



Submission to Initial NBN co SAU Discussion Paper

February 2012

The CCC welcomes the opportunity to provide its initial views on the NBN co Special Access Undertaking. The CCC does not intend in this submission to provide its definitive views on the SAU. Rather, this submission focuses on the importance the CCC places on the Commission establishing a process capable of identifying ventilating and resolving the matters that arise from the SAU of concern to access seekers, consumers and other stakeholders.

The National Broadband Network and the associated changes to policy and regulation of the communications markets generally represent a profound change in the competitive, technological and regulatory environment in all communications industries. The centrality of these industries to the lives of Australians and to the national economic welfare is acknowledged in the Government's decision to undertake such an ambitious and far reaching set of measures.

The decisions that the Commission makes in the course of the SAU will form the core of the competitive environment for communications services in Australia for the foreseeable future. CCC submits that there are a number of principles that must form the basis of the Commission's approach to the issues to be concluded and the process by which it reaches those decisions.

Firstly and most importantly, the NBN co is intended to be an enduring monopoly provider of fixed line access services. The lessons of the failed access regime that applied to the copper access network must be foremost in the minds of regulators and policy makers as they finalise and put in place arrangements for the future.

First and foremost, it is now generally acknowledged that the negotiate-arbitrate model was inappropriate in an industry where there was an imbalance between the commercial power of the parties. This problem was magnified because the owner of the monopoly access network was vertically integrated and therefore had an incentive to discriminate against access seekers who had no other source of supply.

While the requirement that NBN co remain a wholesale owner provider of fixed line services should overcome this incentive to discriminate problem, the problem of commercial imbalance in negotiations is separate and remains. NBN co has some incentive to, in effect, compete with its downstream customers to maximise its share of the total consumer spend, even if they are not

competing for the retail business itself. Due to its monopoly power, NBN co would be able to dictate terms, prices and conditions if it so desired and if it was not subject to effective regulatory oversight.

The CCC submits that this is the reason that the Parliament established a framework that allows for strict and on going oversight of the NBN co by the ACCC.

The CCC believes this is well understood by the Commission. However, there are elements of the SAU as it is presently drafted that cause the CCC concern when considered in this context. The CCC believes that the role that the SAU defines for the Commission is too constrained, and does not recognise the needs and reasonable expectations of access seekers with regard to regulatory oversight.

The CCC does not intend to address these concerns in this submission as its members continue to consider their positions and interests.

The most important matter at this stage, the CCC submits, goes to the process that the Commission undertakes to reach a resolution of these matters. In this regard, the CCC points to recent history for both an example of innovative thinking by the Commission that went a long way toward preventing a similarly important process from bogging down, and a process of negotiation between NBN co and access seekers that has not been well received by NBN co's downstream customers.

The Commission initiated a forum between access seekers and Telstra during a crucial point in the examination of the Telstra Structural Separation Undertaking during 2011. The forum allowed access seekers to raise a wide range of concerns with Telstra in front of the Commission. This gave access seekers comfort that their concerns were being properly communicated to the Commission, and insight into the Commission's thinking when it was asked to make a judgement about these matters.

The CCC submits that this is an exercise that the Commission should seek to replicate in the consideration of the SAU at some time after the publication of its next discussion paper.

A less happy experience has been the discussions between NBN co and retail service providers in the development of the NBN co Wholesale Broadband Agreement. Again, a key point of contention in this document has been NBN co's preferred role for the Commission to exercise its oversight role, along with issues related to the balance of commercial risk between parties.

NBNco's approach was to conduct the discussions in multiple bilateral negotiations. It became clear that there were many common concerns among access seekers, but the ability to deal with these matters through a multilateral approach was limited. The result was at times rancorous and public disputation that has left a legacy of mistrust even after many access seekers signed on to short term agreements.

The CCC would therefore encourage the Commission to initiate multilateral processes early in its considerations of the SAU.

The CCC will provide further written submissions in coming months addressing matters of specific concerns with the SAU as submitted by NBN co.