ACCC inquiry into NBN access pricing

Position paper

April 2020

Contents

List of abbreviations and acronyms

ACCC – Australian Competition and Consumer Commission

ADSL – Asymmetric digital subscriber line

AVC – Access virtual circuit

CCA – Competition and Consumer Act 2010 (Cth)

CSA – Connectivity Serving Area

CVC – Connectivity virtual circuit

DBDR – Dimension-Based Discount by RSP

ELB – Entry Level Bundle

FAD – Final Access Determination

FTTB – Fibre to the building or Fibre to the basement

FTTC – Fibre to the curb

FTTN – Fibre to the node

FTTP – Fibre to the premises

HFC – Hybrid fibre coaxial

LTIE – Long-term interests of end-users

MTM – Multi-technology mix

NBN – National Broadband Network

NBN Co – National Broadband Network Company

RSP – Retail Service Provider

SAU – Special access undertaking

SFAA – Standard Form of Access Agreement

TC – Traffic class

WBA – Wholesale Broadband Agreement

WBA3 – Wholesale Broadband Agreement 3

WBA4 – Wholesale Broadband Agreement 4

Glossary

Access agreement – an agreement between a carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid Access Agreement are set out in section 152BE of the *Competition and Consumer Act 2010*.

Access seeker – a content service provider or carriage service provider that makes, or proposes to make, a request to NBN Co for access to its services, as defined in section 152AG of the *Competition and Consumer Act 2010*.

ADSL (Asymmetric digital subscriber line) – A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload speeds are not symmetrical (that is, download is faster than upload).

AVC (access virtual circuit) – an Ethernet-based Layer 2 virtual connection that carries traffic to and from an end-user on NBN Co's fibre, FTTB, FTTN, FTTC, HFC, wireless, or satellite networks.

Basic speed access product – an NBN access product that allows the supply of a retail carriage service that is functionally equivalent to an ADSL/ADSL2+ and line rental bundle.

Carriage service – defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

CVC (connectivity virtual circuit) – NBN Co defines this as an Ethernet-based Layer 2 virtual capacity for the transport of customer traffic from multiple end-users within a Connectivity Serving Area on an aggregated basis and presented at the Network-Network Interface at the point of interconnect associated with that Connectivity Serving Area.

Final Access determination (FAD) – a determination that can only be made after a public inquiry has been undertaken under *Part 25 of the Telecommunications Act 1997.* Amongst other things it may specify terms and conditions of access to a declared service, impose other requirements on an access provider such as NBN Co and specify the terms and conditions on which a it must comply with the requirements and deal with any other matter relating to access to the declared service.

Listed carriage service – a carriage service of the type listed in section 16 of the *Telecommunications Act 1997*, that is, a carriage service between two points where at least one point is in Australia.

Modified Entry Level Bundle (modified ELB) – an NBN access product that bundles an AVC at the 12/1 Mbps speed tier with a bandwidth inclusion of 0.15 Mbps of CVC per AVC, as specified in NBN Co's Discounts, Credits and Rebates List. It has a starting charge of $22.50 per month. If the 0.15 Mbps of peak CVC per day is exceeded on average during a billing period across all entry level services on CVC, a penalty charge applies (currently $5.70, falling to $4.90 in May 2020 and $4.10 in October 2020) along with a CVC overage charge at the rate of $8 per Mbps. The modified ELB was introduced by NBN Co on 1 October 2019 and replaces an earlier ELB that had a penalty charge of $22.50.

NBN access service – NBN Co describes this as a Layer 2 service supplied on the NBN Co network between and including: a User Network Interface on a Network Termination Device; and the Network-Network Interface at the point of interconnect associated with the relevant Network Termination Device, for the purpose of enabling an access seeker or another service provider that is a customer of an access seeker to supply carriage or content services.

Retail Service Provider (RSP) – refers to providers of services to consumers that may be wholesale customers of NBN Co or may purchase services from wholesale customers

SAU (special access undertaking) – a voluntary undertaking given to the ACCC by a supplier of a telecommunications service specifying the terms and conditions upon which it agrees to supply a listed carriage service or a service which facilitates the supply of a listed carriage service.

Standard Form of Access Agreement (SFAA) – a document published on the NBN Co website which sets out terms and conditions on which NBN Co is obliged to enter into in an Access Agreement with an access seeker upon request, and declares the services to which it relates.

TC-1 – highest priority, dedicated capacity traffic class, suitable for voice.

TC-4 – standard, best efforts traffic class used for delivering residential and small business broadband services.

Wholesale broadband agreement (WBA) – The WBA sets out price and non-price terms in relation to the supply of NBN Co's services; and the processes for providing NBN Co's customers with operational and technical information in relation to those services. The WBA is a Standard Form of Access Agreement.

1 Introduction

This paper provides a public statement on some key matters related to our ongoing NBN wholesale pricing inquiry and sets the scope for some further consultation. The paper constitutes the next step in the inquiry following our release of a discussion paper in October 2019 and consideration of submissions provided in response.

In preparing this position paper, the ACCC has also considered the evolving emergency health situation relating to the COVID-19 pandemic and associated disruptions in the telecommunications industry. We recognise the situation is evolving rapidly and has already resulted in significant changes in traffic volumes and usage patterns over the NBN.

