included within a broad basket for which there is an overall regulatory control. In what circumstances (if any) should we consider providing greater flexibility for NBN access product and pricing

commitments within a regulatory period? For which price related terms is certainty so important that we should not consider providing such flexibility?

Response: TelSoc has no view on these matters at this time and would be guided by the industry on the elements of regulatory certainty that are required. We do, however, consider that much of NBN Co's need for flexibility since 2013 has arisen because of the inadequacy of the current SAU. Ensuring a comprehensive SAU for the future is therefore critical.

Question 7: How often should the price related regulatory controls be reset?

Response: At least every 5 years, with flexibility for earlier review if the industry, and NBN Co, in particular, require it from time to time.

Attachment B

Submission to NBN Co on its Special Access Undertaking Variation 2021 Discussion Paper

15 July 2021

Introduction

TelSoc (the Telecommunications Association Inc.) welcomes NBN Co's Discussion Paper of 7 June 2021 on its proposed options for Variations to the Special Access Undertaking and pathways for the development of wholesale pricing for fixed broadband capacity in Australia.

TelSoc's primary interests are in the development of the ICT industry overall and in maximising the value that is achieved in social and economic terms from investments, both public and private, in ICT infrastructure and services.

As outlined in our November 2020 report, *Towards a National Broadband Strategy, 2020-2030*, TelSoc is seeking the development of a long-term strategy that maximises the usage of broadband services in Australia to support the modern digital economy. Consequently, TelSoc has an abiding interest in the affordability of broadband services to all segments of the population and to all regions of Australia.

TelSoc is not a commercial operator, nor a mouthpiece of operators, and therefore it would not be relevant for TelSoc to answer the specific questions set out on pages 20 and 21 of the Discussion Paper.

Objectives of the Special Access Undertaking (SAU)

TelSoc sees merit in considering the SAU in a context of enhancing social and economic benefits for Australia, into which the high-level policy objectives for the NBN *To bridge the digital divide* and *To institute market reform* clearly fit. However, while bridging the digital divide is important, we would prefer the broader statement of *Lifting Australia's Digital Capability* used in the Corporate Plan.

TelSoc broadly supports the more specific list of eight objectives for the SAU listed at pages 4 and 5 of the Discussion Paper. However, these are still broad objectives and do not entail particular outcomes for pricing or for other terms and conditions of wholesale broadband service provision, as confirmed by the pricing options set out in the Discussion Paper. On the 6th point about the SAU needing to provide NBN Co with the flexibility to respond to market dynamics, TelSoc considers:

- that NBN Co's strength in the fixed broadband market should be a reason for constraint on the need for flexibility;
- that flexibility should be on the basis of known criteria stated within the SAU itself; and
- that, in relation to the mass market for broadband services (consumer and SME segments), NBN Co should seek to operate within the terms of the SAU and avoid off-SAU mechanisms such as extensive discount and inclusion arrangements.

TelSoc understands why NBN Co has adopted discount and inclusion mechanisms to this point but, if the SAU was more effective in terms of wholesale regulation, the need for such measures would be heavily reduced in future.

CVC charges: Wholesale pricing reflecting cost causation

TelSoc considers that regulated wholesale prices should essentially be set to recover efficiently incurred costs plus a risk-adjusted return on investment. It is the cost of accessing premises that drives NBN Co's overall costs and revenue requirements. Capacity usage costs are minor in comparison.

Nevertheless, TelSoc understands how a usage component may enable NBN Co to adjust its overall price structure, using CVC charges to enable high-end users, who place greater value on access to broadband service, to make a greater relative contribution to overall cost recovery, with the consequence that lower usage retail customers are assisted through the cross-subsidy that results.

In TelSoc's view, it is not the role of NBN Co to engineer outcomes in the retail market, or to specify a range of services that are not cost-defined. On the other hand, without NBN Co, other assistance to users with affordability issues may prove to be very limited. The result is therefore a policy quandary.

TelSoc's recommendation is that NBN Co should seek to minimise CVC charges in the proposed SAU variation and should give a commitment to phase them out altogether.

Product diversity

TelSoc notes that certainty and simplicity are related at the wholesale level, and recommends that NBN Co should reduce the complexity of its service offerings. TelSoc supports NBN Co's categorisation of services into entry-level, standard and high-speed bundles, but encourages NBN Co to reduce the number of services in each bundle. Alternatively, NBN Co should commit in the SAU to increasing the data speed in these categories over the life of the SAU, with a likely merger of bundles in the process.

Re-set periods within a very long-life SAU

Forty years is a very long time for the SAU, given the fast-changing nature of the industry. It is therefore important for regular re-set periods to be established, in which price and other terms, such as data speeds, can be recalibrated according to explicit objective criteria in the SAU itself.

TelSoc recommends that the re-set period be no longer than 5 years, with NBN Co having an option, if circumstances so require, to reduce it to 3 years from time to time. This is one area of flexibility that should be afforded to NBN Co in the SAU.

Low-income products and affordability

TelSoc recognizes NBN Co's efforts to define options for low-income households in the Discussion Paper. However, we also recognize NBN Co provides access to premises, rather than to retail customers or to households. Customers and households change premises, making it exceedingly difficult to efficiently target affordability measures at the wholesale level. While targeting social housing may be appropriate, as approximately 98% of social housing stock is used by customers who would likely qualify for low-income support to access broadband, this alone would not be adequate. As NBN Co points out at page 21, other boundary conditions, such as recipients of Age and Disability Support Pensions, may create too large and unmanageable a cohort, without being particularly well targeted.

TelSoc understands why NBN CO in its 2021 Pricing Consultation would have wanted to limit the eligibility criteria to premises currently disconnected from the network (to prevent a large and unmanageable entitlement cohort), but the result is too restrictive in our view.

We therefore recommend that NBN Co should continue to work with special interest groups and with retailers who are addressing the mass broadband market to define criteria that are capable of being effectively implemented at the retail level, and which provide financial certainty to NBN Co itself.

TelSoc accepts that these proposals might be developed outside the forthcoming SAU Variation in the first instance, but should then be added in the course of a future Variation.

More broadly, we see the affordability issue as not being solely a matter for NBN Co, as wholesaler, to solve. It is a responsibility of government policy and retailers handling the customer interface. NBN Co should support an appropriately broad approach being properly investigated and pursued. This will entail definition of what constitutes affordability, and what standards and measures can be set for ongoing monitoring.

TelSoc would welcome the opportunity to elaborate on its views, and may be contacted via the President on these matters.

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TelSoc (Telecommunications Association Inc)