



Australian  
Competition &  
Consumer  
Commission

# NBN Co Special Access Undertaking

## Final Decision

13 December 2013

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# List of abbreviations and acronyms

ABBRR	Annual Building Block Revenue Requirement
ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
ACIPA	Annual Construction in Progress Allowance
AVC	Access Virtual Circuit
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CFO	Chief Financial Officer
CPI	Consumer Price Index
CVC	Connectivity Virtual Circuit
FANOC	FANOC Pty Limited
HFC	Hybrid Fibre Coaxial
ICRA	Initial Cost Recovery Account
LTRCM	Long Term Revenue Constraint Methodology
NBN	National Broadband Network
NBN Co	NBN Co Limited
NFAS	NBN Co Fibre Access Service
NNI	Network to Network Interface
NWAS	NBN Co Wireless Access Service
PDF	Product Development Forum
POIs	Points of Interconnection
RAB	Regulatory Asset Base
SAOs	Standard Access Obligations
SAU	Special Access Undertaking
SFAA	Standard Form of Access Agreement
UNI	User Network Interface
WACC	Weighted Average Cost of Capital
WBA	Wholesale Broadband Agreement

# Glossary

**Access agreements** – An agreement between a carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid Access Agreement are set out in section 152BE of the *Competition and Consumer Act 2010*.

**Access determinations** – Written determinations made by the ACCC relating to terms and conditions for access to a declared service.

**Access seeker** – A content service provider or carriage service provider that makes, or proposes to make, a request to NBN Co for access to its services, as defined in section 152AG of the *Competition and Consumer Act 2010*.

**Ancillary services** – NBN Co defines this as the services supplied by NBN Co that facilitate the supply of the NBN access service, but excludes the facilities access service.

**Annual revenue requirements** – The amount of revenue that NBN Co would be required to earn to recover its costs in a particular year. Over the SAU term, the annual revenue requirements will provide NBN Co an opportunity to recover all of its costs.

**AVC (access virtual circuit)** – An Ethernet-based Layer 2 virtual connection that carries traffic to and from an end-user on NBN Co's fibre, wireless, or satellite networks.

**Binding rules of conduct** – Written rules made by the ACCC specifying any or all terms and conditions for compliance with Standard Access Obligations or requiring compliance with any or all applicable Standard Access Obligations in a manner specified in the rules. These rules are made when there is an urgent need to do so.

**Building block model** – A methodology used to calculate NBN Co's annual revenue requirements.

**Building block revenue period** – The period of the SAU term during which NBN Co's prices will be set to recover its annual revenue requirements. This period follows the initial cost recovery period.

**Carriage service** – This is defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

**Consumer advocacy group** – This means a body or association whose functions include representing the interests of consumers of telecommunications services in Australia, including small businesses, special interest groups and not-for-profit organisations.

**Customer** – NBN Co defines this as a carrier or carriage service provider that has entered into, or is otherwise subject to, an Access Agreement with NBN Co.

**CVC (connectivity virtual circuit)** – NBN Co defines this as an Ethernet-based Layer 2 virtual capacity for the transport of customer traffic from multiple end-users within a Connectivity Serving Area on an aggregated basis and presented at the Network-Network Interface at the point of interconnect associated with that Connectivity Serving Area (CSA).

**Data rate** – The number of binary bits per second of data passing through an interface during a given time.

**Draft decision** – The document published on 4 April 2013 that contained the ACCC's preliminary views on the 18 December 2012 SAU.

**Draft notice to vary** – A document published on 4 July 2013 that contained the ACCC's proposed variations to the 18 December 2012 SAU.

**Eligible service** – This is defined in section 152AL of the *Competition and Consumer Act 2010* as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons).

**Explanatory statement** – A document published on 8 October 2013 that outlined the key changes that were made to the draft notice to vary when finalising the notice and addresses the views put forward in submissions to the draft Notice to Vary.

**Facilities access service** – Described by NBN Co as a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a point of interconnect for the purpose of interconnecting its network with the NBN Co network.

**FANOC Pty Limited (FANOC)** – a company formed by the G9 Consortium of telecommunications companies. In May 2007 FANOC lodged an SAU with the ACCC in respect of its prospective fibre-to-the-node broadband access service. The ACCC made a draft decision on the SAU in December 2007. FANOC withdrew the SAU in March 2008 before the ACCC made a final decision on the SAU.

**Initial cost recovery account (ICRA)** – NBN Co describes this as the account used to accumulate any initial unrecovered costs.

**Initial cost recovery period** – The initial period of the SAU term during which NBN Co will accumulate unrecovered costs, and then recover these costs as demand increases. NBN Co will be allowed to earn more revenue than allowed by its annual revenue requirements to recover these accumulated costs.

**Initial product roadmap** – NBN Co describes this as the document titled 'Initial Roadmap July 2012, version 2' published on NBN Co's website.

**Layer 2 bitstream** – A point-to-point data stream with defined interface protocol. It is independent of the underlying network technology and the services running over it.

**Listed carriage service** – A carriage service of the type listed in section 16 of the *Telecommunications Act 1997*, that is, a carriage service between two points where at least one point is in Australia.

**Long-term revenue constraint methodology (LTRCM)** – The methodology for determining the amount of revenue NBN Co would be able to earn via its prices over the SAU term. The key components are annual revenue requirements, a regulatory asset base and the initial cost recovery account.

**Multicast service** – A service which enables content to be transmitted simultaneously to multiple parties, but is carried as a single stream as far into the network as possible.

**Multilateral SFAA forum** – A multilateral forum established by NBN Co to consult with access seekers and consumer advocacy groups on possible future changes to the terms and conditions of SFAAs.

**NBN access service** – NBN Co describes this as a Layer 2 service supplied on the NBN Co network between and including: a User Network Interface on a Network Termination Device; and the Network-Network Interface at the point of interconnect associated with the relevant Network Termination Device, for the purpose of enabling an access seeker or another service provider that is a customer of an access seeker to supply carriage or content services.

**NBN Co** – NBN Co Limited.

**NBN Offer** – the set of products supplied by NBN Co comprising the product components, multicast services, platform interfacing offer, sandpit offer, NBN Co co-location offer, facilities access offer and standard business offer. NBN offers include products introduced during the SAU term, but do not include other charges.

**Network design rules** – The document that describes the design of NBN Co's fibre, wireless and satellite networks. This document has a role in determining the amount of capital and operating expenditure that NBN Co may recover via the SAU.

**Network termination device (NTD)** – The device on the customer end of an access network used to send and receive signals sent across the physical access medium.

**NNI (network-network interface)** – A physical interface between the NBN Co network and the access seeker's network at the point of interconnect.

**Notice to vary** – A notice issued to NBN Co under section 152CBDA of the *Competition and Consumer Act 2010* on 8 October 2013 that specified variations to the 18 December 2012 SAU.

**Other charge** – NBN Co defines this as an ancillary charge associated with the supply of a product component, product feature, ancillary service or type of facilities access service.

**PDF processes** – The provisions of Annexure 1 to Schedule 1I of the SAU. These provisions describe how NBN Co will engage with customers via the product development forum on the development and withdrawal of products.

**POI (point of interconnect)** – The geographical point where traffic stops being carried on the network of the access seeker and is given to the network owned by NBN Co to carry.

**Product components** – These are the UNI, AVC, CVC, NNI, and any new or varied product components introduced by NBN Co pursuant to the product development provisions in the SAU or any new or varied product components introduced by NBN Co that are Initial Products or Licence Condition Products.

**Product development forum (PDF)** – NBN Co describes this as the primary forum through which customers may submit new product ideas, provide input on the development of new and existing products, and obtain information from NBN Co on its current and future product offerings.

**Product features** – NBN Co defines these as the features of a product component that are made available by NBN Co and which are selectable and configurable by the customer in respect of that product component (for example, data transfer rate or traffic class associated with an Access Virtual Circuit).

**Regulatory asset base (RAB)** – Represents the value of capital investments made by NBN Co that it can recover via prices over the SAU term.

**Regulatory determination** – A term used in the SAU to mean either an Access Determination or a Binding Rule of Conduct.

**Response to submissions** – A document published on 4 July 2013 that provided the ACCC's reasons for the proposed variations contained in the draft Notice to Vary, and the ACCC's response to submissions on the draft decision on the 18 December 2012 SAU and the Consultation Paper on the Notice to Vary the SAU.

**SAU (special access undertaking)** – A voluntary undertaking given to the ACCC by a supplier of a telecommunications service specifying the terms and conditions upon which it agrees to supply a listed carriage service or a service which facilitates the supply of a listed carriage service.

**SAU term** – Refers to the term of NBN Co's Special Access Undertaking. This term commences on the date that the ACCC notifies NBN Co that it has accepted the SAU and ends on 30 June 2040.

**Standard business offer** – NBN Co defines this as its entry-level business grade service, including an AVC (25/10 Mbps, Traffic Class 4), a UNI-D and an optional UNI-V.

**Standard Form of Access Agreement (SFAA)** – A document published on the NBN Co website which sets out terms and conditions on which NBN Co is obliged to enter into in an Access Agreement with an access seeker upon request, and declares the services to which it relates.

**The SAU** – the SAU given to the ACCC on 19 November 2013.

**UNI (user-network interface)** – The physical interface where the end-user's equipment connects to NBN Co's network, either a data port (UNI-D) or a voice port (UNI-V).

**WACC (weighted average cost of capital)** – A method for calculating the minimum required cost of capital for a company. This method is calculated by using a weighted average of the costs of the sources of funding for a company.

**Wholesale broadband agreement (WBA)** – The WBA sets out comprehensive price and non-price terms in relation to the supply of NBN Co's services; and the processes for providing NBN Co's customers with operational and technical information in relation to those services. The WBA is a Standard Form of Access Agreement.

# Summary

This is the ACCC's final decision on the Special Access Undertaking (SAU) lodged by NBN Co Limited (NBN Co) on 19 November 2013, in response to the ACCC's notice to vary. The varied SAU incorporates all of the changes in the ACCC's notice to vary and replaces the undertaking submitted by NBN Co in December 2012.

The ACCC's role in assessing the SAU is defined by Part XIC of the *Competition and Consumer Act 2010* (CCA). Broadly, to accept an undertaking, the ACCC must be satisfied that the SAU is reasonable and will promote the long-term interests of end-users of the National Broadband Network (NBN).

For the reasons in this final decision, the ACCC is satisfied that the SAU meets the relevant criteria for acceptance under Part XIC of the CCA. Hence, the ACCC's decision is to accept the SAU. The SAU will commence on this day, 13 December 2013.

The SAU will form a key part of the framework that governs the price and other terms upon which NBN Co will supply NBN services to telecommunications companies, including wholesale and retail service providers. The SAU sets in place principles for the regulation of access to the NBN until June 2040. This is the first time that the ACCC has accepted an undertaking of this duration. However, the ACCC considers that the length of the SAU is appropriate given the modular structure of the SAU, which allows for different matters to be 'locked in' for different periods.

Key features of the SAU include:

- A modular structure which provides for different arrangements in different periods, allowing a balance between providing certainty about long-term cost recovery and flexibility to respond to changing circumstances.
- Long-term binding price caps to ensure that end-users are not subject to unreasonable price rises and to incentivise NBN Co to only incur efficient expenditure.
- An overall revenue cap and prudency measures, to provide NBN Co with the opportunity to recover its prudent and efficient costs over the term of the SAU.
- The ability for the ACCC to initiate price reviews to rebalance prices (subject to revenue neutrality) at certain times, as required.
- Product development and withdrawal provisions to ensure access seekers and consumer advocacy groups can participate in product development and to provide ACCC oversight of product withdrawal.
- Non-price terms and conditions in relation to points of interconnect (POIs) and rollout information and to allow for independent dispute resolution.

This final decision comes almost one year after the ACCC first began its assessment of the SAU lodged by NBN Co in December 2012. This process has included the release of several ACCC consultation documents, submissions being invited and submitted, NBN Co submitting a varied SAU in November 2013 (replacing the December 2012 SAU), and numerous informal consultations. It also follows the submission and withdrawal of two other undertakings by NBN Co and over three years of discussions between the ACCC, NBN Co, access seekers and other key stakeholders.

The accepted SAU incorporates all of the changes in the ACCC's notice to vary. For example, it increased the number of price reviews in Module 1 and removed a number of non-price terms and conditions from the SAU, leaving these more appropriately to commercial negotiations. Given the amendments to the original undertaking, the ACCC is now satisfied that the SAU meets the relevant criteria for acceptance.

The acceptance of the SAU by the ACCC provides the broad regulatory framework to facilitate effective engagement between NBN Co and access seekers to negotiate commercial agreements. The ACCC understands that a Wholesale Broadband Agreement (WBA) is currently under negotiation in the expectation of the SAU being accepted by the ACCC.

## The National Broadband Network

The Australian Government established NBN Co to design, build and operate the NBN. The NBN is intended to deliver high data rate broadband services to all Australians, by building an access network using a combination of optical fibre, wireless and satellite technologies.

The structure and function of NBN Co is established by the *National Broadband Network Companies Act 2011*. NBN Co is to operate as a wholesale-only company. This will deliver a key structural reform to the telecommunications sector, responding to longstanding competition concerns that have arisen from vertical integration in Australian telecommunications markets. That said, NBN Co will still be a monopoly provider, requiring ACCC oversight to ensure the terms and conditions of access to the NBN are in the long-term interests of end-users.

NBN Co is a wholly Commonwealth Government owned entity that has been prescribed as a Government Business Enterprise. Privatisation can only occur after certain conditions are met, as prescribed in section 47 of the *National Broadband Network Companies Act 2011*. Whilst NBN Co will be initially funded solely with Government equity, NBN Co is expected to operate on a commercial basis — that is, NBN Co is expected to recover its costs, including earning a commercial return on its investment.

## Regulatory framework

Part XIC of the CCA establishes the regulatory framework governing access to telecommunications infrastructure and provides for regulatory oversight by the ACCC, where necessary.

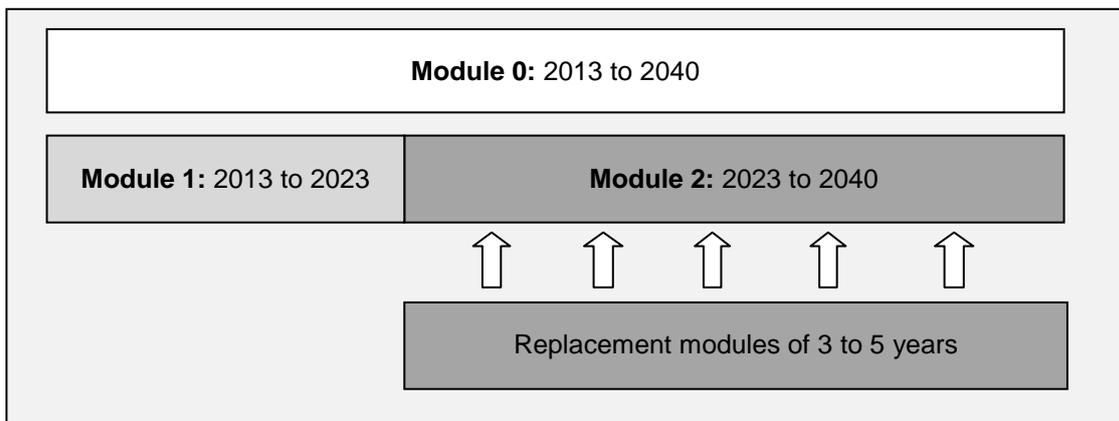
NBN Co is required to comply with certain obligations (Standard Access Obligations (SAOs)) including the supply of NBN services to access seekers upon request. In addition, Part XIC imposes 'non-discrimination obligations' on NBN Co.

NBN Co may comply with its obligations through commercial agreements with access seekers (Access Agreements), an accepted SAU, or ACCC determinations (Binding Rules of Conduct or Access Determinations). To the extent that there is inconsistency between these instruments, Part XIC establishes that Access Agreements will override other instruments.

## Overview of the SAU

While the SAU has an expiry date of 2040, its modular structure provides for matters to be 'locked in' for different periods of time (see figure 1). This allows for a balance between providing certainty about long-term cost recovery while retaining flexibility to respond to changing circumstances.

**Figure 1**      **Modular structure of the SAU**



## Module 0

Module 0 applies for the term of the SAU and provides the overarching structure and context to the other parts of the SAU. In particular, Module 0:

- Describes the services to which the SAU relates: the 'NBN access service' (a Layer 2 bitstream service), 'ancillary services' and the 'facilities access service'.
- Requires NBN Co to publish and maintain Standard Form of Access Agreements (SFAAs), which can form the basis of commercially agreed Access Agreements.
- Establishes a number of fixed principles terms and conditions relating to NBN Co's long-term cost recovery.

## Module 1

Module 1 contains terms and conditions that will operate from the commencement of the SAU until June 2023 (the initial regulatory period). Key elements include:

- A commitment to develop SFAAs with access seekers through a multilateral SFAA forum.
- A commitment to supply a suite of initial 'NBN offers' through which NBN Co will provide the NBN service.
- Initial prices for NBN offers and methods for changing prices over time, including restricting annual price increases to CPI minus 1.5 per cent, and the ability for the ACCC (or NBN Co) to initiate up to two price reviews to rebalance prices (subject to revenue neutrality), as required.
- The methodology for determining NBN Co's required revenue to cover its actual prudent and efficient costs, including an initial cost recovery account (ICRA) to carry forward any initial losses. The ACCC will have a role in ensuring that NBN Co's expenditure is prudent.
- Product development and withdrawal provisions to ensure access seekers and consumer advocacy groups can participate in product development and to provide ACCC oversight of product withdrawal.
- Non-price terms and conditions, including requiring NBN Co to publish POI and rollout information and to allow for independent dispute resolution.

## Module 2

Module 2 commences after the expiry of Module 1 and sets out the long-term arrangements for determining NBN Co's required revenue for the remainder of the SAU term (the subsequent regulatory period). During Module 2 NBN Co's annual revenue requirement will be based on forecast costs rather than actual costs, and NBN Co will submit 'replacement module applications', to operate for three to five years each, for ACCC approval. These replacement modules will include forecasts of NBN Co's expenditure, as well as other detailed terms and conditions proposed by NBN Co. Module 2 also contains the following provisions, similar to those in Module 1:

- the commitment to supply NBN offers
- the annual price cap on price increases and ability to rebalance prices
- product development and withdrawal provisions.

## Reasons for decision

The ACCC's reasons for its decision are set out in detail in Part B of this final decision, and are summarised below.

The ACCC has previously noted its support of the modular structure of the SAU. This allows for different regulatory arrangements to apply during Module 1 and Module 2, reflecting the different incentives and circumstances applying to NBN Co in these two periods. These incentives are discussed in more detail below.

### Incentives in Module 1

The regulatory arrangements applying in Module 1 largely reflect the uncertainty that NBN Co is likely to face during the construction of the NBN and until it starts making sufficient revenue to cover its efficient costs. This should provide NBN Co with incentives to incur only efficient costs and to price reasonably so as to encourage take-up of services.

The scale of the NBN rollout is unprecedented meaning there is significant uncertainty about the cost of the rollout. In these circumstances, setting NBN Co's required revenue based on forecast costs might put too much risk on NBN Co during this highly uncertain period. However, if NBN Co's required revenue is to be set using its actual costs, the ACCC needs to be satisfied that NBN Co has sufficient incentives to ensure its costs are prudent and efficient. These incentives are created through the pricing and revenue provisions in the SAU in Module 1.

Initial prices in the SAU are set at levels similar to current prices for copper and hybrid fibre coaxial (HFC) services and there is a limit on how much prices can change by each year. In particular, prices cannot increase by more than CPI minus 1.5 per cent each year. This means that NBN Co will only be able to increase its revenue by offering new products or increasing demand, meaning NBN Co has an incentive to innovate and to increase take-up of its services.

Given the level of initial prices and the anticipated low demand for NBN services initially, NBN Co's ability to increase its revenue will likely be constrained in Module 1. This, coupled with uncertain costs during the rollout of the NBN, means that NBN Co will have an incentive to minimise its costs during Module 1.

If NBN Co incurs inefficient costs, this could result in a higher revenue shortfall during Module 1. This shortfall will be capitalised in the initial cost recovery account (ICRA) to be recovered later. However, if NBN Co does not invest efficiently there is a risk that NBN Co will

not fully recover its costs, even with the ICRA. This should put downward pressure on NBN Co's costs.

In the event that NBN Co does not respond to the incentive to incur only efficient costs, the revenue provisions in Module 1 provide for ACCC oversight of NBN Co's operating and capital expenditure, to help ensure this is prudent. This should provide additional protection to ensure end-users only pay for NBN Co's efficient costs.

The CPI minus 1.5 per cent price cap, which applies to all products for the term of the SAU, should ensure smooth price paths over time. As discussed above, it should also ensure that NBN Co has an incentive to price products so as to encourage take-up during Module 1. To the extent that this incentive is less strong for the pricing of new products and previously zero-priced products, there is ACCC oversight of the pricing of these products. In particular, the SAU provides that the ACCC may undertake a price review of a new product or previously zero-priced product within 24 months of a price being introduced for these types of products.

In addition, the SAU provides for the ACCC or NBN Co to initiate a price review for any prices at various times during the term of the SAU. This would allow for prices to be rebalanced, subject to this being revenue neutral.

These two ACCC price oversight roles should provide protection for access seekers and end-users against NBN Co pricing in a way that does not promote the long-term interests of end-users. In summary, the ACCC is satisfied that the pricing and revenue provisions in Module 1 include sufficient incentives for NBN Co to incur only efficient expenditure and to price reasonably to promote the long-term interests of end-users.

## Incentives in Module 2

During Module 2 NBN Co's costs are likely to become more predictable and it is more likely to be recovering its costs.

Given the likely change in NBN Co's incentives and circumstances, Module 2 provides for more flexibility in the methodology for determining NBN Co's required revenue. In particular, NBN Co will submit 'replacement modules' to the ACCC for approval. These replacement modules can be between three and five years and will include NBN Co's costs for the corresponding period. This approach is similar to that used to regulate other established monopolies such as energy network businesses.

The ability to set different periods for the replacement module allows for different incentives to apply to NBN Co depending on the circumstances at the time. In particular, a longer period will provide greater incentives for NBN Co to minimise its expenditure, relative to its forecast allowance. Given the period in which Module 2 operates, the ACCC considers it appropriate to determine these issues at the time, considering NBN Co's circumstances.

The change in approach to setting NBN Co's required revenue is the key difference between Module 1 and Module 2. The pricing arrangements largely remain unchanged between the two periods. In particular, the ACCC will retain oversight of prices over the entire term of the SAU.

There are also a number of provisions that are intended to protect access seekers and end-users, which apply over the term of the SAU. These are discussed below.

## Protections for access seekers and end-users

There are a number of provisions that offer protections for access seekers and end-users. These include non-price provisions around SFAA processes, product development, variation and withdrawal, dispute resolution, and publishing of certain information.

The SAU requires NBN Co to produce and maintain SFAAs in relation to the supply of services covered by the SAU, for the duration of the SAU term. This ensures that access seekers have the option of obtaining supply of these services via Access Agreements based on an SFAA. Further, the term of any SFAA published during Module 1 is limited to two years (subject to extension by agreement between access seekers and NBN Co). This should ensure that access seekers are not prevented from taking advantage of ACCC regulatory decisions because they are locked into long-term Access Agreements.

The SAU sets out processes for developing SFAAs to facilitate engagement between NBN Co, access seekers and consumer advocacy groups in the development of the terms and conditions of any SFAA. This should increase transparency and involvement in the SFAA process.

The SAU includes provisions relating to product development and variation. In particular, the provisions commit NBN Co to developing products (through new or varied products) that access seekers want and are willing to pay for. They also provide for access seekers and consumer advocacy groups to participate directly in product development.

In respect of product withdrawal, NBN Co is first required to notify its intent to withdraw and the ACCC has the power to disallow the withdrawal (except where NBN Co is acting in response to a legal requirement or Shareholder Minister directive). This objection power is key to ensuring that only products that end-users no longer value are withdrawn.

The dispute management provisions in the SAU are designed to ensure the independence of the decision makers in disputes between NBN Co and its customers. The appointment of decision makers who are independent and free of bias is necessary to ensure impartial decision-making, and thus to promote the efficient, consistent and unbiased resolution of disputes.

The SAU requires NBN Co to publish information on points of interconnect (POIs) and the NBN rollout. The provision of this information is important to allow access seekers adequate time and information to plan efficient downstream investment.

The ACCC notes that previous undertakings submitted by NBN Co included a broader range of non-price terms and conditions. The ACCC has previously noted that the inclusion of such terms and conditions is not reasonable or in the long-term interests of end-users. The ACCC considers that these should be subject to commercial negotiation in the first instance.

## Provisions to support NBN Co's business interests

The revenue provisions (discussed above) should provide NBN Co with the opportunity to recover, through access prices, the efficient and prudent costs of providing the relevant services, including an appropriate return on investment.

To provide additional certainty regarding NBN Co's long-term cost recovery in Module 2, a number of provisions have been set as fixed principles terms and conditions. These relate to the roll-forward of the Regulatory Asset Base (RAB) and ICRA, and specify that the building block methodology will be used to determine NBN Co's required revenue in Module 2.

The term of the SAU (until 2040) is also in NBN Co's legitimate business interests. In particular, the ACCC considers that the term of the SAU is reasonable given the modular structure of the SAU, the scale of the rollout and the likely timeframe for recovering costs associated with construction of the NBN.

## Possible future developments

The ACCC expects that the SAU will facilitate commercial negotiations between NBN Co and access seekers. In particular, the ACCC understands that the Wholesale Broadband Agreement (WBA) is currently being renegotiated.

The ACCC retains its ability to make Binding Rules of Conduct or Access Determinations into the future. However, any such determination must be consistent with the SAU in order to have effect and will not override Access Agreements.

The ACCC notes that the government's NBN policy may change into the future. The ACCC considers that the SAU has the flexibility to work under a range of policy and infrastructure configurations. In addition, NBN Co can apply to the ACCC to vary the SAU if this is required or desired in light of any change in circumstances. Further, NBN Co retains the option to withdraw the SAU provided it gives 12 months' notice.

# Part A: Introduction

# 1. Background

This decision follows a long process of consultation and engagement between the ACCC, NBN Co, access seekers and other affected stakeholders. Pre-lodgement discussions started in 2010. NBN Co Ltd and NBN Tasmania Ltd submitted an undertaking in December 2011, which was later withdrawn in September 2012. A new undertaking was submitted in September 2012 and then withdrawn in December 2012. A new undertaking replaced the withdrawn undertaking in December 2012. This undertaking was then varied in November 2013 in response to the ACCC's notice to vary. This decision is on the varied SAU given in November 2013.

While the discussions prior to December 2012 were important to developing the December 2012 undertaking, the process discussed below focuses on the formal consultation undertaken in respect of this decision.

## 1.1. Consultation process

NBN Co Limited and NBN Tasmania Limited lodged an SAU with the ACCC on 18 December 2012.<sup>1</sup> The SAU specified matters relating to the provision of access to what NBN Co Limited and NBN Tasmania Limited termed the 'NBN access service' and 'ancillary services'. It also specified commitments relating to the 'facilities access service'.

On 4 April 2013, the ACCC released a draft decision setting out its preliminary view that it was not satisfied that the SAU lodged in December 2012 met the criteria for acceptance.<sup>2</sup>

Alongside its draft decision, the ACCC released a consultation paper seeking views on the variations to the December 2012 SAU that the ACCC was proposing to include in a notice to vary to be given to NBN Co Limited and NBN Tasmania Limited.<sup>3</sup> On 4 July 2013, the ACCC released for consultation a draft notice to vary.<sup>4</sup>

The ACCC gave NBN Co Limited and NBN Tasmania Limited a final notice to vary on 8 October 2013. On 19 November 2013, NBN Tasmania Limited formally withdrew the SAU lodged on 18 December 2012, while NBN Co Limited remained a party to the 18 December 2012 SAU.<sup>5</sup> On the same date, NBN Co Limited solely submitted a varied SAU in response to the ACCC's notice to vary.<sup>6</sup>

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<sup>1</sup> Pursuant to section 152CBA in Division 5 of Part XIC of the *Competition and Consumer Act 2010* (CCA).

<sup>2</sup> The criteria are specified in section 152CBD of the CCA and are discussed further in chapter 4.

<sup>3</sup> Submissions to the consultation paper were received from: AAPT, the Australian Communications Consumer Action Network (ACCAN), the Australian Communications and Media Authority (ACMA), the Competitive Carriers' Coalition (CCC), the Department of Broadband, Communications and the Digital Economy (DBCDE), Herbert Geer (on behalf of iiNet), John de Ridder, Macquarie Telecom, NBN Co, Optus, Telstra and Vodafone Hutchison Australia (VHA).

<sup>4</sup> Submissions to the draft notice to vary were received from: AAPT, the Competitive Carriers' Coalition (CCC), Herbert Geer (on behalf of iiNet), John de Ridder, Macquarie Telecom, NBN Co, Optus and Telstra.

<sup>5</sup> NBN Co, *Covering Letter – NBN Co Response to ACCC Notice to Vary*, 19 November 2013, available at: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013/sau-documents>

<sup>6</sup> NBN Co, *Covering Letter – NBN Co Response to ACCC Notice to Vary*, 19 November 2013, available at: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013/sau-documents>

Under Part XIC of the CCA, the ACCC must consider the varied SAU as if it had been given to the ACCC instead of the December 2012 SAU.<sup>7</sup> The varied SAU given to the ACCC is the SAU on which this decision is made.

On 20 November 2013, the ACCC published the varied SAU and invited people to make submissions by 28 November 2013.<sup>8</sup> Submissions to the varied SAU were received from:

- Optus, *Varied November 2013 NBN Co Special Access Undertaking*, 28 November 2013
- Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013

The ACCC has had regard to these submissions in making this decision on the varied SAU.<sup>9</sup>

## 1.2. Timeframe for decision

The ACCC must make a decision to accept or reject an undertaking within six months of receiving the undertaking.<sup>10</sup> The ACCC may extend, or further extend, the decision-making period by giving written notice to NBN Co.<sup>11</sup> If the ACCC does not make a decision within this period, it is deemed to have accepted the SAU.<sup>12</sup>

The ACCC's decision-making timeframe commenced after receiving the December 2012 SAU. This time period was extended by three months on 4 July 2013 (when the draft notice to vary was released for consultation), and by a further three months on 8 October 2013 (when the notice to vary was given to NBN Co).

In calculating the decision-making timeframe, the period beginning on 8 October 2013 (when the ACCC gave NBN Co the notice to vary) and ending on 28 November 2013 (the last day for submissions specified by the ACCC when it published the varied SAU) is to be disregarded.<sup>13</sup>

The ACCC has made this decision within the statutory timeframe.

## 1.3. Structure of the final decision

This final decision is structured as follows:

- Part A provides background to the ACCC's decision including:
  - the Part XIC regulatory framework — chapter 2
  - an overview of the SAU — chapter 3
  - the ACCC's approach to assessing the SAU — chapter 4.

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<sup>7</sup> Given the extent of the changes proposed by the ACCC in its notice to vary, the ACCC is required under subsection 152CBDA(3) of the CCA to publish the varied SAU and invite submissions that it must consider when making a decision on the varied SAU.

<sup>8</sup> CCA, ss. 152CBD(6) and 152CBD(2)(d).

<sup>9</sup> These submissions are available on the ACCC website at: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013/consultation-on-sau>

<sup>10</sup> CCA, s. 152CBC(5).

<sup>11</sup> CCA, s. 152CBC(7). Each extension must be for a period of not more than three months. The ACCC must explain in its notice why it was unable to make a decision on the SAU during the original decision-making period.

<sup>12</sup> CCA, s. 152CBC(5).

<sup>13</sup> CCA, s. 152CBC(6)(ac).

- Part B provides the reasons for the ACCC's decision including in relation to:
  - the structure and operation of the SAU — chapter 5
  - services and products covered by the SAU — chapter 6
  - maximum prices — chapter 7
  - the long-term revenue constraint methodology (LTRCM) — chapter 8
  - non-price terms and conditions — chapter 9
  - fixed principles — chapter 10.

## 2. Regulatory framework

This chapter discusses the legislative framework that underpins the regulation of access to telecommunications infrastructure, including the NBN.

Part XIC of the CCA establishes a telecommunications access regime that is administered by the ACCC. The general purpose of access regimes is to facilitate access to services provided by monopoly or bottleneck infrastructure in order to promote competition in related markets. Specifically, the object of Part XIC is to promote the 'long-term interests of end-users' of carriage services or of services provided by means of carriage services.<sup>14</sup> (The meaning of 'long-term interests of end-users' is discussed at section 4.2).

The SAU given by NBN Co is the first Special Access Undertaking to be assessed by the ACCC since the Part XIC legislative framework was significantly amended in 2011 (which included the introduction of a number of NBN-specific provisions). An accepted SAU would be a key part of the framework under which the NBN would be regulated. However, it is important to note that Part XIC establishes a regulatory framework that is broader than an accepted SAU.

Part XIC governs access to services provided by means of the NBN Co network as follows:

- Firstly, NBN Co must only supply services that are declared services (unless the services are not eligible to be declared services)<sup>15</sup> (discussed at section 2.1).
- Secondly, once its services are declared, NBN Co is required to comply with applicable Standard Access Obligations,<sup>16</sup> known as Category B Standard Access Obligations (SAOs)<sup>17</sup> (discussed at section 2.2).
- Thirdly, NBN Co must comply with the SAOs in accordance with a hierarchy of the terms and conditions specified in applicable Access Agreements, Special Access Undertakings, Binding Rules of Conduct and Access Determinations<sup>18</sup> (discussed at section 2.3).
- Fourthly, NBN Co is subject to non-discrimination obligations,<sup>19</sup> and is permitted to engage in certain authorised conduct<sup>20</sup> (discussed at section 2.4).
- Finally, NBN Co must, at the request of an access seeker, enter into an Access Agreement on the same terms and conditions as set out in any Standard Form of Access Agreement (SFAA) relating to the declared service<sup>21</sup> (discussed at section 2.6).

Section 2.5 sets out an overview of Special Access Undertakings under Part XIC and section 2.7 outlines the interaction between the different components of the Part XIC regulatory framework (specifically, the relationship between the SAU, Access Agreements, SFAAs and other ACCC powers) that establish the arrangements for access to NBN Co's services.

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<sup>14</sup> CCA, s. 152AB(1).

<sup>15</sup> CCA, s. 152CJA(1).

<sup>16</sup> CCA, ss. 152AZ and 152BA.

<sup>17</sup> CCA, s. 152AXB.

<sup>18</sup> CCA, s. 152AY.

<sup>19</sup> CCA, ss. 152AXC and 152AXD.

<sup>20</sup> CCA, s. 151DA.

<sup>21</sup> CCA, s. 152CJA(2).

## 2.1. Declared services

Declared services must be supplied to access seekers upon request.<sup>22</sup> There are three means by which services that are supplied by NBN Co, or are capable of being supplied by NBN Co, may become declared services:

- The ACCC may decide to declare NBN-related services after conducting a public inquiry.<sup>23</sup>
- The ACCC may accept a Special Access Undertaking given by NBN Co.<sup>24</sup>
- NBN Co may publish an SFAA that relates to access to the service.<sup>25</sup>

NBN Co is specifically prohibited from supplying services that are listed carriage services, or that facilitate the supply of listed carriage services, unless these services are declared services.<sup>26</sup>

## 2.2. Standard Access Obligations

Standard Access Obligations require the provision of access to declared services on request, in order for access seekers to provide carriage services or content services using declared services.<sup>27</sup> NBN-specific Standard Access Obligations, known as Category B SAOs, apply to declared services that are provided by NBN Co.<sup>28</sup> These SAOs are:

- to supply a declared service upon request<sup>29</sup>
- to provide interconnection to facilities upon request,<sup>30</sup> and
- to supply any service that is necessary to enable a service provider to provide carriage and/or content services by means of the declared service and using the conditional-access customer equipment by which NBN Co supplies the declared service, upon request.<sup>31</sup>

## 2.3. Compliance with the Standard Access Obligations

The terms and conditions on which a carrier or carriage service provider (such as NBN Co) are required to comply with applicable Standard Access Obligations may be specified in one or a combination of different instruments:

- An Access Agreement — a commercial contract between the access provider and an access seeker which sets out negotiated terms and conditions of supply for an agreed period of time.<sup>32</sup>

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<sup>22</sup> CCA, s. 152AXB(2).

