



Submission by AAPT Limited (July 2013)

to

Australian Competition and Consumer Commission

on the

Draft Notice to Vary the NBN Co SAU and accompanying

Response to submissions to the consultation paper, 4 July

2013



1 Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission (**ACCC**) *Draft Notice to Vary the NBN Co SAU (Variation Notice)* and accompanying *Response to Submissions to the Consultation Paper (ACCC Response Paper)*, both dated 4 July 2013.
2. In AAPT's submission¹ on the ACCC Consultation Paper on the variation of NBN Co Special Access Undertaking (**SAU**) and related Draft Decision (**Previous AAPT Submission**), AAPT set out on an item by item basis whether it agreed with each of the ACCC's proposed variations to the SAU. AAPT agreed with the large majority of the variations to the SAU proposed by the ACCC in the Draft Decision on the basis that they were required to ensure that the SAU met the criteria specified in Part XIC of the Competition and Consumer Act 2010 for acceptance by the ACCC.
3. AAPT supports the amendments articulated in more detail in the Variation Notice to the extent they seek to implement the principles and changes with which AAPT already indicated agreement in the Previous AAPT Submission. Given the tight consultation time frame, AAPT has not been able to undertake a thorough review of the mark ups contained in the Variation Notice for any unintended consequences.
4. In this submission, AAPT sets out its high level views on the following proposed variations:
 - Proposed variations in relation to the operation of the SAU and its interaction with Part XIC:
 - Regulatory recourse and interaction with the SFAA

¹ AAPT Limited, *Submission by AAPT Limited on ACCC "Consultation Paper – variation of NBN Co Special Access Undertaking" and related draft decision (dated April 2013)*, 2 May 2013.



- Inclusion of a midpoint review
- Services to which the SAU relates
- Proposed variations in relation to price matters
 - Pricing of individual products – CVC Pricing
 - Prices for new products
 - Ability for relative price levels to change in response to unforeseen circumstances
- Newly proposed variations
 - Additional variations to the product development and withdrawal provisions proposed by Telstra
 - Removal of the concepts of Reference Offers and Non-Reference Offers

2 Proposed variations in relation to the operation of the SAU and its interaction with Part XIC

Regulatory recourse and interaction with the SFAA

5. AAPT supports any variation which, in principle, will set up a regulatory recourse framework that would enable:
 - an access seeker to request NBN Co to supply services on regulated terms on a standalone basis where commercial agreement could not be reached; and



- terms in Access Determinations and Binding Rules of Conduct to be enforced by the ACCC, NBN Co and access seekers.
6. In the Consultation Paper, the ACCC was still considering the precise form of variation to address the above. As the ACCC Response Paper states, the key difference between the two options is that the first option explicitly requires NBN Co to ensure that SFAAs are consistent with regulatory determinations and the SAU, whereas the second option removes the explicit links between SFAAs, and the SAU and regulatory determinations.
 7. Although AAPT has expressed a preference for the first option, it is willing to support amendments to implement the second option on the basis of the ACCC's reasoning that excluding commitments linking SFAAs to the legislative hierarchy means that NBN Co's obligations to comply with regulated terms will be determined solely by the normal operation of Part XIC.

Conduct concerning changes to the SAU over time - midpoint review

8. The ACCC has indicated that it maintains the view that the midpoint review mechanism should be removed from the SAU because it does not enable the ACCC to make decisions that are reasonable and promote the long-term interests of end-users in all circumstances.
9. AAPT is of the view that a midpoint review is necessary to give access seekers comfort amid inherent uncertainty. While it is open for NBN Co to use the SAU variation processes under section 152CBG to seek changes at the end of the five-year period, this can only occur at NBN Co's discretion. AAPT considers that the promise of a midpoint review may help prevent intervention of the ACCC being sought unnecessarily on the basis that the issue in question is likely to get addressed during the midpoint review.



Services to which the SAU relates

10. AAPT supports the proposed amendments which aim to:
 - remove any uncertainty as to how the SAU will interact with services declared by the ACCC and regulatory determinations made by the ACCC in respect of those services (including changes which clarify that regulatory determinations are not rendered inconsistent with the SAU where they require a product to be supplied that is not required to be supplied under the SAU), and
 - clarify that any revenues earned from NBN Co's supply of services that have been declared by the ACCC are intended to be included in the long-term revenue constraint methodology established by the SAU.

3 Proposed variations in relation to price matters

11. As previously submitted, AAPT agrees with the ACCC's views that it would not be appropriate to have restrictions that explicitly preclude the ACCC from intervening in circumstances where NBN Co's incentives to operate, invest and price efficiently can potentially change over the term of the SAU.

