

NBN Co Limited Special Access Undertaking

Supplementary Consultation Paper

Submission by Herbert Geer Lawyers on behalf of:

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TransACT Communications Pty Limited

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1. INTRODUCTION

This submission is made on behalf of Adam Internet, iiNet Limited, Internode Pty Ltd, Primus Telecom and TransACT Communications Pty Limited (collectively, **our Clients**) in response to the ACCC's supplementary consultation paper of February 2012 entitled *NBN Co Limited Special Access Undertaking Supplementary Consultation Paper (the Consultation Paper)*.

Our Clients welcome the opportunity of responding to the Consultation Paper. Our Clients note that the Consultation Paper is the second of two consultation papers that the ACCC has released on NBN Co's Special Access Undertaking (**SAU**), and that the ACCC released a previous consultation paper in December 2011 (**the First Consultation Paper**) which was aimed only at:

- providing guidance on the legislative framework;
- providing a summary of the SAU; and
- seeking stakeholders' preliminary views on the SAU.

A submission was provided on behalf of iiNet, Internode and TransACT in response to the First Consultation Paper (**the First Submission**) which drew attention to the fact that:

- NBN Co could potentially force access seekers to accept terms and conditions of access that had not been approved by the ACCC and which would override any alternative regulated terms and conditions which the ACCC might subsequently set by means of an access determination or binding rules of conduct (referred to as **the Problem**); and
- the Problem could be solved by means of an SAU which contained a commitment from NBN Co to allow access seekers to have access to the terms and conditions of an access determination or binding rule of conduct.

The purpose of the First Submission was merely to raise awareness of the Problem and the fact that an SAU could deliver a sensible and effective means of solving the Problem. The purpose of this submission is to provide a fuller assessment of the SAU.

2. STRUCTURE OF THIS SUBMISSION

As regards the assessment of the SAU, the ACCC states the following in the Consultation Paper¹:

While the ACCC may provide some guidance to NBN Co about the changes that would allow the SAU to be accepted, it cannot unilaterally amend NBN Co's proposed SAU. That is, the terms and conditions that are set out in the SAU, as drafted by NBN Co, are the focus of the SAU assessment process. As a consequence of this, alternative approaches or commitments are generally not directly relevant to an assessment of whether the particular SAU that NBN Co has lodged should be accepted or rejected.

Having said this, section 152CBDA of the CCA provides for a person to make

¹ At p.11.

variations to an original undertaking in accordance with a notice given by the ACCC. If the person does so, the ACCC must consider the varied undertaking as if it had been given to the ACCC instead of the original undertaking. This streamlines the SAU assessment process by preventing NBN Co from having to submit a new SAU.

In light of this, the primary focus of this submission is to provide our Clients' view on whether the ACCC should accept or reject the SAU. However, given the ACCC's power under section 152CBDA of the Competition and Consumer Act 2010 (**CCA**), this submission also seeks to identify some fundamental requirements that the SAU does not currently satisfy but which it must satisfy before it can be acceptable.

For the reasons set out below, our Clients believe that the ACCC should not accept the SAU in its current form. In order to fully understand the reasoning process that supports our Clients' conclusion on the SAU, it is first of all necessary to consider a number of background considerations. Accordingly, the remainder of this submission is structured as follows:

- Executive Summary.
- Background Considerations.
- Why the SAU in its current form is unacceptable.
- Improvements required to make the SAU acceptable.
- Conclusion.

3. EXECUTIVE SUMMARY

In conceptual terms, it is possible to distinguish between two distinct types of access agreement as follows:

- an agreement which is the result of meaningful negotiations between the parties and which contains terms and conditions that both parties accept are reasonable (**Genuine Agreement**); and
- an agreement which is the result of the first party to the agreement taking advantage of its stronger bargaining position and effectively forcing the second party to accept terms and conditions which the second party does not accept are reasonable (**Take it or Leave it Agreement**).

It is submitted that the intention behind the current regulatory structure that exists in Part XIC of the CCA is that the sources of terms and conditions of access should be as follows:

1. regulated terms (if the statutory criteria is applied correctly these regulated terms of access will be reasonable); or
2. terms that are established through a special access undertaking (if the statutory criteria is applied correctly a special access undertaking will not be accepted unless it ensures reasonable terms of access will be available); or
3. a Genuine Agreement.

If the statutory criteria is applied correctly, 1 and 2 above will result in reasonable terms of access.

It is submitted that the SAU in its current form is not acceptable because it does not meet the applicable statutory criteria because it does not ensure that reasonable terms of access will be available. This is because:

- the SAU does not provide for adequate regulatory oversight in respect of issues relating to price terms;
- the SAU gives very broad discretion to NBN Co as regards the setting of non price terms and there is no guarantee that in setting non price terms NBN Co will appropriately balance competing interests and promote the long term interests of end users rather than simply furthering NBN Co's own interests;
- there is a lack of clarity as regards the extent to which the non price terms provisions in the SAU will override alternative regulated terms; and
- the carve outs and limitations that apply to the regulatory recourse mechanisms make them of only marginal relevance to the issues that arise.

These concerns are exacerbated by the fact that the SAU has a term of 30 years. In order to be acceptable the SAU must:

- provide for a more hands on role for the ACCC as regards issues that relate to price terms;
- clearly articulate the extent to which non price regulated terms will apply and, where applicable, provide a regulated terms pass through clause; and
- to the extent that regulated terms in respect of non price subject matter are excluded, provide sufficient constraints on NBN Co so as to ensure that reasonable terms of access will be established and maintained for the term of the SAU. This requires a more comprehensive set of principles and a more comprehensive regulatory recourse mechanism.

