

## ACCC Letter of 22 July 2011

### Attachment B – Questions Regarding DAs

**(Public Version Draft as at 16 August 2011)**

Question	Response
<p>1: Could the parties please explain the main differences between the interim access terms in the IID and the terms in the ISA for the ongoing supply of services?</p>	<p>There are interim terms which enable NBN Co to access Telstra infrastructure for the period from the signing of the Definitive Agreements on 23 June 2011 until the terms of the Definitive Agreements become binding on NBN Co or are terminated because the conditions precedent to them are not satisfied. The interim access terms incorporate most of the terms of the ISA with some amendment to reflect the fact that they are short term arrangements.</p> <p>One key difference is that the interim access terms include provisions to deal with infrastructure access arrangements in the event that the conditions precedents to the Definitive Agreements are not satisfied. If this occurs, NBN Co does not have any further right to order infrastructure but has a continuing right to access and use any infrastructure supplied by Telstra for a shorter term than the term of the ISA.</p>
<p>2: The parties have foreshadowed that the South Brisbane Agreement may require subsequent authorisation (e.g. through the use of s.577BA(9)). However the parties have also indicated that s.51(1) of the CCA may apply. Could the parties please explain how s.51(1) could apply to such an agreement?</p>	<p>(a) Telstra has entered into a number of agreements with the State of Queensland which provide for Telstra to close the South Brisbane exchange, to sell the land it is on to the State of Queensland, and to deploy a fibre to the premises network ("<b>FTTP Network</b>") to service premises in the South Brisbane exchange serving area (that is, to service those customers who were previously connected to the South Brisbane exchange).</p> <p>(b) Under the IID, Telstra and NBN Co have agreed to negotiate terms of an agreement for the deployment of fibre in the South Brisbane Exchange Area to facilitate the build of the FTTP network covering the South Brisbane exchange serving area, including the price to be paid for the deployment of that fibre. This is likely to include the sale to NBN Co of the fibre network built by Telstra in the South Brisbane exchange serving area as well as terms and conditions relating to the provision of fibre services in that relevant area.</p>
<p>3: Is Telstra permanently restrained by the DAs from using its copper or the specified services over the HFC network within the fibre footprint, or only for the 20 year preference?</p>	<p>Consistent with the Government's policy with respect to structural separation of Telstra, where NBN Co has passed premises with NBN Co fibre Telstra must permanently "Disconnect" those premises from the Copper or HFC Networks in accordance with the Disconnection Protocols. Where this has occurred, Telstra is not entitled to reconnect those premises to the Copper or HFC Networks (i.e. provide services to them over its Copper or HFC Networks) except in very limited circumstances, even after the 20 year network preference period has expired. These limited circumstances are set out in the Disconnection Protocols (e.g. if there is material unavailability of the NBN, or the occurrence of an Insolvency Event in relation to NBN Co).</p>

Question	Response
<p>4: Given the “anti-cherry picking” legislative measures, what do the parties believe is the likelihood that there would be a purchaser for the copper and/or HFC networks but for the provisions in the DAs which restrain such a sale?</p>	<p>The "anti-cherry picking" legislation will only apply if and to the extent the Copper and HFC networks were upgraded to deliver "superfast broadband" after 1 January 2011. Otherwise, those networks would not be caught by the "anti-cherry picking" legislation.</p> <p>The quantum of the consideration which NBN Co has agreed to pay Telstra for disconnecting and deactivating the Copper and HFC networks under the Subscriber Agreement is based on the commercial terms agreed between the parties which require the Copper and HFC networks to be permanently disconnected and deactivated. The valuation of the PSAA amount would be different if the disconnection and deactivation was only temporary (i.e. if Telstra, at some later stage, could sell all, or any parts, of the Copper or HFC networks to a third party as a going concern and thereby realise additional value from the assets).</p>
<p>5: The ACCC believes that the restraint on disposal of the copper and HFC networks does not necessarily relate to Telstra’s primary obligation to migrate its fixed-line customers to the NBN. If the parties contend that this restriction is necessary to support the economic viability of NBN Co, why does the sale of the copper/HFC network within the Fibre Footprint require NBN Co’s consent after the 20 year preference has passed, especially in light of NBN Co’s comments regarding the length of the payback period?</p>	<p>As explained above, the PSAA consideration was valued on the basis of a permanent disconnection of the Copper and HFC networks. The PSAA consideration would be valued on a different basis if the disconnection and deactivation was only temporary i.e. taking in account the shorter term of the period of disconnection and the residual value that Telstra could realise from the sale of a network that could be operated as a going concern.</p> <p>In addition, NBN Co had agreed to limit the network preference obligation to 20 years (rather than including an on-going obligation) on the basis that the Copper and HFC networks have been permanently disconnected and deactivated. If another party could acquire the Copper or HFC networks from Telstra and reconnect premises and provide services over those networks then that would be a significant change to the agreed commercial terms, requiring a re-valuation of the consideration payable to Telstra,. While the network preference would apply to Telstra for a twenty year period, this would not prevent other RSPs from using the copper or HFC networks during that period if Telstra could dispose of the copper or HFC networks; nor would it prevent Telstra from using the networks after the restriction has expired.</p> <p>NBN Co agreed to Telstra having limited rights to sell parts of its networks to third parties as scrap or for use overseas. However, this limited disposal right was granted on the basis of that the acquirer was prohibited from using the Copper or HFC networks for the provision of services in Australia.</p>
<p>7: Furthermore, the ACCC would be interested in better</p>	<p>(a) Pursuant to the Substantial Adverse Events (“<b>SAE</b>”) clause Telstra or NBN Co can invoke a process which will result an amendment to the Subscriber Agreement if the other party engages in activities which have</p>