We note also that in response to this situation, NBN Co has temporarily increased aggregate CVC entitlements for its access seekers by up to 40 percent above February 2020 levels at no extra cost and suspended the CVC utilisation conditions.[1] This will better allow access seekers to offer competitive broadband plans on the NBN, including entry-level plans.

We also recognise the challenges faced by stakeholders to deal with a range of issues at this time and the degree of uncertainty as to when business as usual arrangements will resume. For these reasons, and in line with the ACCC's statement on its response to the COVID-19 pandemic,[2] we have decided to put the inquiry on hold. The ACCC will resume the inquiry once more business as usual circumstances return and more is known about the impacts of the health crisis on the industry.

Notwithstanding this, we consider it useful to publish our position at this time. This is to provide an indicative view of the nature and direction of any final access determination (FAD) that could be made once circumstances stabilise; and details of particular aspects of NBN Co's wholesale pricing that we will consider further in our inquiry when it resumes. We envisage that the position paper could also assist NBN Co to develop a revised commercial offer as well as allow RSPs to address more effectively outstanding matters on resumption of the inquiry.

Our inquiry takes place in the context that NBN Co's wholesale prices for services supplied over its FTTP, fixed wireless and satellite networks are regulated by an existing special access undertaking (SAU). NBN Co has also sought to extend these regulated terms to other access technologies included under the new multi-technology-mix model (FTTN, FTTB and HFC) via an SAU variation, but the process to facilitate this is currently on hold.

The contractual terms, including prices, for the supply of services by NBN Co to its wholesale customers across all access technologies are contained within its Wholesale Broadband Agreement (WBA). This agreement is a standard agreement (known as a SFAA) negotiated commercially between NBN Co and its wholesale customers. We note that NBN Co and RSPs have been in discussions about WBA4, which is due to come into effect once WBA3 expires in November this year.

Most of NBN Co's services are currently supplied at prices well below the maximum regulated prices specified in the SAU, as well as those specified in the WBA3. These prices are contained in its Discounts Credits and Rebates list, which can be withdrawn at the discretion of NBN Co.

Further details of the nature the inquiry, stakeholder views to date, views we have reached, matters for further consideration and stakeholder input and the next steps for the inquiry are discussed in turn in the sections of the paper below.

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[1] NBN Co, *NBN waives additional wholesale capacity charges of up to 40 percent for three months,* 18 March 2020

[2] ACCC media release, ACCC response to COVID-19 pandemic, 27 March 2020.

2 Background to the inquiry

In this section we reiterate our reasons for undertaking the inquiry and related background information, and our rationale for focusing on entry level NBN access pricing.

We commenced this inquiry to consider entry level NBN access prices that would promote the long-term interests of end-users as the broad scale build of the NBN is nearing completion. Consequently, we sought views on access arrangements that would allow consumers the option to transition their broadband service onto the NBN on a like-for-like price and product basis.

We note that many consumers previously had an option to move their service to the NBN on this basis well into 2018. However the changes that NBN Co then made to its wholesale pricing led to the withdrawal of many cheaper, lower speed NBN retail plans. This has made it much more difficult for consumers to move their broadband service to the NBN without facing a price increase.

We also note that most consumers, save for those outside the footprint of the NBN fixed line networks, do not have the option to simply retain their existing service. Under the forced migration model that the government specified for the NBN, consumers generally must migrate their services during a defined switchover period that commences when their local area becomes able to connect to the NBN.

This necessarily requires us to develop views on access arrangements that would better support those consumers who are yet to migrate to the NBN, and who do not want or need higher NBN speeds (but who are losing their existing services nonetheless as the NBN rolls out).

That said, this approach can promote the long-term interests of all end-users of NBN services, as the price and inclusions of even higher speed plans are more likely to represent fair value over time. This is because the prospect of market entry by new providers that can offer better entry-level retail plans requires other service providers to improve the price or inclusions of their higher-speed plans as well, or risk marginal consumers (those that value higher speeds the least) moving away from them. In this respect, the price and inclusions of lower speed plans in both wholesale and retail markets would serve to “anchor” indirectly the market more generally.

After considering what we have heard so far in the inquiry, and given current circumstances and the initiatives by NBN Co in response to the emergency health situation, we have decided to put the inquiry on hold. We nonetheless consider it is important that we provide a statement that confirms its future scope and direction. This includes our current views on the most important access arrangements that we would be likely to specify in a final decision, based on all the information that we have available to us, and the other access arrangements in respect of which we will do more work at the resumption of the inquiry.

It is important to remember at the outset that NBN Co is subject to our economic regulation because it has very significant power in fixed broadband access markets, and that it is part-and-parcel of this regulatory framework that regulatory decisions inform important access arrangements. That is, it is intended that regulatory decisions will allow NBN Co to develop commercial offers for its access seekers that better promote the LTIE, and to provide parties a viable fall back where mutually acceptable access arrangements are not forthcoming.

We note in this regard that NBN Co has extended WBA3 until November this year, and has been in discussions with RSPS about WBA4. We have also learnt in this inquiry that there are a number of price related terms where NBN Co and access seekers are at some distance in their views.

