

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Draft Report

**Communications Sector
Market Study**

Public Version

December 2017

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Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the Australian Competition and Consumer Commission's (ACCC) Draft Report on the Communications Sector Market Study. The Report reflects the extensive work undertaken over the last 15 months by industry and the ACCC, and demonstrates a deep understanding of the communications market.
- 1.2 We largely agree with many of the ACCC's observations and recommendations. Optus agrees that the economic regulatory framework for the communications sector has worked well during a period of significant change for the industry – and we expect it to continue to work well in addressing upcoming changes and challenges.
- 1.3 First and foremost, Optus agrees with the comments in the Draft Report that the mobile sector remains competitive and continues to deliver positive outcomes for consumers. Consumers continue to benefit from the level of competition and investment made possible by the appropriate regulatory settings in the mobile sector.
- 1.4 The fixed communications sector, however, presents more challenges and further regulatory action may be required to promote competition and ensure pro-consumer outcomes. Many of these challenges have been recognised in the Draft Report. Importantly, regulatory policy should recognise that the economic benefits of the NBN come from consumer usage of superfast broadband services and the applications and services that run over the network. To achieve this, Optus finds that:
 - (a) The Draft Report correctly identifies the cost recovery profile of the NBN as a central issue driving poor outcomes for consumers and competition. Optus supports the need for NBN Co's cost recovery obligation to be reviewed in the context of delivering better outcomes for consumers and competition. Optus supports this occurring in the near term.
 - (b) The price structure of NBN services remains of concern. Whilst recent changes by NBN Co are welcome, it is not clear that they will resolve longer-term structural issues. Together with a revaluation of the NBN, the CVC pricing construct should be overhauled to unlock the bandwidth potential of the NBN.
 - (c) Non-price issues continue to contribute to poor outcomes for consumers. Optus agrees that the ACCC should take a more active role in this area. We look forward to engaging with the inquiry into NBN Co's non-price terms of access.
- 1.5 One outcome of NBN Co's drive to increase its revenue and lift ARPU is its desire to move into markets outside its original remit. This can raise potential competition concerns and we recommend the ACCC maintains a watching brief.
- 1.6 As an example, Optus strongly disagrees with the recommendation NBN Co be allowed to enter the wholesale aggregation market — even on a temporary basis. The disaggregated POI model endorsed by the ACCC has been a cornerstone of the NBN market since its inception. The decision of the ACCC to support a disaggregated model has resulted in a competitive NBN aggregation market; with aggregators investing many millions in developing products that enable small RSPs to offer national services. Whilst we recognise that some resellers have raised concerns with the ACCC, the market should be left to respond to these. Allowing NBN Co to provide aggregation services would foreclose the market, and have significant consequences for competition and investor confidence in the fixed line market.

- 1.7 With regard to the other issues addressed in the study, Optus agrees with many of recommendations and observations made in the Draft Report. However, we do have additional comments on some issues, including;
- (a) There is little evidence to support the claim that internet interconnection arrangements are not working well. Optus is concerned that the ACCC has mischaracterised the nature of IP interconnection and the commercial drivers of different forms of interconnection. We do not believe that any RSP in Australia has market power over access to internet services or access to internet content; there is no access bottleneck that prevents small RSPs from connecting to the internet.
 - (b) In relation to e-SIMs, there could also be competition concerns for MNOs, not just MVNOs, as it is ultimately the device manufacturers who decide on which networks their device can work on, and on what terms devices can be accessed.
 - (c) There seems to be little need to regulate dark fibre at the moment as dark fibre services are substitutable for other transmissions services, but this suggests a thorough analysis of the type and level of substitution across different type of transmissions services for specific downstream markets is required. In the upcoming DTCS inquiries, Optus recommends that the ACCC should focus on the type of wholesale transmission inputs required in downstream markets, rather than the technology over which services are delivered.
- 1.8 In relation to the consumer issues raised in the Draft Report, Optus does not agree that:
- (a) There should be a compliance audit as part of the TCP Code review, when the ACMA already undertakes such compliance, engagement and enforcement activities on a regular basis; and
 - (b) There should be an email portability regime, as this is unnecessary and likely to be unworkable.

Section 2. MOBILE SERVICES

- 2.1 Optus welcomes the comments in the Draft Report that the mobile industry remains competitive and continues to deliver positive outcomes for consumers.
- 2.2 The mobile sector has been the outstanding success of the Australian communications market, with three competing mobile networks in operation across the vast majority of Australia's population. Effective competition between providers has seen continued network investment; improving coverage and service quality; and retail prices falling significantly over the last decade. There is an expectation that TPG will build a fourth mobile network. As a result of this competition-driven investment, Australia is a world-leader in the uptake of smartphones and advanced LTE deployment. Australian consumers are at the forefront of mobile consumption and capability. Retail competition is further enhanced by a vibrant and competitive MVNO sector, supported by the three MNOs, there are currently more than 60 MVNOs operating across Australia in different market segments.
- 2.3 This section will show:
- (a) The mobile market is highly competitive, with constant price and service innovation and continual investment; and
 - (b) Spectrum remains vital to competition in the mobile market.
- 2.4 Finally, we respond to the observations made in the Draft Report on the development of e-SIM business models and issues around the deployment of future 5G networks.

Effective competition in the mobile market

- 2.5 The Draft Report observes that there is strong price competition amongst mobile phone providers; non-price competition in inclusions, bundling and plan features; and competition in service quality and network coverage.¹
- 2.6 The Draft Report states that for 2016-17, average prices paid for mobile phone services decreased by 2.8 per cent in real terms and were accompanied by a 49 per cent average increase in data inclusions of mobile phone services.² Analysis from Credit Suisse also shows the decreasing average cost of data over the past three years, with all three major MNOs charging less than \$5 per GB.³ This demonstrates that competition has been effective in ensuring all MNOs, irrespective of their market size, continue to compete on price, quality and inclusions to maintain or gain market share.
- 2.7 Competition and increasing consumer value has driven the continual growth of mobile services with approximately 33.7 million connections.⁴ Optus continues to grow its mobile customer base with 9.83 million users at the end of September 2017. Recent subscriber growth has occurred as a result of ongoing mobile network investment and unique content offers, such as Optus Sport and other over-the-top (OTT) services such as Netflix, Stan and Spotify.
- 2.8 Within the overall carrier subscriber market shares, there are also a number of MVNOs. MVNO market share has stabilised at around 10 per cent of the market from June 2014

¹ ACCC, 2017, Communications Sector Market Study - Draft Report, p. 40-44.

² ACCC, 2017, Communications Sector Market Study Draft Report, p. 42.

³ CommsDay, Communications Day, 28 November 2017, p.4

⁴ CommsDay, Communications Day, 28 November 2017, p.4

to June 2016. Recent data indicates that MVNOs are adding more subscribers. According to Telsyte's Australian Mobile Services Market Study, MVNOs have added more than 200,000 services out of a possible 444,000 subscriber growth total in the first half of 2017.⁵

- 2.9 New entry has also occurred in the mobile industry, with TPG purchasing 2x10 MHz of 700 MHz spectrum and announcing plans to build its own mobile network.
- 2.10 The level of competition in the mobile sector can also be seen through the high level of continual investment in mobile networks. The effect of competition on mobile investment has been recognised by the ACCC in the inquiry into domestic mobile roaming. The inquiry highlighted the benefits that flow from continual mobile investment and noted that MNOs "*actively compete on network quality and there are no barriers to competing over network quality and coverage depth.*"⁶
- 2.11 This investment has had a material impact on the quality of Australian mobile networks. The annual P3 CommsDay Mobile Benchmark reports demonstrate a year on year performance improvement for all three mobile network operators. Indeed, Optus' consistent and holistic approach to network investment and improvement across metropolitan and regional cities and towns, along major roads, highways and in remote locations, saw Optus obtain the highest overall rating in the 2017 survey.⁷