Question	Response
<p>understanding the operation of the SAE clause. For example, what specific types of conduct would trigger an SAE for either party? (in this regard, the ACCC is particularly interested in the parties' explanation of practical examples of "Affected Carriage Services"). What types of restraints could the parties agree in a variation that was entered into as a result of the SAE clause?</p>	<p>the effect of substantially affecting the business of the affected party in particular markets. In particular:</p> <ul style="list-style-type: none"> <li>(i) the clause can be invoked by NBN Co if Telstra engages in activities in the market for the provision of carriage services to premises which has the effect (or is highly likely to have the effect of) substantially adversely affecting NBN Co's fibre network business; or</li> <li>(ii) the clause can be invoked by Telstra if NBN Co engages in activities in the market for the supply of retail carriage services or the market for supply of mobile carriage services in Australia which has the effect (or is highly likely to have the effect of) substantially adversely affecting Telstra's business in those markets.</li> </ul> <p>There are provisions which allow the parties to engage in certain activities in particular markets or by exercising particular rights, without triggering the amendment process (see paragraph (e) below for examples).</p> <ul style="list-style-type: none"> <li>(b) The SAE clause is best understood by reference to the intention of the parties at the time of entry into the DAs and the examples of conduct listed in the SA. Given the long term nature of the DAs, the parties agreed that the examples would be merely examples of conduct that could trigger the SAE clause, and would not be exhaustive - the test would always require competitive conduct in a market which has a substantial adverse effect on the other party.</li> <li>(c) The key examples of conduct by NBN Co which could trigger an SAE in relation to Telstra include if NBN Co provides services otherwise than on a wholesale basis, if it provides certain switching services as part of the supply of carriage services (referred to as "Affected Carriage Services), or if it provides mobile carriage services.</li> <li>(d) The key examples of conduct by Telstra which could trigger an SAE in relation to NBN Co include if Telstra systematically uses its rights under the DAs to materially increase the quantity and extent of P2P fibre in rollout regions in advance of the NBN rollout over and above the quantity and extent of P2P fibre that would be implemented by Telstra based on market trends and bona fide demand at the time, or if it increases the density of its mobile networks to picocell density (or reasonably similar density) that provides services that are substitutable for comparable NBN services except in public places with high demand (such as CBDs, sports grounds, airports and shopping centres).</li> <li>(e) At the same time, the parties recognised that there is legitimate conduct which each of them should be able to engage in without triggering the SAE clause. For example, the following conduct engaged in by Telstra will not trigger a SAE: <ul style="list-style-type: none"> <li>(i) the installation of new P2P fibre and provision of P2P services where that conduct is bona fide proportionate competitive activity in the market for fixed line carriage services in Australia to</li> </ul> </li> </ul>

