

Undertaking to the Australian Competition and
Consumer Commission

Given under section 87B of the *Competition and
Consumer Act 2010* by **Telstra Corporation Limited**
and **NBN Co Limited**

1. Person giving the Undertaking

1.1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by:

- (a) Telstra Corporation Limited ABN 33 051 775 556 referred to as **Telstra** in the Undertaking; and
- (b) NBN Co Limited ABN 86 136 533 741 referred to as **NBN Co** in this Undertaking.

(together **the parties**).

2. Background

The Parties to the transaction and the transaction details

- 2.1 On 23 June 2011, Telstra announced the execution of commercial agreements with NBN Co, known as the Definitive Agreements.
- 2.2 The Definitive Agreements govern, among other things, the terms on which Telstra will disconnect premises from its copper and hybrid fibre coaxial networks and provide services and access to key infrastructure to NBN Co.
- 2.3 The operative provisions of the following agreements are subject to a condition precedent, namely, the coming into force of an undertaking under section 577A of *Telecommunications Act 1997 (Cth)* (**Telco Act**) and copies of these agreements were provided to the ACCC in accordance with section 577BA(3) of the Telco Act:
 - (a) Subscriber Agreement between NBN Co and Telstra dated 23 June 2011;
 - (b) Deed of Amendment between NBN Co and Telstra dated on or about 24 February 2012;
 - (c) Infrastructure Services Agreement between NBN Co and Telstra dated 23 June 2011;
 - (d) Access Deed between NBN Co and Telstra dated 23 June 2011; and
 - (e) Letter dated 23 June 2011, sent to John Stanhope and entitled 'Condition Precedent - Optus'.

The ACCC's review

- 2.4 Paragraph 577A(1)(a) of the Telco Act allows the ACCC to accept a written structural separation undertaking from Telstra.
- 2.5 Section 577BA of the Telco Act specifies a range of different contracts, arrangements and understandings and conduct relating to the agreements between NBN Co and Telstra and relating to a structural separation undertaking given by Telstra that are

authorised for the purposes of subsection 51(1) of the *Competition and Consumer Act 2010* (Cth) (Act).

- 2.6 Subsection 51(1) of the Act relevantly provides that in deciding whether a person has contravened Part IV of the Act, anything specified in, and specifically authorised by another Commonwealth Act must be disregarded.
- 2.7 The section 577BA authorisation is extended to Part XIB of the Act by subsection 151AJ(9) of the Act, which provides that a person does not engage in anti-competitive conduct if, under section 577BA of the Telco Act, the conduct is authorised for the purposes of subsection 51(1) of the Act.
- 2.8 On 24 June 2011, following a public consultation period, the Minister for Broadband, Communications and the Digital Economy (the **Minister**) published the following instruments relating to the scope and criteria for assessment of a structural separation undertaking provided by Telstra:
- (a) *Telecommunication (Structural Separation - Network and Services Exemption) Instrument (No. 1) 2011* - this determines the networks and services that will be exempt from the scope of Telstra's structural separation undertaking.
 - (b) *Telecommunications (Regulated Services) Determination (No. 1) 2011* - this specifies which services will be subject to interim transparency and equivalence measures.
 - (c) *Telecommunications (Acceptance of an Undertaking about Structural Separation – Matters) Instrument 2011 (Ministerial Criteria Instrument)* – this sets out matters to which the ACCC is to have regard in assessing the structural separation undertaking in addition to those specified in section 577A of the Telco Act.
- 2.9 The Ministerial Criteria Instrument specifies that the ACCC must have regard to:
- [T]he conduct that would be authorised under section 577BA of the [Telco] Act as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force.
- 2.10 On 29 July 2011, Telstra submitted a structural separation undertaking and draft migration plan to the ACCC under sections 577A and 577BDA, respectively, of the Telco Act. On 24 August 2011, Telstra submitted a revised draft migration plan in response to certain concerns raised by the ACCC.
- 2.11 The ACCC is responsible for assessment of the structural separation undertaking and draft migration plan. The ACCC undertook a 28 day consultation period in relation to the draft migration plan. The ACCC also invited comments from interested parties on Telstra's structural separation undertaking during this period.
- 2.12 On 30 August 2011, the ACCC published a discussion paper for the purposes of its consideration of whether to accept the structural separation undertaking and approve the draft migration plan submitted by Telstra (**Discussion Paper**).

- 2.13 On 16 December 2011, Telstra lodged an amended structural separation undertaking. On 20 December 2011, the ACCC published a consultation paper on the amended structural separation undertaking.