It is also important to note that we have not rushed to this point, having taken a steady and measured approach, which has allowed an opportunity for different commercial product and pricing initiatives to play out in markets, and provide NBN Co an opportunity to respond to concerns that we and others had expressed.

Access seekers have expressed concerns for some time that certain aspects of NBN Co's product and pricing offers have not allowed them to compete. We first heard the extent of access seeker concerns during our market study into the communications sector, which we conducted over 2016 to 2018. These concerns dissipated when NBN Co introduced its "Focus on Fifty" pricing in December 2017. However, they re-emerged with the further product and pricing changes that NBN Co made in the second half of 2018.

We began monitoring the effects of NBN Co's product and pricing changes more closely in October 2018, following a request to do so by the then Minister for Communications. Over the course of this close monitoring, we observed a number of product and firm exits and an overall lessening of competition in NBN markets. We also became aware that more consumers were deferring their switchover to the NBN within the periods allowed to them, with some choosing not to migrate within this window at all.

We observed that Telstra, which supplies close to one in two of all NBN retail services, moved to increase its prices for both lower speed and higher speed plans, reversing a trend towards more competitive offers. Most competitor RSPs switched to selling only higher speed plans in a bid to remain profitable.

We found that NBN Co's changed approach to access products and pricing significantly reduced the commercial viability of lower-yielding, lower speed access products. In some circumstances, lower speed NBN access products had even become more expensive than its higher speed access products, and placed firms that continued to sell them at a competitive disadvantage.

We first expressed concerns with NBN Co's approach to access product and pricing in November 2018, when we published a statement explaining why we had been unable to accept a proposed extension of the SAU to cover other technologies. In short, we stated our concerns that the SAU was not providing sufficient certainty to access seekers over the prices they would face in future, and was failing to mitigate the risk of poor outcomes for entry level consumers.

We reported our findings to the then Minister for Communications in April 2019, and shortly afterwards called on NBN Co to revise its approach to its entry-level products. NBN Co responded in September 2019 by announcing additional access products and pricing initiatives. The first of these was introduced in October 2019 consisting of a modified Entry Level Bundle (modified ELB) offer, which provides access to a 12/1 Mbps speed product. NBN Co has since implemented its improved 25/5 Mbps access product, with further product changes to take effect in May 2020.[3]

We commenced this inquiry in October 2019, and hence the inquiry has naturally considered whether NBN Co's revised access product and pricing offers would be sufficient to address the concerns. We took this step given the significance of the issues we had observed, which called for an open and transparent process to reach a proper resolution, and in recognition that there was still potential for NBN Co's new offers to need further refinement.

This is not to say that we thought NBN Co had not made a genuine attempt to respond to our concerns with the introduction of its September 2019 pricing package, rather we are

[3] NBN Co, *NBN proposes big discounts to wholesale prices and annual improvements in capacity inclusions,* 17 September 2019

aware that NBN Co has a range of potentially competing considerations to balance, and limited visibility over the retail market given its wholesale only remit.

3 What we have heard in the inquiry

In this section, we describe the main points that stakeholders have made in their submissions to the inquiry and in any further engagement that we have had to better understand these points. This is provided with a view to allowing parties to better understand the overall nature and scope of issues that have arisen and the extent to which opposing views are held.

In response to our discussion paper, we received submissions from a broad range of stakeholders that hold differing views. This included retail service providers (RSPs) on the one hand, and NBN Co and the Department of Communications and Arts (DoCA) on the other. We also heard from a consumer group (ACCAN), the Telecommunications Industry Ombudsman, a commercial information and intermediary service provider (Finder) and members of the public.

Some of the issues that arose in submissions were either generally applicable to NBN Co's product and pricing offers or else were more specific to a basic-speed or entry-level NBN Co access product that would promote a smooth transition to the NBN.

3.1 Issues raised with NBN access pricing more generally

RSPs and consumer groups expressed concerns that are broadly applicable to NBN Co's overall approach to their access products and pricing, which they see as leading to poor outcomes in retail markets.

Managing risk and complexity from the CVC charge item

A recurring theme of submissions is that NBN Co's commercial offers are unnecessarily complex and that RSPs and hence consumers are exposed to price increases due to this complexity. The principal issue raised is that retailers and consumers face uncertain costs due to increasing requirements for aggregate bandwidth (termed "CVC" in NBN Co's product and pricing construct) that would allow consumers a good experience when accessing popular applications.

RSPs hold these views notwithstanding the trend towards bundle products due to an ongoing need to pay for additional CVC above the included allowances, which is termed overage in NBN Co's pricing model.

For instance, VHA considers that NBN Co's retention of a CVC element creates ongoing risk to market outcomes in the form of increasing prices and/or unnecessary congestion that causes poor consumer experience. TPG questions the appropriateness of a CVC element in basic speed access products in particular, as these contribute proportionally less towards growth in overall network capacity requirements.

All RSPs advocate for either the removal of the CVC tariff component or else across the board increases to CVC inclusions within NBN Co's bundled product offerings so that these keep pace with consumer demand and remove the need to pay for overage in the ordinary course. Vocus called for this to be achieved via an upfront indexation of CVC inclusions in bundle products to account for growth in real-world consumer demand.

