

Consultation Paper

Variation of NBN Co Special Access Undertaking

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited

2 May 2013

1. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**).

On 28 September 2012 NBN Co Ltd and NBN Tasmania Ltd (collectively referred to in this submission as **NBN Co**) lodged a Special Access Undertaking (**the September 2012 SAU**) with the Australian Competition and Consumer Commission (**ACCC**) under section 152CBA(2) of the *Competition and Consumer Act 2010* (**CCA**). The September 2012 SAU replaced a previous special access undertaking that was lodged by NBN Co on 5 December 2011 but later withdrawn on 7 September 2012. In November 2012 the ACCC released a consultation paper entitled *NBN Co Limited 2012 Special Access Undertaking Consultation Paper* (**the November 2012 Consultation Paper**).

On 18 December 2012 NBN Co withdrew the September 2012 SAU and replaced it with a revised version (**the SAU**). The SAU is given in relation to the NBN Access Service and the Ancillary Services. The SAU also sets out commitments in relation to NBN Co's supply of the Facilities Access Service.

In April 2013 the ACCC released a draft decision on the SAU¹ (**the Draft Decision**). The Draft Decision outlines the ACCC's preliminary views on the SAU. The ACCC is proposing to give NBN Co a notice specifying variations to the SAU in order to facilitate NBN Co being able to lodge an amended SAU in accordance with section 152CBDA(2) of the CCA. The ACCC has issued a consultation paper which considers issues relating to the ACCC's proposed notice to vary the SAU and which invites comments from interested parties about the Draft Decision and the ACCC's proposed notice to vary the SAU² (**the Consultation Paper**).

iiNet welcomes the opportunity of making a submission in response to the Consultation Paper. Please note that where capitalised terms appear in this submission that are not defined in this submission, they are as defined in the SAU.

2. OVERVIEW OF THIS SUBMISSION

In iiNet's submission in response to the November 2012 Consultation Paper³ (**iiNet's January 2013 Submission**), iiNet put forward the view that:

- the SAU in its current form should be rejected; but
- the outcome that would best promote the long term interests of end users (**LTIE**) is one where a revised SAU is forthcoming that satisfactorily addresses the issues raised in iiNet's January 2013 Submission.

In light of this, iiNet welcomes the ACCC's decision to issue a notice to vary rather than an outright rejection of the SAU.

iiNet is in agreement with the bulk of the ACCC's assessment of the SAU as set out in the Draft Decision. In large part, the Draft Decision represents a sensible and

¹ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012.

² Consultation Paper - variation of the NBN Co Special Access Undertaking.

³ NBN Co Limited 2012 Special Access Undertaking Consultation Paper Submission by Herbert Geer Lawyers on behalf of iiNet Limited 18 January 2013.

pragmatic approach to dealing with what is a highly complex and intricate document that must be assessed within a highly complex and largely untested statutory framework. However, iiNet believes that the amendments proposed in the Consultation Paper fall short of what is required to satisfy the statutory criteria for the following reasons.

Firstly, considerable uncertainty still exists as regards ascertaining the terms and conditions under which NBN Co will comply with the category B standard access obligations (**SAOs**). iiNet submits that what is required is either a regulatory terms pass through clause that allows regulated terms to be incorporated into access agreements, or, alternatively, for the SAU to include a mechanism that replicates the hierarchy of instruments in Part XIC of the CCA and extends this hierarchy by including the SFAA at the bottom. These issues are discussed in section 4.1 of this submission.

Secondly, the ACCC's proposed variations in respect of a number of subject matter are too blunt because they remove all SAU commitments in respect of particular subject matter in circumstances where either:

- some of the commitments which the ACCC proposes to remove are reasonable and do promote the LTIE. iiNet submits that this is the case as regards some of the commitments relating to:
 - the procedural requirements for the Multilateral SFAA Forum - discussed in section 4.2(a) of this submission; and
 - the midpoint review - discussed in section 4.2(b) of this submission; or
- the ACCC's consideration of the SAU gives rise to clear principles which should be included in the SAU in order to avoid access seekers finding themselves back at square one as regards achieving reasonable terms and conditions of access as regards that subject matter. iiNet submits that this is the case as regards:
 - the terms relating to confidentiality and intellectual property rights as relevant to the PDF Processes - discussed in section 6.3 of this submission; and
 - the terms relating to service levels, dispute management, information and rights management, and risk management - discussed in section 8 of this submission.

Thirdly, the ACCC's proposed amendments relating to price terms do not go far enough because further amendments are required to ensure that the ACCC's oversight powers are effective. This issue is discussed in section 7 of this submission.

3. STRUCTURE OF THIS SUBMISSION

The Consultation Paper considers the issues relating to the ACCC's proposed notice to vary within the following subject matter headings:

- interaction between the SAU and the telecommunications access regime;

- services to which the SAU relates;
- product development and withdrawal;
- price-related terms and conditions; and
- non-price terms and conditions.

The Consultation Paper also seeks views on⁴:

- whether any variations should be made to the fixed principles provisions in the SAU; and
- whether any consequential amendments are necessary to address the issues discussed in the Draft Decision and Consultation Paper.

This submission will provide iiNet's views on the issues that relate to each of the above subject matter in turn.

4. INTERACTION BETWEEN THE SAU AND THE TELECOMMUNICATIONS ACCESS REGIME

The issues discussed in this section of this submission relate to the issues discussed in chapter 2 of the Draft Decision and chapter 2.1 of the Consultation Paper. The ACCC proposes a number of variations to the SAU in chapter 2.1 of the Consultation Paper. Subject to the comments below, iiNet welcomes these proposed variations. iiNet believes that these proposed variations are pragmatic and sensible and have the effect of substantially removing a large amount of unnecessary complexity and uncertainty from the SAU, as well as removing a significant potential for terms and conditions that are not reasonable to apply. However, although iiNet welcomes these amendments and acknowledges that they go some way to alleviating some of the concerns expressed by iiNet in iiNet's January 2013 Submission, iiNet believes that these amendments fall short of what is required to satisfy the statutory criteria because:

- considerable uncertainty still exists as regards ascertaining the terms and conditions under which NBN Co will comply with the category B standard access obligations (**SAOs**); and
- the ACCC's proposed variations as regards the SAU commitments relating to the Multilateral SFAA Forum and the midpoint review are too blunt and effectively 'lose some of the baby with the bathwater'.