<sup>23</sup> CCA, s. 152AL(8A).

<sup>24</sup> CCA, s. 152AL(8E).

<sup>25</sup> CCA, s. 152AL(8D).

<sup>26</sup> CCA, s. 152CJA(1).

<sup>27</sup> CCA, s. 152AA.

<sup>28</sup> CCA, s. 152AXB.

<sup>29</sup> CCA, s. 152AXB(2).

<sup>30</sup> CCA, s. 152AXB(4).

<sup>31</sup> CCA, s. 152AXB(5).

<sup>32</sup> CCA, s. 152BE.

- A Special Access Undertaking — a document given by the access provider proposing the terms and conditions on which it will offer access to its services (if approved by the ACCC, access seekers can obtain supply on these terms).<sup>33</sup>
- Binding Rules of Conduct — written rules made by the ACCC where there is an urgent need to make such rules, specifying any or all of the terms and conditions for compliance with any or all of the SAOs, or requiring compliance with any or all of the SAOs in a manner specified in the rules.<sup>34</sup>
- An Access Determination — written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry, specifying any or all of the terms and conditions for compliance with any or all of the SAOs.<sup>35</sup>

Part XIC establishes a hierarchy between these instruments to allow parties to identify which terms and conditions for compliance with the SAOs are to apply in relation to a declared service, particularly in the event of inconsistency between the instruments. Essentially, terms and conditions about a particular matter in an instrument that is higher in the above list will prevail over terms and conditions about the same matter specified in an instrument that is lower in the list. For instance, commercially negotiated and agreed terms and conditions (set out in an Access Agreement) will prevail over regulated terms in an accepted Special Access Undertaking, Binding Rules of Conduct, and Access Determinations, to the extent of any inconsistency between these terms.<sup>36</sup>

The Part XIC legislative hierarchy is explained further at section 2.7.

## 2.4. Non-discrimination obligations and authorised conduct

Part XIC imposes non-discrimination obligations on NBN Co and other designated superfast network providers.<sup>37</sup> The requirements of the non-discrimination obligations relating to NBN Co are that:

- NBN Co must not discriminate between access seekers in complying with the SAOs and in the carrying on of certain activities related to the supply of declared services,<sup>38</sup> and
- NBN Co must not discriminate in favour of itself in the supply of declared services.<sup>39</sup>

For further information about the ACCC's approach to assessing compliance with these non-discrimination obligations, please refer to the ACCC's *Part XIC Non-Discrimination Guidelines* available on the ACCC website.<sup>40</sup>

Part XIC also refers to certain conduct by NBN Co that is authorised under the telecommunications-specific anti-competitive conduct regime contained in Part XIB of the CCA. Under Part XIB, NBN Co is authorised to engage in certain conduct that could otherwise be in

<sup>33</sup> CCA, s. 152CBA.

<sup>34</sup> CCA, s. 152BD.

<sup>35</sup> CCA, s. 152BC.

<sup>36</sup> CCA, ss. 152AY, 152BCC, 152BDB, 152BDE, 152CBIA, 152CBIB and 152CBIC.

<sup>37</sup> CCA, ss. 152AXC and 152AXD.

<sup>38</sup> CCA, ss. 152AXC(1) and 152AXD(1).

<sup>39</sup> CCA, s. 152AXC(7).

<sup>40</sup> Available at: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/non-discrimination-under-part-xic/guideline>

breach of the anti-competitive conduct provisions of the CCA, if it is reasonably necessary to achieve uniform national pricing of eligible services by NBN Co.<sup>41</sup> This includes:

- refusing to permit interconnection of facilities at a location that is not a 'listed point of interconnection' (that is, a point of interconnection specified in the ACCC's list in force under section 151DB)<sup>42</sup> if the refusal is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co<sup>43</sup>
- refusing to supply designated access services on a standalone basis (that is, NBN Co may 'bundle' the supply of certain access services) if the refusal is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co,<sup>44</sup> and
- engaging in conduct that is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co.<sup>45</sup>

## 2.5. Special access undertakings

Section 152CBA of the CCA allows NBN Co to give a Special Access Undertaking to the ACCC in certain circumstances.<sup>46</sup>

NBN Co may give an undertaking if it is, or expects to be, a carrier or carriage service provider supplying a listed carriage service or a service that facilitates the supply of a listed carriage service, and the undertaking is given in connection with the provision of access to services that are not yet declared under subsection 152AL(8A), and for which there is no Access Determination in place.<sup>47</sup>

NBN Co is a carrier (within the meaning of the *Telecommunications Act 1997*) and has given the SAU in connection with a listed carriage service — the 'NBN access service' — and a service that facilitates the supply of the NBN access service — the 'ancillary services'.<sup>48</sup> The SAU also sets out commitments in relation to the 'facilities access service', which is stated by NBN Co to be a service in connection with the satisfaction of the interconnection obligations under subsection 152AXB(4) of the CCA.<sup>49</sup> The NBN access service, the ancillary services and the facilities access service are not declared services under subsection 152AL(8A), and there is currently no Access Determination applying in respect of these services.

A Special Access Undertaking given by NBN Co must include certain commitments:

- The undertaking must state that NBN Co agrees to be bound by the Category B SAOs and will comply with the terms and conditions specified in the undertaking in relation to the SAOs (the SAOs are discussed at section 2.2).<sup>50</sup>
- The undertaking must specify the expiry time of the undertaking,<sup>51</sup> and may provide for NBN Co to extend the expiry time if the extension is approved by the ACCC in accordance with the criteria as specified in the undertaking.<sup>52</sup>

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<sup>41</sup> CCA, s. 151DA.

<sup>42</sup> For further information, please refer to the ACCC website: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-points-of-interconnect-pois>

<sup>43</sup> CCA, s. 151DA(2).

<sup>44</sup> CCA, s. 151DA(3).

<sup>45</sup> CCA, s. 151DA(4).

<sup>46</sup> CCA, ss. 152CBA(1)(b) and 152CBA(2).

<sup>47</sup> CCA, ss. 152CBA(1)(b) and 152CBA(2).

<sup>48</sup> NBN Co, *Special Access Undertaking (SAU)*, November 2013, Main Body, clause 2.1.

<sup>49</sup> NBN Co, *SAU*, November 2013, Main Body, clause 2.2.

<sup>50</sup> CCA, s. 152CBA(3A).

<sup>51</sup> CCA, s. 152CBA(6).

The ACCC notes that clause 1 of the Main Body of the SAU given by NBN Co refers to the application of the SAOs and states that NBN Co will comply with any applicable SAOs. In addition, clause 3.2 of the Main Body of the SAU specifies the expiry time of the SAU to be 30 June 2040, and clause 7.3 of the Main Body of the SAU provides for the SAU to be extended.

Further, the undertaking may:

- state that NBN Co will engage in specified conduct in relation to access to the service, and will do so on such terms and conditions as are specified in the undertaking<sup>53</sup>
- state that NBN Co will engage in certain specified conduct relating to other matters (such as developing new eligible services, enhancing declared services and giving information in relation to those activities)<sup>54</sup>
- provide for the ACCC to perform functions or exercise powers in relation to the undertaking,<sup>55</sup> and
- provide that a term or condition specified in the undertaking is a fixed principles term or condition for a certain period of time.<sup>56</sup>

Essentially, an SAU given by NBN Co must contain provisions that reflect terms and conditions in relation to the SAOs and may contain provisions that reflect any of the above matters. The ability for an SAU to include these different 'categories' of provisions was enabled by the legislative amendments to Part XIC introduced in early 2011. The ACCC's approach to categorising the provisions of the SAU given by NBN Co is discussed further at section 4.4.

The ACCC has identified that the SAU provides for the ACCC to perform functions or exercise powers in relation to the undertaking. These functions and powers are outlined at section 4.4.4.

The ACCC also notes that clause 5.3 of the Main Body of the SAU given by NBN Co specifies that certain provisions in Module 2 of the SAU are fixed principles terms or conditions for the SAU term (discussed at chapter 10).

## 2.5.1. Effect and enforcement of an accepted SAU

Under Part XIC, acceptance of a Special Access Undertaking will have the following effects:

- First, the SAU would specify some of the terms and conditions upon which NBN Co must comply with the SAOs (subject to the legislative hierarchy of terms and conditions for compliance with these obligations).<sup>57</sup>
- Second, Access Determinations and Binding Rules of Conduct (if and when made by the ACCC) would have no effect to the extent of inconsistency with the SAU.<sup>58</sup>
- Third, NBN Co must comply with the commitments set out in the SAU (subject to the legislative hierarchy of terms and conditions for compliance with these obligations). NBN Co's compliance with the SAOs in accordance with these commitments is a carrier

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<sup>52</sup> CCA, s. 152CBA(9).

<sup>53</sup> CCA, s. 152CBA(3B).

<sup>54</sup> CCA, s. 152CBA(3C).

<sup>55</sup> CCA, s. 152CBA(10A).

<sup>56</sup> CCA, s. 152CBAA(1).

<sup>57</sup> As noted, the Part XIC legislative hierarchy provides for commercially negotiated and agreed terms to prevail over regulated terms in an SAU to the extent of any inconsistency (CCA, ss. 152AY, 152CBIC).

<sup>58</sup> CCA, ss. 152AY, 152CBIA and 152CBIB.

licence condition and service provider rule,<sup>59</sup> and a failure to comply is subject to penalties specified in the *Telecommunications Act 1997*.

Part XIC also provides for the ACCC, and other parties whose interests are affected by a Special Access Undertaking that is in operation, to enforce the undertaking in the Federal Court.<sup>60</sup> If the Federal Court is satisfied that the person who gave the Special Access Undertaking has breached the undertaking, it may make any or all of the following orders:

- an order directing the person who gave the undertaking to comply with the undertaking<sup>61</sup>
- an order directing the person who gave the undertaking to compensate any other person who has suffered loss or damage as a result of the breach,<sup>62</sup> and
- any other order that the Court thinks appropriate.<sup>63</sup>

## 2.5.2. Variation and withdrawal of an accepted SAU

Part XIC provides for a person that has given a Special Access Undertaking to vary or withdraw the undertaking while it is in operation, as follows:

- If NBN Co gives a variation of the SAU to the ACCC,<sup>64</sup> the ACCC must decide whether to accept or reject the variation.<sup>65</sup> In assessing a variation, the ACCC must apply the legislative criteria that apply to the assessment of an undertaking (discussed at chapter 4).<sup>66</sup>
- NBN Co may withdraw the SAU while it is in operation by giving written notice to the ACCC.<sup>67</sup> If the service to which the undertaking relates is not a declared service (other than by virtue of acceptance of the SAU by the ACCC), NBN Co must also inform the ACCC in writing, at least 12 months before giving the notice to the ACCC, that it proposes to withdraw the undertaking.<sup>68</sup>

The ACCC notes that clause 7 of the Main Body of the SAU given by NBN Co refers to the variation and withdrawal of the SAU in accordance with the Part XIC requirements. The ACCC's assessment of this provision is discussed at section 5.1.3.

There is no provision under Part XIC for the ACCC to otherwise vary or set aside the terms of a Special Access Undertaking once it has been accepted by the ACCC.

## 2.6. Standard Form of Access Agreements

Part XIC provides for an NBN corporation to formulate and publish open offers to provide access to its services.<sup>69</sup> The terms and conditions that comprise these offers are known as a Standard Form of Access Agreement (SFAA).

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<sup>59</sup> CCA, ss. 152AZ and 152BA.

<sup>60</sup> CCA, s. 152CD(2).

<sup>61</sup> CCA, s. 152CD(3)(a).

<sup>62</sup> CCA, s. 152CD(3)(b).

<sup>63</sup> CCA, s. 152CD(3)(c).

<sup>64</sup> CCA, s. 152CBG(2).

<sup>65</sup> CCA, s. 152CBG(3).

<sup>66</sup> CCA, s. 152CBG(4).

<sup>67</sup> CCA, s. 152CBI(2).

<sup>68</sup> CCA, s. 152CBI(2)(b).

<sup>69</sup> CCA, ss. 152CJA(2)(b) and 152CJF.

If an SFAA is available on NBN Co's website, at the request of an access seeker, NBN Co is obliged to enter into an Access Agreement with the access seeker on the terms and conditions contained in the SFAA.<sup>70</sup> As noted at section 2.1, publication of an SFAA by NBN Co on its website also has the effect of declaring the service to which the SFAA relates.<sup>71</sup> An SFAA therefore provides one means by which an access seeker may obtain access to NBN Co's services, and once executed as an Access Agreement, for NBN Co to comply with the applicable SAOs.

NBN Co has formulated and published a number of SFAAs, and at the time of publishing this decision, the following SFAAs were available on NBN Co's website:

- Wholesale Broadband Agreement (WBA)
- Satellite Wholesale Broadband Agreement
- Test Agreement
- Satellite Testing Terms and Conditions.<sup>72</sup>

The ACCC understands that a number of access seekers have executed Access Agreements with NBN Co that are based on NBN Co's SFAAs. The ACCC also understands that the WBA is currently being renegotiated between NBN Co and access seekers. Entry into an Access Agreement based on an SFAA is a commercial decision for persons who may wish to provide services utilising NBN Co's network.

## 2.7. Relationship between the SAU, SFAAs and other ACCC powers

Part XIC provides the ACCC with a range of powers for the purpose of furthering the object of the part, which is to promote the 'long-term interests of end-users' (discussed at section 4.2). The ACCC is able to directly establish regulated terms and conditions of access to services supplied by NBN Co by two means:

- First, the ACCC may make Access Determinations that relate to access to a declared service.<sup>73</sup>
- Second, the ACCC may issue Binding Rules of Conduct specifying terms and conditions for compliance with the SAOs or a manner of compliance with the SAOs, if there is an urgent need to do so.<sup>74</sup>

The ACCC is able to exercise these powers to address matters that are not dealt with by the SAU given by NBN Co. The ACCC notes that the SAU does not set out all terms and conditions of access to NBN Co's services, nor is it required to do so in order for it to be accepted by the ACCC.

As noted at section 2.3, since the terms and conditions for compliance with the SAOs can be simultaneously derived from different instruments, Part XIC establishes a hierarchy of these instruments to allow parties to identify which terms and conditions are to apply in the event of inconsistency between these instruments. One effect of this hierarchy is that if an access

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<sup>70</sup> CCA, ss. 152CJA(2)(c) and 152CJA(2)(d).

<sup>71</sup> CCA, s. 152AL(8D).

<sup>72</sup> For more information, please refer to NBN Co's website: <http://www.nbnco.com.au>

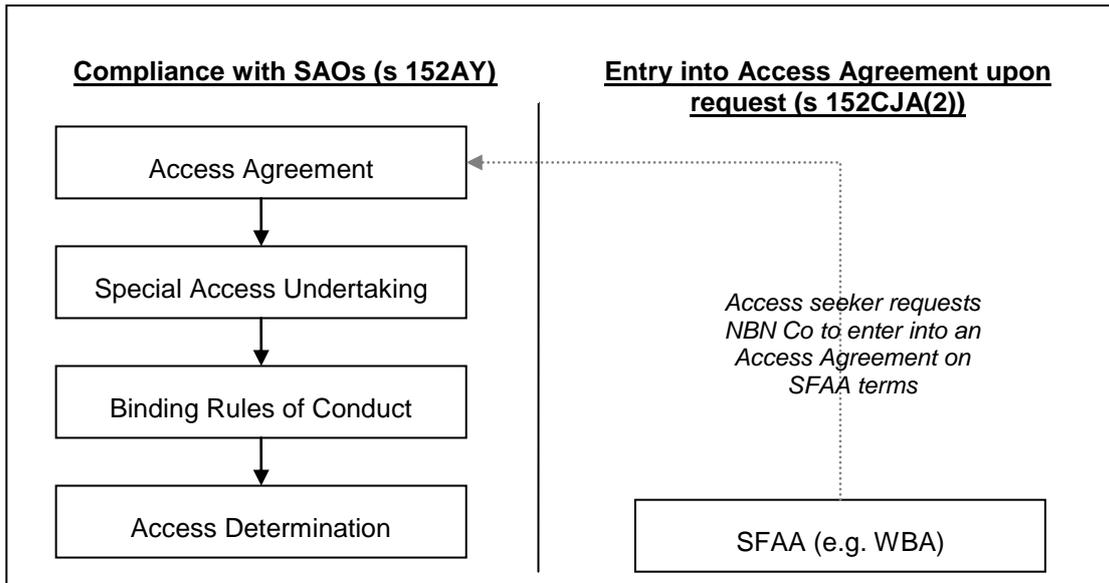
<sup>73</sup> CCA, s. 152BC.

<sup>74</sup> CCA, s. 152BD.

seeker enters into an Access Agreement with NBN Co, Binding Rules of Conduct or Access Determinations will have no effect between the access seeker and NBN Co to the extent of inconsistency with the Access Agreement.<sup>75</sup> Further, any Binding Rules of Conduct and Access Determinations will have no effect to the extent that they are inconsistent with the accepted SAU.<sup>76</sup>

The relationship that Part XIC establishes between the SAU, Access Agreements and other regulated terms, as well as the relationship between these instruments and SFAAs, is depicted in figure 2 below.

**Figure 2 Part XIC hierarchy and its relationship with the SFAA**



As discussed at section 2.6, under Part XIC, one way that access seekers may obtain access to services supplied by NBN Co is by means of an Access Agreement that is based on an SFAA.<sup>77</sup> An SFAA itself is not an Access Agreement and does not form part of the Part XIC legislative hierarchy (see figure 2 above). However, as noted, an access seeker may request NBN Co to enter into an Access Agreement that contains the same terms as those contained in an SFAA, and NBN Co must comply with such a request.<sup>78</sup>

Part XIC also establishes a number of alternative means by which an access seeker can obtain access to services supplied by NBN Co:

- An access seeker and NBN Co can negotiate and agree to different terms and conditions in an Access Agreement to those that are contained in an SFAA,<sup>79</sup> subject to NBN Co's non-discrimination obligations.<sup>80</sup>
- An access seeker can request NBN Co to supply services on regulated terms and conditions in the SAU, Binding Rules of Conduct or Access Determinations.<sup>81</sup> In particular:

<sup>75</sup> CCA, ss. 152AY, 152BCC, 152BDB.

<sup>76</sup> CCA, ss. 152AY, 152CBIA and 152CBIB.

<sup>77</sup> CCA, s. 152CJA(2).

<sup>78</sup> CCA, ss. 152CJA(2)(c) and 152CJA(2)(d).

<sup>79</sup> CCA, s. 152CJA(3).

<sup>80</sup> NBN Co's non-discrimination obligations are discussed further at section 2.4.

<sup>81</sup> At this time, the ACCC has not made any Access Determinations or Binding Rules of Conduct in relation to NBN Co's services.

- NBN Co must comply with such a request,<sup>82</sup> to the extent that these regulated terms are not inconsistent with an Access Agreement between the parties (or in the case of Binding Rules of Conduct and Access Determinations, the regulated terms are not inconsistent with an SAU that is in operation)
- the access seeker does not have to enter into an Access Agreement to obtain access on these regulated terms (though the parties can commercially agree to include these regulated terms in an Access Agreement if they wished to do so), and
- NBN Co, the ACCC and access seekers can seek to enforce these regulated terms.<sup>83</sup>

Therefore, it is not essential for NBN Co and an access seeker to enter into an Access Agreement based on an SFAA in order for NBN Co to supply declared services to the access seeker. If an access seeker requests that NBN Co enter into an SFAA-based Access Agreement, these Access Agreements will prevail over regulated terms specified by the accepted SAU, Binding Rules of Conduct and Access Determinations, to the extent of any inconsistency between these terms.<sup>84</sup>

As noted, an accepted SAU would be a key part of the framework under which the NBN would be regulated; however, Part XIC establishes a regulatory framework that is broader than an accepted SAU. That is, the ACCC's assessment of the SAU given by NBN Co is one component of the broader arrangements for access to NBN Co's services.

The ACCC recognises that Part XIC establishes the primacy of commercial agreements, and considers that commercially agreed terms and conditions of access are desirable where these can occur. However, it also considers that access seekers should have the opportunity to seek an effective regulatory fallback in the absence of such agreement. The opportunity for a regulated outcome can, in and of itself, enhance the likelihood of commercial agreement being reached.

This is consistent with the legislative intent of Part XIC, which provides that all services supplied by NBN Co will be declared services and hence able to be regulated by the ACCC when necessary. The Explanatory Memorandum to the *Telecommunications Legislation (National Broadband Network Measures — Access Arrangements) Bill 2010* states that "the policy intention is that at all times NBN corporations are subject to the obligations under Part XIC — specifically the Category B SAOs...[a]s a consequence the supply of services by NBN corporations is always subject to oversight by the ACCC."<sup>85</sup>

As noted, the SAU given by NBN Co does not specify all terms and conditions of access to NBN Co's services. Therefore, it is important that all parties have certainty about when and how NBN Co must comply with regulatory determinations which specify terms and conditions for matters that are not directly dealt with by the SAU (and which are not inconsistent with Access Agreements),<sup>86</sup> as well as in the event that commercial agreement between NBN Co and access seekers cannot be reached.

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<sup>82</sup> CCA, ss. 152BCO, 152BCP, 152BCQ, 152BDF, 152BDG and 152BDH.

<sup>83</sup> For example, under sections 152BCQ and 152BDH of the CCA, access seekers have private rights to seek Federal Court orders to enforce compliance with Access Determinations and Binding Rules of Conduct; and under section 152EG, the ACCC or access seekers can seek Federal Court orders about conduct engaged in for the purpose of preventing or hindering the fulfilment of a requirement imposed by an Access Determination or Binding Rules of Conduct. The means by which an accepted SAU may be enforced are discussed further at section 2.5.1.

<sup>84</sup> CCA, ss. 152AY, 152BCC, 152BDB and 152CBIC.

<sup>85</sup> Explanatory Memorandum to the *Telecommunications Legislation (National Broadband Measures — Access Arrangements) Bill 2010*, p. 136.

<sup>86</sup> That is, the specific circumstance in which an access seeker enters into an Access Agreement with NBN Co, and any Access Determinations or Binding Rules of Conduct subsequently having no effect between that access seeker and NBN Co to the extent of inconsistency with their Access Agreement.

The ACCC notes that throughout the SAU assessment process, access seekers identified concerns about the possible consequences of executing commercial agreements prior to regulated terms being established on matters that may not be agreed. NBN Co and access seekers sought to address this issue by considering the inclusion of a 'regulatory recourse' mechanism in the SAU. The ACCC observes that while the parties identified substantially similar issues, there were differing conceptions as to the purpose and operation of such a mechanism.

Therefore, in the ACCC's notice to vary, the ACCC proposed to remove the 'regulatory recourse' provisions that link SFAAs with the Part XIC legislative hierarchy from the SAU. This was aimed at creating certainty that Part XIC will continue to operate in its normal way following acceptance of the SAU, free from any ambiguity or unintended consequences that may arise from including such provisions in the SAU.<sup>87</sup> The varied SAU given by NBN Co incorporated these changes.<sup>88</sup> Submissions to the varied SAU supported this approach.<sup>89</sup>

The ACCC notes that ongoing commercial negotiations between NBN Co and access seekers are occurring in the above context. Having regard to the current commercial and regulatory context, the ACCC considers that the following framework would adequately address the practical difficulties within the existing regulatory regime — the ACCC would expect that, in practice, NBN Co would incorporate the terms of any regulatory determination (if and when established by the ACCC) into its SFAAs, and in particular:

- Consistent with the Part XIC legislative hierarchy, regulated terms would not override commercially agreed terms.
- Where the ACCC determines disputed terms prior to the execution of commercial agreements, the ACCC expects that NBN Co will make regulated terms available to parties via their incorporation into its SFAAs for subsequent inclusion in prospective Access Agreements.
- Where the ACCC has not yet determined disputed terms prior to the execution of commercial agreements, the ACCC expects that NBN Co will include disputed terms in commercial agreements on an interim basis only, pending the ACCC's determination of regulated terms. These regulated terms would then have their ordinary effect, in that access seekers can request access on these terms on a standalone basis, or NBN Co and access seekers can agree to include these terms in an Access Agreement.

In the event that this did not occur, the ACCC would consider other options, such as requiring in an Access Determination that NBN Co incorporate the terms and conditions in an Access Determination in its SFAAs, or the making of more comprehensive Access Determinations.

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<sup>87</sup> ACCC, *Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012 (Draft Decision)*, April 2013, pp. 31-35 and pp. 44-45; ACCC, *Variation of NBN Co Special Access Undertaking – response to submissions (Response to Submissions)*, July 2013, pp. 15-20; ACCC, *Variation of NBN Co Special Access Undertaking – explanatory statement (Explanatory Statement)*, October 2013, pp. 10-12. Specifically, the ACCC considered that these commitments could mean that access seekers must enter into SFAA-based Access Agreements to obtain access to services on ACCC regulated terms, thereby changing the obligations of NBN Co and the rights of access seekers under Part XIC.

<sup>88</sup> The ACCC notes that in their submissions to the ACCC's draft notice to vary, NBN Co and most access seekers supported this proposed variation (see ACCC, *Explanatory Statement*, October 2013, pp. 10-12).

<sup>89</sup> Optus, *Varied November 2013 NBN Co Special Access Undertaking*, 28 November 2013, p. 2; Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 1 and p. 3.

## 3. Overview of the SAU

This chapter provides a high level overview of the SAU provided by NBN Co on 19 November 2013 in response to the ACCC's notice to vary. In general, the SAU consists of three broad parts:

- The Main Body (incorporating Module 0), which sets out the background to and the framework of the SAU. These provisions operate throughout the term of the SAU (until 30 June 2040).
- Module 1 (the initial regulatory period), which sets out the regulatory arrangements to apply from the commencement of the SAU until 30 June 2023.
- Module 2 (the subsequent regulatory period), which sets out the regulatory arrangements to apply from 1 July 2023 to 30 June 2040.

These are discussed in more detail below.

### 3.1. Main Body

The Main Body of the SAU provides background to, and the overarching framework for, the SAU. Specifically, it includes:

- Background to the SAU — it refers to the relevant legislation under which the SAU is given, the services to which the SAU relates (being the 'NBN access service', 'ancillary services' and the 'facilities access service') and the modular structure of the SAU, including the incorporation of 'replacement modules' during Module 2.
- Compliance statements (clause 1) — as required under Part XIC, the SAU includes statements that NBN Co will comply with the SAOs, and the terms and conditions specified in the SAU in relation to the SAOs, in respect of the relevant services.
- Scope of the SAU (clause 2) — the SAU covers the supply of the NBN access service and the ancillary services, and includes commitments relating to the supply of the facilities access service.
- Term of the SAU (clause 3) — being from the commencement date until 30 June 2040.
- Structure of the SAU (clause 4) — including descriptions of Module 0, Module 1 and Module 2. This clause also outlines: NBN Co's commitments in respect of lodging 'replacement module applications', which must include a proposed term for the replacement module (three, four or five years), a long term revenue constraint methodology (LTRCM) proposal and a regulatory asset base (RAB) roll forward proposal.
- A conferral of power on the ACCC to make a 'replacement module determination' where it has not accepted a replacement module application.
- Fixed principles terms and conditions (clause 5) — the specification of particular terms and conditions in Module 2 as fixed principles, being:
  - the RAB roll-forward equation (clauses 2C.7.2 and 2C.7.3(a))
  - the ICRA roll-forward equation (clause 2C.5.4(a)), and

- the fact that the annual revenue requirements will be calculated using the following building block components — operating expenditure (which is to include operating expenditure to be incurred pursuant to the Telstra and Optus arrangements), depreciation, a return on capital, and tax allowance (clause 2C.2.1(a)).
- An obligation for NBN Co to produce and maintain an SFAA (clause 6) — in relation to the services covered by the SAU for the duration of the SAU term.
- Processes for varying, withdrawing and extending the term of the SAU (clause 7) — by reference to the requirements of Part XIC of the CCA.

There are four attachments to the Main Body; attachments A, B, C and D.

### 3.1.1. Attachment A: Service Descriptions

Attachment A to the Main Body sets out high-level descriptions of services covered by the SAU. In particular:

- NBN access service – this is a Layer 2 bitstream service that allows an access seeker to supply broadband and voice services to an end-user who has a connection to the NBN (without rolling out its own network to the end-user’s premises). The access seeker must connect its own network to the NBN at locations known as points of interconnect (POIs).
- Ancillary services – these are services supplied by NBN Co to support the NBN access service. The initial ancillary services allow access seekers to carry out operations related to the supply of the NBN access service.

### 3.1.2. Attachment B: Facilities Access Service

Attachment B to the Main Body describes the facilities access service. The terms and conditions relating to the facilities access service are in connection with the satisfaction of NBN Co’s interconnection obligations in relation to the NBN access service and the ancillary services. It permits access seekers to connect to NBN Co equipment at a POI, install their own equipment at the POI, and enter certain POI buildings.

### 3.1.3. Attachment C: Dictionary

Section 1 of Attachment C includes a list of defined terms used in the SAU. Defined terms are used throughout the SAU and are generally capitalised (though they have not been capitalised in this final decision). Section 2 of the attachment includes a glossary of acronyms. Section 3 of the attachment provides some guidance on the interpretation of the SAU.

### 3.1.4. Attachment D: Initial Products

Attachment D of the Main Body contains a list of the products and services available at the commencement of the SAU:

- Section 1 of the attachment lists the initial NBN Co products and describes the features of those products:
  - Product components provided over the NBN interim satellite network include network to network interface (NNI) and connectivity virtual circuit (CVC).

- Product components provided over the NBN Co fibre network, NBN Co wireless network and NBN Co permanent satellite network include NNI, CVC, access virtual circuit (AVC) and user network interface (UNI).
- Section 2 of the attachment lists the initial ancillary services including the platform interfacing service and the sandpit.
- Section 3 of the attachment lists the initial types of facilities access service including cross-connect, NBN Co co-location, NBN Co optical distribution frame termination point, and NBN Co building entry service.

## 3.2. Module 1

As noted above, Module 1 covers the initial regulatory period from the commencement of the SAU until 30 June 2023. Module 1 contains a number of schedules; these are discussed below.

### 3.2.1. Schedule 1A: Implementation of NBN access service, ancillary services and the facilities access service

Schedule 1A describes how NBN Co will provide the relevant services during the initial regulatory period (i.e. during Module 1).

The product components that make up the NBN access service are described in clause 1A.3. These include NNI, CVC, AVC and UNI, for example. Certain terms and conditions in connection with the supply of those product components are contained in clause 1A.4. For example, NBN Co is only required to provide services to a premise that is NBN serviceable. Further, under clause 1A.4.2, NBN Co may make the supply of AVC conditional on the access seeker also acquiring a UNI, CVC and NNI; or an AVC of a different traffic class, where required for technical reasons.

There are similar detailed implementations for ancillary services (clauses 1A.5 and 1A.6) and the facilities access service (clause 1A.7).

Clause 1A.8 notes that the SAU does not affect the ACCC's ability to declare a service under section 152AL(8A) of the CCA (even if that service is captured by the SAU) and does not affect NBN Co's standard access obligations in relation a service declared by the ACCC.

### 3.2.2. Schedule 1B: Term of any SFAA and consultation on changes to any SFAA

Clause 1B.2 requires that each SFAA published by NBN Co during Module 1 must have an expiry date that is no later than two years after the commencement of that SFAA. However, the SFAA may provide for this expiry date to be extended, subject to agreement from the parties to an Access Agreement based on the SFAA.

Clause 1B.3 commits NBN Co to establishing a 'multilateral SFAA forum' to consult with access seekers and consumer advocacy groups on possible future changes to the terms and conditions of SFAAs. For any SFAA that is published after the SAU commences, NBN Co will be required to convene a multilateral SFAA Forum no later than 12 months before the SFAA is due to expire. Changes to the SFAA can be suggested by access seekers, consumer advocacy groups or NBN Co. Participation by access seekers is voluntary.

### 3.2.3. Schedule 1C: NBN offers and other charges

Schedule 1C commits NBN Co to supplying 'NBN offers' and sets out the maximum regulated prices for those NBN offers. It also provides for NBN Co to apply 'other charges'.

#### 3.2.3.1. Commitment to supply NBN offers

Clause 1C.1 requires NBN Co to provide the NBN offers in clause 1C.2 (which have maximum regulated prices specified in clause 1C.3) from the commencement of the SAU and throughout Module 1. The only exception is that 'subsequent CVC TC-1/TC-4 offers' are only required to be supplied from the date they are introduced.

Clause 1C.2 lists the NBN offers. These include:

- Offers relating to the NBN access service, including: asymmetric AVC offers, additional asymmetric AVC offers, the symmetric access capacity offers, the second UNI-V and AVC offer, CVC offers, and NNI offers.
- Offers relating to ancillary services, including: the 'platform interfacing offer' and the 'sandpit offer'.
- Offers relating to multicast services, including: multicast AVC offers, multicast domain offers and multicast media stream offers.
- Offers relating to the facilities access service, including: the NBN Co co-location offer and the facilities access service offer.
- The 'standard business offer', comprising: an asymmetric AVC offer with a data transfer rate of 25 Mbps peak information rate (TC-4) (downlink) and 10 Mbps peak information rate (TC-4) (uplink), and a symmetric access capacity offer with a symmetrical data transfer rate of 0.5 Mbps committed information rate (TC-1).

#### 3.2.3.2. The maximum regulated price for NBN offers

Clause 1C.3 specifies the maximum regulated price for certain NBN offers. Unless there has been a tax change event, price review, or a NBN offer in clause 1C.3 has ceased to be zero-priced, the maximum regulated price for each of the NBN offers in this clause will remain fixed (either from the commencement of the SAU or from the first financial year in which the NBN offer is introduced) at the level specified in this clause until 30 June 2017. Tax change events and price reviews are discussed in more detail below.

Clause 1C.4 specifies how maximum regulated prices are to be set for the remaining NBN offers, either from the commencement of the SAU or from the first year in which the NBN offer is introduced. This clause also specifies:

- the maximum regulated price for other charges
- the CVC credit and pricing intent
- the rebate that will apply if an access seeker acquires a symmetric access capacity offer and an asymmetric AVC offer in respect of the same service in operation.

Clause 1C.5 specifies the price limit for maximum regulated prices over time. In determining what the maximum regulated price is for a certain NBN offer, the first consideration is whether the NBN offer is under clause 1C.3 or 1C.4.

For NBN offers listed in clause 1C.3, the default maximum regulated price is the price specified in clause 1C.3:

- until 30 June 2017, for NBN offers introduced before 30 June 2017; or
- for the first financial year in which the product is introduced, for NBN offers introduced after 30 June 2017.

After that, the default maximum regulated price for NBN offers listed in clause 1C.3 may increase by CPI minus 1.5 per cent each year.

For NBN offers listed in clause 1C.4, the default maximum regulated price is the price specified in clause 1C.4 for the first year of the SAU or the first financial year in which the NBN offer is introduced. After that, the default maximum regulated price for NBN offers listed in clause 1C.4 may increase by CPI minus 1.5 per cent each year.

