

1 November 2012

Mr Richard Home  
General Manager  
NBN Engagement and Group Coordination Branch  
Communications Group

By email: [richard.home@accc.gov.au](mailto:richard.home@accc.gov.au)

Dear Richard,

**Re: NBN Co Special Access Undertaking (SAU) – request for clarification**

I refer to your letter of 26 October 2012 seeking clarification on two matters relating to NBN Co's Special Access Undertaking (SAU). Our response to your request is set out below.

***Categorisation of SAU provisions***

As required under section 152CBA(3A) of the CCA:

- in clause 1.1 of the SAU, NBN Co undertakes to be bound by the Category B SAOs (to the extent those obligations would apply to NBN Co); and
- in clause 1.2 of the SAU, NBN Co undertakes to comply with the terms and conditions specified in the SAU in relation to the Category B SAOs.

NBN Co submits that all of the terms and conditions in the SAU are terms and conditions in relation to section 152CBA(3A) of the *Competition and Consumer Act 2010* (CCA) and as such all of the terms and conditions in the SAU should be assessed by the ACCC pursuant to the criteria in section 152CBD(2)(b) of the CCA.

NBN Co submits that, as required by section 152CBD(2)(b) of the CCA, all of the terms and conditions of the SAU are consistent with the Category B SAOs and are reasonable (see sections 9 and 10.2 of NBN Co's Supporting Submission).

While the above is NBN Co's position in relation to all of the terms and conditions of the SAU, it is possible that the ACCC may adopt an alternative view that some or all of the conduct specified in Schedule 1I (Product Development and Withdrawal) may only fall within 'specified conduct' under section 152CBA(3C) of the CCA.

If the ACCC were to adopt such a view of any part of Schedule 1I of the SAU, NBN Co considers that in accordance with section 152CBD(2)(cb) of the CCA the specified conduct in Schedule 1I will promote the long-term interests of end-users (LTIE) for the reasons set out in section 10.3 of the Supporting Submission.



## ***SAU commitments about Standard Form of Access Agreement***

### ***Compliance with the terms and conditions in the Annexures to Schedule 1H***

In relation to the Annexures in Schedule 1H (non-price terms and conditions), NBN Co undertakes to:

- incorporate the terms and conditions in these Annexures into any Standard Form of Access Agreement (SFAA); and
- maintain such terms in any SFAA subject to the changes permitted in the SAU (i.e. changes arising from the Multilateral SFAA Forum approved by the ACCC and changes resulting from the reviews required under Schedule 1K).

As part of its assessment of whether to accept/reject the SAU, NBN Co expects the ACCC will consider the reasonableness of the terms and conditions in the Annexures.

If the SAU is accepted, the ACCC and/or access seekers will be able to seek legal action against NBN Co for breach of the SAU if it does not incorporate and maintain the terms and conditions in the Annexures in any SFAA in accordance with the commitments made in the SAU (as summarised above) in relation to those terms and conditions.

Any breaches of the terms and conditions in the Annexures of Schedule 1H that are incorporated into any SFAA will be dealt with as a contractual matter between NBN Co and its Customers under their access agreement, rather than as a breach of the SAU. The same approach applies in relation to service levels that are included as an Annexure to Schedule 1J (Service level commitments).

### ***Interaction between Annexures and ACCC ADs and BROCs***

The Annexures to Schedule 1H and Schedule 1J of the SAU specify a comprehensive set of terms and conditions in relation to dispute management, confidentiality and intellectual property rights, risk management and service levels for the duration of Module 1 (subject to the changes permitted by the SAU, which are intended to ensure that these terms and conditions can remain relevant and reasonable over time, for example, in light of operational experience of NBN Co and access seekers).

These terms and conditions reflect NBN Co's current state of operational and commercial readiness, the significance of these particular terms for both Customers and NBN Co and, accordingly, the desirability of having certainty and stability in respect of these terms and conditions (once they have been considered as part of the SAU) via the commitments described above.

These terms and conditions have been developed via comprehensive and detailed review and engagement with NBN Co's Customers during the Contract Development Process, and have changed significantly from these matters in the current Wholesale Broadband Agreement. NBN Co believes that the terms and conditions reflect an appropriate balance between the interests of NBN Co and Access Seekers and are reasonable.

Part XIC of the CCA operates so that the ACCC is able to make, vary or withdraw an Access Determination (AD) or Binding Rule of Conduct (BROC) relating to access to declared services provided by NBN Co. This could include setting out different terms and conditions to those specified in the Annexures to the SAU. However such an instrument will have no effect



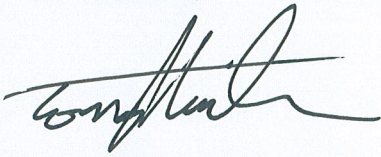
to the extent to which it is inconsistent with the terms set out in the SAU (including Annexures) as a result of the operation of sections 152CBIA and 152CBIB of the CCA.

Other non-price terms and conditions (e.g. financial management terms) are not referred to in the SAU and are only dealt with in the SFAA. This approach provides a clear demarcation between the terms of the SAU and terms that are set out only in the SFAA.

For clarity, this response is not commercial-in-confidence and may be published by the ACCC.

Please do not hesitate to contact me in relation to any of the above.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Lovell', written in a cursive style.

**for Caroline Lovell**  
Principal, Regulatory Affairs & Industry Engagement