

Wholesale Broadband Agreement

Contract Development Process

30 NOVEMBER 2011



This document forms part of version 1.0 of NBN Co's Wholesale Broadband Agreement which is a Standard Form of Access Agreement for the purposes of Part XIC of the Competition and Consumer Act 2010.

NBN Co Limited

Wholesale Broadband Agreement

Contract Development Process

30 November 2011

Version: 1.0

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Environment

NBN Co asks that you consider the environment before printing this document

Background

- A On 30 November 2011, NBN Co published a short term wholesale broadband agreement that is intended to apply until 30 November 2012 (**Short Term WBA**) as a standard form access agreement for the purposes of Part XIC of the *Competition and Consumer Act 2010* (Cth) (**SFAA**).
- B NBN Co intends to publish a wholesale broadband agreement that will apply to the period following the term of the Short Term WBA (**Long Term WBA**) in accordance with the timetable set out in Appendix 1 (**WBA Roadmap**).
- C NBN Co is committed to the CDP through which NBN Co will, among other things, seek Customers' feedback on the further refinement of the Long Term WBA and, where appropriate, the terms of the Short Term WBA.

1 Objectives of the CDP

- (a) NBN Co is committed to having wholesale broadband agreements which are fair and reasonable to all parties and which give effect to NBN Co's statutory obligations.
- (b) It is intended that the CDP will provide a framework, consistent with applicable laws, for
 - i Customers to identify their key issues of concern and interact with NBN Co and other Customers; and
 - ii NBN Co to take into account communications from Customers and seek to resolve in good faith their Key Issues,in the further refinement of the Long Term WBA and, where appropriate, the Short Term WBA.

2 Scope of the CDP

2.1 The CDP is the forum for the refinement of the Long Term WBA

- (a) NBN Co will comply with the CDP in the further refinement of the Long Term WBA and, where appropriate, the Short Term WBA.
- (b) Recognising that the terms of the Long Term WBA are under continuous improvement, NBN Co may also propose changes to the Long Term WBA in the course of the CDP.

2.2 Roadmap

- (a) NBN Co has established the WBA Roadmap.
- (b) NBN Co will publish updated drafts of the Long Term WBA for consultation from time to time in accordance with the WBA Roadmap.
- (c) The WBA Roadmap may be updated from time to time by NBN Co in accordance with section 14 and will be made available on NBN Co's Website.

2.3 Interaction with Wholesale Broadband Agreement

Nothing in the CDP will limit the effect of the provisions of an executed Short Term WBA.

3 Participation in the CDP

- (a) NBN Co will nominate a CDP Representative and notify each Customer of the name, mail address, email address and fax number for its CDP Representative and keep them updated from time to time.
- (b) Each Customer that wishes to participate in the CDP must register a CDP Representative with NBN Co.
- (c) By registering a CDP Representative and participating in the CDP, a Customer agrees that it will comply with the terms of this document.
- (d) NBN Co will send all correspondence regarding the CDP to a Customer's CDP Representative.
- (e) Each Customer must ensure that it provides to NBN Co details of the name, mail address, email address and fax number for its CDP Representative and keep them updated from time to time.
- (f) A Customer may withdraw from participation in the CDP by notice in writing to NBN Co at any time.

4 Short Term WBA

- (a) The Short Term WBA sets out the terms and conditions on which NBN Co will supply the products and services included in the Short Term WBA to Customer.

- (b) Where Key Issues have been resolved (within the meaning of clause 7.5), NBN Co will implement the relevant changes to the Short Term WBA pursuant to clause 7.5 of the CDP and the change control provisions of the Short Term WBA. Any outcomes of the CDP will not otherwise affect the terms of a Short Term WBA.
- (c) Execution of a Short Term WBA will not set a precedent for, and will not prejudice the nomination of a Key Issue or any party's position taken in respect of, the Long Term WBA.
- (d) During the term of the Short Term WBA, NBN Co will be free to continue to improve existing services and introduce new products and services and new product-related terms into the Short Term WBA in accordance with its terms.

