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Submission to the Joint Standing Committee on the National Broadband Network inquiry into the business case for the NBN and the experiences of small businesses

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Summary

Commpete—an industry alliance for competition in digital communications markets—welcomes this opportunity to contribute to the Joint Standing Committee on the National Broadband Network’s inquiry into the business case for the NBN and the experiences of small businesses.

Commpete represents non-dominant telecommunication service providers. Our members provide fixed and mobile voice and data services across a range of customer segments, including residential, SME, corporate, and government. Our members acquire access services from a range of wholesale suppliers, including NBN Co.

In short, Commpete submits that:

- NBN Co’s entry into the enterprise market is good for competition and should be supported by the Joint Committee;
- a write-down of the investment in NBN is both necessary and inevitable;
- NBN Co’s wholesale service standards need to be regulated by the Australian Competition and Consumer Commission (ACCC), but that timely implementation of the ACCC’s proposals may require the introduction of some form of legislative obligation on NBN Co.;
- NBN Co should not be combined with the InfraCo entity that is being established by Telstra as long as Telstra retains any equity interest in it.

NBN Co’s entry into enterprise markets is good for competition

Enterprise telecommunications markets have long been dominated by the Tier 1 vertically integrated carriers such as Telstra, Optus and TPG. A telco without its own nationwide network of physical infrastructure had to acquire wholesale connectivity services from those Tier 1 carriers in order to compete head-to-head with them.



In practice this has meant that the services and pricing that a non-infrastructure telco can offer its customers has been constrained by the wholesale products and service capabilities that those Tier 1 carriers are willing to supply to their competitors. A carrier's willingness to supply such wholesale services or to price those services reasonably will tend to vary depending on geography and thus the extent of alternative wholesale network infrastructure. There is also scope of particular end-users/sites to be effectively excluded from wholesale offers. All this has long limited the extent of service-based competition and innovation, especially in regional areas.

NBN Co was established as a structurally separated wholesale-only entity specifically to address such competition problems, which derive from the ability and incentive of a vertically integrated carrier to discriminate against the downstream competitors seeking access to its network. As long as the open access and equivalence principles that govern NBN Co endure, by entering the enterprise markets in the way that it has, NBN Co is not straying beyond its mission, which includes providing for end-users who are unserved in terms of access as well as those who are underserved in terms of choice, quality, price, and innovation.

NBN Co's presence in enterprise markets is thus promoting competition and pro-consumer outcomes in many important ways.

- It is enabling RSPs to access new markets, geographies, and customers. For the first time, a non-infrastructure telco can compete for business customers head-to-head with the Tier 1 carriers on a level-playing field as all NBN RSPs source their wholesale connectivity at the same price. This makes RSPs stronger competitors vis-à-vis the incumbent Tier 1 carriers and expands the product and service provider options available to business customers.
- It is encouraging the Tier 1 carriers to reduce wholesale pricing. These savings are ultimately passed through to retail customers in one form or another. Commpete views the recent announcement to simplify pricing structures and offer new competitive rates such as for Telstra's Ethernet Access standard products as a positive step which will ultimately improve competition and benefit end customers.
- It is substantially reducing the switching-costs for business customers who otherwise face a complex, expensive, and time-consuming process to switch between telecommunications providers. A 'network cutover' is often a 6-12 month proposition involving construction of new infrastructure, parallel running of the old and new systems, and considerable management attention. In contrast, switching between RSPs on the NBN is quick and uncomplicated (achievable in 24 hours). As switching becomes easier, business customers will be more inclined to do so, which will stimulate greater competition among the RSPs wishing to serve their needs.

The Tier 1 carriers are thus openly critical of NBN Co's entry into enterprise markets because it is intensifying competition. The suggested interventions publicly advanced by the Tier 1 carriers are self-serving and potentially anti-competitive. For example, the (market sharing) proposal that NBN Co only build to enterprises that currently have either no fibre at all or direct access to only one fibre connection. Although the risk of anti-competitive cross-subsidy by NBN Co is a



legitimate concern given its lower cost of capital, it is not a new phenomenon in Australian telecommunications markets. Commpete believes the Australian Competition and Consumer Commission (**ACCC**) is able to identify and address any such behavior using its existing powers.

Commpete's support for NBN Co's presence in enterprise markets is not entirely without criticism. Specifically, there are two aspects of NBN Co's conduct that Commpete opposes.

1. NBN Co should not be permitted to contract directly with end-users. Although it is appropriate that NBN Co be able to market directly to business customers, direct contracting is a bridge too far and impedes the ability of RSPs to manage and meet the customers' service expectations.
2. NBN Co should not limit its offer of a premium assurance service only to its Enterprise Ethernet product but instead should allow business customers to acquire—through their RSP—enhanced service levels in respect of any and all NBN broadband services that that customer acquires. Each wholesale product that NBN Co offers under its WBA comes with a Standard Service Level Agreement (**Standard SLA**) specifying the hours of the day when an RSP can raise faults with NBN Co and NBN Co's maximum response and rectification times. Where a business customer is supplied using NBN Co's Enterprise Ethernet product, NBN Co offers a premium option that provides faster rectification of faults and a wider window of time during which those faults can be addressed. However, some business customers want this premium assurance service but do not require an Enterprise Ethernet product as a wholesale input, or they may want the same premium assurance service across all of their NBN services, both Enterprise Ethernet and otherwise.

