

Regulatory and Pricing Issues

Introduction

- 3.1 The first and second reviews included examination and discussion of key regulatory matters affecting and enabling the rollout of the National Broadband Network (NBN). Matters reviewed included the: Binding Definitive Agreements between Telstra Corporation (Telstra) and Optus, the NBN Co Special Access Undertaking (SAU) and Wholesale Broadband Agreement (WBA).
- 3.2 This chapter provides an update on the regulatory components enabling the NBN rollout as outlined above. In addition, e-readiness of small business is briefly discussed.
- 3.3 The Shareholder Ministers' Performance Report (the performance report) includes an update on the status of regulatory matters pertaining to the NBN rollout for the period ended on 31 December 2011. The Performance Report also includes an update of these matters for the period from 1 January to 31 March 2012. Where relevant the updated information has been included in this chapter.

Binding Definitive Agreements with Telstra and Optus

Telstra Agreement

- 3.4 In addition to including interim arrangements for immediate access to Telstra infrastructure, the Binding Definitive Agreement between NBN Co

and Telstra (the Telstra Agreement) assists the NBN rollout in two other main ways. These are, it assists to:

- Avoid infrastructure duplication and ensure the efficient fibre network rollout, it grants NBN Co access to Telstra facilities and infrastructure over a minimum period of 35 years.
- Provide for the progressive disconnection of Telstra's copper and Hybrid Fibre Coaxial (HFC) customers (excluding HFC pay television customers), and NBN Co will be Telstra's preferred fixed line network.¹

- 3.5 To take effect, the Telstra Agreement² was required to satisfy nine conditions precedent (CP). These CP included: Telstra shareholder approval, and the Australian Competition and Consumer Commission (ACCC) acceptance of the Telstra Structural Separation Undertaking (SSU) and an accompanying final Migration Plan.
- 3.6 The Telstra Agreement received shareholder approval on 18 October 2011. Under the *Telecommunications Act 1997* (Cth), the ACCC was tasked with consideration of Telstra's draft Migration Plan. Given its significance in facilitating structural reform in the Telecommunications Sector, although not required, the ACCC also reviewed Telstra's SSU.
- 3.7 The ACCC consideration and approval of the SSU and accompanying (customer) migration plan was the final CP remaining to be satisfied before the Telstra Agreement could come into force.
- 3.8 To meet the terms of the Telstra Agreement, ACCC consideration of the SSU and draft Migration Plan would have to be completed before 20 December 2011 or otherwise extended by agreement.
- 3.9 As the ACCC consideration of the Telstra SSU was delayed beyond 20 December 2011, the terms of the Telstra Agreement were extended until 30 March 2012 by agreement with the respective parties.³

1 Joint Committee on the National Broadband Network (JCNBN), November 2011, *Review of the Rollout of the National Broadband Network: Second Report*, Parliament of the Commonwealth of Australia, p. 37.

2 The Telstra Agreement was negotiated between the Government, NBN Co Limited (NBN Co) and Telstra over a two year period. Under the NBN Co Corporate Plan, the Telstra Agreement was expected to be completed and approved by the Australian Competition and Consumer Commission by 30 June 2011.

3 Shareholder Ministers, 'Performance Report to 31 December 2011' *Submission 12*, p. 6.

Telstra's Structural Separation Undertaking and Draft Migration Plan

- 3.10 Telstra's SSU was lodged with the ACCC on 29 July 2011. On 30 August 2011, the ACCC issued a discussion paper and sought industry comment.
- 3.11 In addition to outlining the terms of the SSU and draft migration plan, the discussion paper highlighted concerns about the SSU which centred on interim equivalence and transparency measures, both of which were required under legislation.
- 3.12 On release of the discussion paper, Telstra 'engaged in constructive discussions with the ACCC and industry', to resolve ACCC concerns in regard to the Agreement.
- 3.13 The timeframe for the completion of the Agreement was made by the respective parties before the expiry date. Telstra lodged a revised SSU with the ACCC on 9 December 2011. The revised SSU included 'substantially improved interim equivalence and transparency commitments intended to address ACCC and industry concerns.'
- 3.14 The ACCC released a discussion paper on the revised SSU and sought industry comment by 13 January 2012.
- 3.15 Following industry consultation, on 28 February 2012, the Prime Minister and the Minister for Broadband, Communications and the Digital Economy announced that the ACCC had approved the Telstra SSU.
- 3.16 Approval of the Telstra SSU would enable the NBN Co to use existing Telstra infrastructure and migrate Telstra customers onto the NBN, thereby reducing the costs and time taken to rollout the NBN.
- 3.17 The structural separation of Telstra would also require Telstra to change its corporate structure. This would have the effect of reducing the market power of Telstra and together with the construction of the NBN deliver microeconomic reform to the Australian telecommunications industry.
- 3.18 The aim of the Government's reform to the telecommunications sector is to deliver greater competition for industry. Through improvements in economic efficiency, sector reform would deliver better outcomes for the end consumer in regard to price and service of telecommunication products than previously available under Telstra.⁴

4 Gillard J (Prime Minister) and Conroy S (Minister for Broadband, Communications and the Digital Economy), 2012, *ACCC final approval of structural separation of Telstra*, joint media release, 28 February.