The ACCC's competition concerns

- 2.14 The parties agreed to include in the Subscriber Agreement a variation mechanism that may be triggered if a substantial adverse event occurs in relation to either NBN Co or Telstra within 20 years from the date that the Subscriber Agreement becomes binding (**substantial adverse event clause**). The party which is affected by the substantial adverse event may initiate the variation procedure provided for in the Subscriber Agreement.
- 2.15 In accordance with the substantial adverse event clause, the range of variations that the parties might agree include releasing a party from competitive restraints in the Definitive Agreements, imposing additional restraints or making a cash payment.
- 2.16 The parties' rationale for the substantial adverse event clause is that it is designed to enable the parties to restore the negotiated position between themselves having regard to the business intentions of the parties at the time of entry into the Definitive Agreements.
- 2.17 The ACCC's concern with the substantial adverse event clause, as noted in its Discussion Paper is that a variation in accordance with the substantial adverse event clause, and conduct pursuant to that variation, may receive the benefit of the legislative authorisation set out in section 577BA without any mechanism for regulatory review.
- 2.18 The Discussion Paper noted that the ability of the parties to make variations under the substantial adverse event clause, including to impose additional competitive restraints, may receive the benefit of the legislative authorisation, without independent consideration as to whether those variations would be appropriate when viewed against the mandatory considerations to which the ACCC must have regard in deciding whether to accept a structural separation undertaking.
- 2.19 The purpose of this Undertaking is to:
- (a) prevent the parties from varying the Definitive Agreements in accordance with the substantial adverse event clause, as those variations may otherwise receive the benefit of authorisation for the purposes of subsection 51(1)(a) of the Act (by reason of section 577BA(3) of the Telco Act) without ACCC review; and
 - (b) to provide a transparent public review process for the ACCC's consideration of Proposed SAE Changes that are of concern.

- 2.20 For consistency with this Undertaking, the parties have amended the substantial adverse event clause pursuant to the Deed of Amendment between NBN Co and Telstra dated on or about 24 February 2012. The substantial adverse event clause contained in the Subscriber Agreement (as amended) is set out in confidential schedule 3 to this Undertaking (**SAE Clause**).
- 2.21 The purpose of this Undertaking is not to involve a re-consideration of the ACCC's acceptance of Telstra's Structural Separation Undertaking and Migration Plan.
- 2.22 The ACCC's review in accordance with this Undertaking (including any public consultation) will be limited to the Proposed SAE Change and the associated SAE and will not involve a re-consideration of the ACCC's acceptance of Telstra's Structural Separation Undertaking and Migration Plan.

The proposed Undertaking remedy

- 2.23 The parties acknowledge the ACCC's concerns and have offered this Undertaking to address those concerns.
- 2.24 The parties also acknowledge that:
- (a) conduct engaged in by Telstra or NBN Co after Telstra's structural separation undertaking comes into force in order to give effect to the SAE Clause will be specifically authorised for the purposes of section 51(1)(a) of the Act (by reason of section 577BA(3) of the Telco Act); and
 - (b) upon this Undertaking being accepted, any variation to a Definitive Agreement purported to be made in accordance with the SAE Clause without complying with clause 5 of this Undertaking will not, for the purposes of that authorisation, be conduct engaged in by Telstra or NBN Co in order to give effect to the SAE Clause.

3. Commencement of the Undertaking

Commencement

- 3.1 This Undertaking comes into effect (the **Commencement Date**) when:
- (a) this Undertaking is executed by NBN Co and Telstra; and
 - (b) this Undertaking so executed is accepted by the ACCC; and
 - (c) the Subscriber Agreement becomes binding upon Telstra and NBN Co.
- 3.2 The parties will notify the ACCC when clause 3.1(c) has been satisfied.

4. Cessation of ongoing obligations

Withdrawal

- 4.1 This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

Waiver

- 4.2 The ACCC may, at any time, expressly waive in writing any of the obligations of Telstra or NBN Co contained in the Undertaking or amend the date by which any such obligation is to be satisfied.

5. Undertaking

Referral to ACCC

- 5.1 Prior to the implementation of any variation to the Definitive Agreements pursuant to the SAE Clause, the parties will (either separately or collectively, at the parties' discretion) give notice (**SAE Notice**) to the ACCC of:
- (a) any proposed variation to the Definitive Agreements made in accordance with the SAE Clause which has been agreed between the parties or results from the Expert Determination process in accordance with clause 12 of the Subscriber Agreement (**Proposed SAE Change**); and
 - (b) the associated substantial adverse event, which will be the event described in the SAE Statement that gave rise to the Proposed SAE Change in accordance with the SAE Clause (**associated SAE**).
- 5.2 Clause 5.1 does not apply to any variation which is authorised:
- (a) by Commonwealth legislation other than by section 577BA(3) of the Telco Act; or
 - (b) pursuant to Part VII of the Act.
- 5.3 In addition to the information set out in clause 5.1, the SAE Notice will also annex the SAE Statement.
- 5.4 The parties will not vary the Definitive Agreements to implement or otherwise give effect to a Proposed SAE Change referred to in an SAE Notice unless clauses 5.7, 5.20, 5.21 or 5.23 apply in respect of that Proposed SAE Change.