4. BACKGROUND CONSIDERATIONS

In order to understand the reasoning process that leads to the conclusion that the SAU in its current form is unacceptable, it is necessary to have regard to the following:

- An important conceptual distinction that exists within the concept of an 'access agreement' as defined in section 152BE of the CCA.
- The operation of the telecommunications access regime under Part XIC of the CCA as in force prior to the amendments that were made by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (CCS Act)*.
- The effect of changes that were made to the telecommunications access regime by the CCS Act.

- The role of a special access undertaking.
- Provisions in the telecommunications access regime that are specific to NBN Co.

Each of the above will be considered in turn.

Access Agreements

The concept of an 'access agreement' as defined in section 152BE of the CCA needs to be treated with care because it includes the following two types of agreements which are conceptually distinct:

- an agreement which is the result of meaningful negotiations between the parties and which contains terms and conditions that both parties accept are reasonable (**Genuine Agreement**); and
- an agreement which is the result of the first party to the agreement taking advantage of its stronger bargaining position and effectively forcing the second party to accept terms and conditions which the second party does not accept are reasonable (**Take it or Leave it Agreement**).

This distinction needs to be kept in mind in order to ensure that the regulatory framework operates as it was intended to.

Part XIC of the CCA prior to the CCS Act amendments (the Former Access Regime)

Under the Former Access Regime, if an access provider and access seeker entered into a Genuine Agreement, there was no work for the ACCC to do. However, in the case of a Take it or Leave it Agreement, an access seeker could request regulatory intervention by means of an arbitration which allowed the ACCC, if it determined it was necessary, to set regulated terms and conditions (**Arbitrated Terms**)². This was commonly referred to as the 'negotiate/arbitrate' model. Under this model, the Arbitrated Terms would override the terms of the Take it or Leave it Agreement. The ACCC was able to set indicative prices and make model terms and conditions of access. This allowed access providers and access seekers to know what the ACCC's likely approach in an arbitration would be.

Changes to the Former Access Regime made by the CCS Act

Practical difficulties arose with the 'negotiate/arbitrate' model because Telstra tended to only offer Take it or Leave it Agreements which were inconsistent with what had become well established regulated terms (i.e. access seekers were forced to seek arbitrations in circumstances where the outcome of the arbitration was obvious to all parties concerned due to the existence of indicative prices, model terms and previous arbitration decisions). The legislative response to these difficulties was to move away from the 'arbitrate' part of the model and instead allow the ACCC to set upfront regulated terms which could be applicable without the need for an arbitration. However, the ACCC's ability to set upfront regulated terms was not intended to interfere with the parties' ability to enter into a Genuine Agreement.

² See former Division 8 of Part XIC of the CCA.

This is clearly acknowledged in the Explanatory Memorandum relating to the CCS Act, as follows (emphasis added)³:

Currently Part XIC of the CCA provides that if parties cannot agree on the terms of access to a declared service, then either party (the carrier or carriage service provider that provides access to the service, or the access seeker) can notify an access dispute to the ACCC. The ACCC must then arbitrate the dispute. The terms and conditions of access are then those determined by the ACCC in its arbitration determination for those two parties only. This is known as the 'negotiate-arbitrate' model.

*Since it is clear that the 'negotiate-arbitrate' model is not producing effective outcomes for industry or consumers, Part 2 of Schedule 1 to the Bill reforms the regime to allow the regulator to set up front prices and non-price terms for declared services. **This will create a benchmark which access seekers can fall back on, while still allowing parties to negotiate different terms.***

According to the Explanatory Memorandum relating to the CCS Act, this new model, which relies on the setting of upfront terms, was intended to work as follows (emphasis added)⁴:

1. *The ACCC would declare a service, and set standard price and non-price terms of access for the declared service in an access determination.*
2. **An access provider would be obliged to offer the declared service to any access seeker on the terms set down in the access determination. The two parties could still negotiate different terms.**
3. *The ACCC would be able to specify in the access determination fixed principles for treating certain on-going matters such as the depreciation methodology or the regulatory asset base, which could be set for a longer duration than the duration of the access determination.*
4. *The ACCC would not be able to issue ordinary exemptions from the access obligations as it can now; however anticipatory exemptions would still be available.*

For ease of expression the situation where an access seeker is able to fall back on regulated terms and conditions will be referred to as **the Regulated Terms Default Position**.

Section 152BCA(1) of the CCA sets out a list of matters that the ACCC must take into account when making an access determination. It should be noted that:

- the list of matters in section 152BCA(1) encompasses the list of matters contained in section 152AH of the CCA; and
- the list of matters in section 152AH of the CCA is relevant to determining whether particular terms and conditions of access are reasonable.

In light of this it is appropriate to conclude that it is a requirement of an access determination that it provide reasonable terms and conditions of access. Therefore, the Regulated Terms Default Position ensures the availability of reasonable terms and conditions of access. This leads to the following fundamental conclusion:

³ At p.4.

⁴ At pp.52, 53

The legislation evinces a clear intention that if an access seeker is negotiating terms and conditions of access with an access provider and they cannot reach agreement, a default set of reasonable terms and conditions of access should be available.

The role of a special access undertaking

Under the Former Access Regime, an Access Provider or prospective access provider was able to submit a voluntary undertaking to the ACCC. If the voluntary undertaking was accepted by the ACCC, the terms of the voluntary undertaking would prevail over any inconsistent Arbitrated Terms. The Explanatory Memorandum to the CCS Act describes the purpose of these voluntary undertakings as follows⁵:

Voluntary access undertakings were intended to provide an opportunity for increased certainty for access providers, as well as the flexibility to develop their own terms of access for approval by the ACCC.