5 Establishment of the CDP and Key Issues

5.1 Customer identification of Key Issues

- (a) **Key Issues** are the issues which arise from the provisions of the Short Term WBA which a Customer considers are material and must be satisfactorily resolved prior to execution of the Long Term WBA.
- (b) Customers should review the documents comprising the Short Term WBA to establish those matters which they consider to be Key Issues.
- (c) Each Customer should identify and provide to NBN Co in writing a list of its Key Issues including their context and rationale, categorised into, and prioritised within, one of the following core areas:
 - i product issues;
 - ii operational matters;
 - iii commercial matters; and
 - iv legal terms.
- (d) A Customer must notify its Key Issues to NBN Co by no later than the later to occur of the date specified in the WBA Roadmap and, if the Customer executes a Short Term WBA, the date that is 20 Business Days after the date of execution of that agreement.
- (e) NBN Co and Customers will communicate with the objective of agreeing on the scope of the Key Issues within the timeframes

specified in the WBA Roadmap to ensure a common understanding of the subject matter and scope of each Key Issue.

5.2 Key Issue prioritisation

- (a) Customers should prioritise the Key Issues identified under paragraph 5.1.
- (b) Prioritisation will affect both the schedule for assessment and development of a Key Issue and the resources committed by NBN Co to the resolution of that Key Issue.

6 NBN Co's assessment of a Key Issue

6.1 Criteria for assessment

In seeking to resolve Key Issues within the timeframes specified in the WBA Roadmap, NBN Co will have regard to, and consider in good faith, the following criteria:

- (a) significance to Customer individually and NBN Co of the Key Issue;
- (b) significance to one or more other Customers generally of the Key Issue;
- (c) the likely impact of the Key Issue on End Users;
- (d) whether the Key Issue has, in NBN Co's view, already been resolved;
- (e) whether there is any real likelihood of resolving the Key Issue;
- (f) potential technical and operational quality issues raised by the Key Issue;
- (g) resources required to resolve the Key Issue;
- (h) the Non-Discrimination Obligation and wholesale-only status;
- (i) potential regulatory issues related to the Key Issue;
- (j) government policy;
- (k) environmental impact of the Key Issue;
- (l) health and safety concerns related to the Key Issue;
- (m) the legitimate business interests of Customers and of NBN Co; and
- (n) any other factor that NBN Co reasonably considers should be taken into account.

6.2 Ongoing assessment

NBN Co will comply with the CDP as any consequential issues concerning Key Issues are raised by a Customer or another Customer during the CDP and deal with those issues iteratively.

6.3 Unresolved Key Issues

Following assessment of a Key Issue, if NBN Co decides not to progress a resolution of that issue, it will give specific reasons in writing to the relevant Customer for NBN Co deciding not to progress that issue.

7 Engagement

7.1 Bilateral Customer engagement

- (a) As part of seeking to resolve Key Issues, NBN Co will engage with Customers on their Key Issues on a bilateral basis. Such engagement may include workshops to be held with Customers (**Workshops**) to discuss and seek to resolve the Key Issues on a bilateral basis.
- (b) If NBN Co does not convene Workshops on a bilateral basis, NBN Co may seek the input of Customers through alternative means suited to the particular Key Issues (for example, by seeking written submissions).

7.2 Multilateral Customer engagement

- (a) Where appropriate, NBN Co may convene Workshops on a multilateral basis discuss and seek to resolve Key Issues. The multilateral engagement process will include at least the elements set out in Appendix 2.
- (b) As permitted by law, NBN Co intends to hold a multiparty forum that will be open to all Customers following the release of at least version one and version two of the draft Long Term WBA, as referred to in the WBA Roadmap, in order to provide Customers with an opportunity to discuss the amendments of those drafts.