Each of these issues will be considered in turn.

4.1 Uncertainty regarding ascertaining the terms and conditions under which NBN Co will comply with the category B SAOs

This uncertainty is perhaps best illustrated by means of the following scenario:

- *An access seeker requests access to the NBN Access Service.*

⁴ Consultation Paper, at p. 10.

- *NBN Co offers to provide access on the terms of the SFAA.*
- *The access seeker reviews the SFAA and decides that the terms in the SFAA that relate to risk and liability and dispute resolution contain terms that are unacceptably one sided in favour of NBN Co (**the Disputed Terms**).*
- *The access seeker is not prepared to accept the Disputed Terms but is otherwise happy to accept the rest of the SFAA.*
- *NBN Co disagrees that the Disputed Terms are unfair and refuses to offer a varied SFAA as an access agreement.*
- *The ACCC makes an access determination that specifies risk and liability and dispute resolution terms that are different to the Disputed Terms (**the ACCC Terms**).*

For ease of expression this scenario will be referred to as **the Disputed Terms Scenario**.

The first question that arises as regards the Disputed Terms Scenario is:

Should the access seeker be required to sign the SFAA in order to gain access?

iiNet notes the following comment by the ACCC in the Draft Decision⁵:

Further, under Part XIC, access to declared services is not contingent on entry into any Access Agreement.

iiNet also notes the following comment by the ACCC in the Consultation Paper⁶:

As noted in the Draft Decision, the ACCC is not satisfied that the conduct that is specified by the SAU in relation to SFAAs will promote the long-term interests of end-users, because it may mean that access seekers must sign an SFAA-based Access Agreement to obtain access on the SFAA terms and conditions.

These comments suggest that it is the ACCC's view that:

- where the category B SAOs are applicable, NBN Co is legally obliged to provide access even if an access seeker does not enter into an access agreement; and
- it would not be in the LTIE to require the access seeker to sign the SFAA in the Disputed Terms Scenario.

These conclusions lead to a second question as regards the Disputed Terms Scenario as follows:

If the access seeker refuses to sign the SFAA, what will the terms of access be?

The starting point in answering this question is section 152AY of the CCA which provides as follows:

(1) This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

⁵ Draft Decision, at p.37.

⁶ Consultation Paper, at p.11.

(2) *The carrier or carriage service provider must comply with the obligations:*

(a) *if an access agreement between:*

- (i) the carrier or carriage service provider, as the case requires; and*
- (ii) the access seeker;*

is in operation and specifies terms and conditions about a particular matter--on such terms and conditions relating to that matter as are set out in the agreement; or

(b) *if:*

- (i) paragraph (a) does not apply in relation to terms and conditions about a particular matter; and*
- (ii) a special access undertaking given by the carrier or carriage service provider is in operation, and the undertaking specifies terms and conditions about that matter--*

on such terms and conditions relating to that matter as are set out in the undertaking; or

(c) *if:*

- (i) neither paragraph (a) nor (b) applies to terms and conditions about a particular matter; and*
- (ii) binding rules of conduct specify terms and conditions about that matter;*

on such terms and conditions relating to that matter as are set out in the binding rules of conduct; or

(d) *if:*

- (i) none of the above paragraphs applies to terms and conditions about a particular matter; and*
- (ii) an access determination specifies terms and conditions about that matter;*

on such terms and conditions relating to that matter as are set out in the access determination.

iiNet submits that section 152AY of the CCA assumes the existence of an access determination that will act as a default set of terms and conditions in the event that the parties cannot reach agreement. This is clearly acknowledged in the explanatory memorandum relating to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*, as follows (emphasis added)⁷:

Currently Part XIC of the CCA provides that if parties cannot agree on the terms of access to a declared service, then either party (the carrier or carriage service provider that provides access to the service, or the access seeker) can notify an access dispute to the ACCC. The ACCC must then arbitrate the dispute. The terms and conditions of access are then those determined by the ACCC in its arbitration determination for those two parties only. This is known as the 'negotiate-arbitrate' model.

Since it is clear that the 'negotiate-arbitrate' model is not producing effective outcomes for industry or consumers, Part 2 of Schedule 1 to the Bill reforms the regime to allow the regulator to set up front prices and non-price terms for declared

⁷ Telecommunications Legislation Amendment (Competition And Consumer Safeguards) Bill 2010 Explanatory Memorandum, at p.4.

services. **This will create a benchmark which access seekers can fall back on, while still allowing parties to negotiate different terms.**

In light of this, real practical difficulties can arise if the ACCC Terms are not in existence at the time the access seeker requires the service (i.e. an unresolved dispute about the Disputed Terms exists at the time the access seeker needs the service). This leads to two possibilities:

- the access seeker can simply accept the SFAA with the Disputed Terms and be locked out from relying on the ACCC Terms until the resultant access agreement has expired⁸ (iiNet submits that this outcome is not in the LTIE); or
- if the ACCC's analysis is correct, the access seeker can insist on obtaining access without signing the SFAA in which case there will be no access agreement in place and considerable uncertainty as to what the terms and conditions of access are (iiNet submits that this outcome is not in the LTIE).

