



NBN Co Submission to ACCC Consultation Paper on variation of NBN Co SAU

**Appendix B – Service Levels and Non-Price Terms and Conditions
included in WBA**

May 2013

Contents

Contents	2
1 Service Levels	4
1.1 NBN Co's approach to service levels.....	4
1.2 Response to specific issues raised by the ACCC	6
1.2.1 Comparison with service levels on legacy networks	6
1.2.2 Improvements to service levels over time	7
1.2.3 Incentives to meet specified service levels	7
1.2.4 Module 2 discretion conferred on NBN Co.....	10
1.2.5 Technical specifications	10
2 Dispute Management Rules	11
2.1 Background	11
2.2 Removal of Dispute Management Rules from SAU	11
2.3 Independence of decision makers	13
2.4 Access to courts	15
2.5 Procedural Fairness	16
2.6 Complexity of Dispute Management Rules.....	18
2.7 Contract variation	20
3 Confidential Information- Supply context	22
3.1 General comments	22
3.2 Disclosure to financiers, investors, potential financiers and investors, and professional advisors and financial advisers or bankers	22
3.3 Disclosure to the extent necessary for planning, developing, testing, trialling and supplying products.....	24
3.4 Disclosure to downstream customers	24
3.5 Breadth of authorised use and disclosure.....	24
3.6 Asymmetry of authorised use and disclosure	25
3.7 Consent for disclosure	26
4 Intellectual Property – Supply Context	28
4.1 General comments	28
4.2 Absolute discretion regarding consent and NBN trade mark	28
4.3 Third party IPRs	29
5 Confidential Information and Intellectual Property - PDF	31
5.1 Approach to PDF confidentiality and intellectual property provisions	31
5.2 PDF Confidentiality.....	32
5.3 PDF Intellectual Property Rights.....	33

6	Risk Management	35
6.1	Background	35
6.2	Limited liability - NBN Co negligence.....	39
6.3	Exclusion - Downstream Customer loss	41
6.4	Asymmetry of indemnities.....	45
6.5	Exclusion - NBN maintenances, upgrade or relocation or replacement of POIs	46
6.6	Exclusion - failure to meet service levels	47
6.7	Insurances.....	47
6.8	Exclusion of industry-expected representations, conditions, warranties and guarantees	48
6.9	Clarity	49

1 Service Levels

1.1 NBN Co's approach to service levels

The service level commitments in the next WBA will continue to be based on Annexure 1 to Schedule 1J of the SAU, subject to modifications made in response to the ACCC's comments in its Draft Decision and the completion of Customer consultations. These service levels represent the maximum base level commitment NBN Co is reasonably able to make for the two-year term of the next WBA, bearing in mind NBN Co's relatively early stage of network rollout, operational maturity and IT system development, while not constraining enhancements to service level commitments in the future. Besides specific service quality performance commitments, the service levels include commitments to corrective action, performance objectives and more rigorous reporting requirements. The service level regime will necessarily be reviewed as part of the consultation process leading up to any subsequent WBA.

NBN Co has strong incentives to meet Customer expectations regarding service level commitments and performance. NBN Co's primary focus over the next two years is on building the network and activating new NBN services, with a particular focus on managing its workforce to enable a smooth transition of end users from legacy networks to the NBN over the 18-month migration period. This emphasis is reflected in the specific nature of the service level commitments, including the availability of commercial rebates offered on connection timeframes.

To the extent possible at the current stage of development of NBN Co's network and systems, NBN Co has taken into account feedback provided by Customers during the Contract Development Process (**CDP**) in setting service levels. Feedback related to connection and service restoration timeframes, network performance, the ability for customers to manage retail-level commercial and regulatory obligations, sanctions when service level commitments are not met and ongoing service level evolution. A particular focus has been managing situations in which end users do not have a fixed line alternative to the NBN (for example, premises in new estates and where copper services are not otherwise available).

In addition, the service levels are underpinned by rigorous analysis of the industry's drivers for good customer experience, Australian and international market benchmarks, and having regard to the financial implications of the proposed service levels for achieving NBN Co's Corporate Plan goals.

The service levels set out in the SAU provide an appropriate set of commitments given the current stage of network and systems development, and in many cases represent an improvement over the service levels currently in place under the current WBA. More specifically:

- **Connections.** Connection timeframes and service level definitions have significantly improved compared to the service levels introduced in the SFAA first published in November 2011. By setting connection timeframes based on whether an existing in-place connection is available to end users when requesting an NBN-enabled service, NBN Co is better able to apply short connection times where they are most needed.
 - Where end users have access to a fixed-line network when migrating to the NBN, NBN Co has asked Customers to use that existing connection to manage both the end user experience and retail-level regulatory obligations, although NBN Co will pay commercial rebates where service levels for such connections are not met.¹

¹ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), ss 1.4, 14.1(c)(ii).

- Where a working service is not available at the time an NBN connection is requested, NBN Co has created an Accelerated Connections approach, including to support Customers' and downstream providers' retail-level regulatory obligations. Where appropriate, NBN Co will pay CSG compensation via a contractual mechanism set out in the SFAA when these service levels are not met.²
- **Assurance.** Although NBN Co is still in the relatively early stages of network rollout and service activation, the service levels set out in the SAU include a solid starting point for assurance activities. These commitments focus on service faults that impact end users. Accordingly the restoration timeframes are associated with the entire service and not with the individual Product Components a Customer may select to modify the service. Where appropriate, NBN Co will pay CSG compensation via a contractual mechanism set out in the SFAA when these service levels are not met.³

Consistent with industry best practice, NBN Co has a clearly defined network severity system that will capture faults affecting the performance of multiple services. Network faults are rectified on a 24/7 basis, with the highest severity faults being restored within six hours. NBN Co has consulted widely with industry to provide detail on what constitutes a network fault and how it would impact Customers, as the number of end users affected is not an effective measure for NBN Co at this point of its network rollout and maturity.

- **Modification orders.** The Customer expectation is that logical modification—modifications that do not require an appointment such as speed changes—should occur virtually instantaneously. However, this function needs to take into account IT system and operational maturity, and thus modification timeframes are set from 14 and 19 hours for 2013, although NBN Co has committed to improved timeframes in 2014.⁴
- **Network availability and shared capacity.** NBN Co has committed to a performance objective of 99.9% for the network (both fibre and wireless), which means approximately nine hours of interruption per annum.⁵ Reporting, measurement and the network availability target are at a national level for the two-year period of the next WBA, due both to NBN Co reporting systems maturity and the anticipated footprint of the NBN (which means that reporting at a CSA level would be statistically insignificant).

NBN Co also recognises an imperative for the “best efforts” traffic class on the NBN (Traffic Class 4) to maintain a consistent level of performance, and has committed to managing shared capacity to a 70% utilisation threshold to ensure capacity constraints do not impact speed or data throughput performance.⁶

- **Ordering and billing systems.** The NBN Co Platform Interfacing Service is available in the forms of B2B Access and the NBN Co Service Portal. NBN Co has introduced a substantial improvement to the current service level of 95% availability target; committing to 97% availability per calendar quarter in 2013, and 99% by 2014.⁷ The 99% target exceeds the current benchmarks in the Australian telecommunication industry and provides a strong basis for volume ordering.

² WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), ss 1.1(c), 14.1.

³ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 14.1.

⁴ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 7.

⁵ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 11.1.

⁶ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 11.3.

⁷ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 10.