There were two types of voluntary undertakings:

- an ordinary access undertaking which applied in respect of services that had already been declared⁶; and
- a special access undertaking that applied in respect of services that had not yet been declared.

Therefore, if an access provider or prospective access provider wanted to determine whether some or all of its terms and conditions of access would be acceptable to the ACCC, it could include those terms of access in an access undertaking. If the ACCC accepted the access undertaking, those terms were effectively 'locked in' for the term of the undertaking because any inconsistent Arbitrated Terms that were subsequently made would be of no effect⁷.

The CCS Act abolished Ordinary Access Undertakings. The reason for this was expressed as follows⁸:

Ordinary access undertakings were intended to promote regulatory certainty for access providers, by allowing them to propose terms and conditions of access for a declared service which would be compatible with their own operational and commercial requirements. If the ACCC accepted an undertaking, it would not be able to make an arbitration determination under Division 8 of Part XIC that was incompatible with the undertaking.

In practice, almost all undertakings submitted to the ACCC since 1997 were rejected on the basis that they did not promote the long-term interests of end-users. Ordinary access undertakings have not only failed to promote regulatory certainty, their use has resulted in significant regulatory uncertainty and the allocation of considerable resources by the ACCC, access providers and access seekers.

⁵ At p.49.

⁶ See former subdivision A of Division 5 of Part XIC of the CCA.

⁷ See former section 152CGB of the CCA.

⁸ Explanatory Memorandum to the CCS Act pp 202, 203.

However, special access undertakings were retained. A special access undertaking is defined in section 152CBA of the CCA. Given that section 152CBA(2) of the CCA refers to: an undertaking '*in connection with the provision of access to the service*', it is permissible for a special access undertaking to do any of the following as regards terms and conditions of access (including a combination of 1 and 3 or any combination of 2 to 4 below):

1. set out all of the terms and conditions of access⁹;
2. set out some of the terms and conditions of access;
3. set out commitments on the part of the access provider that are relevant to the supply of the service¹⁰; or
4. set out a method for setting or ascertaining the terms and conditions of access.

It should be noted that:

- an access provider is not permitted to submit a special access undertaking in respect of a service after the ACCC has made an access determination in respect of that service¹¹; and
- by virtue of sections 152CBIA and 152CBIB of the CCA, regulated terms will have no effect to the extent that they are inconsistent with a special access undertaking.

This supports the conclusion that the role of a special access undertaking is to allow an access provider to submit, for ACCC approval, a complete or partial alternative to the Regulated Terms Default Position (**the SAU Default Position**), in advance of the ACCC setting the Regulated Terms Default Position.

It should be noted that an SAU Default Position need not shut out access to regulated terms completely. It could, for example, provide that:

- regulated terms will apply in respect of particular subject matter only (for example non price terms); or
- regulated terms will not apply to the extent that they are inconsistent with certain requirements (for example price terms being calculated in accordance with a particular methodology or being consistent with price floors in respect of certain services).

Section 152CBD of the CCA sets out the criteria for accepting a special access undertaking. In so far as it is relevant to establishing terms and conditions of access, the statutory criteria as regards the making of an access determination and the statutory criteria as regards the acceptance of a special access undertaking are

⁹ See for example the special access undertaking from Foxtel in relation to the Digital Set Top Unit Service (December 2006) available at <http://www.accc.gov.au/content/index.phtml/itemId/772632> which specifies the full terms and conditions of access.

¹⁰ See for example see the special access undertaking from G9/FANOC in relation to the FTTN (May 2007) available at <http://www.accc.gov.au/content/index.phtml/itemId/788471>.

¹¹ By virtue of section 152CBA(1).

in all material respects identical¹². This leads to the following fundamental conclusion:

Given the similarity in statutory criteria that relate to terms and conditions of access established by an access determination and terms and conditions of access established¹³ by a special access undertaking, a special access undertaking should not result in default terms and conditions of access that are less reasonable than if the default terms and conditions had been established by an access determination.

NBN Co specific provisions

The *Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Act 2011 (NBN Access Act)* also made changes to Part XIC of the CCA. The outcome of these changes, as relevant to the issues addressed in this submission, is as follows:

1. NBN Co must not supply an eligible service¹⁴ unless:
 - (a) the service has been declared by the ACCC under section 152AL(8A); or
 - (b) NBN Co has published on its website a Standard Form of Access Agreement (**SFAA**) that relates to access to the service; or
 - (c) a special access undertaking relating to the service is in operation¹⁵.
2. If NBN Co supplies a service in accordance with 1(b) or (c) above, the service will be a declared service¹⁶.
3. If NBN Co has published an SFAA that relates to access to a service, and an access seeker requests NBN Co to enter into an access agreement that contains the same terms and conditions as set out in the SFAA, NBN Co must comply with the request¹⁷.

The Explanatory Memorandum to the NBN Access Act states that the key objectives of the access arrangements for NBN Co are to ensure that (emphasis added)¹⁸:

¹² Section 152BCA(1) of the CCA sets out a list of matters that the ACCC must take into account when making an access determination. The list of matters in section 152BCA(1) encompasses the list of matters contained in section 152AH of the CCA. The list of matters in section 152AH of the CCA is relevant to determining whether particular terms and conditions of access are reasonable. Section 152CBD of the CCA sets out the criteria for accepting a special access undertaking. One of the mandatory requirements is that the undertaking must result in terms and conditions of access that are reasonable. In considering whether the terms and conditions of access are reasonable, regard is to be had to the matters listed in section 152AH of the CCA.