Ensuring spectrum continues to promote competitive industry

- 2.12 Spectrum is an important network input for the operation of mobile networks. Responding to the increase demand in data, the industry has invested significantly on new spectrum in recent years. Recent spectrum auctions have also facilitated new entry into the mobile market.
- 2.13 To maintain the level of competition in the mobile sector, Optus supports the continued use of competition limits to ensure spectrum is not monopolised by any one MNO. Competition limits have played an important role in ensuring that no one MNO has been able to dominate spectrum ranges. We note recommendation 27 in the Draft Report, however, it is not the recognition (explicit or otherwise) of competition objectives in spectrum legislation that promotes competition, rather it is the practical implementation of competition limits.
- 2.14 The approach adopted by the ACCC has typically focused on spectrum limits for each individual spectrum range – reflecting that different mobile technologies (2G and 3G) have specific bands in which they could operate. While this approach has had merit in the past, modern mobile technology allows MNOs to utilise multiple spectrum bands to offer mobile services. For example, LTE technology can be (and has been) deployed across several low band ranges (700 MHz, 850 MHz, 900 MHz) and high-band ranges (1.8 GHz and above). Moreover, the use of carrier aggregation enables MNOs to combine non-contiguous spectrum capacity, breaking down another technical barrier that limited the use of multiple bands.
- 2.15 While technology has developed in a manner which allows the use of LTE across many spectrum bands, there still exists substantial propagation differences that make some spectrum bands suited for specific purposes.

⁵ CommsDay, Communications Day 28 November 2017, p.4

⁶ ACCC, 2017, Domestic mobile roaming declaration inquiry, Final Report, October, p.46

⁷ Communications Day, 'P3 mobile network benchmark: voice performance edges Optus into pole position', 5 December 2017, pp. 3-4.

2.16 Optus therefore believes the ACCC should extend its focus for assessing competition caps from single bands to spectrum ranges that are substitutable based on technology and propagation characteristics.

Spectrum assets across substitutable bands should be included in competition limits

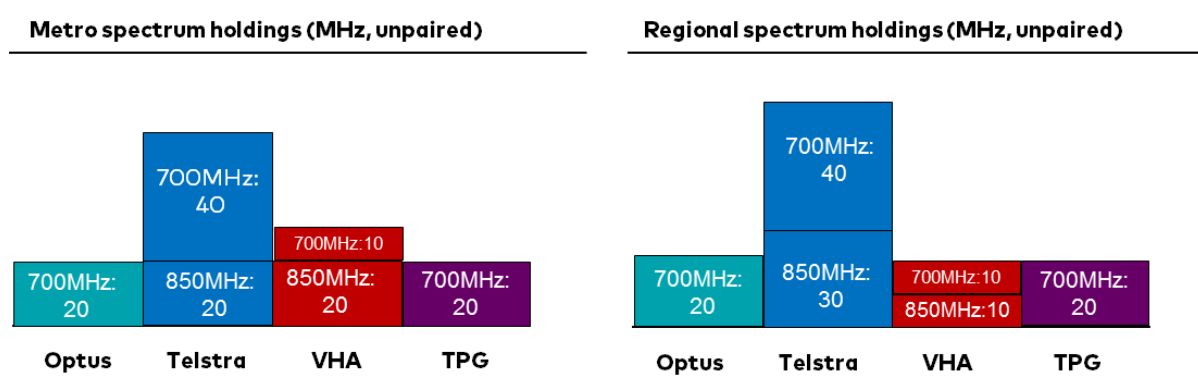
2.17 The mobile industry uses a variety of spectrum bands to supply mobile services across Australia. In broad terms, while all spectrum ranges provide coverage and capacity, low band spectrum (sub-1GHz) is preferred in the industry for use as a coverage layer, while high band spectrum (above 1GHz) is used primarily for providing additional capacity where required.

2.18 Importantly, the propagation factors that make low band beneficial for regional coverage also results in low band being superior for urban and suburban coverage (including for in-building coverage). Indeed, given the prevalence of large buildings made of thick and dense materials, the propagation advantages of low band spectrum are just as important, if not more, in urban areas.

2.19 Modern mobile technology allows MNOs to utilise multiple spectrum bands to offer mobile services. As such, it is the total spectrum holdings across spectrum ranges that can be used by the same technology and offer similar propagation characteristics, which is important for MNOs.

2.20 The current mobile spectrum licences for low band spectrum is shown below. This highlights that Telstra still currently holds a significant proportion of available mobile spectrum licences in the sub-1 GHz spectrum bands. A total of 130 MHz of sub-1 GHz LTE spectrum licences are allocated to the four MNOs. Telstra holds 60 MHz of this in metro areas; and 70 MHz of this in regional areas. Telstra’s current holdings are three time greater than Optus and TPG in metro areas; and are 3.5 times greater than the rest of the industry in regional areas. Such concentration of valuable low-band spectrum should give rise to competition concerns.

Figure 1 Sub-1 GHz spectrum licences



Source: ACMA data.

2.21 To ensure spectrum ownership does not become a bottleneck, the ACCC should focus its competition assessment on licences across all sub-1GHz LTE bands. The sub-1 GHz bands (700 MHz, 850 MHz, 900 MHz) are largely interchangeable and provide similar commercial advantages across the whole mobile network. It is the total ownership of licences across these bands that impacts competition.⁸ Focusing on just one single

⁸ Ongoing access to 900 MHz is currently uncertain due to the ACMA review

band, or one single auction risks missing the impact of potential competition issues associated with the ownership of sub-1 GHz spectrum licences.

Future issues for the mobile industry

2.22 The Draft Report proposes action relating to:

- (a) Exploring concerns regarding restrictions associated with the e-SIM model which are impeding the ability of MVNOs to compete with mobile operators; and
- (b) Considering whether to assess the merits of open access to dense small cell infrastructure.

2.23 We address these issues below.

Development of e-SIM business models require observations

- 2.24 Optus notes the proposed action to explore concerns regarding restrictions associated with the e-SIM model which are impeding the ability of MVNOs to compete with the MNOs.
- 2.25 Embedded SIMs (e-SIMs) are physically integrated into the mobile device and enable consumers to switch between networks without having to juggle between multiple physical SIMs. e-SIMs are still able to provide the same level of security and connectivity as physical SIMs. e-SIMs are slated to integrate heavily within mobile products such as smartphones, wearables, tablets and Machine to Machine (M2M) technologies including automobiles, smart metres and sensors.
- 2.26 First, concerns over the ability of e-SIM models to impede competition in the mobile market should not just be focused on the MVNO sector; concerns apply equally to the MNOs. It is necessary to acknowledge that MNOs do not control the e-SIM model, rather it is the device manufacturers (OEM) that decide which networks their device can work on and on what terms devices can be accessed. Optus notes that concerns may arise where the OEM has a degree of market power.
- 2.27 The technical specifications and standards upon which e-SIMs are developed for consumer devices are generated by the GSM Association (GSMA). With the e-SIM development rapidly gaining momentum, the GSMA are in the process of creating Phase 3 of the “Remote SIM Provisioning” specifications. It is envisioned that the new version will encompass guidelines for e-SIM usage in the M2M and IoT context.
- 2.28 It is important to note that the concept of network portability, which is engrained in the consumer mobile ecosystem, exists within the GSMA standards. Optus does not believe there is anything in the standards that prevents portability from occurring. Indeed, Optus strongly supports the facilitation of full portability between networks in an e-SIM environment.
- 2.29 The new e-SIM technology dictates that a network operator will need to build a new platform for each OEM to support their mobile products. **[CiC]**

Access to dense small cell infrastructure

- 2.30 Optus welcomes the proposed watching brief to identify any potential barriers to the deployment of dense small cell infrastructure. We also welcome comments from the ACCC Chairman that they are not looking for natural monopolies to regulate and that this is an issue for ongoing observation.

2.31 Optus notes that the inputs into the deployment of dense 5G infrastructure are subject to regulation already – e.g., DTCS for backhaul; facilities code for access to passive infrastructure. We also note the current consultation being conducted by the Department of Communications on possible amendments to telecommunications carrier powers and immunities.⁹ Given the extensive coverage of existing regulations to this issue, problems that may arise are likely to be due to inadequacies of the existing regulations. Optus recommends that should problems be identified in the future, the ACCC (or other relevant agency) should look at addressing the underlying issue in the applicable regulation rather than overlaying a new regulation.

