

## FREEDOM OF INFORMATION REQUESTS – STATEMENTS OF REASONS

### GENERAL BACKGROUND INFORMATION

AND

### NBN CO'S COMMERCIAL ACTIVITIES EXEMPTION

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#### General Background

1. NBN Co Limited (**NBN Co**) is a government business entity (**GBE**), which has the mandate of realising the Australian Government's vision to develop a national broadband network that is truly national in character.
2. NBN Co recognises that information is a vital and an invaluable resource, both for the company and for the broader Australian community. That is why NBN Co fosters and promotes a pro-disclosure culture, with the goal of creating an organisation that is open, transparent and accountable. In that light, members of the public will be able to find a large amount of information freely available on our [website](#).
3. In addition, NBN Co manages its information assets within the spirit and terms of the *Freedom of Information Act 1982* (**the FOI Act** or **the Act**). We also endeavour to release information proactively, while taking into account our commercial and other legal obligations.
4. Under subsection 23(1) of the FOI Act, NBN Co's Chief Executive Officer has authorised NBN Co's FOI Officer – or other relevant NBN Co staff members – to make decisions about access to documents under the FOI Act.
5. Under section 26 of the FOI Act, the FOI Officer is required to provide a Statement of Reasons for his/her decisions in relation to FOI access applications. The FOI Officer is also required to set out findings on any material questions of fact, referring to the material upon which those findings were based.
6. The FOI Officer's findings of fact, application chronology and other relevant information will be found in the formal Statement of Reasons, which will be provided separately to the individual FOI Applicant.
7. Subject to relevant exemptions, the FOI Act gives the Australian community the right to access documents held by Commonwealth Government agencies, as well as "prescribed authorities", such as NBN Co. It is important to note that Part II of Schedule 2 of the FOI Act exempts NBN Co from the operation of the Act in respect of documents relating to its commercial activities. That section of the FOI Act is outlined below, along with background information regarding the application of the commercial activities exemption to NBN Co documents.

### NBN Co's Commercial Activities Exemption

8. NBN Co is a "prescribed authority" and is subject to the FOI Act. However, Part II of Schedule 2 of the FOI Act exempts NBN Co from the operation of the Act in respect of documents relating to its commercial activities. As per [section 7\(3A\) of the FOI Act](#), "commercial activities" mean:

(a) *activities carried on by NBN Co on a commercial basis; or*

(b) *activities, carried on by NBN Co, that may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.*

9. It is open to NBN Co's FOI Officer to consider whether information requested by an FOI Applicant falls within the terms of section 7(3A) of the FOI Act and is, therefore, not subject to the operation of the Act.

10. In relation to any FOI application, the FOI Officer is required to consider if relevant documents fall within the definition of "commercial activities" and, as a threshold question, whether they are – or are not – subject to the operation of the FOI Act. The Office of the Australian Information Commissioner (**the OAIC**) considered the phrase "commercial activities" in relation to NBN Co in the OAIC review decision, [Internode Pty Ltd and NBN Co Ltd \[2012\] AICmr 4](#) (**the Internode Decision**).

11. In the Internode Decision, the OAIC's FOI Commissioner, Dr James Popple, held that NBN Co's Definitive Agreements with Telstra (**the Telstra Deal**) fell within the terms of section 7(3A) of the FOI Act for a variety of reasons. Key among those reasons is that NBN Co will draw a financial benefit from the Telstra Deal, which is valued at in excess of \$9 billion. The Telstra Deal also translated financial heads of agreement with Telstra into binding legal agreements that will govern NBN Co's use of Telstra's infrastructure as well as the decommissioning of some of Telstra's network capability during the network's rollout.

12. In considering the application of NBN Co's commercial activities exemption in the Internode Decision, the FOI Commissioner reviewed two cases dealing with commercial activities provisions analogous to those governing NBN Co. In particular, those cases were *Bell v Commonwealth Scientific and Industrial Research Organisation [2008] FCAFC 40* (**the CSIRO Decision**) and *Johnston and Australian Postal Corporation [2006] AATA 144* (**the AusPost Decision**). Drawing from the CSIRO Decision, the FOI Commissioner quoted the Federal Court's holding that:

*"...activities are conducted on a commercial basis if they are related to, engaged in or used for commerce" (Underlined emphasis added);*

Also drawing from the CSIRO Decision in the Internode Decision, the FOI Commissioner highlighted:

*"...the importance of the whole of the circumstances including the commercial goal (profit-making or the generation of income or return) in determining whether particular activities are sufficiently related to commerce to be characterised as commercial activities" (Underlined emphasis added).*

13. In the Internode Decision, the FOI Commissioner also drew from the AusPost Decision, in which the Commonwealth Administrative Appeals Tribunal considered various dictionary definitions and concluded that "commercial activity":

*"...can be regarded as a business venture with a profit-making objective and, strictly speaking, will involve activity to generate trade and sales with a view to profit. This is particularly so when the volume of activity is on a large scale" (Underlined emphasis added).*