7.3 Process for engagement

- (a) NBN Co wishes by means of the CDP to obtain broad-industry commitment to the engagement process so that all parties have confidence that the CDP will facilitate discussion and resolution of Key Issues.

- (b) Workshops (or other means of engagement) will be held with all Customers who wish to engage in the CDP in accordance with this document.
- (c) NBN Co intends that this engagement process will occur once Customers have had a sufficient time to identify the Key Issues under section 5.1 and NBN Co has had an opportunity to consider those issues in accordance with section 6.
- (d) Subject to the confidentiality obligations in this CDP, NBN Co will create, maintain and make available to Customers participating in the CDP a common register of Key Issues discussed during the engagement process, noting which issues are outstanding and those that have been resolved with the purpose of ensuring Customers are kept aware of the status of Key Issues from time to time.
- (e) Parties may agree milestones for resolving particular Key Issues. Failure to meet a milestone or allegations of bad faith negotiations may result in escalation.
- (f) In the interests of expedience and efficiency, Key Issues may be bundled for resolution together.
- (g) All discussions and contributions will be held on a without prejudice basis.
- (h) As NBN Co and Customers seek to resolve Key Issues through engagement, NBN Co may from time to time issue documents to Customers which reflect refinements and changes proposed during engagement to facilitate discussion.

7.4 Escalation

- (a) For a Key Issue where resolution cannot be reached by respective parties within the agreed engagement model and within a reasonable period, parties may escalate the resolution of that Key Issue to more senior management (Head of Product Development and Sales for NBN Co and equivalent senior executive for Customer).
- (b) Where more senior management cannot resolve a Key Issue, that Key Issue may be escalated to senior management (eg CEO of NBN Co and CEO of Customer).

- (c) It is not intended that escalation of Key Issues will occur by way of multi-lateral meetings between senior executives from different Customers.
- (d) Nothing in this CDP precludes a Customer or NBN Co discussing Key Issues with other Customers or raising Key Issues with a Regulator if they wish to do so.

7.5 Resolution of Key Issues

- (a) For the purposes of the CDP, a Key Issue will be regarded as having been resolved if:
 - i NBN Co and Customers unanimously determine that the Key Issue has been resolved; or
 - ii after having assessed the Key Issue and engaged with Customers in accordance with the CDP, NBN Co reasonably considers that general consensus has been reached between NBN Co and Customers in relation to the Key Issue.
- (b) If a Key Issue has been resolved and NBN Co wants to implement corresponding changes to the Short Term WBA, NBN Co may issue a notice under clause F4.1(n) of the WBA and, subject to clauses 7.5(c) and (d), the change will take effect in accordance with that notice.
- (c) During the 10 Business Day period following the issue of a notice under clause F4.1(n) of the Short Term WBA, a Customer may approach the ACCC to issue a binding rule of conduct on NBN Co under Division 4A of Part XIC of the *Competition and Consumer Act 2010* (Cth) (**BROC**), relating to the proposed change and must simultaneously give notice to NBN Co of such an approach and the details of the Customer's concerns.
- (d) If the ACCC:
 - i issues a BROC in respect of a proposed change, NBN Co will, in the 10 Business Day period following the issue of that BROC, by notice to Customer, either:
 - A cancel the implementation of the proposed change;
 - B suspend the implementation the proposed change for a period specified in the notice or until the occurrence of an event specified in the notice; or

- C implement the proposed change in a manner consistent with that BROC; or
- ii does not issue a BROC in respect of a proposed change, NBN Co may implement the proposed change within 10 Business Days of receiving notice of the ACCC's decision not to do so.

8 Submissions

- (a) From time to time, NBN Co may request submissions from Customers and other third parties in relation to a Key Issue or following the release of revised draft documents such as the draft Long Term WBA (each a **Submission**).
- (b) NBN Co may notify Customers and other third parties that Submissions are required by a particular deadline, which NBN Co will ensure is reasonable in the circumstances.
- (c) NBN Co may extend a deadline notified under paragraph (b) by providing Customers with further notice.