- 3.19 Under the Financial Heads of Agreement and the Telstra Agreement, (between Telstra and the NBN Co), in the longer term, Telstra's copper and HFC networks will be progressively decommissioned and customers migrated to the NBN, with the NBN Co the wholesale provider of services over the NBN.

Timeframe for Completion

- 3.20 The NBN rollout targets in the NBN Co 2011-2013 Corporate Plan are based on the assumption that negotiations and regulatory processes relating to the Telstra Agreement would be completed by the end of June 2011.⁵
- 3.21 The Telstra Agreement came into force on 7 March 2012, just over eight months after the expected date.
- 3.22 In response to the committee's recommendation to publish a detailed account of the impacts on timing and cost of the NBN, as a result of the time taken to complete the Telstra and Optus Agreements⁶, the Government stated:

While the agreement with Telstra was extremely complex and took longer than first anticipated, the government is confident that these agreements will protect the interests of Australian taxpayers and support the NBN rollout by providing access to existing infrastructure, minimising overhead cabling and reducing the overall costs of the NBN. Further, NBN Co will proactively manage the construction timetable over the life of the project to minimise and overcome any delays.⁷

NBN Rollout Progress since Telstra Agreement Approval

- 3.23 Since the Telstra Agreement 'became unconditional and commenced', the following milestones in support of the NBN rollout have occurred:

5 NBN Co, *Corporate Plan 2011-2013*, December 2010, p. 19.

6 Australian Government, February 2012, *Response to the Joint Committee on the National Broadband Network First Report on 31 August 2011*, p. 7.

7 Recommendation 3 of the First Report also included the Australian Competition and Consumer Commission (ACCC) decision to increase the points of interconnect from 14 to 121. Australian Government, February 2012, *Response to the Joint Committee on the National Broadband Network First Report on 31 August 2011*.

- 'Delivery of the transit schedule in line with the initial roll out plan, with 26 Fibre Access Nodes... and aggregation node sites handed over from Telstra as of 31 December 2011.
- Development of processes, systems and methodology to implement the Telstra Definitive Agreements.
- Completion of [operation] and maintenance manuals and technical specifications for each infrastructure type under the Infrastructure Services Agreement with Telstra.
- The required joint governance committees, and associated forums, meet at least once per month.
- Significant work has been undertaken on end-to-end processes for the deployment.'⁸

Optus Agreement

- 3.24 The \$800 million Binding Definitive Agreement between the NBN Co and Singtel Optus (the Optus Agreement) was not included under the NBN Co 2011-2013 Corporate Plan.
- 3.25 The Optus Agreement, like the Telstra Agreement, requires the decommissioning of the Optus HFC network and migration of its customers to the NBN in line with the pace of the NBN rollout.
- 3.26 During the second review, Optus advised that it would retain only that component of its fibre network used for its mobile backhaul and other corporate customers.⁹
- 3.27 Also at the time of the second review, finalisation of the Optus Agreement was dependent on ACCC approval and confirmation of tax treatments.
- 3.28 The Shareholder Ministers provided an update on matters being progressed as part of the Optus Agreement. The following key matters were progressed over the review period were:
- 'ACCC Approval (condition precedent): The application to the ACCC for authorisations for the implementation of the Optus HFC Subscriber Agreement.

8 Shareholder Ministers, 'Performance Report to 31 December 2011' *Submission 12*, p. 6.

9 JCNBN, November 2011, *Review of the Rollout of the National Broadband Network: Second Report*, Parliament of the Commonwealth of Australia, p. 46.

- Implementation Plan: On the 17 November 2011, NBN Co and Optus agreed the Optus HFC Subscriber Agreement Implementation Plan.¹⁰
- 3.29 The ACCC commented that consideration of the Optus Agreement was one of two major pieces of regulatory work relating to the NBN, yet to be completed. The ACCC stated that it was in a position to finalise its consideration of the Optus Agreement in the specified period.¹¹
- 3.30 On 28 May 2012, the ACCC 'issued a draft determination proposing to grant authorisation' for the Optus Agreement.¹²
- 3.31 The ACCC outlined the main public benefits of the Optus Agreement. The ACCC stated the Optus Agreement will:
- 'Avoid the cost of operating the Optus HFC network to provide a service the NBN is also able to provide; and
 - Deliver a lower cost HFC subscriber migration to the NBN.'¹³
- 3.32 In making its determination, the ACCC took into consideration 'a number of unique factors' serving to reduce the competition and performance detriments which it also outlined.¹⁴
- 3.33 The ACCC stated these unique factors are:
- The Optus HFC footprint is unlikely to be extended beyond its current 1.4 million homes, so its subscriber base is unlikely to also grow beyond 400 000 broadband subscribers.
 - Optus is unlikely to provide the same large investment to enable its subscribers a faster broadband product through its HFC network than is currently available. 'The Optus HFC network will, therefore, only provide a close substitute to the NBN for customers seeking broadband services that will be at the lower end of the range of services that the NBN will support'.