As is evident from the above description, NBN Co does not distinguish between broadband or telephony services, business or residential premises or have regard to end user segmentation in setting its service levels. The service levels are consistent in terms of connection, modification, fault restoration and network availability regardless of the application being delivered to the end user.

NBN Co also notes that aspects of the service levels require Customers' cooperation to achieve. For example, Customer forecasting accuracy on connection rates is used in the commercial rebate calculation to provide an industry focus on forecasting. With respect to connection service levels, Customers' use of in-place connections to manage migrations will enable NBN Co to fill Accelerated Connections on a shorter timeframe—assuming that Customers make use of this connection type appropriately.

All service levels are further defined by performance objective targets. The performance objective is an important feature of NBN Co's service levels, at this stage of the NBN's development, and aims to assist Customers to formulate a clear retail value proposition and manage end users expectations.

NBN Co's failure to achieve service levels or performance objectives will give rise to consequences. If a commercial rebate is not available, corrective action will apply. NBN Co submits that this approach is a prudent approach (financially) at this point of network, IT system and operational maturity.

1.2 Response to specific issues raised by the ACCC

NBN Co provides inputs into the range of offerings provided by its Customers, with service levels appropriate at this stage of development and to NBN Co's role as a wholesale provider of a Layer 2 bitstream service.

While acknowledging that its Customers may have retail-level regulatory obligations such as CSG and Priority Assistance, it is not appropriate for NBN Co, as a wholesale-only provider, to provide a general commitment to comply with these obligations. Whether an individual Customer has such obligations and the manner in which it ensures compliance is a matter for that Customer. That being said, NBN Co understands the imperative for its Customers to comply with such obligations when they apply. NBN Co has proposed service levels that, with Customers' cooperation in mitigating such liability where possible and to provide accurate forecasts, will enable compliance with these obligations.

The following discussion responds to specific issues relating to service levels—raised either by the ACCC or other parties—referred to in the Draft Decision and not already addressed above.

1.2.1 Comparison with service levels on legacy networks

The ACCC has noted that a number of submissions proposed that some service levels in the SAU are set at a level lower than those currently supplied.⁸ The example given was that the enhanced-12 fault rectification commitments proposed by NBN Co do not include the two-hour, four-hour and eight-hour response times that are currently available over existing (non-NBN) networks.

NBN Co submits that it is not appropriate to compare its service levels with those available to end users on established telecommunications networks today, given that NBN Co is in the process of building the physical network and providing initial connections on a national basis.⁹ In this context, comparisons with how retail-level regulatory requirements are dealt with by providers on existing networks are also overly simplistic.

⁸ Draft Decision, p 182 [ensuring service quality does not deteriorate when migrating to the NBN].

⁹ Draft Decision, p 180 [response to Optus submission criticism].

That being said, NBN Co has already planned to enhance its service levels during the term of the next WBA, including the fault rectification activities referred to here. NBN Co's Integrated Industry Roadmap indicates commitments to introduce 8-hour fault rectification in addition to the 12-hour fault rectification response times currently offered for extended business hours (9am to 7pm), as well as 24/7 fault rectification with both 8- and 12-hour restoration timeframes for Medium Business Services planned by the end of calendar year 2013. NBN Co will also consider the introduction of four-hour restoration timeframes as part of the Enterprise Ethernet product to be introduced in 2015, should there be evidence of sufficient market demand.¹⁰

1.2.2 Improvements to service levels over time

NBN Co understands that the ACCC is concerned that the current approach to service levels in the SAU would not enable the service levels to change over time to reflect improving certainty as to the service quality that NBN Co will be able to deliver as the network and its supporting systems mature.¹¹

NBN Co will offer enhanced service level commitments in the future, reflecting the development of its network and systems, improvements to its product offerings, and greater operational experience.

Given that NBN Co will remove the service levels from the SAU, the question of the frequency of reviews by the ACCC into NBN Co's service level commitments is no longer relevant. The service levels in the next WBA can be considered as part of the consultation and engagement leading up to any subsequent SFAA, as well as during the course of the next WBA as already committed, and any additional required service levels can be developed through the Product Development Forum. As noted above, the removal of service levels from the SAU would mean that the ACCC could issue regulatory determinations under Part XIC of the CCA should it have unresolved concerns.

1.2.3 Incentives to meet specified service levels

The ACCC has noted in its Draft Decision that it considers that NBN Co does not have sufficient incentives to meet its service levels.¹²

NBN Co submits that it faces strong incentives to deliver robust service levels that will enable Customers to deliver attractive NBN-enabled services to end users. It is in NBN Co's interests to encourage a smooth transition to the NBN, including enabling NBN Co to manage its workforce and contracting arrangements for construction and installation optimally, which will reinforce NBN Co's ability to deliver to and develop its service level commitments over time. It is in NBN Co's interests to make its offerings a commercial success.

NBN Co has been responsive to industry feedback received during CDP that service levels must align with a good end user experience. NBN Co has also sought to meet Customers' expectations that service levels on the NBN to be equal to or better than equivalent services provided on copper networks, bearing in mind the NBN's current state of operational and IT system maturity. The service levels proposed for the next WBA accordingly measure 46 metrics across eleven activities, covering customer connections, appointments, activations, fault rectification and modifications—all in the context of system and network availability targets.

NBN Co responds to the specific concerns raised regarding incentives to meet service levels below.

¹⁰ NBN Co, Integrated Industry Roadmap (as at April 2013), available at <http://www.nbnco.com.au/industry/service-providers/product-components/product-roadmap.html>.

¹¹ Draft Decision, pp 182-183.

¹² Draft Decision, pp 183-185.

(a) Rebates are offered only for end user connections and Enhanced-12 fault rectification

The ACCC has noted that while rebates may create incentives for NBN Co to meet its service levels, at this time they are provided only for end user connections and Enhanced-12 fault rectification, and the likelihood that NBN Co will be able to recover their cost weakens NBN Co's incentives to meet other service levels.¹³

NBN Co submits that the current scope and level of commercial rebates is appropriate for the next WBA.

More generally, NBN Co questions the approach of relying on rebates as an incentive to meet service levels. The history of service level compliance behaviour in the telecommunications industry strongly suggests that end user-focussed considerations such as brand reputation, customer loyalty, service attractiveness and operational efficiency are key factors driving compliance. The financial incentives from rebates have had limited impact relative to these considerations, suggesting that rebates should not be relied on to enforce service level compliance. Commercial rebates in the WBA are intended to support Customers in their management of the end user experience.

Despite its wholesale-only status, end user considerations are critical motivators for NBN Co, to ensure that the migration of services to the NBN occurs smoothly, and to avoid the operational burden and associated costs of rectifying service level shortfalls on an *ad hoc* basis.

(b) Requiring Customers to provide accurate forecasts to receive rebates

NBN Co understands that the ACCC considers tying commercial rebates to the accuracy of Customer forecasts reduces incentives for NBN Co to meet service level commitments.¹⁴

NBN Co submits that the forecasting requirement is not intended to have that result, nor does it do so in practice. Linking rebate payments to the accuracy of demand forecasts creates an incentive for Customers to provide accurate forecasts to the best of their ability, to support NBN Co in managing the roll out and activations. It should be noted, however, that Customers are not penalised should their forecasts not be completely accurate. Under the service levels proposed for the next WBA, there will be no reduction in the rebate received for connections if the forecasts are accurate across a 30% spread, *ie*, accurate between 85% and 115% of the actual connection orders made.¹⁵

As Customer activity will directly drive take up of NBN services, accurate forecasts will enable NBN Co to ensure adequate resourcing and thus better meet or exceed its stated service levels. Inaccurate Customer forecasts may cause substantial network dimensioning and operational inefficiencies for NBN Co, with the potential to result in service level deterioration for other Customers. While over-estimating demand will result in an inefficient dimensioning of the network and operational support, under-estimating demand may result in network congestion and inadequate operational support, with both resulting in reduced service quality for all Customers and their end users.

