

# **The declaration of resale services provided over the NBN: a response to aspects of the ACCC's Fixed Service Review – Discussion Paper on the Declaration Inquiry**

Martin Cave

## *Summary*

*As a component of the Fixed Services Review, the ACCC has before it the question of whether or not to declare resale services provided over the NBN – equivalent to copper-based WLR, LCS and PSTN OA. The NBN heralds two major changes: application of a significantly different technology which is likely to change the demand for access products, and at the same time, a separated ownership structure which removes any incentive for the access provider to discriminate in favour of any retailer (and is supported by a statutory prohibition on discrimination). Moreover, there are nearly 50 participating retail service providers likely to offer retail services over the NBN, and at least 12 are certified wholesale service providers. There is no evidence of barriers to entry in these still nascent markets or that they are not effectively competitive.*

*Requiring any provider to supply a regulated product risks distorting the market place and stifling innovation, as the regulator typically defines the attributes of the regulated product in a fashion which may pre-empt rivals' offerings and curtails or eliminates the market discovery process from which customers benefit. I consider that in this case forbearance from regulation is in the long term interests of end users (LTIE). Voice-only resale products are likely to emerge through the competitive process as and when demand for them crystallises, and the indications are that regulation is not needed to promote competition, achieve connectivity or encourage efficient use of or investment in infrastructure.*

## **1. Introduction**

I have been asked by King & Wood Mallesons, acting on behalf of Telstra, to prepare a paper addressing the questions relating to the declaration of resale services provided over the NBN raised in the ACCC's Fixed Service Review Discussion Paper dated July 2013 ("the Discussion Paper").<sup>1</sup> The essential issue in question here is whether the equivalents of regulated copper-based resale services - WLR, LCS and PSTN OA - should be subject to regulation when provided over the NBN.

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<sup>1</sup> ACCC, *Fixed Service Review Discussion Paper on the Declaration Inquiry*, July 2013

My letter of instruction is attached (annexure A), together with my curriculum vitae (annexure B).

I have made all the inquiries that I believe are desirable and appropriate and confirm that no matter of significance that I regard as relevant has, to my knowledge, been withheld.

## **2. Legislative framework**

The Discussion Paper sets out the legislative framework for the Fixed Services Review. Under Part XIC of the Competition and Consumer Act 2010, services can be declared, and the currently declared six fixed line services are the chief subject of the Discussion Paper. The declarations expire on 31 July 2014. During the 18 month period prior to the expiry date, the ACCC is required to conduct a public inquiry to determine whether the existing declarations should be extended, revoked, allowed to expire or remade. It must also decide whether to commence an inquiry into declaring any other fixed service.

In deciding to declare a service, the ACCC must be satisfied that to do so will promote the long term interests of end users (LTIE) of telecommunications services, having regard to the extent to which a declaration is likely to result in the achievement of the following three objectives:

- promoting competition in markets for telecommunications services;
- achieving any-to-any connectivity; and
- encouraging efficient use of and investment in infrastructure by which the service is supplied.

## **3. The ACCC's earlier consultation and decision on the status of NBN resale services**

In April 2011, the ACCC raised the question of whether the final access determination (FADs) for WLR, LCS, PSTN OA and PSTN TA services should apply when those services are supplied over the NBN. The ACCC noted that if they were so applied, it would be necessary to specify terms and conditions relating to price for the relevant services. It noted that 'for instance, the price could be based on an NBN basic access price and the costs the access provider would incur in developing the services which are delivered over the NBN'.<sup>2</sup> In July 2011, the ACCC reported on the responses to the previous Discussion Paper, and noted a number of factors which would influence the development of the NBN wholesale aggregation market:<sup>3</sup>

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<sup>2</sup> ACCC, *Public inquiry to make final access determinations for the declared fixed line services – Discussion Paper*, April 2011, p. 249.

<sup>3</sup> *Inquiry to make final access determinations for the declared fixed line services – Final Report*, July 2011, p.165.

- ‘ - the existence of barriers to entry to accessing services directly from NBN Co at the access level;
- the ability and willingness of access level service providers to provide wholesale aggregation services, in particular for vertically integrated retailers to do so in the initial stages of the NBN;
- the profitability of entering the market at the resale level, in the face of competition from access level service providers in the retail market.’

It expressed its final view as follows:

‘The ACCC has considered the views expressed in submissions... and concluded that the case for access regulation of NBN wholesale aggregation services over the long term is not clear. The ACCC has decided to specify that these FADs do not apply to services by a carrier or carriage service provided over the NBN...’<sup>4</sup>

Following a further inquiry, the ACCC decided not to impose so-called Category A SAOs upon Telstra until the earlier of 31 March 2013 and the date at which Telstra could supply a wholesale NBN voice service.<sup>5</sup>

In its final report in July 2012, the ACCC proposed to re-examine the issue of regulation of the NBN wholesale aggregation (or resale) market in the course of the Fixed Services Declaration inquiry, which is now under way, by which time the NBN roll-out would have progressed further.<sup>6</sup>

#### **4. The questions posed in the current review relating to the resale of NBN services**

The Discussion Paper emphasises the major changes which the introduction of the NBN will have on fixed communications markets in Australia, both in terms of technology and in terms of industrial organisation. The replacement of copper by fibre networks is a ‘once in a century’ change in fixed access networks, and ownership and control of the fibre network are assigned to NBN Co, a government-owned company which is limited to supplying services to carriers, service providers and utilities (for their own use) and thus lacks any incentive to favour any particular retailer; any such discrimination would in any case be unlawful.<sup>7</sup>

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<sup>4</sup> *Inquiry to make final access determinations for the declared fixed line services – Final Report*, July 2011, pp.165-6.