10 Shareholder Ministers, 'Performance Report to 31 December 2011' *Submission 12*, p. 6.

11 Mr Ed Willett, Commissioner and Chair, Communications Committee, Australian Competition and Consumer Commission (ACCC), Transcript of Evidence, Sydney, 16 April 2012, p. 68

12 Under the *Competition and Consumer Act 2010* (Cth), before making a final determination, the ACCC must 'prepare a draft determination in relation to an application for authorisation. The purpose of this draft determination is to test the ACCC's views with the applicant and interested parties.' ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May.

13 ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May.

14 ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May 2012.

- 'Over time, HFC customers demanding higher speed services are likely to be migrated by Optus to the NBN. There are a range of views on how quickly Optus' current HFC customers will want such higher speeds. While the ACCC did not form a view on the future need for high speed broadband, it did accept that the Optus HFC network would be uneconomic to operate once a critical mass of customers were lost.'¹⁵

3.34 Further, the ACCC stated:

...the HFC Agreement removes a potentially significant fixed line competitor to the NBN in Brisbane, Sydney and Melbourne. Competitive pressure from the Optus HFC network may have resulted in positive outcomes notably prompting NBN Co to improve its performance.¹⁶

3.35 However, the ACCC also commented that:

...the regulatory approach which will ultimately apply to the NBN is intended to provide strong incentives for NBN Co to promote utilisation of the NBN and to be responsive to customer needs concerning speeds and other aspects of service quality.¹⁷

Future Use of Remaining Copper Network

3.36 For both Telstra and Optus, the question of the possible use of any existing infrastructure network arose throughout the Second and Third reviews.

3.37 As part of the second review, Optus stated that as part of its agreement with the NBN Co, that it had 'effectively made a sale of ... [its]...HFC network and capacity to NBN Co and agreed a migration strategy across to NBN Co.'¹⁸

3.38 Alternatively, Telstra still owns a proportion of the existing copper network (copper access network) which has not been included under the Telstra Agreement and so will not be decommissioned. This network has

15 ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May.

16 ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May.

17 ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May.

18 JCNBN, November 2011, *Review of the Rollout of the National Broadband Network: Second Report*, Parliament of the Commonwealth of Australia, p. 46.

been valued at between \$20 and \$33 billion.¹⁹ Telstra would not confirm the value of its copper network and stated 'we do not disclose ... the valuation of our copper network.'²⁰

- 3.39 Telstra also commented that in the interest of its shareholders and a possible change in Government policy that it would again be prepared to negotiate for the sale of its existing copper network in the future. Telstra stated:

Telstra has shown in the last couple of years that it is able to deal with the government policy of the day and negotiate in a way that I think helps the government get its objectives while protecting shareholders, customers and employees' interests. If there is a change in policy... we would do exactly the same thing. We would sit down and seek to negotiate in a way that protected shareholder, employee and customer interest but also allowed the government to achieve the policy objectives that it specifies.²¹

Other

- 3.40 The Australian Communications Consumer Action Network (ACCAN) was concerned about the initial NBN-based Telstra offers, where consumers will keep a copper line for telephone services and also receive internet services through a fibre network. The ACCAN stated that this arrangement would have a cost implication and create an inconvenience for consumers. The ACCAN stated:

This on the whole is likely to inflate the price of a service because consumers would continue to pay a line rental fee to Telstra, when both phone and internet services could potentially be operating through the NBN box. It also means customers who take up these offers will have the inconvenience of doing a 'switch-over' twice – once when the NBN box is installed for their internet, and again at a later date when they need to connect their phones to the NBN box.²²

19 Conroy, S (Minister for Broadband, Communications and the Digital Economy), 2012, *Turnbull adds lazy billions to Abbott's budget woes*, media release, 28 February.

20 Dr Tony Warren, Group Managing Director, Corporate Affairs, Telstra Corporation (Telstra), Transcript of Evidence, Sydney, 16 April 2012, p. 38.

