



**Submission by AAPT Limited (2 May 2013)**

**on**

**ACCC “Consultation Paper – variation of NBN Co Special  
Access Undertaking” and related draft decision (dated  
April 2013)**



## **Introduction**

1. AAPT Limited (AAPT) welcomes the opportunity to comment on the Australian Competition and Consumer Commission (ACCC) “Consultation Paper – variation of NBN Co Special Access Undertaking” (Consultation Paper) and related draft decision (Draft Decision), both dated April 2013.
2. AAPT welcomes the ACCC's preliminary view stated in the Draft Decision that it is not satisfied that the Special Access Undertaking lodged by NBN Co (SAU) meets the criteria specified in Part XIC of the Competition and Consumer Act 2010 for acceptance of an SAU. The ACCC’s position clearly demonstrates that it has listened to the concerns raised by industry about the SAU and given proper regard to those submissions.

## **Executive summary**

3. AAPT agrees with the ACCC’s preliminary position that the SAU has not met the criteria for acceptance of an undertaking due to the following key issues:
  - o the lack of regulatory oversight and uncertainty about the application of the ACCC’s powers under Part XIC and the effectiveness of regulatory determinations;
  - o the locking in of price structures and price relativities for an overly excessive term (i.e. until 2040);
  - o the wide discretions afforded to NBN Co to withdraw a broad range of products and set new prices; and
  - o the interests of access seekers not being sufficiently addressed in the proposed non-price terms.



4. Accordingly, AAPT agrees with the ACCC's proposal to issue a notice to NBN Co suggesting variations to the SAU to address the above issues and the concerns raised by access seekers, including changes to:
  - o provide certainty about the extent to which NBN Co must comply with regulatory determinations made by the ACCC;
  - o include an opportunity for the ACCC to periodically review whether price structures and relative price levels should be re-balanced (for example, every five years), subject to the changes being revenue neutral;
  - o enable the ACCC to have a role in the process of withdrawing products and development of new products and their prices, declaring services and setting terms and conditions for new services;
  - o incorporate and mirror usual regulatory practice into the SAU to provide a greater degree of flexibility in NBN Co's approach to the long-term revenue constraint methodology; and
  - o remove a number of the proposed non-price terms, including those relating to service levels, to open them to ACCC regulatory determinations and therefore facilitate effective commercial negotiation.
  
5. AAPT sets out in the table below its specific views in relation to each amendment to the SAU proposed by the ACCC.



## ACCC Questions in Supplementary Consultation Paper

Below are AAPT’s responses to each amendment to SAU proposed by the ACCC (numbering is in accordance with the Consultation Paper).

ACCC Proposed Amendment	AAPT position on proposed amendment	AAPT Comment
<b>2.1. Interaction between the SAU and the telecommunications access regime</b>		
2.1.1. <i>Conduct concerning elements of the telecommunications access regime</i>		
2.1.1.1. Conduct about including terms and conditions in SFAAs	Agree	AAPT agrees with changes proposed by the ACCC to ensure that access seekers are able to obtain supply based on the SAU terms and conditions without being required to sign a SFAA-based Access Agreement. This would promote the long term interest of end-users ( <b>LTIE</b> ).
2.1.1.2. Conduct about updating SFAAs in response to Access Determinations and Binding Rules of Conduct	Agree with first mentioned option	<p>AAPT agrees with the proposed amendment that would allow an access seeker to request NBN Co to immediately comply with ACCC regulatory determinations and binding rules of conduct (<b>BROCs</b>).</p> <p>In addition, where the ACCC makes a regulatory determination or BROc, the ACCC should have the ability to direct which parts of a determination are mandatory and which NBN Co must amend all access agreements to include, rather than giving access seekers the option to not have those terms reflected in their subsequent access agreements. Without this, an AD or BROc could be rendered redundant, which could not have been the legislative policy intent.</p> <p>AAPT does not support amendments which would delay the application of an ACCC regulatory determination or BROc. The effectiveness of such instruments is likely to be highly dependent on</p>



