

## Regulatory and Pricing Issues

### Introduction

- 3.1 The Shareholder Ministers' Six Monthly Performance Report (the Performance Report) provides an update of the regulatory matters facilitating and associated with the National Broadband Network (NBN) rollout for the period ended on 30 June 2012.
- 3.2 These matters include an update on the binding definitive agreements with the Telstra Corporation (Telstra) and SingTel Optus Pty Ltd (Optus), the NBN Co Limited (NBN Co) Special Access Undertaking (SAU) and Wholesale Broadband Agreement (WBA). In addition, general pricing issues are discussed.

### Binding Definitive Agreements with Telstra and Optus

#### Telstra Agreement

- 3.3 The broad terms of the Binding Definitive Agreement between the NBN Co and Telstra (the Telstra Agreement) were outlined in the Second and Third Reports. With the ACCC's approval of the Telstra Structural Separation Undertaking and accompanying draft customer migration plan, the final conditions precedent were met and the Telstra Agreement came into force on 7 March 2012.<sup>1</sup>

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<sup>1</sup> For an overview of the process and negotiations undertaken to arrive at the Telstra Agreement see JCNBN Second Report, Chapter 3, November 2011 and Third Report, Chapter 3, June 2012.

- 3.4 The Telstra Deal is now in its implementation stage with the following ‘key milestones’ achieved over the period covered in the Performance Report:
- ‘Delivery of the Transit schedule with 142 exchanges and 99 dark fibre links handed over at the end of June 2012.’
  - ‘Significant work has been undertaken in relation to Network Design Documents and detailed processes developed.’
  - ‘In conjunction with Telstra, NBN Co has updated its design rules to reduce excess remediation and to reduce the amount of augmentation required.’<sup>2</sup>

## Optus Agreement

- 3.5 The ACCC issued a final determination on the \$800 million Binding Definitive Agreement between the NBN Co and SingTel Optus Pty Ltd (Optus Agreement) on 19 July 2012.<sup>3</sup> With the conditions precedent to the Optus Agreement being met, the agreement came into force. The NBN Co 2012-15 Corporate Plan now incorporates the financial impact of the Optus Agreement.

## Australian Competition and Consumer Commission Review

- 3.6 The ACCC stated that its determination on the Optus Agreement was ‘an extremely difficult decision’, but that it had ‘made the right decision.’<sup>4</sup>
- 3.7 In making its determination in reference to the Optus Agreement, the ACCC stated that it weighed up the benefits and the detriments of the authorisation in regard to the impact on competition. The ACCC explained:

...we have to weigh the benefits with the detriments, under the authorisation test. Is there a net benefit from the arrangement? Normally, whenever a party in this situation as it were buys out its main competitor, the detriments are enormous in terms of price competition, non-price competition and dynamic effects from both the player that is still there and the one that is coming, but here it is very difficult for NBN to respond, because they have to provide a universal price and service across the country. So you lose a lot

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2 Shareholder Ministers, ‘Performance Report to 30 June 2012’, *Submission 13*, p. 7.

3 NBN Co, *Corporate Plan 2012-2015*, 6 August 2012, p. 31; ACCC, <[www.accc.gov.au](http://www.accc.gov.au)>

4 Mr Rod Sims, Chairman, ACCC, Transcript of Evidence, Canberra, 14 August 2012, p. 5.

of the dynamic response from NBN. Then, from Optus' point of view, we judged they were not going to roll out the HFC any further. I think it really is quite clear that, under the legislation, they have no incentive to do that. And the amount they would need to invest to match the higher level services is something that, again, we judged they would not do. So it is a very unusual situation. If you look at it from Optus's point of view, one way to look at this is: if the NBN had been rolled out as an open access network first, if that was the first investment made, would Optus subsequently want to invest in an HFC? I doubt they would, because this is an open access fibre network. Optus is making those judgements all the time about whether they would compete against something that has been overbuilt against them. It is a very unusual situation.<sup>5</sup>

## Access Pricing

### NBN Co's Special Access Undertaking

- 3.8 On 5 December 2011, the NBN Co voluntarily lodged a Special Access Undertaking (SAU)<sup>6</sup> with the Australian Competition and Consumer Commission (ACCC) for review.<sup>7</sup> Following receipt of the SAU, the ACCC began its legislatively required consideration process (which includes industry consultation).<sup>8</sup>
- 3.9 As a result of the ACCC's process, and subsequent discussions with the NBN Co, on 20 June 2012, to 'address issues raised by Access Seekers and the ACCC' the NBN Co released a document containing its revised approach to the SAU.<sup>9</sup>

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5 Mr Sims, ACCC, Transcript of Evidence, Canberra, 14 August 2012, p. 3.