Without any incentive, Customers have little to lose from providing inaccurate forecasts, and may in fact have incentives to either over-estimate (to ensure full attention to their expected requirements) or under-estimate (to avoid or delay system development requirements that may be required above certain volume thresholds) demand.

¹³ Draft Decision, p 183.

¹⁴ Draft Decision, p 183.

¹⁵ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 1.4(b) (definition of Forecast Factor).

(c) Corrective action commitments require enforceable timing obligations

In its Draft Decision, the ACCC notes that while commitments to undertake corrective action may provide NBN Co with incentives to comply with its service levels, this remedy needs to contain clear and enforceable obligations regarding timing to be effective.¹⁶ Otherwise, the ACCC considers, Customers will be unable to make assurances to downstream customers regarding the quality of their own service offerings.

Corrective action is an innovative advance on typical industry practice. NBN Co's commitments to corrective action in the event of non-compliance with either service levels or performance objectives are intended to function as proof that NBN Co considers any failure to meet a service level or performance objective to be a serious matter, and as a practical means, at this point in the NBN's development, of improving compliance.

(d) Incentives to meet service levels would be strengthened if NBN Co was required to report non-compliance with service levels to the ACCC

The ACCC considers NBN Co requires stronger incentives to comply with its service levels, noting that any failure to comply with obligations to report compliance with service levels, identify the cause of non-compliance and undertake corrective action could be directly enforceable by the ACCC via the SAU.¹⁷

NBN Co regards this additional level of regulation as unnecessary. As indicated above, NBN Co's proposed contractual reporting obligations in the next WBA are transparent and robust, requiring NBN Co to provide monthly and quarterly reports on service levels relating to each Customer's services, as well as quarterly reporting on Network Availability and Platform Interfacing Service availability.¹⁸ While the current WBA requires similar reporting, the provision of service level reporting is subject to availability.¹⁹ The next WBA does not contain this carveout from the reporting obligation. In addition, NBN Co will be introducing additional service level reporting tools for Customers in two phases, the first to be completed in mid-2013, and the other by mid-2014.²⁰

It is important to note that the ACCC is able to seek additional information through its information collection powers if necessary.

(e) Customers should have the right to enforce service level compliance through the courts, and to seek damages for material breach

The ACCC has expressed the view that because non-compliance with a service level is not a breach of the WBA, the scope for enforcement action by Customers is limited. Moreover, the ACCC believes that even if Customers had the right to enforce compliance with service levels through the courts or via the SAU, enforcement by individual Customers will not be efficient in the event of non-compliance with service levels on an industry-wide basis.²¹

It is not clear what alternative the ACCC is suggesting in this context, or how it provides further incentives for NBN Co to comply with its service levels (or would be effective in doing so).

The ACCC has also noted that Customers should have the right to seek damages for material breaches of NBN Co's contractual commitments, in addition to receiving commercial rebates.²²

¹⁶ Draft Decision, pp 183-184.

¹⁷ Draft Decision, p 184.

¹⁸ WBA Product Catalogue, Service Levels Schedule (Final CDP version, 30 November 2012), s 12.3.

¹⁹ NBN Co Operations Manual (version 1.13, 22 April 2013), Module 8, s 1.2.1.

²⁰ NBN Co, Integrated Industry Roadmap (as at April 2013), SE002 Service Level Reporting (June 2013) and SE003 Product Performance (Q2 2014).

²¹ Draft Decision, p 184.

²² Draft Decision, pp 184-185.

NBN Co submits that the most effective outcomes will result from NBN Co devoting its resources to complying with and improving its service levels. Categorising non-compliance with service levels as a contractual breach, and enhancing the ability of Customers to enforce service level compliance via litigation, will not necessarily lead to an optimal result.

1.2.4 Module 2 discretion conferred on NBN Co

The ACCC considers that Module 2 may result in the ACCC being unable to reject an SAU variation because the principles in Module 2 relating to service levels form part of the fixed principle term and condition of the SAU (see section 7 (Fixed Principles) of this submission). The ACCC has expressed concerns that NBN Co would be able to set service levels and remedies in a way that does not appropriately balance its interests with those of its Customers during the term of the SAU. The ACCC has also expressed the view that NBN Co could propose lower service levels than were previously in place.²³

NBN Co notes that this concern is no longer relevant, given that service levels will be removed from the SAU

Nevertheless, NBN Co submits that its Module 2 approach to service levels would not have created an incentive for NBN Co to preference its interests, as meeting Customers' interests is fundamental to NBN Co's commercial success. As the ACCC has noted, the drafting of the principles requires NBN Co to have regard to a number of factors when setting service levels for existing products: promotion of efficient take-up and usage; cost impacts on NBN Co and Access Seekers; retail-level regulatory requirements; and service levels that have the same or better terms as previous service levels.

1.2.5 Technical specifications

As noted by the ACCC, some Customers have expressed concerns that technical specifications are missing for some offerings for which a price is specified in the SAU, for example the AVC Traffic Class 2 and Traffic Class 3 bandwidth profiles, meaning NBN Co could subsequently specify a poor standard of quality for these offerings.²⁴ NBN Co notes that while it has been necessary to provide price commitments in the SAU for future offerings, it is not yet possible to determine appropriate specifications, service levels and conditions for Product Features that have not yet been introduced. Technical specifications will be introduced when the traffic classes are introduced to the WBA.

²³ Draft Decision, p 185.

²⁴ Draft Decision, p 180.

2 Dispute Management Rules

2.1 Background

1. The regulatory regime which applies to NBN Co does not include any dispute resolution scheme. This is unusual for an Australian access regime. For example, the inclusion of a dispute resolution mechanism under which disputes concerning the terms and conditions of access are determined by an independent dispute resolution body on a final basis is a principle recognised in the Competition Principles Agreement.
2. The Dispute Management Rules in Schedule 1H of the SAU were intended to establish a dispute resolution scheme that:
 - a. is applicable to all disputes between NBN Co and Customer under or in relation to agreements under which NBN Co provides access to the NBN Access Service, the Ancillary Services and the Facilities Access Service;
 - b. will enable NBN Co to comply with its non-discrimination obligations; and
 - c. facilitates the fair, impartial and final resolution of disputes without unnecessary delay or expense through the application of the provisions of the *Commercial Arbitration Act 2010* (NSW) (**CAA**).
3. The scheme in Annexure 1 to Schedule 1H drew heavily from the dispute resolution schemes under the National Gas Rules and National Electricity Rules. Under both those schemes:
 - a. a resolution advisor is responsible for ensuring the effective operation of the dispute resolution arrangements;
 - b. there is a pool of appropriately qualified individuals from which a panel is drawn to determine disputes; and
 - c. there is scope for broader participation in a dispute in the event that the subject matter is relevant to the industry.
4. Given many Customers are likely to be party to an access agreement with NBN Co in terms that are substantially the same as many other Customers, NBN Co considered that there is a real prospect that the outcome of a dispute with one Customer might be relevant to other Customers. As a result, NBN Co sought to include a dispute resolution scheme which could accommodate bilateral and multilateral disputes which drew upon the precedent of the energy dispute resolution schemes.