¹³ There is more than one way in which a special access undertaking can establish terms and conditions of access: i.e. by setting them out, by setting out governing principles or by setting out a method for ascertaining terms and conditions - e.g. recourse to the ACCC or other third party.

¹⁴ What constitutes an eligible service is defined in section 152AL of the CCA.

¹⁵ See section 152CJA of the CCA.

¹⁶ See sections 152AL(8D) and 152AL(8E) of the CCA.

¹⁷ See section 152CJA of the CCA.

¹⁸ At pp. 9,10.

1. *services needed by its wholesale customers are available, information about the services and the terms and conditions of supply is available and transparent,*
2. *there is open, non-discriminatory access to those services, and*
3. **there is scrutiny by, and recourse to, the ACCC in relation to access issues, including terms and conditions.**

It should be noted that Part XIC of the CCA does not make the content of an SFAA subject to ACCC approval. Therefore, although NBN Co must publish its SFAA, there is nothing to stop the SFAA becoming a Take it or Leave It Agreement. It should also be noted that a service that is provided under an SFAA will be a declared service, and will be subject to the provisions that apply to declared services under Part XIC of the CCA, including the provisions that give the ACCC the power to make access determinations and binding rules of conduct. Therefore, it seems clear that the Regulated Terms Default Position was intended to apply to services provided by NBN Co under the terms of an SFAA (i.e. an access seeker should be able to choose between the terms of the SFAA and alternative regulated terms). Of course, if the SAU is accepted, this position will be subject to the terms of the SAU - i.e. to the extent that the regulated terms are inconsistent with the SAU, the regulated terms will have no effect¹⁹.

5. WHY THE SAU IN ITS CURRENT FORM IS UNACCEPTABLE

It is submitted that the SAU in its current form is not acceptable because it does not ensure that reasonable terms of access will be available because:

- it does not provide for adequate regulatory oversight in respect of issues relating to price terms and conditions;
- it gives very broad discretion to NBN Co as regards the setting of non price terms and there is no guarantee that in setting non price terms NBN Co will appropriately balance competing interests and promote the long term interests of end users rather than simply furthering NBN Co's own interests;
- there is a lack of clarity as regards the extent to which the non price terms provisions in the SAU will override alternative regulated terms;
- the carve outs and limitations that apply to the regulatory recourse mechanisms make them of only marginal relevance to the issues that arise.

The reasons for this view are set out in sections 5.1 to 5.4 below. In addition, other issues that weigh against acceptance of the SAU are also identified and set out in section 5.5 below. It should be noted that the above concerns are exacerbated by the fact that the SAU has a term of 30 years.

5.1 Issues relating to price terms

In order to put consideration of the provisions relating to price terms in the SAU in an appropriate context, it is important to keep in mind that the Regulated Terms Default Position would allow the ACCC to set the actual price terms. Therefore, the default position that the legislation contemplates is that the ACCC has complete

¹⁹ Regulated terms that are inconsistent with the SAU will have no effect by virtue of sections 152CBIA and 152CBIB of the CCA.

oversight of all aspects of price terms. It is important to view the points made in this section of this submission within this context.

It is respectfully submitted that the SAU gives too much discretion as regards various important aspects that relate to price terms. An overview of some of the relevant issues as identified in the Consultation Paper is as follows²⁰:

- The ACCC has no role for setting initial prices for products where the price has been announced by NBN Co prior to the SAU commencement date²¹.
- Although NBN Co is required to report to the ACCC as regards its annual revenue requirement, unlike with other regulated utility industries, for example the electricity industry, there is no requirement for regulatory approval of revenue requirements²².
- NBN Co's pricing methodology determines a single revenue requirement that is referable to its total costs. This allows the potential for NBN Co to cross-subsidize revenues earned in competitive markets with revenues earned in non-competitive markets²³.
- The ACCC has no ongoing role in approving or overseeing NBN Co's expenditure²⁴.
- There is no requirement for NBN Co to seek ACCC approval for long term expenditure forecasts. This allows NBN Co to recover actual costs and removes an important incentive to seek costs savings.
- There is no scope for regulatory oversight of operating expenditure levels²⁵.
- NBN Co has considerable latitude in the application of the prudence requirements²⁶. For example:
 - The prudence requirements do not provide a basis for classifying expenditure items as capital or operating expenditure. This may create an incentive to classify expenditure in a particular way in order to most easily satisfy the prudence requirements.
 - NBN Co can determine whether particular expenditure items are associated with a deemed prudent category, thereby ensuring that that expenditure item does not need to satisfy the prudence requirements.
- Although various aspects relating to pricing are subject to review during the term of the SAU²⁷:

²⁰ Note this list is not intended to be exhaustive and is only intended to identify obvious problems with the appropriate in the SAU.

²¹ This issue is discussed section 6.2 of the Consultation Paper.

²² This issue is discussed in sections 6.4 and 6.1.1 of the Consultation Paper.

²³ This issue is discussed in section 6.4.2 of the Consultation Paper.

²⁴ This issue is discussed in section 6.6.1 of the Consultation Paper.

²⁵ This issue is discussed in section 6.6.2 of the Consultation Paper.

²⁶ This issue is discussed in sections 6.6.2 and 6.6.3 of the Consultation Paper.

²⁷ See section 3.2.2 of the Consultation Paper.

- the parameters and objectives of the review, and the extent to which other interested parties may be involved, are unclear; and
- although ACCC approval of a variation is required, it is a matter for NBN Co to decide which aspects of the SAU, if any, it seeks to vary.

