



5 June 2012

Mr Ed Willett
Commissioner
Australian Competition & Consumer Commission
350 Elizabeth St
Melbourne
Victoria 3000
By email

Dear Ed,

Regulatory oversight of NBN Co's terms of supply

As the ACCC will be aware, over the past year members of the CCC and Optus have individually and collectively raised concerns with the lack of appropriate regulatory oversight in NBN Co's Wholesale Broadband Agreement (WBA). This includes recent discussions as part of NBN Co's Contract Development Process and the ACCC's recent industry forum on NBN Co's Special Access Undertaking (SAU), which served to highlight that there is a commonality of view across access seekers on this matter.

In summary there are two broad concerns with the oversight arrangements within the current WBA and SAU;

1. The WBA provides NBN Co with the opportunity and discretion to set the terms of supply for NBN services, to change the terms of supply and to make unilateral decisions under the WBA. There is limited opportunity for access seekers to object to decisions initiated by NBN Co and ultimately these decisions can be driven through with or without access seeker consent; and
2. There is no opportunity for access seekers to seek and achieve changes to the terms of supply for NBN services.

The common is that NBN Co has too much discretion under the current WBA and greater balance is required. This is an important threshold issue for members of the CCC and Optus in terms of the appropriate approach to setting access terms to the NBN.

Over the course of the past year a number of suggestions have been put forward by access seekers to resolve these concerns through detailed drafting changes to the WBA, but to date none of these has been taken up by NBN Co. We consider that our concerns can be addressed by the inclusion of the following principles in NBN Co's SAU;

- A. A commitment to ensure that on any matter where NBN Co exercises its discretion (for example to set access terms, to initiate changes under the processes established within the

WBA or to initiate changes outside the WBA) the exercise of that discretion is made subject to a process of multi-lateral engagement. In the event that consensus cannot be achieved, then either party has the right to seek an ACCC ruling (be it Determination or Binding Rule of Conduct); and

- B. There is a mechanism for NBN Co or Access Seekers to take advantage of an ACCC ruling to amend an existing WBA.

As the ACCC will be aware, the members of the CCC and Optus have raised other concerns that relate to the more specific regulatory oversight arrangements set out in the SAU. The principles outlined above are not intended to address those concerns, but they will form the basis for a more constructive engagement on the development of the WBA between NBN Co and the industry.

Yours sincerely

David Forman, for the CCC

Andrew Sheridan, for Optus