9 Revisions to WBA

- (a) NBN Co will, in good faith, in seeking to refine the Long Term WBA and, where appropriate, the Short Term WBA:
 - i take into account the communications from Customers to NBN Co in the course of the CDP; and
 - ii seek to resolve the Key Issues having regard to those communications.

However, NBN Co may not be able to implement a Key Issue in the manner resolved bilaterally with a Customer, including due to differing views of different Customers.

- (b) If a Key Issue is not able to be implemented in the manner resolved bilaterally with a Customer, NBN Co will inform the Customer and further bilateral and multilateral discussions may be held, including potential escalation by the parties.
- (c) NBN Co will inform Customers when it determines that the Workshops, Submissions and other contributions provided by Customers have provided sufficient input to allow NBN Co to produce a satisfactory draft Long Term WBA for the purposes of the CDP.

- (d) NBN Co will implement in the Long Term WBA the outcome of Key Issues that have been resolved under the CDP.
- (e) NBN Co presently intends to publish a final draft Long Term WBA in accordance with the WBA Roadmap.

10 Implementation of Long Term WBA as SFAA

- (a) NBN Co presently intends that the Long Term WBA will be published as an SFAA in accordance with the WBA Roadmap.
- (b) The Long Term WBA will include any necessary transition provisions for products and services to be supplied under the Long Term WBA.

11 Confidentiality

- (a) Subject to this section 11, the content of communications between parties under the CDP which is designated confidential by a participant must be kept confidential (**Confidential Information**) and must not be disclosed or used other than in accordance with this clause 11.
- (b) Subject to clause 11(c), where NBN Co determines it necessary or desirable in relation to a specific Key Issue, NBN Co may disclose Confidential Information concerning the nature of the Key Issue and the proposed resolution of that Key Issue to other Customers in the course of the CDP:
 - i in a generic manner which does not reveal the source of the issue or the details of the relevant Customer, after having consulted and reached an agreement with that Customer as to the form of such disclosure; or
 - ii with consent of the relevant Customer.
- (c) Provided that NBN Co:
 - i notifies the relevant Customer of the particulars of the required disclosure;
 - ii gives the relevant Customer a reasonable opportunity to take any available steps to challenge the proposed disclosure or make it subject to an obligation of confidence; and
 - iii uses reasonable endeavours to ensure that a person to whom the NBN Co discloses Confidential Information in

accordance with this clause 11(c) keeps the disclosed information confidential.

- (d) Participants may disclose the nature of Key Issues and the proposed resolution of Key Issues to other participants or a Regulator provided that disclosure does not disclose any Confidential Information. Nothing in this clause 11 precludes the disclosure of a Customer's own Confidential Information, should it wish to do so.
- (e) NBN Co may disclose Confidential Information to a third party, if it is required to do so by law, any government agency, or any order of any court or tribunal.
- (f) Each party agrees that damages may not be an adequate remedy for a breach of this clause 11 and that a party is entitled to seek specific performance or injunctive relief for a breach, anticipatory breach, or reasonably suspected breach of this clause 11.

12 Non discrimination

- (a) Sections 152AXC and 152AXD of the *Competition and Consumer Act 2010* (Cth) (the **Non-Discrimination Obligation**) impose obligations on NBN Co in relation to non-discrimination.
- (b) In order to ensure NBN Co's compliance with the Non-Discrimination Obligation at all times, all the provisions of this document and the results of the CDP are subject to the Non-Discrimination Obligation and nothing in the CDP requires NBN Co to act inconsistently with the Non-Discrimination Obligation.