⁹ <https://www.communications.gov.au/have-your-say/consultation-possible-amendments-telecommunications-carrier-powers-and-immunities>

Section 3. RETAIL FIXED LINE SERVICES

- 3.1 The Draft Report identifies the impact that the NBN has on retail fixed line services, and the ACCC indicates that it:
- (a) Will carefully examine any outcome of NBN Co's current pricing consultation, including the need for any regulatory intervention;
 - (b) Will examine the non-price terms of access, particularly the service level standards being proposed for access to NBN services, and the impact that these may be having on delivering positive consumer experiences on the NBN; and
 - (c) Recommends in the medium term, the Government should;
 - (i) consider whether NBN Co should continue to be obliged to recover its full cost of investment through its prices; and
 - (ii) examine possible direct budget funding arrangements for non-commercial services, debt relief measures or an asset revaluation
- 3.2 Optus acknowledges these observations and supports increased regulatory oversight on the activities of NBN Co. Further, Optus' experience supports the view that there is scope for improvement in a number of areas of service delivery. Further, we agree that regulatory intervention over NBN services may be required to achieve the necessary improvements and to achieve outcomes that benefit end-users.
- 3.3 This section discusses:
- (a) The current valuation of the NBN, and cost recovery policy, is likely to reduce the economic benefits of the NBN.
 - (b) NBN pricing remains of concern, with scope for the ACCC to improve end-user outcomes.
 - (c) Non-price terms of access, particularly NBN Co's service level standards, require greater examination to determine if further regulation is needed.
 - (d) Concerns over the expansion of NBN services into competitive markets outside NBN Co's original remit.
 - (e) The likelihood of fixed mobile substitution and the regional broadband scheme.

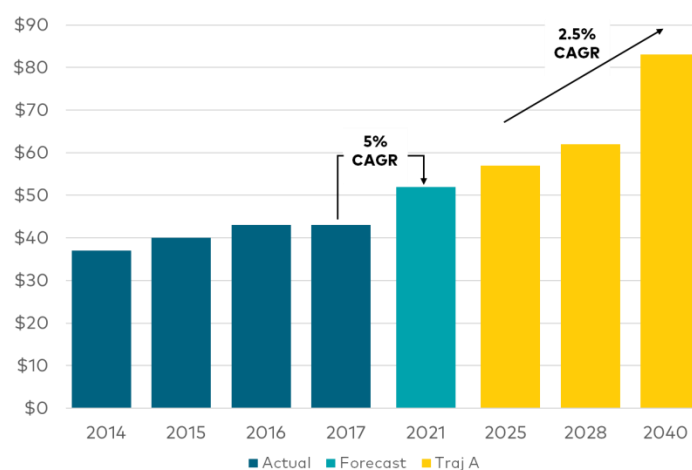
Current NBN valuation is likely to reduce benefits of the NBN

- 3.4 The Draft Report recommends that in the medium term, the Government could consider whether NBN Co should continue to be obliged to recover its full cost of investment through its prices. This may involve direct budget funding or an asset revaluation – consistent with actions of private sector business when business plans are not met.¹⁰
- 3.5 Optus supports this recommendation and considers that any review should occur in the near term.

¹⁰ ACCC, 2017, Communications Sector Market Study - Draft Report, p.16

- 3.6 The requirement to achieve a dedicated internal rate of return (IRR) limits the ability of NBN Co to adopt the pricing reforms necessary to promote the long term interests of end-users. The impact of this on consumer pricing can be observed in the ARPU forecasts in NBN Co's Corporate Plans. These ARPU forecasts, together with subscriber numbers, need to be achieved to reach the IRR.
- 3.7 The NBN strategic review in 2013 showed the link between ARPU growth and IRR outcomes; acknowledging that ARPU growth in line with inflation results in an IRR around 2.5%, where a stable nominal ARPU produces a negative IRR.¹¹
- 3.8 NBN Co ARPU has remained flat since 2016 at \$43 per month. NBN Co remains of the view that its forecasted ARPU of \$52 in FY21 is achievable, relying on higher speed tier take-up and business services to grow ARPU.¹² That implies an annual growth in ARPU from FY17 of 5% – double that assumed in the strategic review. Further, assuming the ARPU growth of 2.5% as per the Strategic Review, from FY21 wholesale ARPU will grow to over \$80 by 2040.

Figure 2 NBN ARPU growth forecasts



Source: NBN Co Annual Reports, Corporate Plan 2018, Strategic Review 2013

- 3.9 NBN Co pricing policy appears to be dictated by this ARPU growth – and this has very real impacts on consumer pricing. NBN Co has for several years assumed that consumer willingness to pay will increase over time; so that consumers pay more to upgrade their residential connections. More recently, NBN Co has started to rely on revenue growth beyond consumer services to support ARPU growth to FY21.

Market developments likely to make business case unachievable

- 3.10 The ability of NBN Co to capture long term annual growth of 2.5% has always been regarded as challenging. The 2013 Strategic Review notes that that this growth is dependent on evolution of the telecommunications markets; and “represents a market without strong challengers in both the fixed and mobile markets, and with moderate consumer pressure”.¹³ It is not clear that this statement reasonably represents the current Australian telecommunications market.

¹¹ NBN Co, 2013, Strategic Review – Final report, p.67

¹² NBN Co, Annual Report 2016-17, p.47

¹³ NBN Co, 2013, Strategic Review – Final report, p.59

- 3.11 Optus notes that there are both micro and macro headwinds that are likely to make the assumed evolution in market unlikely to eventuate. These include:
- (a) At a consumer level, it appears unlikely that the assumed growth in consumers' willingness to pay for NBN services will occur;
 - (i) Service level issues across many access technologies raise doubts whether consumers would be willing to pay more for NBN services; and
 - (ii) Continual low inflation and a history of declining communications prices, indicates that consumers are conditioned to getting more for less not paying more for more.
 - (b) The required increases in pricing puts NBN Co at risk of being undercut in key market segments where substitutability is feasible at the margin;
 - (i) Low volume users are likely to turn to mobile and fixed wireless solutions; and
 - (ii) Customers with more complex, higher quality requirements may seek alternative fibre solutions, including FTTB or point-to-point fibre.
 - (c) Other long range financial forecasts, still based on the Strategic Review,¹⁴ appear tenuous. Peak EBITDA margins of around 60% are much higher than even Telstra was able to achieve in its fixed line business at the height of its monopoly (which were generally in the range of 40-55%)
- 3.12 The problems facing NBN Co, and by extension RSPs and end users, are not straightforward to resolve. While there are a number of possible solutions to ameliorate the under-utilisation of the network, each raises a risk that the solution will worsen financial outcomes. Yet proceeding down the current path presents its own risk: that the network will be remain under-utilised and the financial objectives are not achieved anyway.

Changing NBN Co's cost recovery expectations will benefit consumers

- 3.13 One key implication of these trends is that the prospects for cost recovery are poor even under the current set of market assumptions; this suggests that current charges (and the trajectory of current charges) may be better focused on the delivery of non-financial economic and social objectives, with a lesser focus on the financial objective.
- 3.14 Optus supports the recommendation in the Draft Report that in the medium term, the Government should consider whether NBN Co should continue to be obliged to recover its full cost of investment through its prices; and examine the alternatives identified by the ACCC.
- 3.15 As noted above, potential pricing or product reform is assessed by NBN Co within the lens of meeting ARPU growth and IRR targets. This is likely to limit possible price reform.

¹⁴ NBN Co's 2017 Corporate Plan states that: "Management and the Board have not taken a view on assumptions beyond FY22, and no better estimates exist than the assumptions applied in the Strategic Review dated December 2013."