A number of RSPs also proposed the introduction of national pooling of CVC across CSAs for the purpose of calculating an RSP's overage charge liability on bundled products.

Risk and uncertainty stemming from NBN Co's use of short-term discounts, credits and rebates

RSPs and consumer groups expressed concern about NBN Co's use of billing discounts as a primary way of introducing product and pricing changes, since these fall outside of both the Wholesale Broadband Agreement and can be subject to rapid introduction and withdrawal. Stakeholders noted that the resulting uncertainty with future pricing increased the business risks that they needed to consider and had the potential to restrict them when developing their retail offers. Exetel provided an example of a threatened withdrawal of a long-standing pricing arrangement, which would have resulted in it facing a CVC charge of $17.50 per Mbps. Exetel noted that it had to alter its fundamental approach to supplying retail services over the NBN in order to mitigate the significant risk that such a significant change in pricing posed. This included changing the wholesale products that it acquired and withdrawing products.

NBN product withdrawals and increasing cost pressures

RSPs consider that the product withdrawals and/or increasing cost pressures they are experiencing are the direct consequence of NBN access product and pricing decisions.

RSPs are of the view that as a result it is difficult for them to continue to supply retail products at competitive prices, and expressed concerns that NBN retail prices could tend to increase over time unless the approach to access pricing is revised.

Some RSPs expressed these concerns in respect of a broad range of retail products supplied over the NBN, while others focused more on basic speed broadband plans and voice only services. For instance, Vocus noted that its input costs for basic speed broadband services had increased to approach those for higher speed access products, making basic speed products uneconomic to supply. On the other hand, VHA noted that while it was experiencing cost pressures these were not limited to only its entry-level plan, but higher speed plans as well.

Telstra noted that it incurred significant losses when supplying voice services over the NBN. The TIO also expressed concern over the rising price of voice only services and advocated for the inquiry to address the supply of voice services over both TC-1 and TC-4 ports.

Other price related terms

RSPs also raised concerns about CVC utilisation conditions that apply when acquiring an NBN access product bundle. For instance, one RSP noted that these terms drive material costs in monitoring network utilisation on each CVC, with the potential for high surcharges to be imposed in arrears where the conditions were not met. Telstra also advocates for the removal of the CVC utilisation conditions.

3.2 Views on potential regulated entry level products

RSPs and consumer groups generally support the development of an entry-level broadband product offer, and potentially also a voice only offer, that would remove the potential of consumers being materially worse off from the mandatory move to the NBN. They agree that this has the potential to remove a significant impediment to a smooth migration to the NBN.

Finder noted that in their experience a material number of consumers were finding it difficult to identify NBN plans that represent clear value to them, and so were tending to migrate with their current provider rather than consider all offers in the market. This would suggest customers of those suppliers who have withdrawn their basic speed plans and/or increased their entry-level prices would find it more difficult to have an option of moving to the NBN on a like-for-like product basis.

That said, we heard a range of views as to what form an entry-level broadband product should take. The divergence of views can be explained in part by differing perspectives on the access product which would best support a smooth migration to the NBN on the one hand, and the extent to which commercial offers for higher speed products would nonetheless be influenced by regulated terms being available for more basic speed access products on the other.

Broadband access product and price

RSPs and consumer groups hold different views on what off peak speed-tier and the amount of network bandwidth (CVC) would constitute a suitable entry-level access product.

There is limited support for the 12/1 speed tier as a suitable entry level product amongst access seekers, with more support for a 25/5 speed tier. One access seeker has proposed the 50/20 speed tier.

The RSPs that advocate for a 25/5 product or 50/20 product base their views on providing stronger support for all consumers to migrate to the NBN without a reduction in functionality, including those consumers on higher quality ADSL services or legacy cable broadband services. They also point to potential broader social or economic benefits that they see from more consumers being on higher speed plans.

As noted above, many RSPs would prefer a move away from the CVC tariff item either by its removal or via the inclusion of a CVC allowance that would allow them to meet the busy-hour demands of the plan subscribers without incurring an overage charge in the usual course. Further, RSPs are of the view that the CVC allowances should allow this outcome without them having to “borrow” (i.e., use surplus inclusions) from other access product bundles to achieve this. RSPs also called for periodic increases in the CVC allowance included in access bundles to keep pace with increasing bandwidth demand.

In this regard, RSPs advocated for CVC inclusions that were above the rate of 1 Mbps per service, with those advocating for a higher AVC component calling for higher CVC allowances.

There was more consensus in terms of a suitable monthly recurring charge at around the $35 level. That said, some RSPs indicated that this price point may not allow them to provide as high a quality retail plan at a $60 per month retail price point, in terms of data inclusions or other product features, as they had done on legacy networks. In this regard, some RSPs indicated that they would find it difficult to earn a commercial return on these NBN plans and called into question their ongoing viability, particularly as higher yielding legacy services were being withdrawn.

RSPs were all of the view that a revised product offer should be implemented directly, rather than via a series of discounts, credits and rebates with they see as leading to unnecessary complexity and uncertainty.