6 The SAU will cover 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 over a 30-year period (until 2040) with a mid-term review, JCNBN, November 2011, Second Report, p. 51 and JCNBN, June 2012, Third Report, p. 47.

7 ACCC, 2012, ACCC Commences Public Consultation on NBN Co Special Access Undertaking, media release, 20 December.

8 The ACCC considers the NBN Co SAU under the criteria set out in section 152CBD of the Competition and Consumer Act 2010, ACCC, <[www.accc.gov.au](http://www.accc.gov.au)>

9 This document contains 'high level design principles for the proposed incentive based modular SAU', NBN Co, *NBN Co Corporate Plan 2012-2015*, 6 August 2012, p. 31.

- 3.10 In anticipation of receiving a revised SAU and to allow the NBN Co to develop its revised SAU approach, the ACCC suspended its consideration of the NBN Co's original SAU.<sup>10</sup>
- 3.11 Following the release of the revised approach document, subsequent industry feedback and ongoing discussion with the ACCC, on 7 September 2012, the NBN Co withdrew its original SAU. Withdrawal of the NBN Co SAU meant the ACCC would not have to make a decision on the SAU by 12 September 2012 as legislatively required.<sup>11</sup>
- 3.12 The NBN Co stated in its Corporate Plan that it expected to lodge its revised SAU with the ACCC in advance of finalisation of its Wholesale Broadband Agreement.<sup>12</sup>
- 3.13 On 28 September 2012, NBN Co Limited and NBN Tasmania Limited lodged a revised SAU with the ACCC. The ACCC then commenced its consideration of the SAU under the criteria set out in section 152CBD of the *Competition and Consumer Act 2010* which included an industry consultation process.<sup>13</sup>
- 3.14 This process was restarted with the NBN Co's withdrawal of the revised SAU and the lodgment of a new SAU and accompanying documents, with the ACCC on 18 December 2012. The new SAU 'includes amended non-price terms which NBN Co states have arisen out of the now concluded Contract Development Process' ...and...'some other amendments which NBN Co states clarify the operation of the SAU.'<sup>14</sup>
- 3.15 The ACCC was to release a draft decision on the original SAU by mid-March 2013<sup>15</sup>, which has now changed with the lodgment of the second revised SAU. The ACCC is required to make its decision on the SAU within six months of its receipt. If the ACCC has not arrived at a decision within this timeframe, the SAU would be deemed to be accepted.<sup>16</sup>

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10 ACCC, 2012, ACCC Suspends Assessment of NBN Co Special Access Undertaking, media release, 20 June; Mr Sims, ACCC, Transcript of Evidence, Canberra, 14 August 2012, p. 11; NBN Co, *Corporate Plan 2012-2015*, 6 August 2012, p. 31.

11 ACCC, 2012, NBN Co Withdraws Special Access Undertaking, media release, 11 September.

12 NBN Co, *Corporate Plan 2012-2015*, 6 August 2012, p. 31.

13 On 12 November 2012, the ACCC released its first consultation paper on the revised NBN Co SAU, to be followed by a stakeholder forum in December. Submissions to the ACCC's consultation were due by 11 January 2013. ACCC, 2012, ACCC commences first public consultation on NBN Co Special Access Undertaking, media release, 12 November, p. 2.

14 ACCC, NBN Co Special Access Undertaking (December 2012), [www.accc.gov.au](http://www.accc.gov.au)

15 ACCC, NBN Co Original Special Access Undertaking (December 2011), [www.accc.gov.au](http://www.accc.gov.au)

16 'This timeframe is subject to its ability to extend this period and periods which are discounted from the assessment timeframe such as when the ACCC is consulting on the SAU, or NBN Co

## Wholesale Broadband Agreement

- 3.16 Under the SAU, the NBN Co is required to 'ensure that its Standard Form of Access Agreement (including the Wholesale Broadband Agreement) remains aligned with the SAU.'<sup>17</sup>
- 3.17 The Wholesale Broadband Agreement (WBA) is a standard form of access agreement (SFAA) or contract between a RSP which outlines 'the complete terms and conditions of access to all of the services and products being provided over' the NBN's 'fibre, wireless and satellite networks.'<sup>18</sup>
- 3.18 Following a ten-month industry consultation and several versions of the document on 30 November 2011, the NBN Co released its WBA.
- 3.19 With the absence of an approved SAU, the ACCC raised concerns about the initial five-year term of the WBA. As the SAU would set the framework under which the WBA could be entered into, without the SAU, RSPs would not have recourse to the ACCC if required.<sup>19</sup>
- 3.20 On the ACCC's advice and without an approved SAU, the NBN Co revised the term of its WBA to only 12 months.
- 3.21 As at 30 June 2012, 41 RSPs (or Access Seekers) have signed the WBA. Those RSPs that have signed a WBA with the NBN Co constitute over 94 per cent of market participants in the fixed broadband market.<sup>20</sup>
- 3.22 In the same vein as the WBA, the NBN Co has also released the Wireless Trial Agreement, the Interim Satellite Services Agreement, the Satellite Wholesale Broadband Agreement and Testing Terms and Conditions all as SFAAs. Twelve RSPs have signed onto the Interim Satellite Services Agreement and 16 RSPs have signed the Fixed Wireless Trial Agreement.<sup>21</sup>
- 3.23 On 20 June 2012, when it announced its suspension of the assessment of the NBN Co SAU, the ACCC stated its expectation that:

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is responding to any Notice to vary, issued to it.' ACCC, NBN Co Special Access Undertaking (December 2012), [www.accc.gov.au](http://www.accc.gov.au)

17 NBN Co, *Corporate Plan 2012-2015*, 6 August 2012, pp 31-32.

18 NBN Co, *Corporate Plan 2011-2013*, pp 106-107.

19 JCNBN, November 2011, *Review of the Rollout of the National Broadband Network: Second Report*, p. 56.

20 Shareholder Ministers, 'Performance Report to 30 June 2012', *Submission 13*, p. 11.

21 NBN Co, *Corporate Plan 2012-2015*, p. 31.

...the regulatory framework established by the SAU should be in place prior to the execution of longer term Access Agreements between NBN Co and access seekers.<sup>22</sup>

3.24 On 12 November 2012, with the release of its industry consultation paper on the SAU, the ACCC reiterated that:

...it expects parties to agree to short term arrangements for the continuing supply of NBN Co's services until assessment of the undertaking concludes and the regulatory framework is established.<sup>23</sup>

3.25 The NBN Co is continuing to engage with industry:

...regarding the further enhancement of the WBA, via the Contract Development Process (CDP) set out in the WBA itself.<sup>24</sup>

3.26 The CDP has over the period made 'substantial progress... in relation to... the terms and structure of the WBA and its interaction with the SAU, intellectual property and confidential information and an appropriate approach to service levels including the development of service levels over time.'<sup>25</sup>

3.27 Given the expected finalisation, lodgement and assessment of the revised SAU, the ACCC stated 'that NBN Co and access seekers will need to agree upon interim contractual arrangements.'<sup>26</sup>

3.28 In its new Corporate Plan, the NBN Co provides scope for the extension of an interim WBA by mutual agreement between itself and an RSP.<sup>27</sup> Following lodgement of the revised SAU the NBN Co 'proposed to its customers that current agreements be extended while the ACCC considers the revised SAU.'<sup>28</sup>

3.29 Later, the NBN Co confirmed that the current WBA has been extended until the earlier of either 30 April 2013 or a month after the SAU is accepted. The NBN Co stated:

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22 ACCC, 2012, ACCC Suspends Assessment of NBN Co Special Access Undertaking, media release, 20 June, p. 2.

23 ACCC, 2012, ACCC commences first public consultation on NBN Co Special Access Undertaking, media release, 12 November, p. 2.

24 NBN Co, *Corporate Plan 2012-2015*, p. 31.

25 Shareholder Ministers, 'Performance Report to 30 June 2012', *Submission 13*, p. 22.

26 ACCC, 2012, ACCC Suspends Assessment of NBN Co Special Access Undertaking, media release, 20 June, p. 2.

27 NBN Co, *Corporate Plan 2012-2015*, p. 31.

28 Shareholder Ministers, 'Performance Report to 30 June 2012', *Submission 13*, p. 22.

The majority of customers have now extended the current WBA, until the earlier of 30 April 2013 or a month after the SAU is accepted. Only a couple of customers are yet to return the extension documentation to NBN Co, but are expected to do so shortly.<sup>29</sup>

- 3.30 The NBN Co also stated that the final WBA is expected to be finalised by the end of November 2012 and will be made available to NBN Co customers when the SAU has been accepted. The final WBA will have a two-year term. The NBN Co stated:

NBN Co is planning to finalise its next Wholesale Broadband Agreement (WBA) at the end of November 2012. The next WBA will be available for execution by customers when the Special Access Undertaking (SAU) has been accepted, and will have a term of 2 years. Having the next WBA finalised shortly will give NBN Co and its customers certainty to prepare for its implementation, and also facilitate the SAU assessment process (as the SAU, once accepted, and the next WBA will operate together).<sup>30</sup>

## Impact of Access Price

- 3.31 The impact of the CVC<sup>31</sup> price (or access pricing for RSPs) on the retail prices offered for broadband consumers (or end users) has been raised as an issue since the committee's First Review.
- 3.32 An NBN Co comparison between wholesale pricing offered by Telstra ADSL versus NBN Co shows that the NBN Co is offering cheaper wholesale pricing.<sup>32</sup> The information contained in the NBN Co Corporate Plan 2012-2015 is reproduced in Table 3.1.