21 Dr Warren, Telstra, Transcript of Evidence, Sydney, 16 April 2012, p. 39.

22 Australian Communications Consumer Action Network (ACCAN), *Submission 11*, p. 4.

NBN Co's Special Access Undertaking

Update

- 3.41 Following a two-year industry engagement process, the NBN Co's SAU was lodged with the ACCC for review²³ on 5 December 2011.
- 3.42 The SAU covers the 30-year period of the NBN Co Corporate Plan (2040) with a mid-term review.²⁴
- 3.43 Under the SAU, wholesale prices for key products would be fixed for a five year period ending on 30 June 2017. Price increases after this timeframe would be less than inflation 'to ensure real wholesale price reductions over time.'²⁵
- 3.44 On 19 and 20 December 2011, and 17 January and 3 March 2012, the NBN Co provided supporting documentation to its SAU, (outlining the context and rationale for commitments made in the SAU) to the ACCC. This included: 'Advice on NBN Co Ltd's Special Access Undertaking' by Synergies Economic Consulting and Analysis Mason's Review of the Efficiency and prudence of NBN Co's fibre and wireless network design.
- 3.45 In its Second Report, the committee urged the NBN Co to lodge its SAU²⁶ with the ACCC for consideration without further delay. The committee also suggested that retail service providers (RSPs) not be asked to sign a WBA²⁷ until the SAU is lodged with the ACCC. The impetus of this suggestion was to provide a level of certainty for RSPs for various conditions provided under each WBA,²⁸ especially price and recourse to the ACCC.

23 The ACCC is required to undertake a public consultation process as part of its review of the NBN Co Special Access Undertaking (SAU). NBN Co, *Special Access Undertaking Overview Paper*, 5 December 2011, p. 1.

24 NBN Co, *Special Access Undertaking Overview Paper*, 5 December 2011, p. 3.

25 NBN Co, 2011, *Bringing Broadband to Life*, media release, 5 December; NBN Co, 2012, *Special Access Undertaking*, media release, 17 January.

26 The SAU includes the 'key price and product aspects of access to NBN Co's fibre, wireless and satellite networks' as well as a number of 'non-price terms and conditions.' NBN Co, *Corporate Plan 2011-2013*, p. 106.

27 The Wholesale Broadband Agreement (WBA) outlines the contractual arrangements relating to NBN commercial service delivery by Retail Service Providers in line with broad provisions contained in the SAU. The SAU also 'contains commitments in relation to changes to the WBA over time.' NBN Co, *Special Access Undertaking Overview Paper*, 5 December 2011, p. 5

28 The original term of the WBA was for a period of five years.

- 3.46 While the NBN Co is not required to submit an SAU to the ACCC, the ACCC stated that it is in the NBN Co's interest to do so. The ACCC explained:

... we have a legislative scheme that sets precedents in order of conditions and terms of access first of all being set by commercial agreement, secondly under an SAU, as you described, and thirdly under determinations that we make or binding rules of conduct that we make. So I think it is in NBN Co's interest. We certainly see some advantages in them settling with us an undertaking to set at least a framework of terms and conditions for the provision of their services. That would not necessarily rule out determinations on matters that are not covered under that SAU in future but, for the terms and conditions that are actually covered by that SAU, the SAU would determine how those terms and conditions are provided.²⁹

Recourse to the Australian Competition and Consumer Commission

- 3.47 At the time of the second review, concerns were raised about ACCC recourse to capture pricing terms and conditions under the SAU and its 30-year length.

Special Access Undertaking Terms and Conditions

- 3.48 As part of the Third Review, Vodafone Hutchison Australia (Vodafone) raised concerns about when the ACCC may be able to intervene if there is disagreement between industry and the NBN Co. Vodafone stated:

It is very important that ACCC plays a key role when industry and NBN have a disagreement about what the appropriate arrangements should be. At the moment that is still a work in progress. There are some ambiguities about when and how the ACCC can play a role. We understand NBN's point that there should be some certainty about the way the ACCC plays a role but when there are disagreements, when the industry has new sets of needs and the NBN disagrees with the way that industry wants to take things, then the ACCC with its pro-competition focus should play a role in overseeing and making, in some cases, the final call about what is the appropriate commercial arrangement. That again is a work in progress. We are engaging with NBN about that. They have set up quite an extensive consultation program

29 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 68.

over the next six months about the terms and conditions of supply.³⁰

- 3.49 In regard to the SAU component of the ACCC's role in monitoring NBN Co prices, the ACCC stated that it was in negotiation with the NBN Co to ensure there is sufficient regulatory oversight of key products. Following this negotiation, the ACCC would then consult with industry on the agreed terms of the SAU. The ACCC stated:

This is one area that I think is the subject of quite deep and intensive discussions with NBN Co. The broad framework that we are looking to apply is one where there is sufficient regulatory oversight of key products that NBN Co is disciplined by that regulation to provide all its services on reasonable terms and conditions. We think there is some work to do on the current undertaking to get to that position, but we will need to pursue those discussions first and then engage in some industry consultation on whether what we are proposing or what NBN Co is proposing is sufficient to achieve that.³¹

30-year Term of Special Access Undertaking

- 3.50 Although consideration of the SAU is still underway, the ACCC commented that recourse to the commission would not be prevented under the 30-year term of the SAU. The ACCC stated:

...the very nature of trying to set in place arrangements that will extend over a 30-year period proposes its own challenges; there is no doubt about that. It is not an easy thing to do. At this stage we are leaving open the possibility that the things that are set in place for 30 years might be broad and sweeping in terms of principles rather than actual specific terms and that, within that framework, terms and conditions can be set or revisited on a more regular basis.³²

- 3.51 The ACCC also commented that the 30 year lifespan of the SAU is not unusual. The ACCC explained:

This proposal has a long duration, but can I say at the outset that it is not usual for a greenfields start-up service provider to submit undertakings of this kind. I think this is probably the first one the

30 Mr Matthew Lobb, General Manager, Industry, Strategy and Public Policy, Vodafone Hutchison Australia (Vodafone), Transcript of Evidence, Sydney, 16 April 2012, p. 10.

31 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 70.

32 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 68.

commission has had to deal with, although we have in the past considered the possibility of greenfields applications being made by gas pipelines under the gas pipeline code. We have actually issued a greenfields gas pipeline code guideline for that eventuality. Rather than compare the approach that is being taken here with our usual course of business with access determinations or access undertakings or the like – and the usual course of business is an incumbent service provider with an established network that seeks or is obliged under the various legislation to submit to us terms and conditions for approval on how they will provide services – here we have a business who is seeking to invest in a new network and to set those terms and conditions before that network is complete. I think the relevant comparison would be with the sorts of approaches envisaged in our greenfields gas pipeline guideline, for example, which does envisage the sorts of approaches that are being adopted here – in other words, a long-term, at least, framework undertaking with perhaps more regular consideration of some aspects of those terms and conditions and seeking to establish upfront ways in which efficient costs for the provision of service will be established and how prices will be set.³³

- 3.52 On the possibility of the SAU not receiving ACCC approval and what options would be available to the NBN Co if this occurred, the ACCC stated:

It is hard to say exactly what the commercial implications for NBN Co. would be. That would be a question for them, I think. But there would be some choices for NBN Co. at that point. They could resubmit their undertaking, seeking to address whatever concerns we expressed about their existing draft. Otherwise it would be likely, I think, that the commission would move to implement an access determination inquiry and as part of that process set interim terms and conditions through binding rules of conduct.³⁴

33 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 69.

34 Shareholder Ministers, 'Performance Report to 31 December 2011', *Submission 12*, p. 8.

Wholesale Broadband Agreement

Term of Wholesale Broadband Agreement

- 3.53 The NBN Co's WBA is a contract between it and RSPs which sets out the 'terms and conditions, for the delivery of commercial services over the NBN fibre network.'³⁵
- 3.54 In response to industry concerns surrounding regulatory uncertainty in the absence of a SAU, the NBN Co announced that its interim WBA would change from a five-year to a 12-month term.³⁶ The ACCC commented:
- That was done at our instigation because there were concerns in the market that retailers might be in a position to, or be obliged to, enter into longer term agreements with NBN Co prior to regulatory settings being fully established – in particular, through setting of the SAU. So we expressed our concern to NBN Co. They agreed – as an interim measure, until we have time to go through the SAU processes – to offer 12-month services. That provides retailers with the opportunity to renegotiate those contracts after regulatory settings are established.³⁷
- 3.55 In addition, the ACCC stated that the 12-month term of the WBA enables:
- ... retailers to enter into those agreements, knowing that, if there is a change or adoption of regulatory settings that might cause them to rethink whether that deal is the deal they want to be in with NBN Co, they have the opportunity to renegotiate that agreement.³⁸
- 3.56 Following several rounds of industry consultation over a 12-month period, NBN Co released the final version of its WBA on 30 November 2011.³⁹
- 3.57 As at 16 April 2012, 40 RSPs had signed a WBA with the NBN Co.⁴⁰

35 NBN Co, 2011, *Wholesale Broadband Agreement*, media release, 30 November.

36 NBN Co, 2011, *Wholesale Broadband Agreement*, media release, 30 November.

37 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 70.

38 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 70.

39 NBN Co, 2011, *Wholesale Broadband Agreement*, media release, 30 November.

40 Mr Mike Quigley, Chief Executive Officer, NBN Co, Transcript of Evidence, Sydney, 16 April 2012, p. 45.

Bundling and Pricing of Services

- 3.58 The NBN Co outlined a number of the NBN pricing plans that have been released by RSPs and stated:

Since the commercial launch of NBN Co's first product, a range of retail products and pricing options have been released by retail service providers (RSPs) for example including from \$29.95 per month (with Skymesh) for an entry level service of 12/1 Mbps and \$45.00 per month (with Exetel) for a 100/40 Mbps service. RSPs are also delivering quality telephony over the network across both the data and voice ports. As at 31 December 2011, 125 customers are using existing handsets to make calls over the NBN Co voice ports.⁴¹