Influence over other access product offers

RSPs expressed differing views as to the extent that a 12/1 product offer can influence the commercial offers for higher speed products. Some RSPs indicated that the 12/1 product would limit pricing of higher speed products, such as 25/5 plans. This view is somewhat consistent with the decision of NBN Co to alter its 25/5 product bundle to take effect not long after its revised commercial offer for a 12/1 product bundle offer was introduced.

Other RSPs and ACCAN expressed significant doubts as to whether a 12/1 product offer would provide a strong influence on other commercial product offers. They suggested that a higher speed product, such as the 25/5 product, would provide a stronger influence over 50/20 offers. One RSP expressed the view that lowering prices for basic speed products could lead NBN Co to increase the effective price for higher speed products so as to recoup any revenue foregone.

3.3 Arguments against regulating an NBN access product

NBN Co and DoCA each raised arguments against proceeding towards regulation of an NBN access product at this time.

Appropriate access prices to promote a smooth transition to the NBN

NBN Co and DOCA dispute that consumers cannot now achieve a smooth transition onto the NBN. In this regard, they point to some NBN retail products that remain in market to new customers at around a $60 price point, principally the TPG unlimited quota plan. They also point to higher speed products that are available at a price of $70 to $80 per month, which they consider would still represent good value to a number of consumers and encourage them to migrate to the NBN.

These submissions also suggest that to the extent that there may be ongoing concerns in this regard, the pricing initiatives that NBN Co announced in September 2019 (including its modified entry-level bundle offer) will effectively address these concerns over time.

In addition, these submissions note that mobile networks have already become the dominant technology for the carriage of voice calls. They also suggest that further investment in wireless access services will allow those networks to cater for basic speed broadband demand to the extent that NBN Co's access products do not do so in the interim. Hence, they consider that overall there is potential for consumers to find an alternative means to achieve a like-for-like service notwithstanding the forced withdrawal of legacy voice and ADSL products.

Benefits of ongoing flexibility in NBN access pricing

NBN Co and DOCA each expressed the view that it is appropriate for access product offers to be implemented via discounts, credits and rebates. They consider this gives flexibility to introduce price changes more quickly, which benefits RSPs and end-users. DOCA also expressed the view that offering discounts showed NBN Co was responding to the market, including constraints imposed by the availability of mobile products.

Other relevant considerations

NBN Co and DOCA also point to other considerations that should be balanced against efforts to promote a smooth transition.

These are to the effect that higher access prices can encourage NBN Co to invest more in the network and improve service quality over time. These views stem from a concern that regulation could materially reduce NBN Co's revenues so that it might not be possible to fund further investment from retained earnings or commercial borrowings.

In this regard, NBN Co expressed the view that basic speed access pricing would have a strong influence over its other product offers such that further improvements to the basic speed product bundle would have a significant bearing on its overall revenues.

DoCA also expressed concern that regulation of an NBN entry-level product could have adverse consequences for further investment in mobile networks.

NBN Co and DOCA also express concerns that consumers having the opportunity to select a basic speed product might not be in their own interests due to the potential for them to acquire a broadband plan that does allow them to access the full range of online applications that are now available. They are also concerned that RSPs might encourage consumers to buy a basic speed plan even where it would not meet the consumer's needs.

Legal basis to regulate and/or regulatory reach

Both NBN Co and DoCA questioned whether the ACCC could legally regulate NBN Co access prices. They point to the current SAU (which is limited in its operation to FTTP, fixed wireless and satellite access networks) as well as a statutory limitation on a FAD from preventing NBN Co from engaging in conduct reasonably necessary to achieve uniform national wholesale pricing.

Alternatively, NBN Co and DoCA consider that any FAD that the ACCC were to make would be applicable only to the supply of access services over NBN Co's FTTN, FTTB, FTTC and HFC access networks only. Around 70 percent of all NBN access services are expected to be supplied over these access technologies at end of the broad scale rollout.

In this regard, they point to the regulatory hierarchy stipulated in the CCA, which gives general primacy to terms specified in an accepted SAU over access determinations made by the ACCC to the extent of any inconsistency. They consider a FAD would necessarily conflict with the SAU given the latter sets out maximum prices payable. These maximum prices concern the product and pricing construct that NBN Co was offering at the time it gave the SAU.

4 What views we have reached

This section provides our views on the overall objectives of the inquiry and outlines for stakeholder feedback, some parameters for a proposed alternative entry level broadband access product to that offered by NBN Co's modified ELB. It also signals our further consideration of, and interest in stakeholder input on, simplification to CVC utilisation conditions, the need for and nature of a voice only product, NBN Co's $5 customer transfer charge and measures to increase certainty of NBN Co product and pricing offers. These views are based on NBN Co's price offers and other conditions in place prior to its temporary COVID-19 response. We also signal three issues that we don't intend to consider further in the inquiry. These are regulation of higher speed tiers, application of the regulated terms to wireless technologies and our power to make an access determination.

4.1 Overall objectives

Having considered the range of views and considered the information provided to the inquiry so far, we consider that we should continue to focus on the price related terms that would enable a smooth transition of legacy customers to the NBN. We consider that this approach will most directly promote the LTIE.

