

Pool Members Industry Consultation

July 2018





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1. Introduction

1.1 Background

Under the terms of the Wholesale Broadband Agreement (**WBA**), **nbn** and its Customers agree to manage and resolve disputes that may arise under or in relation to the agreement in accordance with a set of rules that are set out in Module G of that agreement (the Dispute Management Rules).¹ **nbn** has incorporated the same Dispute Management Rules into its other Standard Forms of Access Agreement (SFAAs), as published on its website.²

The Dispute Management Rules provide that certain functions and responsibilities, which contribute to the fair and efficient resolution of disputes, are to be performed by appointees to the roles of 'Pool Member' and 'Panel Member'. The functions and responsibilities of each role are described in the Dispute Management Rules.

nbn has made certain commitments in its Special Access Undertaking (SAU) about the way in which Pool Members and Panel Members will be nominated and appointed, as well as the standard terms on which they will be appointed. These commitments are intended to ensure that Pool Members and Panel Members can perform their functions and responsibilities independent of the parties to the dispute, thereby facilitating the achievement of fair and efficient dispute resolution outcomes using consistent and unbiased dispute resolution processes.

1.2 About this consultation

This consultation paper seeks the views of Customers and Access Seekers on candidates for re-appointment to the Pool. There are currently 24 Pool Members appointed under the Dispute Management Rules, each appointed for a term of two years. The expiry dates of current appointments range from September 2018 through to March 2019 (as the Pool Members were consulted on, approved by the ACCC and appointed in a number of 'tranches').

nbn is proposing to re-appoint the majority of the current Pool Members for a further term of two years from the expiry of their current appointment.

Section 3 of this paper sets out the proposed candidates for re-appointment to the Pool, along with their professional expertise, current location and expiry date of their current appointment. A copy of each candidate's CV and/or Bio and the daily rates that would apply in the event of their appointment to a Panel are set out in Confidential Appendices to this paper.

We know that our Customers and Access Seekers are very busy. Please be assured there is no obligation for you to respond to this consultation paper, but you're welcome to do so if you so choose.

Submissions in response to this consultation paper should be sent by email to contractmanager@nbnco.com.au by no later than 5:00pm on 30 July 2018.

nbn will consider all submissions to be public submissions. If a respondent wishes to provide commercial-in-confidence material as part of its submission, **nbn** requests that the respondent provides public and confidential versions of its submission, with the commercial-in-confidence material in its public version substituted with an appropriate symbol or marking.

¹ Excluding billing disputes, which are resolved in accordance with separate billing dispute processes.

² See <https://www.nbnco.com.au/sell-nbn-services/supply-agreements.html> for **nbn**'s other Standard Forms of Access Agreement, including the the Satellite Mobility Agreement, Test Agreement, Continuity Licences (consisting of the Pre-Transfer Agreement and Continuity Agreement), Fibre TV Agreement and Interim CSAS Agreement.



2. Pool Members

2.1 Role of Pool Members

The Dispute Management Rules provide various means by which a dispute may be resolved, including mediation, expert determination, an alternative agreed dispute mechanism, and panel arbitration. If the disputing parties do not agree to use mediation, expert determination or any other alternative agreed dispute mechanism to resolve the dispute, either of the disputing parties may refer the dispute to the Resolution Advisor to arrange for panel arbitration, in which case the members of the arbitral panel will determine the dispute by arbitration.

2.2 Selection of Panel Members

The process for selecting members of the arbitral Panel is prescribed by the Dispute Management Rules.

If the dispute is referred to the Resolution Advisor to arrange for panel arbitration, the Resolution Advisor is required to select three current and available members of the Pool for appointment as members of the arbitral Panel.³ Although the Resolution Advisor is responsible for selecting the members of the arbitral Panel, the disputing parties are responsible for appointing the persons selected by the Resolution Advisor as members of the arbitral Panel. Such appointments need to be made on the standard terms of appointment⁴ that have been approved by the ACCC (subject to certain permissible variations that may be made by the Resolution Advisor).⁵

2.3 Appointment of Pool Members to the Pool

The process for the appointment of members of the Pool is set out in Schedule 1H of the SAU. The process is summarised in the table below:⁶

	Description
Step 1	nbn seeks views of Customers and Access Seekers on candidate(s) for appointment to the Pool (i.e. this consultation)
Step 2	Having regard to various matters prescribed by the SAU, nbn nominates one or more candidate(s) for appointment to the Pool by providing the ACCC with a written notice setting out the name, expertise and experience of the candidate(s)
Step 3	The ACCC decides whether to approve or reject the nominated candidate(s) for appointment to the Pool
Step 4	nbn appoints the ACCC-approved candidate(s) for appointment to the Pool on the Approved Pool Member Terms of Appointment. ⁷

³ Clause G4.2(a)(iii) of the Dispute Management Rules.

⁴ See <https://www.nbnco.com.au/content/dam/nbnco2/documents/approved-panel-member-terms-of-appointment-december-2014-v1-1.pdf>

⁵ Clause G4.2(g) of the Dispute Management Rules.

⁶ Clause 2.1 of Annexure 1 of Schedule 1H of the SAU.

