

**Variation of NBN Co Special Access Undertaking
Submission by Herbert Geer Lawyers on behalf of:**

iiNet Limited

Public Version

26 July 2013

1. INTRODUCTION

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

Please note that this submission contains commercial in confidence information which is marked '[c-i-c]' and highlighted in yellow.

On 18 December 2012 NBN Co Ltd and NBN Tasmania Ltd (collectively referred to in this submission as **NBN Co**) lodged a Special Access Undertaking (**the December 2012 SAU**) with the Australian Competition and Consumer Commission (**ACCC**) under section 152CBA(2) of the *Competition and Consumer Act 2010* (**CCA**). The December 2012 SAU followed two previous versions of NBN Co's special access undertaking that had been lodged with the ACCC but later withdrawn after it became clear that they would not be accepted.

In April 2013 the ACCC released a draft decision on the December 2012 SAU¹ (**the Draft Decision**). The Draft Decision outlined the ACCC's preliminary view that the ACCC was not satisfied that the December 2012 SAU met the criteria for acceptance. In the Draft Decision, the ACCC proposed to give NBN Co a notice specifying variations to the December 2012 SAU in order to facilitate NBN Co being able to lodge an amended SAU in accordance with section 152CBDA(2) of the CCA (**the Notice to Vary**).

Pursuant to the Draft Decision, the ACCC has now issued:

- a mark-up of the December 2012 SAU which shows the changes that the ACCC proposes to include in the Notice to Vary (**the Mark Up Document**);
- an amended version of the December 2012 SAU which has the marked up changes in the Mark Up Document accepted (**the Draft Revised SAU**); and
- a document entitled *Variation of NBN Co Special Access Undertaking - response to submissions July 2013* (**the Consultation Paper**) which:
 - sets out the ACCC's response to the submissions received in response to the Draft Decision;
 - explains the changes the ACCC is intending to include in the Notice to Vary and has included in the Mark Up Document; and
 - invites submissions on the ACCC's proposed variations to the December 2012 SAU.

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. SCOPE OF THIS SUBMISSION

iiNet has made a number of submissions in response to the ACCC's consultations on the special access undertakings that NBN Co has lodged with the ACCC since December 2011. iiNet does not intend to repeat points raised in previous submissions that have already been considered by the ACCC. Rather, this

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

submission is limited to providing iiNet's view on the following matters which iiNet has not previously made submissions on:

- the adequacy of the new mechanisms in the Revised SAU relating to ACCC oversight of price terms and conditions;
- the reasonableness of NBN Co's proposed prices for multicast products;
- the increased significance of the Multilateral SFAA Forum in achieving access to reasonable non price terms and conditions;
- Telstra's proposed variations to the product development and withdrawal provisions;
- the ACCC's proposal to remove the concepts of Reference Offers and Non-Reference Offers in favour of reliance on the product withdrawal conferral of power; and
- the ACCC's proposed variations which clarify the interaction between the CPI - 1.5% price increase caps and the long-term revenue constraint methodology (**LTRCM**).

3. THE ADEQUACY OF THE NEW MECHANISMS IN THE REVISED SAU RELATING TO ACCC OVERSIGHT OF PRICE TERMS AND CONDITIONS

iiNet understands and acknowledges the need that NBN Co has for certainty that regulatory action will not prevent NBN Co from building the network it is required to build and from recovering a reasonable return on the investments reasonably required to do so. However, achieving this certainty need not, and should not, come at the cost of an appropriate level of regulatory oversight of NBN Co's price terms.

iiNet believes that the Revised SAU does not strike the right balance between achieving certainty for NBN Co and retaining an appropriate level of regulatory oversight of NBN Co's price terms. Although iiNet acknowledges that the Revised SAU includes enhanced ACCC powers relating to price terms as compared to the December 2012 SAU, iiNet has the following concerns:

- the Price Review Arrangement mechanism is subject to a number of unreasonable limitations; and
- the ACCC's oversight powers in respect of Zero Priced Offers and Other Charges are too blunt.

These concerns are explained below in turn.

3.1 Unreasonable limitations on the Price Review Arrangement mechanism

There are two unreasonable limitations.

