

13 September 2023

Australian Competition & Consumer Commission

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

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

Dear Mr Riordan and Mr Harding,

**Commpete Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)**

Commpete thanks the ACCC for the opportunity to comment in response to its Consultation Paper of 23 August 2023 and on the proposed variation to the NBN Co Special Access Undertaking (SAU) submitted by NBN Co on 14 August 2023. Commpete's submission is contained in this letter.

**Introduction**

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

**Summary**

Commpete has had a good opportunity to put its views on the various issues that have arisen in the course of the changing SAU variation proposals, during a protracted process extending over two years. We accept that not all of the outcomes that we have sought will be fully delivered as a result of the August 2023 SAU variation proposals, but we also recognize that there has been substantial improvement in relation to many of the issues of concern to Commpete and its members.

Therefore, we would urge the ACCC to accept the latest SAU variation proposals in its final decision on the matter. However, at the same time we strongly urge the ACCC to intervene with NBN Co to amend its approach to allocating the \$20 million transition fund in a more appropriate and equitable way, as described in the detail of this submission. The transition fund does not form part of the SAU variation proposal, so the issues can be pursued without causing any further delay to the SAU variation process.

Nevertheless, there is still room for improvement, particularly in the manner in which the SAU variations and the undertakings on which they are based are implemented by NBN Co, and for that reason we have added further comment on specific matters below.

### **Structure of Commpete's submission**

This submission addresses issues of interest or concern to Commpete and its members following the sequence in which key topics are dealt with in Chapter 4 of the ACCC's Consultation Paper, ("Key changes to SAU variation proposal").

### **NBN Co's Credit Rating and the Credit Rating Objective**

In earlier SAU variation proposals, NBN Co included a principle that would require the ACCC to adjust NBN Co's allowable revenue during the post-2032 regulatory period to give NBN Co a reasonable opportunity to achieve and maintain a desired commercial grade credit rating. At the time the proposal left it open, as the ACCC has noted, for the credit rating objective to not be premised on NBN Co operating and investing efficiently.

In its submission of 30 May 2023, Commpete stated its objection to this approach and considered that the credit rating objective was not related to the LTIE and therefore should not be reflected in the SAU. Commpete maintains the view that it put to the ACCC at that time, namely, that meeting credit rating objectives is entirely the responsibility of NBN Co's management and board. It follows that the SAU should not become the means of constraining the ACCC's decision-making and co-opting the industry to share that responsibility through the pricing mechanism.

We note that the changes now proposed by NBN Co in the latest variation proposal still refer to giving NBN Co a reasonable opportunity "(i) to transition, in the shortest timeframe practicable while avoiding price shocks, to a position where NBN Co satisfies quantitative financial metrics consistent with achieving and maintaining a stand-alone investment grade credit rating with a stable outlook from one or more established and reputable rating agencies, such as Moody's, Fitch Ratings and Standard and Poor's; or (ii) subject to avoiding price shocks, to satisfy quantitative financial metrics consistent with maintaining a stand-alone investment grade credit rating with a stable outlook from one or more established and reputable rating agencies, such as Moody's, Fitch Ratings and Standard and Poor's."<sup>1</sup>

We note that the emphasis is on the satisfaction of the relevant financial metrics, rather than on achieving the actual credit rating, and we consider that an improvement on previous proposals.

Commpete's preference would have been to remove all reference to a credit rating objective in the SAU, but, on balance, we accept the revised proposal as likely the best we can hope for in the circumstances. In coming to this conclusion, we also note the ACCC's observation in the Consultation Paper that "the ACCC would be able to have regard to all relevant matters [under the revised proposal] without giving primacy to credit rating objectives".<sup>2</sup>

### **Pricing of 50 Mbps and below bundled offers**

The August 2023 NBN Co proposal for 'floor and ceiling' pricing for the 50 Mbps and below bundled offers is, as the ACCC has noted, effectively the same as the second of three options that NBN Co put forward in June 2023.

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<sup>1</sup> NBN Co, August 2023 SAU variation, Module 3, Schedule 3B.3.6(b)

<sup>2</sup> ACCC Consultation Paper, August 2023, Section 4.1, p 20



Commpete's position has been not to state a preference because each of the three options impacts different challenger RSPs in different ways depending on the profile of the customer base. Commpete never accepted that CVCs were appropriate in the first place. Consequently, Commpete members preferred a much quicker removal of CVC charges, but we are realistic that this is likely the best that can be achieved and, at the same time, meet NBN Co's shorter-term requirements to recover its legitimate costs whilst avoiding price shocks. In our previous submission dated May 2023, we recognized that there has been sufficient movement on the CVC issue, considered overall, for the industry to be able to move on.

NBN Co has, outside of the formal SAU variation proposals, undertaken to compensate RSPs for the costs associated with the transition to the new pricing model for broadband services. The total compensation has been set by NBN Co at \$20 million.

NBN Co has proposed that the compensation pool would be allocated on the basis of a maximum per operator fee of \$25,000 with additional compensation based on services in operation (SIO). The fixed amount needs to be set substantially higher than \$25,000 to reflect the investment in systems required to make the change and to deliver improved fairness for the recovery of costs that are essentially not scale-related across all RSPs. However, the transition costs incurred by operators are system modification costs and are not related to the number of services on those systems. To dimension the allocations above the initial \$25,000 on the basis of SIOs is to arbitrarily advantage larger RSPs (with more SIOs) at the expense of smaller RSPs, and particularly at the expense of the middle tier of RSPs who are committed to growing their businesses, but do not yet have the SIO scale, to attract the contribution that their system investments require.