2.2 Removal of Dispute Management Rules from SAU

5. The Draft Decision recommends that the Dispute Management Rules in Schedule 1H should be removed from the SAU.
6. NBN Co proposes to comply with this recommendation in part.
7. The Dispute Management Rules in Schedule 1H gave the ACCC a role in relation to the appointment of the Resolution Advisor and the Draft Decision suggests that the ACCC should have greater input into this appointment.
8. NBN Co agrees that it is beneficial for the ACCC to play a role in this aspect of the Dispute Management Rules.
9. NBN Co proposes that the ACCC:

- a. approves (or directs) NBN Co to appoint, or terminate the appointment of, the Resolution Advisor and members of the arbitration panel pool (**Pool members**);
 - b. approves (including subject to variation) the terms of appointment of Resolution Advisors, Pool members, and members of an arbitration panel (**Panel members**), after preparation of the same by NBN Co following industry consultation; and
 - c. approves (including subject to variation) guideline and criteria documents to be used by the Resolution Advisor or Panel members after preparation of the same by NBN Co following industry consultation.
10. NBN Co considers that this proposed approach assists to:
- a. remove the perception, and avoid the risk, of bias of the Resolution Advisor and Panel members;
 - b. promotes regulatory certainty of the process for appointment and termination of the Resolution Advisor, Pool members and any Panel; and
 - c. promotes efficiency and contractual certainty in respect to the terms of appointment of Resolution Advisors, Pool members and any Panel.
11. NBN Co considers that it is appropriate for the role of the ACCC to be set out in the SAU rather than in the terms of an access agreement to which the ACCC is not a party. For reasons of streamlining and consistency between access agreements, NBN Co also considers that it is appropriate to detail the responsibilities of the Resolution Advisor and the process to be followed by the Resolution Advisor and Panel Members in the SAU.
12. NBN Co has included in Appendix C to this submission a replacement Annexure 1 to Schedule 1H to the SAU. This sets out the ACCC's role as described above and the process NBN Co will follow with respect to these matters. The replacement Annexure 1 to Schedule 1H is based on the ACCC's well-established process for the approval and appointment of independent auditors for the purposes of s87B undertakings. The replacement Annexure 1 to Schedule 1H also sets out the processes that the Resolution Advisor and any Panel must follow in the event of a dispute which is referred for arbitration.
13. In respect to those provisions of Annexure 1 of Schedule 1H that contain the substantive dispute resolution mechanisms that apply to the parties in respect of a particular dispute, NBN Co will remove those provisions from the SAU.
14. The Draft Decision recommends that NBN Co should further negotiate the Dispute Management Rules in Module G of the WBA with Customers and Access Seekers.
15. In respect of the provisions on which the ACCC commented in its Draft Decision, NBN Co has carefully assessed the ACCC's recommendations. Whilst the substantive dispute resolution mechanisms that apply to the parties in respect of a particular dispute will be removed from the SAU, NBN Co proposes to revise Module G of the WBA, as described in this section of Appendix B, in response to those recommendations.
16. In revising Module G, NBN Co will address the concerns of the ACCC that the Dispute Management Rules in WBA could be unfair or impose additional costs or delay. It has never been NBN Co's intention that the rules would operate in this way. These arrangements will be finalised through further commercial engagement with industry.

17. NBN Co notes that the draft of Annexure 1 of Schedule 1H of the SAU submitted in December 2012 included certain principles from the Model Terms, but did not directly reflect the drafting of the Model Terms. In large part this results from the difference in the dispute resolution mechanisms applied in the Model Terms and LBAS (mediation and expert determination by committee) and the Dispute Management Rules in the WBA (panel arbitration, except where the parties agree mediation or expert determination by a single expert - see further detail below). These departures from the Model Terms and LBAS are intended to:

- a. ensure an expert determination process that is cost efficient;
- b. provide a choice of procedure for the parties to a bilateral dispute; and
- c. include a multilateral dispute resolution strategy.

Leaving aside the conceptual differences between the regimes, NBN Co intends to reflect the Model Terms and LBAS dispute resolution provisions to the extent possible.

18. NBN Co intends to revise and simplify the Dispute Management Rules as follows:

- a. parties to an access agreement try to resolve a dispute commercially through escalation to nominated managers;
- b. if the parties cannot resolve the dispute commercially within a specified time period, the parties can either:
 - i. agree to extend the time period to allow for the parties to undertake a mediation process;
 - ii. agree to go to expert determination by a single expert (**Expert**). The parties can either agree on the identity of the Expert or, if they cannot agree, a Resolution Advisor will select the Expert; or
 - iii. refer the dispute to a Resolution Advisor to arrange for panel arbitration; and
- c. if the dispute is referred to a Resolution Advisor for panel arbitration, the Resolution Advisor will convene the Panel and the Panel will classify the dispute as a Bilateral or Industry Relevant Dispute (in the latter case the Panel will identify other parties to the dispute), and the Panel will resolve the dispute by way of arbitration in accordance with the CAA (with some modifications).

19. The Dispute Management Rules are distinguishable from the Model Terms and LBAS, neither of which deal with multilateral disputes. As explained further below, it is NBN Co's view that it is valuable for the Dispute Management Rules to provide a system for resolution of issues that affect a number of Customers. NBN Co intends that industry relevant disputes will be determined by way of panel arbitration for the reasons set out in Section 2.6 below.

2.3 Independence of decision makers

ACCC concerns

20. The ACCC raised the following concerns in its Draft Decision:

- *"NBN Co's role in nominating, appointing, and terminating resolution advisors and Pool members creates a perception that there may be bias on the parts of decision makers that is not mitigated by the ACC's ability to veto such actions due to the discretions conferred on NBN Co to nominate and initiate dismissal of resolution advisors. While the ACCC can object to the initial appointment of resolution advisors and Pool members if there are concerns relating to their independence, the ACCC does not have the power to initiate action during the period of their appointment if circumstances change.*

- *Whilst the ACCC is able to veto the appointment of a candidate for resolution advisor or pool member, the information to be provided to the ACCC does not appear to assist the ACCC to decide whether to exercise a right to veto .*
- *In relation to expert determinations, the expert is nominated by the resolution advisor, who in turn has been nominated by NBN Co. This may lead to the expert lacking independence or being perceived as lacking independence.*
- *The drafting effectively requires customers to demonstrate matters relating to NBN Co's beliefs in order to challenge a candidate on the basis of bias, ill-health or incapacity. This arguably favours NBN Co's interests over those of access seekers because NBN Co is able to affect the result of the challenge. Such matters should be determined on an objective basis in order to ensure that decision makers are independent and free from bias.¹²⁵*