However, there are a number of exceptions to these. In particular, if any of the following apply:

- a price review arrangement (see section 3.2.7), in which case the price in the price review arrangement would be the maximum regulated price
- an NBN offer or Other Charge ceases to be zero-priced, in which case the maximum regulated price will be the price set by NBN Co or the price set by the ACCC through a resetting regulatory determination
- the introduction of a new NBN offer or Other Charge, in which case the maximum regulated price will be the price set by NBN Co or the price set by the ACCC through a resetting regulatory determination
- a tax change event (see section 3.2.7), in which case the maximum regulated price may be changed as a result of a tax change event.

The resetting regulatory determination mentioned above (as defined in the Dictionary in Attachment C to the Main Body) can be undertaken by the ACCC within 24 months of a NBN offer or Other Charge being introduced (or a charge being introduced where a NBN offer or Other Charge was previously zero-priced). Price reviews and tax change events are discussed in more detail in section 3.2.7.

Clause 1C.5 also provides:

- The formula for the individual price increase limit for NBN offers and other charges. That is, individual prices may only increase by a maximum of CPI minus 1.5 per cent each year.
- How the maximum regulated price is calculated in respect of discounts, and treatment of the hourly labour rate.
- The process for the introduction of prices for previously zero-priced NBN offers. In particular, NBN Co is required to consult with access seekers and notify the ACCC and access seekers of its intent to introduce a price.
- Limits around the use of discounts to ensure non-circumvention of the maximum regulated price provisions. That is, to ensure that maximum regulated price thresholds are not undermined through the use of discounts.
- That, to the extent that an NBN offer comprises a bundle of products or services to which a single price applies, the bundle will be subject to a single maximum regulated price.

### **Annexure 1: Standard NFAS Installation**

Annexure 1 to Schedule 1C defines a standard NBN Co fibre access services (NFAS) installation and a non-standard NFAS installation and provides some definitions specific to the annexure.

### **Annexure 2: Standard NWS Installation**

Annexure 2 to Schedule 1C defines a standard NBN Co wireless access service (NWS) installation and a non-standard NWS installation and provides some definitions specific to the annexure.

## **3.2.4. Schedule 1D: Regulatory Asset Base**

Schedule 1D prescribes how the RAB will be determined during Module 1.

### **3.2.4.1. Determining the RAB**

Clause 1D.2 includes the equation for calculating the real and nominal RAB. The real RAB in a given year is calculated as the RAB from the previous year, plus new capital expenditure, minus disposals and depreciation. Clause 1D.2 also prescribes:

- how capital expenditure incurred since 9 April 2009 (the 'cost commencement date'), but before the commencement of the SAU, is to be included in the RAB
- the treatment of construction in progress (to be determined by the ACCC as an annual construction in progress allowance (ACIPA))
- the provision of capital expenditure forecasts to the ACCC each year, as per Schedule 1F (discussed below).

### **3.2.4.2. Ensuring capital expenditure is prudent**

Clause 1D.3 details the criteria for determining whether capital expenditure may be included in the RAB. In particular, capital expenditure can be included in the RAB if it meets the 'prudent cost condition' and the 'prudent design condition', or if it was incurred in connection with specific matters between the cost commencement date and the commencement of the SAU. To the extent that capital expenditure does not meet these criteria, the ACCC can determine a substitute amount of capital expenditure to be included in the RAB. This substitute amount of capital expenditure must meet the prudent design condition and be consistent with capital expenditure included in the RAB in previous years.

Clause 1D.4 describes the prudent cost condition. In particular, capital expenditure meets the prudent cost condition if it was incurred in connection with the design, engineering and construction of the relevant assets and if it was incurred under a conforming contract,<sup>90</sup> in an open and competitive market or through another value for money process. In assessing whether the capital expenditure was incurred under a conforming contract the ACCC can have regard to the capital expenditure factors in clause 1D.4.2; including whether NBN Co has followed its procurement rules.

Clause 1D.5 outlines the procurement rules that NBN Co is required to develop and maintain in respect of its processes for inviting tenders and awarding contracts. Under this clause, NBN Co is required to provide the ACCC with a copy of the procurement rules within 30 days of the SAU commencing and within 30 days of making any material changes to those rules.

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<sup>90</sup> See: NBN Co, *SAU*, November 2013, Schedule 1D, clause 1D.4.1(b) for the criteria that a contract must meet in order to be a Conforming Contract.

The prudent design condition is specified in clause 1D.6. In particular, in order for capital expenditure to meet the prudent design condition it must be “materially consistent” with the network design rules or a permitted variation, endorsed network change or ACCC approved network change to the network design rules:

- Clause 1D.7 describes the scope of the network design rules and describes the circumstances in which permitted variations to the relevant assets may be made.
- Clauses 1D.8 to 1D.11 describe the processes that NBN Co is required to follow in making endorsed changes to the network design rules. This includes consultation processes and a dispute resolution mechanism.
- Clause 1D.12 outlines the process and criteria that NBN Co must consider in developing network change options.

### 3.2.5. Schedule 1E: Long Term Revenue Constraint Methodology

Schedule 1E outlines the LTRCM for Module 1. In particular, it requires the ACCC to make an annual LTRCM determination outlining NBN Co’s RAB, annual revenue requirement (given by the annual building block revenue requirement (ABBRR)), and any revenue shortfall which goes into the ICRA. The LTRCM determination is to be issued within 12 months of the financial year to which it relates. In this way, it is an ex post determination.

#### 3.2.5.1. Process for LTRCM determination

Clause 1E.1 outlines the process that the ACCC is required to follow in making an LTRCM determination. It is required to consult with NBN Co and other stakeholders and to release a draft determination before issuing its final determination. This clause also provides the process to follow where a determination needs to be amended or revoked due to wrong information or error.

Clause 1E.2 outlines the methodology for determining revenues both during the period where the ICRA is positive and where the ICRA falls to zero.

Where the ICRA is positive, revenue is to be determined using the ABBRR with any revenue shortfall being capitalised into the ICRA. The building blocks that make up the ABBRR include a return on and of capital, operating expenditure, tax and any ACIPA. The balance of the ICRA will start to be recovered once NBN Co’s annual revenue from prices exceeds the ABBRR.

If the ICRA falls to zero during Module 1, the methodology will change to that in the building block revenue period so that the revenue from charges does not exceed the ABBRR.

Under clause 1E.2, NBN Co is to undertake reasonable endeavours to notify the ACCC five years before it expects to move to the building block revenue period and to update on progress towards this each year after the notice is given. It is also required to undertake reasonable endeavours to provide a pricing intention statement three years before it moves to the building block revenue period to notify the ACCC and access seekers of the likely pricing impacts of the change in methodology.

#### 3.2.5.2. Calculating the ABBRR

Clause 1E.3 states how financial years are to be counted for the purposes of the equations in Schedule 1E.

Clause 1E.4 includes the equation for calculating the ABBRR. Clause 1E.5 includes the equations for calculating the ICRA. It also includes the equation for carrying forward any

outstanding ICRA into the building block revenue period (called the carry forward revenue adjustment).

Clause 1E.6 includes the equations to be used for the purpose of determining the regulated revenue during the building block revenue period. This includes an equation for determining any Revenue Variation to be carried between years.

Clause 1E.7 specifies the formula for determining the cost of capital (which is an input to the return on capital). Essentially, this prescribes that the cost of capital will be the risk free rate of return plus 350 basis points.

Clause 1E.8 specifies the criteria to be used to assess whether operating expenditure can be included in the ABBRR. These criteria are consistent with that used to determine whether capital expenditure can be included in the RAB. Where operating expenditure does not meet the criteria for inclusion, the ACCC can determine a substitute amount of operating expenditure that meets the criteria in clause 1E.8.2(c) (this is similar to the process for capital expenditure discussed in section 3.2.4.2 above).

Clause 1E.9 specifies the approach to depreciation and tax. In particular, this clause provides that straight line depreciation is to be used and includes equations for determining depreciation, tax and tax depreciation.

Clause 1E.10 includes an equation for calculating the ACIPA, which is an input to the ABBRR.

### 3.2.6. Schedule 1F: Regulatory Information

Schedule 1F outlines the financial and price information that NBN Co is required to provide to the ACCC during Module 1.

Clause 1F.1 requires NBN Co to provide forecast financial information to the ACCC by 30 June each year during Module 1. This is to include forecasts of capital expenditure, operating expenditure, disposals and construction in progress. NBN Co is then required to provide actual financial information to the ACCC by 31 October each year for the financial year just ended. This is to cover those items provided as forecasts (with reasons for any variation) as well as the June quarter CPI, revenue, interest expense, accounting and tax asset lifetimes, the risk free rate and the nominal rate of return. Also on 31 October each year, NBN Co (in respect of the financial year just ended) is to provide the following proposed financial information:

- the ABBRR, including the inputs to that ABBRR
- opening and closing values of the RAB, and construction in progress
- the unrecovered cost (an input to the ICRA)
- the proposed impact of dividend imputation franking credits “gamma” (if the net tax allowance is positive)
- the applicable corporate tax rate.

There are also special reporting requirements for the first financial year of the SAU and for each year of the building block revenue period. This clause also allows the ACCC to make an ‘enhanced information request’ to the extent that this is required to fulfil its responsibilities under Schedules 1D and 1E.

Clause 1F.2 is concerned with expenditure compliance and reporting. In particular, it requires NBN Co to submit a statement by 31 October each year on whether capital expenditure and operating expenditure proposed for inclusion in the RAB and ABBRR respectively, meet the

relevant criteria. This is to be signed by the chief financial officer (CFO) of NBN Co (or authorised delegate). Where capital expenditure or operating expenditure does not meet the criteria, the CFO (or delegate) must propose a substitute amount of capital expenditure or operating expenditure for the ACCC's consideration. At the same time NBN Co must submit a report signed by the CFO (or delegate) certifying that the procurement rules satisfied the relevant criteria.

Clause 1F.3 relates to price compliance and reporting. By 31 October each year NBN Co must submit a report signed by the CFO that certifies that the price of each NBN offer and other charge did not exceed the maximum regulated price for the relevant year, and met the other requirements of Schedule 1C.

### **3.2.7. Schedule 1G: Maximum Regulated Price Review Mechanisms**

Schedule 1G describes the circumstances in which maximum regulated prices may be changed during Module 1. In particular, prices may be changed where there is a change in NBN Co's tax liability or in response to a price review that can be initiated by NBN Co or the ACCC.

#### **3.2.7.1. Price changes resulting from a tax change**

Clause 1G.2 allows for changes to be made to maximum regulated prices in the event that there is a tax change. The tax change may result in NBN Co's costs increasing or decreasing. In the event that NBN Co's costs decrease as a result of a tax change, this is called a negative tax change event. Where a tax change results in NBN Co's costs increasing, this is called a positive tax change event.

Under this clause, NBN Co may publish a tax change event proposal within 60 days of the tax change event occurring. Among other things, this will propose changes to maximum regulated prices to address the revenue impact of the tax change. An access seeker may object to the tax change event proposal in writing to NBN Co. Where an access seeker objects to a tax change event proposal, the proposal will not take effect.

In the event of a negative tax event, the ACCC may notify NBN Co that a negative tax change event has occurred. After receiving a tax change events proposal or notifying NBN Co of a negative tax change event, the ACCC has 40 days to make a determination specifying any price changes to occur as a result of the tax change. If the ACCC does not make a determination in response to NBN Co's proposal within the required time, NBN Co's proposal will be said to have been accepted by the ACCC.

Timeframes for NBN Co submitting the tax change event proposal and for the ACCC making a determination can be extended in accordance with this clause.

#### **3.2.7.2. Price reviews**

Clause 1G.3 provides NBN Co or the ACCC to initiate no more than two price reviews during Module 1. As part of the initiation, the ACCC or NBN Co will identify the prices that it proposes for review and its reasons for this.

Within 120 calendar days of a price review being initiated, NBN Co is required to submit to the ACCC a proposal for the maximum regulated prices identified in the initiation notice. The ACCC can respond by accepting or rejecting NBN Co's proposal. Where it rejects NBN Co's proposal it can make an alternative determination or request NBN Co to make changes to its proposal. In assessing NBN Co's proposal (or revised proposal) or in determining an alternative proposal, the ACCC must be satisfied that:

- the prices are reasonable, having regard to the matters specified in section 152AH of the CCA, and
- the impact of the pricing changes on net revenue are not material over the remaining term of the SAU.

In making its decision the ACCC must also have regard to:

- the legitimate business interests of NBN Co
- the impact of the proposal on the characteristics, costs, demand and revenue associated with NBN offers and other charges whose maximum regulated prices are not affected by the price review arrangement, and
- any other factor the ACCC considers is relevant.

### 3.2.8. Schedule 1H: Non-Price Terms and Conditions

Schedule 1H concerns the non-price terms and conditions applying to NBN Co during Module 1. In particular, it requires NBN Co to report on its progress in rolling out the NBN and POIs, and any closure or relocation of POIs. It also details certain arrangements for dispute management, to apply for the first five years of the SAU.

#### 3.2.8.1. Rollout progress reporting

Clause 1H.2 requires NBN Co to produce the following reports on its planned construction rollout during Module 1:

- a 3 year construction rollout plan to be published by 31 March each year, and
- a one year construction rollout plan to be published quarterly.

These reports are to outline the geographic areas in which construction is scheduled to commence in that period, including the dates at which construction is scheduled to commence, and the number of premises in each area.

NBN Co is also required to produce a monthly 'ready for service rollout plan' including both:

- geographic areas that have entered the design and construction phase, the expected ready for service date for those areas and the estimated number of premises within each geographic area, and
- the proposed footprint list, being the premises that are within the relevant geographic areas that NBN Co expects will be ready for service within the next 6-month period.

In addition, each week (until the rollout is completed) NBN Co is required to produce a list of premises covered by the NBN.

#### 3.2.8.2. Points of Interconnect

Until all POIs are established, NBN Co is required under clause 1H.3 to publish a quarterly report on the status of established POIs. After all POIs are established, the report is to be annual.

Clause 1H.4 requires NBN Co to notify access seekers and the ACCC at least 12 months before closing or relocating an established POI or establishing a new POI.<sup>91</sup> Under this clause NBN Co also commits to close temporary POIs where they are no longer required (having regard to the availability of an established POI among other things). NBN Co will notify any affected access seekers and the ACCC 12 months before closing a temporary POI and migrating customers from a temporary POI to an established POI.

### **3.2.8.3. Dispute Resolution**

Clause 1H.5 and Annexure 1 to Schedule 1H deal with dispute management arrangements in respect of SFAAs.

Clause 1H.5 requires NBN Co to provide in any SFAA that a dispute may be resolved by an expert or panel arbitration. The SFAA must include dispute management rules including the selection of an expert or panel (from the pool members) by a resolution advisor and the conduct of a panel arbitration.

Annexure 1 to Schedule 1H outlines processes in connection with the appointment, terms of appointment and guidelines, and termination of the resolution advisor and pool members. These arrangements are intended to ensure the independence of decision makers in dispute resolution processes, in order to give NBN Co and access seekers confidence that disputes will be resolved through unbiased and efficient processes.

Annexure 1 requires NBN Co to obtain ACCC approval for the appointment of all resolution advisors and pool members. In addition, the ACCC has the power to approve the terms of appointment, as well as the guidelines to which panel members must have regard. Finally, the ACCC has the power to direct NBN Co to terminate a resolution advisor or pool member in certain circumstances.

## **3.2.9. Schedule 1I: Product Development and Withdrawal**

Schedule 1I concerns product development and withdrawal. Annexure 1 to the Schedule outlines the product development forum (PDF) processes, which apply for the first five years of the SAU.

### **3.2.9.1. Principles for product development**

Clause 1I.1 outlines the principles that apply to NBN Co in respect of product development and withdrawal. For example, NBN Co is committed to develop products that access seekers want (where there is sufficient demand for those products), and to seek input from access seekers and consumer advocacy groups as part of the process of designing products. The Schedule does not apply to the introduction of initial products (as listed in Attachment D), the introduction of products that NBN Co is required to supply under a licence condition, or a minor variation or enhancement to a product.

### **3.2.9.2. Integrated product map**

Clause 1I.2 requires NBN Co to publish and maintain an integrated product roadmap. The roadmap will list all available products and products that are expected to be released over the next three years (including any developments in NBN Co's IT and support systems). The roadmap is to be published around 1 July each year on NBN Co's website.

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<sup>91</sup> Except in the event that the closure or relocation is in response to an emergency or where the closure or relocation relates to a temporary POI.

### **3.2.9.3. Product development forum**

Clause 11.3 requires NBN Co to implement a PDF through which access seekers and consumer advocacy groups can engage with NBN Co on product development. Participants to the PDF, including NBN Co, are required to comply with the PDF processes while they are in effect (i.e. for the first five years of the SAU). As part of this, NBN Co may require participants to enter into agreements regarding the treatment of confidential information and intellectual property. Where NBN Co and a participant cannot agree on these issues, this can be determined by the ACCC.

NBN Co will consider, and may weigh as it considers appropriate, such criteria as it determines is appropriate for assessing the appropriateness of developing product ideas. These criteria may include the criteria listed in clause 11.3.3. In developing a new product, NBN Co is required to consult with the PDF about the price of the new product, the technical aspects of the new product and service levels for the new product.

NBN Co does not have to introduce a new product that requires a network change unless the network change is a permitted change or is approved by the ACCC, and NBN Co decides to proceed with the network change.

### **3.2.9.4. Minor product variations**

Under clause 11.4 NBN Co may make minor changes to a product where these update or improve the functionality or performance of a product and which will have no material adverse impact on access seekers. In this case, the PDF will be used to inform access seekers and consumer advocacy groups of the change. However, NBN Co is not required to consult with the PDF prior to making these minor variations.

### **3.2.9.5. Product withdrawal**

Clause 11.5 outlines the process for product withdrawal. The first part of this clause ensures that NBN Co cannot change a product so as to reduce the functionality, performance or features of the product. To make such a variation, NBN Co will have to withdraw the product and introduce a new product instead.

If NBN is planning to withdraw a product, it must give notice of this intent to access seekers, consumer advocacy groups and the ACCC. NBN Co must provide no less than:

- six months, where it relates to an interim satellite service
- 24 months, where:
  - it relates to a product, product component, ancillary service or type of facilities access service, or
  - withdrawal of the product feature will have a material adverse effect on the functionality or performance of an associated product or product component; or
- 12 months, for all other product features.

NBN Co is to have regard to the criteria in clause 11.5 in considering whether to withdraw a product (and include its assessment in the written notice it gives to access seekers, consumer advocacy groups and the ACCC), and must discuss and consider in good faith any feedback received on the proposed product withdrawal.

If NBN Co intends to withdraw a product, it may also develop transitional arrangements to migrate access seekers to alternate products. NBN Co must provide notice of these transitional arrangements, including the proposed timeframe for migration and any testing arrangements.

The ACCC has the power to object to a product being withdrawn. It can do this in writing, with its reasons for objecting, within 60 business days of receiving the notice to withdraw a product from NBN Co (or as extended by up to 40 business days). Upon receiving this notice, NBN Co may not withdraw the relevant product before the end of the period (of up to five years) specified by the ACCC. NBN Co must also notify access seekers that the product is not to be withdrawn.

However, the ACCC cannot object to the withdrawal of a product where NBN Co is required by law or by the shareholder Minister to withdraw that product. In this case NBN Co may withdraw the product but is required to notify the ACCC and access seekers within 20 business days of being made aware of the requirement to withdraw the product.

### **Annexure 1: PDF Processes**

Annexure 1 to Schedule 1I sets out the PDF processes including the objectives of the PDF, membership of the PDF, and the development of product ideas through the PDF. The PDF processes set out the basis on which NBN Co will implement the requirements set out in Schedule 1I and engage with access seekers and consumer advocacy groups.

The PDF processes state that the objective of the PDF is to promote innovation in NBN Co's development of 'product ideas'. Under this Annexure, NBN Co commits to implementing product ideas that access seekers want, that have sufficient demand to be commercially viable, and from which access seekers gain value.

Access seekers and consumer advocacy groups that wish to be part of the PDF are required to register a representative on NBN Co's website. Representatives are required to comply with the PDF processes outlined in Annexure 1 to Schedule 1I.

Representatives may submit product ideas through NBN Co's website. NBN Co will then circulate the product idea to the PDF representatives and seek submissions on the idea. NBN Co will maintain a register of product ideas submitted and under consideration on a protected part of its website.

NBN Co is to assess product in accordance with Schedule 1I. After an initial assessment, NBN Co can decide to progress or reject the product idea:

- If it progresses the idea, it will develop a product construct paper which outlines further refinements to the product idea. NBN Co will provide the product construct paper, along with information on how it is to undertake its assessment of the product idea (both forming the idea development plan), to PDF representatives.
- If it rejects an idea, it will publish a rejection notice outlining its reasons for this.

If a product idea is progressed, NBN Co may consult with PDF representatives through workshops or alternative means (for example, written submissions). Workshops are to be facilitated by NBN Co in accordance with part 6 of the annexure to Schedule 1I. Part 7 outlines the processes around NBN Co requesting formal submissions to a product construct paper.

In finalising a product, product component or product feature, NBN Co will publish a final product construct paper for the information of access seekers and consumer advocacy groups.

The annexure also outlines processes that NBN Co will follow in communicating with PDF representatives and a list of defined terms used in the annexure.

## 3.3. Module 2

Module 2 (the subsequent regulatory period) applies from 1 July 2023 to 30 June 2040. Some schedules in Module 2 closely mirror schedules in Module 1 while others are unique to Module 2; the schedules in Module 2 are discussed below.

### 3.3.1. Schedule 2A: Implementation

Schedule 2A requires NBN Co to implement its obligations under the SAU through the supply of product components, product features, ancillary services and the facilities access service during Module 2.

Clause 2.A.1 commits NBN Co to supplying the NBN access service, ancillary service and facilities access service during Module 2.

Clause 2A.2 mirrors clause 1A.8. It notes that, during Module 2, the SAU does not affect the ACCC's ability to declare a service under section 152AL(8A) of the CCA (even if that service is captured by the SAU) and does not affect NBN Co's standard access obligations in relation to a service declared by the ACCC.

Clause 2A.3 mirrors clause 1A.4.2. In particular, NBN Co may make the supply of AVC conditional on the access seeker also acquiring a UNI, CVC and NNI; or an AVC of a different traffic class, where required for technical reasons.

### 3.3.2. Schedule 2B: Pricing Commitments

Schedule 2B outlines NBN Co's pricing commitments in Module 2. It is largely the same as Schedule 1C.

Clause 2B.1 commits NBN Co to supplying the NBN offers that it supplies at the end of Module 1. It also notes that maximum regulated prices are subject to the LTRCM provisions in Schedule 2C.

Clause 2B.2 sets out the process for determining the maximum regulated price during Module 2. This clause is largely the same as clause 1C.5.

### 3.3.3. Schedule 2C: Long Term Revenue Constraint Methodology and Regulatory Asset Base

Key elements of Schedule 2C include:

- the calculation of the ABBRR in Module 2; and
- the calculation and roll-forward of the ICRA and RAB during Module 2.

Clause 2C.1 provides an introduction including the method for calculating inflation factors and real values.

Clause 2C.2 specifies that the forecast nominal ABBRR must include forecasts of operating expenditure, nominal regulatory depreciation, a return on capital (calculated with reference to a rate of return and the forecast RAB) and a forecast tax allowance. Further, it provides some direction about the method to be used to determine the rate of return. This clause also ensures that the net present value of relevant future cash flow inputs will be equal to zero over time.

Clause 2C.3 clarifies that, during the initial cost recovery period, forecast revenue might not equal the ABBRR.

Clause 2C.4 describes the circumstances in which adjustments can be made to the ABBRR. That is, in the case of a Price Review Arrangement or Regulatory Determination.

Clause 2C.5 describes how the ICRA will be calculated in Module 2. Different methods apply depending on whether the ICRA is above or below zero.<sup>92</sup> In either case, the ICRA in one year will be determined with reference to the ICRA in the previous year.

Clause 2C.6 provides that during the building block revenue period (i.e. the period after the ICRA has fallen to zero), the forecast sum of NBN Co's revenue for all of the financial years in a regulatory cycle must not exceed forecast ABBRR for those financial years.

Clause 2C.7 describes how the RAB is calculated in Module 2. It provides options for the treatment of capital expenditure and depreciation when accounting for these in the RAB roll forward. This is discussed more in chapter 8.

### 3.3.4. Schedule 2D: Product Development and Withdrawal

Schedule 2D sets out the arrangements for product development and withdrawal during Module 2:

- Clause 2D.1 provides a general introduction to the Schedule, which mirrors clause 11.1.
- Clause 2D.2 allows NBN Co to withdraw products (subject to clauses 2D.3, 2D.4 and 2D.6) in a way that is focussed on feedback from access seekers and consumer advocacy groups.
- Clause 2D.3 requires NBN Co to maintain an integrated product roadmap which it is to publish on its website.
- Clause 2D.4 is concerned with product development and establishing the PDF, which mirrors clause 11.3.
- Clause 2D.5 is concerned with minor product variations, which mirrors clause 11.4.
- Clause 2D.6 is concerned with product withdrawal, which mirrors clause 11.5.

### 3.3.5. Schedule 2E: Maximum Regulated Price Review Mechanisms

Schedule 2E allows for maximum regulated prices to be changed during Module 2 through a Price Review. These provisions mirror those in Schedule 1G except that the clauses relating to tax change events are not included as they do not apply in Module 2. In Module 2, tax changes are dealt with through the replacement module process.

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<sup>92</sup> When the ICRA is equal to or below zero this is called a 'Methodology Change Event'.

## 4. Assessment approach

The ACCC is required to make a decision to accept or reject a Special Access Undertaking after assessing it against the legislative criteria.<sup>93</sup> This chapter outlines the relevant criteria and the ACCC's approach to assessing the SAU against the relevant criteria.

### 4.1. Relevant criteria

Section 152CBD of the CCA provides that the ACCC must not accept a Special Access Undertaking unless it is satisfied of certain matters, and prescribes certain reasons for which the ACCC must not reject a Special Access Undertaking.

The ACCC must not accept the SAU unless:

- it has published the undertaking and invited people to make submissions,<sup>94</sup> and considered any submissions received within the specified time limit,<sup>95</sup> and
- it is satisfied that the undertaking is consistent with any Ministerial pricing determination.<sup>96</sup>

As noted, on 20 November 2013, the ACCC published the varied SAU and invited submissions by 28 November 2013. The ACCC has had regard to these submissions in making its decision on the SAU.

The ACCC notes that there is no Ministerial pricing determination in force at this time.

In addition, the ACCC must be satisfied of different matters depending on the nature of the specific clauses in the SAU — the ACCC must not accept the SAU unless it is satisfied that:

- the terms and conditions specified in the undertaking in relation to compliance with the Category B SAOs (referred to in subsection 152CBA(3A)) are consistent with these obligations,<sup>97</sup> and are reasonable<sup>98</sup>
- any conduct specified by the undertaking in relation to access (referred to in subsection 152CBA(3B)) will promote the long-term interests of end-users,<sup>99</sup> and the related terms and conditions are reasonable,<sup>100</sup> and
- any conduct specified by the undertaking in relation to certain matters, such as developing new eligible services or enhancing a declared service (referred to in subsection 152CBA(3C)) will promote the long-term interests of end-users.<sup>101</sup>

Further, if the SAU specifies a fixed principles term or condition, the ACCC must not accept the SAU if it considers that:

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<sup>93</sup> CCA, s. 152CBC(2).  
<sup>94</sup> CCA, s. 152CBD(2)(d)(i).  
<sup>95</sup> CCA, s. 152CBD(2)(d)(ii).  
<sup>96</sup> CCA, s. 152CBD(2)(c).  
<sup>97</sup> CCA, s. 152CBD(2)(b)(i).  
<sup>98</sup> CCA, s. 152CBD(2)(b)(ii).  
<sup>99</sup> CCA, s. 152CBD(2)(ca)(i).  
<sup>100</sup> CCA, s. 152CBD(2)(ca)(ii).  
<sup>101</sup> CCA, s. 152CBD(2)(cb).

- the fixed principles term or condition specified in the SAU should not be a fixed principles term or condition<sup>102</sup>
- the notional period for the fixed principles term or condition should not be the notional fixed period<sup>103</sup>
- if the SAU provides that one or more specified circumstances are qualifying circumstance in relation to the fixed principles term or condition — any of the qualifying circumstances should not be qualifying circumstances,<sup>104</sup> or
- if the SAU does not provide that particular circumstances are qualifying circumstances, those circumstances should be qualifying circumstances in relation to the fixed principles term or condition.<sup>105</sup>

As noted, clause 5.3 of the Main Body of the SAU specifies that certain provisions in Module 2 are fixed principles terms or conditions for the SAU term. The ACCC's assessment of the fixed principles provisions is discussed at chapter 10.

In addition to the circumstances where the ACCC must not accept the SAU, there are three reasons for which the ACCC must not reject the SAU:

- If the undertaking contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services, the ACCC must not reject the undertaking for a reason that concerns those price-related terms and conditions.<sup>106</sup>
- If certain conduct by NBN Co (relating to interconnection and bundling of access services) is authorised under Part XIB of the CCA the ACCC must not reject the undertaking for a reason that concerns this conduct.<sup>107</sup>
- If the ACCC has previously accepted an SAU given by a person that contains fixed principles terms or conditions that are in effect, the ACCC must not reject another undertaking given by this person in relation to the same service for reasons relating to those fixed principles terms or conditions.<sup>108</sup>

The ACCC does not consider that the SAU contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services or matters about conduct by NBN Co relating to interconnection and bundling of access services that is authorised under Part XIB of the CCA. Further, no SAU containing fixed principles terms and conditions has been given by NBN Co and previously accepted by the ACCC. Therefore, the ACCC is not precluded from rejecting the SAU given by NBN Co for these reasons.

The rest of this chapter discusses the ACCC's approach in considering whether the terms and conditions in the SAU are likely to promote the long-term interests of end-users, and whether they are reasonable.

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<sup>102</sup> CCA, s. 152CBD(4)(a).

<sup>103</sup> CCA, s. 152CBD(4)(b).

<sup>104</sup> CCA, s. 152CBD(4)(c).

<sup>105</sup> CCA, s. 152CBD(4)(d).

<sup>106</sup> CCA, s. 152CBD(5A)(c).

<sup>107</sup> CCA, s. 152CBD(5C)(a). NBN Co authorised conduct is discussed further at section 2.4.

<sup>108</sup> CCA, s. 152CBAA(5)(h).

## 4.2. Long-term interests of end-users

In determining whether a particular thing promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services, the CCA requires the ACCC to consider the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communications between end-users, and
- encouraging the economically efficient use of, and economically efficient investment in the infrastructure by which these services are supplied, and any other infrastructure by which these services are, or are likely to become capable of being supplied.<sup>109</sup>

This list of objectives limits the matters to which regard may be had.<sup>110</sup>

At a high level, the ACCC considers that the expression 'long-term' involves a balancing of the flow of costs and benefits to end-users over time in relation to the objectives. The matters that the ACCC is required to take into account are often inter-related and may involve trade-offs that need to be weighed up. The following discussion outlines the approach adopted by the ACCC in taking into account each of these matters.

### 4.2.1. Promoting competition in markets for listed services

'Competition' is the process of rivalry between firms, where each market participant is constrained in its price and output decisions by the activity of other market participants. In the context of the SAU, effective competition requires both that the prices of wholesale 'resale' services and retail services should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-quality packages offered to consumers. Competition usually brings lower prices for end-users, increased quality of service, increased diversity and scope of product offerings and quicker access to innovations.

In the context of the SAU, the ACCC considers that the following markets for listed services are relevant:

- The national retail market or markets for broadband and voice services — retail service providers (RSPs) will require NBN Co's services in order to provide services to end-users.
- Wholesale markets, including the supply of services for use or resale by those RSPs at a range of levels — even though NBN Co provides wholesale services, the expectation is that other service providers will be able to offer 'value-added' wholesale voice and broadband services to RSPs.
- Transmission capability markets — transmission capability refers to links (also referred to as 'backhaul') which are used to connect service providers' core networks with points of service delivery (such as exchanges), which are usually provided using optical fibre, but can be provided using digital microwave or satellite systems.<sup>111</sup>

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<sup>109</sup> CCA, s. 152AB(2).

<sup>110</sup> CCA, s. 152AB(3).

<sup>111</sup> Service providers can obtain transmission capability by building and installing their own physical infrastructure in order to self-supply; acquiring services in an 'unconditioned' state (that is, dark fibre) and providing their own electronics to condition the fibre; or acquiring services in a 'conditioned' state, such as managed transmission services, which includes the declared domestic transmission capacity service (DTCS).

In determining whether a particular thing is likely to promote competition in markets for listed services, the ACCC must have regard to the extent to which the thing will remove obstacles to end-users of listed services gaining access to listed services.<sup>112</sup> The ACCC is not limited to having regard only to this matter.<sup>113</sup> The ACCC would typically also consider:

- whether the terms and conditions will likely lead to an improvement in competition, and
- the extent of the competitive impact and the likelihood of that extent.

The impact on competition is likely to be less relevant for a wholesale-only provider such as NBN Co, compared to an infrastructure operator that also operates in downstream markets (such as Telstra).<sup>114</sup> That said, the ACCC has considered the potential impact on competition in related markets, where relevant.

The promotion of competition will not necessarily be achieved merely by an increase in (or prevention of a decrease in) the number of participants in a market. That is, the 'level' of competition in a particular market is not assessed solely with regard to the number of firms in the market. Rather, in assessing the level of competition, the ACCC has considered the vigour of competition between firms, regardless of their number. In the current context, the ACCC considers that competition in retail markets will not necessarily always be promoted merely by an increase in the number of retail service providers connecting directly to the NBN (that is, purchasing services directly from NBN Co). This is because any barriers that may exist in connecting directly to the NBN do not by themselves create barriers to entering retail markets. The barriers that may exist to entering retail markets can be addressed through the provision of aggregation (and other) services by wholesale providers, rather than through the regulation of terms and conditions of access to NBN Co's network.

## 4.2.2. Ensuring any-to-any connectivity

Any-to-any connectivity is relevant when considering services that involve communications between end-users.<sup>115</sup> It is achieved if and only if each end-user of a carriage service that involves communication between end-users is able to communicate with each other end-user who is supplied with the same or similar service, irrespective of the telecommunications network the end-users are connected to.<sup>116</sup>

However, the ACCC has not placed much weight on this objective in assessing the terms and conditions of the SAU. This is because in the context of the services set out in the SAU (such as carriage services that are inputs to an end-to-end service), the achievement of this objective is neither promoted nor hindered.<sup>117</sup>

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<sup>112</sup> CCA, s. 152AB(4).

<sup>113</sup> CCA, s. 152AB(5).

<sup>114</sup> NBN Co is nonetheless subject to the non-discrimination provisions in Part XIC of the CCA (discussed at section 2.4). The ACCC's guidelines about the non-discrimination provisions note that it will consider the implications for competition in the event that complaints about possible breaches of the provisions are brought to its attention.

<sup>115</sup> Explanatory Memorandum to the *Trade Practices (Telecommunications) Amendment Act 1996* (Cth), p. 41.

<sup>116</sup> CCA, s. 152AB(8).

<sup>117</sup> Explanatory Memorandum to the *Trade Practices (Telecommunications) Amendment Act 1996* (Cth), p. 41; ACCC, *Final Decision – Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR*, July 2009, p. 119.