Pricing of individual products – CVC Pricing

12. The issue of how NBN Co should price CVC continues to be contentious between access seekers and NBN Co. AAPT is concerned that, as the exponential growth in data traffic continues, this will quickly result in the CVC charges making up an increasingly greater proportion of the costs of providing services to end users. Given this, access seekers require greater comfort regarding future CVC pricing than relying on the possibility that it may or may not be considered as part of the revenue-neutral price review or that the ACCC may or may not choose to exercise its existing statutory powers to address CVC



pricing issues. Accordingly, AAPT supports Telstra's submission that there is a need for the ACCC to have a formal role in reviewing CVC pricing over time.

Variations in relation to prices for new products

13. AAPT supports the proposed variations that would allow the ACCC to exercise its existing powers under Part XIC to determine new prices in circumstances where NBN Co cannot reach agreement with its customers about new prices and has weak incentives to set new prices efficiently (for example, this can occur when the 'anchoring' effect of existing products is not effective in constraining new prices and/or when it has become clearer that NBN Co will be able to recover its initial cost recovery account and therefore no longer faces revenue sufficiency risk).

14. AAPT also supports the ACCC's proposal to vary the SAU to provide for new prices to generally be treated in the same way, whether they be new prices for currently zero-priced reference offers or a currently zero priced 'other charge' that is associated with a reference offer. That is, in circumstances where commercial agreement cannot be reached (and the price proposed by NBN Co is not reasonable), the SAU would permit the Maximum Regulated Price for a new product to be set at the level that is specified in an Access Determination (**AD**) or a Binding Rule of Conduct (**BROC**) that has the following particular characteristics:
 - the ACCC must have regard to the characteristics, revenues, costs and demand for other existing products supplied by NBN Co when making a determination; and

 - the AD or BROC must be made within two financial years after NBN Co commences supplying the new product.



Ability for relative price levels to change in response to unforeseen circumstances

15. The ACCC noted in the Draft Decision that although the price of an individual service could not be increased by more than CPI-1.5 per cent each year, there still exists a risk that throughout the SAU term (such as once NBN Co no longer faces revenue sufficiency risk) NBN Co could lack incentives to lower prices of its own accord to address the need for prices to be rebalanced. To address this issue, the ACCC proposed a price review mechanism with six features as set out in the ACCC Response Paper². Although AAPT supports this price review mechanism in principle, it is concerned about the overly restrictive nature of the mechanism, particularly the limitation that there can only be a single review during the term of Module 1.

16. **A single review may occur in Module 1** – AAPT acknowledges the ACCC’s reasoning that limiting the number of reviews to only one review that can only take place in the second half of Module 1, will give certainty that the prices set out in the SAU would apply for a substantial period of time, and that all parties would have the benefit of experience and data before a review occurs. Nevertheless, AAPT is concerned such a restriction may undermine the reason for having a price review mechanism in the first place, which is, to allow for price changes in unforeseen circumstances. Perhaps the more balanced approach is not to prescribe a requirement for a review but rather allow for a review to be requested (whether by access seekers, the ACCC or NBN Co) only in circumstances which meet prescribed threshold criteria that everyone is comfortable with (for example, where there is likely to be considerable consumer detriment). In such an arrangement, it may be that a review never occurs before the second half of Module 1 because one is neither necessary nor practical.

² Refer to pages 79 – 82 of the ACCC Response Paper.



17. Alternatively, AAPT is comfortable with a provision which precludes a review from occurring before 1 July 2015 and is coupled with the ability for discretionary reviews to occur only every three years following the commencement of an earlier review.

4 Newly proposed variations

18. The ACCC is seeking views on the following issues not previously covered to determine whether variations are required to address them:
 - additional variations to the product development and withdrawal provisions proposed by Telstra; and
 - removal of the concepts of Reference Offers and Non-Reference Offers in favour of reliance on the product withdrawal conferral of power.

Additional variations to the product development and withdrawal provisions proposed by Telstra

19. AAPT supports the variations proposed by Telstra on basis they would likely
 - reduce information asymmetries between NBN Co, access seekers and end-users in the development; and
 - improve access seekers' ability to plan for making changes to their business models and other downstream investments as a result of NBN Co's decision to withdraw a product.

Removal of the concepts of Reference Offers and Non-Reference Offers

20. AAPT supports the removal of the concepts of Reference Offers and Non-Reference Offers to the extent that it will aid in removing ambiguity and complexity around whether Products, Product Components, Product Features,



Ancillary Services or types of Facilities Access Service can or cannot be removed.

21. In contrast, AAPT would not be willing to support the removal of the concepts of Reference Offers and Non-Reference Offers altogether until a review of the SAU has been undertaken to ensure that such a distinction is not material and necessary for the proper operation other provisions.

Conclusion

22. Apart from the issues raised above, AAPT supports the amendments included in the Variation Notice to the extent they seek to implement the principles and changes with which AAPT already indicated agreement in the Previous AAPT Submission.