

NBN Co Limited Special Access Undertaking

Consultation Paper

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited,

Internode Pty Ltd, and

TransACT Capital Communications Pty Limited

20 January 2012

1. INTRODUCTION

This submission is made on behalf of iiNet Limited, Internode Pty Ltd and TransACT Capital Communications Pty Limited (collectively, **our Clients**) in response to the ACCC's consultation paper of December 2011 entitled *NBN Co Limited Special Access Undertaking Consultation Paper* (**the Consultation Paper**).

Our Clients note that the Consultation Paper is the first of two consultation papers that the ACCC will be releasing on NBN Co's Special Access Undertaking (**SAU**), and the Consultation Paper is aimed only at:

- providing guidance on the legislative framework;
- providing a summary of the SAU; and
- seeking stakeholders' preliminary views on the SAU to identify the key issues that will be the focus of the supplementary consultation paper.

The purpose of this submission is limited to drawing the ACCC's attention to a problem that our Client's fear may become an 'elephant in the room'¹ unless it is kept in focus. Our Clients believe that this problem is of fundamental importance, and consideration of NBN Co's SAU cannot take place in isolation from consideration of this problem. Our Clients are therefore taking the opportunity presented by the Consultation Paper to request that the ACCC treat this problem as a preliminary issue to be dealt with prior to a more detailed consideration and scrutiny of the SAU that will occur in response to the second consultation paper.

This submission is structured as follows:

- Identification of the problem.
- How the SAU can solve the problem.

2. THE PROBLEM

The problem arises due to the fact that Part XIC of the *Competition and Consumer Act 2010* (**CCA**) sets up a legislative hierarchy with Access Agreements at the top and ACCC Access Determinations at the bottom². The full legislative hierarchy is as follows (from top to bottom):

- Access Agreement
- Special Access Undertaking
- Binding Rule of Conduct
- Access Determination

In the event that there is an inconsistency between any of the terms and conditions contained in any of the above documents, the terms and conditions in the document higher in the hierarchy will prevail.

Going forward, NBN Co will be providing services under the terms of a standard form of access agreement known as the Wholesale Broadband Agreement (**WBA**). The ACCC has no formal oversight of the WBA, and ACCC approval of the WBA is

¹ This is an idiomatic expression that refers to an obvious problem that is not being addressed.

² This legislative hierarchy is described and discussed in section 3.2.3 of the Consultation Paper.

not required³. In the event of an inconsistency between regulated terms set by the ACCC⁴ and the terms of the WBA, the terms of the WBA will prevail⁵. This means that:

NBN Co is able to provide services under terms and conditions that have not been approved by the ACCC, and in the event that the ACCC concludes that it is necessary to make regulated terms that are applicable to NBN Co, the WBA will override those regulated terms.

Note that for ease of expression this will be referred to below as **the Problem**.

We note that the ACCC states the following in the Consultation Paper:⁶

Entry into an Access Agreement based on a Standard Form of Access Agreement is a commercial decision for persons who may wish to provide services utilising the NBN Co Network.

To the extent that this suggests that access seekers will have a choice whether or not to use NBN Co's network, we believe that this is not an accurate reflection of the situation. Once the NBN is fully up and running, many service providers, such as our Clients, are likely to have no choice but to provide their services utilising the NBN. Indeed one of the fundamental policy outcomes of the Government's reforms to the industry is to shut down Telstra's ubiquitous copper network and transfer services provided over that network to the NBN⁷. Given this policy objective, and the monopoly power that this will give to NBN Co, our Clients believe that finding a solution to the Problem should be a paramount consideration for the ACCC. However, the following comments in the Consultation Paper give rise to a fear that the Problem could become an 'elephant in the room' (footnotes omitted):⁸

The ACCC published an open letter on its website on 11 November 2011 in relation to concerns expressed by a number of access seekers about opportunities to seek recourse to the ACCC in respect of terms and conditions of access to the NBN Co network. In this letter, the ACCC expressed the view that the commitment made by NBN Co to reduce the term of the WBA to 12 months had mitigated the ACCC's immediate concerns in this respect, and allowed NBN Co and industry to focus on the formal assessment of NBN Co's SAU. The ACCC also stated that it is committed to ensuring that there is an effective regulatory framework in place as soon as is practicable and ideally prior to the expiry of the 12 month term of the WBA.

Our Clients believe that a proper assessment of NBN Co's SAU cannot take place without consideration of the extent to which the SAU is able to solve the Problem. Our Client's fear that if the ACCC accepts the SAU without first solving the Problem, there will be no further opportunity for the ACCC to implement a solution to the Problem.

³ See Consultation Paper p.19.

⁴ Note that for ease of expression a reference in these submissions to 'regulated terms' is a reference to terms and conditions included in an access determination or binding rules of conduct made under Part XIC of the CCA.

⁵ Due to the effect of sections 152BCC and 152BDB of the CCA.

⁶ At p.19.

⁷ For example, clause 4(b) of the *Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011* refers to: 'the Government's support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the national broadband network as that network is rolled out.'