Affected Party may withdraw SAE Notice

- 5.5 The party in relation to whom the associated SAE event has occurred (being the party affected by the SAE event) may, at any time, withdraw the SAE Notice by providing written notice to the ACCC.

ACCC pre-assessment

- 5.6 Upon receipt of an SAE Notice, the ACCC will:
- (a) review the Proposed SAE Change in the context of the associated SAE expeditiously on a confidential basis to determine whether the ACCC

considers that the Proposed SAE Change would be likely to contravene Parts IV or XIB of the Act, but for section 577BA; and

- (b) notify the parties within 20 Business Days or as soon as reasonably practicable thereafter that either:
 - (i) the ACCC considers that but for section 577BA, the Proposed SAE Change would be likely to contravene Parts IV or XIB of the Act and, if so, that the ACCC will conduct a full review of the Proposed SAE Change in accordance with this Undertaking; or
 - (ii) the ACCC will not conduct a full review of the Proposed SAE Change in accordance with this Undertaking.

5.7 If the ACCC notifies the parties that it will not be conducting a full review of the Proposed SAE Change, in accordance with clause 5.6(b)(ii), the parties are released from their obligation under clause 5.4 not to vary the Definitive Agreements to implement or otherwise give effect to any Proposed SAE Change referred to in an SAE Notice.

ACCC full review

5.8 In the event that the ACCC notifies the parties that it will conduct a full review of the Proposed SAE Change in accordance with clause 5.6(b)(i), the following process will apply:

- (a) The ACCC will require a description of the Proposed SAE Change and associated SAE which may be used by the ACCC for any public consultation undertaken by the ACCC (**Public SAE Description**), which adequately identifies and describes the Proposed SAE Change and associated SAE that would, but for section 577BA, be likely to contravene Parts IV or XIB of the Act.
- (b) Within 20 Business Days of being notified in accordance with clause 5.6(b)(i), the parties will agree and provide a draft description to the ACCC (**draft description**).
- (c) The ACCC will review the draft description and notify the parties within 5 Business Days whether it accepts the draft description.
- (d) If the ACCC rejects the draft description, the parties will agree and provide within 3 Business Days a revised draft description (**revised draft description**) to the ACCC.
- (e) The ACCC will review the revised draft description and notify the parties within 3 Business Days whether it accepts the revised draft description.
- (f) If the ACCC rejects the revised draft description, the ACCC will within a further 5 Business Days decide upon, to its satisfaction, and notify the parties of, the form of an acceptable Public SAE Description.

- (g) If at any point in the process set out above in this clause 5.8, the parties are unable to agree on the form of the public description to be provided to the ACCC, then either party may notify the ACCC that the parties have been unable to agree on the form of the description. Either party may then provide the ACCC and the other party with a proposed public description, and within 5 Business Days of receipt of such a proposed public description, the ACCC must decide upon, to its satisfaction, and notify the parties of, the form of an acceptable Public SAE Description.
- 5.9 Within 5 Business Days of receipt of notice from the ACCC of an acceptable Public SAE Description (as determined pursuant to clauses 5.8(c), 5.8(e), 5.8(f) or 5.8(g)):
- (a) the parties will (either separately or collectively, at the parties' discretion) provide the ACCC with submissions that address the matters to which the ACCC is to have regard in deciding whether or not it will accept a Proposed SAE Change; and
- (b) the party affected by the associated SAE will specify a date by which it would prefer the ACCC to make its decision.
- 5.10 In relation to the timing of its review, the ACCC will have regard to:
- (a) the date requested pursuant to clause 5.9(b);
- (b) the circumstances of the Proposed SAE Change and associated SAE;
- (c) the potential impact of the associated SAE on the affected party; and
- (d) any other information the ACCC consider relevant.
- 5.11 The ACCC may conduct a public consultation in relation to the Proposed SAE Change, if the ACCC considers it necessary.
- 5.12 The ACCC may publish the Public SAE Description (as determined pursuant to clauses 5.8(c), 5.8(e), 5.8(f) or 5.8(g)) and the submissions made by the parties pursuant to clause 5.9(a) (subject to confidentiality claims pursuant to clauses 5.27-5.28) on its website.
- 5.13 If the ACCC conducts a public consultation pursuant to clause 5.11, the ACCC will:
- (a) publish any non confidential submissions received by the ACCC on its website; and
- (b) give the parties a reasonable opportunity to provide a further submission to the ACCC, within a timeframe specified by the ACCC, in response to those submissions which, at the ACCC's discretion, may be published on the ACCC's website (subject to confidentiality claims pursuant to clauses 5.27-5.28).

ACCC test

5.14 The ACCC must accept a Proposed SAE Change if, the Proposed SAE Change and associated SAE operating together would not result, or would not be likely to result, in a net detriment to the public, by comparison to the likely position had the associated SAE not occurred (**SAE Review Test**).