- 3.59 Vodafone stated that the current pricing of service bundles was comparable to the pricing for digital subscriber line (DSL) and that there was innovation in the types of services being offered. Vodafone stated:

...you are seeing comparable pricing to their DSL type pricing. You are also seeing innovation in the types of services they are offering. They are offering different types of bundles of services – voice, data, pay TV – and I think it is the bundling that is the innovation that NBN brings. At the moment, they are focusing on the 12-megabit service and 25-megabit services – those are the services that consumers are buying. I think that, on the whole, the pricing there is appropriate. The bundling is where you are seeing price innovation and you are not seeing increases in pricing for the standard services.⁴²

- 3.60 The ACCC commented that bundling of services by RSPs benefitted the customer and was the current industry trend. The ACCC stated:

We think the industry is probably heading towards retailers offering a sort of 'everything you need in communications' bundle. And that bundle might include not only fixed line voice services and broadband; it might also include pay television services, IPTV services and perhaps mobile services as well. The industry is already heading in that direction. From a consumer point of view, you can see some advantages in just dealing with one retailer for all those services. The NBN is likely, in our view, to boost that sort

41 Shareholder Ministers, 'Performance Report to 31 December 2011', *Submission 12*, p. 8.

42 Mr Matthew Lobb, Vodafone, Transcript of Evidence, 16 April 2012, p. 11.

of trend. I think we are likely to see expanding bundles of services being offered by retailers.⁴³

- 3.61 In regard to regulatory issues associated with bundling of services by RSPs the ACCC stated:

... the commission is well and truly on record expressing some concerns about the availability of key content that might form an essential element of those bundles and what the implications of that is for competition in those services. ...If you are going to have competition between retailers providing bundles, you want to make sure that all aspects of the bundles are at least competitively available and, if there are opportunities for some service providers to lock up key content, like sporting content, then that might limit competition. We have expressed some concerns about that. We are certainly monitoring that issue very closely. Otherwise, we think retail services are likely to be competitive and regulatory issues are likely to be fairly limited at the retail level.⁴⁴

Consumer Protection

- 3.62 The ACCAN advocated for the inclusion of items under the Customer Service Guarantee (CSG) to continue in the NBN environment. This would required the legislated consumer protection arrangements such as the maximum timeframes for new [telephone] connections and fault reports which are currently included under the CSG to be included in the WBA.⁴⁵
- 3.63 The ACCAN stated that inclusion of the CSG was important as it provided that 'consumers can receive compensation if there is a failure to meet CSG timeframes.⁴⁶ The ACCAN stated:

The CSG obligations on telco retailers may therefore need to be an element in, for example, NBN Co's wholesale broadband agreements with telcos. ACCAN believes that some form of appropriate service guarantee from NBN Co as wholesaler is needed to allow the CSG to remain a viable consumer protection measure. If such guarantees are not available to retailers, there exists a risk that retail service providers will have no choice but to seek exemptions from the CSG regulatory obligations.⁴⁷

43 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 69.

44 Mr Willett, ACCC, Transcript of Evidence, Sydney, 16 April 2012, p. 70.

45 ACCAN, *Submission 11*, p. 3.

46 ACCAN, *Submission 11*, p. 3.

47 ACCAN, *Submission 11*, p. 3.

Additional Matters

Small Business e-Readiness

3.64 In the recent Australian Industry Group (AIG) National CEO Survey: Business Investment in New Technologies⁴⁸, it was concluded:

- 'Ubiquitous broadband promises important opportunities for Australian businesses to build competitive advantages.
- Australian businesses recognise the benefits of online technologies, with a near unanimous view amongst businesses surveyed that the internet has had a positive impact on productivity level⁴⁹ (especially for financial activities, data exchange and placing and receiving orders).⁵⁰
- However, individual business awareness of, and preparedness for, faster broadband varies considerably.
- In particular, [small and medium enterprises (SMEs)] report lower levels of information about the benefits of faster broadband compared with larger businesses. SMEs also tend to have less confidence that they have the skills /capabilities to take advantage of a new broadband network.'⁵¹

3.65 The AIG stated that as a consequence of these findings, to enable communities to take advantage of the opportunities offered by faster broadband 'initiatives to improve the e-readiness of business must accompanying the rollout of infrastructure.'⁵²

3.66 In a similar vein, the Australian Retailers Association (ARA) stated that as most online growth can be attributed to SMEs, increasingly SMEs are looking to the Government for information on ways to take advantage of what the NBN may offer. The ARA stated:

As we have seen, with a lot of the information technology changes coming in at an even greater pace in recent years, it has become very clear that the retail sector, and retail where it touches on tourism and hospitality, has been significantly impacted by those changes. We can see that in many of the trade figures – within the

48 The Australian Industry Group (AIG) National CEO Survey 'examined the level and nature of business investment in new technologies over the last three years. It also looked at how businesses are placed to take advantage of a national broadband network and online technologies.' AIG, *Submission 9*, p. 2.

