

28 November 2013

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 Communications Group
 Australian Competition and Consumer Commission
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Dear Ms Barker

Telstra submission re. NBN Co's varied Special Access Undertaking

This letter comprises Telstra's submission regarding the varied Special Access Undertaking (**SAU**) lodged by NBN Co Limited (**NBN Co**) with the Australian Competition and Consumer Commission (**ACCC**) on 19 November 2013, in response to (and incorporating the variations set out in) the ACCC's Notice to Vary dated 8 October 2013 (**Notice to Vary**).

The SAU consultation process

Before addressing a number of substantive points, Telstra would first like to take this opportunity to acknowledge the constructive manner in which both the ACCC and NBN Co have managed the SAU consultation process.

The varied SAU is a complex document with an unprecedented term. During the consultation process:

- the ACCC has taken the time to understand its complexity and has engaged with industry in a considered and professional manner; and
- NBN Co has materially enhanced its undertaking, choosing to withdraw its original SAU and work constructively with the ACCC and industry since December 2012 to get to this point.

Development of the SAU

When compared with the SAU lodged in December 2012, the varied SAU is a vastly superior document. Telstra notes in particular:

- the positive progress relating to the interplay between the SAU, Access Determinations and/or Binding Rules of Conduct (**ACCC Regulatory Determinations**) and Part XIC of the *Competition and Consumer Act 2010 (CCA)*, including:
 - removing the dependency on the Standard Form Access Agreement (**SFAA**) to implement ACCC Regulatory Determinations;
 - ensuring both price and non-price terms are subject to regulatory oversight; and

- appropriately confining the application of fixed principles terms and conditions;
- the adoption of an approach that preserves the ACCC's power to declare NBN services (and ensure that the SAU extends to these declared services) and the improved product development and withdrawal commitments;
- the changes which give the ACCC greater oversight of NBN Co's prices, including:
 - the price review mechanism in Schedule 1G, which allows the ACCC to periodically review NBN price structures and rebalance prices where necessary to promote the long-term interests of end-users (LTIE);
 - the ability of the ACCC to make price determinations for new "NBN Offers" or previously "Zero-Priced NBN Offers", and for the effect of these determinations to flow through to "Maximum Regulated Prices"; and
 - the ACCC's review and oversight role in respect of the long-term revenue constraint; and
- the removal of detailed non-price terms and conditions from the SAU, enabling:
 - NBN Co and industry to negotiate terms of supply without undue constraint from the SAU; and
 - the use of ACCC Regulatory Determinations where agreement cannot be reached.

Acknowledging the above, but subject to the substantive comments set out below, Telstra now believes the terms and conditions of the varied SAU are reasonable and will promote the LTIE.

Introduction of the new Government policy

The Government, through the Department of Communications, is currently undertaking a series of reviews into the NBN and changes are expected to the manner in which the NBN is rolled out, consistent with the "Coalition's Plan for Fast Broadband and an Affordable NBN".¹

At the time of writing this submission, the various reviews and their implementation remain under consideration. If the outcome of these reviews, and the implementation of the Government's policy, lead to any changes in NBN Co's network design and/or the undertakings in the varied SAU, Telstra would expect NBN Co to review the SAU and, if necessary, appropriately vary the SAU through the mechanisms set out in Part XIC of the CCA.

Given the current uncertainty surrounding the implications of new Government policy, Telstra considers that a variation to the SAU to specify that the contractual term in the next SFAA should only extend for 12 months, may reduce the risk of the SFAA being rendered inconsistent with changing policy.

In any event, Telstra remains confident that both NBN Co and the ACCC will appropriately engage with industry once the Government's policy impacts are understood. In this regard, Telstra looks forward to the opportunity to participate in any consequent consultation processes.

Telstra feedback on the varied SAU

Telstra raised a number of concerns with the SAU during the various consultation opportunities. While a number of these have been addressed in the varied SAU, some remain outstanding. Further detail is set out below.

¹ Liberal Party, *The Coalition's Plan for Fast Broadband and an Affordable NBN*, April 2013.

Telstra has also highlighted a number of very minor drafting changes to the revised SAU in the Attachment to this letter.

Regulatory recourse and interplay with Part XIC

In previous submissions, Telstra advocated a regime where the SAU would ensure that the terms of the SFAA would operate consistently with the SAU and other ACCC Regulatory Determinations. The risk that this would not occur remains a possibility given NBN Co's freedom to set the terms of the SFAA without regulatory oversight.

In the Explanatory Statement accompanying its Notice to Vary, the ACCC provided a number of clear "statements of expectation" in relation to the interplay between the SAU, Regulatory Determinations and the SFAA, including that:²

- NBN Co would "...make regulated terms available to parties via their incorporation into its SFAA..."; and
- NBN Co would "include disputed terms in commercial agreements on an interim basis only, pending the ACCC's determination of regulated terms".