### 4.2.3. Encouraging efficient investment in and use of infrastructure

In determining the extent to which a particular thing is likely to encourage the economically efficient investment in, and use of, infrastructure, the CCA requires the ACCC to consider a number of matters:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for (having regard to the technology that is in use, available or likely to become available; whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable; and the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks)<sup>118</sup>
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope,<sup>119</sup> and
- the incentives for investment in the infrastructure by which the services are or will become capable of being supplied.<sup>120</sup>

The ACCC is not restricted to considering these matters when determining whether the provisions in an SAU encourage efficient use of and investment in infrastructure.<sup>121</sup>

In assessing the provisions in the SAU given by NBN Co, the ACCC considers that the SAU neither promotes nor detracts from the technical feasibility for the services to be supplied and charged for. NBN Co is already supplying and charging for services of the nature that the SAU is given in relation to. This suggests that it is technically feasible to supply and charge for such services and that NBN Co considers that the costs in doing so are reasonable. It also suggests that there are not negative effects resulting from supplying and charging for the services on the operation or performance of the network.<sup>122</sup>

The ACCC considers that the legitimate commercial interests of NBN Co in this context are to ensure that it is provided with the opportunity to recover, through access prices, the efficient and prudent costs of providing the relevant services, including an appropriate commercial return on its investment. If NBN Co is not provided the opportunity to recover its efficient and prudent costs, it may not be able to fund its operations. Conversely, if it is able to recover more than its efficient and prudent costs, it may not face incentives to operate in an efficient manner (and higher access prices than otherwise may discourage efficient use of the network).

NBN Co is likely to be the sole supplier of Layer 2 bitstream services used to provide fixed-line telecommunications products to the majority of end-users in Australia. Hence, it will likely be in a position to exploit economies of scale, particularly in respect of the rollout of the network. The ACCC has not identified anything in the SAU that would hinder NBN Co's ability to exploit these economies of scale. Economies of scope are less relevant in the context of NBN Co as a wholesale broadband supplier. However, to the extent that economies of scope exist, the ACCC does not consider that anything in the SAU would detract from NBN Co's ability to exploit these economies of scope.

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<sup>118</sup> CCA, s. 152AB(6)(a).

<sup>119</sup> CCA, s. 152AB(6)(b).

<sup>120</sup> CCA, ss. 152AB(6)(c) and 152AB(7).

<sup>121</sup> CCA, s. 152AB(7B).

<sup>122</sup> CCA, s. 152AB(6)(a)(iii).

In considering the incentives for investment in the infrastructure by which the services are or will become capable of being supplied, the ACCC must have regard to the risks involved in making the investment.<sup>123</sup> The ACCC would also typically consider matters such as:

- whether the supplier has the opportunity to recover the prudent and efficient costs of building, operating and maintaining the infrastructure used to supply the declared service under consideration, and
- whether the supplier faces an incentive to invest efficiently in delivering a particular service quality.

In considering whether the economically efficient use of infrastructure is encouraged, the ACCC would typically consider:

- whether over the long-term access prices allow the access provider the opportunity to recover its prudent and efficient costs, but no more, and
- whether the suppliers of services will make timely changes to technology, products, price structures and price relativities in response to changes in consumer preferences.

Finally, the ACCC considers that the phrase 'economically efficient' consists of three components:

- Productive efficiency — this is achieved where individual firms produce the goods and services that they offer at least cost.
- Allocative efficiency — this is achieved where resources are allocated to their highest valued uses, that is, resources are allocated to those uses that provide the greatest benefit relative to costs.
- Dynamic efficiency — this is achieved when industries make timely changes to and investments in technology and products in response to changes in consumer preferences and productive opportunities.

Further, references to 'efficient' throughout this decision should be read as meaning 'economically efficient'.

## 4.3. Reasonableness

In determining whether a term or condition is reasonable, the CCA requires the ACCC to consider:

- whether the terms and conditions promote the long-term interests of end-users
- the legitimate business interests of NBN Co, and NBN Co's investment in facilities used to supply the declared service concerned
- the interests of persons who have rights to use the declared service concerned
- the direct costs of providing access to the declared service concerned
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility, and

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<sup>123</sup> CCA, s. 152AB(7A).

- the economically efficient operation of a carriage service, a telecommunications network or facility.<sup>124</sup>

In assessing whether terms and conditions are reasonable, the ACCC is not limited to having regard only to these matters.<sup>125</sup> Further, ‘reasonableness’ is not determined by reference to whether they are the best possible terms and conditions or whether they could be improved.<sup>126</sup>

Some of the matters that the ACCC is required to consider in determining whether a term or condition of the SAU is reasonable overlap with those that the ACCC is required to consider in the context of the long-term interests of end-users. Also, as is the case with the matters relevant to the ‘long-term interests of end-users’, many of these matters are often inter-related and may involve trade-offs that need to be weighed up.

The following discussion outlines the approach adopted by the ACCC in taking into account each of these matters.

### 4.3.1. Long-term interests of end-users

The first matter the ACCC is required to consider is whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services.<sup>127</sup> The ACCC’s views in this regard are discussed in section 4.2.

### 4.3.2. Legitimate business interests

The ACCC considers that the expression ‘legitimate business interests’ is synonymous with the expression ‘legitimate commercial interests’, as discussed in section 4.2.3 in the context of encouraging efficient investment in and use of infrastructure — that is, a legitimate business interest for a carrier or carriage service provider that is an access provider, is the opportunity to recover the efficient cost of providing services and to earn an appropriate commercial return on its investment in the infrastructure used to supply those services.<sup>128</sup>

However, this matter also requires consideration of the interests of the carrier or carriage service provider in conducting its business affairs. A carrier or carriage service provider should not be unduly constrained in the conduct of its legitimate business interests simply because it has an obligation to provide access to its services — a carrier or carriage service provider is entitled to have some legitimate control over its relationship with an access seeker to the extent reasonably required to protect its legitimate business interests. For instance, NBN Co should be able to make appropriate decisions about modifications and upgrades to its networks or set appropriate requirements for the billing and payment of its accounts.

### 4.3.3. The interests of persons who have rights to use the declared service

The ACCC considers that the expression ‘persons’ captures all current and potential access seekers of the service. Access seekers will generally use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users.<sup>129</sup>

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<sup>124</sup> CCA, s. 152AH(1).

<sup>125</sup> CCA, s. 152AH(2).

<sup>126</sup> ACCC, *Draft Decision: Assessment of FANOC’s Special Access Undertaking in relation to the Broadband Access Service (FANOC Draft Decision)*, December 2007, pp. 29-30.

<sup>127</sup> CCA, s. 152AH(1)(a).

<sup>128</sup> ACCC, *FANOC Draft Decision*, December 2007, p. 38.

<sup>129</sup> ACCC, *FANOC Draft Decision*, December 2007, p. 39.

Access seekers have an interest in being able to compete for the custom of end-users on the basis of their relative merits. However, it is important to distinguish between the interests of access seekers to effectively compete to supply a service in a dependent market from the interests of access seekers being ensured of remaining profitable. It is the former interest which the ACCC has had regard to in assessing the terms and conditions of the SAU. Another interest of access seekers that the ACCC has considered is to ensure that they are not subjected to overly onerous commercial terms simply because of their status as access seekers. For example, from a non-price perspective, the ACCC would expect NBN Co to reasonably notify and consult with an access seeker in regards to any proposed changes to a facility or service that affects its business interests, including in relation to billing and credit matters, suspension of services and other facets of a business where its customer relationship may be impacted.

#### 4.3.4. The direct costs of providing access to the declared service

Direct costs are those necessarily incurred (or caused) by the provision of access. Previous ACCC decisions have emphasised that direct costs do not include the recovery of any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access. This consideration is not relevant to wholesale-only access providers such as NBN Co because they do not sell services in dependent markets.

#### 4.3.5. Operational and technical requirements necessary for the safe and reliable service, network or facility

An access provider will have a sufficient incentive to ensure the safe and reliable operation of carriage services, telecommunications networks or facilities where it receives sufficient revenue to cover the costs of the operational and technical requirements necessary for ensuring the safe and reliable operation of carriage services.<sup>130</sup> In addition, terms of access also should not require work practices that would be likely to compromise the safety or reliability of the carriage service, network or facility.

However, terms of access aimed at ensuring the safe and reliable operation of a carriage service, a telecommunications network or a facility should not be used as a barrier to access seekers gaining access.<sup>131</sup>

#### 4.3.6. Economically efficient operation of a carriage service, a telecommunications network or facility

The discussion of what the ACCC considers constitutes 'economic efficiency' at section 4.2.3 equally applies to this matter. The economically efficient operation of a carriage service, telecommunications network or facility will not be precluded where the carrier or carriage service provider has the opportunity to recover the efficient costs of providing services (and no more).

If NBN Co is not able to recover its efficient or prudent costs, it may not be able to fund its operations and aspects of service quality may subsequently decline and/or the safe operation of the business may not be guaranteed.

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<sup>130</sup> *Re Telstra Corporation Ltd (No 3)* (2007) 242 ALR 482, 545. Cited in: ACCC, *FANOC Draft Decision*, December 2007, p. 40.

<sup>131</sup> ACCC, *FANOC Draft Decision*, December 2007, p. 40.

## 4.4. Categorisation of SAU clauses

As noted, an SAU may include different categories of provisions, including terms and conditions in relation to the Category B SAOs, provisions specifying conduct in relation to access and related terms and conditions, conduct in relation to additional activities, and provisions conferring functions and powers on the ACCC.

The remainder of this section summarises the ACCC's categorisation of the clauses in the SAU given by NBN Co.

### 4.4.1. Terms and conditions in relation to the SAOs

As noted in section 2.5, a Special Access Undertaking given by NBN Co must state that NBN Co agrees to be bound by the Category B SAOs and will comply with the terms and conditions specified in the undertaking in relation to the SAOs.<sup>132</sup> (The SAOs are outlined at section 2.2.) Clause 1 of the Main Body of the SAU given by NBN Co refers to the application of the SAOs and states that NBN Co will comply with any applicable SAOs.

The ACCC must not accept the SAU unless it is satisfied that the terms and conditions specified in the undertaking in relation to compliance with the Category B SAOs are consistent with these SAOs and are reasonable.<sup>133</sup>

The ACCC has categorised clauses about the following matters as terms and conditions relating to compliance with the Category B SAOs:

- terms and conditions of supply of product components<sup>134</sup>
- the commitment to supply NBN offers<sup>135</sup>
- prices and charges<sup>136</sup>
- the methodology for the calculation of the regulatory asset base (RAB)<sup>137</sup>
- conditions for including capital expenditure into the RAB in Module 1<sup>138</sup>
- calculation of the annual building block revenue requirement (ABBRR)<sup>139</sup>
- operation of the initial cost recovery account (ICRA)<sup>140</sup>
- operation of the building block revenue period<sup>141</sup>
- calculation of inflation and real values.<sup>142</sup>

The ACCC has had regard to the statutory criteria in section 152AH in considering whether these terms and conditions are reasonable (described above at section 4.3).

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<sup>132</sup> CCA, s. 152CBA(3A).

<sup>133</sup> CCA, s. 152CBD(2)(b).

<sup>134</sup> NBN Co, SAU, November 2013, Schedule 1A, clause 1A.4; Schedule 2A, clause 2A.3.

<sup>135</sup> NBN Co, SAU, November 2013, Schedule 1C, clauses 1C.1.2 and 1C.2; Schedule 2B, clause 2B.1.2.

<sup>136</sup> NBN Co, SAU, November 2013, Schedule 1C, clauses 1C.1.3-1C.1.6, 1C.3, 1C.4, 1C.5, Annexures 1 and 2; Schedule 1G, clauses 1G.2.1, 1G.2.2(d), 1G.2.6(b), 1G.2.6(c), and 1G.3.7(c); Schedule 2B, clauses 2B.1.3, 2B.1.4, 2B.2 and 2B.3; Schedule 2E, clause 2E.2.7(c).

<sup>137</sup> NBN Co, SAU, November 2013, Schedule 1D, clause 1D.2; Schedule 2C, clause 2C.7.

<sup>138</sup> NBN Co, SAU, November 2013, Schedule 1D, clauses 1D.3, 1D.4 and 1D. 6.

<sup>139</sup> NBN Co, SAU, November 2013, Schedule 1E, clauses 1E.4, 1E.7-1E.10; Schedule 2C, clauses 2C.2 and 2C.4.

<sup>140</sup> NBN Co, SAU, November 2013, Schedule 1E, clauses 1E.2.1-1E.2.3 and 1E.5; Schedule 2C, clauses 2C.3, 2C.5.1-2C.5.4, 2C.5.7.

<sup>141</sup> NBN Co, SAU, November 2013, Schedule 1E, clauses 1E.2.4 and 1E.6; Schedule 2C, clause 2C.6.

<sup>142</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.3; Schedule 2C, clauses 2C.1.4-2C.1.5.

## 4.4.2. Conduct relating to access

The ACCC must not accept the SAU unless it is satisfied that any conduct specified in the undertaking in relation to access referred to in subsection 152CBA(3B) will promote the long-term interests of end-users, and that the related terms and conditions are reasonable.<sup>143</sup>

The ACCC has categorised clauses about the following matters as conduct and terms and conditions upon which NBN Co will engage in conduct relating to access under subsection 152CBA(3B):

- Production and maintenance of SFAAs — NBN Co will publish and maintain SFAAs in relation to the supply of the NBN access service, the ancillary services and the facilities access service for the duration of the SAU term.<sup>144</sup> NBN Co will also ensure that the SFAAs it publishes during Module 1 will have an expiry date of no later than two years after the date on which the SFAA commences.<sup>145</sup>
- Development of SFAAs ('multilateral SFAA forum') — NBN Co will establish and conduct a 'multilateral SFAA forum' to engage with access seekers and consumer advocacy groups on possible future changes to the terms and conditions of SFAAs.<sup>146</sup>
- Dispute management — NBN Co will seek the ACCC's approval for the appointment of resolution advisors and pool members and the terms of appointment under which they are appointed (including the terms of appointment for panel members). NBN Co will also seek the ACCC's approval for the termination of the appointment of resolution advisors and pool members, and will seek ACCC approval for the guidelines to be applied by a panel.<sup>147</sup>
- Replacement module process — submission and assessment of replacement module applications; and compliance with replacement module determinations.<sup>148</sup>
- Developing and maintaining procurement rules.<sup>149</sup>
- Issuing notices to access seekers and the ACCC prior to the end of the ICRA period.<sup>150</sup>
- Submitting regulatory information to the ACCC.<sup>151</sup>
- Issuing Tax Change Events Proposals and submitting a statement to the ACCC following a Tax Change Event.<sup>152</sup>
- Giving the ACCC a Price Review Notice and a Price Review Proposal.<sup>153</sup>
- Withdrawal of a product.<sup>154</sup>

The ACCC has considered whether this conduct promotes the long-term interests of end-users (described above at section 4.2), and has had regard to the matters in section 152AH in considering whether the related terms and conditions are reasonable (described above at section 4.3).

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<sup>143</sup> CCA, s. 152CBD(2)(ca).

<sup>144</sup> NBN Co, SAU, November 2013, Main Body, clause 6.

<sup>145</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.2.

<sup>146</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.3.

<sup>147</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.5 and Annexure 1.

<sup>148</sup> NBN Co, SAU, November 2013, Main Body, clauses 4.4-4.8.

<sup>149</sup> NBN Co, SAU, November 2013, Schedule 1D, clause 1D.5.

<sup>150</sup> NBN Co, SAU, November 2013, Schedule 1E, clauses 1E.2.5 and 1E.2.6; Schedule 2C, clauses 2C.5.5 and 2C.5.6.

<sup>151</sup> NBN Co, SAU, November 2013, Schedule 1F.

<sup>152</sup> NBN Co, SAU, November 2013, Schedule 1G, clauses 1G.2.2-1G.2.4.

<sup>153</sup> NBN Co, SAU, November 2013, Schedule 1G, clauses 1G.3.1, 1G.3.2 and 1G.3.4; Schedule 2E, clauses 2E.2.1, 2E.2.2 and 2E.2.4.

<sup>154</sup> NBN Co, SAU, November 2013, Schedule 1I, clause 1I.5; Schedule 2D, clauses 2D.2 and 2D.6.

### 4.4.3. Conduct relating to additional activities

The ACCC must not accept the SAU unless it is satisfied that any conduct specified by the undertaking in relation to certain matters (such as developing new eligible services, enhancing a declared service, extending or enhancing the capacity of a facility or telecommunications network, planning for a facility or telecommunications network, certain preparatory and ancillary activities) referred to in subsection 152CBA(3C) will promote the long-term interests of end-users.<sup>155</sup>

The ACCC has categorised clauses about the following matters to be conduct under subsection 152CBA(3C):

- activities relating to the network design rules, permitted variations and network changes<sup>156</sup>
- the POI and rollout provisions<sup>157</sup>
- the product development provisions.<sup>158</sup>

The ACCC has considered whether this conduct promotes the long-term interests of end-users (described above at section 4.2).

### 4.4.4. ACCC functions and powers

As noted above, an SAU given by NBN Co may provide for the ACCC to perform functions or exercise powers in relation to the undertaking.<sup>159</sup>

The ACCC has identified that the SAU provides for the ACCC to perform functions or exercise powers as follows:

- To request information:
  - enhanced information request — to determine the LTRCM components<sup>160</sup>
  - expenditure compliance information request — to assess NBN Co's expenditure compliance report<sup>161</sup>
  - procurement rules compliance information request — to assess NBN Co's compliance with the procurement rules<sup>162</sup>
  - price compliance information request — to determine NBN Co's compliance with Schedule 1C (NBN offers and other charges)<sup>163</sup>
  - further information regarding a negative tax change event — to determine whether a negative tax change event had occurred.<sup>164</sup>
- To resolve disputes:

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<sup>155</sup> CCA, s. 152CBD(2)(cb).

<sup>156</sup> NBN Co, SAU, November 2013, Schedule 1D, clauses 1D.7-1D.12.

<sup>157</sup> NBN Co, SAU, November 2013, Schedule 1H, clauses 1H.2, 1H.3 and 1H.4.

<sup>158</sup> NBN Co, SAU, November 2013, Schedule 1I, clauses 1I.1.2, 1I.1.3, 1I.2-1I.4 and Annexure 1; Schedule 2D, clauses 2D.1.2, 2D.1.3, 2D.3-2D.5.

<sup>159</sup> CCA, s. 152CBA(10A).

<sup>160</sup> NBN Co, SAU, November 2013, Schedule 1F, clause 1F.1.7.

<sup>161</sup> NBN Co, SAU, November 2013, Schedule 1F, clause 1F.2.2.

<sup>162</sup> NBN Co, SAU, November 2013, Schedule 1F, clause 1F.2.3(b).

<sup>163</sup> NBN Co, SAU, November 2013, Schedule 1F, clause 1F.3.

<sup>164</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.2.7.

- network change disputes — acceptance or rejection of a proposed network change that is under dispute between NBN Co and access seekers.<sup>165</sup>
- To determine terms and conditions:
  - Under the ‘replacement module’ submission and assessment process — giving notice requiring NBN Co to provide a replacement module application;<sup>166</sup> issuing ‘replacement module determinations’ in respect of the LTRCM arrangements and the RAB roll-forward arrangements for a ‘regulatory cycle’.<sup>167</sup>
  - Under the ‘LTRCM determination’ process — issuing determinations in respect of the value of LTRCM components (NBN Co’s annual building block revenue requirement (ABBRR), RAB, ICRA, and revenue variations (during the building block revenue period)).<sup>168</sup>
  - Issuing determinations regarding capital expenditure and operating expenditure.<sup>169</sup>
  - Under the ‘tax change events’ process — notifying NBN Co that a negative tax change event has occurred and making a determination in relation to a tax change event.<sup>170</sup>
  - Under the ‘price review arrangements’ — initiating a price review, accepting or rejecting a price review proposal by NBN Co, determining a price review arrangement, discontinuing the price review, or issuing a notice to vary NBN Co’s price review proposal.<sup>171</sup>
- To approve NBN Co doing particular things:
  - Under the ‘dispute management’ provisions — approval of the appointment (including the terms of appointment) of ‘resolution advisors’ and ‘pool members’;<sup>172</sup> approval of the terms of appointment for ‘panel members’;<sup>173</sup> approval of the termination of appointment of ‘resolution advisors’ and ‘pool members’;<sup>174</sup> approval of the guidelines to be applied by a panel when considering a dispute;<sup>175</sup> and giving directions to a ‘resolution advisor’.<sup>176</sup>
  - Approving a request by NBN Co to have a longer period in which to make a tax change events proposal.<sup>177</sup>
- To object to NBN Co doing particular things:

<sup>165</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clauses 1D.10.2(b) and 1D.10.3-1D.10.5.

<sup>166</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 4.5(b), 4.5(c) and 4.5(e).

<sup>167</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.8.

<sup>168</sup> NBN Co, *SAU*, November 2013, Schedule 1E, clauses 1E.1.2 and 1E.1.3.

<sup>169</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clauses 1D.3.2 and 1D.4; Schedule 1E, clauses 1E.8.2-1E.8.4.

<sup>170</sup> NBN Co, *SAU*, November 2013, Schedule 1G, clauses 1G.2.5 and 1G.2.6.

<sup>171</sup> NBN Co, *SAU*, November 2013, Schedule 1G, clauses 1G.3.1, 1G.3.3-1G.3.8; Schedule 2E, clauses 2E.2.1, 2E.2.3-2E.2.8.

<sup>172</sup> NBN Co, *SAU*, November 2013, Schedule 1H, Annexure 1, clauses 1.1(c)-(e), 2.1(e) and 2.2(c).

<sup>173</sup> NBN Co, *SAU*, November 2013, Schedule 1H, Annexure 1, clause 3.1(c).

<sup>174</sup> NBN Co, *SAU*, November 2013, Schedule 1H, Annexure 1, clause 5.2(d)-(f).

<sup>175</sup> NBN Co, *SAU*, November 2013, Schedule 1H, Annexure 1, clause 6(c).

<sup>176</sup> NBN Co, *SAU*, November 2013, Schedule 1H, Annexure 1, clause 7.

<sup>177</sup> NBN Co, *SAU*, November 2013, Schedule 1G, clause 1G.2.3(b).

- Under the process for updating the network design rules — disallowing an NBN Co proposal on how to treat new and old versions of the network design rules.<sup>178</sup>
- Under the product withdrawal process — disallowing an NBN Co proposal to withdraw a ‘product’ (product, product component, product feature, ancillary service or type of facilities access service).<sup>179</sup>

The ACCC has considered whether the functions and powers conferred on the ACCC under the SAU promote the long-term interests of end-users (described above at section 4.2) and whether the conditions and processes for performing the functions or exercising the powers are reasonable (described above at section 4.3).

#### 4.4.5. Other provisions in the SAU

The following provisions set out the structure and other general matters of the SAU:

- The SAU term, withdrawal, variation and extension of the SAU.<sup>180</sup>
- The duration of each Schedule and the description of each Schedule.<sup>181</sup>
- The modular structure of the SAU.<sup>182</sup>
- Definitions and interpretations.<sup>183</sup>
- Descriptions of services covered by the SAU and their implementation as products to be supplied under the SAU,<sup>184</sup> and services declared by the ACCC.<sup>185</sup>
- Fixed principles terms and conditions.<sup>186</sup>

The structure of the SAU, and the SAU term (including withdrawal, variation and extension of the SAU) are discussed in chapter 5. The services and products specified by the SAU are discussed in chapter 6. The fixed principles terms and conditions are discussed in chapter 10. Other provisions on general matters are assessed together with the relevant substantive provisions.

<sup>178</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clause 1D.7.4(e).

<sup>179</sup> NBN Co, *SAU*, November 2013, Schedule 1I, clauses 1I.5.3(a)-1I.5.3(e) and 1I.5.3(g); Schedule 2D, clauses 2D.6.3(a)-2D.6.3(e) and 2D.6.3(g).

<sup>180</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 3 and 7.

<sup>181</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.1; Schedule 1B, clause 1B.1; Schedule 1C, clause 1C.1.1; Schedule 1D, clauses 1D.1.1 and 1D.1.2; Schedule 1E, clause 1E.1.1; Schedule 1F, clause 1F.1.1; Schedule 1G, clauses 1G.1.1 and 1G.1.2; Schedule 1H, clause 1H.1.1; Schedule 1I, clause 1I.1.1; Schedule 2A, clause 2A.1.1; Schedule 2B, clauses 2B.1.1 and 2B.1.5; Schedule 2C, clauses 2C.1.1 and 2C.1.2; Schedule 2D, clause 2D.1.1; Schedule 2E, clauses 2E.1.1 and 2E.1.2.

<sup>182</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 4.1-4.3.

<sup>183</sup> NBN Co, *SAU*, November 2013, Main Body, Attachment C; Schedule 1E, clause 1E.3; Schedule 2C, clause 2C.1.3.

<sup>184</sup> NBN Co, *SAU*, November 2013, Main Body, clause 2 and Attachments A, B and D; Schedule 1A, clauses 1A.2, 1A.3, 1A.5, 1A.6 and 1A.7; Schedule 2A, clauses 2A.1.2-2A.1.4.

<sup>185</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.8; Schedule 2A, clause 2A.2.

<sup>186</sup> NBN Co, *SAU*, November 2013, Main Body, clause 5.

## Part B: Reasons for decision

## 5. Structure and operation of the SAU

This chapter discusses the overarching structure and operation of the SAU. In particular:

- the SAU's modular structure and the term of the SAU, including the process for varying, withdrawing or extending the SAU (section 5.1)
- the role of replacement modules during Module 2 (section 5.2), and
- the provisions relating to SFAAs (section 5.3).

### 5.1. SAU structure and term

This section discusses clauses 3, 4.1, 4.2 and 4.3 of the Main Body of the SAU. These clauses specify the term and the 'modular' structure of the SAU. More specifically, these clauses provide for the following:

- The SAU will commence on the date the ACCC notifies NBN Co that it has accepted the SAU and will remain in effect until 30 June 2040 (the SAU term).<sup>187</sup>
- The SAU comprises three main parts (or 'modules'):
  - Module 0, which will have effect for the duration of the SAU term.<sup>188</sup>
  - Module 1, which will have effect from the commencement of the SAU to 30 June 2023 (the initial regulatory period) and sets out the commitments that NBN Co makes in connection with the provision of access over this period.<sup>189</sup>
  - Module 2, which will have effect from the end of the initial regulatory period (that is, from 1 July 2023) to the end of the SAU term (the subsequent regulatory period) and sets out long term arrangements that apply in connection with the provision of access over this period.<sup>190</sup>
- Replacement modules will be incorporated into the SAU during the subsequent regulatory period (discussed in section 5.2).<sup>191</sup>

The ACCC is satisfied that these provisions in the SAU will promote the long-term interests of end-users and are reasonable. In determining whether the terms and conditions insofar as they relate to the SAU structure are reasonable, the ACCC has had regard to the matters specified in section 152AH of the CCA.

The ACCC's assessment against these matters and reasons are set out in this section.

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<sup>187</sup> NBN Co, SAU, November 2013, Main Body, clause 3.

<sup>188</sup> NBN Co, SAU, November 2013, Main Body, clause 4.1(a).

<sup>189</sup> NBN Co, SAU, November 2013, Main Body, clauses 4.1(b) and 4.2.

<sup>190</sup> NBN Co, SAU, November 2013, Main Body, clauses 4.1(c) and 4.3.

<sup>191</sup> NBN Co, SAU, November 2013, Main Body, clauses 4.1(d) and 4.4. The provisions relating to the process by which replacement modules are assessed and incorporated into the SAU are discussed further at section 5.2.

### 5.1.1. Modular structure of the SAU

The ACCC has previously indicated in principle support of the modular structure of the SAU, and more specifically the locking in of different provisions for different periods of time.<sup>192</sup>

There is a trade-off between certainty to NBN Co and access seekers by locking in detailed provisions and allowing flexibility to consider the particular circumstances at that time. An appropriate balance between certainty and flexibility is desirable, particularly in the context of long term regulatory arrangements. If too many terms and conditions are locked in or are locked in for too long, this may result in situations where, due to changing circumstances, the terms and conditions may not appropriately reflect the legitimate business interests of NBN Co or may not promote the long-term interests of end-users. Conversely, if too many terms and conditions are subject to change, this could create uncertainty, which may have negative implications for the efficient use of and investment in the NBN.

There are a number of factors, including the risk of NBN Co not recovering its costs in Module 1, that will act to initially provide NBN Co with incentives to invest in and operate the NBN in an efficient manner and to set its prices in a way that will encourage efficient use. However, these incentives are likely to change over the course of the SAU term as NBN Co's operating environment changes. The ACCC has indicated that the SAU should include scope to adjust to NBN Co's changing circumstances to ensure that NBN Co continues to face effective incentives to invest, operate and price its products efficiently.

For the following reasons, the ACCC considers it reasonable to lock in those matters specified as Module 0 provisions for the term of the SAU.

First, the Main Body of the SAU performs several important functions that need to apply for the full term of the SAU so that the other provisions of the SAU can operate effectively. These include provisions that specify how Module 1, Module 2 and the replacement module process will operate, and the dictionary of terms used in the SAU. Second, certain provisions necessarily have to apply for the term of the SAU, including the commitment by NBN Co to comply with the Category B SAOs<sup>193</sup> and the description of services to which the SAU relates.

In relation to Module 1 and Module 2, the ACCC notes that for certain matters both modules contain substantially similar provisions. These matters are implementation of the SAU product development and withdrawal and pricing commitments for NBN Co offers (including the price rebalancing provisions). The ACCC considers that the provisions around these matters are sufficiently flexible as to be appropriate over the entire SAU term.

There are matters for which provisions or commitments are specified in Module 1 but not in Module 2. These matters are non-price terms and conditions, a range of commitments regarding SFAAs and the provision of regulatory information. As there are no equivalent provisions for these matters in Module 2, there is scope for these to be subject to commercial negotiations between NBN Co and access seekers, included in replacement modules or other SAU variations, or covered by regulatory determinations by the ACCC (including record-keeping rules in the case of regulatory information).

There are certain provisions in Module 1 that have effect for the first five years of the SAU. These are the product development forum processes and the detailed provisions around dispute resolution, and customer engagement endorsement procedures for network design changes. As discussed in chapters 6, 8 and 9, the ACCC considers that these processes are relatively unique and that some experience of their operation is required to assess whether they are operating as intended and producing the intended outcomes for NBN Co and access seekers. Similar to the provisions that expire at the end of Module 1, there will be scope for

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<sup>192</sup> For example, see: ACCC, *Draft Decision*, April 2013, pp. 56-57.

<sup>193</sup> CCA, s. 152CBA(3A).

these matters to be subject to commercial negotiations, SAU variations or regulatory determinations when they are no longer covered by the SAU.

Further, while Module 1 and Module 2 both contain detailed provisions for the LTRCM, these provisions differ significantly between the two modules. The key difference is that NBN Co's revenue in Module 1 will be based on an ex-post (actual cost) basis while it will be determined on an ex-ante (forecast) basis in Module 2 (see chapter 8 for further discussion on LTRCM). This is one of the key differences between Module 1 and Module 2 and is a key consideration in assessing the appropriateness of the timeframes for Modules 1 and 2.

NBN Co is currently in the rollout phase of the NBN. It is expected that this phase will last for many years, even under a number of different infrastructure configurations, and there is uncertainty as to when the rollout will be completed.

As discussed in the draft decision, the ACCC considers that it is reasonable for the LTRCM to be based on actual costs during the rollout period.<sup>194</sup> NBN Co will face cost uncertainties and revenue risk (given initial prices and demand) during this period. This means it will have increased incentives to invest and operate the NBN efficiently during this time. Further, given NBN Co has only been operating for a number of years, and given the lack of comparative companies, NBN Co's costs are highly uncertain in the short and medium term. If NBN Co's costs were determined on a forecast basis during this time, this could act as a disincentive to invest efficiently as NBN Co would potentially face the risk of forecasting error. This could lead to lower levels of investment, reduced service quality or delayed network rollout. The actual cost approach to LTRCM in Module 1 will also have appropriate regard to NBN Co's direct costs and economically efficient operation because it will allow NBN Co the opportunity to recover all direct costs that have been prudently and efficiently incurred.<sup>195</sup> The ACCC considers that these increased incentives on NBN Co are likely to persist until the point when NBN Co starts recovering the costs it has built up throughout the rollout. In the circumstances, and on the basis of the information available, the ACCC considers that the length of the initial regulatory period, during which Module 1 will apply, is appropriate.

After this period, NBN Co's incentives for efficient investment and operation would decline if its revenue continued to be determined on an actual cost basis. The ACCC considers that these incentives can instead be provided under an ex-ante (forecast) based approach, as will be provided in Module 2. The ACCC also considers that this approach will have appropriate regard to NBN Co's direct cost and economically efficient operation of the network. In particular, under this approach NBN Co's direct costs that are expected to be required for the economically efficient operation of the network will be reflected in NBN Co's expenditure forecasts, which NBN Co will have the opportunity to recover.

The additional flexibility provided in Module 2 is also appropriate as it will allow NBN Co and the ACCC to learn from experience. By Module 2, there will also be greater information about NBN Co's operations and costs, meaning that this can be used to set more accurate forecasts than could be set throughout Module 1.

For these reasons, the ACCC considers that the timing of Modules 1 and 2 are reasonable and promote the long-term interests of end-users.

### 5.1.2. Term of the SAU

The ACCC considers that the term of the SAU must be considered in light of the provisions that will apply over the SAU term.

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<sup>194</sup> ACCC, *Draft Decision*, April 2013, pp. 141-142.

<sup>195</sup> See chapter 8 for further discussion.

As noted above, the ACCC considers that the length of the initial regulatory period, during which Module 1 will apply, is appropriate. It also considers it reasonable for the provisions in Module 0 to apply for the full term of the SAU.

In assessing whether the term of the SAU is reasonable, the ACCC must also be satisfied that it is reasonable for the subsequent regulatory period, during which Module 2 will apply, to apply until 30 June 2040.

The ACCC considers that the provisions in Module 2 achieve an appropriate balance between the degree of certainty and flexibility for matters that can be reviewed and determined at various points over this period.

In relation to the LTRCM in particular, the ACCC will be able to review matters such as expenditure forecasts and the rate of return on a periodic basis through the replacement module process. This will ensure that any expenditure and return on assets that NBN Co will be able to recover will be prudent and efficient and reflect NBN Co's cost of capital. This will promote efficient investment in NBN Co's network and ensure that appropriate regard is had to NBN Co's direct costs and the economically efficient operation of the network. The ACCC also considers that this process will strike an appropriate balance between the interests of NBN Co and access seekers. It will also allow NBN Co and the ACCC to consider the best regulatory practice at the time.

While the LTRCM in Module 2 provides some flexibility in this regard, this flexibility is constrained somewhat by Modules 0 and 2. The ACCC considers that these constraints will provide NBN Co will an appropriate degree of certainty around how the amount of revenue it will be entitled to recover over the SAU period will be determined. Regulatory certainty is an important precursor to efficient investment. In particular, for NBN Co to invest efficiently, it needs to know it will be provided an opportunity to recover its efficient costs (including a return on investment) over time. The ACCC is satisfied that the SAU provides sufficient regulatory certainty to promote efficient investment in the NBN.

The ACCC also considers that there is an appropriate balance between the degree of certainty and scope for flexibility and review for the other provisions in Module 2, which relate to pricing of NBN Co offers and product development and withdrawal. For other matters where there are no explicit provisions in Module 2 (such as non-price terms and conditions) these can be established through other means over this period, including through commercial negotiations, SAU variations (including but not limited to replacement modules) and ACCC regulatory determinations.