Firstly, no price review can be initiated prior to 1 July 2016² and no Price Review Arrangement can have effect before 1 July 2018³. iiNet can see no reason in principle why these limitations should apply. The prices set in the SAU are largely

² By virtue of clause 1H.3.1(a) of the Revised SAU.

³ By virtue of clause 1H.3.7(a)(i)(A).

untested and if it becomes clear that the SAU prices will have a detrimental effect on the long term interests of end users unless they are rebalanced, this rebalancing should occur sooner rather than later. iiNet cannot see why, given that any rebalancing will be revenue neutral, any necessary rebalancing should be delayed.

Secondly, the effect of clause 1H3.1(c) of the Revised SAU is that a price review cannot occur if a Price Review Arrangement applies to any financial year in the Initial Regulatory Period. In other words, if a rebalancing has already occurred and is still in force, no further rebalancing is permitted. iiNet believes that this is an unreasonable limitation on the Price Review Arrangement. For example, iiNet notes that some access seekers have raised issues with the pricing included in the SAU for NBN Co's multicasting service⁴, arguing that the SAU prices may inhibit the development of downstream multicasting services⁵. Although the ACCC has not to date accepted these submissions, the ACCC did note that it could review multicast prices in the future⁶. Therefore, it is possible to conceive of the following scenario:

The ACCC undertakes a review of maximum regulated prices in the SAU for multicast products fairly early in the Initial Regulatory Period. An ACCC Determined Price Review Arrangement results in the setting of lower maximum regulated prices for the multicast products for the remainder of the Initial Regulatory Period.

In this scenario the effect of clause 1H3.1(c) would be that no other price reviews could be initiated while the ACCC Determined Price Review Arrangement in respect of the multicast products remains in force - i.e. for the duration of the Initial Regulator Period. In iiNet's view, the existence of this limitation makes the Price Review Arrangement mechanism unacceptably limited.

3.2 **The ACCC's oversight powers in respect of Zero Priced Offers and Other Charges are too blunt and potentially ineffective**

NBN Co will be permitted to increase a Zero Priced Offer or Other Charge in circumstances where:

- it has issued a proposal to do so in accordance with specified procedural requirements; and
- the ACCC has not issued a New Price Disallowance Determination within six months of receiving NBN Co's proposal⁷.

The effect of the ACCC issuing a New Price Disallowance Determination is that the Offer or Other Charge remains at zero⁸.

As regards the ACCC's power to issue a New Price Disallowance Determination, the Revised SAU provides as follows:⁹

⁴ iiNet's views on NBN Co's multicasting prices are set out in section 4 below.

⁵ Consultation Paper at p.69.

⁶ Draft Decision at p.113.

⁷ Revised SAU - clause 1C4.6(a) (as regards Zero Priced Reference Offers) and clause 1D.4.4(a) (as regards Zero Priced Non Reference Offers and Other Charges).

⁸ *ibid* - clause 1C4.6(c) (as regards Zero Priced Reference Offers) and clause 1D.4.4(c) (as regards Zero Priced Non Reference Offers and Other Charges).

⁹ *ibid* - clause 1C4.6(f) (as regards Zero Priced Reference Offers) and clause 1D.4.4(f) (as regards Zero Priced Non Reference Offers and Other Charges).

The ACCC may issue a New Price Disallowance Determination if it is not satisfied that the [Zero Priced Offer or Other Charge] meets one or more of the following criteria:

(i) the behaviour of one or more Access Seekers in relation to the use of the [Offer or activity associated with the Other Charge] results in additional costs to NBN Co;

(ii) the behaviour of one or more Access Seekers in relation to the use of the [Offer or activity associated with the Other Charge] results in degraded service outcomes for other Access Seekers; or

(iii) any other circumstance arises which makes it uneconomic for NBN Co to maintain the [Offer or Other] as Zero-Priced.

For ease of reference the criteria in (i) to (iii) above will be referred to as the **Relevant Criteria**. The effect of this provision is that if any of the Relevant Criteria are satisfied, the ACCC cannot issue a New Price Disallowance Determination.

Therefore, the ACCC's oversight power in respect of Zero Priced Offers and Other Charges effectively amounts to a power to veto the proposed price increase. However, that power of veto cannot be exercised if any of the Relevant Criteria are met. The following scenario illustrates why this power is too blunt and potentially ineffective.