NBN Co response to ACCC concern

21. NBN Co proposes to address these ACCC concerns by including provisions in a revised Schedule 1H of the SAU which enable the ACCC to expand its regulatory oversight to ensure fairness to all parties. NBN Co proposes as follows:
- ACCC approval of Resolution Advisor:** the ACCC either approves the candidate NBN Co nominates as the Resolution Advisor following consultation with Customers and Access Seekers, or substitutes the nominated person with such person as is approved by the ACCC.
NBN Co must provide relevant information about the nominee in its nomination of a Resolution Advisor to the ACCC.
 - ACCC approval of Pool members:** NBN Co selects the Pool members, following consultation with Customers and Access Seekers and nominates them for approval by the ACCC.
NBN Co must provide relevant information about the nominee in its nomination of a Pool member to the ACCC.
 - ACCC approval of terms of appointment of Resolution Advisor, Pool members and Panel members:** the ACCC either approves the terms of appointment of the Resolution Advisor, Pool members and Panel members submitted by NBN Co following consultation with Customers and Access Seekers, or approves the terms subject to variation.
 - NBN Co appoints Resolution Advisor and Pool members after ACCC approval of appointment and terms:** NBN Co appoints the Resolution Advisor and Pool members approved by the ACCC on the terms approved by the ACCC and NBN Co pays the Resolution Advisor and Pool members what is likely to be a nominal amount in respect of their appointment in accordance with the ACCC approval process set out above. NBN Co will not pay the costs of the Resolution Advisor or Panel members in respect of any dispute. Those costs will be paid in accordance with the terms of their appointment to a Panel, with a presumption that the costs of a panel arbitration will be split equally between all parties to that dispute.
 - ACCC approval of termination of appointment:** NBN Co must make a proposal to the ACCC for approval for NBN Co to terminate the appointment of a Resolution Advisor or Pool member where there is a reasonable danger of bias, ill health or incapacity, or continuing non-compliance with the Dispute Management Rules.

²⁵ Draft Decision, p 188.

Customers may make a proposal to the ACCC to direct NBN Co to terminate the appointment of a Resolution Advisor or Pool member under such circumstances.

The ACCC may, on its own initiative, direct NBN Co to terminate the appointment of a Resolution Advisor or Pool member under such circumstances.

- f. **ACCC approval of guidelines:** guidelines to be used by Panel members are prepared by NBN Co, subject to consultation with Customers and Access Seekers, and approved by the ACCC under the SAU.
22. NBN Co intends that in the revised WBA, Panel members will be appointed by the parties to a Dispute on the standard terms approved by the ACCC, subject to any variations permitted to be made by the Resolution Advisor in the SAU.
23. NBN Co believes that it is efficient for NBN Co to contractually appoint and terminate the Resolution Advisor and Pool members. This is because NBN Co is the party who pays for the services provided by the Resolution Advisor and Pool members (as distinguished from the costs of the Panel in a panel arbitration of a dispute). NBN Co does not seek to recover these costs from Customers involved in disputes. The alternative would be to provide for either the ACCC to contractually appoint the same and to raise an annual levy from all Customers and NBN Co to pay the retainers of the Resolution Advisor(s) and Pool members, or for all Customers to jointly appoint these persons and share the costs relating to their appointment, retention and operations.
24. The proposed approach detailed above is to ensure that all access agreements focus on the mechanism of dispute resolution, and the Dispute Management Rules in the SAU cover areas where it is reasonable for the ACCC to be involved to help ensure the impartial implementation of the dispute resolution mechanisms. NBN Co considers that this is in the long-term interests of end-users, as it promotes regulatory certainty in respect of the efficient, consistent and unbiased resolution of disputes.

2.4 Access to courts

ACCC concerns

25. The ACCC raised the following concerns in its Draft Decision:

"The process provides additional rights to commence court proceedings for NBN Co in relation to the recovery of unpaid debts and insolvency – the asymmetry of rights granted to access seekers and to NBN Co does not appear to be justified by NBN Co's legitimate business interests. Although it is more likely that access seekers would have unpaid debts to NBN Co, it is possible for the reverse to be true. For example, under the risk management provisions, NBN Co must indemnify an access seeker for any breach of the confidentiality provisions in the Access Agreement. Although it is unlikely that NBN Co might become insolvent during the period of Module 1, commercial terms on risk and liability may persist in Access Agreements beyond this period. It is therefore preferable that this provision be symmetric. In any case, it is unlikely that there would be any adverse effect on NBN Co's interests from a reciprocal right in this regard, given the low probability that it would become insolvent. For these reasons, the ACCC does not consider that these asymmetric rights are reasonable."²⁶

"The ACCC does not consider that the SAU provides for an efficient, consistent and unbiased dispute management process because the process could lead to outcomes that consistently favour NBN Co.

²⁶ Draft Decision, pp 188-189.

However, the ACCC notes that this conclusion is in the context of a very limited role for court proceedings. If greater access to the courts were available, so that the dispute resolution process was voluntary, the implications of the above points may be lessened because NBN Co would have an incentive to act fairly under the dispute management process, in order to avoid court proceedings.²⁷

NBN Co response to ACCC concern

26. NBN Co proposes to address the first of these concerns by providing for NBN Co and the Customer to have symmetrical rights to commence court proceedings (i.e. in respect to insolvency of, debts owed by, or material non-compliance of the other party).
27. NBN Co does not propose to make the Dispute Management Rules voluntary, as suggested in the second of the ACCC concerns set out above. In NBN Co's view greater access to the courts would undermine the Dispute Management Rules, as it would not incentivise the parties to progress with alternative dispute resolution procedures if agreement was not immediately forthcoming.
28. The Dispute Management Rules are intended to:
 - a. provide a less expensive and time-consuming method for the resolution of disputes;
 - b. provide greater flexibility of dispute resolution process;
 - c. provide ready access to expertise relevant to the subject of the dispute; and
 - d. better assist parties to the dispute to maintain healthy commercial relations.
29. This is consistent with the object of the CAA, which is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense (codified at section 1C).
30. NBN Co also notes that, under the terms of the CAA, the parties to an arbitration have the right to use court process in certain circumstances (e.g. s.13(4) in respect to challenging the appointment of a panel, and s.17 regarding recognition and enforcement of interim measures etc.). NBN Co does not intend to alter these statutory rights where a dispute proceeds to resolution by way of panel arbitration.
31. NBN Co notes that the parties may avoid arbitration and its integrated court process by agreeing to resolve the dispute by way of a final and binding expert determination by a single Expert.

2.5 Procedural Fairness

ACCC concern

32. The ACCC raised the following concerns in its Draft Decision:

"Although the arbitration process is based on the Commercial Arbitration Act 2010 (NSW), it has been modified in a number of ways. For example, the SAU sets out specific requirements relating to NBN Co's non-discrimination obligations. Similarly, clause 10.3 of Annexure 1 to Schedule 1H appears to exclude certain obligations in relation to procedural fairness. At this stage, the ACCC does not have before it sufficient information to be satisfied about the effect of these modifications and their implications for the reasonableness of the dispute management process."²⁸

²⁷ Draft Decision, p 189.

²⁸ Draft Decision, p 189.

