



**Australian
Competition &
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Commission**

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Ms Caroline Lovell
Principal, Regulatory Affairs & Industry Engagement
NBN Co Limited
Level 11, 100 Arthur Street
NORTH SYDNEY NSW 2060

By email: carolinelovell@nbnco.com.au
CC: kerenwallace@nbnco.com.au

Dear Caroline

NBN Co Special Access Undertaking (SAU) – request for clarification

I refer to the Special Access Undertaking (SAU) lodged by NBN Co on 28 September 2012. I am writing to clarify the matters described below. The ACCC is including discussion of these matters in its consultation paper on the SAU and would like to be able to articulate them in an accurate manner. As NBN Co is aware, the ACCC is looking to release that consultation paper in early November 2012.

For clarity, this is not a request for further information under section 152CBB of the *Competition and Consumer Act 2010* (CCA).

Categorisation of SAU provisions

The ACCC is required to assess the SAU against the criteria in section 152CBD of the CCA. Amongst other things, the ACCC must be satisfied that:

- the specified terms and conditions in relation to compliance with the Category B Standard Access Obligations (SAOs) referred to in subsection 152CBA(3A) are consistent with the Category B SAOs and those terms and conditions are reasonable;

- the specified conduct in relation to access to the service referred to in subsection 152CBA(3B) will promote the long-term interests of end-users, and the terms and conditions on which that conduct will be engaged in are reasonable; and
- the specified conduct in relation to a range of listed activities (relating to new, adjusted or ancillary services) referred to in subsection 152CBA(3C) will promote the long-term interests of end-users.

I would like to clarify with NBN Co which SAU provisions it considers to fall under subsection 152CBA(3A), 152CBA(3B) or 152CBA(3C) of the CCA. I note that NBN Co submits that:

- the terms and conditions in the SAU are consistent with the Category B SAOs as required under subsection 152CBA(3A); and
- Schedule 1I (Product Development and Withdrawal), including the Product Development Forum Processes, specify conduct that may fall within the scope of subsection 152CBA(3C).¹

I am seeking clarification of whether NBN Co considers all of the provisions in the SAU, with the exception of Schedule 1I, to be terms and conditions in relation to compliance with the Category B SAOs in accordance with subsection 152CBA(3A) of the CCA.

SAU commitments about Standard Forms of Access Agreements

In Module 1, the SAU specifies terms and conditions for dispute management, confidentiality and intellectual property rights, risk management and service levels in Annexures to Schedule 1H and Schedule 1J. NBN Co commits to including the terms and conditions in these Annexures in Standard Forms of Access Agreement (SFAAs). NBN Co submits that:

- the SAU is not “the vehicle which actually makes the service level commitments” which means that “any issues related to compliance with the service level terms will be dealt with as a contractual matter between NBN Co and its Customers, rather than as a regulatory matter.”;² and
- the “scope of the non-price terms and conditions ensures that there is a clear demarcation between the SAU terms and those terms in the SFAAs on which the ACCC may make an AD [Access Determination], BROC [Binding Rule of Conduct] or Facilities Access Decision [via the regulatory recourse mechanism].”³

Following from the above, I am seeking clarification of whether:

- NBN Co considers that it is only required to comply with the non-price terms and conditions under an Access Agreement executed on the basis of an SFAA incorporating the terms specified in the Annexures, rather than as terms specified by the SAU itself. Or

¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 180-182.

² NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 81.

³ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 49.

put another way, whether NBN Co considers that if it fails to comply with these terms, the ACCC and/or access seekers cannot seek legal action for a breach of the SAU commitments.

- NBN Co considers that the ACCC may only make effective Access Determinations or Binding Rules of Conduct in relation to non-price matters that are *not* specified in the Annexures to Schedule 1H and Schedule 1J. That is, whether NBN Co considers that any Access Determinations or Binding Rules of Conduct which specified different terms and conditions to those in the Annexures on the same matters would be inconsistent with the SAU and therefore ineffective.

I would appreciate your response to this letter by no later than **31 October 2012**.

To ensure transparency over NBN Co's views on these matters, we intend to publish this letter and NBN Co's response on the ACCC's website.

The ACCC will formulate views on these matters during its assessment of the SAU.

If you have any queries, please contact Analena Gilhome on (03) 9290 1872.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Home', with a stylized, flowing script.

Richard Home
General Manager
NBN Engagement and Group Coordination Branch
Communications Group