As regards the preferred scope of regulated terms, iiNet notes the following comment by the ACCC (emphasis added)⁹:

*The matters covered by the SFAA commitments have been the subject of considerable negotiation between the parties. Submissions also indicated a preference for terms to be set through commercial negotiations, which would then preserve the legislative hierarchy. **The ACCC considers that it would be preferable for parties to agree on these matters to the extent possible, and for the ACCC to intervene only to the extent that agreement is not reached.***

Given the uncertainty that can arise in the Disputed Terms Scenario, iiNet submits that this approach will only be appropriate if the SAU delivers either:

- a commitment to include a regulated terms pass through clause in the SFAA, thereby allowing an access seeker to sign the SFAA and, to the extent that there is a dispute about particular terms, seek regulatory intervention which will not be locked out by the resultant access agreement; or
- some other way of resolving the uncertainty that arises from there being no default access determination for an access seeker to rely on at the time it is negotiating with NBN Co.

iiNet has on a number of occasions called for the SAU to include a commitment in the SAU that NBN Co will include a regulated terms pass through clause in the SFAA¹⁰. It should be noted that the nature of such a term would be akin to a change management mechanism. Therefore, inclusion of such a mechanism in an SFAA that subsequently becomes an access agreement is not inconsistent with the legislative hierarchy in Part XIC of the CCA because it is the access agreement itself that incorporates the regulated terms - i.e. the regulated terms do not 'override' the access agreement. Indeed, iiNet notes that section 152BE(1)(e)(ii) of the CCA expressly contemplates an access agreement incorporating the terms and conditions specified in an access determination. This incorporation of regulated terms need not be limited to regulated terms that are in existence at the time the access agreement was entered into. Furthermore, having regard to the criteria that

⁸ This is due to the operation of the legislative hierarchy discussed at p. 15 of the Draft Decision.

⁹ Consultation Paper, at p. 35.

¹⁰ See section 6.5 of iiNet's January 2013 Submission.

the ACCC must apply when setting regulated terms, regulated terms will by their nature promote the LTIE. Therefore, it is difficult for iiNet to see how delaying access to regulated terms can be justified as promoting the LTIE.

Given that iiNet's repeated calls for the inclusion of a regulated pass through clause have thus far not gained any traction with NBN Co or the ACCC, iiNet wishes to put forward a simple and effective alternative means of resolving the uncertainty that arises from the Disputed Terms Scenario in circumstances where no default access determination is in existence. iiNet submits that this can be done by including a commitment in the SAU regarding NBN Co's compliance with the SAOs that replicates the Part XIC legislative hierarchy in the SAU with the addition of the SFAA at the bottom of the hierarchy. This could be done by including the following commitment (or another commitment with the same effect), in the SAU:

(1) Subject to clause 2, NBN Co will comply with its Access Obligations in respect of a particular Access Seeker:

(a) if an Access Agreement between:

- (i) NBN Co; and*
- (ii) the Access Seeker;*

is in operation and specifies terms and conditions about a particular matter - on such terms and conditions relating to that matter as are set out in the Access Agreement; or

(b) if:

- (i) paragraph (a) does not apply in relation to terms and conditions about a particular matter; and*
- (ii) this Special Access Undertaking specifies terms and conditions about that matter--*

on such terms and conditions relating to that matter as are set out in this Special Access Undertaking; or

(c) if:

- (i) neither paragraph (a) nor (b) applies to terms and conditions about a particular matter; and*
- (ii) Binding Rules of Conduct specify terms and conditions about that matter;*

on such terms and conditions relating to that matter as are set out in the Binding Rules of Conduct; or

(d) if:

- (i) none of paragraphs (a), (b) or (c) apply to terms and conditions about a particular matter; and*
- (ii) an Access Determination specifies terms and conditions about that matter;*

on such terms and conditions relating to that matter as are set out in the Access Determination; or

(e) if:

- (i) none of paragraphs (a), (b), (c) or (d) apply to terms and conditions about a particular matter; and*
- (ii) an In Force SFAA specifies terms and conditions about that matter;*

on such terms and conditions relating to that matter as are set out in the In Force SFAA.

(2) For the purposes of clause (1):

- (a) nothing in this Special Access Undertaking that is inconsistent with the Access Agreement referred to in clause 1(a) has any effect;
- (b) nothing in Binding Rules of Conduct that is inconsistent with the Access Agreement referred to in clause 1(a) or this Special Access Undertaking has any effect;
- (c) nothing in an Access Determination that is inconsistent with the Access Agreement referred to in clause 1(a), this Special Access Undertaking or Binding Rules of Conduct has any effect;
- (d) nothing in an SFAA that is inconsistent with the Access Agreement referred to in clause 1(a), this Special Access Undertaking, Binding Rules of Conduct or an Access Determination has any effect; and
- (e) no amendment that NBN Co makes to an In Force SFAA will have any effect unless the access seeker agrees to the amendment in writing.

[New Definitions]

Access Agreement has the same meaning as in section 152BE of the Competition and Consumer Act 2010.

Access Obligations means:

- (a) conduct engaged in by NBN Co that relates to NBN Co's compliance with the Category B Standard Access Obligations; and
- (b) conduct that does not relate to NBN Co's compliance with the Category B Standard Access Obligations which this Special Access Undertaking requires NBN Co to engage in.

In Force SFAA means an SFAA in respect of which the expiry date for that SFAA that is included in that SFAA as first published in accordance with clause 1B.1.3(a) of this Special Access Undertaking has not yet occurred.

For ease of expression this will be referred to as **the SAOs Terms Mechanism**. iiNet submits that the SAOs Terms Mechanism is reasonable and promotes the LTIE because it has the following benefits:

- It removes the need for the ACCC to make an upfront access determination (to act as a default set of terms and conditions that will apply if the parties cannot reach agreement) and allows the ACCC to limit its consideration to the terms in the SFAA that have not been agreed upon.
- Any regulated terms that are made in respect of the terms of the SFAA that are in dispute could apply with immediate effect (if the ACCC deems this appropriate).
- It is entirely consistent with the legislative hierarchy in Part XIC of the CCA because:
 - there is no prospect of an access agreement being overridden by regulated terms (although the SFAA is overridden by regulated terms it is not an access agreement)¹¹; and
 - access agreements are likely to be based on a genuine agreement between the parties rather than an exercise of monopoly power by NBN Co. In particular, if the parties desire the certainty that results from locking in particular terms in the SFAA or an access

¹¹ As acknowledged at p. 36 of the Draft Decision.

determination, they are free to do this by entering into an access agreement containing those terms.

Given these obvious benefits, iiNet submits that if the ACCC is not minded to include in its variation notice a requirement in the SAU for a regulated terms pass through clause, the ACCC should include in its variation notice a requirement for the SAU to include the SAOs Terms Mechanism.