- 3.16 And price reform is vital to ensure that the potential economic benefits that could flow from universal access to high speed broadband infrastructure are realised. These benefits, however, flow from the use of broadband services which the NBN will make available. Access to the network alone is not enough. To deliver on these objectives, the NBN must support the future demand of consumers for high speed broadband. This, in turn, means that usage of the network must be affordable and designed to promote such usage.
- 3.17 The NBN's greatest advantage over competing technologies is its ability to handle very large amounts of data throughput at low additional cost. The pricing model adopted by NBN Co should accentuate this advantage rather than neutralise it by charging excessively for data throughput. This suggests that the focus of any changes needs to be lowering CVC charges.

NBN pricing remains a problem

- 3.18 Optus acknowledge the efforts of NBN Co over recent months to temper concerns by changing its pricing structure. We are cautiously optimistic about these price changes. Nevertheless, we reiterate our concern with the current pricing structure and make further proposals that, in our view, would be beneficial to all stakeholders.
- 3.19 Optus' preference for price reform is to remove the commercial CVC construct and open up the pipes for end-users. Removing the CVC charge would bring the NBN Co product construct in line with the standard product design over next generation networks by imposing a line charge and a port charge only. That is, RSPs would purchase AVCs for each of their customers and would purchase one NNI per POI. The dimensioning and network quality provided in that POI would be determined by the NNI capacity and the number of AVCs connected to that NNI.
- 3.20 This is likely to maximise the benefit of the NBN to end-users. One option is to price the range of AVC speed tiers so that it returns an ARPU close to that expected in the various financial plans. While this would not address longer-term cost concerns, it would greatly increase the quality of service.
- 3.21 However, the price structure is only one issue. Without structural change consumers will continue to pay ever increasing broadband charges. The NBN Co business model assumes that the wholesale ARPU increases 20% by 2021. It is this increase in charges that will limit the benefits of superfast broadband.
- 3.22 If the objective is to promote the efficient use of the NBN, then it potentially opens up a broader range of price reforms. At one end of the range, reforms could allow for a significant reduction or elimination of CVC charges while leaving AVC charges relatively unchanged. This should maximise the number of consumers on the network, and put RSPs in a position to maximise consumption and consumer value obtained from the network by increasing the ability of consumers to access existing and new services.

Service level standards require further examination

- 3.23 The Draft Report identified three main issues of concern in relation to NBN services:
- (a) Whether current service levels are appropriate and represent an appropriate baseline to ensure a positive end-user experience, particularly around connections, fault rectification and complaint handling;
 - (b) Whether there is sufficient recourse to compensation where services levels are not met; and

- (c) Whether there is adequate information flows and coordination between NBN Co, service providers and consumers.
- 3.24 Optus notes that since the release of the Draft Report, the ACCC has initiated a public inquiry into NBN service levels. The ACCC said it will determine whether NBN wholesale service levels are appropriate, and consider whether regulation is necessary to improve consumer experiences. On 18 December 2017, the ACCC released a discussion paper canvassing a broad range of NBN non-price and service level issues.¹⁵
- 3.25 Optus supports the ACCC's decision to more fully explore issues concerning non-price terms of access related to the supply of NBN services and to consider if further regulation regarding NBN Co's service level standards is warranted.

NBN expanding into competitive markets

- 3.26 One outcome of NBN Co's drive to achieve the forecasted ARPU target and growth rate, is its increased appetite to enter new markets. NBN Co has signalled that it expects to raise sufficient revenue in business and wholesale markets to increase ARPU from the current \$43 per month to \$52 per month by 2021.¹⁶
- 3.27 Optus is concerned by NBN Co signalling to the business market;
- (a) First and foremost, the market for business access services is competitive, served by a variety of dedicated business networks owned by Telstra, Optus, TPG, Macquarie, Opticomm, Vocus, and others. By entering these markets, NBN Co is largely duplicating existing fibre networks.
- (b) Second, NBN Co appears to be directly engaging end-user business customers to advertise their network services.¹⁷ Such direct end-user contact undermines the wholesale-only nature of NBN Co and can create customer confusion and distort competition in the market.
- 3.28 In addition to plans to enter the competitive business market, NBN Co has also shown a willingness to develop products that allow the aggregation of NBN Services from the 121 POIs back to a central location. This issue is addressed in more detail in Section 4.
- 3.29 NBN Co's expansion into competitive markets poses interesting competition issues. Should NBN Co move into these related markets, Optus recommends the ACCC maintains an active brief on the competitive impacts.
- 3.30 **[CiC]**
- 3.31 Optus recommends that NBN Co remain focused on its core purpose – connecting residential and small business premises within the Telstra copper PSTN. Such focus is required to ensure the roll-out in its monopoly-services areas is achieved in the shortest timeframe, ensuring adequate customer experience and at the lowest cost. Expanding into competitive business markets will involve additional costs for NBN Co with little potential benefit to Australian businesses.

¹⁵ ACCC, 2017, ACCC Inquiry into NBN wholesale service standards – Discussion Paper. <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-service-standards-inquiry>

¹⁶ <https://www.computerworld.com.au/article/629981/nbn-revenue-grows-revenue-per-user-steady/>

¹⁷ <http://www.theaustralian.com.au/business/technology/nbn-co-speeds-up-business-push/news-story/14108149f56b664461c88339ccda5f32>

Fixed mobile substitutability and the regional broadband scheme

- 3.32 The Draft Report observes that the deployment of next generation 5G networks could create opportunities for fixed to mobile substitution. Importantly, however, such substitution will in part depend on the performance of NBN services in terms of price and service quality.¹⁸
- 3.33 Optus agrees with the observation that the degree of future substitution to wireless technologies will in part depend on the performance of NBN services. The NBN's greatest advantage over competing technologies is its ability to handle very large amounts of data throughput at low additional cost. An efficiently run NBN should not experience substantial levels of wireless substitution due to the unique engineering advantages that fixed fibre networks have over wireless – the ability to supply large volumes of data at constantly high throughputs. While there will be a small cohort of consumers that do not sufficiently value access to large amounts of data throughput – and to whom wireless access will remain attractive – the clear majority of households do value access to large volumes of data throughput. Further, the need to acquire large amounts of data throughput will only increase over time as consumption habits change.
- 3.34 Optus submits that the level of discussion around the potential substitution from NBN to wireless networks reflects current concerns over the NBN project rather than the engineering and economic comparison of the networks.
- 3.35 Optus supports draft recommendation 21 which states that regulation should not constrain competition with the NBN. This is consistent with the views expressed previously by both the ACCC and NBN Co that the potential for wireless bypass is a key driver to ensure NBN Co operates efficiently and continues to deliver good outcomes to customers. For example:
- (a) NBN Co submitted that its pricing is efficient because it minimises the threat of consumers moving to mobile services;¹⁹
 - (b) NBN Co submitted that it would operate and price efficiently, as “NBN Co will continue to face potential competition from some services delivered on other networks (such as 3G and 4G mobile)”;²⁰ and
 - (c) The ACCC accepted the revenue sufficiency risk as being a key driver of investment and cost efficiency given the NBN Co will face significant demand risk and revenue sufficiency risk.²¹
- 3.36 The 2013 Strategic Review also highlighted the important role that potential diversion to mobile services could play if NBN Co raised prices to high levels – the potential diversion to mobile services was a key reason why the IRR target was changed from 7% to 3%.²²
- 3.37 Following on from above, and the important acknowledgement that competition (whether actual or potential) from wireless services is a key, if not the key, driver of efficiencies for NBN Co, Optus fully agrees with proposed recommendation 29 that the RBS should continue to only apply to fixed line services.

¹⁸ ACCC, 2017, Communications Sector Market Study - Draft Report, p.12.

¹⁹ NBN Co, 2011, SAU Supporting Submission, December, p.48

²⁰ Ibid., p.99

²¹ ACCC, 2013, NBN Co SAU Final Decision.

²² NBN Co, 2013, Strategic Review - Final Report, p.106

3.38 We also agree with the comments made by the ACCC Chairman rejecting claims made by some that the scheme should be extended to mobile services – noting that increased mobile pressure on NBN would ward off a completely unconstrained monopoly.²³

²³ Commsday, 31 October 2017.

