

NBN Co Limited 2012 Special Access Undertaking

Consultation Paper

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1. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**).

On 28 September 2012 NBN Co Ltd and NBN Tasmania Ltd (collectively referred to in this submission as **NBN Co**) lodged a Special Access Undertaking (**the September 2012 SAU**) with the Australian Competition and Consumer Commission (**ACCC**) under section 152CBA(2) of the *Competition and Consumer Act 2010* (**CCA**). The September 2012 SAU replaced a previous special access undertaking that was lodged by NBN Co on 5 December 2011 (**the 2011 SAU**) but later withdrawn on 7 September 2012. On 18 December 2012 NBN Co withdrew the September 2012 SAU and replaced it with a revised version (**the SAU**)¹.

The SAU is given in relation to the NBN Access Service and the Ancillary Services. The SAU also sets out commitments in relation to NBN Co's supply of the Facilities Access Service.

Section 152CBC of the CCA provides that after considering a special access undertaking, the ACCC must either accept or reject the special access undertaking. Section 152CBD sets out a number of requirements that must be satisfied before the ACCC is permitted to accept a special access undertaking. One of these requirements is that the ACCC must publish and invite submissions on the special access undertaking. In November 2012 the ACCC released a consultation paper entitled *NBN Co Limited 2012 Special Access Undertaking Consultation Paper* (**the Consultation Paper**). The Consultation Paper was released at the time that the September 2012 SAU was current. Accordingly, the Consultation Paper invited submissions on the September 2012 SAU.

Although the September 2012 SAU has been withdrawn and replaced by the SAU, the ACCC has not issued a revised consultation paper in respect of the SAU. Instead, the ACCC has informed interested parties that they should have regard to the issues raised and questions asked in the Consultation Paper when making submissions on the SAU.

iiNet welcomes the opportunity of making a submission on the SAU.

2. OVERALL CONCLUSION

The ACCC is required to either accept or reject the SAU². iiNet submits that the SAU in its current form should be rejected. An overview of the reasons for this conclusion is provided in section 3 of this submission. The detailed reasons for this conclusion are provided in sections 5 to 13 of this submission. However, iiNet believes that the outcome that would best promote the long term interests of end users (**LTIE**) is one where a revised SAU is forthcoming that satisfactorily addresses the issues raised in this submission.

3. OVERVIEW AND SUMMARY OF SUBMISSION

The rollout of the NBN is an unprecedented chapter in Australian telecommunications history. A new network build of this nature presents many regulatory challenges. The SAU is a complex and intricate document and the applicable statutory framework is also complex and in many respects untested.

¹ Note that where capitalised terms appear in this submission that are not defined in this submission, they are as defined in the SAU.

² Section 152CBC of the CCA.

NBN Co is prohibited from:

- supplying an eligible service³ to another person unless the other person is a carrier or a service provider⁴; and
- supplying a content service to another person,

(the Wholesale Only Requirement).

In addition, except in a number of limited circumstances which are not relevant to this submission, NBN Co must not discriminate between access seekers in complying with its Category B standard access obligations or when carrying out related activities⁵ **(the Non-Discrimination Obligation)**.

iiNet acknowledges that the fact that NBN Co is subject to the Wholesale Only Requirement and the Non-Discrimination Obligation presents an obvious improvement on the current situation in which access seekers are required to obtain services from a vertically integrated incumbent. However, the fact remains that NBN Co is a monopoly provider of bottleneck infrastructure and the Wholesale Only Requirement and the Non-Discrimination Obligation do not prevent NBN Co acting in ways that will hinder competition and lead to outcomes that are not in the long term interests of end users (**LTIE**). For example, the Wholesale Only Requirement and the Non-Discrimination Obligation do not prevent NBN Co from:

- charging monopoly rents or otherwise charging suboptimal prices;
- making inefficient investments or otherwise acting in a way that will lead to inefficient use of infrastructure;
- imposing one-sided terms of access; or
- acting in ways that will stifle innovation.

Therefore, there is a clear need for NBN Co to be fully regulated. This is acknowledged in the Explanatory Memorandum that relates to the *Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Act 2011* which states that the key objectives of the access arrangements for NBN Co are to ensure that (emphasis added)⁶:

services needed by its wholesale customers are available, information about the services and the terms and conditions of supply is available and transparent,

there is open, non-discriminatory access to those services, and

there is scrutiny by, and recourse to, the ACCC in relation to access issues, including terms and conditions.

The relevant statutory test that applies to the ACCC's consideration of the SAU has a number of components which include the following:

³ What constitutes an eligible service is defined in section 152AL of the CCA.

⁴ Section 9 of the *National Broadband Network Companies Act 2011* - this is subject to exceptions relating to: transport authorities, electricity supply bodies, gas supply bodies, water supply bodies, sewerage services bodies, storm water drainage services bodies and State or Territory road authorities.

⁵ Sections 152AXC and 152AXD of the CCA.

⁶ At pp. 9,10.

- A prohibition on the ACCC *accepting* the SAU unless the ACCC is satisfied that:
 - the terms and conditions in the SAU are reasonable (**the Reasonableness Test**); and
 - there are no particular circumstances that should be specified as qualifying circumstances in relation to the fixed principles in the SAU that are not specified as qualifying circumstances (**the Qualifying Circumstances Test**).
- A prohibition on the ACCC *rejecting* the SAU for a reason concerning price related terms and conditions if those terms and conditions are reasonably necessary to achieve uniform national pricing (**the UNP Prohibition**).

iiNet believes that the SAU as currently drafted fails to satisfy the Reasonableness Test. Therefore, the ACCC should not accept the SAU in its current form. iiNet believes that the SAU is unreasonable because:

- Many of the commitments in the SAU are capable of being circumvented.
- The SAU includes a regulatory recourse mechanism that:
 - has the potential to lead to uncertainty;
 - unnecessarily delays the ability to rely on regulated terms of access; and
 - fails to adequately give effect to NBN Co's non-discrimination obligations.
- The SAU fails to provide adequate constraints and commitments on NBN Co as regards the setting of price terms.
- The SAU gives rise to uncertainty as to whether the ACCC's power to declare, and make terms and conditions of access, in respect of services that come within the scope of the NBN Access Service, the Ancillary Services or the Facilities Access Service will be effective.
- The mechanisms that apply to reviews and the transition to replacement SAU modules have the effect of unreasonably delaying the application of alternative ACCC terms and the potential to allow terms that the ACCC has rejected to continue to apply.
- The terms relating to service levels:
 - are inadequate to provide NBN Co with appropriate incentives to engage in efficient investment in its infrastructure;
 - may lead to problems for retail service providers meeting their obligations under the *Telecommunications (Customer Service Guarantee Standard) 2011 (CSG)*;
 - contain provisions that lead to uncertainty; and
 - lock out recourse to Regulated Terms in respect of service levels for new products during the Subsequent Regulatory Period.

- The terms relating to risk management:
 - lead to an imbalance between the rights of NBN Co and the rights of access seekers;
 - include contradictory provisions; and
 - provide a blanket exclusion of liability for NBN Co's third party suppliers.
- The terms relating to dispute management:
 - fail to deal appropriately with issues relating to natural justice;
 - include strict procedural requirements that may affect the decision maker's ability to make a properly informed and considered decision;
 - fail to provide adequate safeguards for the protection of access seeker confidential information; and
 - provide insufficient grounds to appeal an expert determination.

In addition, the SAU should also be rejected because the SAU fails to satisfy the Qualifying Circumstances Test because the following circumstances, which are not specified as qualifying circumstances, should be specified as qualifying circumstances:

- The Wholesale Only Requirement ceases to apply.
- The Non-Discrimination Obligation ceases to apply.
- An amendment or adjustment is necessary or desirable to avoid an unintended consequence of the fixed principles provisions.

iiNet submits that the UNP Prohibition does not prevent the ACCC from rejecting the SAU on the basis that the SAU fails to provide adequate constraints and commitments on NBN Co as regards the setting of price terms, because the relevant terms in the SAU are not concerned with achieving uniform national pricing.

The remainder of this submission is structured as follows:

- Section 4 sets out general observations on the relevant statutory test.
- Sections 5 to 13 set out iiNet's detailed views on why iiNet believes the SAU in its current form is not acceptable. These views relate to:
 - NBN Co's ability to circumvent many of the commitments in the SAU.
 - The regulatory recourse mechanism.
 - The constraints and commitments on NBN Co as regards the setting of price terms.
 - The effectiveness of ACCC declarations under section 152AL(8A) of the CCA.

- The mechanisms that apply to reviews and the transition to replacement SAU modules.
- Service Levels.
- The terms relating to risk management.
- The terms relating to dispute management.
- Qualifying circumstances.

4. THE STATUTORY TEST

The following is a description in summary form of the statutory test as relevant to the SAU:

- The ACCC cannot accept the SAU unless the ACCC is satisfied that the terms and conditions in the SAU are reasonable (**the Reasonableness Test**)⁷.
- The ACCC cannot accept the SAU unless the ACCC is satisfied that the terms and conditions in the SAU are consistent with the Category B standard access obligations (**the Category B SAO Test**)⁸.
- The ACCC cannot accept the SAU if it is not satisfied that the parts of the SAU specified as a fixed principles term, notional fixed period or qualifying circumstances should be specified as such (**the Fixed Principles Test**)⁹.
- The ACCC cannot accept the SAU unless it is satisfied that there are no particular circumstances that should be specified as qualifying circumstances in relation to the fixed principles in the SAU that are not specified as qualifying circumstances (**the Qualifying Circumstances Test**)¹⁰.
- The ACCC cannot reject the SAU for a reason concerning price related terms and conditions if those terms and conditions are reasonably necessary to achieve uniform national pricing (**the UNP Prohibition**)¹¹.
- The ACCC cannot reject the SAU for a reason that concerns certain conduct by NBN Co if that conduct is authorised under Part XIB for the purposes of subsection 51(1) of the CCA (**the Authorised Conduct Prohibition**)¹².

At the outset, iiNet believes that it is important to acknowledge that even if the Reasonableness Test, Category B SAOs Test, Fixed Principles Test and Qualifying Circumstances Test (**the Threshold Tests**) are all satisfied, the ACCC is not bound to accept the SAU. Subject to the UNP Prohibition and the Authorised Conduct

⁷ Section 152CBD(2)(b) of the CCA - there are no relevant Ministerial Pricing Determinations and NBN Co has confirmed that all the terms and conditions in the SAU are terms and conditions in relation to subsection 152CBA(3A) of the CCA and should be assessed by the ACCC pursuant to the criteria in subsection 152CBD(2)(b) of the CCA - NBN Co, Letter to ACCC titled NBN Co Special Access Undertaking (SAU) – request for clarification, 1 November 2012.

⁸ *ibid.*

⁹ Section CBD(4)(a) to (c) of the CCA.

¹⁰ Section 152CBD(4)(c) of the CCA.

¹¹ Section 152CBD(5A) of the CCA.

¹² Section 152CBD(5C) of the CCA.