4.2 **The ACCC's proposed variations as regards the SAU commitments relating to the multilateral SFAA forum and the midpoint review**

(a) The Multilateral SFAA Forum

Clause 1B.3.1 of Schedule 1B of the SAU requires NBN Co to establish a multilateral SFAA forum to engage with access seekers about possible future changes to the terms of an SFAA. Clause 1B.3.1 provides as follows:

*(a) NBN Co will establish a multilateral consultation forum to engage with Access Seekers on possible future changes to the terms of an SFAA (**Multilateral SFAA Forum**).*

(b) NBN Co will convene the first Multilateral SFAA Forum no later than 18 months after the SAU Commencement Date.

(c) The purpose of the Multilateral SFAA Forum will include identifying and prioritising issues associated with any SFAA and working to develop multilateral resolutions to changes to any SFAA.

(d) The Multilateral SFAA Forum will allow Access Seekers and NBN Co to suggest changes to any SFAA.

(e) Subject to clauses 6 and 1B.2, NBN Co may make such changes to any SFAA as NBN Co considers appropriate, including any changes arising from the Multilateral SFAA Forum. Except with the ACCC's prior approval, NBN Co may not make any change to an SFAA under this clause 1B.3.1(e) in relation to the provisions referred to in:

(i) Annexure 1 (Dispute Management Rules) to Schedule 1H (Non-price terms and conditions);

(ii) Annexure 2 (Information & Rights Management) to Schedule 1H (Non-price terms and conditions);

(iii) Annexure 3 (Risk Management) to Schedule 1H (Non-price terms and conditions);

(iv) Annexure 1 (PDF Processes) to Schedule 1I (Product Development and Withdrawal); or

(v) Annexure 1 (Service Levels Schedule) to Schedule 1J (Service Level commitments), other than in relation to the supply of new Products, Product Components, Product Features, Ancillary Services and types of Facilities Access Service introduced during the Initial Regulatory Period.

(f) NBN Co will incorporate the changes made under clause 1B.3.1(e) into the new version of the relevant SFAA that NBN Co publishes to be available upon expiry of the term of the current SFAA in accordance with clause 1B.1.3(a).

(g) If NBN Co does not agree with a suggested change made by an Access Seeker through the Multilateral SFAA Forum, NBN Co will notify Access Seekers and the ACCC of that fact no later than 4 months after convening a Multilateral SFAA Forum.

(h) NBN Co will convene another Multilateral SFAA Forum no later than 6 months prior to the expiry date of each version of the SFAA published under clause 1B.3.1(f).

(i) The Multilateral SFAA Forum will be available to all Access Seekers irrespective of whether they have an Access Agreement with NBN Co. However, Access Seeker participation in the Multilateral SFAA Forum will be voluntary such that each Access Seeker can engage as they deem appropriate given their level of interest and/or resources.

(j) NBN Co may, but is not obliged to, discuss changes to any SFAA arising from a Regulatory Determination within the Multilateral SFAA Forum.

(k) The operation of the Multilateral SFAA Forum will be reviewed in accordance with clause 1K.2.

(l) Nothing in this clause 1B.3 precludes NBN Co from conducting bilateral consultation with Access Seekers in relation to any SFAA in a manner that is consistent with NBN Co's Non-Discrimination Obligations.

The ACCC proposes a variation to the SAU that will have the effect of deleting clauses 1B.3(b) and 1B.3(e) to (l)¹². The ACCC's reasons for this are¹³:

1. NBN Co is not obliged to discuss changes to SFAAs arising from a regulatory determination. There should be no restrictions on the topics that are discussed to enable open engagement and input into the development of mutually agreeable terms for SFAAs.
2. The SAU specifies that the multilateral SFAA forum will be convened six months prior to the expiry of each version of the SFAA. NBN Co only commits to incorporating the outcomes of the forum in new SFAAs. If the outcomes are not settled at the time of publication of a new SFAA, they may not be implemented until publication of the next SFAA another two years later.
3. Clause 1B3.(e) allows NBN Co to make such changes to any SFAA as NBN Co considers appropriate, subject to clause 6 of the SAU (i.e. the commitment to ensure consistency between SFAAs and the SAU) and clause 1B.2 (i.e. the regulatory recourse commitment). As the ACCC has concluded that these commitments are not in the LTIE, the ACCC cannot be satisfied that such changes will promote the LTIE.

iiNet agrees with the conclusions at 1 to 3 above. Although iiNet agrees that these conclusions justify the deletion of clauses 1B3.1(e), 1B3.1(f) and 1B3.1(j) of Schedule 1B of the SAU, iiNet does not agree that they justify the removal of clauses 1B3.1(b), 1B3.1(g), 1B3.1(h) and 1B3.1(i). On the contrary, iiNet believes that these clauses impose appropriate limitations on NBN Co's discretion and, as such, do promote the LTIE. iiNet submits that removal of these clauses does not promote the LTIE as it gives NBN Co a completely unfettered discretion as regards the procedural requirements for the multilateral SFAA forum. As regards 2 above, iiNet submits that this concern could be appropriately dealt with by including an additional requirement that requires NBN Co to complete the multilateral SFAA forum at least one month before the expiry of the relevant SFAA. As regards clauses 1B3.1(k) and 1B3.1(l), iiNet believes that these clauses are unnecessary and can be removed.

¹² Consultation Paper, at p. 15.

¹³ Draft Decision, at pp. 51-52.

(b) The Midpoint Review

The ACCC has formed the preliminary view that Schedule 1K of the SAU (which provides for a review of the provisions relating to various multilateral process and non-price terms half way through module 1 of the SAU) should be removed¹⁴. In reaching this conclusion, the ACCC has highlighted a number of problems with the midpoint review provisions as follows¹⁵:

- The midpoint review provisions prescribe strict review timeframes - the ACCC must make a decision within 60 business days, with no possibility of extension, and if the ACCC does not make a decision within this timeframe, NBN Co's proposal will be accepted.
- The midpoint review provisions specify different matters that the ACCC must consider when conducting each review. As drafted, these provisions create uncertainty about how the ACCC will consider the matters to which it is required to have regard when conducting the midpoint review. The specified criteria do not specifically refer to the legislative criteria for assessing an SAU variation.
- The midpoint review provisions provide that if the ACCC makes substitute terms, such a decision has no effect to the extent that it is 'inconsistent with the SAU'. Given that the SAU specifies the terms that are being reviewed when the decision is made, and that the existing terms are not amended or removed from the SAU to reflect the review outcomes, the ACCC's substitute terms may not have effect.
- The review outcomes are specified to take effect from 1 July 2018. It is possible that, despite the reviews continuing in accordance with the specified process, the review outcomes will not be settled prior to 1 July 2018.
- NBN Co undertakes to comply with ACCC decisions for the remainder of Module 1 in substitution for the multilateral processes and non-price terms that are set out in the SAU rather than amending the SAU to reflect the outcomes of the midpoint review. This creates uncertainty about whether the outcomes will be specified as terms and conditions of the SAU. Consequently, it is unclear if NBN Co's commitment to align SFAAs with the SAU would also apply to the ACCC's decisions. It is also unclear whether any subsequent ACCC access determination or binding rules of conduct addressing the same matters as an ACCC decision made under the review mechanism would be inconsistent with the SAU and consequently of no effect.

iiNet agrees that the existence of these problems should result in a rejection of the relevant provisions. However, iiNet notes that clause 1K.2.1 of the SAU requires NBN Co to provide the following information to the ACCC no later than six months prior to 1 July 2018:

- the Customer Engagement Information;

¹⁴ Consultation Paper, at p. 17.

¹⁵ These problems are discussed in section 2.3.2 of the Draft Decision.

- the PDF Information;
- the Dispute Management Information; and
- the Multilateral SFAA Forum Information.

iiNet submits that the obligation for NBN Co to provide this information to the ACCC should remain in the SAU as it is likely to be highly relevant to the ACCC's assessment at the midpoint of module 1 of whether:

- to accept any variation to the SAU from NBN Co regarding these matters; and/or
- to make regulated terms in respect of these matters (or to continue such terms if they are already in existence).

iiNet submits that the availability of this information to the ACCC is likely to assist the ACCC in its deliberations and shorten the timeframe required for any public inquiry that may be required. iiNet submits that this outcome would promote the LTIE.

5. SERVICES TO WHICH THE SAU RELATES

The ACCC proposes variations that address the following¹⁶:

- uncertainty in relation to the ACCC's ability to set terms and conditions;
- compliance and consistency with the SAOs; and
- Layer 3 awareness.

Each of these issues will be considered in turn.

5.1 Uncertainty in relation to the ACCC's ability to set terms and conditions

iiNet agrees with the view expressed in the Draft Decision¹⁷ that the breadth of the service descriptions specified in Attachments A and B of the main body of the SAU (**the SAU Service Descriptions**) and the specific drafting of the SAU create uncertainty as to what effect the SAU would have where the ACCC declares a specific service which NBN Co is not providing but which comes within any of the SAU Service Descriptions. In particular, the SAU could be interpreted as leading to an outcome where any declaration by the ACCC of a service that falls within any of the SAU Service Descriptions is of no practical effect because the products specified in the SAU, or developed in accordance with the processes set out in the SAU, are the only Layer 2 services that NBN Co can be required to supply because the SAU exhaustively sets out how NBN Co will fulfil the SAOs in respect of the services to which the SAU relates. iiNet believes that terms and conditions that give rise to this level of uncertainty are not reasonable and should not be accepted. Furthermore, iiNet agrees that in circumstances where NBN Co is not providing a service, an ACCC declaration in respect of that service should have effect. Accordingly, iiNet believes that amendments are required. iiNet believes that the

¹⁶ These variations are discussed at section 2.2 of the Consultation Paper.

¹⁷ Draft Decision, at pp. 69, 70.

amendments referred to in section 2.2.1 of the Consultation Paper are appropriate to resolve these issues.

5.2 Compliance and consistency with the SAOs

iiNet agrees that NBN Co being required to comply with the SAOs should not be dependent on an access seeker being required to enter into an access agreement with NBN Co. iiNet notes that any provisions in the SAU which imply such an outcome should be appropriately amended. Furthermore, iiNet also agrees that NBN Co should not be permitted to force bundled products on access seekers where to do so goes beyond the authorisation provided by section 151DA of the CCA. Accordingly, iiNet supports all of the amendments referred to in section 2.2.2 of the Consultation Paper.

5.3 Layer 3 awareness

iiNet agrees that NBN Co should not be permitted to enter downstream markets for aggregation and wholesale services that operate at Layer 3, thereby allowing NBN Co to compete as a vertically integrated supplier in those markets. While iiNet does not believe that clause 1A2.6 of the SAU was drafted with the intention of allowing this to occur, iiNet agrees that the drafting of clause 1A2.6 of the SAU should be tightened in the manner the ACCC proposes in order to remove any doubt.

6. PRODUCT DEVELOPMENT AND WITHDRAWAL

The ACCC proposes variations that relate to the following¹⁸:

- Term of operation of the PDF Processes.
- Commitments by NBN Co to share information and consult.
- Provisions which establish rights for, and obligations on, NBN Co and its customers about how consultation will occur.
- Provisions which allow for consultation not to be undertaken in particular circumstances.
- Provisions which set out NBN Co's ability to make a decision about whether or not to develop, introduce or vary a product.
- Product withdrawal.

Each of these issues will be considered in turn.

6.1 Term of operation of the PDF Processes

The SAU provides that the PDF Processes apply for the duration of Module 1 and are subject to review under the midpoint review of Module 1. The ACCC proposes that the PDF Processes should only operate for the first five years of Module 1. This is because the ACCC is not satisfied that the processes and criteria that relate to the midpoint review would promote the long-term interests of end-users. In light of this, the ACCC proposes a variation that would result in the PDF Processes not being

¹⁸ These variations are discussed in section 2.3 of the Consultation Paper.

specified in the SAU after the first five years of Module 1. The PDF Processes would thereafter be left to commercial negotiation between NBN Co and its customers. In the event that agreement on the PDF Processes could not be reached, processes for consultation about the development and variation of products could be determined by the ACCC via other regulatory processes under Part XIC of the CCA. Alternatively, it would be a matter for NBN Co as to whether, around the end of the first five years of the SAU, it wished to seek a variation to the SAU under Part XIC to extend the period that the PDF Processes operate for.

Given the removal of the midpoint review (see section 4.2(b) above), iiNet agrees that the initial term of the PDF Processes should not be more than five years.