Section 4. WHOLESALE NBN MARKET

- 4.1 The Draft Report raises several issues surrounding price and non-price terms for NBN wholesale aggregation services, namely that:
- (a) NBN discounts are not being passed through to purchasers as opposed to vertically integrated companies (Telstra, Optus etc.)
 - (b) Limited differentiation between NBN aggregation services
 - (c) Delays in NBN wholesale aggregation products going to market
- 4.2 However, while concerns have been raised with the ACCC, Optus does not believe this is an accurate representation of the aggregation services available to the market. Further, some of the concerns raised above reflect limitations of the underlying NBN service and should not be attributed to NBN aggregators.
- 4.3 Optus does not agree that the wholesale NBN market is not providing competitive services to RSPs. **[CiC]** Available evidence clearly demonstrates the NBN wholesale market is competitive, continues to develop new services, and enables new entry and growth of smaller RSPs.

Wholesale services reflect limitations in underlying NBN product

- 4.4 It is first necessary to highlight that NBN aggregation and backhaul services offer to address one problem associated with acquiring NBN services – high fixed costs which have the potential to limit the ability of RSPs to enter or grow in the market. Aggregation and backhaul services do not, and cannot, address issues with the NBN product or network. Optus is concerned that criticisms of aggregation services are often criticisms of the underlying NBN construct. We note that the three concerns listed in the Draft Report are best attributable to problems associated with the underlying NBN product.
- 4.5 The aggregation services supplied in the wholesale NBN market resell existing NBN services. We note the statement in the Draft Report that there is a lack of differentiation in the wholesale market. Optus disagrees with this observation. While the basic NBN service is provided on a non-discriminatory basis, and there are limits on how much differentiation is possible, Optus provides differentiated Level 2 or Level 3 aggregation services, we provide different cost structures to suit our customers, we enable bundling with other services, and the option of CPE support. Further, we provide P95 CVC billing – a pricing option not available from NBN Co.
- 4.6 Optus submits that a lack of differentiation is not a legitimate criticism of NBN aggregation services when the offers provided in the market are highly customisable and flexible.
- 4.7 Finally, Optus does not agree that the concern that NBN CVC discounts are not passed through to wholesale customers can be attributable to the wholesale market. This concern is not accurate. We acknowledge that there are legitimate concerns around the level and structure of NBN pricing, including CVC. Further, the RSP industry has acknowledged the difficult commercial reality of providing NBN services in the retail market. It is widely acknowledged that all RSPs (direct and reseller) are facing marginal returns on NBN services. But again, these issues relate to the underlying NBN pricing construct and are not attributable to wholesalers. Nevertheless, aggregation can be more cost effective for many RSPs compared to direct supply from NBN Co. RSPs can save on NNI establishment and monthly costs, can smooth out the CVC incremental cost curve, and offer higher CVC discounts than under NBN Co rules. Most importantly,

Optus Wholesale aggregation provides a much quicker go-to-market solution compared to direct purchase from NBN Co.

- 4.8 Further, it is not clear that any potential remedy would lead to better outcomes. Providers of wholesale aggregation services must also make a return on the investments incurred to provide the products. Optus can confirm that it has invested over [CiC] on product development and systems to support our residential wholesale NBN aggregation product. This excludes the [CiC] invested in our Business/Enterprise NBN product offering across Optus Wholesale, Optus Business and Optus SMB. This also does not include the network investment, electronics & fibre, to connect the 121 POIs to our network, plus the infrastructure deployed in commercial and carrier neutral Data Centres for our wholesale customers to connect into.
- 4.9 This investment requires a commercial return sufficient to promote the legitimate business interests of providers. [CiC]
- 4.10 Optus submits there is little, if any, evidence to support the concerns outlined in the Draft Report. While the concerns outlined may be legitimate concerns of the NBN services; the issue often lie with the NBN network and NBN Co.

Wholesale aggregators have enabled entry and growth of smaller RSPs

- 4.11 NBN wholesale aggregation products offer substantial benefits to new entrants, notwithstanding limitations of the underlying NBN product. New entrants are able to enter the market on a national basis and obtain scale, while avoiding the high fixed cost of building access and acquiring CVC capacity to all 121 POIs. New entrants are able to leverage the existing networks and CVC capacity of existing RSPs to provide competitive services.
- 4.12 To help the ACCC better understand services provided in this market, we explain Optus Wholesale's products below and outline the impact it has had on the promotion of competition in the retail NBN broadband market.

Optus Wholesale's NBN aggregations products

- 4.13 Optus Wholesale currently provides separate backhaul and aggregation products to smaller RSPs and other wholesale partners: [CiC]
- 4.14 [CiC]
- 4.15 [CiC]
- 4.16 As at November 2017, Optus Wholesale will have dedicated around [CiC] to the continuing improvement of the RBBonBN product. This is a significant investment in the aggregation product in order to bring increasing features and to remain competitive against the growing number of alternative providers. Such investments and product improvements would not be necessary if the wholesale market was not competitive.
- 4.17 The RBBonBN aggregation product offers smaller RSPs with a host of advantages over direct connection into the NBN which includes:
- (a) Bypassing the need to pre-purchase CVC capacity which will allow smaller RSPs to avoid the fixed charge associated with CVC provisioning from NBN;
 - (b) Utilisation of the accessible and easy-to-use Optus Wholesale Extranet to add, change or terminate orders with bandwidth dimensioning options for AVC and AGVC for the RBBonBN product; and

- (c) Ongoing program of improvement with the potential addition of a residential voice aggregated product over the NBN on traffic class TC1 and migration of the ordering process for the product from the Optus Wholesale Extranet to the Optus Wholesale Unity – a new business support system which will consolidate all Optus products to allow seamless bundling of fixed and mobile services and improved end to end self-service.

Overview of customers and their development

- 4.18 At November 2017, Optus had over **[CiC]** wholesale customers acquiring the NBN aggregation products – almost double the SIOs from April. These customers include a mix of RSPs such as HarbourISP, Spintel, Exetel, My Republic, Escapenet, Anticlockwise and Symbio.
- 4.19 Optus' wholesale customers include RSPs that utilise aggregation services exclusively; and those that use a combination of direct access and aggregation. Importantly, Optus' wholesale product enables small RSPs to grow over time. **[CiC]**
- 4.20 The success of Optus' RBBonBN product can be seen through the growth in wholesale customers. **[CiC]**
- 4.21 There has been a substantial increase in the number of wholesale SIOs since 2016. The rise in wholesale customers signals a budding market that will grow over time as the NBN is being built, enabling effective competition amongst all NBN aggregation product providers.
- 4.22 There are many other operators that provide similar wholesale national aggregation products including Telstra, MyNetFone (iBoss), Aussie Broadband (Wideband), Vocus (Nextgen) and TPG (AAPT).²⁴ It is evident that the wholesale NBN aggregation market currently contains a high number of competitors to facilitate effective competition. Optus has invested heavily in ensuring that the RBBonBN remains an aggregation product of choice for smaller RSPs in terms of value and product quality.
- 4.23 In addition to the competition between different aggregators to acquire wholesale RSPs, there is competition between the use of aggregation products and direct purchase from NBN Co. As noted in the Draft Report, several reseller RSPs are using NBN wholesale aggregation products in the short-term before transitioning to a direct NBN connection model upon reaching scale at the NBN POIs:
- “From our survey of the twelve service providers, five were using this hybrid approach, all with the intentions to move to a full direct connection model”.²⁵*
- 4.24 This can be confirmed from Optus Wholesale's data, which show that **[CiC]** of the current wholesale customers are also direct customers of NBN Co. **[CiC]** Optus submits this is how the wholesale market should work; allowing new RSPs to grow over time and to obtain sufficient scale to purchase directly from NBN Co.
- 4.25 All available evidence shows that there is strong competition in the market for wholesale NBN aggregation.