Question	Response
	<p>meet the competition in a relevant market or to main proportionate competitive advantage in relation to Telstra's fixed line networks (other than any competitive advantage in relation to the NBN Co fibre network) or in the market for services or solutions which Telstra provides using P2P fibre; and</p> <p>(ii) bona fide proportionate competitive activity in the market for the supply of mobile carriage services in Australia to meet the competition in that market, or to maintain proportionate competitive advantage in relation to Telstra's mobile networks or its mobile carriage services.</p> <p>Further, examples of conduct engaged in by NBN Co that will not trigger a SAE include:</p> <p>(i) facilities access to mobile base station infrastructure (excluding Telstra mobile base stations);</p> <p>(ii) backhaul to mobile base stations or wireless base station devices; and</p> <p>(iii) satellite or fixed wireless services to premises that are not in the fibre footprint or which are in the fibre footprint but are not NBN serviceable.</p> <p>(f) The "Affected Carriage Services" concept resulted from an agreement between the parties that the use of "Layer 2" and "Layer 3" engineering concepts in the DAs as the basis for an SAE clause was flawed and did not provide the parties with sufficient certainty as to whether or not particular conduct falls within the scope of the SAE clause:</p> <p>(i) for example, NBN Co's satellite service, which Telstra accepted as not being within the scope of the SAE clause, does include Layer 3 functionality;</p> <p>(ii) for example, if NBN Co provided internet connectivity directly between two premises, or provided connectivity between a premises and a public network such as the Internet, then it would no longer be providing "Layer 2" services;</p> <p>(iii) accordingly, the parties agreed that the key functionality which could constitute an SAE is the routing or switching of communications between 2 locations which are NBN Connected (or one location and a public network such as the internet); and</p> <p>(iv) the parties also recognised that there are particular types of services (Unaffected Services) which are not Affected Carriage Services - an example of this is where the routing or switching is between a POI and a premises.</p> <p>(g) If the SAE clause does apply, both the nature and extent of the variations that can be made to the Subscriber Agreement as a result of the operation of the SAE clause are limited. Specifically, the variation</p>

Question	Response
	<p>must only be a modification or deletion of existing provisions in the Subscriber Agreement which puts the affected party in a position to more effectively compete with the other party and/or the imposition of restrictions which have the effect of putting each party in the same position in which it would have been had the SAE not occurred. Further, in all circumstances, the overall effect of the variation must be proportionate to the competitive activities of the party which gave rise to the SAE. In relation to the types of restrictions which could be agreed or imposed, these could vary depending on the conduct engaged in by the party, but as noted above, in all cases must be proportionate to the competitive activity engaged in by that party. If for example, NBN Co decided to provide mobile services and that had a substantial adverse effect on Telstra in the agreed markets, then two possible outcomes could be that NBN Co could be restrained from providing those services, or that Telstra's restrictions on promoting wireless as a substitute for fibre could be relaxed to enable Telstra to more effectively compete with NBN Co.</p>
<p>8: Do the restraints on HFC services that Telstra may continue to provide in any way limit Telstra's ability to enter into commercial arrangements with current and potential future access seekers under the Foxtel Special Access Undertaking for the supply of:</p> <p>(a) broadcast subscription television carriage services over Telstra's HFC network; or</p> <p>(b) return path functionality services over Telstra's PSTN?</p>	<p>In respect of broadcast subscription television carriage services over the HFC Network, there are no constraints in the DAs on the provision of such services to a premises in a Rollout Region prior to the Disconnection Date for that region. After the Disconnection Date, Telstra can only provide services to those premises over the HFC Network. These services are either FOXTEL Television Services or services provided under HFC related contracts that are in existence as at 20 June 2011 (other than internet protocol based services, voice services, broadband services or services requiring a return path transmission over the HFC network), or under any new or varied contract with NBN Co's consent. Furthermore, an access seeker who seeks access to the FOXTEL digital set top unit during the term of the FOXTEL Special Access Undertaking could get access to that set top unit otherwise than over the HFC Network (e.g. by getting access to satellite carriage services).</p>
<p>10: Have the parties considered whether provisions in the CCA regarding misleading and deceptive conduct would sufficiently prohibit Telstra from marketing wireless services as substitutable for fibre services?</p>	<p>The parties' agreement concerning the restriction on Telstra promoting wireless services as substitutable for fibre services was not struck in light of the CCA provisions regarding misleading and deceptive conduct. That agreement was considered to be appropriate by the parties in the context of structuring the transaction as a disconnection arrangement.</p> <p>In addition, the Government's policy objectives to provide superfast broadband to all Australians in the national interest over the long term would in part be thwarted as the productivity gains and future proofing of the fibre based fixed line network cannot be achieved to the same degree by wireless network services owing to technical limitations. Accordingly, the purpose and effect of the wireless marketing clause is to play its part to bring about the transformation of the telecommunications industry envisaged by the Government in deploying the NBN.</p> <p>For wireless marketing by Telstra which promoted wireless services as substitutable for fibre services to be prohibited by the relevant CCA provisions, it would be necessary to establish that Telstra represented that the</p>