Prohibition, the ACCC maintains a discretion to reject the SAU because the Threshold Tests merely prevent the ACCC from accepting the SAU, they do not mandate that the ACCC must accept the SAU if the Threshold Tests are satisfied.

This section of the submission provides comments on the general approach to be adopted as regards:

- The Reasonableness Test.
- The Fixed Principles and Qualifying Circumstances Tests.
- The UNP Prohibition.

4.1 The Reasonableness Test

iiNet submits that the following statements from previous Australian Competition Tribunal (**Tribunal**) and ACCC decisions which are relied on by NBN Co need to be treated with care¹³:

*In this analysis we are limiting ourselves to asking whether Telstra's charge term and its cost allocation method is reasonable having regard to the statutory matters. We are not concerned to enquire whether any other price term or cost allocation method is more reasonable.*¹⁴

and

*Further, reasonableness is not determined by reference to what would exist if the SAU was not accepted. In this sense, as has been confirmed by the Tribunal, it is not always necessary to apply a 'with and without' test in assessing the reasonableness of the SAU. It may be useful to apply the 'with and without' test to individual criteria or in specific circumstances but, ultimately, the reasonableness test is applied as a standalone test.*¹⁵

iiNet respectfully submits that these statements were not intended to be, and should not be treated as, exhaustive expositions on the application of the statutory test for accepting a special access undertaking. iiNet respectfully submits that the assessment of a special access undertaking can and should involve consideration of:

- whether acceptance of that special access undertaking would result in more reasonable terms of access than its rejection¹⁶; and
- whether the terms of that special access undertaking could reasonably be improved (particularly if there are existing uncertainties or problems that the undertaking could resolve but does not),

(the Comparative Matters).

Whether consideration of the Comparative Matters takes place as part of the Reasonableness Test, or whether it takes place as part of the ACCC's consideration of its residual discretion to accept or reject the SAU is immaterial. What is important is that the ACCC does not exclude consideration of these issues when assessing

¹³ Supporting Submission NBN Co Special Access Undertaking 28 September 2012, at pp. 26,27.

¹⁴ *Telstra Corporation Limited* [2006] ACompT 4 at [150]

¹⁵ ACCC - Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service Draft Decision, December 2007, at p.31.

¹⁶ This is commonly referred to the 'future with / future without' test.

the SAU. Indeed the above statement from the Tribunal is incomplete. When a fuller version of the statement is considered, it becomes clear that the Tribunal did consider whether there was an alternative approach that might better achieve the statutory objectives (emphasis added):

*In this analysis we are limiting ourselves to asking whether Telstra's charge term and its cost allocation method is reasonable having regard to the statutory matters. We are not concerned to enquire whether any other price term or cost allocation method is more reasonable. **However, it is helpful in the present analysis to note that spreading the LSS-specific costs over a broader range of services would be more likely to promote competition between providers of those services, subject to those costs being pooled with other specific costs relevant to the provision of DSL services in downstream markets (eg Telstra's own internal costs of a nature similar to those of providing the LSS and ULLS-specific costs).***¹⁷

When applying the Reasonableness Test, it is important to keep in mind the distinction between objectives and considerations. iiNet submits that there is only one ultimate objective under Part XIC of the CCA: to promote the long term interests of end users (**LTIE**)¹⁸.

It is submitted that the outcome of a decision whether to accept or reject a special access undertaking that best promotes the LTIE can be expressed as follows:

End users have access to the best possible services at the lowest possible prices.

For ease of expression, this will be referred to as the **End User Outcome**. Clearly, end users cannot receive services unless there are firms that provide those services. Therefore, the inclusion of the adjective 'possible' in the End User Outcome is intended to connote there being a sufficient incentive for firms to provide the relevant services at the relevant prices¹⁹.

It is submitted that the End User Outcome is clearly what the Tribunal had in mind when it stated:²⁰

the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings.

In a market that is fully competitive, with low barriers to entry, the End User Outcome will be achieved naturally²¹. In other words, the End User Outcome will take care of itself. Given the nature of the telecommunications market (which exhibits natural monopoly characteristics – i.e. it requires the use of ubiquitous infrastructure with high sunk costs, thereby making barriers to entry high), the End User Outcome can only be achieved with the aid of regulatory intervention.

In the telecommunications context, achieving the End User Outcome requires investment in infrastructure because without it the quality of services will deteriorate. Therefore, in the telecommunications context, the End User Outcome is achieved by:

¹⁷ *Telstra Corporation Limited* [2006] ACompT 4 at [150] (emphasis added).

¹⁸ See section 152AB of the CCA.

¹⁹ Inclusion of the word "possible" also acknowledges that perfect competition or total efficiency are likely to exist in theory only.

²⁰ *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120]

²¹ i.e. competition leads to productive and dynamic efficiency.

- promoting competition; and
- promoting investment in infrastructure.

This is acknowledged in section 152AB(2) of the CCA which provides that in determining whether a particular thing promotes the LTIE regard must be had to the extent to which the thing is likely to result in the achievement of the objectives of:

- promoting competition;
- achieving any-to-any connectivity; and
- encouraging the economically efficient use of, and the economically efficient investment in infrastructure by which listed services are supplied.

However, although it is submitted that the promotion of the LTIE (by means of promoting competition, investment in infrastructure and any to any connectivity) is the ACCC's only *objective* in making a regulatory decision under Part XIC, it is not the ACCC's only *consideration* when deciding whether or not the terms of a special access undertaking are reasonable. This is because in addition to consideration of whether the objective of promotion of the LTIE is achieved, the ACCC must also consider the following matters:²²

1. the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service (**consideration 1**);
2. the interests of all persons who have rights to use the declared service (**consideration 2**);
3. the direct costs of providing access to the declared service (**consideration 3**);
4. the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility (**consideration 4**);
5. the economically efficient operation of a carriage service, a telecommunications network or a facility (**consideration 5**).

It is submitted that these considerations are not in any way at odds with promoting the LTIE because they feed in to what is the correct approach to promoting the LTIE, as the following points demonstrate (using price terms as an example):

- As regards consideration 1, if an access price is set at a level where the access provider's legitimate business interests are not satisfied, the access provider will have no incentives to provide the necessary investment in its network. The result of this lack of investment will be that the quality of services provided to end users via the access provider's network will be affected.

²² See sections 152AH and 152CBD(2)(d)(ii) of the CCA.

- As regards consideration 2, if the access price is set in a discriminatory manner competition may be affected. Having effective competition is one of the essential ingredients required to promote the LTIE²³.
- As regards consideration 3, this raises similar issues as consideration 1 – i.e. the access provider should be allowed to recover its efficient direct costs of providing access because if it is not allowed to do so, it may not provide the required investment in its network. This is balanced by reference to consideration 2 - i.e. if the access provider's costs are not efficient, then access charges will be too high and the LTIE will be adversely affected.
- As regards consideration 4, similar considerations as to consideration 1 apply – i.e. if the access price is set too low there may be insufficient incentive to make the required investments in access provider's network, and this will affect the quality of services provided to end users.
- As regards consideration 5, the efficient provision of services will drive down the price for the services that end users must pay. Therefore an access price should be set at a level that encourages efficiency.

iiNet submits that where the terms in a special access undertaking are uncertain or unclear leading to a situation where, on one interpretation they may be reasonable but on another interpretation they may not be reasonable, the ACCC will not be in a position to be satisfied that the special access undertaking is reasonable, and the ACCC should, unless appropriate amendments are made to the special access undertaking, reject it.

4.2 **The Fixed Principles and Qualifying Circumstances Tests**

As the legislation does not specify any particular objectives or circumstances that the ACCC is required to consider when applying the Fixed Principles and Qualifying Circumstances Tests, iiNet submits that the object that the ACCC should consider is the promotion of the LTIE which is the object of Part XIC of the CCA.

4.3 **The UNP Prohibition**

The UNP Prohibition is contained in section 152CBD(5A) of the CCA which provides as follows:

(5A) If:

(a) the undertaking contains price-related terms and conditions relating to the supply of a service; and

(b) the price-related terms and conditions are reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities;

then:

(c) the Commission must not reject the undertaking for a reason that concerns the price-related terms and conditions; and

²³ See section 152AB of the CCA.

(d) [the Category B SAO Test and the Reasonableness Test do] not apply to the price-related terms and conditions.

The purpose of 152CBD(5A) of the CCA is stated to be as follows (emphasis added)²⁴:

*Proposed new subsection 152CBD(5A) prevents the ACCC from rejecting a special access undertaking if that undertaking contains price-related terms and conditions (within the meaning of section 151DA), **which are attributable to cross-subsidisation** and the extent of such cross-subsidisation is no greater than is reasonably necessary. This amendment ensures that the ACCC cannot reject a special access undertaking **for a reason that concerns cross subsidisation**. The amendment does not limit the ACCC's obligation to determine that other parts of a special access undertaking are reasonable (within the meaning of section 152AH of the CCA).*

iiNet submits that given that this provision has the potential to allow unreasonable price terms to apply contrary to the Reasonableness Test, it should be interpreted strictly. iiNet submits that a correct interpretation of section 152CBD(5A) of the CCA limits its scope to such terms in a special access undertaking (if any) that if rejected would affect NBN Co's ability to achieve uniform national pricing. It does not mean that price terms in a special access undertaking cannot be rejected if they are otherwise unreasonable. For example, if NBN Co includes the following price terms in a special access undertaking:

1. the price for the Basic Access Reference Offer will be \$500; and
2. the price for the Basic Access Reference Offer will be applied uniformly throughout Australia,

the ACCC would be permitted to reject 1 (which is clearly unreasonable for a reason that is unrelated to cross subsidisation) but the ACCC would not be permitted to reject 2. Furthermore, iiNet submits that 152CBD(5A) of the CCA is not engaged where the reason for the rejection is a failure to include additional terms (for example additional commitments or ACCC oversight provisions) that are not relevant to, or do not affect, NBN Co's ability to achieve uniform national pricing.

5. NBN CO'S ABILITY TO CIRCUMVENT MANY OF THE COMMITMENTS IN THE SAU

If there are commitments in the SAU that are deemed necessary for the SAU to satisfy the Reasonableness Test, then it follows that, if those commitments are capable of being circumvented, it is not possible to conclude that the terms of the SAU satisfy the Reasonableness Test.

In order to put iiNet's views on this issue in their appropriate context, it is necessary to consider the following:

- the 'legislative hierarchy' under Part XIC of the CCA;
- how access seekers are able to rely on regulated terms; and
- the focus of the SAU.

²⁴ Supplementary Explanatory Statement to the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011, at p. 15.

Each of these matters will be considered in turn.

5.1 The legislative hierarchy under Part XIC of the CCA

If an eligible service²⁵ is a declared service, it is subject to the standard access obligations (**SAOs**). The ACCC may make an access determination relating to access to a declared service²⁶. If the ACCC considers that there is an urgent need to do so, the ACCC may make written rules (known as binding rules of conduct) that:

- specify any or all of the terms and conditions on which an access provider is to comply with any or all of the SAOs applicable to the declared service; or
- require an access provider to comply with any or all of the SAOs in relation to the declared service in a manner specified in the rules.