In addition, the ACCC considers that the scale of the NBN rollout warrants a longer SAU term than might usually be considered for other regulated access providers. NBN Co will be investing significantly in the NBN rollout in the early stages of the SAU but its revenues will be constrained by the low initial prices and demand. It will likely take many years for NBN Co to recover its initial capital outlay associated with the NBN rollout. For this reason, the longer term of the SAU is reasonable and necessary to ensure NBN Co has the opportunity to recover its efficient costs. This is important to efficient use of the NBN and NBN Co's legitimate business interests.

In summary, the ACCC is satisfied that the term of the SAU, alongside the provisions in Modules 0, 1 and 2, are reasonable.

### 5.1.3. Withdrawal, variation and extension of the SAU

Clause 7.1 of the SAU notes NBN Co's ability to vary the SAU under Part XIC of the CCA.<sup>196</sup> If NBN Co does submit a variation to the SAU, this clause does not interfere with or affect the

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<sup>196</sup> CCA, s. 152CBG.

ACCC's ability to assess a variation against the statutory criteria in Part XIC. Clause 7.1 will not alter the criteria for acceptance of an SAU variation in any way.

Similarly, clause 7.2 of the SAU notes NBN Co's ability to withdraw the SAU under Part XIC of the CCA.<sup>197</sup> Again, this clause does not interfere with or affect the ability of NBN Co to withdraw the SAU as provided by Part XIC of the CCA.

On the other hand, clause 7.3 of the SAU sets out the criteria that are to be applied by the ACCC in deciding whether to approve an extension of the SAU. The ACCC must approve an application for an extension of the SAU made under the CCA if it is satisfied that these criteria have been met.<sup>198</sup> The ACCC has previously indicated that any criteria for the extension of the SAU should be consistent with the assessment criteria that the ACCC must consider when assessing an undertaking or a variation to an undertaking.<sup>199</sup> In other words, the SAU may only be extended if the ACCC is satisfied that the terms and conditions in the SAU to apply for the extension period are reasonable and that any conduct (including specified conduct) will promote the long-term interests of end-users and that the terms and conditions relating to this conduct are reasonable. The ACCC is satisfied that these criteria are reasonable.

## 5.2. Replacement modules

Clauses 4.4 to 4.8 of the Main Body of the SAU set out the 'replacement module process'. Clauses 4.4 to 4.7 specify processes for the submission and assessment of detailed terms and conditions ('replacement module applications') proposed by NBN Co to take effect after the expiry of Module 1 (and operate concurrently with Module 2). In addition, clause 4.8 confers a power on the ACCC to make its own decision about replacement terms if it does not accept NBN Co's proposed terms and conditions ('replacement module determination').<sup>200</sup>

A set of terms and conditions that is put in place through these processes is known as a 'replacement module'.

The SAU provides that each replacement module will be in place for a period of three, four or five years (known as the 'regulatory cycle' for that replacement module).<sup>201</sup> The replacement module process will therefore operate multiple times during the period of the SAU. The process will generally commence 21 to 30 months prior to the expiry of Module 1 or the replacement module in force at the time.<sup>202</sup>

The replacement module process operates as follows:

- The ACCC will provide NBN Co with at least 12 months written notice that NBN Co is required to submit a replacement module application by a specified date (between nine and 18 months before expiry of the current module).<sup>203</sup>
- NBN Co must submit a replacement module application containing proposals about the length of the regulatory cycle,<sup>204</sup> inputs to the LTRCM,<sup>205</sup> and the RAB roll-forward.<sup>206</sup> The

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<sup>197</sup> CCA, s. 152CBI.

<sup>198</sup> CCA, s. 152CBE.

<sup>199</sup> ACCC, *Draft Decision*, April 2013, p. 63 and ACCC, *Response to Submissions*, July 2013, p. 33.

<sup>200</sup> This power is conferred on the ACCC in accordance with subsection 152CBA(10A) of the CCA.

<sup>201</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 4.5(e)(i) and 4.8(b)(i).

<sup>202</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.5. In fact, the ACCC can give notice to NBN Co before this period. However, this is the most likely period, given that NBN Co must lodge the replacement module application between 9 and 18 months before expiry of the module in force, and the ACCC must give NBN Co 12 months' notice of the due date. The ACCC must have given NBN Co notice by 21 months prior to the expiry of the module in force

<sup>203</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.5.

<sup>204</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.5(e)(i).

<sup>205</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.6.

<sup>206</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.7.

replacement module application must include forecasts for five financial years, even if NBN Co proposes a shorter regulatory cycle.<sup>207</sup> NBN Co may also include other terms and conditions in the replacement module application if it wishes to do so.<sup>208</sup> For example, NBN Co could propose non-price terms and conditions.

- As the replacement module application is lodged as a variation to the SAU, the ACCC must assess the replacement module application in accordance with the requirements of section 152CBD of the CCA.<sup>209</sup>
- If the ACCC does not accept the replacement module application, the ACCC is required to issue a replacement module determination at least 20 business days prior to the end of the module in force at the time.<sup>210</sup> The replacement module determination must cover matters relating to reference offers, LTRCM and the RAB roll-forward.<sup>211</sup>

The replacement module process specifies conduct to be undertaken by NBN Co in accordance with subsection 152CBA(3B) of the CCA. In assessing these provisions, the ACCC must be satisfied that such conduct promotes the long-term interests of end-users and that the terms and conditions are reasonable.

The major features of the replacement module process are discussed below.

### 5.2.1. Timing of the replacement module process

The ACCC considers that there are three factors that need to be considered when assessing the timing of the replacement module process:

- First, it is important that the replacement module process be completed before the expiry of the module in force in order to provide regulatory certainty for both NBN Co and access seekers.
- Second, the replacement module process must provide sufficient time for the ACCC to undertake an assessment of NBN Co's replacement module application, and to make a replacement module determination if necessary. This will include a period of consultation with access seekers, as required by the legislation.<sup>212</sup>
- Third, the replacement module process must provide sufficient time for NBN Co to prepare and lodge a replacement module application, including forecasts for five financial years.

As noted above, the replacement module process will commence at least 21 months before the expiry of the module in force, and the ACCC may determine the exact starting date. NBN Co will have at least 12 months to prepare and lodge its replacement module application. The ACCC will then have at least nine months to assess the application. However, in the event that the ACCC does not accept NBN Co's replacement module application, the ACCC is required to make a replacement module determination at least 20 days prior to the expiry of the module in force.

The ACCC considers that the timelines contemplated by the replacement module process will provide sufficient time for NBN Co and the ACCC to undertake the activities set out above. The SAU therefore avoids the prospect of a 'regulatory gap', and therefore provides regulatory

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<sup>207</sup> NBN Co, SAU, November 2013, Main Body, clause 4.5(e)(iv).

<sup>208</sup> NBN Co, SAU, November 2013, Main Body, clause 4.5(e)(v).

<sup>209</sup> NBN Co, SAU, November 2013, Main Body, clause 4.4(a).

<sup>210</sup> NBN Co, SAU, November 2013, Main Body, clause 4.9(a).

<sup>211</sup> NBN Co, SAU, November 2013, Main Body, clause 4.9(b).

<sup>212</sup> CCA, s. 152CBD(4).

certainty for both NBN Co and access seekers. This will promote efficient investment in infrastructure, and the long-term interests of end-users.

### 5.2.2. Length of the regulatory cycle

The length of the regulatory cycle will be a factor in determining NBN Co's efficiency incentives, and will therefore also be a factor in the ACCC's assessment of whether a replacement module application will promote the long-term interests of end-users. Generally speaking, longer regulatory cycles (for example, five years) create stronger incentives to invest and operate efficiently. This is because a longer period means that cost overruns would be absorbed by NBN Co for a longer period, thereby reducing NBN Co's incentives to incur these cost overruns — and similarly, the additional revenues associated with reduced costs would also be retained by NBN Co for a longer period. Conversely, shorter regulatory cycles would reduce the level of expenditure risk to NBN Co, but would reduce the length of time NBN Co would be allowed to keep additional revenues or absorb cost overruns, in turn reducing the strength of the incentive created for NBN Co to spend efficiently.

The ACCC will be able to decide the length of the regulatory cycle (whether three, four or five years) *after* considering the information submitted by NBN Co in the replacement module application and in any submissions received during public consultation. The ACCC also notes that the proposed three, four or five year period is consistent with the period for which similar regulatory arrangements are in force.<sup>213</sup>

The ACCC therefore considers that the ability for it to make this decision at the relevant time will promote efficient investment in infrastructure, and the long-term interests of end-users.

The ACCC is satisfied that these provisions are reasonable and the conduct specified in these provisions will promote the long-term interests of end-users.

### 5.2.3. Content of replacement modules

In addition to the length of the regulatory cycle, as discussed above, certain terms and conditions and conduct relating to access to declared services will be determined through the replacement module process.

The detailed content that must be included in a replacement module application is as follows:

- First, NBN Co must propose in a replacement module application that, at the end of the upcoming regulatory cycle, a specified approach be used for rolling forward the RAB (in relation to both the treatment of capital expenditure and regulatory depreciation).
- Second, NBN Co must propose how it will address changes in tax during the upcoming regulatory cycle.
- Third, NBN Co must provide forecasts of the ABBRR and the inputs required for the calculation of the ABBRR.

These issues are discussed in more detail in section 8.4. The ACCC must also include the same content in any replacement module determination it makes.<sup>214</sup>

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<sup>213</sup> For example, subsection 152ALA(2) of the CCA sets out the principle that a service should be declared for a period between three and five years.

<sup>214</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.8(b).

However, one notable difference between a replacement module application and a replacement module determination is that NBN Co may propose to include any other matters that it considers desirable in a replacement module application.<sup>215</sup>

The ACCC is satisfied that the replacement module process will provide the ACCC with sufficient information for the effective operation of the LTRCM and RAB roll-forward mechanisms, as discussed in section 8.4.

The ACCC is satisfied that these provisions are reasonable and the conduct relating to these provisions will promote the long-term interests of end-users.

#### 5.2.4. Assessment of replacement module applications

As the replacement module application is lodged as a variation to the SAU, the ACCC must assess the replacement module application against the requirements specified for assessment of an SAU in section 152CBD of the CCA.<sup>216</sup>

As discussed in section 4.4, this requires the ACCC to assess the variation and determine whether the terms and conditions are reasonable, and whether conduct specified in the variation will promote the long-term interests of end-users. The ACCC must undertake public consultation on the variation, and either accept or reject the variation within six months.<sup>217</sup> Although this is a shorter period than the nine to 18 months provided by the replacement module process, the statutory period does not include periods during which the ACCC was undertaking consultation.<sup>218</sup> In addition, the ACCC may extend the six-month period.<sup>219</sup>

This process is consistent with the provisions of Part XIC of the CCA in relation to the variation of an SAU. The ACCC therefore considers that these provisions will promote the long-term interests of end-users and are reasonable.

#### 5.2.5. Replacement module determination

As noted above, if the ACCC does not accept NBN Co's replacement module application, the ACCC is required to issue a replacement module determination at least 20 business days prior to the end of the module in force.<sup>220</sup>

This function and power is a substitute for the ACCC's power to make Access Determinations or Binding Rules of Conduct under Part XIC, adapted to ensure that a replacement module covering inputs to the LTRCM and RAB roll-forward is in place prior to the expiry of the module in force. Accordingly, the SAU has incorporated the criteria and restrictions that Part XIC provides in relation to the ACCC's power to make Access Determination into the replacement module process.

First, the SAU provides that the ACCC must take into account the same matters that the ACCC will take into account in making an Access Determination under subsection 152BCA(1) of the CCA.<sup>221</sup> This effectively ensures that the ACCC must make a replacement module determination that is reasonable within the meaning of section 152AH of the CCA.

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<sup>215</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.5(e)(v).

<sup>216</sup> CCA, s. 152CBG(4).

<sup>217</sup> CCA, ss. 152CBD(2)(d) and 152CBG(3).

<sup>218</sup> CCA, s. 152CBC(6)(a).

<sup>219</sup> CCA, s. 152CBC(7).

<sup>220</sup> NBN Co, *Submission to ACCC consultation paper on variation of NBN Co SAU – Proposed Drafting of SAU Changes*, May 2013, Appendix C, clause 4.9(a).

<sup>221</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.8(c).

Second, the SAU provides that the ACCC is subject to the same restrictions that would apply to it when making an access determination.<sup>222</sup> For example, the ACCC is not able to make a replacement module determination that would have the effect of preventing NBN Co from engaging in conduct that is reasonably necessary to achieve uniform national pricing.

Third, the SAU requires the ACCC to undertake consultation with NBN Co and other persons in making a replacement module determination.<sup>223</sup> This is consistent with (although not precisely equivalent to) the public inquiry process under section 152BCH of the CCA. Given the more limited scope of the replacement module process (compared to a full SAU assessment) and the earlier consultation that will have taken place in relation to the replacement module application, the ACCC considers that this will provide acceptable transparency and procedural fairness, allowing proper consideration of the interests of both NBN Co and access seekers.

Finally, NBN Co is required to comply with the terms of a replacement module determination, unless the ACCC decides to accept the replacement module application (or an updated version submitted by NBN Co) prior to the end of the module in force.<sup>224</sup> This is similar in effect to subsection 152BCP(2) of the CCA, which requires compliance with access determinations.

The ACCC considers that this process will provide certainty for NBN Co and access seekers that arrangements for LTRCM and RAB roll-forward will be put in place in a timely manner. The ACCC therefore considers that the function and power given to the ACCC to make replacement module determinations will promote the long-term interests of end-users and that the terms and conditions relating to the function and power are reasonable.

## 5.3. Standard Form of Access Agreements

As discussed in section 2.6, Part XIC provides for NBN Co to formulate and publish a Standard Form of Access Agreement (SFAA) to supply services.<sup>225</sup> SFAAs are not an Access Agreement and do not form part of the Part XIC legislative hierarchy. However, if an access seeker requests NBN Co to enter into an Access Agreement that contains the same terms as an SFAA,<sup>226</sup> these terms will prevail over regulated terms specified by an SAU, Binding Rules of Conduct and Access Determinations.<sup>227</sup>

The SAU given by NBN Co refers to the production and maintenance of SFAAs and the development of SFAAs (the 'multilateral SFAA forum').

The ACCC has categorised the provisions relating to these matters as conduct in relation to access under subsection 152CBA(3B) of the CCA. As noted in section 4.4.2, the ACCC must be satisfied that any conduct that is specified by the SAU will promote the long-term interests of end-users, and the related terms and conditions are reasonable.<sup>228</sup>

The ACCC's assessment of these provisions is set out in the remainder of this section.

### 5.3.1. Conduct about production and maintenance of SFAAs

NBN Co makes certain commitments in the SAU about producing and maintaining SFAAs:

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<sup>222</sup> NBN Co, SAU, November 2013, Main Body, clause 4.8(e). The relevant provisions are subsections 152BCB(1), 152BCB(3B), 152BCB(3C) and 152BCB(4A) of the CCA.

<sup>223</sup> NBN Co, SAU, November 2013, Main Body, clause 4.8(f).

<sup>224</sup> NBN Co, SAU, November 2013, Main Body, clause 4.9(e).

<sup>225</sup> CCA, ss. 152CJA(2) and 152CJF.

<sup>226</sup> CCA, s. 152CJA(2).

<sup>227</sup> CCA, ss. 152AY, 152BCC, 152BDB and 152CBIC. The Part XIC legislative hierarchy is discussed further at sections 2.3 and 2.7.

<sup>228</sup> CCA, s. 152CBD(2)(ca).

- Clause 6 of the Main Body states that NBN Co will publish and maintain SFAAs in relation to the supply of the NBN access service, the ancillary services and the facilities access service for the duration of the SAU term.
- Clause 1B.2 of Schedule 1B provides that NBN Co will ensure that the SFAAs it publishes during Module 1 will have an expiry date of no later than two years after the date on which the SFAA commences. Clause 1B.2 also states that this requirement does not preclude NBN Co publishing any SFAA which includes the option of the parties to an Access Agreement agreeing to extend the term of that agreement beyond such expiry date. That is, if NBN Co and access seekers executed an Access Agreement based on such SFAAs, they can agree to extend the term of these Access Agreements beyond the specified expiry date.

The ACCC considers that the first commitment has the effect of ensuring that access seekers have the option of obtaining supply of the NBN access service, ancillary services and the facilities access service via Access Agreements based on an SFAA for the SAU term.<sup>229</sup> Therefore, the ACCC is of the view that the conduct that NBN Co will engage in will promote the long-term interests of end-users.

The ACCC considers that the effect of the second commitment is that SFAA-based Access Agreements will have a two-year term during the first 10 years of the SAU term, and will be ‘co-terminus’. That is, all Access Agreements based on these SFAAs will expire at the same time (however, as noted, NBN Co and access seekers are free to agree to Access Agreements with a different term). The ACCC considers that a two-year SFAA term is an appropriate length of time — this will facilitate the ability for terms and conditions of access to NBN Co’s services to continue to develop and be open to negotiation (see also NBN Co’s commitments about the ‘multilateral SFAA forum’ discussed at section 5.3.2), while providing certainty that an SFAA with a fixed maximum term will be available. Therefore, the ACCC is of the view that the conduct that NBN Co will engage in will promote the long-term interests of end-users.

### 5.3.2. Conduct about development of SFAAs (the ‘multilateral SFAA forum’)

Clause 1B.3 of Schedule 1B states that NBN Co will establish and conduct a ‘multilateral SFAA forum’ to engage with access seekers and consumer advocacy groups on possible future changes to the terms and conditions of SFAAs.<sup>230</sup> These commitments will apply for the first ten years of the SAU term. The purpose of the forum includes “identifying and prioritising issues associated with any SFAA and working to develop multilateral resolutions to changes to any SFAA.”<sup>231</sup> NBN Co and access seekers and consumer advocacy groups can suggest changes to any SFAA.<sup>232</sup>

The SAU sets out the following processes for conducting the forum:

- NBN Co will convene the forum no later than 12 months prior to the expiration of the term of each SFAA published under the CCA and in accordance with clause 6 of the Main Body of the SAU (discussed at section 5.3.1).<sup>233</sup> This requirement will not apply to SFAAs that exist at the SAU Commencement Date and expire within 12 months of the SAU commencement date.<sup>234</sup>

<sup>229</sup> As discussed at section 2.7, under Part XIC, NBN Co and access seekers can also commercially negotiate different terms in their Access Agreements, and access seekers can also obtain supply via any Access Determinations or Binding Rules of Conduct (subject to the operation of the Part XIC legislative hierarchy).

<sup>230</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.3.1(a).

<sup>231</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.3.1(c).

<sup>232</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.3.1(d).

<sup>233</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.3.1(b).

<sup>234</sup> NBN Co, SAU, November 2013, Schedule 1B, clause 1B.3.1(b).

- The forum will be available to all access seekers, irrespective of whether they have an Access Agreement with NBN Co (however, access seeker participation is voluntary such that each access seeker can engage as they deem appropriate given their level of interest and/or resources).<sup>235</sup>
- NBN Co is not precluded from conducting bilateral consultation with access seekers in relation to any SFAA in a manner that is consistent with NBN Co's non-discrimination obligations.<sup>236</sup>

The ACCC considers that these commitments would facilitate ongoing engagement between NBN Co and industry to develop the terms and conditions of SFAAs. For instance, access seekers (irrespective of whether they have entered into an Access Agreement with NBN Co) will have the opportunity to be consulted on the development of their future supply contracts. Further, consumer advocacy groups, who are likely to have an interest in SFAA terms that may have direct impacts on downstream customer or end-user contracts (for example, risk management and liability clauses, mandated clauses for downstream contracts), will be able raise any concerns directly with NBN Co and/or retail service providers and facilitate the early resolution of any issues.

The ACCC considers that the commitments about the timing of the forum will provide all parties with certainty that there is an avenue for ongoing commercial negotiations about the next SFAA, and that there will be at the least a 12 month period for conducting these negotiations. The ACCC considers that this addresses the legitimate business interests of NBN Co and the interests of access seekers. It is likely to encourage the efficient use of the NBN and related infrastructure as access seekers are more likely to make efficient investments if they have certainty about their interactions with the access provider. The ACCC nevertheless expects that NBN Co and access seekers would commercially agree to commence and conclude negotiations within a sufficient period of time to ensure that access seekers and consumer advocacy groups have the opportunity to meaningfully participate in consultation in respect of future SFAAs. In particular, the ACCC notes that NBN Co has stated that it "intends to consult with Access Seekers on the terms of reference and procedures for the Multilateral SFAA Forum in due course."<sup>237</sup>

Therefore, the ACCC is of the view that the provisions about the multilateral SFAA forum will promote the long-term interests of end-users and the related terms and conditions are reasonable.

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<sup>235</sup> NBN Co, *SAU*, November 2013, Schedule 1B, clause 1B.3.1(e).

<sup>236</sup> NBN Co, *SAU*, November 2013, Schedule 1B, clause 1B.3.1(f).

<sup>237</sup> NBN Co, *Submission to ACCC consultation paper on variation of NBN Co SAU*, May 2013, p. 15.

## 6. Services and products

This chapter discusses the services and products specified in the SAU. In particular, this chapter covers:

- the scope of the services that the SAU relates to, and therefore the scope of the services that become declared services upon acceptance of the SAU and subject to the Category B SAOs (section 6.1)
- the concept of products supplied under the SAU and NBN Co's commitments under the SAU to supply products (section 6.2)
- the processes for product development and variation (section 6.3)
- the processes for product withdrawal (section 6.4).

### 6.1. Services to which the SAU relates

The scope of the SAU is set out in clause 2 of the Main Body of the SAU. The clause states that the SAU is given in respect of the NBN access service and ancillary services, and that NBN Co will supply the facilities access service to comply with its interconnection obligations in respect of these services.<sup>238</sup>

The service description for each service is defined broadly in the Main Body of the SAU.<sup>239</sup> However, what NBN Co actually commits to supply under the SAU is more limited — the details of the implementation of each service are set out separately in Schedules 1A and 2A of the SAU.

In accordance with subsection 152AL(8E) of the CCA, if the undertaking is subject to limitations, the service supplied by NBN Co is a declared service only to the extent to which the service falls within the scope of the limitations. As indicated in the ACCC's draft decision on the SAU, the ACCC considers that the provisions in the SAU that narrow what is to be supplied by NBN Co under the SAU constitute limitations on the broadly defined NBN access service and ancillary services.<sup>240</sup> Under this approach, the Category B SAOs only apply to the limited service. Where the provisions are classified as limitations, the ACCC considers that it is appropriate to assess the provisions to determine if they promote the objective of Part XIC — the long-term interests of end-users.

However, an alternative view is that those provisions could be seen as terms and conditions relating to the Category B SAOs. Under this approach, the ACCC would be required by the CCA to assess the provisions to determine if they are consistent with the Category B SAOs and are reasonable.<sup>241</sup> If this is the case, the ACCC considers that these provisions in the SAU are consistent with the SAOs because they commit NBN Co to supply certain products from the commencement of the SAU.

The ACCC previously noted in its draft decision on an SAU lodged by FANOC Pty Limited in 2007 (the FANOC draft decision), that it will have regard to certain characteristics of a bitstream service when assessing whether a service description will promote the long-term

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<sup>238</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 1 and 2.2.

<sup>239</sup> NBN Co, *SAU*, November 2013, Main Body, Attachments A and B.

<sup>240</sup> ACCC, *Draft Decision*, April 2013, p. 68.

<sup>241</sup> CCA, s. 152CBD(2)(b).

interests of end-users and is reasonable.<sup>242</sup> These elements are discussed where relevant in sections 6.1.1 to 6.1.3 below.

### 6.1.1. NBN access service

The 'NBN access service' is defined in Attachment A as a Layer 2 service supplied on the NBN Co network between the User Network Interface (UNI) and the Network to Network Interface (NNI).<sup>243</sup>

The NBN access service is implemented through 'Product Components' and 'Product Features'.<sup>244</sup>

Module 1 defines four major product components that make up the NBN access service: the User Network Interface (UNI), Access Virtual Circuit (AVC), Connectivity Virtual Circuit (CVC), and Network Network Interface (NNI).<sup>245</sup> Product features are the attributes that determine the characteristics of a product component, such as data rate or data traffic priority.<sup>246</sup> Each product component has certain product features.

In Module 2, the SAU states that NBN Co will implement its obligations under the SAU in connection with the NBN access service by the supply of the product components and product features.<sup>247</sup>

Module 1 also specifies certain terms and conditions for the supply of the product components.<sup>248</sup>

- First, NBN Co will only supply product components to an access seeker where the NBN is available, and the relevant access seeker has connected its network to the relevant POI and completed testing of that connectivity.<sup>249</sup>
- Second, NBN Co may require that an access seeker who acquires an AVC also purchase additional product components (a UNI, a CVC, a NNI, or an AVC of a different traffic class), if, for technical reasons, the first-mentioned AVC could not otherwise be supplied to the access seeker.<sup>250</sup> This condition also applies in Module 2.<sup>251</sup>
- Third, the supply of an AVC to an access seeker is subject to the maximum data rate that can be supplied to the network termination device (NTD) at the end-user's premises, as well as the availability of a UNI on that NTD.<sup>252</sup>

The ACCC's views on the NBN access service are set out below.

The ACCC notes that the NBN access service is defined as a Layer 2 service, and that there is a limitation in clause 1A.3.5 of Schedule 1A on the amount of Layer 3 awareness that may be incorporated into the AVC and CVC product components. The ACCC considers that this will promote the long-term interests of end-users because it prevents NBN Co from offering a broader range of Layer 3 products, which could result in access seekers competing with NBN Co in the supply of Layer 3 capability. This is desirable because NBN Co might otherwise have an incentive and the ability to discriminate against access seekers in its supply of Layer 2

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<sup>242</sup> ACCC, *FANOC Draft Decision*, 2007, pp. 11-12.

<sup>243</sup> NBN Co, *SAU*, November 2013, Main Body, Attachment A, clause 2.

<sup>244</sup> NBN Co, *SAU*, November 2013, Main Body, Schedule 1A, clause 1A.2.

<sup>245</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.3.

<sup>246</sup> NBN Co, *SAU*, November 2013, Main Body, Attachment C, clause 1, definition of 'Product Feature'.

<sup>247</sup> NBN Co, *SAU*, November 2013, Schedule 2A, clause 2A.1.2.

<sup>248</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.4.

<sup>249</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.4.1.

<sup>250</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.4.2.

<sup>251</sup> NBN Co, *SAU*, November 2013, Schedule 2A, clause 2A.3.

<sup>252</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clauses 1A.4.3 and 1A.4.4.

services (in favour of supplying to itself), with subsequent implications for competition in downstream markets. This is also consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.<sup>253</sup>

The ACCC notes that the NBN access service is offered at a variety of data rates, and that the range of data rates (including symmetric access products) is sufficient to enable access seekers to offer a wide variety of products to end-users, to the extent permitted by the technology of the NBN. The ACCC therefore considers that the NBN access service will promote competition between access seekers in downstream markets for listed services. In these respects, the service description is also consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.<sup>254</sup>

The ACCC notes that NBN Co is legally required to only supply wholesale services, so that it does not compete in downstream markets and will not have incentives to discriminate in favour of itself.<sup>255</sup> NBN Co is further subject to the non-discrimination obligations for all its activities.<sup>256</sup> The ACCC is therefore satisfied that there will be equivalent treatment of access seekers in relation to the products offered and quality of service parameters, consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.<sup>257</sup>

In relation to downstream services, the NBN access service supports the provision of a voice service over fibre, wireless and satellite networks.<sup>258</sup> The NBN access service also supports multicasting and IPTV through multicast offers.<sup>259</sup> The ACCC notes that these aspects of the NBN access service will allow access seekers to continue to supply services that are currently being supplied in the retail market, as well as enabling innovation in services supplied by means of carriage services (content services). Support for such services is also consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.<sup>260</sup>

The ACCC notes that the service description refers to interconnection protocols based on well-accepted standards, such as Ethernet and the OSI model.<sup>261</sup> Such standards help to ensure that access seekers have a wide range of technological choices available to them and reduce the risks of assets being stranded by only being able to connect through limited protocols. The use of such standard therefore promotes both any-to-any connectivity as well as efficient investment in and use of infrastructure. ACCC also noted in the FANOC draft decision that it is important that open and non-proprietary protocols are adopted.<sup>262</sup>

While the SAU does not specify protocols for how packets are to be prioritised and handled on the NBN, nor for handling congestion, the ACCC notes that it has the ability to make Access Determinations setting out terms and conditions to address issues that are not covered by an SAU. The SAU does not include any provisions which might be inconsistent with any protocols made by the ACCC in this respect. Accordingly, the ACCC considers that it is not necessary for protocols on congestion and quality of service parameters to be included in the SAU in order to promote the long-term interests of end-users.

For these reasons, the ACCC considers that the service description for the NBN access service will promote the long-term interests of end-users and is reasonable. In addition, the ACCC considers that the terms and conditions for the supply of product components are reasonable

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<sup>253</sup> ACCC, *FANOC Draft Decision*, 2007, p. 12.

<sup>254</sup> ACCC, *FANOC Draft Decision*, 2007, p. 12.

<sup>255</sup> *National Broadband Network Companies Act 2011*, ss. 3(2) and 9.

<sup>256</sup> CCA, ss. 152AXC and 152AXD.

<sup>257</sup> ACCC, *FANOC Draft Decision*, 2007, pp. 11-12.

<sup>258</sup> NBN Co, *SAU*, November 2013, Schedule 1C, clauses 1C.2.2(c), 1C.2.2(d)(i), 1C.2.5, 1C.2.15(b), 1C.2.2(d)(i) and 1C.2.2(d)(iii). However, only the fibre network will allow connection and use of existing voice equipment directly through the UNI-V port.

<sup>259</sup> NBN Co, *SAU*, November 2013, Schedule 1C, clauses 1C.2.10-1C.2.12.

<sup>260</sup> ACCC, *FANOC Draft Decision*, 2007, pp. 11-12.

<sup>261</sup> For example, see the implementation of AVC and CVC product components in clauses 1A.3.1 and 1A.3.2 in Schedule 1A of the SAU, and clause 2(b) of the Main Body of the SAU.

<sup>262</sup> ACCC, *FANOC Draft Decision*, 2007, pp. 11-12.

because they relate to operational and technical requirements necessary for the safe and reliable operation of the NBN.

## 6.1.2. Ancillary services

Ancillary services are defined in the Main Body of the SAU as those services supplied by NBN Co that facilitate the supply of the NBN access service, excluding the facilities access service.<sup>263</sup> These include a service for activation and assurance related transactions, and a test and verification service.<sup>264</sup>

Schedule 1A of Module 1 provides that NBN Co will implement the ancillary services through:

- the 'platform interfacing service' — a service that supports activation transactions, assurance transactions (including fault reporting) and billing transactions through B2B gateways or a service portal<sup>265</sup>
- the 'sandpit' — a service for testing and verification of product components, product features, the platform interfacing service, product functionality developed by NBN Co, and access seeker products that are related to the NBN,<sup>266</sup> and
- any new types of ancillary services introduced at a later date.<sup>267</sup>

In Module 2, the SAU states that NBN Co will implement its obligations under the SAU in connection with the ancillary services by the supply of the ancillary services.<sup>268</sup>

The ACCC notes that the ancillary services will support an access seeker performing activation and assurance related transactions as well as testing and verification.

The ACCC therefore considers that these will adequately allow access seekers to access and interact with operations support systems, consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.<sup>269</sup>

For these reasons, the ACCC considers that the service description for the ancillary services will promote the long-term interests of end-users and is reasonable.

## 6.1.3. Facilities access service

The facilities access service is defined as a service that provides cross connection, co-location, NBN Co ODF termination points, and other facilities supplied by NBN Co that are necessary to facilitate entry to buildings.<sup>270</sup>

Schedule 1A of Module 1 provides that NBN Co will implement the ancillary services through the supply of:

- cross-connect — connectivity between locations at a POI or aggregation node<sup>271</sup>

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<sup>263</sup> NBN Co, SAU, November 2013, Main Body, Attachment A, clause 3.

<sup>264</sup> NBN Co, SAU, November 2013, Main Body, Attachment A, clause 3.

<sup>265</sup> NBN Co, SAU, November 2013, Schedule 1A, clause 1A.6.1.

<sup>266</sup> NBN Co, SAU, November 2013, Schedule 1A, clause 1A.6.2.

<sup>267</sup> NBN Co, SAU, November 2013, Schedule 1A, clause 1A.5.

<sup>268</sup> NBN Co, SAU, November 2013, Schedule 2A, clause 2A.1.3.

<sup>269</sup> ACCC, *FANOC Draft Decision*, 2007, pp. 11-12.

<sup>270</sup> NBN Co, SAU, November 2013, Main Body, Attachment B, clause 2.

<sup>271</sup> NBN Co, SAU, November 2013, Schedule 1A, clause 1A.7(a).

- NBN Co co-location — rack space and co-location for access seeker equipment at an aggregation node<sup>272</sup>
- NBN Co ODF termination point — connection of an access seeker's transmission cables to the NBN Co ODF<sup>273</sup>
- NBN Co building entry service — access to the POI site within a building owned or operated by NBN Co<sup>274</sup>
- any new types of facilities access service introduced at a later date.<sup>275</sup>

In Module 2, the SAU states that NBN Co will implement its obligations under the SAU in connection with the facilities access service by the supply of the facilities access service.<sup>276</sup>

The ACCC considers that the service description for the facilities access services provides for access to buildings, shelters and facilities for interconnection, such that there will be efficient investment in infrastructure used to supply listed services. This is also consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.<sup>277</sup>

For these reasons, the ACCC considers that the service description for the facilities access service will promote the long-term interests of end-users and is reasonable.

## 6.2. Products

The previous section set out the services to which the SAU relates, and the products through which NBN Co will implement these services. The SAU also sets out a number of requirements to supply particular types of products and product combinations at particular times throughout the SAU term (for example, specific AVC data-rates and traffic classes). These requirements to supply are discussed in this section.

The ACCC considers that there are likely to be times throughout the SAU term when NBN Co faces appropriate incentives to supply products in line with evolving end-user and access seeker demand. However, there may also be times throughout the SAU term when NBN Co does not face these incentives (these incentives are discussed further in section 5.1.1 and chapter 8).<sup>278</sup>

The requirements to supply in the SAU impose positive obligations on NBN Co to supply specific products to access seekers. However, they also limit the types of products that NBN Co is required to supply to access seekers under the SAU to those defined as 'NBN offers'. As discussed in this section, these limitations will have important implications for encouraging the efficient use of and investment in the NBN over the SAU term, in particular during times when NBN Co does not face strong incentives to supply particular products to access seekers.

These requirements in the SAU are not the only means by which NBN Co will supply products to access seekers. For further discussion on the other means of supplying NBN Co's services, see sections 2.1 to 2.3 of this document.

<sup>272</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.7(b).

<sup>273</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.7(c).

<sup>274</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clause 1A.7(d).

<sup>275</sup> NBN Co, *SAU*, November 2013, Schedule 1A, clauses 1A.7(e) and 1A.7(f).

<sup>276</sup> NBN Co, *SAU*, November 2013, Schedule 2A, clause 2A.1.3.

<sup>277</sup> ACCC, *FANOC Draft Decision*, 2007, pp. 11-12.

<sup>278</sup> See also: ACCC, *Draft Decision*, April 2013, pp. 99-103.

## 6.2.1. Commitment to supply products under the SAU

The SAU sets out 'NBN offers' that are specific products and product combinations that NBN Co is required to supply. NBN offers are collections of different product components, product features, ancillary services and types of facilities access service that access seekers will need in order to supply services in downstream markets. The SAU sets out a list of NBN offers, with associated initial maximum regulated prices. NBN Co may also introduce a new NBN offer over the SAU term by following a product development process (see section 6.3).