⁸ Consultation Paper p.19.

3. HOW THE SAU CAN SOLVE THE PROBLEM

It should be noted that the legislative hierarchy is only called into play in the event that there is an inconsistency in the terms and conditions set out in any of the documents contained in the hierarchy. Therefore, if an access agreement includes a mechanism that allows the access agreement to be amended in accordance with terms and conditions specified in a document lower in the hierarchy (for convenience referred to as a **Pass Through Clause**), the legislative hierarchy will not be called into play.

Significantly, NBN Co has included such a Pass Through Clause in the WBA in order to prevent the terms of the SAU being overridden by the WBA. This Pass Through Clause is contained in clause F3 of the WBA⁹. It seems obvious to our Clients that, given the Pass Through Clause in respect of the SAU, a simple and effective way to solve the Problem is to include in the WBA similar Pass Through Clauses in respect of binding rules of conduct and access determinations. However, for reasons best understood and expressed by NBN Co, NBN Co has refused to include such clauses in the WBA¹⁰. In discussion on this point, NBN Co has expressed concern that a Pass Through Clause could result in RSPs lodging a high number of disputes with the ACCC. Our Clients consider that this is unlikely. Unlike Telstra, whose tenure as the fixed line incumbent has resulted in a large number of access disputes, NBN Co is not a vertically integrated provider and therefore does not have a clear incentive to inhibit its wholesale customers' ability to compete. Nonetheless, NBN Co will have monopoly power in fixed services and regulatory oversight will provide a crucial safety net to the industry and the LTIE. Though this is relevant in the short-term, it is even more important longer term and particularly in the event that NBN Co is no longer a government owned entity. In the event that NBN Co is privatised, it should be on the basis that it is subject to regulatory oversight, which would be far more palatable to investors if the regulation had been in place for several years rather than imposed at the time of privatisation.

It is important for the ACCC to be aware that although the WBA does include provisions that would, in certain circumstances, allow the content of access determinations and binding rules of conduct to apply¹¹, these provisions are of limited scope and, crucially, would not apply in the following example scenario:

Six months into the WBA an access seeker believes that a particular NBN Co process or procedure does not work. The access seeker tells NBN Co about the problem. NBN Co refuses to do anything about it. The access seeker goes to the ACCC. The ACCC agrees there is a problem that needs to be dealt with, and the ACCC makes a binding rule of conduct to deal with the problem. As things currently stand under the WBA and SAU, NBN Co could simply ignore the binding rule of conduct because the legislative hierarchy in Part XIC of the CCA would have the effect of making the terms of the WBA override the binding rule of conduct. The only way the access seeker could get the protection of the binding

⁹ The WBA is available on NBN Co's website at:

<http://www.nbnco.com.au/getting-connected/service-providers/wba.html>

¹⁰ Note that there is nothing in the CCA that precludes the inclusion of a Pass Through Clause in an access agreement. The fact that NBN Co has included clause F3 in the WBA shows that NBN Co agrees, at least implicitly, that there is nothing in Part XIC of the CCA that prevents the inclusion of a Pass Through Clause in an access agreement. Therefore, NBN Co's refusal to include a Pass Through Clause in the WBA that applies to binding rules of conduct and access determinations must be based on issues of policy rather than issues of law.

¹¹ Clause F4.2 of the WBA provides for NBN Co to be subject to an interim access determination or binding rule of conduct made by the ACCC in respect of a proposed change to the WBA by NBN Co in certain limited circumstances.

*rule of conduct would be to terminate the WBA but there is no provision to terminate without cause*¹².

The regulatory recourse provision in the SAU clearly would not have any effect in the above scenario because it only gives the ACCC power to impose an outcome prior to the access seeker entering into the WBA¹³.

In light of NBN Co's refusal to voluntarily implement what seems to our Clients to be a sensible, straightforward and uncontroversial way of solving the Problem, our Clients believe that the ACCC should consider refusing to accept the SAU unless the SAU contains a commitment to a Pass Through Clause that would allow access seekers to obtain the benefit of access determinations and binding rules of conduct during the currency of the WBA (**the Required Outcome**). If such a Pass Through Clause is included in the SAU then, by virtue of clause F3 of the WBA, NBN Co will be obliged to offer such a Pass Through Clause to access seekers. We note that in *NBN Co Discussion Paper - Introducing NBN Co's Special Access Undertaking - July 2011*, NBN Co refers to the following recommendation made by the ACCC:¹⁴

Importantly, access seekers should not be subject to barriers imposed by exiting access agreements if they wish to respond to regulatory events, such as the making by the ACCC of a binding rule of conduct or access determination, or the acceptance of an SAU.

This suggests that the ACCC agrees that the Required Outcome would be appropriate.

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¹² Note that even if there were a termination for convenience clause in the WBA, exercising this entitlement to get the benefit of a binding rule of conduct could be problematic in terms of ensuring continuity of service.

¹³ The regulatory recourse provision is contained in clause 6 of the SAU.

¹⁴ At p.10.