6.2 **Commitments by NBN Co to share information and consult**

The SAU contains a number of commitments about how NBN Co will share information and consult with its customers about the development of new products and the variation of existing products. The ACCC considers that the effectiveness of these commitments would be enhanced if there was a role for consumer advocacy groups in NBN Co's consultation processes. Accordingly, the ACCC proposes that the SAU be varied so that consumer advocacy groups are able to participate in the PDF Processes. The ACCC seeks the views of interested parties on the appropriate definition of 'consumer advocacy group'.

iiNet agrees with this proposed variation. As regards the definition of 'consumer advocacy group', relevant criteria that may be appropriate to include in the definition include that the group:

- be an incorporated not for profit organisation;
- has as one of its published objectives the objective or promoting the interests of consumers of telecommunications services; and
- has requested to participate in the PDF Process.

6.3 **Provisions which establish rights for and obligations on NBN Co and its customers about how consultation will occur**

The PDF Processes include clauses about the treatment of confidential information and intellectual property associated with new product ideas. Note that for ease of expression rights and obligations relating to confidential information and intellectual property associated with new product ideas that are considered under the PDF Processes will be referred to as **PDF Rights**.

The ACCC considers that the obligations placed on customers about PDF Rights may discourage customers from participating in the Product Development Forum. To address this issue, the ACCC proposes variations that will remove the clauses in the PDF process that deal with PDF Rights¹⁹. This means that terms and conditions about PDF Rights will be left to commercial negotiation between NBN Co and its customers, and, if necessary, future ACCC determinations.

In iiNet's view, broadly speaking, the SAU can deliver four possible outcomes relating to terms and conditions of access in respect of a particular subject matter:

¹⁹ i.e. clauses 5 and 5 of the PDF Processes.

1. It can include actual terms and conditions of access in relation to the subject matter that satisfy the applicable statutory criteria.
2. It can include commitments that relate to the development of substantive terms and conditions of access that relate to the subject matter that satisfy the applicable statutory criteria.
3. It can be silent about the subject matter - i.e. the SAU has a neutral effect on the subject matter.
4. It can include commitments (either in the form of actual terms and conditions of access or commitments that relate to the development of such terms and conditions) that relate to the subject matter that do not satisfy the applicable statutory criteria.

iiNet agrees that the terms and conditions in the SAU relating to the PDF Rights lead to an outcome as per 4 above. iiNet submits that the ACCC's proposed variations lead to an outcome as per 3 above as regards the PDF Rights. Although iiNet acknowledges that the ACCC may feel that getting to 1 above is unlikely to be possible in the timeframe available, iiNet can see no justification why it is necessary to make do with 3 above rather than achieve an outcome that delivers 2 above. Given that:

- NBN Co has included actual terms and conditions relating to the PDF Rights for ACCC approval;
- the ACCC has considered these terms and conditions and submissions in response and formed a view on why these terms and conditions do not satisfy the applicable statutory criteria; and
- the ACCC has decided to issue a notice to vary rather than reject the SAU,

iiNet submits that the varied SAU should not be silent on the issue of the PDF Rights but should include high level commitments based on the ACCC's conclusions in the Draft Decision so as to put binding commitments on NBN Co that will require NBN Co to enter into meaningful negotiations about the PDF Rights. Although iiNet acknowledges that the ACCC's comments in the Draft Decision could be referred to in negotiations with NBN Co, the Draft Decision does not impose any legal obligations on NBN Co. Therefore, NBN Co could simply choose to ignore the ACCC's conclusions about the PDF Rights. On the basis of the ACCC's reasoning in the Draft Decision, these high level commitments could include commitments for NBN Co to develop terms and conditions relating to the PDF Rights that establish that²⁰:

- the definition of 'Confidential Information' will apply uniformly as between NBN Co and access seekers;
- NBN Co will not disclose access seeker confidential information to third parties²¹ without the consent of the access seeker except where required by law;

²⁰ These principles are intended to address the ACCC's concerns set out at pp. 83-84 of the Draft Decision.

²¹ Note that for the purpose of this principle related bodies corporate and personnel are not intended to be treated as third parties.

- where NBN Co is required by law to disclose access seeker confidential information NBN Co will give as much notice of the disclosure as is reasonably practicable to the access seeker;
- NBN Co must destroy or delete an access seeker's confidential information where requested to do so by that access seeker unless:
 - it is impracticable to do so (in which case NBN Co may retain the confidential information subject to its obligations of confidence) or
 - NBN Co is required by law to retain the confidential information in which case it may retain the confidential information for as long as it is required by law subject to its obligations of confidence.
- indemnities relating to the PDF Rights will be reciprocal and uniform as between the parties; and
- access seekers' IP rights will be protected without the necessity of complying with onerous procedural requirements.

6.4 **Provisions which allow for consultation to not be undertaken in particular circumstances**

The SAU contains a number of exceptions to NBN Co's obligation to consult with customers on the development or variation of products. The ACCC considers that these exceptions reduce the extent to which the product development commitments result in:

- competition being promoted; and
- economically efficient use of, and investment in, infrastructure being encouraged.

The ACCC therefore proposes amendments that would ensure that all products that are not yet fully developed, and all variations to existing products (whether NBN Co considers that the variation is minor or otherwise) are able to be consulted on via the Product Development Forum and PDF Processes. iiNet agrees that the effect of the ACCC's proposed variations would be to increase the extent to which the proposed consultation processes about product development and variation promote the LTIE. Accordingly, iiNet agrees with the ACCC's proposed variations set out in section 2.3.1.4 of the Consultation Paper.

6.5 **Provisions which set out NBN Co's ability to make a decision about whether or not to develop, introduce or vary a product.**

The ACCC considers that the provisions in the SAU that narrow what is to be supplied by NBN Co under the SAU create uncertainty in a situation where the ACCC declares an NBN Co service that comes within the scope of the SAU Service Descriptions. The ACCC therefore proposes the inclusion of explicit statements in the SAU which acknowledge that:

- the CCA allows the ACCC to declare services; and

- the means by which NBN Co will fulfil its obligations in relation to services that come within the SAU Service Descriptions will include through the supply of services declared by the ACCC.

iiNet believes that these amendments resolve a significant issue of uncertainty within the SAU²². Accordingly, iiNet agrees with these proposed amendments.