The SAU requires NBN Co to supply a subset of NBN offers from the commencement of the SAU. For all other NBN offers set out in the SAU or developed in the future, NBN Co is required to supply them from the date they are introduced. NBN Co may withdraw NBN offers by following a product withdrawal process (see section 6.4), in which case it is no longer required to supply this NBN offer, subject to the ACCC's objection power.

The commitments on NBN Co to supply NBN offers are specified in Schedules 1C and 2B. As noted in section 4.4, the ACCC considers these provisions are terms and conditions about compliance with the Category B SAOs. The relevant criteria for assessing these terms and conditions are that the terms and conditions are consistent with the Category B SAOs, and are reasonable.

The ACCC considers that the reasonableness criteria most relevant to assessing these terms and conditions are whether they promote efficient use of, and investment in, infrastructure, the interests of persons who have rights to use the service, and the legitimate business interests of NBN Co.

The NBN offers specified in the SAU, and in particular the commitments on NBN Co to supply these offers, will have important implications for encouraging efficient use of and investment in the network.

In the draft decision, the ACCC stated that end-users should not be made worse off by virtue of their migration to the NBN. An important aspect of achieving this outcome is ensuring that, for the term of the SAU, there are functionally equivalent services supplied over the NBN to those currently being supplied over Telstra's fixed-line copper network and Telstra's and Optus' HFC networks. The ACCC considers that this will encourage efficient use of the network because if access seekers are able to provide services to current end-users of a similar functionality to what they receive today, these access seekers, and in turn their end-users, will only purchase services of a higher quality (in terms of higher data rates or better quality traffic classes) if the price of those services encourages them to do so. This is likely to create incentives for NBN Co to price in such a way as to encourage greater use of its higher quality services. This is also in the interests of persons who have rights to use the service.

Conversely, if access seekers, and their end-users, were compelled to purchase higher quality services by virtue of their existing services not being supplied over the NBN, they might reduce their use of the NBN relative to their current usage, or cease purchasing services altogether. Further, NBN Co may face lower incentives to price its new services in such a way as to encourage their take-up.

The SAU specifies that NBN Co will supply a subset of NBN offers from the SAU commencement date. With a few exceptions,<sup>279</sup> this subset of NBN offers largely reflects services currently available over Telstra's fixed-line copper network and Telstra's and Optus' HFC networks. The ACCC considers that requiring NBN Co to supply these NBN offers from the commencement of the SAU term, and only being able to withdraw them in accordance with the product withdrawal provisions in the SAU, will help to ensure that (subject to the pricing provisions, discussed in chapter 7) current end-users of services provided over copper and HFC networks will not be made worse off as a result of the transition to the NBN. Further, it will

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<sup>279</sup> See: ACCC, *Draft Decision*, April 2013, pp. 91-92.

ensure that those consumers that desire and are willing to pay for services that offer greater functionality than currently available over copper and HFC contribute more to the recovery of the costs of the NBN upgrade than those that do not desire such services.

The SAU specifies that all other NBN offers are required to be supplied from the date that they are first introduced by NBN Co, and may only be withdrawn in accordance with the product withdrawal provisions in the SAU. The effect of these provisions is that they limit the types of products that NBN Co is required to supply to access seekers under the SAU. This consequently limits the way in which NBN Co will supply the services to which the SAU relates (for example, the NBN access service).

The ACCC considers that providing NBN Co with some flexibility over when it introduces these additional NBN offers will promote efficient investment in the NBN because NBN Co will only supply these offers if consumers' willingness to pay is at least as great as the additional cost to NBN Co of supplying those services. Further, in terms of higher quality services, the ACCC considers that NBN Co will have an incentive to introduce these services to encourage access seekers, and in turn end-users, to take up higher quality services, as this will generate greater revenue for NBN Co.

In addition, the ACCC notes that some NBN offers (such as some TC-1 and TC-4 CVC tiers) are exempt from the requirement to supply from the SAU Commencement Date because NBN Co has indicated it will not be in a position to supply those offers from the SAU Commencement Date. The ACCC considers these exemptions have appropriate regard to NBN Co's legitimate business interests.

## 6.2.2. Products and services declared by the ACCC

The SAU includes provisions which acknowledge that the SAU does not affect the ACCC's ability to declare a service under Part XIC of the CCA. These provisions are intended to reduce any uncertainty about the ACCC's ability to declare services and set terms and conditions for these services.

Under Part XIC of the CCA, the ACCC can declare a service if, following a public inquiry, it is satisfied that declaring the service will promote the long-term interests of end-users. Once a service is declared, NBN Co is subject to the Category B SAOs in respect of that service. This means that NBN Co will be required to supply this service to an access seeker upon request. The ability to declare services is important to ensuring that the long-term interests of end-users are promoted over the SAU term.

The ACCC considers that the provisions in the SAU which acknowledge the ACCC's ability to declare services are important to ensure that the ordinary operation of Part XIC is not undermined. This will ensure that the ACCC is able to intervene when necessary to promote the long-term interests of end-users, such as in circumstances when NBN Co may not face incentives to respond to evolving end-user demand. As noted in the Draft Decision, NBN Co's decisions about whether or not to supply products (including new products) would nonetheless in the first instance be subject to commercial negotiation and agreement between NBN Co and access seekers. In the event that agreement could not be reached, and in circumstances where the ACCC considered that NBN Co did not face incentives to respond to evolving end-user demand, the ACCC could declare a specific product if it was satisfied that the making of the declaration would promote the long-term interests of end-users.<sup>280</sup>

The ACCC also notes that Telstra supports the inclusion of these provisions in the SAU.<sup>281</sup>

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<sup>280</sup> For more discussion on these issues see: ACCC, *Draft Decision*, April 2013, pp. 69-70; ACCC, *Response to Submissions*, July 2013, p. 34-36; ACCC, *Explanatory Statement*, October 2013, pp. 16-17.

<sup>281</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

## 6.3. Product development and variation

The SAU contains provisions that NBN Co must apply to the development of products over the SAU term. These provisions are contained in clauses 11.1 to 11.4 of Schedule 1I, Annexure 1 to Schedule 1I, and clauses 2D.1 and 2D.3 to 2D.5 of Schedule 2D.

The key elements of the product development and variation provisions are:

- product development principles, which include commitments by NBN Co to develop products that access seekers want and have sufficient demand to be commercially viable, which apply for the full SAU term
- commitments by NBN Co to consult and share information about the development of new products and variation to existing products through a 'product development forum', which apply for the full SAU term, and specific terms and conditions about how consultation and information sharing will occur in the first five years of Module 1 (the 'PDF processes')
- provisions which set out circumstances where these product development commitments do not apply, which apply for the full SAU term.

As noted in section 4.4, the ACCC has categorised the product development and variation provisions as conduct under subsection 152CBA(3C) of the CCA. This means that the ACCC is required to assess whether the product development and variation provisions promote the long-term interests of end-users. The product development and variation provisions may also be categorised as conduct in relation to access under subsection 152CBA(3B), so the ACCC has also assessed whether the terms and conditions in relation to the conduct are reasonable.

In its assessment, the ACCC considered the following:

- The extent to which NBN Co will develop and supply products that access seekers and consumer advocacy groups want and are willing to pay for. This goes towards promoting the economically efficient use of, and investment in, the NBN and having regard to the interests of those that use the declared services.
- The extent to which NBN Co and access seekers share information and consult with each other about the development and variation of products, and the prices, technical attributes and service levels for new products. This will reduce information asymmetries between NBN Co, access seekers and consumer advocacy groups and enhance the prospect of aligning supply and demand. This goes towards promoting the economically efficient use of the NBN and promoting efficient investment by both NBN Co in its infrastructure and access seekers in their own downstream infrastructure.
- The extent to which the SAU imposes appropriate obligations on NBN Co, access seekers and consumer advocacy groups about the process of developing and varying products, including the treatment of confidential information and intellectual property. This goes towards encouraging efficient investment in infrastructure, and having regard to NBN Co's legitimate business interests and the interests of those that use the declared services.

These issues are discussed further below.

### 6.3.1. Developing products that end-users want and are willing to pay for

The SAU sets out the general principles that apply to NBN Co's development of and variation to products. These principles include NBN Co's commitment to develop products that access seekers want and will gain value from and that have sufficient demand to be commercially

viable, and that NBN Co wishes to encourage access seeker and consumer advocacy group participation in the design of products.<sup>282</sup>

Changes in technology, costs and end-user demand are highly likely to occur over the term of the SAU. Whether NBN Co develops or varies products over time in response to these changes will have implications for whether competition is promoted in downstream markets, whether the economically efficient use of the NBN is encouraged, and whether efficient investment in the NBN and in downstream markets is encouraged.

The ACCC considers that at certain times throughout the SAU term, NBN Co is likely to face appropriate incentives to develop and vary products in line with evolving end-user demand and market change. However, additional measures may also be warranted and these are provided through the product development provisions of the SAU.

In particular, the ACCC considers that the commitments in the SAU to engage with access seekers and consumer advocacy groups in relation to product development and variation will increase the extent to which, over the SAU term, NBN Co develops products that access seekers want and are willing to pay for. This should increase the extent to which the SAU encourages the economically efficient use of the NBN, encourages efficient investment in the NBN and downstream infrastructure, and promotes competition in downstream markets.

### 6.3.2. Requirement to publish certain information and consult on new products

The SAU requires NBN Co to publish certain information and to consult with access seekers and consumer advocacy groups about the design and development of and variation to products.

These provisions fall into three categories:

- Overarching requirements about information sharing and consultation through a product development forum, which apply for the full SAU term.
- ‘PDF processes’; specific terms and conditions about the operation of the product development forum, which apply for the initial five years of Module 1.
- Provisions about the use of confidential information and intellectual property in the product development forum, which apply for the full SAU term.

These are discussed below.

#### 6.3.2.1. Overarching requirements about the publication of certain information and consultation

The SAU provides that:

- NBN Co must publish and maintain an integrated product roadmap<sup>283</sup>
- NBN Co must implement and maintain a product development forum that facilitates an open and consultative dialogue with access seekers and consumer advocacy groups in respect of ideas for new products and for enhancements and variations to existing products,<sup>284</sup> and

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<sup>282</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.1.2; Schedule 2D, clause 2D.1.2.

<sup>283</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.2; Schedule 2D, clause 2D.3.

<sup>284</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.3.1; Schedule 2D, clause 2D.4.1.

- NBN Co must consult with access seekers and consumer advocacy groups about the pricing, technical specifications and service levels of a new product, prior to introducing the product.<sup>285</sup>

The ACCC considers that these commitments in the SAU will reduce information asymmetry about the types of products that are needed to support end-user demand, and will increase the prospect that NBN Co will be in a position to supply products that end-users are willing to pay for. This will encourage the economically efficient use of and investment in the NBN.<sup>286</sup> The ACCC also considers that these provisions are in the interests of access seekers. Through these processes, access seekers will be better informed about the product developments that are occurring. This will allow them to contribute to this process and prepare their own systems to deal with any new products being introduced.

The product development and variation provisions provide for the involvement of consumer advocacy groups in the product development forum. The ACCC considers that including consumer advocacy groups in the product development forum process will allow the needs of end-user and small businesses that purchase telecommunications services to be communicated to NBN Co and access seekers.<sup>287</sup> This will increase the prospect that NBN Co will be in a position to supply products that end-users want and are willing to pay for, thereby promoting efficient use of and investment in infrastructure.

### 6.3.2.2. The PDF processes

The 'PDF processes' are contained in Annexure 1 of Module 1, and apply for the initial five years of the SAU. The PDF processes set out the requirements for membership of the PDF, how participants can submit product ideas, how NBN Co will assess a product idea and provide information about this assessment; and how NBN Co will consult and consider feedback on the development of product ideas (such as through workshops and submissions).

The provisions relating to PDF processes include objectives of the PDF, membership of the PDF, and the development of product ideas through the PDF. Importantly, the provisions provide for PDF members (including access seekers and consumer advocacy groups) to submit product ideas to NBN Co for consideration for development. If NBN Co decides to develop a product idea it may then consult with members of the PDF through workshops or by requesting submissions. These arrangements should encourage transparency and consultation in the development of product ideas. This is likely to be in the interests of access seekers and end-users as it should encourage the development of products that are valued by access seekers and end-users.

The ACCC considers that the terms and conditions in the PDF processes have been subject to appropriate consideration by interested parties through consultation on the SAU and the draft notice to vary, as well as through the WBA negotiations. This includes variations proposed by Telstra, and supported by a number of access seekers, which the ACCC included in the notice to vary.<sup>288</sup> Indeed, in its submission on the varied SAU Telstra noted its support for the PDF processes.<sup>289</sup> Based on these consultations and the variations adopted by NBN Co, the ACCC is satisfied that the PDF processes provide an appropriate initial framework for facilitating effective consultation between NBN Co and participants about developing and varying products.

An important aspect of the PDF processes is that they only apply for the first five years of Module 1 (whereas the product development provisions set out in Schedule 1I apply for the

<sup>285</sup> NBN Co, *SAU*, November 2013, Schedule 1I, clause 11.3.4 to 11.3.6; Schedule 2D, clause 2D.4.4-2D.4.6.

<sup>286</sup> For more on these issues, see: ACCC, *Draft Decision*, April 2013, p. 82; ACCC, *Explanatory Statement*, October 2013, pp. 26-27.

<sup>287</sup> See also: ACCC, *Draft Decision*, April 2013, p. 82; ACCC, *Response to Submissions*, July 2013, pp. 43-47; ACCC, *Explanatory Statement*, October 2013, pp. 20-21.

<sup>288</sup> ACCC, *Explanatory Statement*, October 2013, pp. 26-27.

<sup>289</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 3.

duration of Module 1, with further product development provisions set out in Schedule 2D applying in Module 2).

The ACCC considers that because the PDF processes are novel and their effectiveness in promoting engagement and information sharing between NBN Co and participants is untested, their five year duration is reasonable having regard to the interests of access seekers and the legitimate business interests of NBN Co.<sup>290</sup> The ACCC considers that the operational experience gained over the five year duration of the PDF processes will provide a basis on which to consider the processes to be applied to the product development forum in the future.

### 6.3.2.3. Confidential information and intellectual property

The SAU permits NBN Co to require access seekers and consumer advocacy groups to enter into an agreement regarding the treatment of confidential information and intellectual property that may be disclosed or created in connection with their participation in the product development forum.<sup>291</sup> The terms and conditions of these arrangements will be as agreed between NBN Co and the relevant access seeker or consumer advocacy groups or, failing agreement, as may be determined by the ACCC.<sup>292</sup>

Requiring parties to enter into these arrangements will provide NBN Co and access seekers with certainty about how their confidential information and intellectual property will be protected. This will encourage participation in the product development forum, which is one of the principles of product development set out in the SAU. The ACCC considers that this will encourage the efficient use of and investment in the NBN.

The ACCC recognises that there may be disagreement between NBN Co and other parties about the confidentiality and intellectual property arrangements. In some circumstances, this may lead to parties choosing not to participate in the product development forum. However, in the event of disagreement, the SAU contemplates that the ACCC may exercise its other powers under Part XIC to address the terms and conditions relating to confidentiality and intellectual property. Interested parties may then make a commercial decision whether to participate based on the terms and conditions set by the ACCC. Telstra notes that industry engagement on issues of intellectual property and confidentiality is ongoing and that it will continue to work constructively to develop 'terms of engagement that do not impact on the ability or willingness to participate in important product related consultation processes'.<sup>293</sup>

The ACCC considers that that a provision allowing NBN Co to require that an access seeker or Consumer Advocacy Group enter into an agreement regarding the treatment of confidential information and intellectual property are an important part of the processes governing participation in the product development forum, having regard to both the legitimate business interests of NBN Co and the interests of access seekers and Consumer Advocacy Groups.<sup>294</sup>

### 6.3.3. Circumstances when the product development provisions do not apply

There are some circumstances in which the product development provisions as discussed in do not apply. These are discussed below.

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<sup>290</sup> ACCC, *Response to Submissions*, July 2013, pp. 42-43.

<sup>291</sup> NBN Co, *SAU*, November 2013, Schedule 11, clause 11.3.2(c); Schedule 2D, clause 2D.4.2(a).

<sup>292</sup> NBN Co, *SAU*, November 2013, Schedule 11, clause 11.3.2(d). Schedule 2D, clause 2D.4.2(b).

<sup>293</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 3.

<sup>294</sup> For more on this see: ACCC, *Response to Submissions*, July 2013, pp. 47-49, ACCC, *Explanatory Statement*, October 2013, pp. 22-23.

### 6.3.3.1. Initial Products

The product development provisions do not apply to the introduction of products that are listed in Attachment D of the Main Body of the SAU.<sup>295</sup> The effect of excluding these products from the product development provisions is that NBN Co will not be required to engage in consultation about the design of these products through the product development forum.

The products listed in Attachment D encompass:

- products that NBN Co must supply from the commencement of the SAU (such as the entry-level AVC and CVC data-rate tiers)
- products that NBN Co intends to supply after the commencement of the SAU (such as higher data-rate AVC and CVC tiers)
- products that NBN Co has consulted with access seekers on and is in the process of building and testing, with the intention of supplying in the future (such as enterprise and business-grade services).

The ACCC's views in relation to the benefits of consultation on product development are explained above. However, the individual products listed in Attachment D have already been subject to various levels of consultation.<sup>296</sup> This means that any detrimental effect on information asymmetries, and in turn the efficient use of and investment in the NBN, is likely to be reduced in respect of these products.

The other effect of excluding these products from the product development provisions is that NBN Co will be able to introduce certain new products sooner than if they were subject to consultation in the product development forum. Given the existing consultations that have already occurred on these products, this should benefit NBN Co and access seekers. In addition, NBN Co will not have to undertake costly re-design of these products, which will reduce NBN Co's costs.

The ACCC is satisfied that excluding these products from the product development provisions is likely to encourage efficient investment by NBN Co, is unlikely to have detrimental effects on the efficient use of the NBN, and is in NBN Co's legitimate business interests.

### 6.3.3.2. Product attributes specified in a licence condition

The product development provisions also do not apply to the introduction of a product that NBN Co is obliged to offer as a result of a licence condition, but only to the extent that the specification of that product is prescribed by that licence condition.<sup>297</sup>

The effect of this exclusion is that NBN Co will not be required to consult with access seekers and consumer advocacy groups about the elements of a product that NBN Co is required to supply as part of its licence condition. For all other elements of the product, NBN Co will be required to follow the product development processes as set out in the SAU.

NBN Co is required to comply with its licence condition. The ACCC considers that requiring consultation on any mandatory product specifications contained in its licence condition is likely to be counterproductive as it will delay the supply of the product. For these reasons, the ACCC is satisfied that this exclusion is in NBN Co's legitimate business interests and is unlikely to be detrimental to the objective of promoting the long-term interests of end-users.

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<sup>295</sup> NBN Co, *SAU*, November 2013, Schedule 11, clause 11.1.3(b)(i); Schedule 2D, clause 2D.1.3(b)(i).

<sup>296</sup> See also: ACCC, *Draft Decision*, April 2013, pp. 84-85; ACCC, *Response to Submissions*, July 2013, pp. 49-51; ACCC, *Explanatory Statement*, October 2013, pp. 23-26.

<sup>297</sup> NBN Co, *SAU*, November 2013, Schedule 11, clause 11.1.3(b)(ii); Schedule 2D, clause 2D.1.3(b)(i).

### 6.3.3.3. Minor variations

The product development and variation provisions do not apply to a minor variation or enhancement to a product within the terms of clause 11.4. Clause 11.4 provides that NBN Co may carry out minor product variations or enhancements which update or improve the functionality or performance of a product and which will have no material adverse impact on access seekers.<sup>298</sup> NBN Co will use the product development forum to notify access seekers and consumer advocacy groups about the proposed change and implementation timeframe.<sup>299</sup>

In relation to minor variations, the ACCC considers that these provisions are unlikely to be detrimental to the long-term interests of end-users. In particular, NBN Co can only make such minor variations where there is no material adverse impact on access seekers.

### 6.3.3.4. Product development and network design changes

During Module 1, the SAU does not require NBN Co to implement a product idea or introduce a new product which requires a network design change, unless the network design change has been endorsed by access seekers or the ACCC (through the relevant endorsement processes in the SAU), and NBN Co decides to proceed with that network design change.<sup>300</sup>

The network design change endorsement processes are an important part of assessing the prudence and efficiency of NBN Co's capital and operating expenditure. These processes are discussed in chapter 8. Broadly, if a network design change is endorsed by access seekers, then this will satisfy the criteria in Module 1 of the SAU for determining whether capital expenditure reflects prudent network design.

The effect of these product development provisions is that NBN Co will not be required to make network changes, through the introduction of a new product, without the relevant expenditure first being endorsed by access seekers. This will provide certainty to NBN Co that any expenditure associated with a new product may be recovered by NBN Co via its revenue methodology. The ACCC considers that this will encourage efficient investment by NBN Co.

## 6.4. Product withdrawal

The SAU also contains provisions about how NBN Co may withdraw the products that make up existing NBN offers. These provisions are contained in clause 11.5 of Schedule 1I; and clause 2D.6 of Schedule 2D.

The key elements of the product withdrawal provisions are:

- commitments by NBN Co to provide notice and other information to access seekers, consumer advocacy groups and the ACCC about its decision to withdraw a product
- the conferral of a power on the ACCC to object to the withdrawal of a product by providing written notice to NBN Co
- a requirement that NBN Co must not vary a product to reduce its functionality, performance or features (these are termed the 'non-circumvention' provisions) — if NBN Co wants to vary the product in this way, it must withdraw the product and introduce a new product, and
- a provision that sets out the circumstances in which the product withdrawal commitments do not apply.

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<sup>298</sup> NBN Co, SAU, November 2013, Schedule 1I, clause 11.4(a).

<sup>299</sup> NBN Co, SAU, November 2013, Schedule 1I, clause 11.4(b).

<sup>300</sup> NBN Co, SAU, November 2013, Schedule 1I, clause 11.3.7.

These provisions are contained in both Module 1 and Module 2 and therefore apply for the full SAU term.

As noted in section 4.4, the ACCC has categorised these provisions (except for the functions conferred on the ACCC) as conduct specified in the SAU in relation to access under subsection 152CBA(3B) of the CCA. This means that the ACCC is required to assess whether the conduct promotes the long-term interests of end-users, and whether the related terms and conditions are reasonable. In relation to the product withdrawal disallowance function conferred on the ACCC, the ACCC has also assessed whether this function promotes the long-term interests of end-users, and whether the related terms and conditions are reasonable.

In its assessment of these provisions, the ACCC considered the following:

- The extent to which NBN Co has incentives to price its services in such a way as to promote take-up of higher functionality services in the event that products with a lower functionality are withdrawn. This goes towards promoting the economically efficient use of the NBN.
- The opportunity for NBN Co to recover its efficient costs, which underpins efficient investment in the NBN. To the extent that a product becomes less valued by end-users, it may be costly for NBN Co to continue to provide that product. Hence, product withdrawal could be important to NBN Co's long-term cost recovery.
- The extent to which NBN Co shares information and consults with access seekers and end-users about the variation and withdrawal of products. This will reduce information asymmetries between NBN Co and end-users and enhance the prospect of aligning supply and demand. This goes towards promoting the economically efficient use of the NBN and promoting efficient investment by both NBN Co in its infrastructure and access seekers in downstream markets.
- The extent to which NBN Co's legitimate business interests are affected by the product withdrawal provisions.

These issues are discussed further below.

### 6.4.1. Consultation and information sharing

The key elements of these commitments are that:

- NBN Co must provide written notice to access seekers, consumer advocacy groups and the ACCC between 12 and 24 months prior to the intended withdrawal of a product<sup>301</sup>
- NBN Co must have regard to particular factors when considering whether to withdraw a product, and must provide its assessment of these factors to access seekers, consumer advocacy groups and the ACCC<sup>302</sup>
- NBN Co must provide access seekers, consumer advocacy groups and the ACCC with information about the transitional arrangements it may put in place to migrate access seekers to an alternative product,<sup>303</sup> and

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<sup>301</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.5.2(a); Schedule 2D, clause 2D.6.2(a).

<sup>302</sup> NBN Co, SAU, November 2013, Schedule 11, clauses 11.5.2(b) and 11.5.2(c)(ii); Schedule 2D, clauses 2D.6.2(a) and 2D.6.2(c)(ii).

<sup>303</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.5.2(c)(i); Schedule 2D, clause 2D.6.2(c)(i).

- NBN Co must discuss and consider in good faith any feedback received from access seekers, consumer advocacy groups and the ACCC in relation to the impending withdrawal of a product.<sup>304</sup>

The ACCC considers that these commitments will ensure that access seekers will have sufficient time to plan and make changes to their business models and network investments as a result of the withdrawal of an NBN product and the migration to an alternative product where relevant. This will encourage efficient investment in downstream infrastructure and is in the interests of those that have the right to use the declared services.

The commitments will also ensure that NBN Co considers the views and interests of access seekers and end-user advocates in its decision to withdraw a product. This should reduce information asymmetries between NBN Co and end-users about demand in downstream markets. This should limit the withdrawal of products to circumstances in which the relevant product is not valued by access seekers or end-users. This should encourage the economically efficient use of and investment in the NBN as it should ensure that products are not withdrawn where there is demand for the product.

## 6.4.2. ACCC objection power

The SAU confers a function on the ACCC to object to the withdrawal of a product by NBN Co, by providing written notice to NBN Co.<sup>305</sup> Under this function, NBN Co is prevented from withdrawing a product for a time period specified by the ACCC, which must not be more than five years (but may be less than five years).<sup>306</sup> In making a decision to object to a product withdrawal, the ACCC must have regard to the long term interests of end-users and certain factors listed in the SAU, and may consult with NBN Co or any other person.<sup>307</sup>

The ACCC considers that, throughout the SAU term, there will be circumstances where withdrawing a product will likely encourage the economically efficient use of and investment in the NBN. For example, demand for lower functionality products (for example, products with lower data rates) might reduce to the extent that it is no longer economically viable to continue to supply the product.

However, the ACCC considers that the product withdrawal disallowance function will allow the ACCC to ensure that NBN Co will continue to supply products where this will promote the long-term interests of end-users. For example, through exercising this function to prevent the withdrawal of a product, the ACCC can ensure that:

- current consumers of services providers over copper and HFC networks will not be made worse off as a result of the transition to the NBN, and that in turn those consumers that desire and are willing to pay for services that offer greater functionality will contribute more to the recovery of the costs of the NBN upgrade
- NBN Co has incentives to price its services in such a way as to promote take-up of higher functionality products, rather than artificially promoting take-up through the withdrawal of lower functionality products, and
- NBN Co will face significant demand risk and, in combination with the SAU pricing commitments, face revenue sufficiency risk, which may be reduced if NBN Co is able to shape demand by withdrawing particular products.

<sup>304</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.5.2(d); Schedule 2D, clause 2D.6.2(d).

<sup>305</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.5.3; Schedule 2D, clause 2D.6.3.

<sup>306</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.5.3(f)(ii); Schedule 2D, clause 2D.6.2(f)(ii).

<sup>307</sup> NBN Co, SAU, November 2013, Schedule 11, clause 11.5.3(c); Schedule 2D, clause 2D.6.2(c).

For these reasons, the ACCC considers that the product disallowance function conferred on the ACCC will encourage the economically efficient use of and investment in the NBN.<sup>308</sup>

### 6.4.3. Product withdrawal non-circumvention

The SAU provides that NBN Co must not vary a product in a manner that changes the functionality, performance or features of that product to such an extent that results in the product no longer being reasonably capable of delivering at least the same functionality, performance or features previously associated with the product (these are termed the 'non-circumvention' provisions).<sup>309</sup> This means that, if NBN Co wishes to reduce the functionality, performance or features of a product, it must withdraw this product and introduce a new product. The ACCC would then be able to exercise its product withdrawal disallowance function.

The ACCC considers that these provisions will ensure that NBN Co cannot vary its products to circumvent the intension and operation of the product withdrawal disallowance function conferred on the ACCC. For example, in the absence of these non-circumvention provisions, NBN Co could reduce the quality or functionality or lower-functionality products in such a way to artificially encourage consumers to purchase higher functionality products. This may not encourage the efficient use of the NBN.

The ACCC's views in relation to the benefits of the product withdrawal disallowance function are outlined above. For similar reasons, the ACCC considers that the 'non-circumvention' provisions will encourage the economically efficient use of and investment in the NBN.<sup>310</sup>

### 6.4.4. Circumstances in which the product withdrawal provisions do not apply

The product withdrawal provisions discussed in this section do not apply to the withdrawal of a product that NBN Co is required by law or Shareholder Minister to withdraw, or which NBN Co is prohibited from providing under the *National Broadband Network Companies Act 2011*.<sup>311</sup>

If NBN Co is required to withdraw such a product, the SAU commits NBN Co to:

- provide access seekers, consumer advocacy groups and the ACCC with written notice of the withdrawal within 20 business days of NBN Co being made aware of the requirement to withdraw the product, and
- consult with, and consider any feedback received from, access seekers, consumer advocacy groups and the ACCC in relation to the impending withdrawal.

The ACCC considers that these provisions will ensure that access seekers are informed about the withdrawal of a product, and provide interested parties with an opportunity to comment on the withdrawal. While interested parties are not provided with the same notice as with the withdrawal of products in other circumstances (such as 12 to 24 months' notice), the ACCC considers that these provisions appropriately balance NBN Co's legitimate business interests to withdraw the product as soon as possible as required by law, and the rights of those access seekers and end-users that use the declared services.

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<sup>308</sup> See also: ACCC, *Draft Decision*, April 2013, pp. 89-93; ACCC, *Response to Submissions*, July 2013, pp. 54-59; ACCC, *Explanatory Statement*, October 2013, pp. 27-28.

<sup>309</sup> NBN Co, *SAU*, November 2013, Schedule 11, clause 11.5.1(a); Schedule 2D, clause 2D.6.1.

<sup>310</sup> See also: ACCC, *Explanatory Statement*, October 2013, p. 30.

<sup>311</sup> NBN Co, *SAU*, November 2013, Schedule 11, clause 11.5.4; Schedule 2D, clause 2D.6.4.

# 7. Prices

This chapter discusses the various pricing provisions in the SAU, including provisions in Schedules 1C, 1G, 2B and 2E of the SAU. In particular, this chapter covers:

- initial maximum prices for products included in the SAU (section 7.1)
- initial maximum prices for new and previously zero-priced products (section 7.2)
- changes to maximum regulated prices over time (section 7.3)
- the interaction between maximum regulated prices and the LTRCM (section 7.4).

The ACCC considers that these terms and conditions in the SAU will promote the long-term interests of end-users and are reasonable, having assessed it against the matters it is required to consider, as discussed in chapter 4. The ACCC also considers that these provisions are consistent with the Category B SAOs. In particular, nothing within these provisions would amount to a refusal to provide a service in relation to access upon request. The following discussion sets out the ACCC's assessment of these pricing provisions against the relevant criteria.

## 7.1. Initial prices for products in the SAU

As noted in section 3.2.3, Schedule 1C sets out a number of initial maximum regulated prices.

Key to the ACCC's assessment of initial maximum regulated prices is whether the regulated service is functionally equivalent to a service that is currently available over copper or HFC.

To the extent that a functionally equivalent service is available, the ACCC considers that end-users should not be made worse off by virtue of their migration to the NBN.<sup>312</sup> In particular, to ensure that initial maximum regulated prices will promote the long-term interests of end-users, it is important that end-users do not experience a 'price shock' due to migration to the NBN. Hence, where a NBN service is functionally equivalent to a current service being offered on copper or HFC, the price for that service should be comparable to the price of the equivalent copper or HFC service.

The ACCC considers that the initial maximum regulated prices for all NBN Co products with a copper or HFC equivalent are comparable to the prices for the equivalent copper or HFC service. Hence, the ACCC is satisfied that the provisions that specify these prices are reasonable. Detailed reasons for this are provided in the draft decision.<sup>313</sup>

In terms of services for which there is no copper or HFC-based equivalent, the draft decision stated that providing NBN Co with flexibility to set initial prices for these services should generally encourage the economically efficient investment in and use of infrastructure.<sup>314</sup>

Based on the detailed reasoning set out in the draft decision, the ACCC concluded that the provisions that specify prices for most of the NBN offers and other charges for which there is no copper or HFC equivalent were reasonable.<sup>315</sup>

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<sup>312</sup> For more on this see: ACCC, *Draft Decision*, April 2013, p. 104.

<sup>313</sup> ACCC, *Draft Decision*, April 2013, pp. 106-109.

<sup>314</sup> ACCC, *Draft Decision*, April 2013, p. 104.

However, there were a number of provisions that specified NBN offers and other charges for which the ACCC was not satisfied that initial prices were reasonable, including the standard business offer, symmetric access capacity offers (2 Mbps and under), and the restoration charge.<sup>316</sup> NBN Co subsequently removed the restoration charge from the SAU. In respect of the remaining prices, the ACCC's initial concerns were addressed through further consultation with NBN Co and access seekers. Therefore, the ACCC is now satisfied that the terms and conditions that specify the initial prices for the standard business offer and the symmetric access capacity offers (2 Mbps and under) are reasonable.<sup>317</sup>

The SAU includes initial maximum regulated prices for a number of additional NBN offers and other charges that were not included in the 18 December 2012 SAU, including:

- NBN Co building entry service, and
- CVC TC-4: 1100, 1200, 1300, 1400, 1500, 1600, 1700, 1800, 1900 Mbps and 2 Gbps.

The following sections discuss why the ACCC is satisfied that the provisions that specify the initial maximum regulated prices for these NBN offers and other charges are reasonable.

### 7.1.1. NBN Co building entry service

The NBN Co building entry service is a type of facilities access service. This service allows an access seeker to connect fibre optic cables from a physical location outside an NBN Co site or facility to an optical distribution frame termination point or another agreed location within an NBN Co facility. The price for the NBN Co building entry service is \$190 per month per fibre cable.

The ACCC understands that this \$190 per month price for the NBN Co building entry service is based on NBN Co's understanding of the market rates for similar product elements that would provide access seekers with the same capability as this service, as well as based upon the cost associated with building this service.

Given this service is already being supplied at this price, and in the absence of any concerns being raised by stakeholders, the ACCC considers the initial price for the building entry service is reasonable.

### 7.1.2. Additional CVC TC-4 tiers

The 18 December 2012 SAU included CVC TC-4 up to 1 Gbps at individual tiers of between 50 Mbps and 100 Mbps.<sup>318</sup> The price for CVC TC-4 is \$20 per Mbps per month.<sup>319</sup> The additional CVC TC-4 tiers requested by NBN Co extend these tiers up to 2 Gbps in increments of 100 Mbps. Consistent with the existing CVC tiers, the price for additional tiers is \$20 per Mbps per month.<sup>320</sup>

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<sup>315</sup> In the draft decision, the ACCC considered the initial prices for the following services were reasonable: the high data rate asymmetric AVCs that are not available to end-users of copper and HFC services; the additional asymmetric AVCs; the second UNI-V and AVC offer; most symmetric access capacity offers (with the exception of the 0.15Mbps, 0.3Mbps, 0.5Mbps, 1Mbps and 2Mbps symmetric access capacity offers); multicast pricing; and all other charges (with the exception of the Restoration Charge, which NBN Co has subsequently removed from the SAU).

<sup>316</sup> ACCC, *Draft Decision*, April 2013, pp. 109-111.

<sup>317</sup> For a detailed discussion on why the ACCC is now satisfied that these prices are reasonable, refer to: ACCC, *Response to Submissions*, July 2013, pp. 64-66.

<sup>318</sup> NBN Co, *SAU*, November 2013, Schedule 1C, clause 1C.2.5.

<sup>319</sup> NBN Co, *SAU*, November 2013, Schedule 1C, clause 1C.3(e).