<sup>5</sup> ACCC, *Inquiry to vary the fixed line services final access determinations – where WLR, LCS and PSTN OA services are supplied over the NBN: Final Report*, June 2012.

<sup>6</sup> *Inquiry to make final access determinations for the declared fixed line services – Final Report*, July 2011, p.165.

<sup>7</sup> Non-discrimination provisions were introduced into the C&C Act by the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* which provide that in respect of the NBN, network access providers must not discriminate between access seekers in complying with the SAOs or the carrying on of activities related to the supply of declared services and that a network access provider must not discriminate in favour of itself in the supply of declared services.

The NBN roll out will take place over a number of years, and by March 2013 there were only 48,600 active connections.<sup>8</sup>

In relation to the declaration of resale services on Telstra's copper network, the ACCC has the advantage of many years' observation of the fixed services market place and of the role which resale services have played. This benefit of observation is not present in the case of resale of NBN services, and the ACCC expressly notes in the Discussion Paper that:

'The roll out of the NBN raises the question of whether similar resale services [to those provided on copper] should be supplied on a declared basis when they are supplied using NBN infrastructure. As a result, the ACCC is seeking submissions on whether potential access seekers will face significant barriers to entry to supplying services on the NBN and whether the LTIE would be promoted by declaring resale services provided over NBN infrastructure.'<sup>9</sup>

Accordingly, one of the questions asked in the Discussion Paper is:

*'10. Will potential access seekers face significant barriers to entry in supplying services over the NBN? If so, would declaring resale services provided using NBN infrastructure promote the LTIE? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.'*<sup>10</sup>

It is clear that the answer to this question is likely to depend in part upon:

- a) the degree to which NBN retailers can avail themselves of the option of buying service directly from the NBN, rather than going through reselling intermediaries;
- b) if there is a demand for resold services on the NBN, the structure of supply of such services; and
- c) the nature of the service demanded from and supplied by the intermediaries, such as backhaul, layer 2 aggregation, layer 3+ "resale", etc.

## **5. Regulatory approaches to new technologies**

A useful starting point in reaching a decision about whether or not to impose a requirement to supply a product or products (in this case the above-noted NBN resale products) is to consider whether there are adequate grounds to believe that, absent the mandated access, but taking as given other access decisions already made, end users' interests will be promoted in the long term.

When considering how to regulate in the presence of a major innovation, such as the near-universal projected availability of a fibre access network in place of the traditional copper one, the question remains relevant; even if, because of the limited availability of market observations, it is harder to answer.

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<sup>8</sup> ACCC, *Fixed Service Review Discussion Paper on the Declaration Inquiry*, July 2013, p. 20.

<sup>9</sup> *Ibid.* p. 30.

<sup>10</sup> *Ibid.* p. 31.

In the European Union, the primary legislation governing the regulation of electronic communications services provides that newly emerging markets should not be subjected to inappropriate regulatory obligations.<sup>11</sup> This is further reflected in the European Commission's 2<sup>nd</sup> Relevant Market Recommendation, which states that:

'Recital 27 [of the Framework directive] also indicates that newly emerging markets, where de facto the market leader is likely to have a substantial market share, should not be subjected to inappropriate obligations. The Commission considers that 'emerging markets' are markets which are so new and volatile that it is not possible to determine whether or not the '3 criteria' test described below is met.'<sup>12</sup>

This proposition has been supported in a judgment of the European Court of Justice.<sup>13</sup>

It has not meant that fibre networks (known in Europe as Next Generation Access – NGA – networks) have been placed beyond the reach of regulation. This would be inappropriate since the basic access service they provide – connection to the customer – is a substitute for that provided by the copper network, and the same operator often owns both networks and provides retail services as well. Access to certain NGA passive assets<sup>14</sup> and to an active bitstream product (wholesale broadband access) is generally regulated in Europe. It is, however, often regulated in significantly different ways than access to copper networks, both as that regulation pertains to pricing adopted and the set of services to which access is mandated.<sup>15</sup>

But this leaves open the question of whether to carry forward, in the same form as applies to copper networks, mandatory access to resale services (such as WLR, LCS and PSTN OA) over the NBN.

In individual European jurisdictions, regulators have adopted or have had imposed on them various principles of forbearance. Thus in the United Kingdom, Ofcom has adopted as a regulatory principle a 'bias against intervention'.<sup>16</sup>

In its review of Whole Fixed Narrowband Markets in 2009, Ofcom specifically addressed the question of whether BT should be under an obligation to provide WLR in NGA conditions. It concluded that 'in an NGA environment where no copper exists, it may still remain appropriate for BT to be obliged to provide a wholesale narrowband access remedy. This would not be the WLR product provided today.'<sup>17</sup>

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<sup>11</sup> L Garzaniti, *Telecommunications, Broadcasting and the Internet*, 2010, paras. 4-001-4.003.

<sup>12</sup> (MC note) The first two criteria mentioned are the presence and expected persistence of barriers to entry, and the third is the insufficiency of competition law to address the market failure.

<sup>13</sup> Case C-424/07, *Commission v Germany*, paras. 64 and 73. ,

<sup>14</sup> Passive services involve access to components of a telecommunications network which do not rely on electronics; they include ducts, poles, towers and dark fibre. Active services also include electronics.

<sup>15</sup> Under the European Commission's draft *Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment*, December 2012, in certain circumstances fibre access products can be made available at prices which are not cost-related.

<sup>16</sup> The full principle is: 'a bias against intervention, but with a willingness to intervene promptly and effectively when required'. Ofcom, *Annual Report and Accounts 2010/11*, p. 35.

<sup>17</sup> Ofcom, *Review of the wholesale fixed narrowband markets*, Statement and Consultation, 15 December 2009, para. 13.25.