5.2 Issues relating to Non price terms

There are a number of instances in the SAU where the SAU merely requires NBN Co to set terms and conditions in respect of particular non price subject matter where the SAU simply leaves the content of those terms and conditions entirely to NBN Co's discretion. For example, the commitments that relate to credit management in the SAU are as follows²⁸:

- a) *NBN Co will develop, publish and maintain a credit policy (the Credit Policy) as part of the Wholesale Broadband Agreement.*
- b) *NBN Co will comply with the Credit Policy.*
- c) *NBN Co will ensure that the Credit Policy sets out the following:*
 1. *NBN Co's requirements in relation to the ongoing creditworthiness of Customers, including the criteria and processes that NBN Co will apply when reviewing and assessing the creditworthiness of Customers;*
 2. *the points in time at which, or the circumstances in which, NBN Co may review and assess the creditworthiness of a Customer;*
 3. *the circumstances in which NBN Co may:*
 - a. *require a Customer to provide a Financial Security or vary an existing Financial Security; and*
 - b. *apply a credit limit in respect of a Customer or vary an existing credit limit in respect of a Customer; and*
 4. *the circumstances in which NBN Co may enforce a Financial Security provided by a Customer.*

These commitments clearly do not prevent NBN Co from setting terms and conditions relating to credit management that are unreasonable. Further instances of terms in the SAU that provide NBN Co with a wide discretion as regards the precise terms to be included in the WBA (and which, accordingly, do not prevent the WBA from including unreasonable terms in respect of that particular subject matter) are as follows:

- Clause 3.2(b) of Schedule 6 - Customers will be required to comply with the PDF processes pursuant to the terms of their respective access agreements²⁹.
- Clause 5.4 of the Product Development Forum Processes³⁰ - the terms of the WBA will apply in respect of intellectual property rights relating to product ideas.

²⁸ See clause 9 of Schedule 11 of the SAU.

²⁹ If an access seeker executes the WBA, the terms of the WBA will be the terms of the access agreement in respect of that access seeker. NBN Co is under no obligation to agree to different terms and conditions of access.

- Clause 10 of the Product Development Forum Processes - product solutions derived from the Product Ideas will be implemented, offered and supplied in accordance with the WBA.
- Clause 7.1(b) of Schedule 11 - the basis on which customers may connect to the NBN Co platform will be set out in the WBA.
- Clause 8.1 of Schedule 11 - billing dispute processes will be included in the WBA.
- Clauses 11.1(b) and 11.2(b) of Schedule 11 - use and disclosure of confidential information is subject to the WBA.
- Clause 13(a) of Schedule 11 - liability for indirect loss is subject to the WBA (i.e. *'except as expressly provided otherwise by the Wholesale Broadband Agreement'*).
- Clause 13(c) of Schedule 11 - indemnities are subject to the WBA (i.e. *'subject to and in accordance with the terms of the Wholesale Broadband Agreement'*).
- Clause 14.2 of Schedule 11 - NBN Co will introduce service levels. There is no commitments or constraints as regards the content of those service levels.
- Clause 2.1(b) of Schedule 12 - Appointment of Resolution Advisers - *'NBN Co will ensure that the Wholesale Broadband agreement contains a process...'*
- Clause 2.2(b) of Schedule 12 - *'except to that the non-mandatory provisions of the CCA are excluded or varied'*.

For ease of expression, the terms in the above list and the terms relating to credit management will be referred to as the **Discretionary Terms**.

5.3 Lack of clarity regarding access to regulated terms

If the ACCC accepts the SAU, the possible alternative sources of terms and conditions of access will be as follows:

1. The WBA as governed by the SAU.
2. Regulated terms *to the extent that those regulated terms are not inconsistent with the SAU* (should the ACCC make any)³¹.
3. A Genuine Agreement (i.e. to the extent that the parties agree on different terms and conditions to 1 and 2 above).

³⁰ The Product Development Forum Processes are included as annexure 1 to Schedule 6 of the SAU.

³¹ Regulated terms that are inconsistent with the SAU will have no effect by virtue of sections 152CBIA and 152CBIB of the CCA.

As regards 2 above, the following statement from NBN Co's submission in support of the SAU is relevant (emphasis added)³²:

*As noted above, NBN Co intends for terms of access **to be governed by a SAU (if accepted) and a WBA or an Access Agreement once signed by Access Seekers. These documents are intended to operate as complementary documents and have been drafted accordingly.** Each instrument imposes related but distinct obligations on NBN Co: **the SAU requires NBN Co to include certain terms in the WBA which put into operation the principles contained in the SAU; the WBA commits NBN Co to comply with those terms in supplying services to Customers.** The complementary operation of these documents is further strengthened by NBN Co making provision in the WBA for alignment between this SAU and the WBA (if necessary, for example because the SAU is varied between lodgement and acceptance).*

Provided that NBN Co complies with its obligations under the SAU, then Customers will have a remedy under the WBA in the event that NBN Co fails to comply with an obligation that it has committed to observe in the SAU (e.g. a failure to publish a construction rollout plan). If NBN Co fails to include an appropriate obligation in the WBA, thereby depriving a Customer of a remedy under the WBA, then this would be a breach of its obligations under the SAU and the Customer would be able to enforce the terms and conditions of the SAU accordingly.

This suggests that it is NBN Co's intention is that the default terms and conditions of access should be exhaustively set out by the WBA as governed by the SAU.