For ease of expression access determinations and binding rules of conduct will be referred to collectively in this submission as **Regulated Terms**. Access providers are required to comply with Regulated Terms²⁷.

NBN Co is not permitted to supply an eligible service unless that service is a declared service²⁸. An eligible service supplied by NBN Co can be declared in one of three ways²⁹:

- the service has been declared by the ACCC under section 152AL(8A) of the CCA;
- NBN Co has published on its website a Standard Form of Access Agreement (**SFAA**) that relates to access to the service; or
- a special access undertaking relating to the service is in operation³⁰.

Particular SAOs apply to NBN Co that are known as Category B SAOs³¹.

A person may give a special access undertaking to the ACCC in connection with the supply of an eligible service provided that that eligible service is not a declared service³². In the case of NBN Co, NBN Co is permitted to give a special access undertaking in respect of an eligible service provided that that service has not been declared by the ACCC under section 152(8A) of the CCA and the ACCC has not made an access determination in relation to access to that service.

An access provider and access seeker may enter into an agreement in relation to the supply of a declared service by the access provider to the access seeker. This is known as an access agreement³³.

²⁵ What constitutes an eligible service is defined in section 152AL of the CCA.

²⁶ See section 152BC of the CCA.

²⁷ See sections 152BCO, 152BCP, 152BDF and 152BDG of the CCA.

²⁸ See section 152CJA of the CCA.

²⁹ See sections 152(8A), 152(8D) and 152(8E) of the CCA.

³⁰ See section 152CJA of the CCA.

³¹ The SAOs Category B SAOs are set out in Subdivision B of Division 3 of Part XIC of the CCA.

³² See section 152CBA of the CCA.

³³ See section 152BE of the CCA.

Therefore, there are a number of possible sources of terms and conditions of access to a declared service. As regards which particular terms and conditions will apply, Part XIC of the CCA provides as follows:

- A special access undertaking has no effect to the extent to which it is inconsistent with an access agreement³⁴.
- Binding rules of conduct and access determinations have no effect to the extent to which they are inconsistent with a special access undertaking that is in operation³⁵.
- If an access determination or binding rules of conduct are applicable to an access seeker and an access provider, the access determination or binding rules of conduct have no effect to the extent to which they are inconsistent with an access agreement that is applicable to those parties³⁶.
- If a provision of an access determination (other than a fixed principles provision) is inconsistent with binding rules of conduct, the provision has no effect to the extent of the inconsistency³⁷.

This results in a 'legislative hierarchy' with access agreements at the top as follows:

Access Agreement
Special Access Undertaking
Binding Rules of Conduct
Access Determination

5.2 How access seekers are able to rely on regulated terms and problems that can arise

In order to understand how access seekers can rely on Regulated Terms, and some of the problems and uncertainties that can arise, it is useful to consider some example scenarios as follows.

Scenario 1

The access provider has a standard agreement that sets out terms and conditions that relate to the supply of a declared service. That standard agreement specifies price X. The ACCC makes an access determination in respect of the declared service which specifies price Y. An access seeker requests the access provider to supply the declared service to the access seeker. The access provider gives the access seeker the access provider's standard agreement and requests the access seeker to sign it. The access seeker refuses to sign the access provider's standard agreement and requests that the service be provided in accordance with the ACCC's access determination. If the access provider refuses to provide the service at price Y, it will be in breach of its carrier licence conditions and the service provider rules³⁸.

Scenario 2

*The access provider has a standard agreement that sets out terms and conditions that relate to the supply of a declared service. That standard agreement specifies price X. It also contains a clause that allows the access provider to vary the agreement unilaterally on 10 days' notice (**the Variation Clause**). The ACCC*

³⁴ See section 152CBIC

³⁵ See sections 152CBIA and 152CBIB of the CCA.

³⁶ See sections 152BCC and 152BDB of the CCA.

³⁷ See section 152BDE.

³⁸ See sections 152BCO, 152BCP, 152BDF and 152BDG of the CCA.

makes an access determination in respect of the declared service which specifies price Y. The ACCC's access determination does not include any other terms. An access seeker requests the access provider to supply the declared service to the access seeker. The access provider provides the access seeker with a copy of the access provider's standard agreement and requests the access seeker to sign it. The access seeker refuses to sign the access provider's standard agreement and requests that the service be provided in accordance with the ACCC's access determination. The access seeker also requests the access provider to amend the Variation Clause. The access provider varies the standard terms so that the price specified in the agreement is price Y. However, the access provider refuses to amend the Variation Clause. In this scenario, if the access seeker signs the agreement, the access provider could vary the price back to price X on 10 days' notice. Due to the operation of the 'legislative hierarchy' it is arguable that the access provider using the Variation Clause to vary the price back to price X would not be a breach of the access provider's carrier licence conditions or the service provider rules. Therefore, the access seeker's only option would be to refuse to sign the agreement and either:

- 1. Request the access provider to provide the service without an access agreement being in place (it is unclear whether the access provider would be obliged to do this); or*
- 2. Request the ACCC to make binding rules of conduct that specify a change management procedure that does not give the access provider a unilateral right to vary (the access seeker could then request that the access provider provide the service in accordance with the terms of the binding rules of conduct and if the access provider refuses to do so, the access provider would be in breach of its carrier licence conditions and the service provider rules).*

Although 1 above may seem like a viable option in theory, in practice there may be commercial imperatives that would make it very difficult for an access seeker to forego the provision of the service while it is waiting for the ACCC to make binding rules of conduct.

5.3 The focus of the SAU

Many of the commitments in the SAU regarding terms of access are focused on the SFAA. For example clause 1C1.5 of the SAU provides:

NBN Co will ensure that, from 1 July 2017 until the end of the Initial Regulatory Period, the annual increase in the Price of a Reference Offer specified in any SFAA will not exceed the Individual Price Increase Limit applicable to that Reference Offer, subject to clauses 1C.4 and 1C.5.

For ease of expression these types of commitments in the SAU will be referred to as **SFAA Commitments**. SFAA Commitments affect the terms that NBN Co will offer to access seekers in its SFAA, leaving the actual terms to be included in an access agreement to be agreed between the parties. In principle there is nothing wrong with this approach. However, in the absence of clear commitments that relate to the change management provisions that will be included in an SFAA, SFAA Commitments are capable of being circumvented. How this can happen is explained below.

5.4 How the SFAA Commitments can be circumvented

As demonstrated in Scenario 2 above, if an access provider has a unilateral right to vary an access agreement, the access provider can effectively circumvent any included Regulated Terms. In the same way, NBN Co would be able to circumvent

the SFAA Commitments³⁹. For example, if NBN Co varies an access agreement by increasing prices by 10%, this would not be in breach of the price caps in the SAU which only relate to the prices offered in the SFAA and not the prices in access agreements. NBN Co could also circumvent the 2 year SFAA term⁴⁰ by unilaterally extending the term of the access agreement. Furthermore, the Non Discrimination Obligation would not necessarily act as a constraint in this scenario if all access agreements are varied in the same way at the same time.

Although such a scenario may seem unlikely, iiNet submits that the ACCC should assess the SAU on the basis of what is legally possible, and the ACCC should not simply rely on NBN Co being trusted to 'do the right thing'.

5.5 The appropriate solution

iiNet believes that the solution to this problem is for the SAU to include clear commitments that relate to the change management provisions that will be included in an SFAA. These change management commitments should include a prohibition on NBN Co varying the agreement in a way that would be inconsistent with the SFAA Commitments.

6. THE REGULATORY RECOURSE MECHANISM

Schedule 1B of the SAU provides a mechanism for the setting of terms and conditions in the SFAA which include commitments by NBN Co to⁴¹:

- publish SFAAs with fixed terms;
- set up a multilateral consultation forum which allows NBN Co and access seekers to suggest changes to any SFAA; and
- give effect to terms made by the ACCC

(the Regulatory Recourse Mechanism).

iiNet submits that the Regulatory Recourse Mechanism:

- has the potential to lead to uncertainty;
- unreasonably delays reliance on regulated terms of access; and
- fails to adequately give effect to the Non-Discrimination Obligation.

iiNet submits that these outcomes clearly do not satisfy the Reasonableness Test.

The salient features of the Regulatory Recourse Mechanism will be considered. The problems relating to uncertainty, delay and compliance with the Non-Discrimination Obligation will then be set out. This section of the submission concludes with what iiNet's considers to be the appropriate solution to the identified problems.

³⁹ iiNet acknowledges that the current version of the SFAA does not include such a unilateral right of variation. However, there is nothing in the SAU that would prevent NBN Co from including such a right in future versions of the SFAA and, as discussed in section 6 below, there is uncertainty as regards whether the regulatory recourse mechanism included in the SAU would prevent NBN Co from being able to rely on such a clause.

⁴⁰ This is discussed in section 5 of this submission.

⁴¹ The commitments in Schedule 1B of the SAU do not apply to price terms - Clause 1B.1.2 of the SAU.

6.1 Salient features of the Regulatory Recourse Mechanism

Three related but distinct components require consideration:

- the publication of SFAA's with fixed terms;
- the multilateral consultation forum; and
- the mechanism for giving effect to terms made by the ACCC.

Each will be considered in turn.

6.1(a) The publication of SFAA's with fixed terms

Clause 1B.1.3 of the SAU provides as follows:

(a) NBN Co will ensure that any SFAA that is published includes an expiry date, to be a date no later than 2 years after the date on which the SFAA commences. For clarity, this does not preclude NBN Co publishing any SFAA with the option of agreeing to extend the term of any SFAA beyond such expiry date.

(b) In accordance with clause 1B.2, NBN Co commits to updating, where necessary, an SFAA throughout the Initial Regulatory Period.

It should be noted that there is a distinction between:

- the publication of an SFAA; and
- the commencement of an SFAA.

6.1(b) The multilateral consultation forum

Clause 1B.3 of the SAU provides as follows:

1B.3.1 Establishment of a Multilateral SFAA Forum

*(a) NBN Co will establish a multilateral consultation forum to engage with Access Seekers on possible future changes to the terms of an SFAA (**Multilateral SFAA Forum**).*

(b) NBN Co will convene the first Multilateral SFAA Forum no later than 18 months after the SAU Commencement Date.

(c) The purpose of the Multilateral SFAA Forum will include identifying and prioritising issues associated with any SFAA and working to develop multilateral resolutions to changes to any SFAA.

(d) The Multilateral SFAA Forum will allow Access Seekers and NBN Co to suggest changes to any SFAA.