In a later statement, Ofcom reiterated the point about demand-side uncertainty, and noted that BT was currently planning to provide a fixed voice access product which would allow access to and control of an analogue telephone adaptor (“ATA”). Ofcom noted that whether or not this would become the wholesale line access remedy would depend on whether it met the needs of BT’s customers.

I understand that the current (FTTP) design of the NBN also provides for a built-in ATA to translate the analogue telephone signal to an IP signal. But as distinct from the NBN, BT in the UK proposes to maintain its copper network while ‘overbuilding’ mostly a FTTN network. Ofcom’s statement concluded: ‘Due to the nascent nature of this technology, we felt that it was too early for us to prescribe a specific solution.’<sup>18</sup>

In February 2012 BT formally announced its new Fibre Voice Access (FVA-FTTP) product providing an analogue telephone adaptor for its fibre to the premises network. The fee was £15.29 (A\$25.91) per month when bought as a stand-alone service.<sup>19</sup> Unlike copper-based WLR, there is no regulation of and no charge control on FVA. This is despite the fact that FVA is supplied by Openreach, a division of BT which is functionally separated from but in common ownership with BT Retail.

Stepping back from the details, it seems to me that two factors in this discussion are of particular importance. First, the replacement of the copper network by an NBN/NGA is a technological change of major significance. The NBN leads to the availability of an all IP network. The full implications - for market structure and firm strategies and business models - of relying upon a nearly universal IP network have not become clear.

Secondly, the current Australian approach to building an NBN relies upon the construction of a fully separated government-owned national fibre access network which replaces a CAN embedded within an investor-owned vertically integrated operator. The implication of this for the access regime is that (as distinct from what happens elsewhere – in the UK for example), and quite apart from the explicit legislative prohibition on discrimination,<sup>20</sup> the operator of the access network has no motive to favour any retailer or provider on non-access network services. Competing retailers can rely on the same access services as can the retailer associated with the formerly vertically integrated incumbent.

I now examine the emerging market structures in retail and resale NBN-based services.

## **6. The NBN market structure**

As well as implementing a new access technology and a new network architecture, the NBN inaugurates a new, vertically separated ownership structure for the sector. Many

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<sup>18</sup> Ofcom, *Review of the wholesale fixed analogue exchange lines markets*, Statement, 20 December 2010, paras. 6.14-6.16.

<sup>19</sup> See <http://www.ispreview.co.uk/story/2012/02/02/bt-prices-fibre-voice-access-on-uk-fibre-optic-ftp-broadband-isp-lines.html>

<sup>20</sup> See fn. 7 above.

service providers are likely to acquire service directly from NBN Co rather than through a resale service provider. This makes it doubly inappropriate simply to read across the regulatory structure adopted in respect of the copper-based network.

As noted above, in March 2013, there were only 48,600 active connections.<sup>21</sup> Despite the pace of the roll-out, I am instructed that in early August 2013, 47 providers, including iiNet and Optus, had been listed on the NBN's website as participating retail service providers over the NBN, in addition to Telstra.<sup>22</sup> At that date, of the 121 Points of Interconnection (POIs), NBN Co had commissioned and activated 68 (not all of which had active end users). The number of service providers present in those activated PoIs varied, up to a maximum of 39.

Further, 94% of brownfield fibre estates currently ready for service are within Connectivity Service Areas (CSAs) in which there are 10 or more retail service providers. This suggests a very encouraging level of interest in retail service provision. RSPs are currently providing a range of broadband only, voice and broadband bundle and voice only services over the NBN.

In addition, in early August 2013 I am instructed that there are at least 12 certified wholesale service providers.<sup>23</sup> AAPT, Amcom, Aurora Energy, Clear Networks, Eftel, Iseek, Nextgen Networks, Optus, PIPE Networks, Platform Networks, Symbio and Telstra Wholesale.

I am instructed that the services listed on the web sites of 11 of those providers are as shown in the following table:<sup>24</sup>

Table: Wholesale services provided over the NBN include:

	Backhaul	Aggregation	Layer 3 voice services	Layer 3 internet services
AAPT		✓	✓	✓
Amcom				✓
Clear Networks				✓
Eftel	✓	✓	✓	✓
Iseek		✓		
Nextgen Networks	✓	✓	✓	✓
Optus	✓	✓	✓	✓
PIPE Networks	✓			
Platform Networks	✓	✓		✓
Symbio		✓	✓	
Telstra Wholesale	✓	✓	✓	✓

Source: Telstra, based on wholesale service provider websites and NBN Co.

<sup>21</sup> See fn. 8 above.

<sup>22</sup> The equivalent figure on 16 April 2013 was 23 service providers.

<sup>23</sup> The equivalent figure on 16 April 2013 was 8 providers.

<sup>24</sup> Data for Aurora Energy are not available on its web site.

This shows a wide range of offerings. Thus there are eight providers of aggregation services,<sup>25</sup> including AAPT<sup>26</sup>, Nextgen<sup>27</sup>, Optus and Telstra.

A further 10 companies were NBN satellite service providers: Activ8me, Ant, Bordernet, Clear Networks, iiNet, IPSTAR Australia, Reachnet, Skymesh and Westnet.

These changes suggest a substantial erosion of Telstra's pivotal position in the copper market place, where it was a vertically integrated provider of a core network and an access network, and a retail service provider. The availability to all of access services from NBN will force existing and new retailers to ask themselves whether they want to buy a service from a wholesale provider, which could be something like WLR (e.g. a fully bundled service offering NBN access, backhaul and aggregation, as well as a voice application), or could be a new service better suited to an IP network (e.g. a layer 2 aggregation service), or whether they would be better off contracting directly with NBN Co for an access service. At the same time, Telstra's competitors become as well placed as Telstra to compete in the provision of resale products, both because the new ownership structure puts paid to any concerns about discrimination and because under the new arrangements Telstra loses its previous advantage in providing access services to itself at marginal cost, while its competitors had to buy the same service from Telstra at a regulated price.<sup>28</sup> These factors are likely to change the competitive dynamic in the wholesale market.