These statements of expectation are helpful. While the varied SAU does not expressly incorporate terms which obligate NBN Co to "pull-through" ACCC Regulatory Determinations, in light of the ACCC's statements of expectation, Telstra is now comfortable with the regulatory recourse model in the varied SAU.

It still remains important that NBN Co's approach to its SFAA does not undermine the implementation of these expectations. Importantly, the varied SAU presupposes a co-terminus access agreement model and continuous, constructive engagement on the terms of the SFAA. Both of these aspects, and implementation consistent with the ACCC's "statements of expectation", should be closely monitored going forward.

Products and services

Telstra has consistently highlighted that the product construct established by the SAU – which allows the NBN product suite to "expand" and "contract" as new products are developed and legacy products are withdrawn – necessitates NBN Co undertaking robust product development and withdrawal processes. The quality of NBN Co's consultation and engagement with stakeholders on these matters will ultimately determine the efficacy of this product construct.

Telstra looks forward to actively participating in NBN Co's product related forums. However, Telstra may look to the ACCC to intervene (perhaps through Regulatory Determinations, if required) in the event that these forums fail to deliver appropriate engagement.

Importantly, the extent of participation in these forums is dependent on reaching agreement with NBN Co in relation to the specific confidentiality and intellectual property terms that will apply to the "Product Development Forum". Industry engagement on these terms is ongoing and Telstra will continue to work constructively with NBN Co to develop terms of engagement that do not impact on the ability or willingness to participate in important product related consultation processes.

² Australian Competition and Consumer Commission, *Variation of NBN Co Special Access Undertaking – Explanatory Statement*, October 2013, p 11-12.

Price related terms

The varied SAU includes a package of commitments in relation to pricing of NBN services, and important powers for the ACCC to monitor NBN pricing and intervene where necessary. This package of commitments, combined with the ACCC's existing powers under Part XIB and Part XIC of the CCA, is critical to ensuring that pricing of NBN services promotes the LTIE.

Telstra continues to have concerns around the potential for CVC pricing to develop in a way that is detrimental to the LTIE. These concerns are shared by a number of other stakeholders and have been acknowledged by the ACCC.

However, Telstra is optimistic that its concerns in relation to CVC pricing can be addressed by appropriate use of the review and monitoring powers in the varied SAU, and the ACCC's existing powers under the CCA.

The price review mechanism, although more limited in scope and frequency than Telstra had proposed, will still have an important role to play in ensuring an appropriate balance between access and usage charges.

Further, the ACCC will be able to use many of its existing powers under Part XIB and Part XIC of the CCA to monitor CVC pricing and usage, for example, by making record keeping rules.

Telstra looks forward to engaging constructively with the ACCC in relation to the application of the various price review and monitoring mechanisms in the varied SAU and in the CCA, to ensure that the overall framework provides for price outcomes which promote the LTIE.

Non-price terms and conditions

The non-price terms and conditions in the varied SAU are now largely confined to dispute resolution and POI related commitments. As previously mentioned, Telstra supports the POI commitments in the varied SAU.

However, Telstra remains concerned with the independence of the Resolution Advisor, Pool Members and Panel Members (these terms are defined in the varied SAU), and the uncertainty inherent in committing to a dispute resolution regime where the adjudicators' terms of engagement and dispute guidelines are yet to be drafted and are to be drafted by a party (NBN Co) to the anticipated disputes.

Telstra's concerns are partially ameliorated by:

- the right to apply for relief pursuant to the *Commercial Arbitration Act 2010*;
- NBN Co's obligations to have regard to submissions received from customers and access seekers in nominating the Resolution Advisor, Pool Members and their respective terms of appointment, Panel Member terms of appointment and dispute guidelines.

In each case, Telstra believes that the obligation to "have regard" must be construed as an obligation to consider each submission bona fide on its merits, respond in writing to customers / access seekers as to whether their proposed candidate/s, terms of appointment or guidelines were nominated to the ACCC and, if not, to provide substantive reasons for the decision not to do so;

- the ACCC's right, after consultation with NBN Co, customers and access seekers, to propose its own Resolution Advisor candidate and vary the terms of appointment. Telstra considers that

this right requires the ACCC to allow all customers and access seekers the opportunity to consult on all occasions (i.e. NBN Co cannot consult with some but not others);

- the requirement on the ACCC to notify NBN Co of certain decisions throughout the appointment processes. In each case, fairness dictates that NBN Co must also provide the ACCC's notification in full to customers and access seekers; and
- the requirement on NBN Co to take all steps reasonably necessary to enforce any material non-compliance by a Resolution Advisor, Pool Member or Panel Member with the terms of appointment. This obligation must necessarily require NBN Co to have regard to, and respond in writing (with reasons) to, any submissions by customers or access seekers regarding instances of alleged non-compliance.

In order for the above checks and balances to operate effectively, Telstra encourages the ACCC to closely monitor the efficacy of the dispute management processes and whether appropriate independence is evidenced during their application.

Telstra also previously proposed that the SAU should include a general commitment to support retail level regulatory requirements. Despite previously noting that such a commitment would support the LTIE, the ACCC did not adopt Telstra's proposal in its Notice to Vary.