We are intending to consider an access product that will allow a smooth transition of legacy broadband services onto the NBN once more business as usual circumstances return and more is known about the impacts of the health crisis on the industry. We will also explore whether there may be a similar need for us to consider an access product that will more directly promote the migration of legacy voice products onto the NBN.

4.2 Broadband access product and pricing

We will continue to consider the suitability of an access product that has the same general construct and value as the modified ELB product offer that NBN Co announced in September 2019 and came into operation on 1 October 2019. We will however also test whether or not a higher amount of CVC should be available within a target $35 monthly recurring charge.

We consider that a 12/1 Mbps speed access product bundle is most likely to lead to a like-for-like product for most consumers when migrating to the NBN, and so do not intend to similarly test whether the AVC speed tier should be increased.

We do however also consider that there is clear potential for this approach to result in a commercial offer for the 25/5 access product bundle that allows consumers on higher performing legacy plans to also migrate to the NBN with a broadband product that meets their requirements and represents reasonable value to them.

While we consider that the adverse consequences that NBN Co and DoCA have outlined are unlikely, including the potential for our regulation to restrict investment in NBN access networks, or mobile networks, we note that this approach would further minimise the risk of these concerns eventuating.

This is because around 11 to 12 percent of NBN access services are used to supply 12/1 Mbps broadband services and around 26 percent are used for either 12/1 or 25/5 Mbps broadband services. While lower-speed NBN access services represent 33 percent of total access services[4], we estimate that around 6 to 7 percent of NBN access services, offered over 12/1 Mbps access lines, are used to supply voice-only customers (and so are not affected by any price regulation currently under consideration, being already priced at $22.50 per month).

A regulated price reduction would allow RSPs to spend more on their retail product offerings as competition strengthens in the retail market. For instance, an RSP could undertake expenditure to improve the value of plan inclusions, or to enable better support for customers. An obvious outlay that RSPs could make is to acquire more CVC. Should an RSP choose to maintain their existing CVC budgets (prior to NBN Co's temporary COVID-19 CVC boost), access costs and access revenues would remain steady. Consumers however would benefit from their broadband speeds remaining consistently high further into the busiest hours of the week.

We also expect that more services are more likely to migrate to the NBN sooner as retail service providers can include in their NBN offers plans that are priced similarly to consumers' legacy plans. In turn, more competition in the retail market will also encourage incumbent RSPs to actively move their legacy services to the NBN rather than risk losing the service to another service provider that is actively promoting NBN products. Accordingly, the proposed base features of the alternative access bundle we are seeking to test comprise:

- an AVC at the 12/1 speed tier plus an allowance of 0.15Mbps of included CVC per service
- supply on a bundled CVC
- CVC overage available at a rate of $8 per Mbps
- continued availability at a price of $22.50 if used to supply a voice-only service.

As of May 2020 NBN Co's current 12/1 modified ELB will have a minimum price of $27.40 when used to supply a broadband service[5], so as to allow 1.1 Mbps of CVC to be acquired per AVC at a total cost of $35 per month.

On the other hand, our proposed alternative broadband access product bundle would have a minimum charge of between $24.80 and $25.70, which would allow between 1.31 and 1.42 Mbps of CVC to be acquired for a $35 monthly cost.

[4] See NBN Co, Monthly Progress Report, February 2020. This proportion has remained steady over the last six months following NBN Co's September 2019 pricing announcement. See also ACCC, NBN Wholesale Market Indicator Report, 20 February 2020, for most recent data concerning aggregate 12/1 and 25/5 access services in operation.

[5] Equal to a starting charge of $22.50 plus the penalty charge of $4.90. A charge for any required CVC or overage above the 0.15 Mbps allowance also applies at the rate of $8 per Mbps.

We have developed this alternative access product bundle offer based on the bandwidth demand data and retail transformation cost information that RSPs have provided. This information indicates on its face that RSPs would be very unlikely to introduce or continue to supply unlimited broadband products over the NBN at a price of $60 per month based on NBN Co's modified ELB offer. Instead, retailers would have to reduce quota, reduce busy hour speeds and/or increase price to avoid incurring losses on the supply of their entry-level NBN services.

This is the case even where we take into account only the retail transformation costs that lower cost operators incur, and would become more pressing as remaining higher-yielding legacy services are withdrawn.

We have also considered whether NBN Co's planned introduction of national pooling of CVC across CSAs, which simplifies the calculation of an RSP's overage charge liability on bundled products, will materially alter this. A number of RSPs had sought this change in approach prior to the introduction of the modified ELB and the new 25/5 Mbps bundle. Feedback from RSPs and our assessment is that this pooling will not significantly reduce the per customer costs of acquiring NBN access, as most of the potential cost savings are obtained via the introduction of these new bundled products.

4.2.1 Allowance for growth in CVC inclusions

NBN Co's current 12/1 bundle offer makes allowance for a 20 per cent annual growth in the CVC allowance available at a $35 price point (by reaching 1.2 Mbps in October 2020 from a starting point of 1 Mbps in October 2019). We would propose to make a similar allowance for growth in CVC requirements over time.

Several submissions to the inquiry advocated for this allowance to be set at around 30 percent, to align with historical trends in CVC peak utilisation across all services and network-level demand forecasts.