There are thus two major new developments in the market place. Retailers are likely to buy services directly from NBN, rather than from a reseller, and, according to their announcements, additional firms seem likely to supply resale products.

## **7. The factors identified by the ACCC in relation to the wholesale aggregation market.**

In its July 2011 final report on the inquiry into fixed line services, the ACCC noted that the rollout of the NBN was in its early stages and identified three factors which would influence the development of the wholesale aggregation market. These were:

- the existence of barriers to entry to accessing services directly from NBN Co at the access level;
- the ability and willingness of access level service providers to provide wholesale aggregation services, in particular for vertically integrated retailers to do so in the initial stages of the NBN; and
- the profitability of entering the market at the resale level, in the face of competition from access level service providers in the retail market.

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<sup>25</sup> Aggregation services obviate the need for the purchaser to make direct connections with NBN's points of interconnection.

<sup>26</sup> [http://www.arnnet.com.au/article/392203/aapt\\_becomes\\_official\\_nbn\\_aggregator](http://www.arnnet.com.au/article/392203/aapt_becomes_official_nbn_aggregator)

<sup>27</sup>

<http://www.nextgennetworks.com.au/LinkClick.aspx?fileticket=TRIUfGNj8Hg%3D&tabid=65&mid=4>

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<sup>28</sup> J Gans and S King, 'Competitive neutrality in access pricing', *Australian Economic Review*, 33, (2005), pp 128-136.



Two years later, it is fair to say that the NBN is still in a fairly early stage of development, with 48,600 active connections at the end of March 2013, in a footprint of 363,360 premises of which 96,060 were passed by fibre.<sup>29</sup> In other words, while the ACCC may reasonably have expected in 2011 that many of the uncertainties concerning the development of resale markets would have been resolved by 2013/4, in fact this is not the case.

As a result, as we revisit the ACCC's three considerations, even now there may be only provisional answers to the questions raised:

a) in relation to 'barriers to entry to accessing services directly from NBN Co at the access level', there are now 48 participating retail service providers. I understand that in these cases, the retailer has access to NBN Co services directly rather than via a reseller. Although it is by no means certain that all will survive, this suggests that barriers to entry have failed to stop at least this number of access seekers from gaining access to services directly from NBN Co. It should also be remembered the principal test is not whether barriers to entry exist at all, but whether they are sufficiently large to jeopardise competition in the relevant downstream retail markets;

b) in connection with 'the ability and willingness of access level service providers to provide wholesale aggregation services, in particular for vertically integrated retailers to do so in the initial stages of the NBN', I have noted in '6. The NBN market structure' that at the current initial stages of the NBN, 13 operators offer resale services to retailers using the NBN, and that several of these including Optus and Telstra (both vertically integrated operators reselling wholesale services on current generation networks), and AAPT and Nextgen, plan to provide aggregation services on the NBN. These arrangements should provide continuity in the supply of aggregation services in the transition to the NBN without the need for regulation. The persistence of such supply beyond the initial stages of the NBN depends on the factors relevant to c) below; and

c) in relation to 'the profitability of entering the market at the resale level, in the face of competition from access level service providers in the retail market,' this must fundamentally depend on how retailers weigh the choice between gaining direct access to NBN and dealing via a reselling intermediary. If the former option is more attractive, then lack of profitability in reselling is simply telling us the service provided is not wanted. Given the number of current resellers and aggregators offering services, the better way to market test the need for resellers is likely to be to allow them to compete on price and product choice. Mandating a price-regulated product would impede the competition among resellers and competition between reselling and direct access to the NBN.

## **8. Judgement against the statutory criteria.**

I now return to the criteria which ACCC uses to decide whether declaration of NBN resale services are in the LTIE. Given the limited body of evidence drawn from the

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<sup>29</sup> ACCC, *Fixed Service Review Discussion Paper on the Declaration Inquiry*, July 2013, p. 20.

operation of the NBN, these judgements inevitably draw to some degree on *a priori* reasoning.

*i) promoting competition in markets for carriage services and services supplied by carriage services.*

One of the goals of the design of the NBN has been to maximise competition at the PoIs. It appears from the data presented above that this goal is now being realised. Many providers are now certified to offer services on the NBN. There are 48 participating retail service providers. These have or will have the choice of dealing directly with the NBN or of buying resale products from 12 certified wholesale service providers. The IP technology is new and its implications have not become fully apparent. The framework of ownership of the NBN network is quite different from that of the copper network, with NBN Co having no motive to discriminate in favour of any retailer. In other platform transitions, a vertically integrated operator may have sought to disadvantage its rivals to win customers. NBN Co has no reason to do so and is prevented by statute from doing so.<sup>30</sup>

These circumstances suggest that it is inappropriate simply to carry over to the NBN era provisions in respect of resale products adopted for the copper network. In my opinion, current developments support the view that end users will generally enjoy access to a significant range of suppliers.

In particular, I see no strong *a priori* cause for concern about the fate of customers currently being supplied using a copper-based WLR service. I am instructed that the vast preponderance (95%) of purchases from Telstra of copper WLR services are currently made by larger operators which at present also purchase ULLS from Telstra. In relation to those operators' broadband customers, such relatively large service providers, already experienced with local loop unbundling, are likely to find it more advantageous to go directly to NBN for access products, rather than to deal via an intermediary. It would be relatively easy for such a service provider to purchase NBN's dedicated voice only access product (the UNI-V port) and combine that with its own facilities to offer an NBN-based retail voice only service. This reflects the more general consideration that, unlike the PSTN, where access other than via unbundled loops has to be through the voice switching infrastructure, in an IP network, access to the access network can be accomplished via an aggregation service, of the kind noted in '6. The NBN market structure' above.