49 AIG, *Submission 9*, p. 2.

50 AIG, *Submission 9*, p. 2.

51 AIG, *Submission 9*, p. 1.

52 AIG, *Submission 9*, p. 1.

ABS figures, as accurate as they are – with the massive growth in the unidentified sector of retail, which holds a number of elements including gaming and the like, but most of that growth, anecdotally and from what evidence we have been able to pool, has been coming through the online sector. Having said that, retailers and our association do not believe that online competition is a threat. It is something that should be embraced and we look forward to working closely with government at state, local and national levels to embrace new technologies and better education to inform our retail members and non-retail members on how to utilise things like the National Broadband Network as they reach out across the country.⁵³

- 3.67 The ARA commented that the NBN would be especially useful for SMEs located in regional and remote areas, but that many small business operators lack the knowledge to establish an online presence. The ARA further stated that to remedy this situation, it had been in discussion with major information technology (IT) companies and state governments about putting place programs to educate and assist rural and remote SMEs. The ARA explained:

We are working with some of the major IT companies in programs such as Driving Business Online – eBay is a member of ours and is working quite closely with us on trying to encourage retailers to use its e-commerce platform. We have also been talking to Australia Post, I have had a brief conversation with Google and with some of the other major technology companies as well as with major state governments. In fact, we have a pilot program being rolled out in regional Victoria under Victoria's Regional Growth Fund to help educate SMEs to get online. I think that program will get underway in Ballarat. In New South Wales the government has approached us to assist in education, starting out in regional New South Wales. I have spoken to a large proportion of the current government's ministry on how the government can assist as part of the NBN rollout. We have put in a couple of submissions on plans on how to do that.⁵⁴

- 3.68 The ARA stated that as there had been rapid growth of businesses with an online presence, there were no accurate statistics on identifying the amount of retail sales generated. The ARA explained:

53 Mr Heath Michael, Director, Policy, Australian Retailers Association (ARA), Transcript of Evidence, Sydney, 16 April 2012, p. 27.

54 Mr Michael, ARA, Transcript of Evidence, Sydney, 16 April 2012, pp 27-28.

There are no accurate statistics. I think the best stats you will find were in the Productivity Commission report late last year. The problem is that each report you read has a different figure. It can be anything from five to 20 per cent. It depends what is counted. Is it your Qantas ticket sales; is it your hotel sales? All of that can be counted in some of the evidence. The ABS, after the recent PC report, has been told to look at better reporting systems for collection. ... We are missing accurate statistics in this area [and] ...it is the rapid growth that has caused it.⁵⁵

3.69 The ARA further commented that there three main inhibitors for SMEs embracing an online platform. These were identified as the:

- high cost in setting up a business to have an online presence
- limited internal knowledge in how to set up and maintain an online presence
- time investment involved in arranging or creating an online presence.⁵⁶

3.70 The AIG also highlighted that 50 per cent of SMEs it had surveyed had a low perception of their ability to take advantage of the NBN. The AIG found:

Small businesses had the least confidence in their ability to take advantage of a new broadband network. Just under 50% of small businesses surveyed rated their business readiness for a new broadband network as low – none, while the figure was closer to 40% for both medium and large businesses. The most common strategies that businesses are considering to prepare for a national broadband network are training existing staff (80%) and employing new staff (25%).⁵⁷

3.71 To improve SMEs preparedness for and ability to take advantage of the NBN, the AIG identified the following policy options:

- 'Improving the dissemination of information about new technologies;
- Government programs to boost understanding of SMEs of the opportunities provided by a national broadband network;
- Developing better industry-driven mechanisms for collaboration between publicly funded research organisations and businesses; and

55 Mr Michael, ARA, Transcript of Evidence, Sydney, 16 April 2012, p. 29.

56 Mr Michael, ARA, Transcript of Evidence, Sydney, 16 April 2012, p. 29.

57 AIG, *Submission 9*, p. 3.

- Improving the competitiveness of tax arrangements by lowering the company tax rate or through more targeted measures.⁵⁸
- 3.72 In its response to the First Report⁵⁹, the Government stated that SMEs would greatly benefit from the NBN by enabling them to better compete where previously geographically impractical. Further, increased on line business competition would likely 'deliver lower prices and other benefits to consumers' while improving operational efficiency for SMEs with an online presence.⁶⁰
- 3.73 The Government also commented that the NBN will enable SMEs to expand into new export markets and 'promote greater remote collaboration between businesses.'⁶¹
- 3.74 In support of Australian Businesses, the Government announced the Digital Enterprise Program (DEP). The DEP is intended to:
- ... enable more Australian businesses and not-for-profit organisations in communities which will first benefit from the NBN, particularly those located in non-metropolitan areas, to leverage the benefits of broadband-empowered online engagement. This initiative will assist these organisations to achieve cost savings, productivity enhancements and improved marketing through greater online engagement.⁶²

Concluding Comments

Telstra Agreement

- 3.75 The committee understands that the Telstra Agreement was finalised and came into force on 7 March 2012. This represents a period of just over eight months longer to finalise the Telstra Agreement than envisaged in the NBN Co 2011-2013 Corporate Plan.

