



**Australian
Competition &
Consumer
Commission**

GPO Box 520
Melbourne Vic 3001

Level 35, The Tower
360 Elizabeth Street
Melbourne Vic 3000

tel: (03) 9290 1800
fax: (03) 9663 3699

www.accc.gov.au

Our Ref: 45913
Contact Officer: Richard Home
Contact Phone: (03) 9290 6960

11 November 2011

Mr Patrick Fair
Partner
Baker & McKenzie
Level 27, AMP Centre
50 Bridge Street
SYDNEY NSW 2000

Email: patrick.fair@bakermckenzie.com

Dear Mr Fair

Re: NBN Co and the Wholesale Broadband Agreement

I refer to your letter of 28 October 2011, and prior correspondence, that outlines the concerns of a number of parties with NBN Co's Wholesale Broadband Agreement (WBA).

I note the concerns expressed about the relative 'hierarchy'¹ of regulatory instruments in Part XIC of the *Competition and Consumer Act 2010* (CCA) and their relationship to the WBA. In particular I acknowledge the concern that, once the WBA becomes an 'Access Agreement' (as defined in the CCA), the NBN Co customer and the ACCC will have limited recourse to rectify any deficiencies with the WBA.

¹ Part XIC provides that the terms and conditions of access to 'declared services' may be set out in a number of different documents. If the parties are able to commercially agree in an 'access agreement' for the supply of the declared service, the terms and conditions set out in the access agreement will take precedence over those set out in any other regulatory document.

However, the regulatory hierarchy provides that where agreement cannot be reached, access seekers will have recourse to terms set out in regulatory instruments. The relevant instruments will be, in order, any SAU accepted by the ACCC, any 'binding rule of conduct' (BROC) made by the ACCC, or any access determination made by the ACCC. If an SAU from NBN Co is accepted by the ACCC, then the terms and conditions in the SAU will prevail over any inconsistent terms in a BROC or access determination that is made by the ACCC. Similarly, the terms of any BROC will prevail over any inconsistent terms in an access determination.

The legislative arrangements in the CCA recognise that NBN Co will be a national, wholesale-only, fixed-line monopoly and therefore provide that all services supplied by NBN Co will be declared services and hence able to be regulated by the ACCC. This reflects that while the interests of a wholesale-only provider differ from those of the current vertically integrated incumbent, they do not necessarily fully align with those of access seekers or end-users.

The ACCC's expectation has therefore been that NBN Co would submit for ACCC approval a Special Access Undertaking (SAU) that would establish the regulatory framework under which access seekers would subsequently enter into Access Agreements with NBN Co.

The ACCC's acceptance of an SAU would provide guidance to the parties in the course of negotiations over access terms and conditions. It would also trigger the ACCC's power to make an Access Determination in relation to matters not covered by the SAU itself, should that prove necessary.

For a variety of reasons, that framework has not yet been established. The issue that has consequently arisen is that NBN Co was until recently seeking to enter 5 year agreements with its customers. Under the legislative hierarchy, this would have the effect of precluding access seekers from the opportunity to avail themselves of access terms and conditions established by the ACCC either accepting an SAU from NBN Co, or setting them out in an Access Determination².

While acknowledging that the CCA - through the legislative hierarchy – recognises the desirability of commercially agreed outcomes wherever possible, the ACCC considers it continues to be of importance that access seekers have the opportunity to seek regulatory recourse in the absence of such agreement, and particularly prior to entering into long-term Access Agreements. At this stage, the ACCC expects that such an opportunity will be provided through its consideration of an SAU, although that expectation will need to be kept under review during that process. NBN Co has indicated its intention is to provide an SAU to the ACCC in November 2011 for consideration.

The ACCC also understands that on 28 October 2011, NBN Co wrote to its customers committing to:

- amending version 4 of the WBA to operate for an initial 12 month period (Short Term WBA);
- releasing the Short Term WBA in mid-November 2011 and publishing it as a Standard Form Access Agreement shortly thereafter;
- working with a view to lodging its SAU at the time the WBA is published as a Standard Form Access Agreement;
- creating a multilateral process that 'delivers and assesses the outputs of bilateral engagement ahead of finalising the details of improvements or refinements for inclusion in the WBA'; and

² The ACCC's ability to make an access determination is itself dependent upon NBN Co either publishing its WBA as a 'standard form access agreement', or the ACCC conducting a public inquiry into whether relevant NBN Co services should be 'declared'. Neither of these pre-conditions has at this point been satisfied.

- clarifying and strengthening provisions dealing with the alignment of the WBA to any accepted SAU, to ensure that customers are comfortable that the WBA will be aligned with the SAU if accepted.

I understand these commitments have been made in response to the concerns raised with NBN Co by both the ACCC and access seekers in relation to previous versions of the WBA. As noted, of particular concern was that the proposal for a 5-year term as set out in version 4 of the WBA would have prevented access seekers from accessing regulated terms and conditions for a significant period of time.

NBN Co's proposals do not necessarily address all issues associated with the terms and conditions of access to NBN Co's services. At this time the ACCC has not formed any formal views on the appropriate terms and conditions for long-term access to the NBN, including the need for NBN Co to offer a regulatory events pass-through clause in Access Agreements, as proposed by your clients. Such matters will be kept under review in the course of the SAU assessment process.

However, the ACCC considers that the commitments offered – in particular the reduction of the term of the WBA to a 12-month duration – mitigate its immediate concern about access seekers having to execute long term Access Agreements without the opportunity for effective recourse to regulated terms and conditions, particularly given a similar proposal was contained in earlier correspondence from your clients. This is in part due to the number of services likely to be active over the coming 12 months. It also reflects that the publication of the WBA by NBN Co as a Standard Form Access Agreement has the effect of declaring the NBN Co services covered by that agreement.

The ACCC considers that, on balance, NBN Co's commitments are sufficient at this time to allow NBN Co, the industry and the ACCC to focus on the formal assessment of NBN Co's SAU, such that the regulatory framework to be established by that undertaking can be in place prior to the execution of longer term Access Agreements. The ACCC remains committed to ensuring that there is an effective regulatory framework in place as soon as is practicable and ideally prior to the expiry of the 12 month term of the WBA.

In relation to your concern regarding the need for a multilateral negotiation approach with NBN Co, I note that NBN Co has now committed to the creation of such a process. As such, it appears there is no immediate need for the ACCC to intervene in a facilitation role as you have proposed. Again, this is a matter that could be kept under review in the course of the SAU assessment process and as the details of that process emerge.

The ACCC wishes to publish this letter, and the correspondence to which it responds, on its website given broader interest in the subject matter under discussion. I would therefore be grateful if you could seek your clients' consent to the publication of their letter. Should this not be satisfactory to them, the ACCC will consider whether an alternative form of publication of these views could be undertaken. I have copied this correspondence to the same recipients as your original letter.

Please do not hesitate to contact me on (03) 9290 1914 or Richard Home on (03) 9290 6960 should you wish to discuss this matter further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Cosgrave', with a stylized flourish at the end.

Michael Cosgrave
Group General Manager
Communications Group

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