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		timely application.
2.1.1.3. Conduct about updating SFAAs in response to Facilities Access Decisions	Agree	AAPT agrees with the ACCC proposed amendment to allow it to use its Part XIC powers to establish the Facilities Access Service, rather than constraining the ACCC powers within processes formulated by NBN Co.
2.1.1.4. Conduct about production and maintenance of SFAAs	Agree	AAPT agrees with the ACCC proposed amendment which allows for terms and conditions in relation to the Facilities Access Service to be commercially agreed, but which the ACCC to address any issues via a regulatory determination or BROCC.
2.1.1.5. Conduct about development of SFAAs	Agree	AAPT agrees with the ACCC proposed amendment which allows for the inclusion of commercially agreed terms and conditions in relation to the establishment of a multilateral forum but which allows the ACCC to address any issues via a regulatory determination or BROCC.
<i>2.1.2. Conduct concerning changes to the SAU over time</i>		
2.1.2.1. Conduct about submitting variations to the SAU	Agree	AAPT agrees with the ACCC proposed amendment to remove the NBN Co prescribed processes for replacement modules thereby making commercially agreed terms and conditions the default subject to ACCC regulatory recourse.
2.1.2.2. Conduct about the midpoint review of Module 1	Partially Agree	AAPT agrees with the principle that a review mechanism in the SAU does not need to be prescriptive. However, AAPT considers that there should be an express requirement to conduct a mid-point



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		<p>review. Alternatively, the ACCC and/or access seeker should have the ability to request that NBN Co conduct a mid-point review, should either of them consider that type of review is required.</p> <p>Given the dynamic nature of the market and the fact that non-price provisions and service levels provision have not been properly settled with the industry, it would be inappropriate to lock them in without a mechanism to refine such terms.</p>
<b>2.1.3. SAU extension mechanisms</b>		
2.1.3.1. Extension of the Initial Regulatory Period (Module 1)	Agree	AAPT agrees with the ACCC proposed amendment to remove the automatic extension of Module 1.
2.1.3.2. Extension of the SAU term	Agree	AAPT agrees with the ACCC proposed amendment to ensure that the statutory criteria apply to its assessment of an NBN Co application to extend the operation of the SAU.
<b>2.2. Services to which the SAU relates</b>		
2.2.1. Uncertainty in relation to the ACCC's ability to set terms and conditions	Agree	AAPT agrees with the ACCC proposed amendment to remove any uncertainty around the ACCC's ability to intervene in matters concerning the service description (i.e. by declaring services and setting terms and conditions for those services).
2.2.2. Compliance and consistency with the SAOs	Agree	AAPT agrees with the ACCC proposed amendments which clarify that NBN Co has a commitment to supply to access seekers in accordance with SAU terms and the Cat B SAOs.



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2.2.2. <i>Layer 3 awareness</i>	Agree	AAPT agrees with the ACCC proposed amendments, which ensure that NBN Co is prevented from entering downstream markets and competing with existing suppliers on a vertically integrated basis.
<b>2.3. Product development and withdrawal</b>		
<i>2.3.1. Product development and variation</i>		
2.3.1.1. Term of operation of the PDF Processes	Partially Agree	AAPT agrees with the principle that there need not be a prescriptive PDF process after the first five years. However AAPT considers that the LTIE would be better promoted if a PDF process was mandated, but the terms were to be commercially agreed (but subject to ACCC intervention where agreement can't be reached).
2.3.1.2. Commitments by NBN Co to share information and consult	Partially Agree	AAPT is not opposed to participation of consumer advocacy groups in the PDF, but notes that there may be certain circumstances where end-user input may be not appropriate or relevant in the context of negotiations between supplier and customer.
2.3.1.3. Provisions which establish rights for and obligations on NBN Co and its customers about how consultation will occur	Disagree	While AAPT agrees with the ACCC's position in principle, this need to be balanced with the fact that pre-determined confidentiality terms are just as likely to facilitate, rather than hinder, effective participation by customers. For example, a customer may only choose to participate if it can satisfied that it information will be treated confidentially and its IP is protected.
2.3.1.4. Provisions which allow for consultation to not be undertaken in particular circumstances	Agree	AAPT supports the ACCC's proposed amendments to ensure that all products that are not yet fully developed and all variations to existing products are able to be consulted on via the Product Development