²⁴ ACCC, 2017, Communications Sector Market Study - Draft Report, p. 81

²⁵ ACCC, 2017, Communications Sector Market Study - Draft Report, p. 144

No evidence of a lack of competition in the market

- 4.26 Competition is typically measured by; price movements; non-price developments and innovations. Formal competition assessments rely upon small but significant and non-transitory increase in price and hypothetical monopolist tests. This typical analysis clearly shows there is no evidence on which to conclude there is a lack of competition in the market for NBN wholesale services
- 4.27 There is limited scope for any price movement in the wholesale market given the pricing realities of the underlying NBN product. Indeed, given that the wholesale market must reflect the NBN product, one should expect price rises over time as the NBN product increases in line with its ARPU forecasts. But this is not an indication of lack of competition; it reflects changes in the input costs. Further, it cannot be reasonably expected that aggregators pass through NBN Co charges. Aggregators have a legitimate business expectation to make a reasonable return on their investments.
- 4.28 There has been developments and innovation in the elements of the product that can be controlled by wholesale aggregators. This has been shown above.
- 4.29 Wholesale providers face the ultimate competitive pressure – self-acquisition of NBN services. There is limited, if any scope, for wholesale providers to impose a small but significant and non-transitory increase in price or to act in a monopolistic manner, due to the possibility of RSPs acquiring services directly from NBN Co. There is a finite and small margin in which NBN aggregators operate within. Aggregators must charge higher than direct NBN Co charges to recover the direct costs incurred in the service, but not so high as to overcome the costs associated with direct acquisition. Furthermore, aggregators must provide better non-price outcomes that that obtainable through NBN Co. This is a very difficult space to operate in.
- 4.30 With respect to Proposed Recommendation 8, Optus does not agree that NBN Co should enter the wholesale aggregation market as it is effectively competitive in its' current state, and we expect competition to strengthen in the future.

NBN Co would likely foreclose competition

- 4.31 The Draft Report recommends that in the absence of a genuinely competitive wholesale aggregation market NBN Co should consider provision of transitional products or pricing measures, for no longer than the NBN build period that facilitate the entry of smaller or niche service providers to provide a further competitive dynamic.
- 4.32 As explained above, there is no evidence of an absence of competition in the wholesale aggregation market.
- 4.33 Optus does not support this recommendation. This recommendation would have the likely impact of foreclosing the wholesale market, and thereby increasing barriers to entry to new RSPs and making it difficult for small RSPs to grow.
- 4.34 Providers of wholesale aggregation services have invested many millions of dollars in developing the product – Optus, for example, has invested around **[CiC]**, for its retail aggregation product. Should NBN Co enter into this market it would have the likely result of removing any demand for non-NBN aggregation products. If NBN Co was to provide aggregation service for a finite period, the investment made by aggregators would be stranded. Optus, for example, would not be able to recover its investment. Given this significant loss, and the sovereign risk associated with investing in NBN-related markets, it is unlikely Optus would undertake further investment post roll-out.
- 4.35 The draft recommendation would:

- (a) reduce competition;
 - (b) strand many millions of dollars worth of investment;
 - (c) not promote efficient investment; and
 - (d) would have a chilling effect on investment.
- 4.36 Independent of recommendations made from this inquiry, NBN Co appears to be considering entering the wholesale aggregation market. Optus is concerned by these developments.
- 4.37 NBN Co's expansion into competitive markets poses difficult competition law questions. There is no doubt that NBN Co has significant market power in the market for fixed line broadband access services. Development of aggregation products would represent NBN Co entering a related market for wholesale aggregation services. The relevant question, therefore, is whether NBN Co entry into aggregation could impact competition.
- 4.38 Should NBN Co move into these related markets, Optus recommends the ACCC keep an active brief on any competition issues that may arise.
- 4.39 Related to this, Optus is concerned that the development of products for the aggregation market through the PDF could raise competition issues. Development of products through the PDF – as required under the SAU – involves consultation between competitors, or potential competitors, in the supply of wholesale aggregation services.
- 4.40 Optus recommends that the ACCC actively monitor the manner in which NBN Co engages its customers when developing products for the wholesale NBN markets.

Section 5. TRANSMISSION AND DARK FIBRE SERVICES

- 5.1 The ACCC proposes two actions that impact the regulation of transmission services:
- (a) To examine the supply of transmission services to NBN Points of Interconnection (POIs) as part of the Domestic Transmission Capacity Service (DTCS) declaration and Final Access Determination (FAD); and
 - (b) To consult on the need to obtain information from industry via a record keeping rule to monitor the supply of dark fibre services to determine whether any regulatory intervention is required.
- 5.2 Optus welcomes these initiatives, including rolling any transmission issue into the upcoming inquiries into DTCS. However, Optus wishes to provide the following comments:
- (a) Optus sees potential benefits from disaggregating of the DTCS service description such that services can be priced more efficiently and better align with the long term interest of end-users (LTIE).
 - (b) The provision of dark fibre should be assessed within a framework that identifies the downstream market into which the transmission product is supplied. Any inquiry into dark fibre must also take into account not all networks are designed to deliver dark fibre as a service.

Disaggregating the DTCS service description would benefit end-users

- 5.3 The efficient and effective regulation of wholesale transmission access is of utmost importance in the telecommunications industry. Optus has long advocated for the disaggregation of the DTCS service description to reflect actual wholesale services used as inputs into different and distinct downstream markets. The DTCS declaration, in the current form, assumes that all related downstream markets for wholesale transmission services face similar market conditions and customer requirements. Such an assumption is not valid.
- 5.4 For example, 2Mbps transmission services, which are primarily used for access network connections are not substitutable for 1Gbps or wavelength services for use in the relevant downstream market. Similarly, high capacity transmission services, which are used for carrier services, are not substitutable with 2Mbps transmission links. And yet, all these services are covered within the one declared service and are all priced in the same manner. Optus has consistently submitted that this approach damages end-user outcomes and does not reflect actual market behaviour.
- 5.5 Optus refers the ACCC to the approach adopted in the UK for the regulation of transmission markets. Specifically, to the recent judgement of the Competition Appeals Tribunal which overturned a regulatory decision to adopt a broad-based market for transmission. The UK regulator, Ofcom, had adopted a broad-ranging market for transmission services. The CAT rejected this approach observing that the nature of substitution between transmission inputs demonstrated there were different economic markets. Optus recommends that the ACCC adopt a similar economic test when determining whether different type of transmission products should be regulated. Different transmission products which are inputs into different downstream economic markets, should be subject to different declarations.

- 5.6 Optus supports the proposed action to examine the supply of transmission services to NBN Points of Interconnection (POIs) as part of the DTCS regulatory inquiries. We note this was already considered in the last DTCS inquiry, which found the majority of POIs had a competitive supply of transmissions services. Those POIs which do not have sufficient supply are subject to regulation and prices are set by the ACCC.

Dark fibre

- 5.7 The ACCC proposes to consult on the need to obtain information from industry via a record keeping rule (RKR) to monitor the supply of dark fibre to determine whether any regulatory intervention is required. Although Optus does not object to this proposal, there appears to be little need for regulation of dark fibre services in the current market.
- 5.8 The ACCC notes that the market for dark fibre service appears to be relatively concentrated, with only two active larger suppliers and a small number of providers supplying more niche services, limiting competition in the supply of these services, including to NBN POIs. However, a limited number of network suppliers of dark fibre does not lead to a conclusion that the market for the supply of high bandwidth transmission services, including to NBN POIs, is not competitive. Optus notes that this assessment does not consider substitutable transmissions services for dark fibre. This again demonstrates the need to undertake a thorough analysis of the type and level of substitution across different type of transmissions services used in specific downstream markets.

Dark fibre services are substitutable with other transmission services

- 5.9 The ACCC states that dark fibre services enable large volumes of aggregated communications traffic likely to be carried over long distances, from one point to another. These generally involve high capacity data links and are acquired by service providers as a wholesale input to the supply of voice and broadband services to end-user in both fixed line and mobile market.
- 5.10 However, the ACCC fails to recognise that there are alternative transmission services that provide high capacity data links that are also acquired by service providers as a wholesale input to the supply of voice and broadband services to end-user. Optus notes that wavelength services also provide the same wholesale input. A relevant question for any examination of dark fibre is the extent of substitution with other transmission technologies.
- 5.11 Optus recommends the ACCC focus on wholesale inputs required rather than the technology over which the service is delivered. The ACCC should be guided in any assessment by the operation of the market and actual evidence of substitution and market behaviour – for example, a required wholesale input may be inter-capital high bandwidth transmission. This can be delivered as dark fibre or wavelength or some other transmission technology. These different technologies are substitutes for one another for the supply of high bandwidth. Any competition assessment on the market for wholesale inter-capital high bandwidth transmission market should take into account the supply of both unlit and lit transmission products.