While we agree that 30 percent would appear a relevant benchmark to what would be observed inclusive of high speed broadband access services, we are not convinced that basic broadband access services would have CVC requirements that grow at this rate. This is because at least some of this aggregate growth will be driven by demand profiles that would naturally select a high speed broadband product. That is, bandwidth requirements for high speed access products would grow faster than the expected aggregate growth rate, and basic-speed access services would grow at a slower rate. Consequently, we are proposing to maintain the 20 per cent annual growth rate that NBN Co has built into its modified ELB offer.

4.3 CVC utilisation conditions

NBN Co's commercial offer provides for the payment of an additional charge should the access seeker use more than 95 percent of its purchased CVC capacity in more than 30 hours in a 30 day period.

This does not mean that retailers must operate their services on the NBN at close to full speed, as they retain the option to slow their retail services to fit within a fixed aggregate quantity of CVC capacity during busier hours. These conditions can however encourage RSPs to monitor their networks more closely so that end-to-end speeds and customer satisfaction can be maximised at these times.

The method of calculating the additional charge is not straightforward. Rather than being a simple amount, it in effect requires an RSP to forgo all "discount amounts" they would otherwise have been entitled to receive in respect of services supplied over the relevant CVCs. This discount amount, and hence the additional charge to apply, varies from month to month and across access seekers, depending upon the amount of CVC that has been purchased over the month and mix of speed tiers acquired.

Consequently, we are intending to consider further whether CVC utilisation conditions should apply to entry-level access products in particular, and if so what form they should take.

4.4 Consideration of a voice-only access product

As noted above, we will consider whether the introduction of a voice-only NBN access product would promote the LTIE. Again, we would intend to consider this principally from the perspective of whether this is required to allow a smooth transition of some customers given their existing fixed line voice products are also being withdrawn with the rollout of the NBN.

Under NBN Co's current arrangements for its modified ELB, an RSP can achieve a monthly access charge of $22.50 when supplying voice only products to consumers, provided it meets certain conditions. We would propose to allow RSPs that acquire a regulated basic-speed access product to access a similar pricing outcome when using that access product to supply a voice service.

We are aware that RSPs have concerns with these arrangements. In particular, whether the $22.50 charge is achievable depends upon how the RSP allocates its voice only customers to CVCs, and the aggregate bandwidth that those consumers then consume. If the average peak bandwidth they consume exceeds 150 Kbps over the course of the billing period then the RSP is liable to pay an additional amount. Even if this monthly charge is achievable, RSPs consider it is too high to allow them to recover their costs of supply without sharply increasing their retail prices.

Before moving to address these issues, we are interested in first reaching a view on the particular customer cohorts for whom a mobile service would not represent a viable voice product given that many consumers have already moved to mobiles for all of their voice calls, and there is potential for more to do so. We are also interested in hearing whether there are any plans to provide targeted assistance to the relevant cohorts for whom mobiles will not provide suitable support, which would potentially obviate the need to develop a revised voice only offer of general application.

We are aware that older Australians are seen as a key demographic for whom continuing access to a fixed line voice product can be of greater importance. We note that NBN Co has recently invited expressions of interest from RSPs and consumers groups to co-develop initiatives with the aim of improving NBN uptake for Australians are aged 65 and over.[6] This process may potentially present an alternative opportunity for parties to raise relevant initiatives to better support the supply of voice services over the NBN to these consumers in particular.

4.5 Transfer charges – lock in current pricing at $5

A gaining access seeker pays a transfer charge when an end-user moves from one access seeker to another. NBN Co has reduced its transfer charge from $22.50 to $5.00 per transfer in response to access seekers raising strong concerns regarding the existence and level of these charges. In doing so, NBN noted that continuing to levy the higher charge could provide inefficient incentives to access seekers, given the charge could be avoided by disconnecting and then reactivating the customer's service.

Some access seekers still remain of the view that the charge should be abolished, for intra-company transfers in particular, while others submit that they would be satisfied by locking this charge in for a longer period. The commercial offer is valid only to November 2020.

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[6] NBN Co, *Media Statement*, 24 February 2020

Subject to any final views, we are of the view that the $5.00 charge appears reasonable to apply over an extended period, and we do not consider that a strong case can been made on competition and efficiency grounds for this charge to be set at zero. This includes for intra-company transfers. This is because this level of charge would be unlikely to impede competition. A small transfer charge would also contribute towards the recovery of the efficient costs of processing any transfers that fall out of the automated process, and discourage inefficient use of the transfer process.

That said, service transfers are an intrinsic function of supplying access and so we do not see merit in attempting to recover the associated costs solely through an additional charge, particularly where it could result in a material charge that attaches when service providers compete for each other's customers.

4.6 Certainty

Access seekers continue to raise strong concerns with the lack of certainty over the composition of access products and prices they will face to access the NBN over time. This reflects that NBN Co's discount offers are time-limited and there may not be sufficient advanced notification provided of what price offers will follow those in place.

We have also previously expressed concerns about NBN Co's use of discounts, including in our assessment of NBN Co's proposed variation to the SAU.[7] We continue to hold these concerns due to the financial risk that uncertainty poses, which cannot be readily mitigated.