NBN Co issues a proposal that the price for a Zero Priced Reference Offer be increased to \$50. NBN Co establishes that it is uneconomic for that particular Reference Offer to remain Zero Priced and thereby satisfies the Relevant Criteria. The ACCC believes that \$50 is too high but it is not permitted to issue a New Price Disallowance Determination because the Relevant Criteria have been satisfied. Accordingly, NBN Co's \$50 price will take effect.

iiNet submits that the ACCC's power to issue a New Price Disallowance Determination should be broadened to include a power to specify an alternative price to the one proposed by NBN Co.

Furthermore, given the complex issues that may need to be considered and the need for consultation with stakeholders, iiNet submits that the ACCC should have discretion to extend the six month period in which to make a determination when reasonably required.

4. THE REASONABLENESS OF NBN CO'S PROPOSED PRICES FOR MULTICAST PRODUCTS

iiNet notes that both Optus and Telstra have raised concerns about the prices for multicast products¹⁰. iiNet shares these concerns.

In order to demonstrate iiNet's concerns regarding the prices for NBN Co's multicast products, iiNet has carried out a modelling exercise which compares the additional costs to iiNet to deliver the iiNet TV with Fetch service to iiNet's 'on net' customers¹¹ and the additional costs that would apply to deliver the service if NBN Co's multicast

¹⁰ Optus, Submission to the ACCC Consultation Paper: NBN Co Limited 2012 Special Access Undertaking, 18 January 2013, pp. 97-98; NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper – variation of NBN Co Special Access Undertaking, 2 May 2013, p. 28.

¹¹ These are customers who are provided with a broadband service using the ULLS or LSS connected to an iiNet DSLAM.

products are used. This modelling is set out in a confidential spread sheet which is attached to this submission (**the Multicast Pricing Model Spread Sheet**).

[C-I-C]

iiNet respectfully submits that the fact that the three largest internet service providers in Australia are all voicing concerns about the viability of a multicast product using the NBN should be given appropriate weight by the ACCC. However, iiNet acknowledges that, given the advance stage of consideration of the SAU, it may not be appropriate to delay acceptance of the SAU until the issues relating to multicasting have been resolved. In light of this, iiNet submits that it is appropriate for the Multicast AVC Offer and the Multicast Domain Offer to be removed from the Revised SAU.

This would allow access seekers and NBN Co further time to negotiate multicast prices and allow access seekers to seek an access determination from the ACCC if agreement cannot be reached. iiNet is concerned that if NBN Co's multicast prices are accepted by the ACCC for inclusion in the SAU, NBN Co may seek to use this as a justification not to lower the prices in the future even if a compelling case is made for them to be lowered. In this scenario, unless the changes to the Price Review Arrangement mechanism discussed in section 3.1 above are made, the ACCC will not be able to use the Price Review Arrangement mechanism to lower the prices until 1 July 2018.

5. THE INCREASED SIGNIFICANCE OF THE MULTILATERAL SFAA FORUM IN ACHIEVING ACCESS TO REASONABLE NON PRICE TERMS AND CONDITIONS

NBN Co included detailed terms and conditions on the following matters in the December 2012 SAU:

- Dispute Management;
- Information and Rights Management;
- Risk Management; and
- Service Levels,

For ease of expression referred to collectively as the **Non Price Terms**.

iiNet agrees with the ACCC's conclusion in the Draft Decision that the Non Price Terms are not acceptable. iiNet acknowledges that the ACCC has concluded that detailed terms on these matters should be removed from the SAU and resolved through commercial negotiation between the parties. While iiNet acknowledges and understands the ACCC's reasons for doing this, iiNet is disappointed with this outcome, as it results in the SAU failing to deliver reasonable non price terms.

iiNet is also concerned that, judging by NBN Co's response to the Draft Decision¹², NBN Co may not have fully taken on board the reasons why the Non Price Terms were rejected by the ACCC and NBN Co appears instead to be taking issue with the ACCC's approach and reasoning in respect of the Non Price Terms in a number of

¹² NBN Co Submission to ACCC Consultation Paper on variation of NBN Co SAU Appendix B – Service Levels and Non-Price Terms and Conditions included in WBA May 2013.