Question	Response
	<p>specific wireless services the subject of the particular wireless marketing activities were substitutable for the specific fibre services the subject of those marketing activities and that this representation was false, misleading or deceptive or likely to mislead or deceive.</p> <p>While the parties each consider that wireless services are complementary to fibre services, it is possible for wireless broadband services to deliver speeds of 12Mbps (the initial entry level service to be offered by NBN Co on its fibre network). As noted in NBN Co's Corporate Plan (p. 41), wireless network speeds are limited by both distance and contention within a cell's coverage. Because wireless network performance is dependent on the number of users per cell, the ability of wireless to compete at higher bandwidths is largely determined by the number of base stations deployed. It is conceivable that representations comparing wireless service speeds in particular areas to the speed of NBN Co's entry level service as the NBN rolls out could be made in a way that is not false, misleading or deceptive. Absent the wireless marketing provision, NBN Co considers Telstra would be in a position to engage in the conduct described in answer to question 12 below.</p> <p>In addition, even if a CCA enforcement was available, NBN Co does not consider that it is appropriate to seek to achieve a policy and commercial outcome by use of Federal Court enforcement which is fact specific, expensive and time consuming even in the fast track jurisdiction and subject to appeal rights to higher Courts with attendant delay when NBN Co is directing its resources to the rollout of its networks.</p>
<p>12: Could NBN Co provide the ACCC with any additional supporting material regarding the rationale for the inclusion of the wireless restraints? (for example, what would be the expected increase in wireless only homes should this restraint not be in place and what impact would the corresponding decrease in NBN Co's take up rate have upon NBN Co's financial viability?)</p>	<p>From NBN Co's perspective the payment to Telstra of a PSAA for the disconnection of copper and HFC premises without the restrictions on promotion of wireless services as substitutable for fibre services and the wireless substitution provisions would, in NBN Co's opinion, create significant commercial incentives for Telstra to migrate their customers to the Telstra Next-G wireless networks, because Telstra would then avoid the need to pay NBN any ongoing access fees and retain a higher proportion of its revenues, but still collect the PSAA for disconnections. NBN Co considers that Telstra would be able to use some of the PSAA payments from NBN Co to finance marketing and sales activities including additional subsidies on wireless handsets or customer premises equipment. Telstra's ability to support a large number of customers on its wireless network is further enhanced through its ability to leverage recently remediated infrastructure (for the NBN Co roll-out) to deploy additional base stations and new wireless technologies such as LTE.</p> <p>Given that Telstra has at least 50% of the fixed line market and therefore a good chance of influencing the migration choice of most of those customers, it would not have been commercially acceptable for NBN Co to agree with Telstra to a payment for disconnection model without commercial incentives to discourage the substitution of fibre services with wireless services. It would not be appropriate or in the interests of promoting healthy competition in the market for fixed line services generally. The arrangements reached with Telstra provide a balance of commercial incentives to facilitate competition for fixed line services following the disconnection of the Copper and HFC networks.</p>
<p>13: The Network and Services</p>	<p>NBN Co considered that a separate contractual constraint on Telstra's ability to build fibre networks was</p>