Clause 2.6 of the SAU appears to be consistent with this intention³³. Clause 2.6 provides as follows (emphasis added):

- (a) *The Wholesale Broadband Agreement **will** set out the agreement comprising the terms and conditions on which NBN Co will offer to supply, and an Access Seeker may acquire:*
 - i *the Product Components and associated Product Features; and*
 - ii *the Ancillary Services.*
- (b) *This Special Access Undertaking does not specify all of the terms and conditions on which NBN Co will offer to supply the Product Components, associated Product Features or the Ancillary Services. **To the extent that an aspect of the supply of a Product Component, associated Product Features and/or Ancillary Services is not covered directly by this Special Access Undertaking, those aspects will be set out in the Wholesale Broadband Agreement.***

Clause 2.6 of the SAU could support an argument that access to regulated terms in respect of the NBN Access Service is not possible unless specifically provided for in the SAU or WBA (**the Cover the Field Argument**). The reasoning process behind the Cover the Field Argument is as follows:

1. The SAU requires that the source of the terms and conditions of access in respect of the NBN Access Service will be the SAU and WBA.

³² NBN Co - *Supporting Submission NBN Co Special Access Undertaking 20 December 2011*, at p.84.

³³ See also clause 14.1 of Schedule 14.

2. It would be inconsistent with 1 above (and therefore inconsistent with the SAU) if the terms and conditions of access are regulated terms unless the SAU or WBA allows access to such regulated terms.
3. Given 2 above, the effect of sections 152CBIA and 152CBIB of the CCA would be that for so long as the SAU remains in force (i.e. 30 years), NBN Co could refuse to provide access on regulated terms that are inconsistent with the SAU/WBA terms (i.e. there will be no access to alternative regulated terms unless the SAU or WBA permit this).

There are two versions of the Cover the Field Argument as follows:

- The Cover the Field Argument applies to all terms and conditions contained in the WBA (**the Wide View**).
- The Cover the Field Argument only applies to terms and conditions in the WBA that seek to give effect to commitments in the SAU, including the commitments contained in the Discretionary Terms (**the Narrow View**).

It is submitted that if either version of the Cover the Field Argument is correct, then the SAU should not be accepted because it gives too much discretion to NBN Co, and, for the reasons set out in section 5.4 below, the SAU does not contain a sufficient constraint on the exercise of that discretion.

Even if the ACCC concludes that the Cover the Field Argument has no merit, there is still a fundamental lack of clarity within the SAU as regards the extent to which access seekers will be able to have access to regulated terms in the event that they feel unable to accept the terms offered in the WBA due to those terms being unreasonable. It is submitted that the uncertainty that arises from this lack of clarity is, of itself, an appropriate reason not to accept the SAU.

It should be noted that section 152BC(8) of the CCA adds another dimension to the Cover the Field Argument. Section 152BC(8) of the CCA provides that terms and conditions specified in an access determination must include terms and conditions relating to price or a method of ascertaining price. Therefore, it could be argued that if the SAU exhaustively sets out the method for ascertaining price for the NBN Access Service, the ACCC should not make any access determination in respect of the NBN Access Service. The reasoning process for this argument is as follows:

- Section 152BC(8) does not allow the ACCC to make an access determination that does not specify price terms or a method for ascertaining price.
- The SAU exhaustively sets out the method for ascertaining price. Therefore, there is no further room for an access determination to operate in as regards price terms.
- If the access determination cannot include price terms or a method for ascertaining price, it cannot be made.

However, a potential way around this problem is to specify in the access determination that price terms will be as determined by the SAU (i.e. this is a 'method for ascertaining price'). This would then allow the access determination to

include non price terms as well. However, these non price terms would only have effect to the extent that the Cover the Field Argument does not apply.

5.4 Regulatory recourse

It is respectfully submitted that the regulatory recourse mechanism set out in clause 6 of the SAU (**the SAU Regulatory Recourse Mechanism**) does not provide a suitable safeguard to address the issues of concern identified above due to its limited and unclear scope. The reasons for this view are set out below.

As pointed out in the Consultation Paper, the SAU Regulatory Recourse Mechanism is unclear as regards the extent to which it would apply to disputes that arise between NBN Co and an access seeker when renegotiating an access agreement³⁴.

As regards price terms, the SAU Regulatory Recourse Mechanism does not apply in respect of price terms announced by NBN Co prior to the SAU Commencement Date. It is unclear whether this carve out would include variations or increases to prices announced prior to the SAU Commencement Date (i.e. if the price and the variation mechanism has been announced prior to the SAU Commencement Date, it is arguable that the SAU Regulatory Recourse Mechanism does not apply in respect of a variation in accordance with that mechanism). Furthermore, the SAU Regulatory Recourse Mechanism requires the ACCC to choose between the price that the access seeker says should apply and the price that NBN Co says should apply. Given the significant information asymmetry that will exist between NBN Co and the access seeker, it may be difficult for an access seeker to be in a position to calculate a precise price to be submitted for ACCC consideration (i.e. under arbitrations under the Former Access Regime, access seekers could use indicative prices as a benchmark but there is no provision in the SAU Regulatory Recourse Mechanism for the ACCC to set indicative prices). Therefore, the SAU Regulatory Recourse Mechanism is not an adequate alternative to ex ante regulatory price control by the ACCC.

As regards non price terms, the Cover the Field Argument discussed above arises in respect of non price terms because the SAU Regulatory Recourse Mechanism only applies in respect of non price terms *'to the extent that they are not covered by [the SAU]*. Consistent with the Narrow View of the Cover the Field Argument, it could be argued with some force that the Discretionary Terms do 'cover' the relevant subject matter. Furthermore, if the Wide View of the Cover the Field Argument is accepted, it is arguable that the SAU Regulatory Recourse Mechanism has no room in which to operate as regards non price terms³⁵.

