



Australian Government

**Department of Broadband, Communications
and the Digital Economy**

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NBN Engagement and Group Coordination Branch
Australian Competition and Consumer Commission
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Dear Mr Home

I am writing to provide some clarification and reinforcement of policy positions underpinning the National Broadband Network (NBN) initiative that may assist the Australian Competition and Consumer Commission (ACCC) in its consideration of the special access undertaking (SAU) of NBN Co Limited (NBN Co).

The NBN is a comprehensive change to the way telecommunications are to be provided in Australia. As the ACCC recognises in its consultation paper, there needs to be a smooth transition from the legacy arrangements to the new NBN arrangements, including in terms of products, pricing and service levels.

DBCDE suggests that, if the end result of the SAU process is merely a replication of all the regulatory intervention opportunities accreted in more than 15 years of managed infrastructure-based competitions then a substantial benefit of structural separation will be lost. The SAU provides the opportunity to encourage commercial solutions rather than regulatory ones. We recommend the ACCC considers closely this overarching objective.

The Government's ability to allocate significant resources to the NBN is based on the project being commercially viable over the long term, including an ability to reliably access the debt market. The SAU supports this commercial viability by including a range of price-related terms and conditions, including the Long Term Revenue Constraint Methodology (LTRCM) that provides NBN Co with the opportunity to recover its investment inclusive of a modest return over the life of the project, while including clear commitments to encourage productivity and innovation via locked-in price reductions over time. The project involves the interests of NBN Co, its access seeker customers and end-users and these need to be appropriately balanced to implement the Government's policy objectives.

Given the size and nature of the investment, a long time horizon for the recovery of the investment is necessary. The proposed 30 year duration of the SAU is commensurate with this and therefore appropriate. Given this, it is also appropriate that key principles be locked in as 'fixed principles', particularly those relating to the LTRCM.

The NBN Co will remain in Government ownership through the roll-out period and for some years after that. This is set in legislation and unlikely to be easily or non-transparently altered. This safeguards the NBN Co's commitment to a publicly-interested management of relationships with access seekers, as far as is practical. The ACCC should note this significant difference with a private dominant network operator.

NBN Co has been directed by the Government to build the NBN in a particular way so as to achieve the Government's policy objectives. These are design and operational parameters that have been set for NBN Co by the Government and are fixed elements in the assessment of the SAU. NBN Co will face incentives to invest prudently outside those provided for in the SAU, but it is also important that the SAU contains, as it does, effective mechanisms that complement the pre-existing incentives to ensure NBN Co incurs costs in a prudent manner.

In the Government's view, industry operates best when negotiated commercial agreements are adhered to. This is reflected in the approach taken to Part XIC of the *Competition and Consumer Act 2010*, including the legislative hierarchy, which gives precedence to Access Agreements. NBN Co's SAU reflects this policy position. It would be of concern if parties were to use the ACCC as a forum-shopping option, pursuing commercial solutions in name, but in reality using the regulator as a tool. The ACCC should give particular consideration to the shift in negotiating strength that has occurred as Telstra moves from one side of the table to the other.

NBN Co's approach means that customers and NBN Co can enter into a new agreement knowing it is for a two-year period. Any new issues that arise in the meantime, if not resolved using processes provided for in the Access Agreement, can be pursued as part of the next cycle. Whether this approach to regulatory recourse should be locked-in beyond the NBN build period is, in our view, a matter best left for consideration after there is experience of the arrangement proposed.

To improve broadband service outcomes for all users, the NBN needs to deliver improved products at prices that are affordable and encourage ready take-up over the life of the project. The proposed initial pricing in the SAU will provide a smooth transition to the NBN, with ongoing pricing being subject to a range of controls. The NBN is also designed to deliver more equitable pricing outcomes for people in regional, rural and remote Australia. As NBN Co has indicated, the SAU in large part is designed to enable it to deliver uniform national wholesale pricing. This objective is specifically recognised in the legislative assessment framework for NBN Co's SAU and should be given weight by the ACCC.

Take-up and use of the NBN also require an appropriate balance between access charges (AVC) and usage charges (CVC). Stakeholders need to recognise that if NBN Co is to recover its costs then any mechanism that forced lower CVC charges would need to be reflected in higher AVC or other charges.

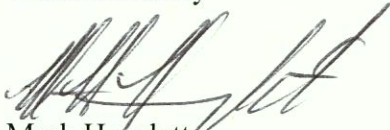
It is clear from market trends in data growth and the limited opportunities for infrastructure suppliers, that the NBN Co approach is oriented sensibly towards sustainability in the future network market. NBN Co's business model provides for real and nominal price reductions as network uptake and usage increase and this can be implemented within the framework of the SAU.

The overall revenue cap provides a long term assurance to access seekers and their end-users that NBN Co's revenues will not exceed its investment and a reasonable return over the life of the SAU. Should the Initial Cost Recovery Account (ICRA) not be extinguished within the SAU period, pricing will be subject to the range of other price controls, and in any case will demonstrably not involve any exploitative market behaviour.

DBCDE recognises non-price terms and conditions play a key role in the supply of services. Our preference is for such matters to be settled through constructive commercial engagement. In this context NBN Co and access seekers have done extensive work, via the Contract Development Process, to prepare the next WBA, in readiness for completion of the SAU assessment process. The SAU sets out the specific drafting of important non-price terms and conditions, with a commitment to including these in NBN Co's SFAAs.

As NBN Co is in the early stages of its network rollout, it is difficult for it to make definitive commitments on service levels at this time. It is also relevant that in the majority of cases it will be connecting premises that already have in place operating copper connections. In these circumstances, a more flexible approach may be warranted, noting NBN Co's clear commitment to review and if necessary alter its service level as the rollout progresses.

Yours sincerely



Mark Heazlett
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Telecommunications
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