This proposition still has to be tested, but there are, of course, other considerations in play to the level of competition, such as the declining numbers of fixed voice only customers, the presence of other means of supplying voice using wireless technologies, and the concern, ever present with regulation, that mandating a particular wholesale service may stifle alternative developments and thus reduce competition.

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<sup>30</sup> See fn. 7 above.

ii) *achieving any-to-any connectivity.*

The ACCC has noted that this criterion is achieved if each end user who is supplied with a carriage service is able to communicate with each other end user supplied with the same or a similar service. This outcome would be jeopardised if interconnection were endangered or if end users were priced off the network. I do not regard this to be a likely outcome of a decision not to declare resale services on the NBN network.

iii) *encouraging economically efficient use of, and economically efficient investment in:*

*-the infrastructure by which listed carriage services are supplied, and  
-any other infrastructure by which listed services are, or are likely to become, capable of being supplied.*

It seems to me that the issue at stake here concerning efficient use of and investment in infrastructure is a fairly modest one, since current evidence suggests that the likely number of prospective users of NBN-based voice resale services (currently exemplified on copper networks as WLR/LCS and PSTN OA) over the currency of the present declaration is quite small; and, if it were larger, the probability is high that these customers' needs would be met in some form.

In this context too, it is reasonable to draw attention to the possibility that declaring resale products carried over from the copper network to the NBN may result in inefficient and wasteful investment if demand for them does not materialise.

## 9. Conclusion

To summarise, the NBN is taking the Australian fixed telecommunications market place into new territory, with the combination of a new technology and a new vertical market structure. The former means that the need for wholesale services, including resale services, in their current form may not continue into the future, so that expenditure on preparing them to meet a regulatory condition may not only be wasted, but also 'crowd out' expenditure to develop products which retailers really want. The latter means that obstacles to competition in the supply of the relevant wholesale services which may have resulted from discriminatory behaviour by the vertically integrated access provider are no longer in effect.

In other words, the situation is uncertain, and, in keeping with 'better regulation' principles,<sup>31</sup> the ACCC should take proper account of this feature. The two issues raised in question 10 of the Discussion Paper are shown below, together with my answers:

1) Will potential access seekers face significant barriers to entry in supplying services over the NBN?

*The evidence shows that many (at present 48) retailers are listed on the NBN website as participating retail service providers over the NBN, and that, absent*

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<sup>31</sup> See Australian Government, *Best Practice Regulation Handbook*, 2010, appendix F. Available at <http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf>

*regulation, there are several (at present at least 12) certified wholesale service providers. There does not therefore seem to be a barrier to entry in place preventing retailers from entering the NBN retail market.*

2) If so, would declaring resale services provided using NBN infrastructure promote the LTIE?

*There is little or no evidence that declaring resale services would promote any of the three aspects of the LTIE. Absent such evidence, regulatory forbearance is desirable.*

A handwritten signature in black ink that reads "Martin Cave". The signature is written in a cursive style and is positioned above a horizontal line.

MARTIN CAVE  
30 August 2013

13 August 2013

Professor Martin Cave

**By email only:**

[martin.e.cave@btinternet.com](mailto:martin.e.cave@btinternet.com)

Dear Martin

**Declaration of wholesale services provided over the NBN: Expert Report**

We act for Telstra Corporation Limited (**Telstra**) in respect of its response to the Australian Competition and Consumer Commission's (**Commission**) *Fixed Services Review – Discussion Paper on the Declaration Inquiry – July 2013* (Discussion Paper)."

The purpose of this letter is to request that you provide an expert report addressing the question set out in section 2.

**1 Background**

***Regulatory framework***

- 1.1 As you no doubt are aware, Part XIC of the Competition and Consumer Act 2010 (**CCA Act**) makes provision for a telecommunications access regime whose object, as set out in Division 1 (section 152AB), is to promote the long term interests of end-users (**LTIE**).
- 1.2 Division 2 of Part XIC of the CCA Act provides for the Commission to declare an eligible service (section 152AL(3)). Section 152AL(1) states that an eligible service is:
- (a) a listed carriage service (within the meaning of the *Telecommunications Act 1997*); or
  - (b) a service which facilitates the supply of a listed carriage service (within the meaning of the *Telecommunications Act 1997*);

where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons).