<sup>320</sup> NBN Co, *SAU*, November 2013, Schedule 1C, clause 1C.3(e).

As the ACCC is satisfied that the initial monthly \$20 per Mbps price is reasonable for the existing CVC TC-4 tiers, it follows that the ACCC is satisfied that the monthly prices for the additional CVC TC-4 tiers are also reasonable. However, this does not imply that the ACCC considers that the CVC charges for all CVC tiers should always be the same on a per Mbps basis.

## 7.2. Initial prices for new or previously zero-priced products

As discussed in chapter 3, Schedules 1C and 2B and Attachment C to the Main Body of the SAU set out the provisions that specify how the initial maximum regulated prices for new and previously zero-priced NBN offers and other charges are to be determined. These processes apply consistently across both Module 1 and Module 2. This section considers whether, over the term of the SAU, the proposed commitments:

- provide NBN Co with an incentive to set new prices at levels that promote competition and efficient use of the network
- ensure that if these incentives do not prevail, the ACCC is able to determine new prices that promote competition and efficient use of the NBN
- provide an incentive — in addition to the commitments made in the SAU about prudence (see chapter 8) — for NBN Co to invest in and operate its network in an efficient manner.

The ACCC recognises that in many circumstances NBN Co may have incentives to set new prices efficiently of its own accord. For example, NBN Co may face incentives to price its new services to encourage efficient use of the NBN to drive revenue growth during periods when it faces revenue sufficiency risk. In addition, to the extent that a new service is substitutable for services that NBN Co is already supplying, NBN Co may have greater incentives to price that new service in such a way as to encourage its use.

However, it is possible that during the term of the SAU these incentives will not prevail (for example, when NBN Co's revenue increases, and if competition from substitutable products is not effective). For these reasons, it is appropriate that the ACCC has the ability to determine new prices to ensure that these prices continue to be set in a manner that promotes competition and the efficient use of the network. Telstra noted its support for the ACCC having oversight of prices for new and previously zero-priced NBN offers.<sup>321</sup>

Importantly, while the SAU permits the ACCC to determine new prices, if NBN Co's observed behaviour indicates that it is responding to the incentives mentioned above, the ACCC expects that it would not be necessary for it to determine initial maximum regulated prices. As noted above, the ACCC considers that it is appropriate for NBN Co to have a degree of pricing flexibility for new products, and that allowing this flexibility can lead to efficient outcomes. However, in the event that NBN Co sets initial prices that do not promote efficiency and/or competition, the ACCC will be able to determine the maximum regulated price in Binding Rules of Conduct and/or Access Determinations. The possibility of ACCC recourse could, in and of itself, reduce the likelihood that NBN Co will set new prices that raise concerns.

Where the ACCC makes an Access Determination or Binding Rules of Conduct in relation to a new price, certain constraints apply. First, any determination must be made within 24 months of NBN Co commencing the supply of the new NBN offer or other charge, or introducing a new price for a previously zero-priced NBN offer or other charge.<sup>322</sup> This restriction will provide NBN Co with certainty that the ACCC may not intervene in respect of new prices after

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<sup>321</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

<sup>322</sup> NBN Co, *SAU*, November 2013, Main Body, Attachment C, definition of 'Resetting Regulatory Determination'.

24 months of a price being introduced. This should promote efficient investment in the network, and is consistent with NBN Co's legitimate business interests.

Second, where the ACCC makes an Access Determination in relation to the maximum regulated price of a new NBN offer or other charge, the ACCC must take into account the characteristics and costs of, and impacts on demand for and revenues earned from, other existing NBN offers and other charges.<sup>323</sup> This requirement provides certainty to NBN Co that the ACCC will consider the possible impact of a regulated price for a new product upon its existing and future revenue streams. It also addresses any disincentive NBN Co may face to introduce new services arising from a concern that an ACCC pricing determination may undermine its overall revenue streams. Further, considering the impact of a pricing determination on NBN Co's overall revenue is important for promoting NBN Co's legitimate business interests.

Finally, in making an Access Determination under Part XIC, the ACCC must take into account (among other things):

- whether the determination will promote the long-term interests of end-users — which would require the ACCC to have regard to the extent to which the determination would encourage the economically efficient use of and investment in the NBN, and
- NBN Co's legitimate business interests and its investment in the NBN.<sup>324</sup>

Based on the above reasoning, the ACCC considers that the provisions in the SAU around setting initial maximum regulated prices for new and previously zero-priced NBN offers and other charges are reasonable.

### 7.3. Changes to maximum prices over time

Maximum regulated prices may change over time through a number of processes, including:

- The CPI-1.5 per cent price control — the price control applies to all NBN offers and other charges for the duration of the SAU term.<sup>325</sup>
- A price review arrangement — a price review can be initiated by NBN Co or the ACCC from 1 July 2014 onwards, and may come into effect from 1 July 2016. A maximum of two price review arrangements may come into effect during Module 1. During Module 2, a price review may be initiated by NBN Co or the ACCC at any time, but must not come into effect while a previous price review arrangement applies.<sup>326</sup>
- Tax change events — the SAU sets out a process for changing maximum regulated prices in response to a tax change event during Module 1. During Module 2, however, this will be determined through the replacement module process.<sup>327</sup>
- Changes to zero-priced NBN offers and other charges (discussed above) — the processes for changing zero-priced NBN offers and other charges are the same for Module 1 and Module 2.<sup>328</sup>

The following section explains why the ACCC considers that, taken together, the provisions that set out the above matters in the SAU are reasonable. Since changes to zero-priced NBN

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<sup>323</sup> NBN Co, SAU, November 2013, Schedule 1C, clause 1C.5.1(d).

<sup>324</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.3.8(d); Schedule 2E, clause 2E.2.8(d).

<sup>325</sup> NBN Co, SAU, November 2013, Schedule 1C, clause 1C.5.2; Schedule 2B, clause 2B.2.3.

<sup>326</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.3; Schedule 2E, clause 2E.2.

<sup>327</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.2.

<sup>328</sup> NBN Co, SAU, November 2013, Schedule 1C, clause 1C.5.1; Schedule 2B, clause 2B.2.2.

offers and other charges were discussed in the previous section, they are not discussed further here.

The processes by which prices may change over time have important implications for NBN Co's incentives to efficiently invest in the NBN and to set prices at efficient levels. At a high level, NBN Co must have the opportunity to recover the costs it incurs from investing in and operating the network through its revenues. By placing restrictions on how prices may change over time, the SAU provides NBN Co with incentives to price services to encourage take-up of services and to increase revenue. Put another way, because NBN Co's ability to increase prices is limited by the SAU, it must increase demand for its existing services, or introduce new services, in order to increase its revenue. In addition, restrictions on how prices may change over time creates incentives for NBN Co to invest in the network efficiently because it will not be able to increase prices above the price controls to recover costs. This in turn provides an incentive for NBN Co to incur only efficient costs (see chapter 8).

The ACCC considers that the CPI-1.5 per cent price control is likely to generate these incentives for NBN Co to invest efficiently in the network and operate the network efficiently. This is because, subject to the revenue neutral price review mechanism, NBN Co will not be able to increase prices above the price control to recover any costs associated with over-investment or inefficient expenditure. If NBN Co were to over-invest or incur expenditure in an inefficient manner, this would increase the likelihood that it would be unable to recover its investment via its prices over the SAU term.

In addition, the CPI-1.5 per cent price control will promote price stability, therefore encouraging efficient use of the network. That is, the price control will provide certainty to access seekers that NBN Co's prices will decrease in real terms over time, subject to the price review mechanism and tax change events (both discussed below).

However, as noted by the ACCC in the draft decision, circumstances may arise over the term of the SAU which suggest that prices for particular services are not encouraging efficient use of and investment in the network.<sup>329</sup> Therefore, it is important that the SAU provides an appropriate balance between pricing certainty for NBN Co and access seekers, and pricing flexibility to respond to unforeseen circumstances. The ACCC considers that the provisions that set out how maximum regulated prices can change over time provide this balance.

The ability for the ACCC or NBN Co to initiate a price review ensures that, if the above circumstances arise, maximum regulated prices can be adjusted appropriately. The ACCC considers that the criteria to which it must have regard when deciding whether to accept or issue a price review arrangement will promote efficient use of, and investment in, infrastructure and will promote NBN Co's legitimate business interests.

First, since price review arrangements must be revenue neutral for NBN Co, NBN Co will not be precluded by the price review from recovering its prudent and efficient costs, including an appropriate commercial return (given the risks of its investments). Revenue neutrality will also ensure that the CPI-1.5 per cent price control continues to create incentives for NBN Co to invest and operate efficiently.

Second, in addition to the revenue neutrality requirement, the ACCC must not accept a price review proposal or issue a price review arrangement unless it is satisfied that the rebalanced maximum regulated prices are reasonable, having regard to:

- the matters specified in section 152AH of the CCA
- the legitimate business interests of NBN Co

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<sup>329</sup> ACCC, *Draft Decision*, April 2013, pp. 122-125.

- the characteristics and costs of other NBN offers not the subject of the review, and the demand for and revenues earned from, these other offers.<sup>330</sup>

These criteria will provide NBN Co with certainty that, in deciding whether or not a Price Review Arrangement should come into effect, the ACCC will consider the effects of the arrangement on the revenues earned from its existing product set. Further, it will allow NBN Co, at the time of a price review, with an opportunity to be heard regarding how a price review arrangement may affect its legitimate business interests, including its ability to raise and service funds (short, medium or long term) and for the ACCC to consider those arguments at that time.

Finally, these criteria will provide certainty to access seekers that when deciding whether to accept or issue a price review arrangement, the ACCC must be satisfied that the rebalanced prices are reasonable, which includes having regard to the long-term interests of end-users, and the interests of those parties who have rights to use the services.

The SAU provides that two price review arrangements (and no more) can take effect during Module 1, and that a Price Review cannot come into effect prior to 1 July 2016.<sup>331</sup> The detailed reasons for this approach are set out in the explanatory statement to the notice to vary.<sup>332</sup> In summary, the ACCC considers that while NBN Co may have incentives during Module 1 to price its services in such a way as to encourage end-users to increase their use of the NBN, these incentives may not be sufficient without also allowing the ACCC the ability to review prices during Module 1. Providing the opportunity for (but not requiring) two price review arrangements to take effect during Module 1 will provide access seekers and NBN Co with certainty that, if particular prices are not encouraging efficient use of and investment in the network, they may be subject to review. However, if it turns out that the incentives faced by NBN do ensure prices are set to encourage efficient use of and investment in infrastructure during Module 1, the ACCC expects that it would be unlikely to be necessary for it to commence a review process as early as 1 July 2014 or make a price review arrangement as soon as 1 July 2016, or to undertake more than one review during Module 1.

Telstra noted its support for the ACCC having the ability to review prices, especially CVC prices:

Telstra is optimistic that its concerns in relation to CVC pricing can be addressed by appropriate use of the review and monitoring powers in the varied SAU ... The price review mechanism, although more limited in scope and frequency than Telstra had proposed, will still have an important role to play in ensuring an appropriate balance between access and usage charges.<sup>333</sup>

In addition to encouraging efficient use of and investment in infrastructure, the ACCC considers that the processes by which prices may change over time are likely to promote competition in markets for listed services. In particular, the price controls will promote price stability, which may promote competition in downstream markets by providing access seekers with greater certainty over future price paths. In addition, the price review process will ensure that if circumstances arise over the term of the SAU which suggest that prices for particular services are not encouraging competition, maximum regulated prices can be adjusted appropriately.

### 7.3.1. Tax Change Events

As noted in section 3.2.7, there are provisions in the SAU that set out processes for maximum regulated prices to change as a result of 'tax change events'.<sup>334</sup> The ACCC considers that allowing NBN Co to recover these costs from its customers would have appropriate regard to

<sup>330</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.3.8; Schedule 2E, clause 2E.2.8.

<sup>331</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.3.1.

<sup>332</sup> ACCC, *Explanatory Statement*, October 2013, pp. 50-54.

<sup>333</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 4.

<sup>334</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.2.

its direct costs and legitimate business interests. This is because taxes imposed on NBN Co by government agencies are a direct cost of doing business. These costs may change from time to time, and any change is outside NBN Co's control.

However, the amount by which prices for particular products and services supplied by NBN Co are increased to recover changes in these costs can have implications for the efficient use of the NBN, and in some circumstances the efficient investment in the NBN. In particular, increases in prices for particular services will affect the extent to which end-users purchase particular services from NBN Co (for example, high data rate services and capacity), and the time period over which NBN Co will be able to recover its investment. Similarly, any changes made by NBN Co to relative prices in response to a tax change event (for example, changes in the relative changes in AVC and CVC prices, AVC price tiers and ancillary and other changes) could have implications for the efficient use of the NBN.

Further, NBN Co's ability to increase prices above the price control could, depending on the size of the price increase applied, have implications for the incentives created by the price controls for NBN Co to both invest and operate efficiently and for it to encourage efficient use of the NBN.

The ACCC recognises that, in the case of increases to maximum regulated prices as a result of an increase in taxes, NBN Co may have incentives to seek to increase maximum regulated prices by more than should be permitted — that is, by more than is required to recover the increased costs associated with the increase in taxes. Further, in the case where there is a decrease in taxes, NBN Co may seek to decrease maximum regulated prices by less than is reflective of the decrease in costs associated with the tax reduction, or to delay or avoid any decrease in maximum regulated prices at all.

Consequently, while the SAU provides for maximum regulated prices to change as a result of tax change events through agreement between NBN Co and access seekers, it also provides for the ACCC to determine this if it cannot be agreed. When making a determination in relation to a tax change event, the ACCC must be satisfied that the change to maximum regulated prices is reasonable, taking into account a number of matters. This will provide an incentive on NBN Co to negotiate with access seekers in relation to price changes in response to tax change events. It will also ensure that price changes resulting from tax change events are consistent with promoting efficient use of, and investment in, infrastructure, as outlined above.

Further, by specifying that the ACCC may issue a notice to NBN Co in relation to a negative tax change event under certain circumstances (as discussed in section 3.2.6),<sup>335</sup> the SAU ensures that if there is a decrease in taxes and reducing prices will encourage the efficient use of, and investment in, the NBN, the ACCC can ensure prices are adjusted accordingly.

During Module 2, the replacement module process will be utilised to determine the specific manner in which maximum regulated prices may be changed in response to a tax change event. This will allow the ACCC to address how changes in taxes are treated for the purposes of both the revenue constraints and price controls through replacement modules, taking into account any relevant factors at the time, such as best regulatory practice.

## 7.4. Interaction between the price controls and revenue constraint

In the draft decision, the ACCC stated that the December 2012 undertaking was not clear as to whether the CPI-1.5 per cent price controls or the regulated revenue allowance determined using the long term revenue constraint methodology would take precedence at different stages

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<sup>335</sup> NBN Co, SAU, November 2013, Schedule 1G, clause 1G.2.5.

during the SAU term.<sup>336</sup> The ACCC considers it is important for the SAU to be absolutely clear about the interaction between maximum regulated prices and the LTRCM. This is because this interaction has important implications for:

- the incentives created by the CPI-1.5 per cent price control for NBN Co to invest, operate and price efficiently — if NBN Co expected that it would be able to increase prices above the maximum regulated prices allowed for by the CPI-1.5 per cent price control, these incentives would be weakened, and
- the efficacy of the constraint on revenues established by the Annual Building Block Revenue Requirements (ABBRR) and the LTRCM — if the CPI-1.5 per cent price control allowed NBN Co to earn revenues in excess of those allowed for by the ABBRR, the LTRCM would not operate to ensure that the net present value of NBN Co's cash inflows and outflows over the life of the SAU came to zero.

The ACCC considers that the SAU provides sufficient clarity about the intended interaction between maximum regulated prices and the LTRCM. In particular, the SAU specifies that NBN Co must set prices subject to both maximum regulated prices and the revenue constraint.<sup>337</sup> In addition, the SAU specifies that, over a regulatory cycle within the building block revenue period, prices must be set so that NBN Co's forecast revenue does not exceed its allowed revenues.<sup>338</sup>

There are two important points to note about the intended interaction of maximum regulated prices and the LTRCM. First, in contrast to many other regulatory regimes, the CPI-1.5 per cent price control is intended to operate for the term of the SAU alongside the revenue constraint. That is, unlike many other regulatory regimes, the price control is not intended to be adjusted to meet the revenue requirement that is determined in accordance with the building block methodology.

Second, NBN Co cannot increase maximum regulated prices in order to earn revenues calculated in accordance with the LTRCM. However it may have to decrease certain prices below the maximum regulated price so that it does not exceed the revenue requirement calculated in accordance with the LTRCM, once the building block period commences.

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<sup>336</sup> ACCC, *Draft Decision*, April 2013, p. 96.

<sup>337</sup> NBN Co, *SAU*, November 2013, Schedule 1C, clause 1C.1.4; Schedule 1E, clause 1E.2.4(c); Schedule 2B, clause 2B.1.4; Schedule 2C, clause 2C.6.2.

<sup>338</sup> NBN Co, *SAU*, November 2013, Schedule 2C, clause 2C.6.2.

## 8. Revenue

This chapter sets out the ACCC's assessment of the provisions in the SAU that set out the LTRCM. This relates to Schedules 1D, 1E, 1F and 2C of the SAU.

The LTRCM is based on the building block methodology often adopted in regulating utilities, but also incorporates an 'initial cost recovery account' (ICRA).<sup>339</sup> The LTRCM is aimed at providing NBN Co with the opportunity to recover its prudent and efficient costs of supply over the term of the SAU, including an appropriate commercial return. The overarching elements of the LTRCM are the Annual Building Block Revenue Requirement (ABBRR), the Regulatory Asset Base (RAB) roll-forward equation and the ICRA:

- The ABBRR represents the amount of revenue that NBN Co would be required to earn in order to recover its costs (including a return on and of its previous capital investments) in a particular year.
- The RAB is the value of capital investment made by NBN Co, and the RAB roll-forward equation determines how that value will change over time.
- The ICRA facilitates the capitalisation and deferred recovery of initial revenue shortfalls. It is anticipated that for a period of time, given the level of initial prices, the expected low initial take-up of NBN services and the proposed price controls, NBN Co will be unlikely to earn sufficient revenues to meet its annual revenue requirement. The SAU establishes that any such revenue shortfalls will be included in the ICRA to be recovered in later years.

The following elements of the LTRCM will remain unchanged over Modules 1 and 2:

- the RAB roll-forward equation — the initial value of the RAB is zero and is to be rolled forward each year by adding prudently and efficiently incurred capital expenditure and subtracting depreciation and asset disposals<sup>340</sup>
- the capitalisation of previously unrecovered cost through the ICRA<sup>341</sup>
- the building block components that can be included in the annual revenue requirement, being a return on capital, regulatory depreciation, operating expenditure and a tax allowance.<sup>342</sup>

However, the way in which the building block components and the ICRA are calculated will change between Module 1 and Module 2. Specifically:

- During Module 1, the annual revenue requirements are to be determined annually by the ACCC on an ex post basis. Specifically, the ACCC will apply the methodologies set out in the SAU to calculate the value of each building block for the preceding year. The ACCC will update the RAB based on NBN Co's prudent and efficient capital expenditure and the ICRA based on the difference between NBN Co's annual revenue requirement and the actual revenue NBN Co earned in the preceding year.<sup>343</sup>
- During Module 2, NBN Co's annual revenue requirements are to be determined ex ante for 'regulatory cycles' of three to five years' duration, based on forecasts for each building

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<sup>339</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.5; Schedule 2C, clause 2C.5.

<sup>340</sup> NBN Co, SAU, November 2013, Schedule 1D, clause 1D.2.1(b); Schedule 2C, clause 2C.7.3(a).

<sup>341</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.5; Schedule 2C, clause 2C.5.

<sup>342</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.4.1; Schedule 2C, clause 2C.2.1(a).

<sup>343</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.1.2.

block component. NBN Co is required to submit these forecasts as part of a 'replacement module application', which the ACCC must assess.<sup>344</sup> At the end of each regulatory cycle, the RAB will be rolled forward in accordance with the methodologies set out in the relevant replacement module (or replacement module determination if made by the ACCC).<sup>345</sup> If the ICRA is in operation during Module 2 (that is, if it is still positive), it will be updated based on the difference between the forecast revenue requirements and either forecast revenue or actual revenue,<sup>346</sup> depending on the methodology specified in the replacement module process for each regulatory cycle.<sup>347</sup>

The ACCC considers that the terms and conditions in the SAU that set out the LTRCM are in the long-term interests of end-users and are reasonable. The ACCC also considers that the revenue provisions are consistent with the SAOs. In particular, nothing within these provisions would amount to a refusal to provide a service in relation to access upon request. The following discussion sets out the ACCC's assessment of the revenue provisions against the relevant criteria.

## 8.1. Framework for assessment of the long-term revenue constraint methodology

As discussed in chapter 4, the ACCC has categorised most of the provisions in Schedules 1D, 1E and 2C (the LTRCM provisions concerning the determination of the RAB, ICRA and the ABBRR) as terms and conditions in relation to compliance with the Category B SAOs for the purposes of its assessment. The remaining provisions in these Schedules, and Schedule 1F, facilitate the operation of the LTRCM and are either categorised as conduct or provide for the ACCC to exercise functions and powers. Overall, the ACCC has assessed whether the terms and conditions that set out the LTRCM:

- provide NBN Co with an opportunity to recover its prudent and efficient costs over time (including an appropriate commercial return, given the risks of the investment) — to encourage efficient investment and allow for the safe and reliable operation of the services that are the subject of the SAU, having regard to NBN Co's direct costs and legitimate business interests
- create incentives for NBN Co to invest efficiently at all times throughout the SAU term
- over the long-term, result in access prices that reflect no more or less than NBN Co's prudent and efficient costs so that effective price signals are provided to access seekers about the costs of NBN Co's services and efficient use of the NBN is encouraged.

In relation to the first point, the LTRCM will encourage efficient investment by NBN Co if the expected net present value of NBN Co's investment is zero — that is, if NBN Co expects, at the time of undertaking the investment, to recover no more or no less than its prudent and efficient costs (including an appropriate commercial return) over time. The ACCC considers that this is an important precursor to ensuring productive efficiency in the provision of NBN services. If this was not the case and, for example, NBN Co were under-compensated relative to its costs (including an appropriate commercial return), this may discourage efficient investment and lead to a situation where NBN Co under-invests. This could result in NBN Co not providing the quality of service expected by access seekers and end-users. Conversely, if NBN Co were over-compensated relative to an appropriate commercial return, this could result in access seekers and end-users paying more than they should.

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<sup>344</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 4.4 and 4.5(e).

<sup>345</sup> NBN Co, *SAU*, November 2013, Schedule 2C, clauses 2C.7.3-2C.7.6.

<sup>346</sup> NBN Co, *SAU*, November 2013, Schedule 2C, clause 2C.5.

<sup>347</sup> NBN Co, *SAU*, November 2013, Main Body, clause 4.6(e).

Allowing NBN Co to earn an appropriate commercial return on its investment would also encourage dynamic efficiency, as NBN Co would not be precluded from making timely investments to respond, on an ongoing basis, to changes in consumers' preferences. In contrast, too high a return might lead NBN Co to over-invest in capital expenditure.

Allowing NBN Co the opportunity to recover its efficient costs will also have appropriate regard to NBN Co's direct costs, legitimate business interests and the requirements necessary for the safe and reliable operation of the services that are the subject of the SAU.

Second, it is important that NBN Co faces incentives to invest in infrastructure efficiently and provide services to customers at a level of quality that customers require and are willing to pay for.

As discussed in section 5.3.1 of the draft decision, the ACCC considers that NBN Co's incentives to invest efficiently are likely to change over the term of the SAU, depending on whether NBN Co faces revenue sufficiency risk — that is, the risk that its revenue from charges may not cover the costs it incurs. If this risk is perceived to be significant, the incentives for NBN Co to invest and operate efficiently will be greater. However, it is not clear when this risk will begin to reduce during the SAU term. The ACCC's assessment of whether the LTRCM will encourage efficient investment considers the incentives faced by NBN Co to invest efficiently over the term of the SAU.

Third, the LTRCM will encourage the economically efficient use of the NBN (including efficient take-up over time) if, over the long-term, it results in prices that ensure customers are charged no more or no less than NBN Co's prudent and efficient costs. Prices that reflect prudently and efficiently incurred costs over the long-term are efficient from an allocative efficiency perspective. In particular, such prices will encourage the efficient supply of services by NBN Co and consumption by end-users. If, for example, NBN Co's revenue from prices were higher than its prudent and efficient costs, customers might underutilise the NBN. Conversely, if NBN Co's prices reflected less than its prudent and efficient costs, customers may overuse the NBN.

The remainder of this chapter sets out the ACCC's assessment of the LTRCM within the framework described above. First, overarching elements of the LTRCM are discussed, followed by a discussion of LTRCM elements specific to Module 1 and Module 2, respectively.

## 8.2. Overarching elements of the long-term revenue constraint methodology

As noted above, the LTRCM is based on the building block methodology often adopted in regulating utilities, but also incorporates an ICRA to facilitate the capitalisation and deferred recovery of initial revenue shortfalls. The methodology contains several core elements which are reflected in both Module 1 and Module 2 of the SAU — the revenue requirement, the RAB roll-forward equation and the ICRA.

An underlying element of the LTRCM is the set of assumptions made about the timing of NBN Co's cash flows. The LTRCM implicitly assumes that all cash flows — capital expenditure, operating expenditure and revenue — are synchronised and occur approximately at the end of each financial year on average. These assumptions are held constant throughout the SAU term. The ACCC considers that consistency with respect to the assumed timing of cash flows over time within the LTRCM will achieve a net present value of zero for NBN Co's expected future cash flows over the SAU term. The ACCC therefore considers that the consistent end-of-year assumptions about the timing of NBN Co's cash flows in the LTRCM will allow NBN Co the opportunity to recover its prudent and efficient costs (including an appropriate commercial return) and no more. Further, consistent end-of-year timing assumptions are transparent and simple to administer.

Also key to the LTRCM is the methodology and criteria applied to determine the value of each of the building blocks. The way in which building block components are calculated will change over the SAU term:

- In Module 1, they will be determined annually ex post by the ACCC based on methodologies set out in the SAU.<sup>348</sup>
- In Module 2, they will be determined periodically ex ante, based on forecasts, approved by the ACCC.<sup>349</sup>

Further, the methodology used to determine the cost of capital will also change over the SAU term:

- In Module 1, it will be calculated by adding a fixed risk premium to the risk free rate.<sup>350</sup>
- In Module 2, it will be determined periodically ex ante in replacement module applications approved or rejected by the ACCC.<sup>351</sup>

These methodologies, and the ACCC's views on whether they are likely to encourage efficient investment in and use of the NBN, are discussed below.

## 8.3. Long-term revenue constraint in Module 1

Module 1 will operate from the commencement of the SAU until 30 June 2023.<sup>352</sup> The LTRCM provisions contained in Module 1 specify detailed methodologies for determining the value of the ABBRR, the RAB and the ICRA over the course of Module 1.

The ACCC considers that NBN Co will face a high degree of revenue sufficiency risk for most, if not all, of Module 1. This is due to NBN Co's initial prices and the expected low initial take-up of NBN services. This should provide incentives for NBN Co to invest efficiently. In addition, there are measures in Module 1 to ensure that the individual cost components of the LTRCM will only allow for NBN Co to recover prudent and efficient costs. This is discussed further below.

### 8.3.1. Ex-post assessment framework

In each year during Module 1, NBN Co will submit to the ACCC information on expenditure incurred and revenues received during the preceding financial year.<sup>353</sup> NBN Co will also submit a report certifying that expenditure has been prudently and efficiently incurred in accordance with the methodologies set out in the SAU.<sup>354</sup> The ACCC will then determine the value of the cost components that make up the ABBRR and the RAB, and the consequential value of the ICRA (and if applicable, the revenue variation and regulated revenue) for that financial year, having regard to the information provided by NBN Co, in an LTRCM determination.<sup>355</sup>

The methodologies for calculating the cost components which determine the value of the RAB in a particular year are as follows:

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<sup>348</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.1.2.

<sup>349</sup> NBN Co, SAU, November 2013, Main Body, clauses 4.4(c)(ii) and 4.5(e).

<sup>350</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.7.1.

<sup>351</sup> NBN Co, SAU, November 2013, Main Body, clause 4.4; Schedule 2C, clause 2C.2.1.

<sup>352</sup> NBN Co, SAU, November 2013, Main Body, clause 4.1(b).

<sup>353</sup> NBN Co, SAU, November 2013, Schedule 1F, clause 1F.1.3.

<sup>354</sup> NBN Co, SAU, November 2013, Schedule 1F, clause 1F.2.1.

<sup>355</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.1.2.

- Capital expenditure — capital expenditure that the ACCC is satisfied can be categorised as being deemed prudent or meeting the requirements of the prudent design condition and the prudent cost condition (explained in section 3.2.4.2) can be included in the RAB.<sup>356</sup> Where the ACCC is not satisfied that capital expenditure meets these requirements, it may determine a substitute amount to be included in the RAB.<sup>357</sup>
- Depreciation — straight line depreciation will be applied to the amount of capital expenditure that is to be included in the RAB, using asset lives that are consistent with NBN Co's audited accounts.<sup>358</sup>

The methodologies for calculating the cost components which determine the value of the ABBRR in a particular year are as follows:

- Return on capital — together with the opening value of the RAB for a particular year, the level of NBN Co's cost of capital (discussed below) will determine the value of the return on capital building block component.<sup>359</sup>
- Regulatory depreciation — this will be calculated as the straight line depreciation component of the opening RAB less the CPI indexation of the opening RAB value for the current year.<sup>360</sup>
- Operating expenditure — operating expenditure that the ACCC is satisfied can be categorised as being deemed prudent or was incurred in accordance with, among other things, NBN Co's procurement processes (explained in section 3.2.5.2) can be included in the ABBRR.<sup>361</sup> Where the ACCC is not satisfied that operating expenditure meets these requirements, it may determine a substitute amount to be included in the ABBRR.<sup>362</sup>
- Tax allowance — tax payable is calculated, taking into account any prior year tax losses, which are used to offset taxable profit and carried forward. If tax payable is positive, a net tax allowance is calculated by applying a gamma factor.<sup>363</sup>
- Construction in progress allowance — together with the opening value of 'construction in progress' for a particular year (determined in accordance with NBN Co's audited accounts),<sup>364</sup> the level of NBN Co's cost of capital (discussed below) will determine the value of the construction in progress allowance.<sup>365</sup> This allowance accounts for the financing costs associated with capital expenditure relating to assets that are not yet in service.

Consequently, the ICRA will be determined in each year during Module 1 by calculating the difference between the ABBRR and the amount of revenue actually earned by NBN Co via access prices in that year.<sup>366</sup> This amount — referred to as 'unrecovered cost' — would be added to the ICRA, with the opening value of the ICRA for that year being capitalised and carried forward.<sup>367</sup>

<sup>356</sup> NBN Co, SAU, November 2013, Schedule 1D, clause 1D.3.2(a).

<sup>357</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.1.2(c)(iv).

<sup>358</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.9.1(a).

<sup>359</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.4.1.

<sup>360</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.9.1(c).

<sup>361</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.8.2(a).

<sup>362</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.1.2(c)(iv).

<sup>363</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.9.3.

<sup>364</sup> Construction in Progress will only be included in the calculation of the construction in progress allowance to the extent that the ACCC is satisfied that the capital expenditure incurred in connection with the relevant assets is prudently incurred.

<sup>365</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.4.1.

<sup>366</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.5.1.

<sup>367</sup> NBN Co, SAU, November 2013, Schedule 1E, clause 1E.5.2.

Given that the calculation of the components which determine the ABBRR, RAB and ICRA will be determined by the ACCC, this should provide confidence to stakeholders that the outcomes have been determined in an impartial manner by an independent party. The ACCC also notes that Telstra supports the ACCC's review and oversight role in respect of the LTRCM.<sup>368</sup> Further, and as noted above, the high degree of revenue sufficiency risk likely to be faced by NBN Co for most, if not all, of Module 1 will also increase NBN Co's incentives to invest and operate efficiently during Module 1.

The ACCC therefore considers that, during Module 1, NBN Co's allowed revenues in each year will reflect NBN Co's prudent and efficient costs. The ACCC acknowledges that the actual revenue earned by NBN Co in a given year may not reflect regulated revenues while the ICRA is in operation. In this way, access prices in a given year would not reflect NBN Co's prudent and efficient costs in that year. However, over the term of the SAU, NBN Co should be have the opportunity to recover its efficient costs. Further, given the operation of the price controls (discussed in section 7.3), and the ability for the ACCC to review and rebalance price structures and price relativities in Module 1 (also discussed in section 7.3), the ACCC considers that prices for NBN Co's products will encourage the ongoing efficient use of the NBN, and will promote the interests of access seekers, during Module 1.

### 8.3.2. Cost of capital

As noted above, in considering whether economically efficient investment is likely to be encouraged, the ACCC has also had regard to the legitimate commercial interests of NBN Co. That is, the ACCC has considered NBN Co's ability to earn an appropriate commercial return on its investment in the infrastructure used to supply the services that are the subject of the SAU, in light of the risks involved in making the investment.

As discussed in section 5.5.1.4 of the draft decision, the Officer and Bishop approach of benchmarking the cost of capital at the level of an overall Weighted Average Cost of Capital (WACC) (compared to benchmarking for individual WACC parameters) across a broad range of regulatory decisions results in a 350 basis point risk premium over the risk free rate. Officer and Bishop consider this to be within a reasonable confidence interval around their estimate of an appropriate mark-up.<sup>369</sup> In the absence of better information at this point in time, the ACCC considers that this is reasonable and is likely to allow NBN Co to earn an appropriate commercial return on its investment.

### 8.3.3. Customer engagement

Module 1 contains a process for NBN Co to seek endorsement of proposed network changes.<sup>370</sup> As discussed in chapter 3, the process makes use of the PDF (and the associated PDF processes) to engage and consult with customers on proposed network changes. If a network change is endorsed by customers, then the capital expenditure associated with that network change may be included in the RAB.<sup>371</sup> The customer engagement provisions will apply for a period of five years after SAU commencement,<sup>372</sup> after which NBN Co would be able to submit an SAU variation to extend and/or revise the provisions. However, if after five years there is no customer engagement process in place, the ACCC would be able to allow network changes.<sup>373</sup>

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<sup>368</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

<sup>369</sup> Bob Officer and Steven Bishop, *Report on WACC component of NBN Co's Special Access Undertaking*, September 2012, p. 21.

<sup>370</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clause 1D.9.

<sup>371</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clause 1D.6.

<sup>372</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clause 1D.1.1(b).

<sup>373</sup> NBN Co, *SAU*, November 2013, Schedule 1D, clause 1D.6.

These customer engagement provisions and associated PDF processes should encourage efficient investment. This is because access seekers and consumer advocacy groups (and potentially end-users) would be able to inform NBN Co about whether network design choices are efficient and deliver network capacity and service quality that end-users desire and are willing to pay for.

### 8.3.4. Conclusion

The ACCC considers that the methodologies specified in the SAU to ensure that only prudently and efficiently incurred expenditure is recovered by NBN Co, and the methodology to determine the cost of capital for Module 1, together with the operation of the core elements of the LTRCM, will allow NBN Co the opportunity to recover its prudent and efficient costs over time (including an appropriate commercial return) and no more, given the risks of the investment. This will be monitored by the ACCC through its role in making LTRCM determinations.

## 8.4. Long-term revenue constraint in Module 2

Module 2 will operate from the expiry of Module 1 to the end of the SAU term.<sup>374</sup> Unlike Module 1, the LTRCM provisions contained in Module 2 do not specify detailed methodologies for determining the ABBRR, the RAB and the ICRA. Instead, Module 2 sets out the high level principles that will apply to the determination of these values, with detailed methodologies to be specified in additional replacement modules of three to five years' duration.