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29 NBN Co, *Submission 7.8*, Answer to question on notice No. 19.

30 NBN Co, *Submission 7.8*, Answer to question on notice No. 19.

31 Connectivity Virtual Circuit 'is an aggregation of the bandwidth allocated to the end user premises and the point of interconnect' to the NBN. NBN Co Corporate Plan 2011-2013, pp 151-152.

32 NBN Co, *Corporate Plan 2012-2015*, p. 60.

Table 3.1 Comparative Wholesale Pricing between the National Broadband Network and Telstra

	Telstra Proposed Wholesale ADSL Pricing (\$) January 2012	ACCC Interim Access Determination (\$) February 2012	NBN 25/5 Pricing (\$) December 2011
Zone 1	30	25.40	27
Zone 2/3	37	30.80	27
AGVC/CVC (per Mbps)	55	40.50*/33.65**	20

\*until 31 June 2012

\*\*from 1 July 2012

Source NBN Co Corporate Plan 2012-2015, Exhibit 7-11: Comparative Wholesale Pricing NBN vs. Telstra, p. 60.

3.33 The NBN Co 2012-2015 Corporate Plan also states that the NBN Co expects 'to reduce CVC prices as traffic across the network increases over time.'<sup>33</sup> However, the NBN Co stated that it cannot prevent any price rises being directly passed onto the consumer. The NBN Co stated:

We deal with wholesale prices. We have agreed in the SAU that we are holding prices fixed for the first five years of the SAU, but we cannot make any guarantees. But we are expecting the market to operate at the retail level....We will drive wholesale prices down.<sup>34</sup>

3.34 The ACCC commented that the price of the CVC charge should fall over time, but that NBN Co's revenue (from CVC pricing) may still increase. The ACCC explained:

It is a very live issue what the trend rates are going to be in the CVC charges over the life of the SAU. NBN Co has recently said it accepts that the price per unit of CVC charges should come down over time. That does not mean that revenues cannot increase because you get more for less, basically, or more for more but at a lower price per unit. What those CVC charges end up at and what the trend rate over time is will be relevant to the margin for retailers in the provision of services.<sup>35</sup>

3.35 In relation to CVC pricing, as part of its consideration of the NBN Co SAU, the ACCC is seeking consumer and industry views on:

The commitments around NBN Co's proposed 'usage' based charge (the 'connectivity virtual circuit), and in particular its implications for how NBN Co's customers and end-users take up

33 NBN Co, *Corporate Plan 2012-2015*, p. 67.

34 Mr Mike Quigley, CEO, NBN Co, Transcript of Evidence, Canberra, 30 October 2012, pp 23-24.

35 Mr Ed Willett, Commissioner, ACCC, Transcript of Evidence, Canberra, 14 August 2012, p. 11.



services and for NBN Co's ability to recover the costs of its investments.<sup>36</sup>

3.36 Further, the ACCC has stated that it:

... will consider whether more binding pricing commitments to lower the usage based charge are required.<sup>37</sup>

## Concluding Comments

### Optus Agreement

3.37 The committee acknowledges the evidence it received from the ACCC on its analysis and acceptance of the Optus Agreement.

### NBN Co's Special Access Undertaking

3.38 The NBN Co has revised and relodged its original SAU in response to industry feedback and ongoing negotiation with the ACCC. The committee understands that the ACCC is currently reviewing the revised NBN Co SAU and is expected to finalise its consideration of the undertaking within six months of its receipt.

3.39 In the meantime, the NBN Co has proposed to RSPs that the interim WBA agreements be extended. With the release of its NBN Co SAU consultation paper, the ACCC has also reiterated its expectation that this approach be taken by the NBN Co.

3.40 The NBN Co has stated that it has already extended its WBA with the 'majority of customers' until the earlier of either 30 April 2013 or a month after the SAU is accepted. The remaining few who are yet to return the extension documentation 'are expected to do so shortly.'

### Impact of Access Price

3.41 The committee acknowledges that the NBN Co is holding prices fixed for the first five years of the SAU, will drive wholesale prices down, but that it cannot make any price guarantees at the retail service level. The ACCC explained how the CVC price is likely to fall over time. While the CVC is a determinant of the retail price offered by RSPs, and taking into

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36 ACCC, 2012, ACCC commences first public consultation on NBN Co Special Access Undertaking, media release, 12 November, p. 1.

37 ACCC, 2012, ACCC commences first public consultation on NBN Co Special Access Undertaking, media release, 12 November, p. 1.

consideration the comments made by the NBN Co, it remains to be seen whether competition at the retail level will provide lower prices for consumers into the longer term. The committee believes the NBN Co and the Government have a responsibility to ensure that high speed broadband is affordable for all consumers.