- 1.3 In determining whether to declare an eligible service, the Commission must be satisfied that declaring the eligible service will promote the LTIE (section 152AL(3)(d)). In making such a determination, section 152AB(2) requires the Commission to have regard to the following objectives:
- (a) promoting competition in markets for listed services;
  - (b) achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
  - (c) the objective of encouraging the economically efficient use of, and the economically efficient investment in:
    - (i) the infrastructure by which listed services are supplied; and
    - (ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.
- 1.4 The Commission must hold a public inquiry about a proposal to make the declaration and prepare a report about the inquiry, which is to have been published during the 180 day period ending when the declaration is made.
- 1.5 A declaration under section 152AL(3) does not apply to an eligible service to the extent to which the service is supplied, or is capable of being supplied, by an NBN corporation (whether to itself or to other persons) (section 152AL(3A)). The declaration of service supplied by an NBN corporation is dealt with under section 152AL(8A) of the CCA Act. The substantive and procedural requirements are the same as those set out above. The Commission may combine inquiries about proposals to declare services (section 152AN).
- 1.6 Once a service is declared, the access provider will have SAOs pursuant to section 152AR of the CCA Act in relation to that service, if the access provider self-supplies a declared service or supplies it to another access seeker. In those circumstances, the declared service is an “active declared service” and if an access seeker requests the supply of an active declared service, the access provider must supply it in a manner which ensures technical and operational equivalence.
- 1.7 The access provider may comply with its access obligations by supplying the declared service pursuant to an agreement between the access provider and the access seeker or pursuant to the terms set out in a regulatory instrument, such as a final access determination (**FAD**) made by the Commission under section 152BC of the CCA Act.
- 1.8 Where a service is already declared, the Commission must commence a public inquiry during the 18-month period prior to the expiry of the declaration about whether to extend, revoke or vary the declaration, or let the declaration expire without issuing a new one (section 152ALA(7)).
- Expiry of declarations for declared fixed line services***
- 1.9 The current declarations for six fixed line services (the unconditioned local loop service (**ULLS**), line sharing service (**LSS**), local carriage service (**LCS**), whole sale line rental service (**WLR**), public switched telephone network originating access service (**PSTN OA**) and public switched telephone network terminating access service (**PSTN TA**)) will expire on 31 July 2014.
- 1.10 In July 2013, the Commission commenced a public inquiry about the declaration of the above fixed line services. As part of that inquiry, the Commission is considering the question of whether, given the rollout of the National Broadband Network (**NBN**), similar wholesale services should be supplied on a declared basis when they are provided using NBN infrastructure. The Commission is seeking

views on whether potential access seekers will face significant barriers to entry to supplying services on the NBN and whether the LTIE would be promoted by declaring wholesale services provided over NBN infrastructure.

**NBN**

- 1.11 The aim of the National Broadband Network (**NBN**) is to connect 93 per cent of Australian homes, schools and businesses to a high speed fibre optic network capable of providing broadband speeds of up to 1 gigabit per second. The remaining premises will be served by a combination of next-generation fixed-wireless and satellite technologies providing peak speeds of 12 megabits per second.
- 1.12 The NBN will be Australia's first national, wholesale-only, open access network offering equivalent terms and conditions to all access seekers. This means that NBN Co Limited (the company established to design, build and operate the NBN) will roll out the network and sell wholesale services to retail service providers.
- 1.13 NBN fibre services are now available in eight Australian communities.
- 1.14 A number of retail service providers have already released their pricing plans for those broadband and voice services provided over the NBN.
- 1.15 On 18 October 2011, NBN Co released its first 12-month national rollout plan. The schedule to the plan listed the communities in each state and territory where work on the fibre network was to begin before September 2012. This marked the end of the NBN trial phase and the beginning of the volume rollout to Australian premises.
- 1.16 NBN has stated that the time taken from start of construction to services being available is about 12 months.
- 1.17 On 29 March 2012 NBN Co issued Stage 1 of the large-scale rollout. NBN Co stated that over the next three years, construction of the fibre optic component of the network will be underway or completed in areas containing 3.5 million premises in 1,500 communities in every state and territory in Australia.
- 1.18 On 15 May 2013, NBN Co provided an update on its rollout in the attached media release: [http://www.nbnco.com.au/assets/media-releases/2013/press\\_release\\_march\\_rollout\\_update\\_2013-15-may-2013.pdf](http://www.nbnco.com.au/assets/media-releases/2013/press_release_march_rollout_update_2013-15-may-2013.pdf)
- 1.19 A number of access seekers have stated that they will provide retail services and/or will be wholesale service providers or wholesale aggregators on NBN. A list of these access seekers is set out in section 3 of this letter.
- 1.20 In respect of the wholesale aggregation market in July 2011, the Commission noted a number of factors which it considered will influence the development of the wholesale aggregation market, including:
  - (a) the existence of barriers to entry to accessing services directly from NBN Co at the access level;
  - (b) the ability and willingness of access level service providers to provide wholesale aggregation services, in particular for vertically integrated retailers to do so in the initial stages of the NBN; and

- (c) the profitability of entering the market at the resale level, in the face of competition from access level services providers in the retail market.<sup>1</sup>
- 1.21 Currently, the following service providers all provide some form of wholesale aggregation product to meet demand from "intermediate" service providers: AAPT, Nextgen Networks, Optus and Telstra. An aggregation service can be either the provision of aggregated backhaul to a retail service provider (**RSP**) (with the RSP acquiring NBN access directly from NBN) or an aggregation service offering combined NBN access and backhaul. In both cases, these types of aggregation service obviate the need for RSPs to make direct connections with NBN points of interconnect (i.e. at one or more of the 121 NBN points of interconnection that are or will be established).
- 1.22 In June 2012, following a public inquiry, the Commission decided that the SAOs would not apply where the WLR, LCS and PSTN OA are supplied over NBN until the earlier of 31 March 2013 or the launch by Telstra of a wholesale voice service over NBN. In December 2012, Telstra Wholesale launched a VOIP based voice service on 7 December 2012. A copy of the announcement by Telstra Wholesale in dated 29 November 2012 is at <http://www.telstrawholesale.com.au/download/document/telstrawholesaleopenforbusinessmediarelease.pdf>.
- 1.23 For further reference, some observations by Stuart Lee, Group Managing Director, Telstra Wholesale, regarding the transition to NBN and the launch by Telstra Wholesale of voice and broadband products can be found in a speech to the American Chamber of Commerce dated 29 November 2012 at- <http://www.telstrawholesale.com.au/download/document/stuart-lee-amcham-speech-november-2012.pdf>.