NBN Co response to ACCC concern

33. The CAA permits arbitration agreements to make provisions in the agreement that diverge from the provisions of the CAA.
34. It is the case that clause 10.3(a) of Annexure 1 of Schedule 1H of the SAU submitted on 18 December 2012 stated that the Dispute Management Rules exhaustively set out the principles of procedural fairness and that no other obligations of procedural fairness will apply. However, clause 10.3(b) stated that this restriction does not apply to any rule or obligation of procedural fairness specified in the CAA which is not expressly waived under the dispute management rules.
35. NBN Co proposes to make the intention of this drafting clearer in the Dispute Management Rules, to ensure that it is clear that the Panel or Expert may specify the procedure to apply to a Panel Arbitration or expert determination (as applicable).
36. NBN Co intends to integrate the following adaptations permitted by the CAA in its Dispute Management Rules:
 - a. the procedure for appointment of arbitrators (s.11 CAA);
 - b. the place and language of the arbitration proceedings (s.20 and 22 CAA);
 - c. the time of commencement of arbitral proceedings (s.21 CAA);
 - d. factors to take into account when making the arbitral award;
 - e. reduction of certain time spans from those timeframes permitted in the CAA. However, NBN Co proposes to permit the Resolution Advisor or Panel to decide whether it is reasonable in all the circumstances for a timeframe to be extended; and
 - f. costs (s. 33B CAA) - costs are not to be determined by the Panel or Expert other than in exceptional circumstances. The default position in the Dispute Management Rules is the equal sharing of costs of the panel between all parties to the dispute.²⁹
37. Many of the default positions in the CAA have always been and still are intended to apply to the WBA, including:
 - a. arbitrators may conduct an arbitration in such manner as they consider appropriate to the extent that the arbitration agreement is silent (s.19(2) CAA) - the Dispute Management Rules do not detail any specific procedures save for the invitation and determination process for other Customers to join multilateral disputes;
 - b. the parties are to be treated with equality and given a reasonable opportunity of presenting its case (s.18 CAA);
 - c. the parties must state their case in accordance with directions of the arbitral tribunal, unless there is agreement to the contrary by the parties (s.23 CAA) - there is no such agreement to the contrary in the Dispute Management Rules;
 - d. the arbitral tribunal is to decide whether to hold oral hearings, unless there is agreement to the contrary by the parties (s.24 CAA) - there is no such agreement to the contrary in the Dispute Management Rules;
 - e. a party may request that the court take the necessary steps to appoint the panel where the procedures for appointment in the WBA fail for one of the reasons specified in s.11(4) of the CAA;

²⁹ This is consistent with the position under the Gas and Electricity dispute resolution rules (National Electricity Rules, rule 8.2.8 and National Gas Rules rule 135JA).

- f. the court may terminate the appointment of an arbitrator under certain circumstances (s.14(2) CAA), including pursuant to a challenge by a party on grounds of bias of the arbitrator (s.13 CAA);
 - g. the decision an arbitral tribunal may make on default of a party without showing sufficient cause (s.25 CAA);
 - h. involvement of an expert in the arbitral proceedings (s.26 CAA);
 - i. consolidation of arbitral proceedings (s.27C CAA);
 - j. the confidentiality provisions (s.27E - 27I CAA);
 - k. request by an arbitrator or the parties to the court to make a judgment on an issue of law (s.27J CAA); and
 - l. decisions of the panel of arbitrators being made by a majority of the members (s.29 CAA).
38. NBN Co considers that the above demonstrates that the Dispute Management Rules provide substantial flexibility for procedural fairness, and the modifications to the default positions under the CAA are reasonable and do not undermine the application of such procedural steps that either the panel considers fair in all the circumstances of the dispute.
39. To address the ACCC's concern in respect to the short timeframes prescribed within the Dispute Management Rules, NBN Co proposes to provide for parties to agree longer timescales prior to appointment of an Expert or Panel, and for a party to a dispute to request that the Panel or Expert extend any timeframes, or vary any procedures, detailed in the Dispute Management Rules. The Panel or Expert may only make such a direction where the Panel or Expert reasonably believes that the making of such a direction is fair in all the circumstances.

2.6 Complexity of Dispute Management Rules

ACCC concern

40. The ACCC raised the following concerns in its Draft Decision:

"The ACCC also notes that the structure of the dispute management process has the potential to be complex and onerous, due to the significant time and procedural requirements. This could favour NBN Co in disputes with those access seekers that do not have sufficient resources to fully engage in the process, particularly in the context of strict procedural time limits. In circumstances where the vast majority of access seekers may have contracts based on the same SFAA, it is likely that many disputes would affect the interests of all these access seekers. The ACCC considers that additional flexibility for parties to agree to modifications of the process may be beneficial in some circumstances."³⁰

- *"There is no distinction drawn between simple and complex disputes, meaning that the time limits imposed may be too short. For example, the time limit of five business days in which an access seeker needs to determine whether to participate in an arbitration process may be insufficient if the dispute is complex. As failure to respond within the required time means an access seeker has waived their right to participate, time limits which are too short would disadvantage access seekers. There is also no flexibility for the*

³⁰ Draft Decision, p 189.

*parties to agree to change the process in circumstances where it would be appropriate to do so.*³¹

NBN Co response to ACCC concern

41. NBN Co acknowledges that the Dispute Management Rules in the draft SAU submitted in December 2012 could benefit from some simplification. NBN Co intended to provide for a straightforward set of alternatives in the Dispute Management Rules, to ensure that the parties have flexibility to deal with different types of disputes in the most effective manner possible.
42. NBN Co intends to address a great deal of the perceived complexity in its previous draft by revising the structure and language of Module G of the WBA (whilst maintaining the same principles), and streamlining the front-end of the dispute resolution decision-making process, to save the parties time and unnecessary cost.

The dispute resolution alternatives proposed by NBN Co are set out in summary in paragraph 18 above.
43. Whilst NBN Co recognises that multilateral disputes have the potential to be complex, time-consuming and expensive, NBN Co considers that there is a real prospect of multilateral disputes arising, given that many Customers are likely to have entered into agreements with NBN Co on substantially the same terms, and due to the existence of NBN Co's non-discrimination obligations.
44. NBN Co considers that establishing a mechanism which governs the participation of a number of parties in a dispute is likely to reduce the complexity, time and cost of multilateral disputes compared with the alternative of having no up-front mechanism and dealing with such disputes on an ad hoc basis. NBN Co notes that the dispute resolution mechanisms under the National Gas and Electricity Rules make provision for the inclusion of additional parties to a dispute. It is NBN Co's understanding that multilateral disputes are run expeditiously under those rules.³²
45. In respect to the concern of complexity, NBN Co considers that the Dispute Management Rules provides as simple a multilateral dispute resolution structure as possible.
46. NBN Co intends that the same procedure apply to multilateral disputes as applies to bilateral disputes, except for the following additional steps after classification as a multilateral dispute and prior to commencement of the panel arbitration proceedings:
 - a. the Panel and the Resolution Advisor cooperate to invite other relevant Customers to the dispute process; and
 - b. the Panel decides on parties to the dispute prior to proceedings with the panel arbitration proceedings.
47. NBN Co proposes to address the ACCC's concerns in the revised draft of the Dispute Management Rules by simplifying the drafting structure to more clearly reflect the above.
48. In respect to the concern of lengthy proceedings, NBN Co considers that, in any context, a more complex dispute is likely to take a longer time to resolve than a simpler dispute, but that not all multilateral disputes may be complex.

³¹ Draft Decision, p 189.

³² NBN Co is aware of the TRUenergy and others v VenCorp matter in 2009 concerning VenCorp's determination of the market price of gas. No criticisms of the multilateral process appear in the summaries prepared by the Dispute Resolution Advisor after the settlement of that matter (see: <http://www.aer.gov.au/node/19251>). See also <http://www.aer.gov.au/node/14721>

49. Please refer to the comments made at paragraph 39 above in respect to the intended provision to flex the timeframes and procedures set out in the Dispute Management Rules. NBN Co also notes that the parties to an access agreement or a dispute are always at liberty to agree an alternative arrangement to the strict application of the Dispute Management Rules, and may for example agree to resolve the dispute using mediation instead of strictly following the procedure of the Dispute Management Rules to the letter (subject to NBN Co being able to comply with its non-discrimination obligations). NBN Co intends to make this flexibility by agreement clearer in the drafting.
50. In respect to the concern as to cost, NBN Co proposes that all the parties to a dispute share the costs of the panel arbitration or expert determination equally, unless the Panel or Expert consider that the circumstances warrant one party to absorb a greater proportion of the costs, for example where the acts or omissions of that party has unduly extended the resolution process. So, where many parties are engaged in a multilateral dispute, it is not a fair assumption to say that the costs of each party will be disproportionately greater than if the parties were involved in a bilateral dispute dealing with the same issue. In addition, the resolution of a multilateral dispute is likely to be more efficient in terms of cost than several bilateral disputes addressing the same matter.
51. Further, approval of standard terms of appointment of Resolution Advisors, Pool members, and any Panel or Expert, is intended to ensure speedy resolution of disputes.