5.15 In applying the SAE Review Test the ACCC must take into account:

- (a) the fact that the parties have agreed or an expert has determined that the Proposed SAE Change achieves the objectives of the SAE Clause (including restoring the parties to the position they were in prior to the associated SAE occurring);
- (b) the importance of the SAE Clause to each party in deciding to enter into the Definitive Agreements and to Telstra in agreeing to enter into the structural separation undertaking;
- (c) any public benefits likely to result from the Proposed SAE Change and associated SAE (operating together); and
- (d) any public detriment likely to result if the Proposed SAE Change and associated SAE (operating together) were to be put into effect.

by comparison to the likely position had the associated SAE (and Proposed SAE Change) not occurred.

5.16 The ACCC must apply the SAE Review Test having regard to:

- (a) any principles ordinarily applied to an authorisation decision made by the ACCC under Part VII of the Act (to the extent those principles are not inconsistent with the provisions of this undertaking);
- (b) the submissions made by the parties;
- (c) any submissions made by third parties through the public consultation process; and
- (d) other information the ACCC considers relevant.

ACCC statement of reasons

5.17 The ACCC will prepare a written statement of reasons for its decision and will make a public version of that statement of reasons, excluding any confidential information, available on its website.

5.18 The ACCC will endeavour to provide the parties with its decision in writing and statement of reasons by the date referred to in clause 5.9(b) or, if that is not feasible, as soon as reasonably practicable thereafter.

5.19 The ACCC's statement of reasons will refer to the information to which it has had regard in applying the SAE Review Test, subject to any accepted claims for confidentiality.

Maximum time limit for ACCC decision

- 5.20 The ACCC will make its decision and give the parties the statement of reasons by the date that is 6 months after the ACCC receives the first submission pursuant to clause 5.9(a). If the ACCC does not do so, the parties will be released from their obligation under clause 5.4 and may vary the Definitive Agreements to implement or otherwise give effect to the Proposed SAE Change referred to in the SAE Notice provided a party gives (or the parties jointly give) the ACCC notice 5 Business Days' prior to such implementation.

Implementation of Proposed SAE Change

- 5.21 If the ACCC:
- (a) gives notice in accordance with clause 5.6(b)(ii) or does not notify the parties that it wishes to conduct a full review in accordance with clause 5.6(b); or
 - (b) determines in accordance with clause 5.14 that it accepts the relevant Proposed SAE Change,
- the parties are released from their obligation under clause 5.4 not to vary the Definitive Agreements to implement or otherwise give effect to the relevant Proposed SAE change referred to in the SAE Notice.
- 5.22 If the ACCC revokes a decision in relation to a Proposed SAE Change pursuant to clause 5.26, effective from the date of revocation, the parties will no longer have the benefit of authorisation for the relevant Proposed SAE Change.
- 5.23 The parties may vary the Definitive Agreements to implement or otherwise give effect to the Proposed SAE Change if permitted to do so by a Court provided that a party has given the ACCC 5 Business Days' prior notice of those proceedings.
- 5.24 If the ACCC gives notice following its review that it has determined that the Proposed SAE Change does not satisfy the SAE Review Test, the parties will not vary the Definitive Agreements to implement or otherwise give effect to the Proposed SAE Change.

Reconsideration by the parties

- 5.25 If the parties repeat the process in clause 12 of the Subscriber Agreement to arrive at a further Proposed SAE Change, the parties will give notice to the ACCC of that Proposed SAE Change and the ACCC will consider the Proposed SAE Change according to the process in this Undertaking.

Revocation

- 5.26 The ACCC may, at any time, revoke its acceptance of a Proposed SAE Change or revoke its decision to not conduct a full review of a Proposed SAE Change in accordance with clause 5.6(b)(ii) under this Undertaking if the ACCC:

- (a) is satisfied that its acceptance of the Proposed SAE Change or its decision to not conduct a full review of the Original SAE Change was on the basis of evidence or information that was materially false or misleading; and
- (b) gives the parties 10 Business Days' prior notice of its intention to revoke its acceptance of the Proposed SAE Change and written reasons for the revocation.

If the ACCC revokes its acceptance of a Proposed SAE Change or its decision to not conduct a full review of the Original SAE Change, the party affected by the associated SAE may repeat the process in clause 12 of the Subscriber Agreement.

Confidentiality

5.27 The parties will:

- (a) clearly identify any commercially confidential information in any submission provided to the ACCC; and
- (b) provide a non-confidential version of the submission to be posted on the ACCC website with confidential information redacted and replaced with '[c-i-c]'; and
- (c) provide reasons in support of each instance in which confidentiality is claimed.