## 2 Instructions

- 2.1 We are instructed to request that you prepare a report providing your opinion as to whether wholesale services supplied over the NBN should be declared (and thus regulated by the Commission pursuant to Part XIC of the CCA). We request that you consider, in particular, whether wholesale voice services provided over NBN should be declared either as part of the existing WLR and LCS service descriptions or otherwise. Please set out the reasons for your answer. Further, in answering this question, please do so by reference to the statutory criteria set out in section 1 above.

## 3 Assumptions and Other Matters

- 3.1 Please assume that, as of 7 August 2013, the following service providers provide services on the NBN:

<b><i>NBN retail service providers</i></b>	
Aardvark Internet	AARNet
Ace Internet Services	Activ8me
Adam Internet	Advanced NBN
Anittel	ANT
Arrow Voice & Data	Aussie Broadband
AusBBS	Boom Broadband

<sup>1</sup> *Inquiry to make final access determinations for the declared fixed line services – Final Report, July 2011, p.165 (July 2011 FAD Final Report).*



Broadband Solutions	Clear Networks
Club Telco	Commander (business services only)
Cybertel Telecom	DeVoteD NBN
Engin	EscapeNet
Exetel	Fastel
Graytech Hosting Pty Ltd	Harbour ISP
iiNet	Infinity NBN:
Internet Solutions	Internode
iPrimus	Key Internet
Loadednet	Macquarie Telecom
Montimedia Internet	MyFibre
MyNetFone	NBNSP
Node1 Internet	North Queensland Telecom
NuSkope	On Q Telecom
Optus	SkyMesh
Southern Phone	Spintel
Spirit Telecom	Telstra
Westnet	

***NBN satellite service providers***

Activ8me	Ant
Bordernet	Clear Networks
Harbour ISP	iiNet
IPSTAR Australia	Reachnet
SkyMesh	Westnet

***NBN wholesale service providers to access seekers***

AAPT	Amcom
Aurora Energy	Clear Networks
Eftel	iseek
ispONE	Nextgen Networks
Optus	PIPE Networks
Platform Networks	Symbio
Telstra Wholesale	

#### 4 Documents

4.1 We enclose copies of the following documents:

- (a) a copy of the Discussion Paper;
- (b) a copy of the July 2011 FAD Final Report;
- (c) a copy of Part XIC of the CCA Act; and
- (d) a copy of the *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* ("**Guidelines**").

4.2 We also provide you the following links to webpages which you may consider relevant to providing your opinion:

- (a) The following links are to a "Next Gen" announcement which provides some detail on aggregation services intended to be provided over the NBN at the wholesaler layer:
  - (i) [http://www.arnnet.com.au/article/392203/aapt\\_becomes\\_official\\_nbn\\_aggregator/](http://www.arnnet.com.au/article/392203/aapt_becomes_official_nbn_aggregator/);
  - (ii) [http://www.arnnet.com.au/article/392203/aapt\\_becomes\\_official\\_nbn\\_aggregator/](http://www.arnnet.com.au/article/392203/aapt_becomes_official_nbn_aggregator/);
  - (iii) [http://www.nextgennetworks.com.au/LinkClick.aspx?fileticket=TRIUfGNj8Hg%3D&tabid=65&mid=450](http://www.nextgennetworks.com.au/LinkClick.aspx?fileticket=TRIUfGNj8Hg%3D&tabid=65&mid=450;);
- (b) The following links provide further details in relation to the services to be provided over the NBN:
  - (i) <http://www.nbnco.com.au/our-network/network-features.html>;
  - (ii) <http://www.nbnco.com.au/our-network/network-features/how-it-works.html>;
  - (iii) <http://www.nbnco.com.au/our-network/rollout-plan.html>;
  - (iv) <http://www.nbnco.com.au/getting-connected/service-providers.html>

#### 5 Purpose

- 5.1 Telstra may provide a copy of your expert report to the Commission. Please assume that your report (or certain aspects of it) will be accessible to the public.
- 5.2 As mentioned above, the primary purpose of your report is to provide an expert opinion which may be provided to the Commission as part of further consultation into these issues. However, depending on the circumstances, Telstra may require your report to be adduced as evidence in review proceedings before the Federal Court of Australia.

#### 6 Expert witness guidelines

- 6.1 As you may know, the Federal Court requires any person providing an expert report, or giving expert evidence, to comply with its Guidelines.

6.2 Please review the Guidelines to ensure that your report conforms to them and in particular we request that you maintain separate records of:

- (a) all instructions;
- (b) the facts, matters or assumptions upon which your report proceeds;
- (c) the documents and materials you have been instructed to consider; and
- (d) the documents and materials upon which you rely in support of your reasoning in the report.

6.3 The Guidelines do not address exhaustively all aspects of an expert's duties when providing a report or giving evidence in Federal Court proceedings. If you have any questions about the Guidelines, or queries about other matters relating to your duties, please bring these to our attention.

## 7 Confidentiality

7.1 This retainer and any information or documents that Telstra provides to you in relation to this retainer are confidential. To maintain confidentiality, we request that you:

- (a) use Telstra's confidential information only for the purposes of this retainer;
- (b) not disclose Telstra's confidential information to anyone without Telstra's written consent;
- (c) if requested by Telstra, destroy or return to Telstra all records containing Telstra's confidential information; and
- (d) address all of your communications to King & Wood Mallesons.

## 8 Your fees

8.1 Further, please note that we will pay your fees. Please send your accounts to us.

## 9 Correspondence

9.1 Please direct all correspondence in this matter to King & Wood Mallesons, for the attention of Sarah Weinberg.

## 10 Presentation of your report

Please include the following with your report:

- (a) a copy of your curriculum vitae including qualifications, experience in the field and any publications;
- (b) our instructions to you;
- (c) any other facts, matters, documents or assumptions upon which you rely in preparing your report;
- (d) any plans, calculations, analyses, measurements or other material that you refer to in your report; and

- (e) any enquiries you make that are necessary to respond to the questions we ask you to consider and also the results of any such inquiries.