Not all networks are designed to provide dark fibre as a service

- 5.12 The ACCC observes that there appears to be a lack of supply of dark fibre services in the market and as a result, this limits competition in the supply of dark fibre services. However, the ACCC should take into account that legacy networks have not been built or designed to provide dark fibre as a service. The network design required to supply dark fibre services to the market is a relatively new concept. A network designed to provide dark fibre as a service typically deploys the largest fibre cable that can fit within

available duct space. Legacy telecommunications networks have typically not deployed fibre assets in this way.

5.13 **[CiC]**

5.14 Each provider would follow a different set of dimensioning rules to align with their specific business goals, which may or may not involve selling of dark fibre. The fact that a few newer networks provide wholesale dark fibre services reflects different fibre network designs. It also shows that the transmission markets are competitive, with a range of providers offering differentiated services. As noted above, however, the supply of dark fibre is only one transmission technology which can be used to supply high bandwidth transmission services.

Section 6. CONSUMER ISSUES

- 6.1 The Draft Report raises several issues concerning consumer issues; focusing on compliance with regulatory obligations, information provision to customers and the ability of customers to switch services/providers.
- 6.2 Optus has concerns over several of the ACCC's proposed actions. Of particular concern are proposals that a compliance audit should form part of the TCP Code review currently underway and the proposal for an email portability regime, both of which Optus considers are unnecessary. There are no significant barriers to switching plans for consumers. Optus's views on these consumer issues are set out below.

Compliance audit should not form part of the TCP Code review

- 6.3 The ACCC proposes that the current TCP Code review provides an opportunity to assess whether service providers meet their Critical Information Summaries (CIS) obligations under the TCP Code and how this can be addressed (proposed recommendation 13).
- 6.4 Optus is concerned this recommendation would replicate existing regulatory action, and appears unnecessary. A compliance audit is currently unnecessary in light of the ACMA's TCP Code compliance and engagement activities; nor is the TCP Code review the appropriate forum for conducting a compliance audit of CIS obligations.
- 6.5 As noted in the ACCC's Draft Report, the ACMA proactively monitors providers' compliance with the TCP Code, including undertaking annual compliance audits of CIS obligations, then takes enforcement action as appropriate. The ACCC expressed concern with the decline in industry compliance with the TCP Code's CIS obligations in 2016-17. However, this does not represent a long term, systemic trend in industry non-compliance. Results of the ACMA's compliance audits in 2013-14 and 2015-16 showed good compliance, with 90% of CIS documents immediately compliant in 2013-14 and 75% immediately compliant in 2015-16.²⁶
- 6.6 The ACMA's 2016-17 audit primarily focussed on NBN telecommunications offers given the significant growth in new NBN service providers. Following the results of the audit the ACMA then initiated 43 preliminary inquiries into providers where compliance was in doubt and conducted two investigations, ultimately resulting in two directions to comply with the TCP Code's CIS obligations.²⁷ An additional audit at this stage would seem unnecessary in light of the ACMA's compliance, engagement and enforcement approach, particularly where a specific reason (such as, significant growth in new providers in the market) is a likely contributing factor to the 2016-17 results.
- 6.7 Furthermore, Communications Compliance's engagement with providers (particularly smaller providers) has had a positive impact on TCP Code compliance attestations. Under the TCP Code Compliance Framework compliance attestations lodged with Communications Compliance (CommCom) have increased over time. From 2013-2015 the number of providers lodging compliance attestations increased from 225 to 391 and the number of warnings and directions from the ACMA regarding lodgement of compliance attestations decreased (from 95 formal warnings in 2013 to 25 formal warnings and 6 directions in 2015). Lodgement requirements changed in 2016 and during the last reporting period the ACMA issued 14 formal warnings and 6 directions

²⁶ ACMA, 2014, Annual Report 2013-14, p. 80, and ACMA, 2016, Annual Report 2015-16, pp. 73-74.

²⁷ ACMA, 2017, Part 1: Australian Communications and Media Authority Annual Report 2016-17, p. 70.

regarding lodgement of compliance attestations, which overall demonstrates a positive impact on compliance awareness as a result of CommCom's activities.²⁸

- 6.8 In addition to being unnecessary at this time, the TCP Code review is not the appropriate forum for a compliance audit. The TCP Code review is being conducted by a Communications Alliance working group made up of industry participants, consumer representatives, and regulators including the ACMA, ACCC and TIO, with an independent chair. The working group should be focussed on the contents of the TCP Code and should not be undertaking or delayed in its considerations by conducting compliance audits. Optus understands that Communications Alliance has commissioned further research regarding critical information summaries, which along with any ACMA research,²⁹ will likely assist in informing the working group's review.

Intervention with comparator websites should not impact RSPs

- 6.9 The ACCC proposes to review the scope, transparency and ease of use of comparator websites and consider the need for further intervention, in addition to existing ACCC guidance for comparator websites (proposed action 14).
- 6.10 Optus notes the ACCC's concerns in the Draft Report include that comparator websites may:
- (a) Fail to disclose commercial relationships with service providers;
 - (b) Fail to acknowledge any limitations in market coverage; and
 - (c) Be limited in how they present price and usage metrics.
- 6.11 The issues raised by the ACCC are primarily focussed on the operation of the comparator websites, their disclosures and their presentation of information. Optus would have concerns if any further proposed ACCC intervention involved increased obligations on service providers to either build additional functionality or be subject to new obligations to provide additional information to such websites.

Early termination fee requirements should not be in the TCP Code

- 6.12 The ACCC proposes to monitor consumer complaints about unfair terms in communications contracts. It proposes to work with industry and government stakeholders to ensure consumer are informed about the potential benefits of short term or no contract options when migrating to the NBN. The ACCC also proposes to consider whether service providers should be obligated to more clearly identify the contract end date to consumers (proposed action 15).
- 6.13 Optus considers there are a breadth of plans and options available for consumers for both mobile and fixed line products, which provide a range of contract lengths, including month to month options, where flexibility or short term commitments may be a consumer's priority. Consumers who sign up to a longer term contract generally receive benefits for such a commitment, including an ongoing monthly discount, customer equipment or other inclusions.

²⁸ See Communications Compliance website: <http://commcom.com.au/news/>, news updates 22 July 2015, 10 September 2015 and 8 October 2015, accessed 4 December 2017. (ACMA, 2017, Part 1: Australian Communications and Media Authority Annual Report 2016-17, p, 70).

²⁹ For example, the ACMA conducted research last year tracking outcomes from its Reconnecting the Customer inquiry. ACMA, 2016, *Reconnecting the Customer: Tracking consumer outcomes 2016 update (RTC2)*.

- 6.14 It is appropriate for companies to have discretion in the setting of early termination fees as long as there is disclosure to customers (as is currently required). The method for determining early termination fees may vary from company to company to accommodate different products; plan structures; equipment supplied and the different underlying costs involved in acquiring and supplying the service to a customer. It would not be appropriate for the TCP Code to specify what providers should charge for terminating a contract early or how providers should determine this fee. In addition, as early termination fees are already subject to the Australian Consumer Law, including additional regulation in the TCP Code could cause confusion as to enforcement and expose industry to double jeopardy.