(e) Subject to clauses 6 and 1B.2, NBN Co may make such changes to any SFAA as NBN Co considers appropriate, including any changes arising from the Multilateral SFAA Forum. Except with the ACCC's prior approval, NBN Co may not make any change to an SFAA under this clause 1B.3.1(e) in relation to the provisions referred to in:

(i) Annexure 1 (Dispute Management Rules) to Schedule 1H (Non-price terms and conditions);

(ii) *Annexure 2 (Information & Rights Management) to Schedule 1H (Non-price terms and conditions);*

(iii) *Annexure 3 (Risk Management) to Schedule 1H (Non-price terms and conditions);*

(iv) *Annexure 1 (PDF Processes) to Schedule 1I (Product Development and Withdrawal); or*

(v) *Annexure 1 (Service Levels Schedule) to Schedule 1J (Service Level commitments), other than in relation to the supply of new Products, Product Components, Product Features, Ancillary Services and types of Facilities Access Service introduced during the Initial Regulatory Period.*

(f) *NBN Co will incorporate the changes made under clause 1B.3.1(e) into the new version of the relevant SFAA that NBN Co publishes to be available upon expiry of the term of the current SFAA in accordance with clause 1B.1.3(a).*

(g) *If NBN Co does not agree with a suggested change made by an Access Seeker through the Multilateral SFAA Forum, NBN Co will notify Access Seekers and the ACCC of that fact no later than 4 months after convening a Multilateral SFAA Forum.*

(h) *NBN Co will convene another Multilateral SFAA Forum no later than 6 months prior to the expiry date of each version of the SFAA published under clause 1B.3.1(f).*

(i) *The Multilateral SFAA Forum will be available to all Access Seekers irrespective of whether they have an Access Agreement with NBN Co. However, Access Seeker participation in the Multilateral SFAA Forum will be voluntary such that each Access Seeker can engage as they deem appropriate given their level of interest and/or resources.*

(j) *NBN Co may, but is not obliged to, discuss changes to any SFAA arising from a Regulatory Determination within the Multilateral SFAA Forum.*

(k) *The operation of the Multilateral SFAA Forum will be reviewed in accordance with clause 1K.2.*

(l) *Nothing in this clause 1B.3 precludes NBN Co from conducting bilateral consultation with Access Seekers in relation to any SFAA in a manner that is consistent with NBN Co's Non-Discrimination Obligations.*

It should be noted that NBN Co is not obliged to submit changes that it makes to an SFAA for discussion in the multilateral forum.

6.1(c) The mechanism for giving effect to terms made by the ACCC

Clause 1B.2.1 of the SAU provides as follows:

1B.2.1 Application of regulatory recourse

(a) *This clause 1B.2 applies in relation to an SFAA.*

(b) *Nothing in this clause 1B.2 has effect in relation to an Access Agreement.*

1B.2.2 ACCC Regulatory Determinations

(a) *NBN Co acknowledges that the ACCC may make, vary or withdraw an Access Determination or Binding Rule of Conduct that relates to the NBN Access Service or*

the Ancillary Services. Such Access Determination or Binding Rule of Conduct will have no effect to the extent to which it:

(i) is inconsistent with the terms of this Special Access

Undertaking;

(ii) has the effect (whether direct or indirect) of discriminating between Access Seekers; or

(iii) is not otherwise compliant with Part XIC of the CCA,

(each a Regulatory Determination).

(b) NBN Co will give effect to any Regulatory Determination by ensuring that the new SFAA, published to be available upon expiry of the term of the current SFAA in accordance with clause 1B.1.3(a), will be consistent with such Regulatory Determination.

(c) NBN Co will not be required to give effect to any Regulatory Determination by amending any existing published SFAA.

(d) When a Regulatory Determination expires, NBN Co may amend any SFAA to remove the effect of that Regulatory Determination on the SFAA.

Clause 1B.2.3 of the SAU contains a similar mechanism for giving effect to ‘Facilities Access Decisions’ made by the ACCC.

It should be noted that NBN Co will not be required to give effect to any Regulatory Determination by amending any existing published SFAA.

It should also be noted that there is a drafting problem in clause 1B.2.2 because taken literally, the definition of ‘Regulatory Determination’ would apply to access determinations and binding rules of conduct that:

- are inconsistent with the terms of the SAU;
- have the effect of discriminating between Access Seekers; or
- are otherwise not compliant with Part XIC of the CCA.

This problem can be overcome by moving the phrase ‘**(each a Regulatory Determination)**’ and putting it at the end of the first sentence of clause 1B.2.2 of the SAU.

6.2 Problems relating to uncertainty

The problems relating to uncertainty that arise from the SAU regulatory recourse mechanism are best illustrated by means of a hypothetical scenario as follows:

Scenario 3

- *On 1 January 2014 the SAU and the first SFAA (**SFAA 1**) commence⁴².*

⁴² Note that for ease of expression, it has been assumed that the SAU and the first SFAA both commence on 1 January 2014.

- SFAA 1 includes a clause that states that on expiry of the agreement NBN Co may cease providing all ordered products (**the Expiry Clause**).
- On 30 June 2015 NBN Co convenes the first multilateral forum⁴³.
- On 5 July 2015 an access seeker requests NBN Co to make changes to the Expiry Clause so that NBN Co is not permitted to terminate services immediately on expiry of the agreement (**the Access Seeker Changes**).
- On 29 October 2015 NBN Co notifies access seekers that it does not agree with the Access Seeker Changes⁴⁴.
- On 31 October 2015 an access seeker requests the ACCC to make an access Determination that is consistent with the Access Seeker Changes.
- On 15 December 2015 the ACCC makes an access determination which is consistent with the Access Seeker Changes (**the Access Determination**).
- On 22 December 2015, NBN Co publishes SFAA 2 which is due to commence on 2 January 2016. In accordance with clause 1B.2.2(b) of the SAU, SFAA 2 is consistent with the Access Determination. However, NBN Co also includes a new change management clause (**the Change Management Clause**) which was not discussed in the multilateral forum and which gives NBN Co a unilateral right to vary the agreement on 10 days' notice.
- On 23 December 2015 an access seeker requests the ACCC to make a binding rule of conduct that addresses the Change Management Clause and removes NBN Co's unilateral right to vary the agreement on 10 days' notice.
- On 29 December 2015 the ACCC makes the binding rule of conduct requested by the access seeker (**the BROC**).

The uncertainty arises from the following questions:

- Is NBN Co obliged to amend SFAA 2 in accordance with the BROC?
- If NBN Co does not amend SFAA 2 in accordance with the BROC, could an access seeker refuse to sign SFAA 2 and rely on the BROC?
- What would happen if the ACCC was not able to make the BROC before 2 January 2016?

Each of these questions will be considered in turn.

6.2(a) Is NBN Co obliged to amend SFAA 2 in accordance with the BROC?

Given that NBN Co has already published SFAA 2, it is arguable that the effect of clause 1B.2.2(c) is that NBN Co is not obliged to amend SFAA 2 in accordance with the BROC.

6.2(b) If NBN Co does not amend SFAA 2 in accordance with the BROC, could an access seeker refuse to sign SFAA 2 and rely on the BROC?

The answer to this question depends on which of the following interpretations of clause 1B2.1 of the SAU is adopted:

⁴³ Pursuant to clause 1B.3.1(b) of the SAU..

⁴⁴ Pursuant to clause 1B.3.1(g) of the SAU.

- Clause 1B2.1 of the SAU exhaustively sets out the circumstances in which NBN Co will give effect to Regulatory Determinations. Therefore, Regulatory Determinations that have not been incorporated into an SFAA have no effect because to proceed otherwise would be inconsistent with the SAU (**the Narrow View**).
- Clause 1B2.1 of the SAU provides one way in which NBN Co will give effect to Regulatory Determinations. It does not limit NBN Co's obligations under Part XIC to give effect to Regulatory Determinations (**the Wide View**).

iiNet notes that the ACCC's view is that the Wide View applies⁴⁵. However, as the relevant legislation is untested, such a view cannot be expressed with complete certainty. Clearly, any doubts surrounding this issue could be simply resolved by the SAU stating in express terms that the Wide View applies.

6.2(c) What happens if the ACCC is not able to make the BROCC before 2 January 2016?

As there are no alternative terms available, and as the Expiry Clause could be used to put real pressure on access seekers to sign SFAA 2, access seekers may have no alternative but to accept SFAA 2.

6.3 Delay

Again, the problems that arise are best illustrated by means of a hypothetical scenario as follows:

Scenario 4

- *On 1 January 2014 the SAU and the first SFAA (SFAA 1) commence⁴⁶.*
- *SFAA 1 includes a clause that states that on expiry of the agreement NBN Co may cease providing all ordered products (the Expiry Clause).*
- *On 30 June 2015 NBN Co convenes the first multilateral forum⁴⁷.*
- *On 5 July 2015 an access seeker requests NBN Co to make changes to SFAA 1 to be incorporated into SFAA 2 (the Access Seeker Changes).*
- *On 29 October 2015 NBN Co notifies access seekers that it does not agree with the Access Seeker Changes⁴⁸.*
- *On 31 October 2015 an access seeker requests the ACCC to make regulated terms that are consistent with the Access Seeker Changes.*
- *On 22 December 2015, NBN Co publishes SFAA 2 which is due to commence on 2 January 2016. SFAA 2 does not contain the Access Seeker Changes.*
- *Due to the procedural requirements involved in making an access determination, the ACCC is unable to make an access determination until 25 January 2016 by which time access seekers have signed SFAA 2.*

⁴⁵ Consultation Paper at p21.

⁴⁶ Note that for ease of expression, it has been assumed that the SAU and the first SFAA both commence on 1 January 2014.

⁴⁷ Pursuant to clause 1B.3.1(b) of the SAU..

⁴⁸ Pursuant to clause 1B.3.1(g) of the SAU.

In this scenario, access seekers would be prevented from relying on the access determination until January 2018 even though the issues giving rise to the access determination were first raised with NBN Co in July 2015. Such an outcome is clearly unreasonable.

6.4 Non-discrimination

The ACCC's non-discrimination guidelines state the following (emphasis added)⁴⁹:

The ACCC considers 'equal opportunity' to mean that network access providers should offer access seekers in the same class the same terms and conditions.

*This would mean that, if a network access provider bilaterally negotiates different terms and conditions with access seekers from those set out in existing Access Agreements, the ACCC would consider this to be non-discriminatory if the network access provider subsequently offers these terms to all access seekers in the same class. **This would require that network access providers offer to amend existing Access Agreements.** However, the network access provider would not be required to amend the Access Agreement of those access seekers that elect not to adopt the new terms and conditions.*

The ACCC considers that the network access provider should ensure that new terms and conditions are offered for incorporation into existing Access Agreements within a reasonable period. Whether or not a period of time is reasonable will depend on the terms and conditions in question.

Again, a hypothetical scenario is used to illustrate the issues that arise.

Scenario 5

- On 1 January 2014 the SAU and the first SFAA (**SFAA 1**) commence⁵⁰.
- SFAA 1 includes a clause that states that on expiry of the agreement NBN Co may cease providing all ordered products (**the Expiry Clause**).
- On 30 June 2015 NBN Co convenes the first multilateral forum⁵¹.
- On 5 July 2015 access seeker 1 requests NBN Co to make changes to SFAA 1 to be incorporated into SFAA 2 (**the Access Seeker Changes**).
- On 29 October 2015 NBN Co notifies access seekers that it does not agree with the Access Seeker Changes⁵².
- On 31 October 2015 access seeker 1 requests the ACCC to make regulated terms that are consistent with the Access Seeker Changes.
- On 22 December 2015, NBN Co publishes SFAA 2 which is due to commence on 2 January 2016. SFAA 2 does not contain the Access Seeker Changes.
- Due to the procedural requirements involved in making an access determination, the ACCC is unable to make an access determination (**the Access Determination**) until 25 January 2016 by which time access seeker 1 has signed SFAA 2.