2.7 Contract variation

ACCC concern

52. The ACCC raised the following concerns in its Draft Decision:

"The dispute management process places a contractual obligation on customers to cooperate with NBN Co to ensure the resolution of any dispute is in accordance with NBN Co's non-discrimination obligations, including a right for NBN Co to vary the executed Access Agreement. This could allow NBN Co to implement the outcome of the dispute in an unreasonable manner, to the detriment of the access seeker."³³

NBN Co response to ACCC concern

53. The ACCC's concern appears to arise because of the apparent ability of NBN Co to unilaterally make unreasonable amendments to an access agreement.
54. NBN Co did not intend these clauses to enable it to make unilateral changes to an executed access agreement in an unreasonable manner, to the detriment of the access seeker following resolution of an access dispute, as suggested by the ACCC.
55. Rather, the intent of these clauses was to seek to ensure that the resolution of an access dispute did not put NBN Co at risk of allegations, that in implementing that resolution, it would be in breach of the non-discrimination obligations that it is required to comply with under section 152AXC and section 152ACD of the CCA. For example, if a determination by the Panel required NBN Co to deal with an access seeker on terms which are different to the terms on which it deals with other access seekers.
56. However, NBN Co has considered the concern raised by the ACCC and intends to delete these clauses in light of the ACCC's concern. NBN Co considers that under the revised dispute resolution processes it will not be required to implement any resolution of a dispute where to do so would require it to contravene its non-discrimination obligations. This is by virtue of the following:

³³ Draft Decision, p 189.

- a. NBN Co is not required to agree to any commercial resolution or resolution by mediation which would have this outcome;
 - b. any expert must determine a dispute in accordance with Module G of the WBA, which requires the expert to have regard to the non-discrimination obligations;
 - c. any panel must determine a dispute in accordance with Annexure 1H to the SAU, which requires the panel to have regard to the non-discrimination obligations; and
 - d. any determination by an expert or the panel will be in accordance with the IAMA Expert Determination Rules or the CCA (as modified by agreement, both of which require the expert and the arbitral tribunal to decide the dispute according to law.³⁴
57. In summary, NBN considers that the revised dispute resolution process, including the requirements now set out in Annexure 1H of the SAU, will operate to ensure that the resolution of a dispute will not require a party to act contrary to law.

³⁴ Rule 5.1 of the IAMA Expert Determination Rules requires the expert to determine the dispute according to law. Section 28 of the CCA requires the arbitral tribunal to decide a dispute in accordance with the law applicable to the substance of the dispute.

3 Confidential Information- Supply context

3.1 General comments

1. NBN Co proposes to comply with the ACCC's recommendation to remove Annexure 2 of Schedule 1H from the SAU, and to finalise the Information and Rights Management in Module D of the WBA via commercial engagement with Customers and Access Seekers.
2. NBN Co has carefully assessed the concerns the ACCC expressed in its Draft Decision regarding certain Information and Rights Management provisions submitted in the draft SAU in December 2012. NBN Co wishes to inform the ACCC of the way NBN Co proposes to revise Module D of the WBA to address the ACCC's comments.
3. NBN Co recognises that the LBAS confidentiality terms are substantially identical to those of the Model Terms. NBN Co understands that in each case these provisions reflect the terms that the ACCC considers achieve a reasonable balance between the interests of access seekers and users and the access provider, and a limitation on the disclosure of confidential information in a way that does not result in competitive detriment to access seekers.
4. NBN Co proposes to substantially adopt the LBAS confidentiality provisions, whilst also enhancing protections of Customer confidential information by providing that, where appropriate, the recipient of any disclosure is placed under an obligation of confidentiality in respect to the confidential information disclosure. The exceptions to this general rule include where the permitted disclosure is in the context of a legal or regulatory requirement, an emergency, essential protection of the safety of personnel or property or the integrity of a telecommunications network, or stems from NBN Co's status as a wholly government-owned entity.
5. NBN Co proposes to ensure that the consent to disclosure provisions of the LBAS are adopted in the WBA, so that a party who wishes to disclose the other party's confidential information must inform that party and comply with any conditions to the consent, except where a specific exclusion to the non-disclosure prohibition exists.

3.2 Disclosure to financiers, investors, potential financiers and investors, and professional advisers and financial advisers or bankers

ACCC concern

6. The ACCC raised the following concern in its Draft Decision:

"The terms and conditions permit disclosure to financiers, investors, potential financiers and investors, and to their professional advisers and financial advisers or bankers. In the context of the intended future privatisation of NBN Co, the group of potential investors could potentially be unlimited. Consistent with the views expressed by the AER, the ACCC considers that there should be no disclosure to financiers or prospective financiers without the consent of the other party, and that the other party should have both notice of the disclosure and be able to put in place an appropriate confidentiality regime."³⁵

³⁵ Draft Decision, p. 192.

NBN Co response to ACCC concern

7. NBN Co notes that:

- a. the LBAS and Model Terms do not provide for a party to disclose the confidential information of the other party for the purposes of financing the disclosing party's business.

However, NBN Co considers that this is unusual in a commercial context. It is common practice in commercial agreements for the parties to permit disclosure to relevant persons in order to raise debt or equity financing.

Typically parties would include this exclusion to keep their financing decisions or strategies confidential. This helps to ensure that that party will continue to comply with its regulatory obligations and minimise the risk of potential inside information entering the market.

The exercise of this right to disclose is often made conditional on the party to whom the information is disclosed entering into a confidentiality agreement with the disclosing party to not breach the confidentiality of the party whose confidential information is being disclosed.

Other regulated network industries also permit this type of exclusion, for example:

- i. The National Electricity Rules (chapter 8, clause 8.6.2 (h)) permits:

"disclosure, use, reproduction of information by or on behalf of [a party] to the extent reasonably required in connection with [that party's] financing arrangements, investment in [that party] or a disposal of [that party's] assets".

NBN Co notes that state-owned assets in the electricity sector which have been privatised in the past have relied on this provision; and

- ii. The Australian Rail Track Corporation Limited's indicative access holder agreement (dated 23 June 2011) permits:

"[the parties] may disclose Confidential Information necessary for the provision of advice by the Recipient's legal advisers, financiers (and their advisers), accountants and other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party)"; and

- b. this exclusion is reciprocal and as far as NBN Co is aware has not been criticised by Customers or Access Seekers during industry negotiations to develop Module D of the WBA. NBN Co considers that Customers will desire this right in order to flexibly assess and arrange financing options;
- c. whilst this exclusion goes beyond the *"purposes required by the contract between the parties or required by law"*³⁶, it is not so far removed from the purposes of the contract to be considered inappropriate in a commercial context. If this type of disclosure were subject to consent and consent were withheld, this could indirectly impact on the ability of a party to perform its obligations under the contract if its ability to raise required debt or equity finance is restricted.