Since NBN Co introduced the modified ELB product and its 25/5 Mbps bundle product, the vast majority of NBN Co's products are now implemented through discount constructs. Although we acknowledge that some discounting is specifically contemplated within the SAU, almost all NBN product offers are now expressed as discounts. In other words, discounting has become the predominant means by which NBN Co establishes its core product specifications and sets its prices.

The SAU was intended to achieve a balance between providing some flexibility to NBN Co in relation to setting prices and providing a high degree of pricing certainty to RSPs. The SAU was also intended to provide a range of safeguards around prices for new services and withdrawal and modification of products. We consider that NBN Co's use of discounts has resulted in a divergence from these initial objectives.

Were we to proceed to make an AD for entry level products, this would bring a higher degree of certainty to the composition and price of these particular access products. It would however not address concerns in relation to the use of discounts by NBN Co more generally. We will further consider how to provide greater certainty beyond entry level products consistent with the intended operation of the SAU, should that be necessary subject to any relevant developments in WBA4 discussions.

4.7 Issues we won't be considering further in this inquiry

There are a number of issues outlined below which we do not propose to consider further.

4.7.1 Higher speed tiers

As noted above, we will not be considering regulating access arrangements for higher speed AVC services in the course of the inquiry. Consumers of higher speed services can still benefit indirectly from heightened competition in NBN markets. Should new firms be able to enter NBN markets by initially offering lower priced services, this would be likely to trigger

[7] ACCC, *Update on ACCC assessment of NBN Co's SAU variation*, 2 November 2018

responses from incumbents wishing to retain market share by offering their customers greater value, including those they consider potentially attracted to the new retail offers.

4.7.2 Wireless access technologies

As indicated above we will not consider regulated price terms to apply to NBN Co's fixed wireless and satellite technologies. This is because there is no forced migration from existing services within the footprint of these NBN access networks. Consequently, consumers already have an option of remaining on existing voice and broadband services if they do not see value in switching to the NBN.

We note that there are other policy initiatives intended to allow RSPs to offer NBN services of sufficient value to attract consumers onto the NBN in these areas. These include the introduction of an industry levy so that all high speed fixed line network operators make a reasonable contribution towards losses that NBN Co incurs in those areas.

4.7.3 Power to make a final access determination

We have considered the arguments that NBN Co and DoCA have raised concerning whether we can make a FAD in the course of this inquiry. While ultimately these arguments could call for determination by a Court (should a party seek to challenge our decision or refuse to comply with the resulting access determination), we are satisfied that we should continue the inquiry with a view towards making a FAD if required. In this regard, we do not consider it is likely that any FAD we were to make could prevent NBN Co from taking steps reasonably necessary to achieve uniform national wholesale pricing.

We have also noted that NBN Co and DOCA are of the view that any FAD that we made would be unlikely to be effective in regards to the supply of services on NBN Co's FTTP networks, and also its Fixed Wireless and Satellite networks. As noted above we do not intend to address Fixed Wireless and Satellite access pricing in this inquiry.

Whether a FAD could relied upon in respect of relevant services supplied over FTTP services would ultimately turn on whether the terms and conditions of access that the FAD specifies are inconsistent with any relevant terms specified in the SAU. It is our view that this will likely depend on the interpretation of the SAU, which provides maximum prices that reflect a product and pricing construct that differs to the access products and pricing that we are considering for the purpose of the inquiry.

5 Next steps

This section outlines the arrangement when the inquiry is on hold and the next steps we are planning to undertake on its resumption to obtain further stakeholder feedback on the matters raised in this paper.

Until recently, our intention had been to move quickly to continue our engagement with industry after publishing a position paper. However, given the current emergency health situation, we have decided to defer this further engagement. This will allow industry an opportunity to first deal with immediate operational issues that they are facing at this time. The ACCC will resume the inquiry only when more business as usual circumstances return and more is known about the impacts of the health crisis on the industry.

The ACCC is not seeking further submissions to the inquiry at this stage but will continue to monitor developments closely. We will also provide regular updates to stakeholders and provide advanced notice of the recommencement of the inquiry. We will continue to plan for the next steps in the inquiry, so that the inquiry can be completed quickly on recommencement should there be an urgent need to do so.

One way in which we could reach a more timely resolution of the inquiry on resumption is to invite stakeholders to an online industry forum. This would depend upon on broad support for such a forum at the time as a way to help convey our underlying considerations for the inquiry and refine our views on the product and pricing elements still under consideration. Such a forum may also provide an opportunity for interested parties to seek to narrow their differences or at least better understand and test the basis for each other's views.

We would conduct the forum on a similar basis to other roundtable meetings that we have previously conducted in the communications sector, such as when finalising our views on certain aspects of the pricing commitments in Telstra's structural separation undertaking and in the course of our market study into the communications sector.

Nonetheless, we would be pleased to obtain views of stakeholders via other means if this approach is not favoured, and indeed we will seek written submissions from stakeholders with or without the forum proceeding when the inquiry resumes.

We will contact stakeholders about their interest in participating in a forum and its timing and further submission processes upon resumption of the inquiry.