⁴⁹ Part XIC non-discrimination guidelines ACCC explanatory material relating to the Part XIC anti-discrimination provisions and the form of Statements of Differences, April 2012, at p11.

⁵⁰ Note that for ease of expression, it has been assumed that the SAU and the first SFAA both commence on 1 January 2014.

⁵¹ Pursuant to clause 1B.3.1(b) of the SAU..

⁵² Pursuant to clause 1B.3.1(g) of the SAU.

- *On 1 February 2016, access seeker 2 enters the market. Access seeker 2 requests NBN Co to provide a service in accordance with the terms on the Access Determination.*

In this scenario, if the Wide View applies, NBN Co will be obliged to provide access seeker 2 with access on the terms of the Access Determination. The reasons why the Wide View should apply have been set out above. Therefore, in this scenario, access seeker 2 would have access to the terms in the Access Determination from 1 February 2016, whereas access seeker 1 will not have access to those terms until 2 January 2018. iiNet submits that unless NBN Co offers to amend access seeker 1's access agreement in line with the Access Determination, NBN Co will be in breach of the Non-Discrimination Obligation.

It should be noted that the Non-Discrimination Obligation is not part of, or subject to, the legislative hierarchy discussed in section 5.1 above. Therefore, the Non-Discrimination Obligation may require NBN Co to offer to amend access agreements even in circumstances where the access seeker has freely entered into that agreement without raising any concerns about the terms of access.

6.5 Solution to the problems

iiNet submits that the problems discussed in this section of the submission can be resolved by redrafting Schedule 1B of the SAU in a manner that gives effect to the following additional outcomes:

- A commitment that NBN Co be required to consult about all amendments to the SFAA.
- An express statement that the Wide View applies.
- A commitment to include a 'Regulated Terms pass through clause' in the SFAA - (i.e. the SFAA should include a clause that gives the wholesale customer the option of accepting a variation to the access agreement that would immediately bring the access agreement into line with the ACCC terms).

As regards the last outcome above, it should be noted that ever since NBN Co first consulted on its Wholesale Broadband Agreement, iiNet has consistently put forward the view, through a number of consultations with NBN Co that some form of 'Regulated Terms pass through clause' is required. iiNet has also put forward this view in response to the ACCC's consultations on NBN Co's special access undertakings. iiNet maintains this view. iiNet requests that the ACCC note that NBN Co's contract development process has now concluded and there are unresolved issues that relate to subject matter that is not covered by the SAU⁵³. A number of these issues were first raised with NBN Co over 12 months ago. If current SAU processes are used, it could be a further two years before access seekers are able to rely on Regulated Terms in respect of these issues.

⁵³ For example issues relating to credit management and NBN Co's ability to suspend or terminate services.

7. THE COMMITMENTS AND CONSTRAINTS RELATING TO PRICE TERMS

iiNet submits that the SAU cannot satisfy the Reasonableness Test unless the ACCC is satisfied that the commitments and constraints relating to price terms that will apply after the SAU has been accepted will be sufficient to lead to an outcome where the price terms that NBN Co sets for the duration of the SAU will promote the LTIE.

7.1 Inadequate constraints

Given that NBN Co is likely to under recover its costs during the Initial Regulatory Period, and NBN Co is permitted to carry forward any over recovered or under recovered amounts between Regulatory Cycles⁵⁴, the Long Term Revenue Constraint Methodology (**LTRCM**) is unlikely to have any constraining effect on NBN Co's pricing during the Initial Regulatory Period. Therefore, the only relevant constraints on NBN Co price terms during the Initial Regulatory Period are as follows:

1. The Maximum Regulated Price for each Reference Offer is specified in the SAU⁵⁵. These prices are locked in until 1 July 2017 and are then subject to an individual price increase limit of CPI - 1.5% per year⁵⁶.
2. The Maximum Regulated Price for a number of specified Non Reference Offers are specified in the SAU⁵⁷. These prices are subject to an individual price increase limit of CPI - 1.5% per year⁵⁸.
3. The introduction of new prices for zero priced Reference Offers and zero priced Other Charges is subject to ACCC oversight⁵⁹.
4. The initial price terms for New Offers, New Other Charges and new prices for zero priced non reference offers are subject to:
 - a. a requirement for NBN Co to publish a pricing statement describing in qualitative terms how the new price has been determined; and
 - b. a requirement for NBN Co to have regard to the Initial Pricing Principles set out in clause 1D.6.

As regards 1 and 2 above, iiNet acknowledges that these will act as constraints on NBN Co's price terms in respect of the relevant services. However, iiNet believes that the provision of services on a new network may require a more flexible approach to be taken to price terms. iiNet therefore believes that NBN Co's price terms should be subject to review in the same way that non price terms are.

As regards 3 and 4 above, iiNet believes that each of these constraints on their own are inadequate. Although 3 above provides ACCC oversight, it is problematic for the following reasons:

- Although NBN Co is required to give three months' notice of its intention to introduce the new price, NBN Co is not required to explain or provide any

⁵⁴ See clause 2D.5.2 of the SAU.

⁵⁵ See clause 1C.3.1 of the SAU.

⁵⁶ See clause 1C.4.1 of the SAU.

⁵⁷ See clause 1D.3.1 of the SAU.

⁵⁸ See clause 1D.4.1 of the SAU.

⁵⁹ See clauses 1C4.5 and 1D.4.3 of the SAU.

rationale for the new Price. This may make it difficult for the ACCC to assess the merits of the new price.

- The ACCC has a fixed three month period in which to make an access determination or binding rule of conduct. Given the complex issues that may need to be considered and the need for public consultation, the ACCC should have discretion to extend this period when reasonably required.

As regards 4 above, iiNet submits that a mere requirement to have regard to pricing principles cannot support a conclusion that the price terms for New Offers, New Other Charges and new prices for zero priced non reference offers will be reasonable, as there is no way to challenge NBN Co's application of the pricing principles. Furthermore, the pricing principles in the SAU do not align with the statutory criteria because there is no requirement for NBN Co to have regard to the effect on competition and the LTIE. iiNet submits that NBN Co should be required to have regard to the effect on competition and the LTIE.

iiNet submits that an adequate regulatory oversight mechanism would be a combination of 3 and 4 above with the improvements suggested. This means that the initial price terms for New Offers, New Other Charges and new prices for zero priced non reference offers and the introduction of new prices for zero priced Reference Offers and zero priced Other Charges would be subject to the following process:

- a requirement for NBN Co to have regard to the Pricing Principles which include having regard to the effect on competition and the LTIE;
- a requirement for NBN Co to publish a pricing statement describing in qualitative terms how the new price has been determined in accordance with the Pricing Principles and to provide this pricing statement with its notification of intention to introduce the new price; and
- the ability of the ACCC to set alternative terms by means of an access determination or binding rule of conduct made within the three month notification period or such other longer period as may reasonably be necessary.

As regards the Subsequent Regulatory Period, iiNet is concerned that a move to a model where the ACCC's role in respect of price terms is limited to approving NBN Co's revenue and expenditure forecasts may not ensure outcomes that promote the LTIE. Unlike electricity and gas which involve one basic product (i.e. the supply of energy), telecommunications involves the supply of many different products, and how individual products are priced could have substantial implications for the LTIE which cannot be appropriately regulated by means of a coarse power to approve expenditure and revenue forecasts. Therefore, iiNet submits that the SAU is not reasonable to the extent that it will require the ACCC to surrender its power to oversee price terms for individual products (either through ex ante approval as with 1 and 2 above or by means of a regulatory determination as with 3 above).

7.2 Inadequate commitments

After each Connectivity Serving Area has more than 30,000 NBN Serviceable Premises or after the end of the Initial Regulatory Period (whichever occurs first), NBN Co will review the Maximum Regulated Price of the CVC Reference Offer Virtual Circuit Offer (TC-4) with a view to reduce the Price as aggregate demand for

that Reference Offer increases⁶⁰. In its review, NBN Co will consider the level of aggregate demand for CVC (TC-4) capacity and the information in the most recently published NBN Co Corporate Plan. iiNet submits that this commitment is inadequate. iiNet submits that the commitment should extend to all CVC services and not just the CVC Reference Offer. iiNet also believes that in order for this commitment to have any value, NBN Co should be required to publish annually:

- particular triggers (for example particular demand levels) that would lead to a reduction in CVC pricing; and
- whether those triggers have been reached.

7.3 Relevance of the UNP Prohibition

iiNet submits that none of the issues discussed in this section 7 of this submission engage the UNP Prohibition because they do not relate to, or impact on, NBN Co's ability to achieve uniform national wholesale pricing.

8. THE EFFECTIVENESS OF ACCC DECLARATIONS UNDER SECTION 152AL(8A) OF THE CCA

The situations that iiNet believes need to be considered are as follows:

- NBN Co withdraws a particular aspect or functionality of a service (for example multicasting), and the ACCC decides that the LTIE requires that NBN Co provide the particular aspect or functionality and so the ACCC declares a service under section 152AL(8A) of the CCA that includes the relevant aspect or functionality.
- NBN Co is requested to provide a particular aspect or functionality of a service, but refuses to do so, and the ACCC decides that the LTIE requires that NBN Co provide the particular aspect or functionality and so declares a service under section 152AL(8A) of the CCA that includes the relevant aspect or functionality.

iiNet believes it is crucial for the ACCC's power to declare the relevant service under section 152AL(8A), and set terms and conditions in respect of it, to be effective. iiNet notes that the SAU is entirely silent on this issue. This may be because NBN Co accepts that Regulated Terms would apply in these circumstances. However, iiNet believes that given the potential uncertainty over this issue, it leads to a situation where the ACCC cannot be satisfied that the SAU is reasonable unless the SAU expressly deals with this issue. iiNet submits that the simplest way to provide the certainty that is required is for the SAU to include an express term in module 0 to the following effect:

1. *In the event that NBN Co ceases to provide a Product, Product Component, Product Feature, Ancillary Service or Facilities Access Service (**Relevant Service**), and the ACCC declares the Relevant Service under section 152AL(8A) of the CCA, nothing in the SAU will prevent Regulated Terms made in respect of the Relevant Service from having effect.*
2. *In the event that:*
 - a. *the ACCC declares a service under section 152AL(8A) of the CCA (**the New Service**);*

⁶⁰ Clause 1C.4.2(d) of the SAU.

- b. *the New Service comes within the definition of NBN Access Service, Ancillary Service or Facilities Access Service; and*
- c. *at the time the declaration is made NBN Co is not providing the New Service,*

nothing in the SAU will prevent Regulated Terms made in respect of the Relevant Service from having effect.