5.28 The ACCC will:

- (a) assess any confidentiality claims by the parties in relation to the content of these submissions to determine whether the information the subject of a confidentiality claim is genuinely confidential in nature and will keep confidential any information that is the subject of a confidentiality claim until the ACCC has assessed that claim;
- (b) where the ACCC is satisfied that the information the subject of a confidentiality claim is genuinely confidential in nature, the ACCC will keep that information confidential in accordance with this Undertaking;
- (c) where the ACCC is not satisfied that the information the subject of a confidentiality claim is genuinely confidential in nature, it will inform the relevant party and that party may within 5 Business Days withdraw that information from the ACCC's consideration;
- (d) where a party withdraws information from the ACCC's consideration under clause 5.27(c), the ACCC will return to that party or destroy all copies of that information; and
- (e) where information is not withdrawn under clause 5.27(c), the ACCC is not required to keep that information confidential in accordance with this Undertaking.

- 5.29 Nothing in clause 5.28 prevents the ACCC from disclosing such information as:
- (a) is required by law;
 - (b) is permitted by section 155AAA of the Act; or
 - (c) is necessary for the purpose of enforcement action under section 87B.
- 5.30 Nothing in clause 5.29 prevents the ACCC from:
- (a) using the information provided in accordance with this Undertaking for any purpose consistent with its statutory functions and powers; or
 - (b) disclosing the information provided in accordance with this Undertaking to its external advisors and consultants where the ACCC ensures that those advisors and consultants also undertake to keep that information confidential.

Acknowledgement

- 5.31 Where the associated SAE has been caused by the conduct of a party, the ACCC's decision concerning the Proposed SAE Change is not a decision as to whether that conduct giving rise to the associated SAE contravenes a provision of Part IV or Part XIB of the Act and neither the ACCC nor the affected party are prevented by this Undertaking from taking action in respect of such conduct.

6. Independent Audit

Obligation to appoint an Approved Independent Auditor

- 6.1 Telstra and NBN Co must jointly appoint and maintain an Approved Independent Auditor to audit and report upon the parties' compliance with this Undertaking.
- 6.2 Without limiting its obligations in this Undertaking, each of Telstra and NBN Co must:
- (a) comply with and enforce the terms of appointment for the Approved Independent Auditor;
 - (b) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
 - (i) indemnify the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor;
 - (ii) provide and pay for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor;

- (c) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
 - (i) direct the parties' personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 6;
 - (ii) provide to the Approved Independent Auditor any information or documents requested by the Approved Independent Auditor that he or she considers necessary for carrying his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
 - (iii) not request any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC; and
- (d) not appoint the Approved Independent Auditor, or have any agreements, understandings or arrangements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.

Approval of the Approved Independent Auditor

- 6.3 Within 15 Business Days after the Commencement Date, Telstra and NBN Co must provide (either separately or collectively, at the parties' discretion) the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 2 to this Undertaking (**Proposed Independent Auditor Notice**).
- 6.4 After receiving a notice for a Proposed Independent Auditor Notice, the ACCC must decide whether to:
- (a) approve the appointment of the person named in the Proposed Independent Auditor Notice as the Approved Independent Auditor which includes approving:
 - (i) the terms of appointment attached to the Proposed Independent Auditor Notice; and
 - (ii) the draft audit plan attached to the Proposed Independent Auditor Notice; or
 - (b) not approve the person named in the notice as the Proposed Independent Auditor Notice and, at the ACCC's absolute discretion:
 - (i) identify and approve a person as the Approved Independent Auditor;

- (ii) approve the terms of appointment of the Approved Independent Auditor;
- (iii) approve a draft audit plan; and
- (iv) appoint the Approved Independent Auditor on the approved terms of appointment.

6.5 Without limiting the ACCC's discretion, in making the decisions described in clause 6.4, the factors to which the ACCC may have regard include whether:

- (a) the person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
- (b) the person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of each of Telstra and NBN Co;
- (c) the terms of appointment and the draft audit plan are consistent with this Undertaking; and
- (d) the terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.

6.6 Within 10 Business Days of receiving a Proposed Independent Auditor Notice, the ACCC must notify each of Telstra and NBN Co in writing of its decisions made pursuant to clause 6.4.

6.7 The ACCC may extend the period within which it will provide the notice described in clause 6.6 by notifying each of Telstra and NBN Co in writing of the extension within 10 Business Days of receiving the notice.

6.8 The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it in the Proposed Independent Auditor Notice was incorrect, inaccurate or misleading.

Appointment of the Approved Independent Auditor

6.9 Within 15 Business Days after receiving notice from the ACCC of its decisions pursuant to clause 6.4, Telstra and NBN Co must jointly:

- (a) appoint the person approved by the ACCC pursuant to clause 6.4(a) or clause 6.4(b)(i) as the Approved Independent Auditor on the terms of appointment approved by the ACCC pursuant to clause 6.4(a)(i) or clause 6.4(b)(ii); and
- (b) forward to the ACCC a copy of the executed terms of appointment within one business day of its execution.