As noted above, the ACCC considers that NBN Co will face a high degree of revenue sufficiency risk during Module 1 that will increase NBN Co's incentive to invest and operate efficiently. It follows that as that risk reduces, these incentives will also reduce. Therefore, when that risk does reduce, NBN Co should face incentives similar to those faced by other regulated utilities. It should therefore be regulated in a similar manner to those utilities, with a sufficient degree of regulatory flexibility retained to accommodate for changes in regulatory best practice over time, as well as changes in NBN Co's operating environment.

Whilst it is uncertain when NBN Co's revenue sufficiency risk might begin to reduce, there is a likelihood that it will begin to do so during Module 2. Therefore the ACCC considers that additional incentive mechanisms should be in place during Module 2 so that NBN Co faces a continuous incentive to invest efficiently throughout the entire term of the SAU. This can be achieved through the use of ex ante determinations that give NBN Co the incentive to 'beat' the forecast costs on which its revenue is determined.

For the ACCC to be satisfied that the LTRCM provisions in Module 2 will encourage efficient investment throughout the course of Module 2, the processes and methodologies for determining the various building block components must be defined in such a way as to result in NBN Co being compensated only for its prudent and efficient costs. These processes and methodologies are discussed below.

### 8.4.1. Replacement module assessment process

During Module 2, before the commencement of each regulatory cycle, NBN Co will submit a replacement module application to the ACCC, which is a variation to the SAU for the purposes of Part XIC.<sup>375</sup> Each replacement module application will include forecasts, for a three to five year period, of the ABBRR, the RAB and the ICRA, as well as all necessary inputs for the

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<sup>374</sup> NBN Co, SAU, November 2013, Main Body, clause 4.1(c).

<sup>375</sup> NBN Co, SAU, November 2013, Main Body, clause 4.5.

calculation of these components.<sup>376</sup> The ACCC will assess each replacement module application as a variation to the SAU under Part XIC and will make a decision to either accept or reject that application.<sup>377</sup> If the ACCC rejects a replacement module application, it must make a replacement module determination in respect of, among other things, forecasts of the ABBRR, the RAB and the ICRA.<sup>378</sup>

The ex ante assessment of replacement module applications is similar to the approach currently used by the Australian Energy Regulator in regulating gas and electricity network service providers, and the ACCC in regulating Telstra's fixed line services. The ACCC would assess NBN Co's expenditure forecasts as part of its overall assessment of the replacement module application.

Unlike Module 1, where the SAU specifies methodologies for determining the prudence of capital expenditure and operating expenditure, these methodologies are not prescribed in Module 2. Instead, there is an acknowledgement that at a minimum, the revenue requirement will include a return on capital, regulatory depreciation, operating expenditure and a tax allowance.<sup>379</sup> However, the SAU specifies options for rolling capital expenditure into the RAB and accounting for depreciation (to be proposed by NBN Co in each replacement module application).<sup>380</sup> The RAB roll-forward provisions are discussed below.

Not prescribing the methodologies for determining the building block components in Module 2 at this current time will allow the ACCC to consider whether the methodologies specified in each replacement module application reflect regulatory best practice in light of the relevant circumstances faced by NBN Co at the time, and the relevant statutory criteria in Part XIC. If the ACCC is not satisfied that the replacement module application meets the relevant statutory criteria, it is able to specify the methodologies and values in a replacement module determination that it is satisfied meet the relevant statutory criteria in Part XIC. Ultimately, this should ensure that there are sufficient incentives for efficient investment in Module 2, whether or not NBN Co still faces revenue sufficiency risk.

As noted in section 8.3.1, Telstra supports the ACCC's review and oversight role in respect of the LTRCM.<sup>381</sup>

## 8.4.2. RAB roll-forward

In assessing whether the LTRCM will create incentives for efficient investment, the ACCC has considered the terms and conditions relating to rolling forward the RAB in Module 2. As noted above, NBN Co must include in each replacement module application a RAB roll-forward proposal which would include methods for rolling capital expenditure into the RAB and accounting for depreciation.<sup>382</sup>

At the end of a regulatory cycle (regardless of whether an ACCC-accepted replacement module or an ACCC-determined replacement module is in effect), capital expenditure would be rolled into the RAB for each year of the regulatory cycle using one of two methods, either:

- all capital expenditure incurred by NBN Co, up to the forecast amount for that year, and an ACCC-determined amount for capital expenditure incurred above forecast, or

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<sup>376</sup> NBN Co, SAU, November 2013, Main Body, clauses 4.5 and 4.6.

<sup>377</sup> NBN Co, SAU, November 2013, Main Body, clause 4.4.

<sup>378</sup> NBN Co, SAU, November 2013, Main Body, clause 4.8.

<sup>379</sup> NBN Co, SAU, November 2013, Schedule 2C, clause 2C.2.1(a).

<sup>380</sup> NBN Co, SAU, November 2013, Schedule 2C, clauses 2C.7.4 and 2C.7.5.

<sup>381</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

<sup>382</sup> NBN Co, SAU, November 2013, Main Body, clause 4.5(e)(iii).

- in accordance with another method of rolling capital expenditure into the RAB which will promote the long-term interests of end-users and is consistent with NBN Co's objective of long-term cost recovery.<sup>383</sup>

In addition, depreciation will be accounted for in rolling forward the RAB for each year of the regulatory cycle using one of two methods, either:

- straight line depreciation of either the forecast amount of capital expenditure for that year, or the amount of capital expenditure rolled into the RAB for that year, or
- in accordance with another method of accounting for depreciation for the purposes of rolling forward the RAB which will promote the long-term interests of end-users and is consistent with NBN Co's objective of long-term cost recovery.<sup>384</sup>

The ACCC considers that these options provide flexibility for the ACCC to consider what methodologies would best meet the relevant statutory criteria at the time of assessing a replacement module application. If necessary, the ACCC is able to specify the methodologies that it is satisfied meet the relevant statutory criteria in a replacement module determination at the relevant time.

There are no prescriptive criteria specified in Module 2 that the ACCC would need to apply or have regard to in undertaking its ex post assessment of capital expenditure. This would allow the ACCC to consider each replacement module application in light of NBN Co's operating environment and the incentives it faces at the relevant time, as well as having regard to regulatory best practice at that time.

The ACCC considers that this would ensure that the method for rolling forward the RAB in each regulatory cycle is flexible enough to allow for adaptation in response to changing circumstances, and would encourage efficient investment across a range of possible future scenarios.

### 8.4.3. Cost of capital

The approach proposed to determine the cost of capital in Module 2 is not prescriptive and provides the necessary flexibility to allow it to conform to regulatory best practice at the relevant time in the future.

Before the commencement of each regulatory cycle during Module 2, the cost of capital will be determined by estimating a WACC for each financial year in that regulatory cycle, having regard to efficient financing practices and the risks involved in providing the services which are the subject of the SAU.<sup>385</sup> The estimated WACC would be used for the purposes of calculating the forecast value of the return on capital building block proposed by NBN Co in each replacement module application.<sup>386</sup>

In assessing the methodology for determining the cost of capital in Module 2, the ACCC has had regard to the risks involved in making the investment as required under Part XIC. The ACCC considers that this methodology achieves a reasonable balance between prescription and flexibility, allowing for the approach to mirror regulatory best practice and give proper consideration to the risks faced by NBN Co in providing the services that are the subject of the SAU. This would also ensure that NBN Co's legitimate business interests can be taken into account.

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<sup>383</sup> NBN Co, SAU, November 2013, Schedule 2C, clause 2C.7.4.

<sup>384</sup> NBN Co, SAU, November 2013, Schedule 2C, clause 2C.7.5.

<sup>385</sup> NBN Co, SAU, November 2013, Schedule 2C, clause 2C.2.1(d).

<sup>386</sup> NBN Co, SAU, November 2013, Schedule 2C, clause 2C.2.1(a)(iii).

#### 8.4.4. Conclusion

The replacement module process in Module 2, together with the operation of the core elements of the LTRCM, will allow NBN Co to recover its prudently and efficiently incurred costs over time (including an appropriate commercial return) and no more. Further, the ACCC's role in assessing replacement module applications and its ability to make replacement module determinations should ensure that NBN Co faces incentives to invest efficiently throughout the entire SAU term. The LTRCM is therefore likely to encourage efficient investment in infrastructure by NBN Co for the duration of Module 2.

The ACCC therefore considers that access prices in Module 2 should reflect NBN Co's prudent and efficient costs. This should encourage the efficient use of the NBN and promote the long-term interests of end-users. As discussed in section 7.3, the terms and conditions which determine how prices change over time during Module 2 will ensure the ongoing efficient use of the NBN. In particular, the ability for price structures and price relativities to be periodically reviewed and rebalanced will allow for the ACCC to review whether prices have been set in an efficient manner, and should encourage efficient use of the NBN throughout Module 2.

# 9. Non-price terms and conditions

This chapter discusses the non-price terms and conditions in the SAU.

The SAU addresses certain non-price matters in Module 1.<sup>387</sup> Module 2 does not contain provisions relating to non-price matters.

The ACCC notes Telstra's support for the absence of detailed non-price terms and conditions, in order to enable both negotiation between NBN Co and access seekers, and the operation of Access Determinations.<sup>388</sup>

The non-price matters in the SAU are divided into two groups:

- POI and rollout information commitments — commitments by NBN Co to publish rollout information and to notify access seekers and the ACCC about changes to POIs.
- Dispute resolution commitments — commitments by NBN Co about the appointment of persons to dispute management roles and the role of the ACCC in relation to those appointments.

The first group of commitments applies during all of Module 1.<sup>389</sup> The second group of commitments applies for the first five years after commencement of the SAU.<sup>390</sup>

These two groups of commitments are discussed below.

## 9.1. POI and rollout information commitments

### 9.1.1. Notification to access seekers about changes to POI locations

A point of interconnection (POI) refers to a location which is a physical point of demarcation between the networks of two or more service providers. Calls or data between the two service providers are handed over at the POI.<sup>391</sup>

The SAU sets out NBN Co's commitments in relation to the changing of POI locations.<sup>392</sup>

The SAU states that NBN Co will provide access seekers and the ACCC with at least 12 months' prior notice of:

- The closure or relocation of a POI on the list made by the ACCC under section 151DB of the CCA ('the POI list'),<sup>393</sup> and
- The compulsory migration of an access seeker's downstream customers from a temporary POI to a POI on the POI list.<sup>394</sup>

<sup>387</sup> NBN Co, SAU, November 2013, Schedule 1H.

<sup>388</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

<sup>389</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.1.1(a).

<sup>390</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.1.1(b).

<sup>391</sup> ACCC, *ACCC Advice to Government - National Broadband Network Points of Interconnection (Public Version)*, November 2010, p. 12.

<sup>392</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.4.

<sup>393</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.4.1(a).

The SAU also requires NBN Co to give access seekers 12 months' notice of the establishment of a new POI (except for temporary POIs).<sup>395</sup>

The SAU also requires NBN Co to close temporary POIs when NBN Co reasonably considers that they are no longer required.<sup>396</sup> NBN Co must have regard to:

- whether an established POI is available and serves the premises served by the temporary POI
- the number of customers that will need to migrate from the temporary to the established POI, and
- the number of premises served by the temporary POI.<sup>397</sup>

The ACCC considers that the commitments regarding POIs in clause 1H.4 of Schedule 1H specify conduct to be undertaken by NBN Co in accordance with subsection 152CBA(3C) of the CCA. The ACCC must be satisfied that such conduct will promote the long-term interests of end-users.

The ACCC notes that significant planning and investment is required to interconnect at a POI, including arrangements for backhaul and access to duct space and other facilities. Access seekers therefore require sufficient notice in relation to changes to POIs in order to undertake planning and investment in infrastructure. The ACCC considers that 12 months is an appropriate period of notice that will promote efficient investment and efficient operation of telecommunications infrastructure. Therefore, the ACCC considers that these provisions will promote the long-term interests of end-users.

The ACCC notes that the SAU does not specify further information about the location of POIs. In the ACCC's views as set out in the FANOC draft decision, the ACCC considered that locating POIs as close to customers as is appropriate and efficient, most likely at or near existing local access switches and other points of interconnection, would promote the long-term interests of end-users. However, the ACCC considers that this is not relevant in the case of the NBN because the ACCC determines the locations of NBN POIs through the list made by the ACCC under section 151DB of the CCA.<sup>398</sup>

## 9.1.2. Publication of rollout information

The SAU requires NBN Co to publish information on the progress of the rollout of the NBN Co fibre and wireless networks and the status of established POIs during Module 1.<sup>399</sup>

The ACCC considers that the commitments regarding rollout information in clauses 1H.2 and 1H.3 of Schedule 1H specify conduct to be undertaken by NBN Co in accordance with subsection 152CBA(3C) of the CCA. As above, the ACCC must be satisfied that such conduct promotes the long-term interests of end-users.

Conduct about the provision of rollout information promotes the long-term interests of end-users in the following ways:

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<sup>394</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.4.3(b).

<sup>395</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.4.2(a).

<sup>396</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.4.3(a).

<sup>397</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.4.3(a).

<sup>398</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.3.1.

<sup>399</sup> NBN Co, SAU, November 2013, Schedule 1H, clauses 1H.2-1H.3. This includes commitments to publish 3-year and 1-year fibre network construction rollout plans, monthly ready for service rollout plans for fibre and wireless networks, and a weekly list of 'NBN Serviceable' premises.

- Promoting competition — rollout information can reduce barriers to entry into new markets by providing access seekers with information required for developing products, marketing and infrastructure. The provision of this information in a timely fashion enables access seekers to make services available more quickly to end-users.
- Encouraging efficient use of and investment in infrastructure — giving access seekers clarity and certainty as to the progress of the rollout of the network will enable them to efficiently plan for operations and investment in downstream services, networks and facilities. This is likely to increase dynamic efficiency in the use of and investment in infrastructure because it enables access seekers to respond to the changing environment.

For these reasons, the ACCC is satisfied that the rollout information commitments will promote the long-term interests of end-users.

## 9.2. Dispute resolution commitments

The SAU makes several commitments with respect to dispute management. Firstly, NBN Co commits that it will include provisions for dispute resolution through expert determination or panel arbitration in any SFAA ('Dispute Management Rules').<sup>400</sup>

Secondly, NBN Co commits to follow the processes in Annexure 1 to Schedule 1H of the SAU for seeking the ACCC's approval in relation to:

- the nomination and appointment of resolution advisors and a pool of persons who may be selected as members of an arbitration panel ('pool members')<sup>401</sup>
- the termination and replacement of resolution advisors and pool members<sup>402</sup>
- the setting of terms of appointment for resolution advisors, pool members and panel members<sup>403</sup>
- guidelines to be applied by a panel when considering a dispute.<sup>404</sup>

NBN Co commits to bear the costs of appointing and retaining resolution advisors and pool members.<sup>405</sup>

Finally, the SAU confers powers on the ACCC to approve the matters described above, to direct NBN Co to terminate a resolution advisor or pool member, and to give directions to a resolution advisor in relation to the performance of his or her duties.<sup>406</sup>

The statutory criteria most relevant to the ACCC's assessment of the conduct and terms and conditions relating to dispute management are.<sup>407</sup>

<sup>400</sup> NBN Co, SAU, November 2013, Schedule 1H, clause 1H.5.1.

<sup>401</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 1.1, 1.2, and 2.1.

<sup>402</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 5.2-5.3.

<sup>403</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 1.1, 2.2, and 3.1.

<sup>404</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clause 6.

<sup>405</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clause 4.

<sup>406</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 1-3, 5.2, and 7. These powers are conferred in accordance with subsection 152CBA(10A) of the CCA.

<sup>407</sup> The ACCC considers that the dispute management commitments in clause 1H.5 of Schedule 1H and Annexure 1 to Schedule 1H specify conduct to be undertaken by NBN Co (and the terms and conditions on which that conduct will be undertaken) in accordance with subsection 152CBA(3B) of the CCA.

- The interests of persons who have rights to use the declared service — a dispute resolution process that provides for the efficient, consistent and unbiased resolution of disputes is likely to be in the interests of NBN Co's customers, as it would enable cost-effective and timely resolution of disputes between NBN Co and its customers.
- The legitimate business interests of NBN Co and NBN Co's investment in facilities used to supply the declared service — a dispute resolution process that provides for the efficient, consistent and unbiased resolution of disputes is likely to be in NBN Co's business interests for the same reasons as it is in the interests of access seekers.

The ACCC notes that the dispute management provisions in the SAU are intended to ensure the independence of the decision makers in disputes between NBN Co and its customers. The ACCC considers that the appointment of decision makers who are independent and free of bias is necessary to ensure impartial decision-making, and thus to promote the efficient, consistent and unbiased resolution of disputes.

The SAU provides that NBN Co must consult access seekers prior to nominating persons for the role of resolution advisor or pool member.<sup>408</sup> NBN Co must also seek the ACCC's approval to appoint resolution advisors and pool members, and that the ACCC must also approve the terms of appointment.<sup>409</sup> These include requirements for resolution advisors and pool members to comply with the Dispute Management Rules, their terms of appointment, and, in the case of resolution advisors, ACCC directions.<sup>410</sup> Similarly, the ACCC must approve the guidelines that must be applied by an arbitration panel when considering a dispute, and the terms of appointment for arbitration panel members.<sup>411</sup> Finally, the ACCC is able to require NBN Co to remove a resolution advisor or panel member in the event of bias or incapacity.<sup>412</sup>

The ACCC notes Telstra's continuing concerns regarding the independence of resolution advisors, pool members and panel members, as well as Telstra's submission that the dispute resolution commitments in the SAU will partially ameliorate these concerns.<sup>413</sup>

The ACCC considers that the dispute resolution provisions in the SAU incorporate sufficient safeguards to ensure that decision-makers will be independent and free from bias, and will therefore promote the long-term interests of end-users. The ACCC also considers that these provisions are reasonable. Further, the dispute resolution provisions only apply for five years, meaning these arrangements can be subject to commercial negotiation after this time.

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<sup>408</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 1.1 and 2.1.

<sup>409</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 1.1, 1.2, 2.1, 2.2 and 3.1.

<sup>410</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 1.3 and 2.2.

<sup>411</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clauses 3.1 and 6.

<sup>412</sup> NBN Co, SAU, November 2013, Schedule 1H, Annexure 1, clause 5.2. The power does not extend to the removal of a pool member during a period during which the pool member is empanelled for a dispute. This situation would be covered by the *Commercial Arbitration Act 2010* (NSW), which forms the basis for the dispute resolution provisions in NBN Co's SFAAs.

<sup>413</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

# 10. Fixed Principles

Part XIC of the CCA provides for a person giving a Special Access Undertaking to ‘lock in’ certain matters for a specified period of time using ‘fixed principles terms and conditions’.<sup>414</sup> According to the Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, fixed principles terms and conditions included in Special Access Undertakings operate in a similar manner to fixed principles provisions in Access Determinations,<sup>415</sup> which are intended “to provide greater regulatory certainty in certain circumstances.”<sup>416</sup> That is, the terms and conditions that are specified as fixed principles are intended to apply to subsequent undertakings (or variations to undertakings), thereby providing certainty that those terms and conditions will continue under future access arrangements.

Specifically, section 152CBAA of the CCA provides that if certain pre-conditions are met, the ACCC must not reject any proposed new or varied undertaking ‘for a reason that concerns’ a fixed principles term or condition. In particular, if there is an accepted SAU containing a fixed principles term or condition, there will be implications for the ACCC’s future assessment of any new SAU or a variation to the SAU where the new or varied SAU contains:

- an identical fixed principles term or condition
- a notional fixed period that ends at or before the end of the notional fixed period for the original fixed principles term or condition (for a new SAU) or a notional fixed period that is identical to the notional fixed period for the original fixed principles term or condition (for a varied SAU), and
- any qualifying circumstances that are identical to the original qualifying circumstances.<sup>417</sup>

These implications are that when the ACCC is assessing a new SAU or a variation to the SAU, it does not need to be satisfied that the fixed principles term or condition, its notional fixed period and the qualifying circumstances meet the statutory criteria for acceptance of an undertaking (these criteria are outlined in chapter 4).

The SAU given by NBN Co specifies that certain provisions in Module 2 are fixed principles terms or conditions for the term of the SAU.<sup>418</sup> The SAU also specifies ‘qualifying circumstances’ in relation to these fixed principles terms and conditions.<sup>419</sup> If these qualifying circumstances exist, the restriction on the ACCC’s future assessment of a new SAU or a varied SAU will not apply.<sup>420</sup>

## 10.1. ACCC views

The ACCC notes that the SAU given by NBN Co is the first Part XIC undertaking that specifies fixed principles terms and conditions since amendments to the CCA provided for an undertaking to do so.

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<sup>414</sup> CCA, s. 152CBAA(1).

<sup>415</sup> Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 205.

<sup>416</sup> Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 182.

<sup>417</sup> CCA, ss. 152CBAA(5) and 152CBAA(6). There is no requirement that any later SAU must contain the same fixed principles term or condition with the same notional fixed period.

<sup>418</sup> NBN Co, *SAU*, November 2013, Main Body, clauses 5.3 and 5.2.

<sup>419</sup> NBN Co, *SAU*, November 2013, Main Body, clause 5.4.

<sup>420</sup> CCA, ss. 152CBAA(5) and 152CBAA(6).

Under Part XIC, the ACCC must refuse to accept the SAU in certain circumstances in respect of fixed principles terms and conditions (outlined in section 4.1). The ACCC has assessed the proposed fixed principles terms and conditions, the notional fixed period and the qualifying circumstances and does not consider that:

- the fixed principles should not be specified as fixed principles<sup>421</sup>
- the specified notional fixed period should not be the notional fixed period,<sup>422</sup> or
- the specified qualifying circumstances in relation to the proposed fixed principles should not be specified as such,<sup>423</sup> or that there are particular circumstances that should be specified as qualifying circumstances that are not specified as such.<sup>424</sup>

Therefore the ACCC is not precluded from accepting the SAU. The key reasons for this view are set out below.

### 10.1.1. Scope of the fixed principles

The SAU given by NBN Co specifies the following terms and conditions in Module 2 as fixed principles terms and conditions:

- the RAB roll-forward equation (clauses 2C.7.2 and 2C.7.3(a))
- the ICRA roll-forward equation (clause 2C.5.4(a)), and
- the fact that the annual revenue requirements will be calculated using the following building block components — operating expenditure (which is to include operating expenditure to be incurred pursuant to the Telstra and Optus arrangements), depreciation, a return on capital and tax allowance (clause 2C.2.1(a)).<sup>425</sup>

Each of these provisions relate to determining NBN Co's allowed revenue in Module 2. As discussed in chapter 8, the ACCC is satisfied that these provisions promote the long-term interests of end-users and are reasonable.

However, as noted, specifying a term or condition as a fixed principles term and condition has implications for the ACCC's future assessment of a subsequent undertaking or a variation to the undertaking. That is, once the SAU is accepted, if NBN Co chooses to include the same fixed principles term and condition in a new SAU in relation to the same service or in varied SAU during the term of the SAU (that is, during the notional fixed period for the original fixed principles), the ACCC would not be able to reject the new SAU or the proposed variation 'for a reason that concerns' those terms and conditions (unless the specified qualifying circumstances exist).<sup>426</sup>

In the current context, the 'modular' structure of the SAU provides that on expiry of Module 1, NBN Co will periodically submit applications to vary the SAU by incorporating replacement modules (which would operate in conjunction with Modules 0 and 2) until the end of the SAU term.<sup>427</sup> Hence the fixed principles terms and conditions specified in the SAU would affect the ACCC's future assessment of NBN Co's replacement module applications — that is, the ACCC

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<sup>421</sup> CCA, s. 152CBD(4)(a).

<sup>422</sup> CCA, s. 152CBD(4)(b).

<sup>423</sup> CCA, s. 152CBD(4)(c).

<sup>424</sup> CCA, s. 152CBD(4)(d).

<sup>425</sup> NBN Co, SAU, November 2013, Main Body, clause 5.3.

<sup>426</sup> CCA, ss. 152CBAA(5) and 152CBAA(6).

<sup>427</sup> The replacement module process is discussed at section 5.2. NBN Co may also seek to vary the SAU at any other time.

would not be able to reject a proposed variation 'for a reason that concerns' these terms and conditions. Therefore, as noted previously, the ACCC will only approve terms and conditions as fixed principles where these terms and conditions will not constrain it in a way that will prevent it from ensuring that the SAU only contains terms and conditions which promote the long-term interests of end-users and are reasonable during the SAU term.<sup>428</sup>

The ACCC appreciates NBN Co's desire for certainty as to its future regulatory arrangements, particularly its ability to recover its costs, over the term of the SAU (and especially during the subsequent regulatory period when NBN Co will periodically seek to vary the SAU to implement replacement modules). The ACCC considers that acceptance of an undertaking with a duration of close to 30 years, which is in and of itself unprecedented, gives NBN Co this certainty. By virtue of the design of the SAU, the terms and conditions in Modules 0 and 2 that have been accepted by the ACCC in its current assessment will be in place for the SAU term.

In the context of assessing a proposed variation to the SAU, the ACCC is to make a decision to accept or reject the variation proposed by NBN Co, and not the existing terms and conditions in Modules 0 and 2 (unless NBN Co proposes to change these existing terms in its variation), although the ACCC may decide that the proposed variation does not meet the statutory criteria by virtue of its interaction with an existing term or condition in Module 0 or 2 (and therefore that the variation should be rejected).

In light of the above, the ACCC reiterates its position that fixed principles terms and condition in the SAU must relate to long-term cost recovery in Module 2 and the content of replacement modules.<sup>429</sup>

In relation to specifying matters relating to long-term cost recovery as fixed principles, the ACCC notes that this is consistent with:

- The ACCC's approach to fixed principles provisions in the 2011 *Fixed-Line Services Final Access Determinations*.<sup>430</sup> As noted, fixed principles terms and conditions included in Special Access Undertakings are intended to operate in a similar manner to fixed principles provisions in Access Determinations.<sup>431</sup>
- The Australian Energy Regulator's (AER) approach in the gas access arrangements.<sup>432</sup>

In addition, the ACCC considers that it should not be constrained in a way that prevents it from rejecting future variations which may not meet the statutory criteria at the time of assessing a new SAU or a varied SAU. For example:

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<sup>428</sup> ACCC, *Draft Decision*, April 2013, pp. 163-167 and p. 185; ACCC, *Response to Submissions*, July 2013, pp. 135-136; ACCC, *Explanatory Statement*, October 2013, p. 93.

<sup>429</sup> ACCC, *Response to Submissions*, July 2013, pp. 135-136; ACCC, *Explanatory Statement*, October 2013, p. 93.

<sup>430</sup> ACCC, *Final Access Determinations 2011*, clause 6; ACCC, *Inquiry to make final access determinations for the declared fixed line services – Final Report*, July 2011, pp. 127-132. The ACCC made terms and conditions relating to the following matters fixed principles provisions for ten years: the initial RAB value; the initial tax asset value; the RAB roll-forward mechanism; what the components of the revenue requirement will be; the factors the ACCC will take into account in assessing operating and capital expenditure forecasts; the process for assess demand forecasts (that the ACCC will take into account any forecasts provided by the provider and consider whether they meet certain criteria); that a vanilla WACC will be used for estimating the weighted average cost of capital and a CAPM approach will be used for the cost of equity; that the tax rate will be the corporate tax rate for calculating tax liabilities and rules around cost allocation.

<sup>431</sup> Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 205. The Explanatory Memorandum gives the example in the Access Determination context of where a utility pricing model for setting the access price for a declared service is adopted, the ACCC being able to lock in a regulated asset base for the requisite period (p. 205 and p. 182).

<sup>432</sup> See for example, AER, *SP AusNet 2008-2012 Access Arrangements*, clause 7.2. For instance, the matters that the AER has approved to be set as fixed principles for a five-year regulatory period relate to the regulatory asset base roll-forward mechanism.

- In the draft decision and response to submissions, the ACCC noted that if a fixed principles term and condition set out high-level principles involving judgement and discretion, there is uncertainty as to whether the ACCC may reject a variation for the reason that the variation does not comply with these principles.<sup>433</sup> For instance, one argument might be that if the ACCC is not satisfied that the proposed variation complies with the high-level principles, the ACCC may not be able to reject the variation, as this could be ‘for a reason that concerns’ the fixed principle.<sup>434</sup>
- In the explanatory statement, the ACCC noted that where a term and condition proposed to be a fixed principle may no longer meet the statutory criteria in the context of a future assessment of a variation to the SAU, it should not be a fixed principle.<sup>435</sup> For instance, if the variation proposes to change the existing terms in Modules 0 and 2 in such a way that, by virtue of the interaction between the terms in Modules 0 and 2 and a term and condition proposed to be a fixed principles, the fixed principles would no longer satisfy the statutory criteria, the ACCC may not be able to reject the variation, as this could be ‘for a reason that concerns’ the fixed principle.<sup>436</sup>

The ACCC considers that the matters proposed to be specified as fixed principles (discussed further below) relate to long-term cost recovery in Module 2 and the content of replacement modules, and will still be reasonable in the context of a future assessment of any new SAU or varied SAU.

Clause 2C.7.2 ensures that the RAB at the commencement of Module 2 will be the RAB at the end of Module 1. Clause 2C.7.3(a) similarly specifies that the RAB at the beginning of one regulatory cycle in Module 2 will be based on the RAB at the end of the previous regulatory cycle in Module 2, and provides an equation for this calculation. Specifically, clause 2C.7.3(a) provides that the RAB is to be determined with respect to capital expenditure, disposals and depreciation, but it does not specify how these components of the RAB will be determined. While the exact determination of these inputs could be undertaken in a number of ways (as provided in Module 2), it is generally accepted that capital expenditure, disposals and depreciation are all required to determine the RAB.

Fundamentally, clauses 2C.7.2 and 2C.7.3(a) ensure that the value of NBN Co’s RAB (as previously determined) cannot be reopened at some future time, which could lead to windfall gains or losses to NBN Co. These provisions are important to NBN Co’s long-term cost recovery in Module 2. The ACCC considers that whether NBN Co’s RAB is determined in accordance with these provisions is objectively ascertainable and does not involve discretion. Further, the ACCC considers that the RAB roll-forward equation will still be reasonable in the context of a future assessment of a new SAU or proposed variation to the SAU.

Clause 2C.5.4(a) contains similar provisions in respect of the ICRA. In particular, it specifies that the ICRA at the start of Module 2 (or any given year) will be equal to the ICRA at the end of Module 1 (or the previous year). Similar to above, these provisions are important to NBN Co’s long-term cost recovery. If the calculation of the ICRA were changed into the future this could lead to a windfall gain or loss to NBN Co. The ACCC considers that whether the ICRA is determined in accordance with this clause is objectively ascertainable and does not involve discretion. Further, the ACCC considers that the ICRA roll-forward equation will still be reasonable in the context of a future assessment of a new SAU or proposed variation to the SAU.

Clause 2C.2.1(a) specifies that certain building block components will be used to calculate NBN Co’s allowed revenues in Module 2. These building block components are operating

<sup>433</sup> ACCC, *Draft Decision*, April 2013, pp. 163-167 and p. 185; ACCC, *Response to Submissions*, July 2013, pp. 135-136.

<sup>434</sup> ACCC, *Draft Decision*, April 2013, pp. 163-167 and p. 185; ACCC, *Response to Submissions*, July 2013, pp. 135-136.

<sup>435</sup> ACCC, *Explanatory Statement*, October 2013, p. 93.

<sup>436</sup> ACCC, *Explanatory Statement*, October 2013, p. 93.

expenditure (which is to include operating expenditure to be incurred pursuant to the Telstra and Optus arrangements), depreciation, a return on capital, and tax allowance. However, the manner in which each building block is calculated is not part of this clause and is not part of the fixed principles. Clause 2C.2.1(a) is important to providing NBN Co with regulatory certainty that it will have the opportunity to recover its efficient costs, which is important to NBN Co's long-term cost recovery. The inclusion of operating expenditure incurred pursuant to the Telstra and Optus arrangements is also important as it will allow NBN Co to recover costs incurred under contracts with Telstra and Optus. The ACCC considers that whether the ABBRR specifies and includes those building block components is objectively ascertainable and does not involve discretion. Further, the ACCC considers that the building block components to calculate NBN Co's allowed revenues in Module 2 will still be reasonable in the context of a future assessment of a new SAU or proposed variation to the SAU.

The ACCC also notes that Telstra is of the view that the application of the fixed principles terms and conditions in the varied SAU given by NBN Co is appropriately confined.<sup>437</sup>

Given the above, the ACCC considers that the matters that are proposed to be specified as fixed principles in the SAU given by NBN Co may be specified as fixed principles terms and conditions for the purposes of section 152CBAA of the CCA.

### 10.1.2. Notional fixed period

The notional fixed period for a fixed principles term or condition sets out the period of time for which the term or condition is fixed. It begins when the SAU comes into operation and is set to end at a time before, on or after the expiry time of the SAU.<sup>438</sup> The SAU given by NBN Co specifies that the period of time for which the proposed fixed principles terms and conditions will be fixed is until the end of the SAU term.<sup>439</sup>

Given the ACCC's views about the scope of the terms and conditions that may be specified as fixed principles in the context of the modular structure of the SAU and the length of the SAU term, the ACCC considers that the proposed notional fixed period is reasonable. In particular, this is consistent with providing NBN Co with greater certainty about its ability to achieve long-term cost recovery over the term of the SAU.

### 10.1.3. Qualifying circumstances

An SAU may provide that one or more specified circumstances are 'qualifying circumstances' in relation to the fixed principles term or condition.<sup>440</sup> As noted, if the qualifying circumstances exist, the restriction on the ACCC's assessment of a new SAU or a variation to the SAU will not apply.<sup>441</sup> The SAU given by NBN Co specifies that the qualifying circumstances for the proposed fixed principles terms and conditions are that the ACCC is satisfied that:

- there is a manifest and material error in the fixed principles terms and conditions, or
- any information on which the fixed principles terms and conditions was based was false or misleading in a material respect.<sup>442</sup>

The ACCC notes that these specified circumstances are adopted from the qualifying circumstances for the fixed principles provisions in the ACCC's 2011 *Fixed-line Services Final*

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<sup>437</sup> Telstra, *Submission re. NBN Co's varied Special Access Undertaking*, 28 November 2013, p. 2.

<sup>438</sup> CCA, s. 152CBAA(3).

<sup>439</sup> NBN Co, *SAU*, November 2013, Main Body, clause 5.2.

<sup>440</sup> CCA, s. 152CBAA(2).

<sup>441</sup> CCA, ss. 152CBAA(5) and 152CBAA(6).

<sup>442</sup> NBN Co, *SAU*, November 2013, Main Body, clause 5.4(b).

*Access Determinations.*<sup>443</sup> The ACCC considers that it should not be restricted in its assessment of a new SAU or a variation to the SAU if the above circumstances exist. Therefore, the ACCC considers that these particular circumstances may be specified as qualifying circumstances for the fixed principles terms and conditions specified in the SAU.

Given the limited scope of the fixed principles terms and conditions (particularly to limit the fixed principles to matters that do not lead to uncertainty as to the ACCC's ability to ensure that those terms and conditions will promote the long-term interests of end-users and will be reasonable over the term of the SAU), the ACCC does not consider that there are additional circumstances that should be specified as qualifying circumstances for the fixed principles terms and conditions.

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<sup>443</sup> ACCC, *Final Access Determinations 2011*, clause 6.2; ACCC, *Inquiry to make final access determinations for the declared fixed line services – Final Report*, July 2011, p. 129.

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