9. THE MECHANISMS THAT APPLY TO REVIEWS AND THE TRANSITION TO REPLACEMENT SAU MODULES

iiNet submits that:

- the terms that apply to reviews during the Initial Regulatory Period impose a decision making time period on the ACCC which is too strict and could result in terms that the ACCC has rejected applying; and
- the terms that apply to replacement SAU modules have the effect of unreasonably delaying the application of alternative ACCC terms and the potential to allow terms that the ACCC has rejected to apply.

iiNet submits that an SAU that has the potential to deliver such outcomes does not satisfy the Reasonableness Test.

9.1 Reviews

Schedule 1K of the SAU sets out terms that relate to reviews that NBN Co will conduct during the Initial Regulatory Period. iiNet acknowledges that these reviews provide for ACCC oversight. However, the ACCC is constrained by a non extendable 60 business day decision making period in circumstances where the effect of the ACCC failing to make a decision leads to the NBN Co proposed terms applying⁶¹. iiNet believes that the ACCC should have a discretion to extend the decision making time period. Otherwise a situation could arise where either the ACCC is unable to make a properly informed or considered decision or the ACCC takes longer than the 60 business days and, in circumstances where it decides to reject the NBN Co proposal, the NBN Co proposal will nevertheless apply.

9.2 Replacement SAU modules

The relevant provisions of the SAU that relate to the transition to replacement SAU modules are as follows.

Clause 4.6 of the SAU provides:

4.6 Commitment to submit a Replacement Module Application

(a) NBN Co will, no later than 9 months prior to:

(i) the end of the Initial Regulatory Period; and

(ii) the end of each Regulatory Cycle,

provide the ACCC with a Replacement Module Application.

(b) NBN Co, as part of any Replacement Module Application, will include:

⁶¹ See clauses 1K.2.3 of the SAU, 1K.2.6, 1K.3.3 and 1K.3.6.

(i) a Replacement Module Term of 3, 4 or 5 years (unless fewer than 3 years remain in the SAU Term, in which case, the Replacement Module Term will be for the number of years remaining in the SAU Term);

(ii) a Reference Offer Proposal established in accordance with clause 4.7;

(iii) a LTRCM Proposal established in accordance with clause 4.8;

(iv) a Service Level Proposal in accordance with clause 4.9; and

(v) any other matters that NBN Co proposes to form part of a Replacement Module, which may include, for example, arrangements relating to regulatory recourse, product development and withdrawal and non-price terms and conditions for inclusion in an SFAA.

Clause 4.3 of the SAU provides for the automatic extension of the Initial Regulatory Period (i.e. the terms in Module 1 to continue to apply) as follows:

(a) The Initial Regulatory Period will be automatically extended for a period of 12 months (the additional period being the **Extended Initial Regulatory Period**), provided that:

(i) NBN Co has lodged a Replacement Module Application by means of an application to vary this Special Access Undertaking pursuant to section 152CBG of the CCA no later than 9 months prior to the end of the Initial Regulatory Period; or

(ii) both:

(A) NBN Co has lodged a new special access undertaking pursuant to section 152CBA of the CCA in relation to the NBN Access Service, Ancillary Services and the Facilities Access Service no later than 9 months prior to the end of the Initial Regulatory Period; and

(B) the ACCC has not, by 30 June 2023, made an Access Determination in relation to the NBN Access Service or Ancillary Services that covers subject matter that is substantially similar to the subject matter of the new special access undertaking.

(b) The Extended Initial Regulatory Period will not take effect if the ACCC accepts a Replacement Module Application or a new special access undertaking in relation to the NBN Access Service, Ancillary Services and the Facilities Access Service before the Extended Initial Regulatory Period would have commenced.

(c) An extension of the Initial Regulatory Period under this clause 4.3 will not have the effect of extending the SAU Term.

The effect of clause 4.3 of the SAU is that if prior to the end of the Initial Regulatory Period, the ACCC rejects a replacement module and makes alternative ACCC terms, Module 1 terms will continue to apply for a further year. Although iiNet accepts that it is appropriate for Module 1 terms to continue to apply while an ACCC decision is pending, iiNet believes that in circumstances where the ACCC has rejected a replacement module and made alternative ACCC terms, the ACCC terms should apply without delay.

Clause 4.10 of the SAU provides as follows:

4.10 Non-acceptance of Replacement Module Applications

(a) This clause 4.10 applies if:

(i) the Extended Initial Regulatory Period ends or a Regulatory Cycle ends (the last day of such period being the Cycle Expiry Date); and

(ii) the ACCC has not accepted a Replacement Module Application to have effect commencing immediately following the Cycle Expiry Date.

(b) Subject to clauses 4.10(d) and 4.10(e), the following matters will be deemed to apply from the Cycle Expiry Date for the Replacement Module Term proposed in the Replacement Module Application provided by NBN Co under clause 4.6:

(i) the Reference Offers provided in the Reference Offer Proposal;

(ii) the terms of the LTRCM Proposal; and

(iii) the Service Levels and Service Level Rebates set out in the Service Level Proposal,

as specified in the Replacement Module Application.

(c) If, following the withdrawal or rejection of a Replacement Module Application, NBN Co had, at least 20 Business Days prior to the Cycle Expiry Date, lodged another Replacement Module Application (in this clause 4.10(c), **Updated Replacement Module Application**) that complies with clause 4.6(b), then clause 4.10(b) will apply as though all references to the Replacement Module Application were references to the Updated Replacement Module Application (or the most recent Updated Replacement Module Application, as the case may be).

(d) If the ACCC makes, before the Cycle Expiry Date, an Access Determination or Binding Rule of Conduct that contains terms relating to the matters described in clause 4.10(b), the Access Determination or Binding Rule of Conduct will, to the extent it is not inconsistent with Module 0 and Module 2:

(i) apply from immediately after the Cycle Expiry Date until the end of the applicable Regulatory Cycle; and

(ii) prevail over the matters described in clause 4.10(b).

(e) If the ACCC makes, after the Cycle Expiry Date but no more than 12 months after the Cycle Expiry Date, an Access Determination or Binding Rule of Conduct that contains terms relating to the matters described in clause 4.10(b), the Access Determination or Binding Rule of Conduct will not apply in the first Financial Year of the applicable Regulatory Cycle and will, to the extent it is not inconsistent with Module 0 and Module 2:

(i) apply from 1 July in the second Financial Year of that Regulatory Cycle until the end of that Regulatory Cycle; and

(ii) prevail over the matters described in clause 4.10(b).

(f) NBN Co acknowledges that if a Replacement Module Application is rejected by the ACCC, the ACCC may make an Access Determination or Binding Rule of Conduct that will have effect to the extent it is not inconsistent with the terms of this Special Access Undertaking (including those principles and conditions set out in Module 0 and Module 2) and otherwise complies with Part XIC of the CCA.

The effect of clause 4.10(e) is that there is the potential for the ability to rely on the ACCC's terms to be delayed for up to 12 months. iiNet submits that such a delay is unreasonable given that the effect of the deeming provision in clause 4.10(b) will be that during this period, terms that the ACCC has rejected will apply. Furthermore, if the ACCC's decision to reject the replacement module is made more than 12

months after the Cycle Expiry date, then, if clause 4.10 is taken literally, the deemed terms will continue to apply for the entire replacement module term notwithstanding the ACCC's rejection of them. This is because clause 4.10(b) is not subject to clause 4.10(f) and clause 4.10(f) simply acknowledges that the ACCC may reject a replacement module and make alternative terms that will have effect '*to the extent not inconsistent with [the SAU]*' - i.e. clause 4.10(f) does not override clause 4.10(b) and clause 4.10(b) will make the deemed provisions applicable thereby making any alternative Regulated Terms to those deemed provisions inconsistent with the SAU. Although iiNet acknowledges that it is reasonable to expect the ACCC to make a decision within the 21 month timeframe (i.e. the initial 9 months before the Cycle Expiry date and the 12 months thereafter), iiNet believes that clause 4.10(c) which allows NBN Co to submit updated replacement modules could lead to the ACCC having to consider more than one version of a replacement module, therefore increasing the time that is required for consideration.

10. SERVICE LEVELS

Schedule 1J of the SAU contains NBN Co's service level commitments for the Initial Regulatory Period. Annexure 1 of Schedule 1J of the SAU contains terms and conditions that are identical to the Service Level Schedule set out in the 30 November 2012 version of NBN Co's Wholesale Broadband Agreement⁶². NBN Co commits to incorporate the terms set out in Annexure 1 of Schedule 1J into any SFAA and maintain such terms that are the same or better (having regard to all circumstances) in any SFAA⁶³. Note that for ease of expression Annexure 1 of Schedule 1J will be referred to as the **Service Level Terms**.

iiNet makes the following points regarding the Service Level Terms:

- The Service Level Terms are insufficient to provide NBN Co with appropriate incentives to engage in efficient investment in its infrastructure.
- The Service Level Terms may lead to problems for retail service providers meeting their obligations under the CSG.
- Measuring NBN Co's performance from NBN Co's acknowledgement of the Order or Trouble Ticket leads to uncertainty.

In addition, iiNet is concerned that there may be no recourse to Regulated Terms in respect of service levels for new products during the Subsequent Regulatory Period.

iiNet submits that these defects lead to a conclusion that the service level regime in the SAU does not promote the LTIE and therefore fails to satisfy the Reasonableness Test. This is because the inadequate service level commitments will result in a failure to achieve the End User Outcome.

Each of the above points will be considered in turn.

10.1 Insufficient incentives

iiNet agrees with the ACCC that commitments to meet particular service levels and penalties for not meeting them could encourage investment and maintenance that is required to meet the service levels on an ongoing basis⁶⁴. However, iiNet submits

⁶² NBN Co letter to ACCC dated 18 December 2012.

⁶³ Clause 1J.2.

⁶⁴ Consultation Paper at p.79.

that the Service Level Terms fall well short of encouraging NBN Co to invest efficiently in infrastructure because:

- the circumstances in which the Service Level Terms require NBN Co to provide service credits are too narrow, uncertain or subject to too much NBN Co discretion;
- the obligations on NBN Co to take corrective action are too weak; and
- the service levels, performance objectives and operational targets are too conservative.

Each of these points will be considered in turn.

10.1(a) the circumstances in which NBN Co is obliged to provide service credits are too narrow, uncertain or subject to too much NBN Co discretion

iiNet has concerns with the following:

- The limited number of service levels that attract service level rebates.
- NBN Co being excused from meeting service level rebates and performance objectives where a customer has not maintained records.
- To receive connection rebates, an access seeker is required to submit forecasts to NBN Co and the rebate amount paid by NBN Co is dependent on the accuracy of the forecasts.
- The service levels in respect of connections do not apply where the access seeker has failed to comply with the order process set out in the Operations Manual.
- The terms relating to a number of matters that are dealt with in the Service Level Terms allow terms to be specified by NBN Co in the Operations Manual or Fair Use Policy.
- The definitions of 'End User Faults' and 'Network Faults' contain extensive carve outs.

Each of these concerns will be explained in turn.