14. However, NBN Co's commercial activities exemption is different in scope to the AusPost and CSIRO exemptions. For reference, the general exemptions relating to those Commonwealth bodies contain a competitive element and only exclude documents relating to commercial activities in competition with private entities. As NBN Co's general exemption does not contain a similar competitive element, it can be read as broader in nature. The FOI Commissioner affirmed that proposition in his OAIC review decision, [Battersby and NBN Co Ltd \[2013\] AICmr 61](#) (the **Battersby Decision**). In particular, the FOI Commissioner indicated – at paragraph 16 of the Battersby Decision – that:

*"I do not take this difference to mean that NBN Co's 'commercial activities' are limited to activities carried on in competition with persons whether government or non-government. For NBN Co, under s 7(3A), 'commercial activities' means those of its current activities that are – or that are reasonably expected, in the future, to be – carried on on (sic) a commercial basis. There is no requirement that those activities be competitive; it is enough that they are intended to make a profit (as explained in Bell and in Johnston). In practice, this distinction may never arise: it may be that all of NBN Co's profit-making activity is also competitive. But there is no doubt that the definition of 'commercial activities' is broader for NBN Co than it is for other government business enterprises listed in Part II of Schedule 2." (Underlined emphasis added)*

15. In the Battersby Decision, the FOI Commissioner considered whether the appointment of a corporate advisor in relation to the Telstra Deal was "commercial" in the context of NBN Co's commercial activities exemption. The FOI Commissioner found that the appointment of a commercial advisor may not have been a commercial matter in-and-of-itself. However, the FOI Commissioner found that the appointment of a corporate advisor was sufficiently close to NBN Co's commercial activities as to fall within the meaning of the commercial activities exemption. A key consideration was whether the appointment had commercial considerations and how closely related it was to a commercial purpose. That reasoning brings a decision-maker back to the text of [section 7\(4\) of the FOI Act](#). That section reads as follows:

*7(4) In subsection (2AA) and Part II of Schedule 2, a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities. (Emphasis added)*

16. It is clear that there is no single test to determine whether an activity will fall within the definition of NBN Co's "commercial activities" per section 7(3A) of the FOI Act. However, the FOI Officer would need to consider whether the activity, to which the relevant document relates:

- Is engaged in or used for commerce; and/or
- Has a commercial goal or purpose, based on the whole of the circumstances; and/or
- Generates trade, sales or income with a view to a profit.

17. It is also clear that NBN Co's operations generally fall within the above criteria and have profit-making as a goal. NBN Co's previous [Shareholder Ministers' Statement of Expectations](#) (the **Previous SOE**) emphasises this fact by outlining our Shareholder Ministers' and the Commonwealth Government's vision for NBN Co and that:

- The company should operate as a commercial entity;
- At an appropriate time, NBN Co will raise debt on its own behalf;
- During rollout, the Government will provide equity funding, so as to provide NBN Co and the market with the certainty required to enter into long-term commercial contracts;

- During rollout, the Government will also retain full ownership of NBN Co in order to achieve its policy objectives, but with the intention to privatise the company once the Minister for Broadband, Communications and the Digital Economy declares the network to be built and fully operational, among other conditions precedent;
- NBN Co should continue to conduct its planning and the execution of its strategy in a publicly transparent manner, subject to any requirements for commercial confidentiality, and reflect this in its annual reporting;
- As a GBE, NBN Co is subject to the [Commonwealth GBE Governance and Oversight Guidelines](#) (October 2011) (the GBE Guidelines);
- In the GBE Guidelines, the “Mandate and Objectives” section outlines that a GBE’s principal objective is to add to shareholder value. To achieve this objective, GBEs are required to:
  - operate efficiently,
  - at minimum cost for a given scale and quality of outputs,
  - price efficiently; and
  - earn at least a commercial rate of return.
- GBEs are to work toward a financial target and a dividend policy, agreed in advance with the Shareholder Ministers.
- Financial targets are to be set on the basis that each GBE should be required to earn commercial returns at least sufficient to justify the long-term retention of assets in the business and to pay commercial dividends from those returns.

18. Following the change of Government in September 2013, NBN Co received an updated [Shareholder Ministers’ Interim Statement of Expectations](#) (the Current SOE), which amends and forms part of the Previous SOE. It should be noted that the Current SOE refers to making a smooth transition to the current Government’s national broadband policy and minimising disruption to construction and other matters. As a finding of fact, the FOI Officer is of the opinion that the Current SOE largely reflects the principles in the Previous SOE, the GBE Guidelines as well as current governance and commercial structures.

19. Drawing from the above points, it follows that NBN Co clearly operates as a commercial entity within a GBE context. However, the “commercial” nature of individual NBN Co documents must be judged on a case-by-case basis and, drawing from the CSIRO decision, reviewed in light of “the whole of the circumstances”.

20. In making a determination as to the application of NBN Co’s commercial activities exemption, the FOI Officer will apply the above general principles to the specific documents found within the scope of an FOI request. However, specific reasons, findings of fact and other contentions will be contained in the formal Statement of Reasons supplied to the individual FOI Applicant.