It is submitted that the mechanism contained in clause 14.3 of Schedule 11 which allows recourse to the ACCC in the event that NBN Co seeks to vary an access agreement (**the Variation Recourse Mechanism**), is also inadequate. While Our Clients agree that NBN Co's ability to vary an access agreement should be appropriately constrained, the Variation Recourse Mechanism does not provide the level of constraint required. The effect of clause 14.3(d) is that the Variation Recourse Mechanism will not apply in circumstances where the access agreement

³⁴ See page 13 of the Consultation Paper.

³⁵ i.e. clause 6.1(a)(ii) of the SAU refers to *'to the extent that they are not covered'* this can be contrasted with clause 2.6(b) that states (emphasis added): *'this [SAU] does not specify all of the terms and conditions'* - i.e. it is arguable that although the SAU does not 'specify' all the non price terms and conditions it does 'cover' all non price terms and conditions by prescribing that the terms and conditions will be in the SAU or WBA.

sets out a specific process for a particular type of change. Given that it is possible for an access agreement to provide exhaustive amendment provisions, the Variation Recourse Mechanism could end up having little if any practical application.

5.5 Other issues that weigh against acceptance of the SAU

This section of the submission identifies further issues that weigh against acceptance of the WBA. While some of these issues when considered individually may not necessarily lead to the conclusion that the SAU as a whole should be rejected, it is appropriate that the ACCC should give appropriate weight to each issue when considering whether to accept the SAU.

These issues relate to the following:

- Product development and withdrawal.
- The minimum notice requirement for a Major NBN Upgrade.
- Access to Common Property.
- Dispute resolution.

Each of the above issues will be considered in turn.

(a) Product development and withdrawal

Our Clients have identified the following shortcomings in the provisions relating to product development and withdrawal:

- The requirements of Schedule 6 do not apply to *Product Components and associated Product Features covered by, or contemplated within, the Initial Product Roadmap*³⁶. Given the breadth of this carve out, the utility of Schedule 6 is greatly reduced and there are a wide range of Products and Product Features that will not be subject to any mandatory requirement for consultation or minimum withdrawal periods.
- There is no applicable dispute resolution procedure that would provide a fast and effect way to ensure that NBN Co complies with the requirements of the Product Development Processes³⁷.
- NBN Co's discretion to develop or withdraw products is unfettered³⁸.

(b) The minimum notice requirement for a Major NBN Upgrade

As currently drafted clause 5 of Schedule 11 of the SAU requires that prior to implementing a Major NBN Upgrade, NBN Co must:

³⁶ See clause 1(b) of Schedule 6.

³⁷ See clause 13 of the Product Development Forum Processes.

³⁸ i.e. the criteria listed in clause 3.4 of Schedule 6 are discretionary and NBN Co's acceptance or rejection of a Product Idea are ultimately in its absolute discretion - see clauses 6.4(a) and 6.6 of the Product Development Forum Processes.

- give the customer no less than 6 months notice in advance of the start of the implementation of the Major NBN Upgrade³⁹; and
- as soon as reasonably practicable after finalising the implementation plan for the Major NBN Upgrade, provide a copy of the plan to any customer will be materially adversely impacted by the Major NBN Upgrade in order to allow the customer to undertaking its own internal planning⁴⁰.

This leaves upon the following possibility:

NBN Co gives six months notice but does not provide the implementation plan until one week before implementation work begins.

It is submitted that an appropriate protection to customers would make the six months minimum notice period begin from the date that NBN Co has given the customer the implementation plan or otherwise provided sufficient information to the customer to allow the customer to take the necessary action arising from the Major NBN Upgrade⁴¹.

(c) Access to Common Property

Our Clients agree that NBN Co should be responsible for ensuring NBN Co's access to Common Property. However, the definition of Common Property is too narrow. It focuses mainly on strata-title type schemes, and does not clearly include areas such as risers and MDF rooms of buildings on land owned or leased by a single owner.

(d) Dispute resolution

Our Clients submit that it is unreasonable for Customers to be locked into a dispute resolution mechanism that has been designed by NBN Co and where the decision makers are hired and fired by NBN Co. While Our Clients have no objection to the SAU making provision for such a mechanism, it should be a voluntary mechanism⁴².

6. IMPROVEMENTS REQUIRED TO MAKE THE SAU ACCEPTABLE

It is submitted that before the SAU can be acceptable the following improvements must be made:

- The setting of price terms by NBN Co needs to be subject to stricter regulatory oversight.
- The SAU must clearly articulate the extent to which access to regulated terms in respect of non price matters will be allowed.
- To the extent that access to regulated non price terms in respect of particular subject matter is not allowed, the SAU must contain stronger

³⁹ Clause 5(b) of Schedule 11.

⁴⁰ Clause 5(c) of Schedule 11.

⁴¹ Such an approach is consistent with the requirements of clauses G1 and G2 of the ACCC Model Non-Price Terms and Conditions Determination 2008.

⁴² In this regard a comparison can be made with Telstra's Structural Separation Undertaking (SSU) which makes provision for the Independent Telecommunications Adjudicator which is a voluntary dispute resolution mechanism. Telstra's SSU is available at: <http://www.accc.gov.au/content/index.phtml/itemId/1003999>

commitments and mechanisms for independent review that will ensure that the terms and conditions of access in respect of that subject matter will be reasonable and will remain reasonable for the duration of the SAU.

Each of these requirements will be considered below.