Email portability is unnecessary and unworkable

- 6.15 The ACCC proposes to review email retention options that service providers offer to consumers and determine whether the charges they impose are reflective of the cost of providing an underlying service. The ACCC noted as part of this review that it proposes to consider the costs and benefits of introducing an email portability regime (proposed action 16).
- 6.16 Optus does not support a proposed email portability regime. Optus offers customers a branded email address as a convenient inclusion with a service, but, does not offer an ongoing, standalone email service if a customer cancels their services. A customer is able to retain an email address as long as they maintain one active internet service with Optus. In those circumstances, the customer is then getting the benefit of the active internet service for the fee they pay. If a customer does not wish to retain any active services with Optus, Optus can place a hold on the email address for 90 days, giving the customer ample time to make alternative arrangements, before disconnecting the email address.
- 6.17 An email address portability regime would seem unnecessary when there are a large number of email service provider alternatives, for example, Gmail, iCloud for Apple users, Outlook for Microsoft and Yahoo! Mail, to name a few. Such email addresses are already 'portable' as a consumer can use these independent of whichever telecommunications service provider supplies their internet access service.
- 6.18 Further, it is not clear how an email portability regime would technically work. Company branded emails are usually supported by company-specific infrastructure (such as, company servers). It is unclear how emails to the company-specific email address could be directed and supported in future if the customer's email address was ported away to another service provider. Further, transferring company-specific email addresses to another provider may also raise intellectual property issues as email addresses often use copyright/ trademarked terms.
- 6.19 An email portability regime may also be unworkable in certain enforcement situations if a company branded email address is not within the control of that company. Currently, where a customer with an '@optusnet.com.au' email address engages in sending spam or threatening emails, enforcement and regulatory officials contact Optus to seek assistance in addressing the issue (the same way they may contact Google to assist in addressing issues if an '@gmail.com' email address is being misused). If an Optus email address has been ported away from Optus, Optus no longer supports this email address or knows which provider supports the email address. Optus would be unable to assist officials or even direct them to the appropriate provider. This would hamper officials in their attempts to address such misconduct.

TIO data should be technology specific

- 6.20 The ACCC stated it supports recent amendments to the Telecommunications Industry Ombudsman's (TIO's) terms of reference which empower it to require all relevant parties

in the supply chain (including NBN Co) to cooperate with the TIO in order to resolve consumer complaints. The ACCC further recommends that to improve the operation of the TIO Scheme, that the TIO collect and report on a clear data set of NBN-related complaints and collect NBN complaint data according to technology type (proposed recommendation 18).

- 6.21 TIO data has been used in the past as evidence in support of regulatory / policy initiatives. Optus supports the collection of data that will allow specific identification of issues (for example, where an issue may be technology specific) as any proposed regulatory or policy initiative should be appropriately targeted.

Information provision to consumers

6.22 The ACCC proposes to:

- (a) work with the TIO, the ACMA and other government agencies to improve information provision to consumers, particularly complaints data (proposed action 19);
- (b) address concerns about the performance of broadband services on the NBN through the ACCC's broadband performance and monitoring and reporting program, broadband speed claims guidance and enforcement action in response to practices that contravene the Australian Consumer Law (proposed action 20); and
- (c) review the broadband speed claims guidance in August 2018 to determine whether it has been effective in addressing consumer concerns about broadband speed claims (proposed action 20).

6.23 The ACCC presented a draft finding that service providers are not presenting complete and accurate information to consumers when advertising broadband services. Optus notes that much of the discussion in section 5.4.8 of the ACCC's Draft Report preceding this draft finding relates to issues that are addressed by the ACCC's recently released broadband speed claims guidance. The ACCC's broadband monitoring and reporting program and broadband speed claims guidance establish a framework for improving information provision to consumers in future.

6.24 Optus supports the ACCC's proposal to review the broadband speed claims guidance in 12 months.

Section 7. INTERNET INTERCONNECTION

- 7.1 Optus is concerned that the ACCC has proposed draft findings in relation to internet interconnection without developing an accurate understanding of today's market for internet interconnection and the way in which RSPs connect to other networks to obtain access to the wider content available on the internet. It is this misunderstanding that gives rise to the ACCC's concerns outlined in the Draft Report. A full understanding of how today's internet interconnection arrangements work clearly demonstrates that it is not possible to reach a conclusion that any one RSP has market power (or a group of RSPs have market power) in the provision of access to internet services.
- 7.2 The Draft Report states that to access content hosted on a service provider's network, other services providers must interconnect directly or indirectly with that service provider. The ACCC continues to state the larger the other network the more important it becomes for RSPs to interconnect with that network. The Draft Report states that:
- Due to the number of end-users on [Telstra, TPG, Optus and Verizon] and value of internet content they host, smaller broadband service providers must interconnect (directly or indirectly) with at least one of [these providers] to supply retail broadband services.³⁰*
- 7.3 The ACCC continues to state, "smaller broadband service providers require access to Telstra, TPG, Optus or Verizon networks to achieve full internet connectivity".³¹ As a result of this view, the ACCC states that transit or peering to a larger RSP is "an essential wholesale input in supplying downstream broadband services."³²
- 7.4 These statements are incorrect and mischaracterise how content is accessed. Optus is disappointed that the ACCC is still unclear about how RSPs obtain access to content hosted on the internet. Optus refers to the submissions it made on internet interconnection in its response to the market study issues paper which set out in detail the nature of current domestic internet interconnection arrangements; and the changes that have occurred in internet interconnection since the ACCC's 2003 inquiry.
- 7.5 First and foremost, Optus does not hold market power in the provision of access to internet services as interconnection to the Optus IP network (or any other RSP's network) is not required for any other RSP to provide internet services to their end-users. The ACCC also errs in its assertion that RSPs with large customer bases are also large content hosts. This is demonstrably false. Optus, for example, is one of the largest ISPs, providing internet services to over 10 million fixed and mobile customers. But Optus does not physically host internet content. There is no need for any RSP to interconnect with Optus to obtain access to content hosted on the internet.
- 7.6 This is illustrated by a simple example. A new RSP wishes to obtain access to key content on the internet. This key content includes Google, Amazon, Facebook, Netflix. This is the content to which end-users require access; and which RSPs need to provide access to if they are to sell broadband services in downstream retail markets. The new RSP could obtain direct interconnection with each of these content providers; or it could obtain access to an open internet exchange; or it could seek interconnection with another RSP that has invested in other options. It is a commercial decision of the new RSP how it wishes to obtain access. There is no bottleneck; and there is no requirement

³⁰ ACCC, 2017, Communications Sector Market Study - Draft Report, p.100

³¹ Ibid.

³² Ibid, p.99

to acquire access to any specific RSP (irrespective of the RSP's size) to obtain content. The ACCC makes brief reference to this in the Draft Report, noting that small RSPs do not require access to RSPs to obtain access to internet content;³³ yet the ACCC still maintains that interconnection with Telstra, TPG, Optus or Verizon is required to provide internet services when clearly this is not the case.

- 7.7 As Internet interconnection is not a bottleneck service, there is no bottleneck over which Optus can be regarded as having market power. Optus end-users can obtain content from the internet; content providers can provide content to Optus end-users; and importantly, any other RSP can do the same without access to Optus' network.
- 7.8 Optus is further concerned that the ACCC appears to have had little regard to the prevalence of internet exchanges which offer access to internet networks on an open basis. The Draft Report does mention internet exchanges, but appears to discount this by stating "*while this may provide a large volume of the traffic requirements of smaller broadband service providers, it does not provide access to Telstra, TPG, Optus or Verizon*".³⁴
- 7.9 As previously stated, there is no need for any RSP to interconnect with Optus or any other RSP to "*achieve full internet connectivity*".³⁵ It would seem unnecessary for a small RSP to require interconnection with Optus' network when Optus does not physically host internet content and the small RSP can obtain access to all internet content through interconnection at an internet exchange.
- 7.10 Optus reiterates that the competition concerns expressed by the ACCC in relation to internet interconnection are unfounded. Optus does not have, nor does it have as part of a group, market power in relation to interconnection as:
- (a) Interconnection is not a bottleneck service because there are alternative arrangements available instead of directly accessing an RSP's network; and
 - (b) Optus does not physically host internet content itself and access to the Optus network is not necessary to access internet content.

³³ Ibid, pp.101-2

³⁴ Ibid, p.100

³⁵ Ibid.