significant respects, meaning that access seekers may effectively be back to 'square one' as regards achieving reasonable non price terms of access. This concern is magnified given the complete absence of a regulatory recourse mechanism for non price terms in the Revised SAU¹³ and the impending expiry of the current Wholesale Broadband Agreement and the pressure that access seekers will come under to accept the new version of the Wholesale Broadband Agreement shortly after the SAU has been accepted - i.e. leaving no time to seek regulated terms from the ACCC.

iiNet believes that the approach that the ACCC has taken to the Non Price Terms and regulatory recourse mean that the Multilateral SFAA Forum takes on a new significance. iiNet believes that NBN Co's obligations relating to the Multilateral SFAA Forum in the Revised SAU amount to little more than a requirement to establish a forum that allows access seekers and Consumer Advocacy Groups to suggest changes to the SFAA. There is no obligation on NBN Co to give reasonable consideration to any requests for changes or to acknowledge the existence of any regulated terms made by the ACCC.

iiNet is also concerned that the existence of the Multilateral SFAA Forum could in practice have the effect of acting as a barrier to access seekers being able to approach the ACCC to make regulated terms in circumstances where NBN Co takes the position that it is still considering an access seeker's request for an amendment to the SFAA (i.e. the ACCC may not feel inclined to act in circumstances where one of the parties indicates it is still considering its position). Furthermore, due to confidentiality constraints, it may be difficult for access seekers to fully inform the ACCC of the terms NBN Co is offering prior to formal publication of the SFAA. In light of these issues, iiNet believes that the provisions in the SAU relating to the Multilateral SFAA Forum need to be strengthened. iiNet submits that the following additional commitments should be included in the SAU:

- Where an access seeker makes a written request to NBN Co to vary the terms of the SFAA, NBN Co must as soon as reasonably practicable inform the access seeker in writing whether NBN Co agrees or disagrees with the proposed variation.
- Any confidentiality restrictions that apply to NBN Co's negotiations with an access seeker will not apply to the disclosure of information to the ACCC provided that the ACCC is informed that the information is confidential to NBN Co.
- When considering possible future changes to the terms of the SFAA, NBN Co must act reasonably and consider and have regard to:

¹³ iiNet agrees with the ACCC's conclusion that the regulatory recourse mechanism in the December 2012 SAU was not acceptable. However, for reasons stated in iiNet's previous submissions, iiNet does not agree that the Revised SAU should contain no regulatory recourse mechanism for non price terms.

- the existence of any applicable Access Determinations or Binding Rules of Conduct;
- the extent to which NBN Co is obliged to comply with any Access Determinations or Binding Rules of Conduct if requested to do so by an access seeker; and
- whether it would be desirable to include the terms of the Access Determinations or Binding Rules of Conduct in the SFAA.

iiNet notes the view expressed in the Consultation Paper that issues that arise in negotiations between the parties could be dealt with by seeking procedural directions from the ACCC under section 152BBA of the CCA¹⁴. However, iiNet respectfully submits that using section 152BBA of the CCA is not the most efficient way of dealing with the issues discussed above.

As part of the December 2012 SAU, NBN Co sought to include commitments in respect of the Multilateral SFAA Forum. This presents an opportunity to put in place a framework that will remove the need for parties to have to rely on section 152BBA of the CCA and the need for parties to expend the additional time and resources that will be required to do so. Viewed in the context of the changes that the ACCC has required NBN Co to make to the December 2012 SAU, strengthening the Multilateral SFAA Forum commitments in the ways discussed above would be a relatively straightforward and easy thing to do as part of the process of getting the December 2012 SAU into a form where it is capable of being accepted.

iiNet believes that not strengthening the Multilateral SFAA Forum Commitments due to the existence of section 152BBA of the CCA is likely to lead to access seekers, NBN Co and the ACCC spending further time and resources resolving problems in the future on bilateral basis that could reasonably be resolved now on a multilateral basis as part of the SAU process. In other words, iiNet submits that strengthening the Multilateral SFAA Forum commitments so that the issues discussed above are dealt with upfront presents the most efficient way of dealing with these issues from a regulatory perspective.