Question	Response
<p>Exemption permits Telstra to supply services over its own fibre networks. It would be useful if the parties could explain why the DAs restrain Telstra's ability to build new fibre infrastructure beyond the restrictions imposed by the NBN Access Act (i.e. the "anti-cherry picking" legislation) or the SSU?</p>	<p>fundamental to NBN Co's ability to meet the Government's policy objectives. In the absence of the provisions, Telstra would be able to build a fibre network in substitution for the copper and HFC networks which NBN Co had paid Telstra to disconnect, potentially using the PSAA payments from NBN Co to fund that network. As discussed in the answer to question 14, Telstra's construction of a substantial fibre network could undermine the Government's objectives of structural separation and the ability of NBN Co to meet its obligations to offer uniform national wholesale pricing.</p> <p>Accordingly, the parties negotiated the scope of the network preference arrangements, which occurred in advance of the making of the Networks and Services Exemption instrument. NBN Co understands that the Exemption Instrument was drafted by reference to the Government's policy decision that structural separation under section 577A should apply to the Telstra copper network and the HFC network because they had been the focus of competition concerns about vertical and horizontal integration respectively.</p> <p>The 'level playing field' regime has a narrower scope than the Definitive Agreements, applying only to superfast networks serving residential and SME customers. For the reasons outlined, NBN Co considers the Definitive Agreements provisions applying to Telstra to be of importance to the NBN Co's ability to meet the Government's objectives.</p>
<p>14: In addition to the above, could the parties explain why the DAs place limitations around Telstra's ability to build new P2P fibre to particular types of customers? In particular, the ACCC does not yet understand NBN Co's plans in relation to building P2P fibre (given the GPON network design).</p>	<p>Given NBN Co's obligations in relation to uniform national wholesale pricing ('UNWP'; see the Statement of Expectations), NBN Co needed to ensure that the P2P exception to the Network Preference clause is not used by Telstra to cherry-pick customers and selected geographies within the NBN fibre footprint using the P2P exception. Without the regime in place, NBN Co faces the risk of Telstra front-running the NBN Co roll-out, with the pre-emptive installation of Telstra P2P fibre in high value geographies using remediated ducts, thereby undermining NBN Co's market for GPON based fibre services. This would adversely affect the efficiency of NBN Co's roll-out and its ability to provide a fibre service to all premises and provide UNWP.</p> <p>The compromise reached with Telstra enables Telstra to serve customers in response to customer orders, without enabling a pre-emptive roll-out of P2P as described above.</p>
<p>15: Could the parties explain how the restriction in relation to Telstra supplying P2P services to "demand aggregators" is meant to operate? (i.e. what kind of services is it expected to constrain and what types of customers are likely to be affected) What is the rationale behind this restriction?</p>	<p>The restriction on the supply by Telstra of P2P services to a person who acquires those services for the purposes of aggregating demand from multiple sub-addresses at a single location which is predominantly residential in nature (a "demand aggregator") is intended to operate as an anti-avoidance measure in relation to Telstra's Network Preference obligation. Telstra may install P2P fibre and provide P2P services to a demand aggregator with NBN Co's consent. Telstra is also entitled to provide P2P services to a demand aggregator using P2P fibre which Telstra installed or operates for the demand aggregator as at the date the Definitive Agreements come into effect (or pursuant to a contract with the demand aggregator for those P2P services or bona fide order for the provision of those P2P services in each case which exists as at the date the Definitive Agreements come into effect).</p>

Question	Response
	effect).
<p>16: What access to exchange facilities do the parties anticipate access seekers will require in the future?</p>	<p>At a general level, the parties expect access seekers to require access to exchange facilities in the future in order to install equipment and connect to the NBN. The ISA provides access to NBN Co to exchange facilities, including rack spaces and also enables NBN Co to grant access to those rack spaces and exchange facilities to access seekers to install, operate and maintain telecommunications facilities in order to interconnect to the NBN.</p> <p>In particular, it is expected that in exchange buildings classified as aggregation nodes, access seekers will want access to exchange facilities in order to facilitate connection from their own fibre transmission link to NBN Co's Optical Distribution Frame or to another access seeker/backhaul provider with presence in the Aggregation Node, or as a backhaul provider, to enable connection to the NBN Co ODF in order to provide transmission for other access seekers to connect to the NBN</p> <p>In addition, access seekers already have access to Telstra exchanges in connection with regulated services they currently acquire from Telstra in respect of Telstra's Copper Network. As contemplated by the SSU and Migration Plan, that access will continue until the Disconnection Date in a Rollout Region when access seekers will terminate that access and acquire access for the purposes of connection to the NBN (except for Special Service Inputs).</p>
<p>17: Do the parties anticipate any equivalence issues arising out of the exchange facilities arrangements?</p>	<p>The parties do not expect any equivalence issues arising out of the supply of access to rack spaces and exchange facilities under the ISA.</p> <p>Under the ISA, NBN Co has the right to provide access seekers with access to rack space which NBN Co has obtained from Telstra. NBN Co will be subject to its statutory obligations of non-discrimination between access seekers. NBN Co will set out its terms and processes for access to rack space (including in Telstra exchange space which NBN Co has obtained) in its Wholesale Broadband Agreement. NBN Co has issued a discussion paper in relation to its facilities access product.</p> <p>Further, under the ISA, in relation to rack spaces, Telstra must maintain a queue for the orders of rack spaces in accordance with its legal obligations and any Telstra internal queuing policies that are in place from time to time. This includes Telstra's queuing policy. This means that NBN Co's orders for rack spaces (provisional and confirmed orders) are placed in the same queue as other access seekers orders (if ordered directly from Telstra and not from NBN Co) for rack spaces in exchanges and are provisioned by Telstra according to the time and date they are placed in that queue.</p> <p>Telstra notes that it does not provide any interconnection to NBN Co under the ISA, and so there will be no</p>



Question	Response
	<p>equivalence issues in respect of interconnection.</p> <p>Lastly, as the ACCC is aware, Telstra is making additional commitments on TEBA in its SSU, including with respect to equivalence between access seekers (although this does not apply as between Telstra and NBN Co and the ISA addresses NBN Co's access).</p>