6.6 Product withdrawal

The ACCC proposes that the SAU be varied to include:

- a commitment that NBN Co provide the same amount of written notice to the ACCC of its intention to withdraw a product, as it provides to its customers; and
- a conferral of power on the ACCC to disallow the withdrawal of a currently supplied product component, product feature, Ancillary Service or Facilities Access Service by NBN Co.

iiNet believes that the ACCC having a right to veto the withdrawal of a product by NBN Co is an essential power to ensure that NBN Co does not act in a manner that is inconsistent with the promotion of the LTIE. Accordingly, iiNet agrees that these proposed variations are necessary.

7. PRICE-RELATED TERMS AND CONDITIONS

Given that NBN Co is likely to under recover its costs during the Initial Regulatory Period, and NBN Co is permitted to carry forward any over recovered or under recovered amounts between Regulatory Cycles²³, the Long Term Revenue Constraint Methodology (**LTRCM**) is unlikely to have any constraining effect on NBN Co's pricing during the Initial Regulatory Period. Therefore, the only relevant constraints on NBN Co price terms during the Initial Regulatory Period are as follows:

1. The Maximum Regulated Price for each Reference Offer is specified in the SAU²⁴. These prices are locked in until 1 July 2017 and are then subject to an individual price increase limit of CPI - 1.5% per year²⁵.
2. The Maximum Regulated Price for a number of specified Non Reference Offers are specified in the SAU²⁶. These prices are subject to an individual price increase limit of CPI - 1.5% per year²⁷.
3. The introduction of new prices for zero priced Reference Offers and zero priced Other Charges is subject to ACCC oversight²⁸.
4. The initial price terms for New Offers, New Other Charges and new prices for zero priced non reference offers are subject to:

²² This issue is discussed in section 8 of iiNet's January 2013 Submission.

²³ See clause 2D.5.2 of the SAU.

²⁴ See clause 1C.3.1 of the SAU.

²⁵ See clause 1C.4.1 of the SAU.

²⁶ See clause 1D.3.1 of the SAU.

²⁷ See clause 1D.4.1 of the SAU.

²⁸ See clauses 1C4.5 and 1D.4.3 of the SAU.

- a. a requirement for NBN Co to publish a pricing statement describing in qualitative terms how the new price has been determined; and
- b. a requirement for NBN Co to have regard to the Initial Pricing Principles set out in clause 1D.6.

As regards 1 and 2 above, iiNet acknowledges that these will act as constraints on NBN Co's price terms in respect of the relevant services. However, iiNet believes that the provision of services on a new network may require a more flexible approach to be taken to price terms. iiNet therefore believes that NBN Co's price terms should be subject to review. Therefore, iiNet supports the ACCC's proposed amendment discussed at section 2.4.1.2 of the Consultation Paper which would provide that NBN Co's prices be subject to periodic review.

As regards 3 above iiNet believes that the oversight provided to the ACCC in respect of these matters is too restrictive because the ACCC has a fixed three month period in which to make an access determination or binding rule of conduct. Given the complex issues that may need to be considered and the need for public consultation, the ACCC should have discretion to extend this period when reasonably required. iiNet therefore submits that a variation to this effect should be included in the ACCC's notice to vary.

As regards 4 above, iiNet agrees with the ACCC's view that NBN Co will not always have incentives to set new prices in a manner that encourages efficient use of the NBN²⁹. Therefore, iiNet supports the proposed variation discussed at section 2.4.1.1 of the Consultation Paper which would allow the ACCC to determine prices for New Offers, New Other Charges and new prices for zero priced non reference offers.

iiNet notes that the ACCC also proposes a number of variations that are relevant to the LTRCM³⁰. iiNet believes that these proposed variations are sensible and appropriate and are necessary to ensure that the terms of the SAU that relate to price are reasonable³¹.

8. NON-PRICE TERMS AND CONDITIONS

The SAU provides detailed non price terms in respect of the following subject matter:

- service levels;
- dispute management;
- information and rights management; and
- risk management,

(for ease of expression these are referred to collectively as **the Non Price Terms**).

The variations that the ACCC proposes in respect of the Non Price Terms are set out in section 2.5 of the Consultation Paper. Section 2.5 of the Consultation Paper

²⁹ Consultation Paper, at p. 26.

³⁰ Consultation Paper, at section 2.4.2.

³¹ As defined in section 152AH of the CCA.

also sets out proposed variations relating to POI related matters. This section of the submission considers the ACCC's proposed variations relating to the Non Price Terms and the POI related matters in turn.

8.1 Non Price Terms

The ACCC has concluded that the Non Price Terms do not satisfy the applicable statutory test. The outcome that the ACCC proposes is that the Non Price Terms be removed from the SAU. The ACCC's reasons for this are as follows³²:

- The ACCC considers that it would be preferable for parties to agree on these matters to the extent possible, and for the ACCC to intervene only to the extent that agreement is not reached.
- The matters covered by the SFAA commitments are complex matters, for which complex drafting may be required. Given the time limits within which the ACCC must make its decision on the SAU, the ACCC considers that it would not be possible to specify detailed replacement terms and conditions in the ACCC's notice to vary without having to significantly extend the deadline for making its decision.
- There are some significant differences between the views expressed in submissions to the November 2012 Consultation Paper (i.e. not all access seekers are in agreement on all issues).