10.1(a)(i) the limited number of service levels that attract service level rebates

NBN Co is not required to provide any rebates where it fails to meet a service level except where NBN Co fails to meet the end-user connections service level and the enhanced-12 fault rectification service level⁶⁵. This means that the majority of service levels in the Service Level Terms do not lead to any consequences if NBN Co fails to meet them.

10.1(a)(ii) NBN Co being excused from meeting service level rebates and performance objectives where a customer has not maintained records

Clause 1.3(b) of the Service Level Terms contains the following condition:

⁶⁵ In addition, there are obligations on NBN Co to reimburse the costs of alternative or interim services in respect of priority assistance connections and fault rectifications.

Customer must maintain up-to-date and accurate records, materials, documents and correspondence relevant to each Accelerated Connection that Customer has ordered in each CSA during each month and, on request, provide NBN Co with access to such information. Customer must cooperate with NBN Co to assist NBN Co with any review of this information.

The implication from this is that if the access seeker does not satisfy this condition, the relevant service levels and performance objectives will not apply. iiNet believes that the inclusion of this condition is unjustified for two reasons. Firstly, whether or not an access seeker maintains records is irrelevant to the ability of NBN Co to meet its service level obligations. As the access provider, NBN Co should maintain appropriate records to meet its service level obligations and should not be reliant on any records from the access seeker. Secondly, such a requirement may indirectly discriminate against smaller access seekers who may have less sophisticated record keeping systems than larger access seekers.

10.1(a)(iii) to receive connection rebates, an access seeker is required to submit forecasts to NBN Co and the rebate amount paid by NBN Co is dependent on the accuracy of the forecasts

iiNet submits that making service level rebates dependent on forecasting adds an unnecessary layer of complexity and gives NBN Co a further unjustified opportunity to avoid having to pay connection rebates. Furthermore, the requirement to provide accurate forecasts is likely to have the effect of indirect discrimination as regards smaller access seekers which are more likely to have difficulty providing accurate forecasts as compared to larger access seekers. It should be noted that such a requirement is not in accordance with current industry practice.

10.1(a)(iv) the service levels in respect of connections do not apply where the access seeker has failed to comply with the order process set out in the Operations Manual

iiNet submits that this carve out is too wide and the service levels should apply where NBN Co has processed the order without objection and the failure to comply with the order did not cause or contribute to NBN Co's failure to meet the service level.

10.1(a)(v) the terms relating to a number of matters that are dealt with in the Service Level Terms allow terms to be specified by NBN Co in the Operations Manual or Fair Use Policy

The terms relating to the following matters that are dealt with in the Service Level Terms allow terms to be specified by NBN Co in the Operations Manual or Fair Use Policy:

- the order process for end user connections⁶⁶;
- the process for claiming Connection Rebates⁶⁷;
- the process for determination of the Alternative or Interim Service Amount⁶⁸;
- the applicability of Service Levels to End User Faults or Network Faults⁶⁹;

⁶⁶ Clause 1.3(c) of Annexure 1 of Schedule 1J of the SAU

⁶⁷ Clause 1.4(c) of Annexure 1 of Schedule 1J of the SAU

⁶⁸ Clauses 1.5 and 4.6 of Annexure 1 of Schedule 1J of the SAU

- the notification procedure for Priority Assistance Faults⁷⁰;
- the process for claiming Enhanced-12 Fault Rebates⁷¹;
- the requirement for NBN Co to contact a customer in relation to Exceeded Configured Peak Bandwidth Events⁷²;
- calculating network availability⁷³;
- the Utilisation Management Performance Objective⁷⁴;
- the definition of 'Unavailable Times' in clause 10.2 of Annexure 1 of Schedule 1J of the SAU;
- the definition of 'Unavailable' in clause 11 of Annexure 1 of Schedule 1J of the SAU;
- the process for calculating, claiming and crediting CSG Compensation⁷⁵; and
- the definition of each of the following words: 'Acknowledged'; 'Appointment Enquiry'; 'Billing Period'; 'Booked'; 'Cables'; 'Cancelled'; 'Closed'; 'Complete'; 'Data Enquiry' Enhanced 12 Fault; 'Held'; 'In Progress'; 'Incomplete'; 'Network Fault Response'; 'Order Acknowledgment'; 'Outage'; 'Pending'; 'Priority Assistance Fault'; 'Rejected'; 'Reserved'; 'Resolved'; 'Rollout Plan'; 'Standard Connection Forecast'; 'Trouble Ticket Acknowledgement'; 'Trouble Ticket ID'⁷⁶.

iiNet is concerned that this provides NBN Co with a wide discretion to specify terms that will have the effect of excluding or limiting NBN Co's compliance with the service levels.

10.1(a)(vi) the definitions of 'End User Faults' and 'Network Faults'

The service levels and performance objectives that relate to fault rectification relate to 'End User Faults' and 'Network Faults' each of which are defined by reference to the definition of 'Service Fault' which is defined as follows:

Service Fault means a failure of an Ordered Product to perform substantially in accordance with the relevant product description or product technical specification where the failure is contributed to by:

(a) a fault in or failure of an NBN-Related Network; or

(b) any other matter or thing for which NBN Co is responsible, except where the failure is contributed to by an Outage.

The effect of this definition is that where the failure of the ordered product is contributed to by an 'Outage', the failure will not come within the definition of

⁶⁹ Clause 4.5(a) of Annexure 1 of Schedule 1J of the SAU

⁷⁰ Clause 4.5(c) of Annexure 1 of Schedule 1J of the SAU

⁷¹ Clause 5.4(b) of Annexure 1 of Schedule 1J of the SAU

⁷² Clause 7.6 of Annexure 1 of Schedule 1J of the SAU

⁷³ Clause 11.2 of Annexure 1 of Schedule 1J of the SAU

⁷⁴ Clause 11.3(b) of Annexure 1 of Schedule 1J of the SAU

⁷⁵ Clause 14.3 of Annexure 1 of Schedule 1J of the SAU

⁷⁶ Clause 19 of Annexure 1 of Schedule 1J of the SAU

'Service Fault' and in turn will not come within the definitions of 'End User Fault' or 'Network Fault', meaning that the service levels and performance objectives relating to fault rectification will not be applicable. An 'Outage' is defined as follows:

Outage means a failure of an Ordered Product to perform substantially in accordance with the relevant product description or product technical specification instigated by NBN Co in accordance with an Access Agreement in order to perform:

- (a) any Upgrade;*
- (b) any maintenance, repair, rationalisation or remediation of:*
 - (i) any NBN-Related Network;*
 - (ii) any other matter or thing for which NBN Co is responsible and which affects, or can affect, the supply of products by NBN Co to a Customer; or*
 - (iii) any facilities, at, on or under which the NBN Co Network is attached, located or installed;*
- (c) the relocation, closure or replacement of any POI, of which NBN Co has given prior notice in accordance with clause 1H.4; or*
- (d) any other matter or thing specified in the NBN Co Operations Manual.*

An Upgrade is defined as:

Upgrade means any upgrade, enhancement, modernisation, reconfiguration, enablement or augmentation of the NBN Co Network, including the removal, rearrangement, replacement or decommissioning of the network elements and associated electronics comprising the NBN Co Network, which will have, or is likely

to have, an impact on a Customer, but does not include any:

- (a) relocation, closure or replacement of a POI or the establishment of a new POI (which are addressed in clause 1H.4);*
- (b) routine maintenance or Service Fault rectification activities in relation to:*
 - (i) any NBN-Related Network;*
 - (ii) any other matter or thing for which NBN Co is responsible and which affects, or can affect, the supply of products by NBN Co to a Customer; or*
 - (iii) any facilities, at, on or under which the NBN Co Network is attached, located or installed; or*
- (c) rollout or expansion of the NBN Co Network.*

iiNet submits that these carve outs are too wide. iiNet submits that service levels should apply to all outages instigated by NBN Co except where NBN Co has given prior notice of the outage in accordance with the terms of the relevant access agreement.

10.1(b) the obligations on NBN Co to take corrective action are too weak

The only obligations in the Service Level Terms in respect of corrective action are:

- clause 4.5(b) of the Service Level Terms which requires NBN Co to take Corrective Action if an End User experiences more than 3 End User Faults in any 60 day period; and
- clause 13.1 of the Service Level Terms which provides that:

If NBN Co does not achieve a Service Level or Performance Objective, as soon as reasonably practicable following a request by Customer, NBN Co will:

 - (a) inform Customer of the reasons for that non-achievement;*
 - (b) inform Customer of any relevant corrective action taken or to be undertaken to address the non-achievement (Corrective Action);*
 - (c) take that Corrective Action; and*
 - (d) notify Customer as soon as reasonably practicable after Corrective Action is taken by NBN Co.*

Corrective action is defined as follows:

Corrective Action has the meaning given to that term in section 13.1(b).

These requirements do not impose any time constraints on NBN Co, and in the case of clause 13.1, there is not even an obligation to actually take any corrective action because clause 13.1(b) is drafted in discretionary rather than mandatory terms.

10.1(c) many of the service levels, performance objectives and operational targets are set too low for a new fibre network

There is no precedent service level agreement standard for large scale government imposed fibre network monopolies. iiNet believes that service level agreements based on legacy copper networks do not provide an appropriate benchmark which should govern NBN Co's service levels. iiNet believes that a more appropriate benchmark is the service level agreements offered by providers of fibre networks that provide services comparable to NBN Co's. iiNet is aware of an offering in the current market place that provides better fault rectification service levels than those offered by NBN Co. This fibre provider offers a four hour fault restoration target for critical fault restorations. By comparison, the best fault rectification target that NBN Co offers is six hours but this only applies in respect of multiple user faults⁷⁷. Single end user faults have a fault restoration target that can be as long as 39 hours⁷⁸.

10.2 Obligations under the CSG

Access seekers are required to waive any right which they may have to recover any amount from NBN Co pursuant to section 118A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999 (TCPSS Act)*, in respect of a 'Migration Connection'⁷⁹. A 'Migration Connection' is defined as:

⁷⁷ See Service Level Terms clause 4.3(a) and the definition of 'Network Fault'.

⁷⁸ See Service Level Terms clause 4.1 and the definition of 'End User Fault'.

⁷⁹ Clause 14.2

End User Connection:

(a) in respect of a Premises that is Service Class 1 or Service Class 2 and is supplied with a working standard telephone service at the time at which

Customer places the order for the End User Connection; and

(b) in respect of which NBN Co needs to perform an Initial Standard Installation or an Initial Non Standard Installation.

iiNet is concerned that in circumstances where pull through activities result in the disconnection of the existing standard telephone service, NBN Co should have an obligation to provide CSG compensation in circumstances where the NBN Co standard telephone service is not connected within CSG timeframes and the access seeker is required to pay the end customer CSG compensation.

iiNet believes that it is unreasonable for NBN Co not to provide CSG compensation in respect of NBN Co's Wireless Network⁸⁰. iiNet believes that such an exclusion is unjustified in circumstances where NBN Co's network is used to provide a standard telephone service that is subject to CSG obligations. iiNet is concerned that a Government owned entity is seeking to avoid federal legislation designed to protect consumers.