If you require any further instructions or material to prepare your expert report please contact Sarah Weinberg on +61 3 9643 4369.

Thank you for agreeing to assist Telstra in this matter.

Yours sincerely

Sarah Weinberg  
Senior Associate  
[Sgd] S Weinberg  
T +61 3 9643 4369  
sarah.weinberg@au.kwm.com

Agata Jarbin  
Partner

**CURRICULUM VITAE**

***MARTIN CAVE***

## **Professor Martin Cave, B.A., BPhil, DPhil**

### **Address**

2 Cannon Meadow  
Bull Lane  
Gerrards Cross  
SL98RE  
UK

Telephone: 44 (0) 7958483709  
Email: martin.e.cave@btinternet.com

### **Date of Birth**

13.12.48

### **Education**

BA, First Class, Philosophy, Politics and Economics, Balliol College, University of Oxford, 1969

BPhil in Economics, Nuffield College, University of Oxford, 1971

DPhil, Nuffield College, University of Oxford, 1977

### **Other**

Awarded an OBE for public service, January 2009

### **Academic Employment to Date**

1971-1974	Research Fellow, Centre for Russian and East European Studies, Birmingham University.
1974-1987	Lecturer and Senior Lecturer, Department of Economics, Brunel University.
1981-1982	Visiting Associate Professor, Department of Economics, University of Virginia.
1987 to 2001	Professor of Economics, Brunel University.
1988 to 1994	Head, Department of Economics, Brunel University.
1989 to 1994	Dean, Faculty of Social Sciences, Brunel University.
1994 to 1996	Pro-Vice-Chancellor, Brunel University.
1996 to 2001	Vice-Principal, Brunel University.
2001 to 2010	Professor, Warwick Business School, University of Warwick
2010 to 2011	BP Centennial Professor, London School of Economics.
From 2011	Visiting Professor, Tanaka Business School, Imperial College, London

## **Journals**

Member, Editorial Board –

*Telecommunications Policy*

Member, Advisory Board –

*Communications and Strategies*  
*INFO*

## **Employment, Advisory and Consultancy Experience for Government Organisations\***

Deputy Chair, **UK Competition Commission**, from January 2012

Adviser on regulation to the **Hooper review of the future of the Royal Mail**, April 2008-February 2009.

Appointed by the **Secretary of State for Transport** to chair an expert panel on airport regulation, April 2008-November 2009.

Appointed by the **Chancellor of Exchequer and Secretary of State for the Environment** to undertake a review of competition and innovation in the UK water industry, March 2008-April 2009

Member, **UK Payments Council**, 2005-2011

Adviser to **Industry Canada** on spectrum policy, 2007

Appointed by the **Secretary of State, Department of Communities and Local Government** to undertake review of the regulation of social housing, 2006-7

Special adviser to **European Commissioner Viviane Reding** on the reform of telecommunications regulation, 2006

Appointed by **Chancellor of Exchequer** to conduct review of major spectrum holdings, December 2004- November 2005.

Adviser to **CAA** on regulation of South East airports, 2003-5.

Adviser to **Lord Chancellor's Department** on legal deregulation 2004-5.

**Ofcom Spectrum Advisory Board (OSAB)**, Member, 2004-07.

**Ofcom**: Economic Advisor, 2003 to 2007

**DEFRA** regulatory task force, member, 2003

**OFWAT** Non-Executive Advisory Director, 2002 -2006

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\* Consultancy assignments from firms omitted.

Appointed by **Chancellor of the Exchequer and the Secretary of State for Trade and Industry** to prepare an independent report on spectrum management, March 2001 – March 2002

**Postal Services Commission:** Adviser 2000-2007.

**Civil Aviation Authority,** Adviser 2000-2003.

**Spectrum Management Advisory Group, DTI,** member from 1999-2003

**French Ministry of Finance (1999)** Member, Groupe d'Expertise, electricity grid pricing.

**UK Competition Commission** Member (1996-2002).

**Office of Utility Regulation (Jamaica)** Economic Consultant (1998-2000).

**OFGAS (1994 – 1999)** Member of OFGAS Panel of Economic Experts, to advise the Director General of Gas Supply on a variety of economic issues relating to regulation of the industry.

**Office of Fair Trading (1990-1992 and 1995-9)** Acted as Broadcasting Adviser to the Office of Fair Trading in matters relating to the regulation of networking arrangements for the television industry (1990 to 1992). Adviser on BSkyB Inquiry (from 1995-96). Expert witness for the Director (1998-1999).

**French Ministry of Posts and Telecommunications (1991)**

Member, Groupe d'Expertise – advisory committee on universal service and interconnection.

**Ministry of Agriculture, Fisheries and Food (1993-1996).** Adviser to the Ministry on appropriate procedures for tendering for the decommissioning of the fishing fleet.

**HM Treasury (1986-1990)** Economic Adviser undertaking advisory work on a consultancy basis for the Public Enterprise Analytical Unit and the Economics of Industry Division involving participation in the design of regulatory regimes for the water and electricity supply industries during privatisation. Secretary to an Inter-Departmental Group reviewing the discount rate and rates of return in the public sector.

**Home Office (1985-1986)** Consultant to the Committee on financing the BBC, chaired by Sir Alan Peacock. Advice on cost and revenues.

## **Publications**

### ***Books, Monographs and Major Reports***

*(co-author) Understanding Regulation, 2<sup>nd</sup> edition, Oxford University Press, 2011*

*(co-editor) Oxford Handbook on Regulation, Oxford University Press, 2010.*

*Independent Review of Competition and Innovation in the England and Wales Water Industry, H M Treasury, April 2009*

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