Commpete seeks to have the apportionment based on a measure reflecting the costs incurred, and this is better reflected in an allocation system based on a significantly higher fixed component per RSP. The assessments undertaken by Commpete members suggests that a fixed amount per eligible organization in the order of \$100,000 would be more appropriate than the figure floated by NBN Co, and we would therefore strongly urge the ACCC to encourage thinking around a figure of that order. This is not just a marginal change. It is a significant amount to smaller and mid-tier RSPs and would promote equity and fair competition. NBN Co and all parties recognize that the transition fund and its disbursement are issues that are outside the SAU variation proposal. Consequently, pursuing the matter and getting it right will not delay the SAU variation process any further.

### **Network-to-Network Interface (NNI) Pricing**

NNI charges are levied by NBN Co without justification whenever there is an AVC transfer between RSPs. We have pointed out in earlier submissions that these charges adversely impact smaller and growing RSPs disproportionately compared to larger RSPs, and their removal will also assist new entrants into the market therefore promoting competition.

Commpete acknowledges that there are positive changes in the August 2023 SAU variation proposal. The proposals for a 50% reduction in the 1G NNI charge and the virtual NNI monthly recurring charges, reductions in the 10G and 100G NNI set up and activation charges from July 2024, and reductions in monthly recurring charges for a single 10G NNI at the point of interconnect from July 2024, are all welcome.

We note that NBN Co has committed to review all NNI charges by 30 June 2027. Given the extent of the discussion that has occurred on these charges, the timescale that NBN Co is reserving for itself for this review is disappointing. It should be completed sooner, or else the benefits of any reductions or cancellations of charges should be backdated.



## **Service Transfer (“Switching”) Fees**

Commpete is pleased with the attention NBN Co placed on the near removal of ‘switching fees’ bringing bulk transfers from \$5 down to \$1.50 per SIO.

Commpete’s position is that the “Service Transfer” and “Non-Infrastructure Transfer” Fees that NBN Co levies on each AVC transfer between RSPs should be removed. These charges are not justified on the basis of cost and negatively impact challenger providers. Commpete encourages NBN Co to now also phase out the charge on single SIO transfers. We consider that retail competition across small and larger players will be enhanced by removal of these switching fees.

## **Levelling the playing field, generally**

One of the aims that Commpete has in the current SAU variation exercise is to take reasonable opportunities to promote levelling the playing field of competition between large RSPs (effectively Telstra, Vodafone and TPG) and smaller RSPs including challengers of the kind that Commpete represents. We appreciate the ACCC’s approach in seeking to give a voice to all stakeholders, big and small, during the course of this protracted exercise, and for allowing Commpete to call out proposals that unduly or inappropriately give price and other benefits based on scale in situations where RSP scale is not a factor in NBN Co costs.

In Commpete’s submission of 30 May 2023 we noted that a 2012 JP Morgan report provided a benchmark to Government on what success would look like for the delivery of a National Broadband Network. It stated with an effective competition policy and a healthy advanced economy, smaller businesses (i.e., the challengers) would move to occupy 30% market share. This would ‘level the playing field’.

We understand that the challengers currently have just over 22.5% market share. There is room for further growth in that share, but specific obstacles need to be identified and removed. We are pleased the SAU process has addressed many obstacles and removed uncertainty. This new SAU brings a step change. We look forward to the increased momentum towards the 30% market share goal supporting retail competition.

## **Low income and digital inclusion forum**

Commpete is pleased to see that NBN Co has provided further detail on how the proposed forum might be structured and operate. Commpete agrees with the ACCC’s encouragement of NBN Co to consider whether having an independent chair for the forum could enhance its operation.

## **Service quality**

Commpete is pleased with the way in which service quality issue and the treatment of benchmark service standards has developed throughout the SAU variation process. We are pleased, and support, the further changes in the August 2023 SAU variation proposals. We particularly support:

- the proposed change that enables the ACCC to initiate a review of benchmark service standards where there is a systematic service event that impacts end-users during a regulatory cycle; and
- the further proposal to include a greater diversity of bodies in the service improvement planning process by inviting ACCAN, IAA and Commpete to participate.



## **Cost recovery and cost modelling**

Commpete acknowledges the beneficial effect on the prospects for sensible wholesale pricing of the capping by NBN Co of the ICRA at \$12.5B and addressing the approach to be taken to the recovery of past and future capital costs in the August 2023 SAU variation proposals. This has allowed for better wholesale pricing in the earlier years of the revised SAU and made way for a sustainable and more certain arrangements for the long term.

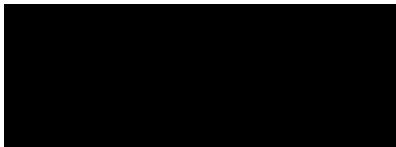
## **The SAU variation process**

Finally, Commpete acknowledges the manner in which the ACCC has managed the difficult, protracted and frustrating process associated with the SAU variation, and particularly the way that the ACCC has sought to be inclusive and to give a voice to a full diversity of stakeholder interests, including the interests of challenger RSPs of the kind that are members of Commpete, which ultimately leads to greater competition.

Because the process has been particularly protracted to date, we encourage the ACCC to move as quickly as possible to a final decision on the latest NBN Co SAU variation proposals, and to address the industry's need for the greatest level of certainty at the earliest time.

We agree that there is no need for a further draft decision with a related further round of submissions.

Yours sincerely,



Michelle Lim  
Chair, Commpete