Telstra will continue to advocate terms and conditions in the SFAA that ensure retail service providers are able to comply with their downstream regulatory commitments and encourages the ACCC to do likewise.

Concluding remarks

The varied SAU remains a very ambitious document and acceptance by the ACCC, if this occurs, will be a truly significant milestone for NBN Co, the ACCC and the Australian telecommunications industry.

While the varied SAU does not contain all of Telstra's preferred elements, nor fully address each of Telstra's concerns, Telstra believes that its outstanding concerns can largely be addressed:

- by correctly adopting and implementing the terms and conditions of the varied SAU;
- through rigorous and ongoing compliance monitoring by the ACCC; and
- with active engagement from the ACCC in ensuring fairness and balance in NBN Co's SFAA.

In addition, Telstra acknowledges that ACCC Regulatory Determinations are also available under Part XIC of the CCA.

Accordingly, and subject to the recommended guidance set out above, Telstra believes that the varied SAU is now in a state capable of acceptance by the ACCC.

Yours sincerely,



Jane van Beelen
Executive Director – Regulatory Affairs
Corporate Affairs

Attachment – Minor drafting changes / corrections

Defined Terms

Consider amending the definitions in Attachment C (Dictionary) as marked-up below:

- “Annual Construction in Progress Allowance” – should read: “**Annual Construction in Progress Allowance** or **ACIPA** is calculated in accordance with ~~has the meaning given to that term in~~ clause 1E.10.”.
- “No Fault Found (No Truck Roll Required)” – replace “Non-NBN-Fault” with “Non-NBN Fault”.
- “Set-up NBN Co Co-location (Lockable Full Equipment Rack)” – should read: “Set-up NBN Co Co-location (Lockable Full Height Equipment Rack)”.
- “Set-up NBN Co Co-location (Lockable Half Equipment Rack)” – should read: “Set-up NBN Co Co-location (Lockable Half Height Equipment Rack)”.
- “Symmetric Access Capacity (TC-1)” – should read: “Symmetric Access Capacity Offer (TC-1)”.
- “Total Actual Capital Expenditure” and “Total Forecast Capital Expenditure” – amend references to clause 2C.7.4(a) to 2C.7.4(a)(i).

Clause references

- Cross-Referencing of clauses switches between using “clause” and “paragraph”.³ Consider making consistent.
- If the standard cross-reference style is adopted consistently, the following provisions would require more specific cross references (as marked-up below):
 - Clause 1F.1.4(g) – reference to clause 1E.9.5 should be to 1E.9.5(b).
 - Clause 1G.3.5 – reference to clause 1G.3.3(a) should be to 1G.3.3(a)(i).
 - Clauses 1G.3.6 and 1G.3.8(c) – references to clause 1G.3.3(a) should be to 1G.3.3(ii)(A).
 - Clause 5.2(g) of Annexure 1, Schedule 1H (Dispute Resolution) – reference to clause 5.2(d) should be to 5.2(d)(ii).

Particular amendments

- Clause 1A.4.1 – consider amending as follows: “NBN Co's~~The~~ supply of Product Components to an Access Seeker...”.
- Clause 1C.1.2(b) – consider amending the last paragraph as follows: “...and NBN Co will not to only withdraw the NBN Offer except in accordance with Schedule 1I (Product Development and Withdrawal).”.
- Clause 1D.10.3(b)(i) – consider amending as follows: “...by reference to whether the ACCC considers that the particular Access Seeker has satisfied the Network Change Dispute Conditions...”.

³ See, in particular~~for example~~, clauses 1C.5.1 and 2B.2.2.

- Clause 11.5.2(c)(D) – at the end of the clause, consider moving the “or” to the start of the next line before “if NBN Co will not offer...”.
- Clause 2.1(ii) of Annexure 1, Schedule 1H (Dispute Resolution) – replace the “; and” at the end of the clause with a full-stop.
- Clause 2E.2.7(a)(v) – replace “Annual Revenue Forecast” with “Annual Forecast Revenue”.

Notices

Consider amending clause 8 of Annexure 1, Schedule 1H (Dispute Resolution) as follows:

- Clause 8(a) – provide a generic email address, rather than one that identifies an individual.
- Clause 8(b) – provide an appropriate generic email address for NBN Co.

References to NBN Co’s Website

All references to NBN Co’s website should use the defined term “NBN Co’s Website”.⁴

References to “publish” and “make available”

All requirements on NBN Co to publish a notice or other document,⁵ or to make available updates,⁶ should specify the e manner in which publication will occur e.g. at it be published or made available on NBN Co’s Website.

⁴ See, in particular, clauses 1G.2.2(a), 1G.2.2(b) and 9.1 of Annexure 1, Schedule 1H (Dispute Resolution).

⁵ See clauses 5.6 and 8(d) of Annexure 1, Schedule 1I (PDF Processes).

⁶ See clause 9.3 of Annexure 1, Schedule 1I (PDF Processes).