Obligations and powers of the Approved Independent Auditor

- 6.10 Each of Telstra and NBN Co must procure that the terms of appointment of the Approved Independent Auditor include obligations on the Approved Independent Auditor to:
- (a) maintain his or her independence from each of Telstra and NBN Co, apart from appointment to the role of Approved Independent Auditor, including not forming any relationship of the types described in clause 2(c) of Schedule 2 with either Telstra or NBN Co for the period of his or her appointment;
 - (b) conduct compliance auditing according to the Approved Audit Plan;
 - (c) provide the following reports directly to the ACCC:
 - (i) a scheduled written Audit Report as described in clause 6.12 and clause 6.13; and
 - (ii) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
 - (d) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.
- 6.11 Telstra and NBN Co must procure that the terms of appointment of the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:
- (a) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and
 - (b) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.

Compliance Audit

- 6.12 The Approved Independent Auditor must conduct an audit and prepare a detailed report (Audit Report) on:
- (a) Whether, during the relevant review period, the parties have varied the Definitive Agreements to implement or otherwise give effect to a SAE Clause change, without notifying the ACCC pursuant to clause 5.1 of this Undertaking;
 - (b) all of the reasons for the conclusions reached in the Audit Report;
 - (c) any qualifications made by the Approved Independent Auditor in forming his or her views; and

- (d) any recommendations by the Approved Independent Auditor to improve the Approved Audit Plan, the integrity of the auditing process and any recommendations to improve the parties' processes or reporting systems in relation to compliance with this Undertaking; and
 - (e) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- 6.13 The Approved Independent Auditor is to provide an Audit Report to the ACCC and Telstra and NBN Co at the following times:
 - (a) within 20 Business Days of the date of appointment, at which time the Audit Report is to include the results of the establishment audit and any recommended changes to the Approved Audit Plan;
 - (b) every 12 months after the date of provision of the first Audit Report, for the term of the Subscriber Agreement.
- 6.14 Each of Telstra and NBN Co must implement any recommendations of the Approved Independent Auditor made in the Audit Report, and notify the ACCC of the implementation of the recommendations, within 10 Business Days of receiving the Audit Report or after a period agreed with the ACCC.
- 6.15 Each of Telstra and NBN Co must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days of being so directed (or such longer period as agreed with the ACCC).

Resignation or termination of the Approved Independent Auditor

- 6.16 Telstra and NBN Co must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- 6.17 The ACCC may approve any proposal by, or alternatively may direct, Telstra and NBN Co to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking or the terms of his or her appointment.
- 6.18 If either clause 6.16 or clause 6.17 applies, Telstra and NBN Co must provide the ACCC with a notice for a Proposed Independent Auditor Notice within 10 Business Days of the resignation or termination of the Approved Independent Auditor and the process in clause 6.4 will apply, otherwise clause 6.4(b) applies.

7. Information

- 7.1 The ACCC may direct each of Telstra and NBN Co to, and each of Telstra and NBN Co must, in relation to performance of any function by the ACCC under this Undertaking or in respect of Telstra or NBN Co's compliance with this Undertaking:
 - (a) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;

- (b) produce information, documents and materials to the ACCC within the relevant party's custody, power or control in the time and in the form requested by the ACCC; and/or
- (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.

7.2 Any direction made by the ACCC under clause 7.1 will be notified to Telstra or NBN Co, in accordance with clause 13.1.

7.3 In respect of Telstra or NBN Co's compliance with this Undertaking or the Approved Independent Auditor's compliance with its terms of appointment, the ACCC may request the Approved Independent Auditor to:

- (a) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;
- (b) produce information, documents and materials to the ACCC within the auditor's custody, power or control in the time and in the form requested by the ACCC; and/or
- (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.

7.4 Each of Telstra and NBN Co will use its best endeavours to ensure that the Approved Independent Auditor complies with any request from the ACCC in accordance with clause 7.3.

7.5 The ACCC may in its discretion to be exercised in good faith:

- (a) advise the Approved Independent Auditor of any request made by it under this clause 7; and/or
- (b) provide copies to the Approved Independent Auditor of any information furnished, documents and material produced or information given to it under this clause 7.

7.6 Nothing in this clause 7 requires the provision of information or documents in respect of which Telstra or NBN Co has a claim of legal professional or other privilege.

7.7 Where confidential information is provided to the ACCC in accordance with this clause 7, the ACCC will keep that information confidential save that nothing in this clause 7 prevents the ACCC from disclosing such information as:

- (a) is required by law;
- (b) is permitted by section 155AAA of the Act;
- (c) is necessary for the purpose of enforcement action under section 87B.

7.8 Nothing in clause 7.7 prevents the ACCC from:

- (a) using the information provided in accordance with this clause 7 for any purpose consistent with its statutory functions and powers; or

- (b) disclosing the information provided in accordance with this clause 7 to its external advisors and consultants where the ACCC ensures that those advisors and consultants are made aware of and bound by these confidentiality obligations.