6.1 Price terms

As regards price terms, our Clients believe that a building block methodology of the type proposed by NBN Co is appropriate. However, there needs to be a much more 'hands on' role for the ACCC so as to ensure that the inputs and parameters of that methodology are appropriate. This would include requiring NBN Co's annual revenue requirement and its expenditure forecasts to be subject to ACCC approval.

6.2 Access to regulated non price terms

As stated in the First Submission, a simple but effective way to deal with the issue of access to regulated terms would be to include a regulated terms 'pass through clause' in the SAU which commits NBN Co to include a clause in the WBA that allows a customer to vary their access agreement so as to be consistent with regulated terms. It is submitted that there is no reason in law or in principle why the SAU could not contain a regulatory pass through clause along similar lines to clause 2.7 of the SAU which commits NBN Co to allowing an access seeker to vary an existing access agreement so as to be in line with the SAU - i.e. NBN Co could include a similar clause which commits NBN Co to allowing an access seeker to vary an existing access agreement so as to be in line with regulated terms. Inclusion of such a clause would remove the uncertainty that arises from the Cover the Field Argument.

6.3 Additional commitments and independent review

Given NBN Co's reliance on a 'principles' based SAU to limit the terms of the WBA, it would be expected that there would be more commitments that go towards ensuring reasonable terms of access. Principles that might reasonably be expected but which are missing from the SAU include the following⁴³:

- In exercising all of its rights under the WBA, NBN Co will be required to act reasonably and proportionately - for example not be able to exercise a right to suspend or terminate for a minor breach or where no reasonable opportunity has been given to rectify the breach.
- A customer will not be liable to pay charges in circumstances where NBN Co has not provided a service (for example due to a force majeure event, service outage or connection delay).
- Any early termination or cancellation fees will be based on the recovery of costs and will not include any penalties or windfall profits.
- NBN Co will bill for its services in a timely manner in accordance with any applicable industry codes or standards relating to billing.

⁴³ Note this list is not intended to be exhaustive.

- NBN Co will provision services and rectify faults in a manner that allows Customers to comply with their obligations under the Customer Service Guarantee or any other similar standards or legislation.
- NBN Co will provide service level rebates at a level that promote efficient use of NBN Co's network and quality of service for end users.
- There will be reasonable notification and consultation in respect of changes to any documents or procedures that are referred to or incorporated into the WBA and which a Customer is required to comply with.
- Liability and indemnify provisions will be even handed and allocate risk fairly so that:
 - the first party will not be liable to compensate the second party for loss that is not within the control of the first party; and
 - where the first party suffers loss that has been caused by the second party and which the first party could not lawfully exclude, the second party will be liable to compensate the second party for that loss.

In order to provide a swift means to enforce the principles in the SAU and in order to ensure that the terms and conditions of access remain reasonable for the duration of the SAU, the SAU Regulatory Recourse Mechanism should be broadened as follows:

- it should be applicable in respect of all non price matters in respect of which the SAU excludes access to regulated terms; and
- it should apply while an access agreement is on foot.

The ACCC having an ex post power to set terms and conditions by means of a streamlined dispute process would give NBN Co a real incentive to set reasonable terms and conditions in the WBA. If the scope of the SAU Regulatory Recourse Mechanism is broadened so as to include all non price terms, then this could remove any need for the ACCC to set ex ante fall back regulated terms and the need for a regulatory pass through clause (i.e. there will be no work for the ACCC to do unless there is a specific issue that needs to be resolved by means of the SAU Regulatory Recourse Mechanism). However, to be acceptable, the existing procedures would need to be less rigid (i.e. the ACCC should have the power to vary the procedure if it deems this necessary - for example increase the page limit for a submission or the time in which a submission can be made - and the ACCC should be able to impose its own outcome rather than being confined to choosing between the alternative outcomes proposed by the parties).

7. CONCLUSION

It is submitted that the intention behind the current regulatory structure that exists in Part XIC of the CCA is that the sources of terms and conditions of access should be as follows:

1. regulated terms (if the statutory criteria is applied correctly these regulated terms of access will be reasonable); or

2. terms that are established through a special access undertaking (if the statutory criteria is applied correctly a special access undertaking will not be accepted unless it ensures reasonable terms of access will be available); or
3. a Genuine Agreement.

Note it is only if 1 and/or 2 above are not available at the time terms of access are being negotiated that there is room for a Take it or Leave it Agreement to operate.

It is submitted that the SAU in its current form is not acceptable because it does not ensure that reasonable terms of access will be available because:

- the SAU does not provide for adequate regulatory oversight in respect of issues relating to price terms and conditions;
- the SAU gives very broad discretion to NBN Co as regards the setting of non price terms and there is no guarantee that in setting non price terms NBN Co will appropriately balance competing interests and promote the long term interests of end users rather than simply furthering NBN Co's own interests;
- there is a lack of clarity as regards the extent to which the non price terms provisions in the SAU will override alternative regulated terms; and
- the carve outs and limitations that apply to the regulatory recourse mechanisms make them of only marginal relevance to the issues that arise.

In order to be acceptable the SAU must:

- provide for a more hands on role for the ACCC as regards issues that relate to price terms;
- clearly articulate the extent to which non price regulated terms will apply and, where applicable, provide a regulated terms pass through clause; and
- to the extent that regulated terms in respect of non price subject matter are excluded, provide sufficient constraints on NBN Co so as to ensure that reasonable terms of access will be established and maintained for the term of the SAU. This requires a more comprehensive set of principles and a more comprehensive regulatory recourse mechanism.

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30 March 2012