

19 February 2014

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Anna Barker

Director, NBN Co Access Co-ordination – Communications Group

Australian Competition and Consumer Commission

Level 35, 360 Elizabeth Street

Melbourne, VIC 3000

Dear Ms Barker,

## Statement of differences—variation to Wholesale Broadband Agreement (WBA1) by execution of WBA2

The Wholesale Broadband Agreement (**WBA1**) is the contractual vehicle that NBN Co has used to supply products and services to its wholesale customers since its publication on 30 November 2011.

On 13 December 2013, a new Wholesale Broadband Agreement (**WBA2**) was published as the contractual vehicle that NBN Co will use to supply products and services to its wholesale customers for the next two years.

WBA1 was made available on NBN Co's website as a standard form of access agreement (**SFAA**) for the purposes of Part XIC of the *Competition and Consumer Act 2010* (**CCA**) from its publication until 13 December 2013, when it ceased being made available as an SFAA. When first published on 13 December 2013, WBA2 was made available as an SFAA.

As part of the transitional arrangements to move to supply under WBA2, NBN Co offered to extend access agreements based on WBA1 (after 20 December 2013 when those access agreements would otherwise have expired) to assist those Customers requiring additional time for administrative reasons before being able to enter into access agreements based on WBA2. The Customers listed in **Appendix A** entered into variations extending their access agreements based on WBA1 until 31 January 2014.

On 14 February 2014, the Customers listed at **Appendix A** entered into access agreements with NBN Co based on WBA2. These new access agreements have the effect of further varying both Customer's access agreements based on WBA1 (extending the term of the agreements until 28 February 2014), where WBA1 was no longer available as an SFAA at the time these variations were entered into.

Accordingly, we provide this statement of differences as between the varied access agreements based on WBA1 and the SFAA for WBA2. A high-level description of the key differences between WBA1, and the SFAA for WBA2, is set out in **Appendix B**.

NBN Co provides this statement of differences having regard to section 152BEBA of the CCA, and having regard to the ACCC's letter of 6 February 2014 in which the ACCC confirmed that where NBN Co enters into a variation agreement with a customer that is based on WBA1, where WBA1 was no longer available as an SFAA at the time

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the variation agreement was entered into, NBN Co may lodge a statement of differences which is a written document specifying certain matters.

We understand that approach approved by the ACCC in its letter of 6 February 2014 applies only the specific circumstances outlined above. NBN Co does not take this as an indication of the ACCC's general approach to assessing and enforcing NBN Co's compliance with its statutory obligations around access agreement lodgement and obligations to provide statements of differences. NBN Co understands that unless the ACCC determines otherwise, the form of statements of differences specified in the guidelines still applies in all circumstances other than those outlined above.

Access agreements and variation agreements will be lodged as required by section 152BEA of the CCA in due course.

Capitalised terms used in this letter have the meaning given to them in WBA1.

Yours sincerely



Caroline Lovell

Head of Regulatory Affairs & Industry Analysis

## **Appendix A: WBA1 customers that executed an access agreement based on WBA2**

1. On Q Network Operations Pty Ltd
2. TPG Internet Pty Ltd



## Appendix B: key differences between the varied WBA1 and the SFAA for WBA2

WBA2 provides improvements for customers with respect to a range of terms, including service delivery, risk management, dispute management and change management, as well as protections offered with respect to confidential information and intellectual property rights. In addition, WBA2 has been drafted to improve its structure, consistency and clarity, including the creation of a unified Dictionary for the entire agreement.

Some specific differences with WBA1 include the following:

1. Module B (Financial Management): amended to include dispute resolution for Billing Disputes (previously set out in the NBN Co Operations Manual);
2. Module C (Operational Management): amended to ensure upstream contract alignment, and the obligation for customers to pass-through certain terms in their downstream customer contracts has been removed;
3. Module D (Information and Rights Management): amended to satisfy SAU requirements—D1 (Confidential Information) has been replaced by the equivalent provisions from the ACCC's local bitstream access service declaration; D5 (Intellectual Property) has been amended to narrow rights for the parties to use each other's IPRs, include recognition that any broader rights for NBN Co to use Customer IPRs will require negotiation for such rights on commercial terms and remove the requirement to comply with the NBN Co Brand Use Guidelines;
4. Module E (Risk Management): substantially simplified and the broad exclusions of NBN Co's liability that were formerly in E2.7 have been removed to reflect NBN Co's commitments in the SAU; amended to clarify that (1) NBN Co limits its liability by excluding economic loss occasioned to end users by negligent acts or omissions of NBN Co to the extent that that loss can lawfully be excluded and (2) the indemnities between NBN Co and Customer are mutual except to the extent appropriate given the asymmetric nature of a supply relationship;
5. Module F (Agreement Management): amended to reduce NBN Co's unilateral change rights, in response to Customer concerns and ACCC feedback;
6. Module G (Dispute Management): significantly redrafted for clarity, as well as alignment with NBN Co's obligations as set out in the SAU and approaches taken in other industries, including to allow the parties to have a matter dealt with by expert determination or mediation without the need to involve the resolution advisor;
7. Product Catalogue: substantially rewritten for clarity and consistency, with significant substantive changes to the Service Level Schedule (including new order types, improved end user connection timeframe commitments, introduction of commercial rebates, clarification of CSG compensation arrangements, strengthening of the corrective action obligation, and the inclusion of service levels and performance objectives for a range of metrics);
8. Operations Manual: substantially rewritten to improve clarity and content;
9. NBN Co Platform Interfacing Service (**NPIS**): while commitments regarding the NPIS remain in the WBA, including regarding change management, the B2B specifications themselves have been removed from the WBA;
10. Product Development Forum Terms: incorporated by reference the PDF Processes set out in the SAU and also incorporated amendments to the confidential information and intellectual property rights provisions to reflect ACCC feedback on the SAU;
11. Term: the Expiry Date is defined as 1 March 2016 (subject to change in accordance with clause F2.2 of the Head Terms) or such other date as the parties may agree in writing.