⁷ The Standard Pool Member Terms of Appointment were approved by the ACCC on 18/12/2014, and are available on **nbn**'s website - <https://www.nbnco.com.au/sell-nbn-services/supply-agreements/dispute-management.html>



When selecting candidates for nomination for appointment to the Pool, the SAU requires **nbn** to have regard to a range of factors, which are summarised below:

1. the submissions received by Customers and Access Seekers in response to this consultation;
2. the need for the Pool to comprise members who have a reasonably diverse and balanced range of professional skills and experience;
3. the need for the Pool to comprise a sufficient number of members to enable panel arbitrations to proceed in the manner contemplated by the Dispute Management Rules;
4. the need for the Pool to contain a reasonable proportion of legal practitioners or dispute resolution practitioners in its membership;
5. the need for candidates to have an understanding of the Australian telecommunications industry (or be able to acquire such an understanding quickly); and
6. the experience of candidates in dispute resolution procedures.⁸

2.4 Term of appointment

The Dispute Management provisions in Schedule 1H of the SAU (which set out the process for Pool Member appointment) currently apply until 30 June 2019. **nbn** expects to separately engage with Customers and Access Seekers on the dispute management arrangements to apply post-30 June 2019 in the coming months.

In the meantime, **nbn** proposes to appoint the candidates identified in section 3 of this consultation paper for a term of two years from the expiry of their current appointment.

3. Candidates for Nomination as Pool Members

nbn is proposing to nominate the following candidates for re-appointment to the Pool.

Candidate	Professional experience/background	Location	Expiry of current appointment
Albert Monichino QC	Senior Counsel; ACICA; CIArb; IAMA grade 1 arbitrator	Melbourne	11/09/2018
Don Ryan QC	Queen's Counsel; former Federal Court Judge; accredited mediator	Melbourne	11/09/2018
Francis Douglas QC	Queen's Counsel; CIArb	Sydney	11/09/2018
Jim Holmes	Industry expert in telecommunications policy, regulatory and commercial operations	Melbourne	11/09/2018
Jonathon Redwood	ACICA; barrister	Sydney	11/09/2018
Malcolm Gracie	IAMA grade 1 arbitrator; barrister; CIArb	Sydney	11/09/2018
Michael Heaton QC	Queen's Counsel; ACICA; CIArb; IAMA grade 1 arbitrator	Melbourne	11/09/2018

⁸ Clause 2.1(d) of Annexure 1 of Schedule 1H of the SAU.



Rob Nicholls	Telecoms engineer; telecoms regulatory specialist; member of Resolution Institute (accredited mediator)	Sydney	11/09/2018
Stephen White	IAMA grade 1 arbitrator; solicitor; computer professional	Sydney/ Melbourne	11/09/2018
Steven Goldstein	IAMA grade 1 arbitrator; barrister; civil engineer;	Sydney	11/09/2018
Terry Mehigan	ACICA; barrister; Representative of ICC Australia on ICC Commission on Arbitration and ADR	Sydney	11/09/2018
Tony Samuel	ACICA; forensic accountant	Sydney	18/12/2018
Michael Sweeney	ACICA; IAMA grade 1 arbitrator; CIARB; barrister	Melbourne	18/12/2018
Philip Argy	IAMA arbitrator; solicitor; computer / IT professional	Sydney	18/12/2018
Raymond Finkelstein QC	Queen's Counsel; former Federal Court judge; former acting Solicitor-General of Victoria; former President of the Australian Competition Tribunal and Australian Copyright Tribunal; adjunct professor in Law at Monash University	Melbourne	18/12/2018
Mark Dempsey SC	Senior Counsel; ACICA, CIARB	Sydney	18/12/2018
Dominique Hogan-Doran SC	FCIARB; NSW Bar approved arbitrator; Supreme Court of New South Wales Mediator Panel	Sydney	21/12/2018
Annabelle Bennett AO SC	Arbitrator of the Court of Arbitration for Sport; former Federal Court judge; former Presidential Member of the Administrative Appeals Tribunal	Sydney	6/03/2019
David Levin QC	Queen's Counsel; IAMA grade 1 arbitrator; CIARB	Melbourne	6/03/2019
Greg Thorpe	IAMA grade 3 arbitrator; engineer; regulated network industry professional	Brisbane	6/03/2019
Mary Walker	Member of the International Mediation Institute Standards Commission; member of Australia International Dispute Centre Mediation Panel; previous Chair of the Law Council of Australia Federal Litigation	Sydney	6/03/2019
Michael Shand QC	Queen's Counsel; CIARB	Melbourne	6/03/2019
Ian Harley Bailey SC	Senior Counsel; IAMA grade 1 arbitrator; professorial fellow in Law at University of Melbourne; previous Vice-President of IAMA	Sydney	16/03/2019

In regard to table above:

- **ACICA** means the Australian Centre of International Commercial Arbitration
- **CIARB** means the Chartered Institute of Arbitrators
- **IAMA** means the Institute of Arbitrators and Mediators Australia



4. Next steps

As outlined in section 1.2, submissions in response to this consultation paper should be sent by email to contractmanager@nbnco.com.au by no later than **5:00pm on 30 July 2018**.

Following this consultation process, **nbn** will proceed with the steps identified in section 2.3 of this paper.



Appendix A Candidates' proposed rates

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Appendix B Candidates' CVs and/or Bios

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