8. Disclosure of the Undertaking

8.1 Telstra and NBN Co acknowledges that the ACCC may:

- (a) make this Undertaking publicly available; and
- (b) publish this Undertaking on the Public Section of its 87B Undertakings Register; and
- (c) from time to time publicly refer to this Undertaking, with the exception of confidential Schedule 3.

8.2 Nothing in clause 8.1 or the confidential parts of this Undertaking prevents the ACCC from disclosing such information as:

- (a) is required by law;
- (b) is permitted by s 155AAA of the Act;
- (c) is necessary for the purpose of enforcement action under section 87B of the Act.

8.3 Nothing in clause 8.1 or the confidential parts of this Undertaking prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

9. Obligation to procure

9.1 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Telstra or NBN Co to take or refrain from taking some action, Telstra or NBN Co will procure that Related Body Corporate to take or refrain from taking that action, as the case may be.

10. No Derogation

10.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Telstra or NBN Co of any term of the Undertaking.

10.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Telstra or NBN Co does not fully implement and/or perform its obligations under this Undertaking.

10.3 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

11. Breach of Undertaking

- 11.1 For the avoidance of doubt, a breach of any clause of this Undertaking by a party shall not be taken to be a breach by the other party.'

12. Costs

- 12.1 Each of Telstra and NBN Co must pay all of its own costs incurred in relation to this Undertaking.

13. Notices

Giving Notices

- 13.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: mergers@accc.gov.au

Attention: Executive General Manager

With a copy sent to:

	Mail Address	Fax Number	Email Address	Attention
Communications Group	GPO Box 520 MELBOURNE VIC 3000	+61 9663 3699	ssu- migration@accc.gov.au	Group General Manager
Mergers – undertakings and compliance unit	GPO Box 3131 CANBERRA ACT 2601	+61 2 6243 1199	mergersucu@accc.gov.au	Undertakings

- 13.2 Any notice or communication to Telstra and NBN Co pursuant to this Undertaking must be sent to:

	Mail Address	Fax Number	Email Address	Attention
NBN Co	Level 11 100 Arthur Street, North Sydney NSW 2060	+61 2 9927 4132	NoticesfromTelstra@nbnco.com.au	Chief Legal Officer and Chief Financial Officer
Telstra	Level 41 242 Exhibition Street Melbourne Victoria 3000	+61 3 9634 4553	nbn.telstra.notifications@team.telstra.com	Group General Counsel and Chief

	Mail Address	Fax Number	Email Address	Attention
				Financial Officer

Change of contact details

- 13.3 Telstra, NBN Co or the ACCC must notify the other party of a change to its contact details within three Business Days of the change occurring.
- 13.4 Any notice or communication will be sent to the most recently advised contact details and subject to clause 13.3, will be taken to be received:
- (a) if it is dispatched by fax:
 - (i) by 5.00pm (local time in the place of receipt) on a Business Day - on that day; or
 - (ii) after 5.00pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day;
 - (b) if it is dispatched by mail:
 - (i) within Australia - three Business Days after posting; or
 - (ii) to or from a place outside Australia - seven Business Days after posting; or
 - (c) if it is transmitted through an email notification, at the time the sender receives a confirmation note from the recipient's server that the message has been delivered, except that if such time is on or after 5.00pm on a Business Day (local time in the place of receipt) or not on a Business Day, then it will be given and received on the next Business Day.

14. Defined terms and interpretation

Definitions in the Dictionary

- 14.1 A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Clause 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
 - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

Interpretation

- 14.2 Clause 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by Telstra Corporation Limited ABN 33 051 775 556 pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director

CATHERINE B. LIVINGSTONE

Name of director (print)

24/2/12

Date



Signature of a director/company secretary

NOKA L. SCHEINKESTEL

Name of director/company secretary (print)

24/2/12

Date

Executed by NBN Co limited ABN 86 136 533 741 pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director

MIKE QUILLEY

Name of director (print)

24/2/2012

Date



Signature of a director/company secretary

DEBRA CONNORS

Name of director/company secretary (print)

24 FEBRUARY 2012

Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* on:

Date: 27 February 2012

And signed on behalf of the Commission:

Chairman



Date

27 February 2012

Schedule 1

1. Dictionary

ACCC means the Australian Competition and Consumer Commission.

Act means the *Competition and Consumer Act 2010* (Cth).

Approved Audit Plan means the plan referred to in clauses 6.4(a)(ii) and 6.4(b)(iii) as amended from time to time by ACCC direction given under clause 6.10(d), by which the Approved Independent Auditor will audit and report upon whether the SAE Clause has been triggered during the relevant review period and if so, the parties' compliance with the Undertaking.

Approved Independent Auditor means the person appointed under clause 6.4(a) or clause 6.4(b)(ii).

Audit Report has the meaning in clause 6.12.