58 *AIG, Submission 9*, pp 3-4.

59 The Government's response to the JCNBN First Report included information on SMEs as part of its response to the committee's recommendation 4.

60 Australian Government, February 2012, *Response to the Joint Committee on the National Broadband Network First Report on 31 August 2011*, p. 13.

61 Australian Government, February 2012, *Response to the Joint Committee on the National Broadband Network First Report on 31 August 2011*, p. 13.

62 Australian Government, February 2012, *Response to the Joint Committee on the National Broadband Network First Report on 31 August 2011*, pp 13-14.

- 3.76 The committee also notes the NBN Co's comment that the NBN rollout was dependent on a number of key assumptions, one of which was the finalisation of the Telstra Agreement by 30 June 2011.
- 3.77 Taking into consideration the expected timeframe for finalising the Telstra Agreement, this would mean that the NBN rollout has been delayed at least eight months.

Telstra's Remaining Copper Network

- 3.78 The committee notes Telstra's comments that it is prepared to negotiate, if the situation arises, for the sale of its remaining copper network. Given that the Government will pay \$11 billion to Telstra for the decommissioning of the copper network and migration of customers, Telstra may receive an additional payment for any future sale of its copper network.

Optus Agreement

- 3.79 The committee understands the \$800 million Optus Agreement was not originally planned for under the NBN Co 2011-2013 Corporate Plan. The Optus Agreement allows for the existing Optus HFC network to be subsumed with its customers required to be migrated to the NBN.
- 3.80 The committee acknowledges the factors affecting the ACCC's draft determination and notes the possible resulting negative impact on competition. The committee also notes the ACCC comment in relation to the regulatory framework underpinning the NBN which should 'provide strong incentives for NBN Co to promote utilisation of the NBN and to be responsive to customer needs'.⁶³

NBN Co's Special Access Undertaking

- 3.81 The committee has received evidence that the 30-year term of the SAU will not inhibit recourse to the ACCC for the monitoring and adjustment of prices over that period.
- 3.82 The committee understands and accepts the comments made by the ACCC that the 30 year term of the SAU is made in the interest of the NBN Co. Further, the 30-year SAU sets in place broad sweeping terms of

63 Under the *Competition and Consumer Act 2010* (Cth), the ACCC must 'prepare a draft determination in relation to an application for authorisation before it makes a final determination. The purpose of this draft determination is to test the ACCC's views with the applicant and interested parties.' ACCC, 2012, *ACCC Proposes to Authorise NBN Co/Optus HFC Subscriber Agreement*, media release, 28 May.

principles rather than actual specific terms, and within that framework terms and conditions can be set or revisited on a more regular basis.

Wholesale Broadband Agreement

- 3.83 In its Second Report, following industry comment, the committee was concerned about the duration of the WBA. The initial five year term of the WBA, on the ACCC's advice, was later changed by the NBN Co to 12 months.
- 3.84 The committee agrees with the interim term of 12 months for the WBA and notes that 40 RSPs have signed up to offer internet services over the NBN.
- 3.85 The committee also acknowledges and understands the importance and appropriateness of preserving the Customer Service Guarantee as described by ACCAN and recommends the NBN Co take into consideration the inclusion of the CSG within its WBA.

Small Business e-Readiness

- 3.86 The committee acknowledges the evidence given by the AIG and the ARA that SMEs are not in a position to take full advantage of the opportunities the NBN may offer.
- 3.87 The committee acknowledges the improved competition and efficiency outcomes for the local and national economies, which can be achieved by greater SME IT knowledge and use of faster broadband offered through the NBN.
- 3.88 The committee understands the Government has launched its DEP. However, further coordination with the IT industry and assistance from government agencies is needed to provide assistance in education and training to reach those resource and time challenged SMEs who would greatly benefit from an online presence.

Other

- 3.89 The committee acknowledges the issues presented by ACCAN that the initial consumer telephone and broadband package offered by Telstra may present a higher cost through rental fees and may inconvenience customers who will be later connected to fibre for telephony services.
- 3.90 The committee believes this issue requires further investigation and will examine NBN pricing in its fourth review.

Recommendation 5

- 3.91 **The committee recommends that NBN Co include the consumer protection components of the Customer Service Guarantee in its Wholesale Broadband Agreement.**

Recommendation 6

- 3.92 **The committee recommends the Government more effectively deliver its Digital Enterprise Program to small and medium sized enterprises (SMEs) with the aim of improving SME access to online resources and enabling interested SMEs to achieve an online presence.**