13 Dispute resolution procedures do not apply to the CDP

Having regard to the consultative nature of the CDP, the dispute resolution provisions in any Short Term WBA or any other NBN Co access agreement do not apply to:

- (a) the CDP or the implementation of the CDP (including the suspension, prioritisation, assessment, acceptance, rejection, finalisation, endorsement or implementation of any amendment or proposed amendment to the WBA);
- (b) any act or omission of NBN Co in the course of the conduct of the CDP;

- (c) any participation or non participation by any person in the CDP; or
- (d) any aspect of this document,

and no matter or circumstance which arises between participants (including NBN Co) in the CDP can give rise to a dispute to which the provisions of any Short Term WBA or any other NBN Co access agreement apply.

14 Changes to the CDP

14.1 Consultation with Customers

- (a) NBN Co may make changes to the CDP under this clause 14.1 that are designed to better achieve the objectives set out in clause 1.
- (b) NBN Co will consult with Customers before making any change to the CDP and will consider and, as appropriate, circulate feedback provided by Customers before making changes.
- (c) If NBN Co intends to make a change to the CDP, it will notify Customers of the proposed change and provide a reasonable period within which Customers may provide feedback.
- (d) Once it has considered any feedback provided under paragraph (b), NBN Co will:
 - i make any consequential amendments it determines to be necessary or desirable and provide Customers with an updated copy of the CDP, which sets out the final changes, and notify Customers of the date from which the update take effect; or
 - ii notify Customers that NBN Co has determined not to make any change to the CDP.
- (e) Notwithstanding anything else in this clause 14.1, NBN Co may not make a change to the CDP under this clause 14.1 (including the WBA Roadmap) if the change would materially adversely affect the integrity of the CDP.

14.2 Review of CDP

- (a) NBN Co will review the CDP if any Regulatory Event occurs.
- (b) If NBN Co determines that the CDP requires amendment following a Regulatory Event, NBN Co will:

- i notify Customers of the proposed change and provide a reasonable period within which Customers may provide feedback;
- ii make any amendments which NBN Co considers necessary pursuant to Customers' feedback;
- iii provide Customers with an amended copy of the CDP.

Schedule 1 Definitions and Interpretation

1 Definitions

A word which is not defined in this document, but is defined in a Short Term WBA, has the meaning given to that term in that agreement.

Except where the context otherwise requires, a term or expression that is defined in this section has the meaning given to it in this section:

CDP means the contract development process described in and contemplated by this document, the purpose of which is to achieve the objectives set out in clause 1.

CDP Representative means an authorised representative of NBN Co or Customer (as the case may be) in relation to the CDP.

Customer means a person who has entered into:

- i) a Trial Agreement extant as at the date of publication of the Short-Term WBA (whether or not that person has ordered any product under that agreement);
- ii) an agreement for the supply of Interim Satellite Services; or
- iii) a Short Term WBA with NBN Co (whether or not that person has ordered any product under that agreement and whether in respect of the supply by NBN Co of carriage services).

Trial Agreement means an agreement for the supply of products or services by NBN Co to access seekers on a trial basis.

Appendix 1

WBA Roadmap

Event	Date
Publication of Short Term WBA as an SFAA	30 November 2011
Short Term WBA available for execution	From 30 November 2011
Identification by Customer of Key Issues	31 January 2012
Conduct of bilateral engagement	February - October 2012
Release of first version of Long Term WBA	April - May 2012
Submissions	May - October 2012
Multilateral engagement	May - October 2012
Release of final version of Long Term WBA	1 October 2012
Engagement on final version of Long Term WBA	October 2012
Publication of Long Term WBA as an SFAA	31 October 2012
Long Term WBA available for execution	From 1 November 2012

Appendix 2

Multilateral Customer engagement elements

- Issuing consultation papers.
- Issuing revised drafts of the Long Term WBA.
- Conduct of open forums that may employ a variety of tools to resolve Key Issues, including webinars, conference calls, teleconferences and specific working groups to resolve particular Key Issues.
- Issuing from time to time of a consolidated position document for consideration by Customers.
- Verbal and written feedback to Customers on Key Issues.
- Subject to any applicable confidentiality obligations under this CDP, issuing minutes of meetings with Customers.