Business Day means a day other than a Saturday, Sunday or public holiday in NSW or Victoria.

Commencement Date means the date described in clause 3.1.

Entity Connected has the meaning given by section 64B of the *Corporations Act 2001* (Cth).

NBN Co means the entity referred to in clause 1.1(b).

Proposed Independent Auditor means a person named in a notice for a Proposed Independent Auditor in the form of Schedule 2.

Proposed Independent Auditor Notice means a completed notice in the form of Schedule 2 to the Undertaking provided to the ACCC with all required attachments in relation to the Proposed Independent Auditor.

Related Entities has the meaning given by section 9 of the *Corporations Act 2001* (Cth).

Related Parties has the meaning given by section 228 of the *Corporations Act 2001* (Cth).

SAE Statement means a description of the associated SAE which has been agreed between the parties or determined by an Expert Panel in accordance with clause 12 of the Subscriber Agreement.

Telstra means the entity referred to in clause 1.1(a).

Undertaking is a reference to all provision of this document, including its schedules and as varied from time to time under section 87B of the Act.

2. Interpretation

2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;

- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) in relation to a clause in this Undertaking, material not forming part of this Undertaking may be considered to:
 - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns arising from variations to the Definitive Agreements that could be agreed between the parties in the event of a relevant substantial adverse event (as set out in clause 2), which are intended to be addressed by the Undertaking and the clause in question;
 - or

- (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to:
 - (i) the effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (ii) the need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns arising from variations to the Definitive Agreements that could be agreed between the parties in accordance with the SAE Clause;
- (o) the ACCC may authorise the Communications Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, each of Telstra and NBN Co will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
 - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
 - (ii) a party includes its successors and permitted assigns; and
 - (iii) a monetary amount is in Australian dollars.

Schedule 2 - Proposed Independent Auditor Appointment Form

This form sets out the information required by the ACCC in relation to the proposed appointment of the Independent Auditor under this Undertaking:

Please note in relation to information given in relation to this form, giving false or misleading information is a serious offence.

Method of Delivery to the ACCC

The completed Appointment form, along with the additional requested information is to be provided to the ACCC with the subject line “*Proposed Independent Auditor Form – Telstra and NBN Co Undertaking*” to the below email addresses:

1.

Attention: Group General Manager, Communications Group
GPO Box 520
MELBOURNE VIC 3000

2. With an email copies sent to:

ssu-migration@acc.gov.au; and

mergersucu@acc.gov.au

Attention: Director, Telstra’s structural separation undertaking

Information Required

The ACCC requires the following information in order to assess a proposed Independent Auditor:

1. Proposed Independent Auditor Details:

- (a) the name of the proposed Independent Auditor; and
- (b) the name of the proposed Independent Auditor’s employer and contact details including:
 - Address;
 - Contact name;
 - Telephone number;
 - Other contact details.

2. A submission containing the following information:

- (a) Details of the proposed Independent Auditor’s qualifications and experience relevant to his or her proposed role pursuant to the Undertaking.
- (b) The names of the owner/s and/or the directors of the Proposed Independent Auditor’s employer.
- (c) Details of any of the following types of relationships between Telstra or NBN Co and the Proposed Independent Auditor or the Proposed Independent Auditor’s

employer or confirmation that no such relationship exists whether within Australia or outside of Australia:

- i. Either Telstra or NBN Co and the Proposed Independent Auditor's employer are Associated Entities within the meaning given by section 50AAA of the *Corporations Act 2001* (Cth).
 - ii. Either Telstra or NBN Co is an Entity Connected with the Proposed Independent Auditor's employer.
 - iii. The Proposed Independent Auditor's employer is an Entity Connected with Telstra or NBN Co.
 - iv. Either Telstra or NBN Co and the Proposed Independent Auditor's employer are Related Entities.
 - v. Telstra and NBN Co and the Proposed Independent Auditor's employer are Related Parties.
 - vi. Any Related Party, Related Entity or Entity Connected with either Telstra or NBN Co is a Related Party, Related Entity or Entity Connected with the Proposed Independent Auditor.
 - vii. Either Telstra or NBN Co and the Proposed Independent Auditor or the Proposed Independent Auditor's employer have a contractual relationship or had one within the past three years, other than those attached to this form.
 - ix. the Proposed Independent Auditor's employer is a supplier of Telstra or NBN Co or has been in the past three years.
 - x. NBN Co is a supplier of the Proposed Independent Auditor's employer or has been in the past three years.
 - xi. Any other relationship between Telstra or NBN Co and the Proposed Independent Auditor or the Proposed Independent Auditor's employer that allows one to affect the business decisions of the other.
- (d) Details of whether Telstra is a supplier of the Proposed Independent Auditor's employer or has been in the past three years.
3. A document outlining the terms of appointment of the Proposed Independent Auditor.

Schedule 3 – Confidential Schedule