It is an undue restriction to tie the option to acquire a premium assurance service to the purchase of an Enterprise Ethernet product. Instead, the availability of a premium assurance service option should simply depend on whether or not the end-user is a business customer. A business customer should be able to acquire an enhanced service level on the NBN in respect of all its NBN services, regardless of whether the wholesale input happens to be NBN Co's Enterprise Ethernet product.

These two issues aside, NBN Co's presence in enterprise markets is an overwhelming positive development for competition and customer choice. Indeed, business customers with existing fibre connections to their premises would not be seeking out NBN direct connections if they were satisfied with the status quo or did not value having access to carrier-independent broadband infrastructure. Business customers generally are more concerned about service outcomes than who owns the underlying physical infrastructure. The NBN policy settings must continue to recognise this.

Commpete encourages the Joint Committee to support NBN Co's entry into the enterprise market in the interests of competition.



A write-down of the investment in NBN is necessary and inevitable

Commpete believes it is necessary to confront the hard reality that inefficient investment has been made in the early years of the rollout of the NBN and to respond to the problem that consumers are paying for those decisions.

Credit agency S&P Global Ratings has warned that a write-down is inevitable. If NBN was a private enterprise, it would have recognised these sunk costs and written them off before now. Writing off these costs would allow NBN to recalculate what it needs to recover from RSPs and would ultimately mean consumers stop paying for bad investments and poor political decisions.

The point of the public investment to create the NBN was to drive greater usage of broadband by all Australians, to the benefit of individuals and the economy as a whole. It is urgent that prices are reset to achieve this goal and a write down by the Government is the first step toward this.

Commpete encourages the Joint Committee to recommend a write-down of the NBN investment so as to promote better consumer pricing and utilisation outcomes.

NBN Co's wholesale service standards need to be regulated, possibly by legislation

Commpete supports the recent draft decision by the ACCC to impose a final access determination (**FAD**) to reshape NBN Co's wholesale service standards.¹ Commpete believes that the existing NBN wholesale service standards set out in NBN Co's WBA are inadequate. They do not operate to ensure that NBN Co delivers an acceptable standard of service to end-users and the service level regime in WBA does not provide adequate incentives for NBN Co to meet the performance objectives set out therein. In particular:

- The WBA does not set out comprehensive service standards in relation to all of the key aspects of the performance of NBN Co's service obligations. Commpete considers that the WBA should set out clear and unequivocal service standards in relation to ordering and provisioning, service availability and fault rectification. The service standards that do exist in the WBA are limited and difficult to apply.
- The service levels that do exist in the WBA are extremely limited and do not provide adequate incentives for NBN Co to meet the service standards to which they relate. In addition, the mechanism for the implementation of these service levels is too complex, and does not enable RSPs to provide any real flow on benefits to end-users.
- The structure of the WBA is much too complex and it is difficult to interpret and apply. It is extremely lengthy (700+ pages), dense and complex and is out of step with other wholesale agreements generally used within the telecommunications industry. This complexity, combined with the extremely limited bargaining power of RSPs, makes it difficult for smaller

¹ ACCC, *NBN Wholesale Service Standards Inquiry* (Draft Decision, October 2019).



RSPs to engage with NBN Co in a meaningful way in relation to the WBA. Given the length and complexity of the WBA, effective engagement requires a very substantial commitment of legal and technical resources. However, where an RSP ultimately has limited ability to effectively negotiate, it is difficult to justify the commitment of such resources.

Commpete considers that ongoing supervision by the ACCC of NBN Co's wholesale service standards is necessary and therefore welcomes the ACCC's draft decision to that effect. However, unless NBN Co voluntarily accepts a service standard recommendation from the ACCC and agrees to amend WBA for those RSPs who are already locked in to the terms of that agreement, consideration will need to be given to implementing the ACCC's wholesale service standards by way of a legislative instrument along the lines of the Customer Service Guarantee.

Commpete encourages the Joint Committee to inquire into NBN Co's preparedness to accept and implement the ACCC's proposed decision to establish a FAD with a view to determining whether prompt implementation will require some form of legislative compulsion.

NBN Co should not be combined with InfraCo while Telstra retains an equity interest

Communication markets around the world are characterised by a tension between constantly evolving technologies and incumbent carriers, typically former monopolies protecting legacy businesses. The countries quickest to benefit from broadband technologies, alternative pricing models, higher standards of customer service and newer generations of mobile technologies have typically been those with the most competitive markets. Almost always these have been driven by regulation and policy to create a competitive market structure.

The NBN was created to break an impasse that had hog-tied competition in fixed line communications since competition was first allowed in 1992. That is, the situation where Telstra—the dominant retailer—owned the network infrastructure that every other telco needed to use to reach customers. As the ACCC characterised the problem in 2001, Telstra had both the incentive and the ability to discriminate against competitors seeking to use its network to deliver services in competition to Telstra.

The NBN was specifically designed to never have this incentive. Hence it is not allowed to be a retailer. It is not allowed to be sold to a retailer. And for good measure, it is not allowed to sell to any retailer on better terms than it sells to everyone else. Accordingly, Commpete is concerned about the often floated idea that NBN may be sold to or integrated into Telstra's InfraCo division.

Commpete encourages the Joint Committee to recommend against any future combination or integration of NBN with InfraCo while Telstra retains an equity interest in InfraCo.

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