Furthermore, iiNet submits that the blanket requirement for access seekers to seek CSG waivers from end customers except where such waivers are prohibited by law⁸¹ is unreasonably draconian and not in the LTIE in circumstances where the services provided by NBN Co are an essential input in the supply of a standard telephone service.

10.3 **Measuring performance from NBN Co's acknowledgement of the Order or Trouble Ticket**

Measuring NBN Co's performance from NBN Co's acknowledgement of the Order or Trouble Ticket leads to uncertainty and an inability for access seekers to clearly articulate service levels to downstream customers unless there is a clear limitation on the time that NBN Co has to acknowledge the Order or Trouble Ticket. For example, the Enhanced -12 Fault rectification service levels provide that a fault in respect of a service in an urban area will be rectified within 12 hours of the 'Trouble Ticket Acknowledgment'. In passing this commitment through to the end customer, an access seeker will need to add on:

- the time it takes the access seeker to process the fault report from the end customer and report the fault to NBN Co (which the access seeker has control over and for which the access seeker can specify an additional timeframe); and
- the time it takes NBN Co to acknowledge the fault report from the access seeker (which the access seeker does not have control over).

As the access seeker does not have control over the time it takes NBN Co to acknowledge a fault report, then, in the absence of a commitment from NBN Co

⁸⁰ See clause 14.2(b) of the Service Level Terms.

⁸¹ See clause 15 of the Service Level Terms.

regarding the timeframe for acknowledging a fault report, the access seeker will not be able to make a firm commitment to its customers.

10.4 **Regulatory Recourse during the Subsequent Regulatory Period**

The wording of clause 2F.2.2 provides as follows (emphasis added):

*The Service Levels and Service Level Rebates **that will apply** to a new Product Component, Product Feature, Ancillary Service or type of Facilities Access Service introduced during a Regulatory Cycle:*

*(a) **will be as specified by NBN Co** when the Product Component, Product Feature, Ancillary Service or type of Facilities Access Service is introduced;*

*(b) **will apply from the introduction of the Product Component, Product Feature, Ancillary Service or type of Facilities Access Service until the end of the Regulatory Cycle;** and*

(c) must be specified in a manner consistent with promoting the efficient take-up and usage of Product Components, Product Features, Ancillary Services and types of Facilities Access Service, generally, and having regard to:

(i) the likely cost impacts on NBN Co and Customers as a result of how those Service Levels and Service Level Rebates are specified; and

(ii) any relevant retail-level regulatory requirements that Customers must comply with.

This wording, if taken literally, will exclude the ACCC from making alternative Regulated Terms in respect of service levels for new products because applying any such terms will be inconsistent with clause 2F.2.2 which states that the applicable terms are those specified by NBN Co. iiNet submits that this is unreasonable because it gives NBN Co too much discretion to set service level terms that promote NBN Co's interests at the expense of the LTIE.

11. **RISK MANAGEMENT**

Annexure 3 to Schedule 1H contains the provisions relating to risk management that NBN Co commits to incorporate in its SFAAs during the Initial Regulatory Period (**Risk Management Rules**). iiNet agrees with the ACCC's view that risk should be placed with the party that has the ability to manage that risk⁸². iiNet submits that the Risk Management Rules do not deliver this outcome and, as such, are unreasonable because they contain provisions that:

- provide unequal treatment of NBN Co and access seekers in respect of liability for 'Downstream Customer Loss'; and
- provide a blanket exclusion of liability for NBN Co's third party suppliers.

The Risk Management Rules also contain contradictory provisions.

Each of the above points will be considered in turn.

⁸² Consultation Paper at p.84.

11.1 Downstream Customer Loss

If a 'Downstream Customer' makes a claim against NBN Co for 'Downstream Customer Loss' which was caused by the access seeker, the operation of clauses 2.4(d)(iv), 2.5(c) and 3.5 of the Risk Management Rules mean that the access seeker would have uncapped liability to NBN Co for all losses (including losses that come within the definition of 'Indirect Loss') incurred by NBN Co arising from the claim. Conversely, if a Downstream Customer makes a claim against an access seeker in respect of Downstream Customer Loss which was caused by NBN Co, NBN Co will have no liability for Indirect Loss which was caused by NBN Co even if the access seeker's liability for the Downstream Customer Loss could not have been lawfully excluded⁸³. This clearly leads to an imbalance between the risk profiles of NBN Co and the access seeker and a situation where the risk is not placed with the party that is best placed to manage the risk⁸⁴.

Furthermore, iiNet questions whether a model which requires an access seeker to bear all risk that it cannot lawfully exclude, leads to an outcome that promotes the LTIE.

iiNet submits that NBN Co's blanket exclusion of all Indirect Loss is particularly unreasonable in circumstances where there is a weak service level regime (this is discussed in section 9 above) as there is a lack of incentive on NBN Co to manage its network and services in a manner that will avoid Downstream Customer Loss.

11.2 Blanket exclusion of liability for NBN Co's third party suppliers

The Risk Management Rules prohibit access seekers from bringing claims against any of NBN Co's third party suppliers⁸⁵. iiNet submits that if a third party supplier negligently omits to perform a service (or part of a service) to NBN Co and this causes significant damage to an access seeker, then the access seeker should be entitled to sue the third party supplier or NBN Co should accept liability for the third party supplier.

11.3 Contradictory provisions

iiNet notes that clause 2.1(e) of the Risk Management Rules provides as follows:

Nothing in this Agreement (except as expressly provided for in the Service Levels Schedule) amends, limits or negates the rights and obligations of the parties under section 118A of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth).

This suggests that NBN Co will honour its obligations under the TCPSS Act unless the service levels schedule provides otherwise. However, notwithstanding this, clause 3.5(c) of the Risk Management Rules provides as follows:

Customer must pay to NBN Co on demand an amount equal to all Losses suffered or incurred by NBN Co, any Related Body Corporate of NBN Co, or their respective Personnel arising from or in connection with any Claim by Customer to pay CSG Compensation or amounts under section 118A of the Telecommunications

⁸³ This outcome results by virtue of clause 2.5 of the Risk Management Rules which excludes liability for Indirect Loss in all cases except for where the indemnity in clause 3.5 of the Risk Management Rules applies. The Indemnity in clause 3.5 is given by the Customer to NBN Co.

⁸⁴ In a situation where the access seeker cannot lawfully exclude the loss, the party best able to manage the risk is NBN Co.

⁸⁵ Risk Management Rules clause 4(b)

(Consumer Protection and Service Standards) Act 1999(Cth) in respect of the supply of the NBN Co Wireless Access Service to Customer.

This has the effect of requiring an access seeker to reimburse NBN Co in respect of any amount claimed by the access seeker under section 118A of the TCPSS Act in respect of the NBN Co Wireless Access Service and, in iiNet's view, could reasonably be taken to 'negate' the access seekers rights under section 118A of the TCPSS Act. iiNet submits that clause 3.5(c) of the Risk Management Rules is unreasonable and should be deleted.

12. DISPUTE MANAGEMENT

Annexure 1 to Schedule 1H of the SAU sets out dispute management provisions that NBN Co commits to include in its SFAAs during the Initial Regulatory Period (the **Dispute Management Rules**). iiNet believes that the Dispute Management Rules are unreasonable because they:

- fail to deal appropriately with issues relating to natural justice;
- include very strict procedural requirements that may affect the decision maker's ability to make a properly informed and considered decision;
- fail to provide adequate safeguards for the protection of access seeker confidential information; and
- provide insufficient grounds to appeal an expert determination.

Each of these issues will be considered in turn.

12.1 Natural Justice

iiNet notes that NBN Co has stated that the intention behind the Dispute Management Rules is to ensure that there is a⁸⁶:

robust, speedy, open and non-discriminatory process for the resolution of disputes that might arise between NBN Co and its customers and for the implementation of dispute outcomes.

iiNet notes that an important omission from this description is the word 'compulsory'. iiNet believes that the fact that NBN Co has the power to dismiss resolution advisors and arbitrators gives rise to natural justice issues because even if there is not actual bias, there may be issues of perceived bias. In light of this, iiNet believes it is not appropriate that access seekers be required to submit to a compulsory panel arbitration if the parties cannot agree to resolve the dispute through expert determination. Rather, an access seeker should be given the choice and should be entitled to seek redress through the Courts if it does not wish to have a dispute resolved through expert determination or panel arbitration⁸⁷.

12.2 Strict procedural requirements

Clause 5.3 of the Dispute Management Rules requires the Panel to provide its award no later than 30 Business Days after the date on which the Panel Members are appointed. While iiNet acknowledges the desire to have speedy dispute

⁸⁶ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 139.

⁸⁷ The ACCC may wish to note in this regard that dispute resolution through the Independent Telecommunications Adjudicator under Telstra's Structural Separation Undertaking is not compulsory for access seekers.

resolution, given the complexity of issues that can arise, iiNet believes that this time period should be capable of being extended by agreement between the parties or in circumstances where the panel believes that complying with this timeframe is likely to seriously hinder its ability to make a properly considered decision. A similar consideration applies to clause 16.3(b) which gives the parties a maximum of five business days in which to comment on the expert's draft decision.

12.3 **Protection of access seeker confidential information**

iiNet believes that the protections of confidential information that relate to access seeker confidential information included in a panel decision are not sufficiently robust. It is unclear what will happen in the following circumstances:

an access seeker makes a submission to an arbitration panel identifying information in the panel Award that the access seeker considers is confidential to it and should not be published. The panel disagrees with the access seeker.

In these circumstances iiNet believes that the arbitration panel should not simply be permitted to publish the relevant information without providing the access seeker with sufficient opportunity to consider the views of the panel and, if appropriate, obtain Court orders preventing publication of the information.

12.4 **Insufficient grounds of appeal from expert determination**

The grounds for appealing against an expert determination are limited to manifest error and bad faith⁸⁸. iiNet submits that these grounds are too narrow and should include error or law. Such an approach would be consistent with the ACCC's model non price terms⁸⁹

13. **QUALIFYING CIRCUMSTANCES**

Given:

- the length of time that the SAU will be in force;
- the fact that the SAU is made in the context of NBN Co being subject to the Wholesale Only Requirement and the Non-Discrimination Obligation; and
- the possibility that the relevant legislation could be amended so that NBN Co no longer becomes subject to the Wholesale Only Requirement and/or the Non-Discrimination Obligation,

iiNet believes that it would be appropriate to include the following as qualifying circumstances:

- the Wholesale Only Requirement ceases to apply and
- the Non-Discrimination Obligation ceases to apply.

⁸⁸ See clauses 16.3(d) and 16.4(a) of the Dispute Management Rules.

⁸⁹ See Model Non-Price Terms & Conditions Determination 2008 - clause D.12(k).

iiNet also believes that, consistent with the fixed line services final access determinations⁹⁰, the following qualifying circumstance should also apply:

- An amendment or adjustment is necessary or desirable to avoid an unintended consequence of the fixed principles provisions.

Herbert Geer Lawyers on behalf of iiNet Limited

18 January 2013

⁹⁰ See for example Final Access Determination No. 1 of 2011 (LSS).