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		Forum and PDF Processes.
2.3.1.5. Provisions which set out NBN Co's ability to make a decision about whether or not to develop, introduce or vary a product	Agree	AAPT agrees with the ACCC proposed amendment to confirm and clarify the ACCC's ability to intervene in matters concerning whether or not to introduce a new product (i.e. by declaring services and setting terms and conditions for those services).
2.3.2. <i>Product withdrawal</i>	Agree	<p>AAPT agrees with the ACCC proposed amendment to:</p> <ul style="list-style-type: none"> <li>▪ require NBN Co to continue supply of a product if the ACCC considered that the withdrawal of a particular product would not promote the LTIE; and</li> <li>▪ include a commitment that NBN Co provides the same amount of written notice to consumer advocacy groups of its intention to withdraw a product, as it provides to its customers.</li> </ul>
<b>2.4. Price-related terms and conditions</b>		
2.4.1. <i>Pricing of individual products</i>		
2.4.1.1. Incentives to set new prices at levels that promote efficiency and competition	Agree	<p>AAPT supports the ACCC proposed variations to enable the ACCC to determine prices for new products and previously zero-priced products in circumstances where NBN Co has weak incentives to set new prices in a manner that encourages efficient use of the network.</p> <p>AAPT also supports the proposed amendments to subject NBN Co's pricing to periodic revenue by the ACCC (i.e. every 4 or 5 years) in a manner that ensures any changes are in the LTIE and are revenue</p>





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		neutral for NBN Co.
2.4.1.2. Ability for relative price levels to change in response to unforeseen circumstances		
2.4.2. Long-term revenue constraint		
2.4.2.1. Long-term revenue constraint in Module 1	Agree	<p>AAPT agrees with amendments proposed by the ACCC to give it a role to calculate the values of the building block components that are inputs to the annual revenue requirements, as well as the roll-forward of the RAB and initial cost recovery account.</p> <p>In AAPT's view, the ACCC should be given a "by exception" oversight power (constrained only by Module 0 and Module 2) where it has grounds to believe that there is a potential competition, LTIE, or reasonableness concern with a price set by NBN Co. This power includes making ADs or BROCC to remedy any problems it identified.</p>
2.4.2.2. Long-term revenue constraint in Module 2	Agree	<p>AAPT agrees with amendments proposed by the ACCC to:</p> <ul style="list-style-type: none"> <li>▪ remove any prescription about the methodologies used, and factors that must be had regard to, when calculating capital and operating expenditure forecasts, the return on capital, depreciation and tax allowances during Module 2;</li> <li>▪ make the SAU silent on the length of the regulatory cycle; and</li> <li>▪ remove any specifics about how the RAB will be rolled forward, but ensure that the RAB be rolled forward based on prudent additional capital expenditure, depreciation and</li> </ul>



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		asset disposals, so that the above issues can be determined by the ACCC in an Access Determination if a commercial outcome cannot be reached.
<b>2.5. Non-price terms and conditions</b>		
2.5.1. <i>Service levels</i>	Agree	AAPT supports the proposal to remove the service level commitments included in the SAU so that they may be determined by the ACCC in an Access Determination (where a commercial outcome cannot be reached).
2.5.2. <i>Other SFAA non-price terms</i>	Partially Agree	While AAPT agrees with the principle that detailed non-price terms need not be included in the SAU, it considers that having high-level principles in the SAU would help facilitate reaching commercial agreement and promote the LTIE.
2.5.3. <i>POI related matters</i>	Agree	AAPT supports the ACCC proposed amendment to ensure that the SAU supports, and is consistent with, the intended purpose of the POI list - that is, that interconnection is offered at locations which promote the long-term interests of end-users.