While iiNet understands the ACCC's approach and has some sympathy for it, iiNet is concerned that after more than 16 months of SAU consideration³³ (including a detailed scrutiny of the Non Price Terms proposed by NBN Co) access seekers may find themselves back at square one as regards achieving reasonable Non Price Terms - i.e. access seekers may be required to negotiate with NBN Co from scratch and seek a fresh regulatory process to achieve reasonable terms of access if, as past experience would suggest, reasonable terms of access are not forthcoming through negotiation with NBN Co. In this regard, it is worth noting that NBN Co did have the benefit of considerable negotiations with access seekers before it included the Non Price Terms in the SAU³⁴. Therefore, the Non Price Terms represent what NBN Co had concluded, after considerable negotiation with access seekers, were reasonable terms - i.e. given the submissions from access seekers in response to the Non Price Terms, it is clear that NBN Co and access seekers have already failed to reach agreement on the Non Price Terms.

iiNet submits that given NBN Co's inclusion of the Non Price Terms in the SAU and the time and resources that have been expended on their consideration, it is not reasonable for the SAU process to conclude with NBN Co having a complete discretion as regards the non price terms and conditions that it includes in its SFAA, with the only consolation to access seekers being that they are free to spend further time and resources on another lengthy and costly regulatory process in the event that NBN Co does not agree to amend its non price terms. In light of this, iiNet submits that, at the very least, the ACCC should include in its notice to vary a variation that requires the SAU to include commitments from NBN Co to the following high level principles that are evident within the Draft Decision:

³² Consultation Paper, at pp. 35-36.

³³ NBN Co first submitted a special access undertaking on 5 December 2011.

³⁴ See Supporting Submission NBN Co Special Access Undertaking 28 September 2012, at p. 136.

- an access agreement will only be varied with the consent of both parties to the agreement (except in the case of operations manuals where a unilateral right to vary will be subject to reasonable notice and dispute resolution provisions)³⁵;
- NBN Co will not include provisions in its contractual terms that hinder its Customers' compliance with retail level regulatory requirements³⁶;
- at a minimum, service levels will initially be set so as to deliver a similar level of quality for a similar price as is provided for on the legacy networks³⁷, with an aspiration to deliver better service levels;
- a failure to meet a service level will attract a penalty for non compliance³⁸ including the right for an access seeker to seek damages for a material breach³⁹;
- eligibility to receive a service level rebate should not be dependent on submitting accurate forecasts⁴⁰;
- a failure to meet a service level will attract a clear commitment for corrective action within a reasonable timeframe⁴¹;
- the dispute management process will include flexible procedures and allow recourse to the Courts⁴²;
- the use or disclosure of access seeker confidential information for non essential purposes without consent will be strictly controlled⁴³;
- access seekers will be permitted to refer to the acronym 'NBN' in order to market their products and NBN Co will act reasonably as regards the use of its trademarks by access seekers for the purposes of marketing their products⁴⁴;
- any indemnities will be uniform as between the parties⁴⁵; and
- responsibility for risks will be borne by the party that is best placed to prevent or mitigate the risk⁴⁶, including that NBN Co will not exclude liability for Downstream Customer Loss where it is the party best placed to prevent or mitigate the risk⁴⁷.

The inclusion of these high level principles would oblige NBN Co to move from the position it has adopted in the SAU and to align the Non Price Terms included in its SFAA with the ACCC's position in the Draft Decision. iiNet submits that this is

³⁵ Draft Decision at p. 175.

³⁶ *ibid.* at p. 176.

³⁷ *ibid.* at p. 181.

³⁸ *ibid.* at p. 181.

³⁹ *ibid.* at p. 183.

⁴⁰ *ibid.* at p. 183.

⁴¹ *ibid.* at p. 183.

⁴² *ibid.* at p. 189.

⁴³ *ibid.* at p. 192.

⁴⁴ *ibid.* at p. 195.

⁴⁵ *ibid.* at p. 195 and p. 199.

⁴⁶ *ibid.* at p. 198.

⁴⁷ *ibid.* at p. 199.

particularly important as regards compliance with retail regulatory requirements. In this regard the SAU should not be used by NBN Co to excuse NBN Co from liability under section 118A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.⁴⁸

iiNet submits that, given NBN Co's desire for these matters to be addressed by the SAU, such an obligation would be appropriate, and would increase the likelihood of speedy and effective negotiations without the need for further ACCC involvement in respect of issues relating to the Non Price Terms.

8.2 POI related matters

The ACCC proposes variations that would have the following effects⁴⁹:

- providing consistency between the provisions in the SAU and the ACCC powers to update the list of POIs under section 151DB of the CCA;
- allowing the ACCC to extend the POI review process as required, depending on the complexity of the particular process;
- providing access seekers with at least 12 months' notice of the migration of end-users from a temporary POI to an established POI; and
- ensuring that the SAU supports and is consistent with the intended purpose of the POI list - i.e. that interconnection is offered only at locations which promote the long-term interests of end-users.

iiNet submits that these amendments are required to:

- remove uncertainty; and or
- limit a discretion that could be used by NBN Co in a manner that does not promote the LTIE.

iiNet therefore agrees with these proposed amendments.

9. FIXED PRINCIPLES

iiNet submits that specifying all of modules 0 and 2 as fixed principles is unnecessary and is likely to lead to an unnecessary level of rigidity over the course of the SAU. Clearly, those provisions in modules 0 and 2 which the ACCC has concerns about should not be specified as fixed principles. iiNet agrees with the ACCC's general principle that only those matters which are reasonably necessary for providing certainty about long term cost recovery should be specified as fixed principles in the SAU⁵⁰. iiNet notes that proceeding in this way would be consistent

⁴⁸ Section 118A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* allows a carriage service provider (the first carriage service provider) to seek contribution from another carriage service provider (the second carriage service provider) in circumstances where the first carriage service provider is liable to pay compensation to an end user under the *Telecommunications (Customer Service Guarantee Standard) 2011* (CSG), and the circumstances giving rise to the first carriage service provider's liability under the CSG were wholly or partly attributable to the second carriage service provider.

⁴⁹ These variations are discussed in section 2.5.3 of the Consultation Paper.

⁵⁰ Draft Decision, at p. 209.

with the approach to fixed principles in the access determinations for fixed line services⁵¹.

10. CONSEQUENTIAL AMENDMENTS

Without seeing the precise drafting of the notice to vary and the amended SAU, iiNet is not in a position to provide a definitive view on whether any consequential amendments are required in order to give effect to the ACCC's reasoning in the Draft Decision and Consultation Paper. iiNet therefore looks forward to further consultation on the amended SAU which iiNet hopes will be forthcoming from NBN Co.

Herbert Geer Lawyers on behalf of iiNet Limited

2 May 2013

⁵¹ See clause 6 of the Final Access Determinations Nos 1 to 6 of 2011.