6. TELSTRA'S PROPOSED VARIATIONS TO THE PRODUCT DEVELOPMENT AND WITHDRAWAL PROVISIONS

iiNet notes that in response to the Draft Decision, Telstra put forward the view that the SAU lacked effective and robust consultation processes in relation to product development and Telstra put forward proposals to address this problem¹⁵. The ACCC is seeking comments on Telstra's proposals.

iiNet agrees that including the following additional commitments in the Revised SAU would reduce information asymmetries between NBN Co, access seekers and end-users and would facilitate a more effective degree of consultation.

- NBN Co being required to provide updates each time a material change is made to a proposed product.

¹⁴ Consultation Paper, p.23.

¹⁵ NBN Co Special Access Undertaking Telstra's response to the ACCC Consultation Paper – variation of NBN Co Special Access Undertaking Public Version 2 May 2013, at p.18.

- RSPs having an opportunity to make formal submissions within reasonable timeframes and NBN Co having a positive obligation to consider those submissions.
- NBN Co being required to provide reasons for its decisions.
- It be a pre-condition to the introduction of a new product that:
 - the product attributes, technical attributes and services attributes of the Product Idea are complete and have been fully documented; and
 - NBN Co has undertaken consultation in relation to these matters as required by the PDF Processes.
- NBN Co being required to consult through the Product Development Forum on its initial assessment on whether to develop a product idea (including when NBN Co has decided not to proceed with developing a product idea).
- NBN Co being required to include proposed price related terms in a Product Construct Paper.
- NBN Co being required to publish and maintain an Integrated Roadmap that outlines how IT support and operational support are being developed for new products under development.

7. **REMOVAL OF THE CONCEPTS OF REFERENCE OFFERS AND NON-REFERENCE OFFERS IN FAVOUR OF RELIANCE ON THE PRODUCT WITHDRAWAL CONFERRAL OF POWER**

The utility of the concept of Reference Offer is not only in respect of NBN Co's commitment to offer and not withdrawal the Reference Offers. There is also a specific commitment which restricts NBN Co's ability to increase the prices of Reference Offers prior 1 July 2017 except in the case of a Tax Change Event (i.e. the ability for NBN Co to increase the Maximum Regulated Price for the Reference Offers by CPI - 1.5% each year does not apply before 1 July 2017)¹⁶. For ease of expression, NBN Co not being permitted to increase Reference Offer Prices by up to CPI - 1.5% each year before 1 July 2017 will be referred as the **Reference Offer Price Commitment**. While in principle iiNet is not against the idea of removing the concepts of Reference Offers and Non Reference Offers in order to simplify the Revised SAU, iiNet is not in agreement with doing this if it results in the removal of the Reference Offer Price Commitment or the removal of any other commitment made in respect of Reference Offers.

As regards the operation of the Reference Offer Price Commitment, consistent with iiNet's views in section 3.1 above, iiNet believes that the Reference Offer Prices prior to 1 July 2017 should be subject to the Price Review Arrangement mechanism. Therefore, the Reference Offer Price Commitment should not prevent the possibility of a rebalancing of the Reference Offer prices prior to 1 July 2017 under the Price Review Arrangement mechanism.

¹⁶ See clause 1C.3

8. VARIATIONS WHICH CLARIFY THE INTERACTION BETWEEN THE CPI - 1.5% PRICE INCREASE CAPS AND THE LTRCM

In the Draft Decision the ACCC formed the view that it was not clear whether the CPI-1.5 per cent price increase caps or the revenue allowance determined using the LTRCM would take precedence at different stages during the SAU term¹⁷. It was not clear that the price increase caps and the annual revenue requirements interacted as intended so that:

- NBN Co could not increase prices above the price increase caps even if the revenue requirement determined using the LTRCM allowed this; and
- NBN Co could not increase prices by the full CPI - 1.5% if this led to the revenue requirement determined using the LTRCM being exceeded

In other words, it is intended that NBN Co is always subject to the CPI-1.5 per cent price increase caps and must lower prices if Maximum Regulated Prices would result in NBN Co earning more than the allowed revenues determined under the LTRCM.

The ACCC has proposed variations to ensure clarity over this matter and to ensure that these provisions operate as intended. iiNet believes that the price control arrangements are a fundamental feature of the SAU. In light of this, it is crucial to ensure that they operate as intended. Accordingly, iiNet supports the ACCC's proposed variations.

Herbert Geer Lawyers on behalf of iiNet Limited

26 July 2013

¹⁷ Draft Decision section 5.1.