

28 October 2011

By Email: michael.cosgrave@accc.gov.au

Mr Michael Cosgrave
Group General Manager Communications Group
Australian Competition and Consumer Commission
Level 20
175 Pitt Street
Sydney NSW 2000

Dear Mr Cosgrave,

NBN Co and the Wholesale Broadband Agreement

We refer to the previous joint letters from Optus, Vodafone, Macquarie Telecom, Primus Telecom and TransACT and endorsed by AAPT and Clear Networks and our other communications with you and representatives of the ACCC relating to the Wholesale Broadband Agreement (**WBA**) with NBN Co Limited (**NBN Co**). This letter is from Optus, Vodafone, Macquarie Telecom and TransACT and will be endorsed by a number of other carriers (**Customers**).

At the outset, we wish to again record our dissatisfaction with the process of engagement with NBN Co as we seek to progress with NBN Co the concerns with the WBA previously raised with the ACCC.

This lack of progress in bi-lateral discussions is evident in relation to one key area being the relative “hierarchy” of the WBA as against other probable regulatory activities. In particular, the Customers have given further thought to addressing the concern that, once the WBA becomes an ‘Access Agreement’ (as defined in the *Competition and Consumer Act 2010*), the NBN Co customer and the ACCC will have very limited recourse to rectify any deficiencies with the WBA. Such an outcome would be inconsistent with the Government’s stated policy intention to ensure that NBN Co, as a monopoly provider, is subject to clear regulatory oversight. This letter outlines an option the Customers consider could address this concern.

The Customers propose that the WBA terms include a mechanism to incorporate the terms of a Standard Access Undertaking (**SAU**), access determination or binding rules of conduct into the WBA. This can be achieved through replacing clause F3 in version 4.0 of the draft WBA with an expanded requirement to incorporate the terms of an SAU, access determination or binding rule of conduct into the WBA and to override the WBA to the extent of any inconsistency.

In the clause of the current proposed F3, NBN Co will consider aligning the WBA with any SAU. While this is a useful starting point, clause F3 as proposed by NBN Co is merely a requirement to consider. F3 provides no assurance that the WBA will in fact be aligned to reflect the SAU (or an access determination or binding rule of conduct), and

so provides no protection against the risks associated with the lack of oversight the ACCC has over the WBA. This is a wholly unacceptable situation and one with which the Customers will not agree.

The Customers feel their proposal reflects a practical solution that can operate alongside the timelines for acceptance of the SAU (and any issuing of an access determination of binding rule of conduct). It would provide Customers with certainty regarding their right to regulatory oversight of NBN Co's access terms. It would also provide sufficient incentive to NBN Co to keep the WBA aligned with any contemplated SAU, access determination and binding rule of conduct (providing the benefit of long-term certainty to NBN Co customers).

Our suggested replacement clause F3 is as follows:

F3 Alignment with SAU

F3.1 Each SAU, access determination and binding rule of conduct shall take precedence over the terms of this Agreement.

F3.2 Nothing in this Agreement prevents, restricts or limits in any way the right of any party to:

- (a) enforce or seek to enforce an SAU, access determination or binding rule of conduct; or*
- (b) the benefit of any right or remedy arising under or in relation to an SAU, access determination or binding rule of conduct.*

F3.3 Where the terms of an SAU, access determination or binding rule of conduct are inconsistent with the terms of this Agreement:

- (a) the relevant terms of this Agreement shall be void and unenforceable to the extent of the inconsistency; and*
- (b) either party may propose amendment(s) or supplementary provisions to ensure that the terms of this Agreement are consistent with the SAU, access determination or binding rule.*

F3.4 NBN Co shall use its best endeavours to ensure that the terms of this Agreement are consistent with the terms of an SAU, access determination or binding rule of conduct at any time. Any change to the Agreement to ensure the Agreement is consistent with the terms of an SAU, access determination or binding rule of conduct, must be made pursuant to clause F4.2.

[Note, clause F4.2 sets a process for making changes to the WBA through a consultation process with the NBN Customer.]

This proposal has been put to NBN Co and rejected. We request that the ACCC support this proposed amendment to the WBA and communicate its support to the NBN Co.

Whilst this “hierarchy of agreements” issue dealt with above is very important to Customers, it is in no way the only core issue that we have raised and continue to raise with NBN Co. It is our collective view that a multi-lateral approach is required to improve outcomes for both NBN Co and its potential customers. At this stage NBN Co has found it difficult to arrange an effective multilateral negotiation about the WBA and this is resulting in a piecemeal discussion of options to make essential and appropriate improvements to the WBA.

If NBN Co is not prepared to develop a workable process of allowing an industry discussion about the options to improve the WBA we would suggest that the ACCC plays a facilitation role to allow the discussion to occur. This would be appropriate because the ACCC would need to consider the issues given the ACCC’s Determination power and the fact that it will need to undertake a formal assessment of the Special Access Undertaking. A preliminary industry discussion would be a very useful step in this regard. Finally, we are also of the view that the situation that we find ourselves in regarding these processes is exacerbated by the fact that NBN Co still has not lodged its SAU.

Yours faithfully,

cc. Shaun Drabsch, Chief of Staff, Senator the Hon. Stephen Conroy
Mr Peter Harris, Secretary, Department of Communications, Broadband and the Digital Economy.
Mr Mike Quigley, Chief Executive Officer, NBN Co

A handwritten signature in blue ink, appearing to read 'M Lobb'.

Matthew Lobb

General Manager Industry Strategy and Public Policy
Vodafone Hutchison Australia

A handwritten signature in black ink, appearing to be 'Peter Lee', with a long horizontal line extending to the right.

Peter Lee
General Manager Strategy, Wholesale and
Regulatory Affairs
TransACT

Encl

Andrew Sheridan

A handwritten signature in black ink, appearing to be 'AS', with a long horizontal stroke extending to the right.

General Manager
Interconnect & Economic Regulation
Optus



Matthew Healy
National Executive Regulatory and
Government
Macquarie Telecom