8. Given the above, NBN Co proposes to maintain a financing exception in Module D of the WBA, but to position it such that the disclosure is subject to appropriate conditions. Consistent with financing exceptions in the confidentiality regimes of other regulated network industries, NBN Co proposes that reciprocal disclosure be permitted in connection with financing arrangements and investment in the disclosing party, as permitted under the National Electricity Rules, and with the added safeguard set out in the provisions of the Australian Rail Track Corporation that recipients of confidential information be under a legal obligation of non-disclosure to third parties.

³⁶ Draft Decision, p 192.

3.3 Disclosure to the extent necessary for planning, developing, testing, trialling and supplying products

ACCC concern

9. The ACCC raised the following concern in its Draft Decision:

"The terms and conditions authorise disclosure to third parties to the extent necessary for planning, developing, testing, trialling and supplying products. This is a wide permission that could cover almost all activities of access seekers and NBN Co. The ACCC considers that this permission is so wide that it is likely to undermine the general principle of protection of confidential information by the parties to the contract. It also seems inappropriate given that there are specific provisions on this issue for product development activities in the PDF"³⁷

NBN Co response to ACCC concern

10. NBN Co proposes to address the ACCC's concern by reflecting the LBAS exclusion and its related conditions. This effectively allows confidential information of the access seeker to be used by NBN Co for the purposes of undertaking planning, maintenance, construction, provisioning, operations or a reconfiguration of the network, and disclosed to personnel who in NBN Co's reasonable opinion require the information to carry out or otherwise give effect to that purpose.
11. Because the NBN Co network is still being built, it is appropriate for NBN Co to extend the scope of purposes above to permit disclosure for the purpose of "construction" of the NBN Co network.

3.4 Disclosure to downstream customers

ACCC concern

12. The ACCC raised the following concern in its Draft Decision:

"The terms and conditions authorise disclosure to downstream customers for purposes "in connection with" the Access Agreement or an SAU. Some service providers are likely to obtain wholesale or aggregation services from other access seekers, rather than directly from NBN Co, therefore qualifying as downstream customers. This creates a significant risk that confidential information may be disclosed by NBN Co to competitors of the access seeker in retail markets. In addition, given the ability of NBN Co to unilaterally amend Access Agreements, and submit variations and further SAUs during the period for which these terms are intended to remain in place, the scope of this authorisation is potentially uncertain and subject to NBN Co's discretion"³⁸.

NBN Co response to ACCC concern

13. The relevant provision is intended for the benefit of Customers. NBN Co proposes to address the ACCC's concern by expressly limiting the provision to only allow "Customers" to disclose confidential information to Downstream Customers (other than end users).
14. Please refer also to section 6.5 of this submission in relation to change management of access agreements.

3.5 Breadth of authorised use and disclosure

ACCC concern

15. The ACCC raised the following concerns in its Draft Decision:

³⁷ Draft Decision, p 192.

³⁸ Draft Decision, p 192.

- *"One undesirable consequence of having such a broad range of authorised uses and disclosures is that it undermines the commitment in clause 1.4 of Annexure 2 to Schedule 1H. This clause provides that NBN Co must not disclose confidential information to other customers of NBN Co, except where expressly contemplated by the Access Agreement. Since the broad range of uses and disclosures mentioned in the provisions in clauses 1.2 and 1.3 of Annexure 2 to Schedule 1H are expressly permitted by the Access Agreement, this clause is unlikely to be effective in preventing NBN Co from disclosing information to other access seekers."³⁹*
- *"[...] the ACCC considers that use or disclosure for non-essential purposes should be restricted. The ACCC notes that the range of uses and disclosures authorised by the confidentiality provisions in the SAU is broad, going beyond the extent necessary to perform obligations under Access Agreements"⁴⁰.*

NBN Co response to ACCC concern

16. NBN Co proposes to address the ACCC's concern by substantially using the drafting from the LBAS, which narrows the types of authorised disclosure.
17. The relevant departure from the LBAS regime in this regard is set out at paragraphs 21 to 24 below, and relates to disclosure of Customer confidential information for purposes connected with the interaction of the NBN with Telstra's network and the transition from Telstra's networks to the NBN.
18. This is an essential purpose and is integral to NBN Co's performance of its obligations to Customers. This is because NBN Co's relationship with Telstra in respect to such activities is interconnected with NBN Co's operation of the network for the purposes of supplying wholesale services to NBN Co's Customers.
19. NBN Co considers that this significantly reduces the risk of the disclosure of Customers' *"strategic intentions, timing of entry into markets, marketing campaigns, number of targeted customers, and new products/internet plans"⁴¹. Also, as recognised by the ACCC "[...] as a wholesale-only operator, NBN Co is less likely (if likely at all) to intentionally disclose information [to the Customer's competitors] (relative to a vertically integrated operator)"⁴².*

3.6 Asymmetry of authorised use and disclosure

ACCC concern

20. The ACCC raised the following concern in its Draft Decision:

"NBN Co also has additional rights to use and disclose information that do not apply to access seekers. The ACCC would generally expect confidentiality provisions to apply equally to NBN Co and access seekers. However, the ACCC acknowledges that NBN Co may require non-reciprocal rights in some circumstances due to its role as the access provider. For example, NBN Co may require such rights in emergency circumstances or for network management purposes. However, the circumstances described in clause 1.3 of Annexure 2 to Schedule 1H appear to be wider than necessary. For example, it is not clear why it would be necessary to disclose confidential information of an access seeker to a third party in order for NBN Co to obtain access to that third party's network. Similarly, clause 1.3(b)(iii)(c) of Annexure 2 to Schedule 1H could be interpreted as authorising disclosure for any purpose to any

³⁹ Draft Decision, p 192.

⁴⁰ Draft Decision, p 192.

⁴¹ Draft Decision, p 191.

⁴² Draft Decision, p 191.

government department. It is also arguable that rights to use and disclose information in emergency circumstances or for network management purposes may also be required by access seekers⁴³.

NBN Co response to ACCC concern

21. NBN Co proposes to address the ACCC's concern by substantially using the drafting from the LBAS.
22. The only asymmetrical exclusions that are additional to the LBAS relate to NBN Co's permitted disclosure of Customer confidential information:
 - a. to the extent necessary (and subject to NBN Co ensuring that the person to whom the proposed disclosure is made (which may be an Other NBN Co Customer) is subject to an obligation to keep the information confidential):
 - i. for the purposes of pull through activities, investigating and rectifying faults on cables in lead-in conduits;
 - ii. to enable facilities access by Customers necessary for the supply of products; or
 - iii. for purposes connected with:
 - a) the disconnection of premises from the network of a third party; or
 - b) the provision by a third party to NBN Co of access to or ownership of parts of a network of a third party;
 - b. where required or authorised by law, to any Shareholder Minister (being the Communications Minister and Finance Minister) and their respective departments (this is narrower than the position set out in the December draft SAU, which permitted disclosure to any Commonwealth government minister and their respective government departments and/or delegates) and, otherwise, to any Regulator.
23. As noted by the ACCC, it is legitimate for NBN Co to have some non-reciprocal rights to use and disclose Customer confidential formation as "[...] *it is appropriate for NBN Co to do so in order to fulfil its obligations to supply services, manage its networks and workforce, and comply with legal obligations*⁴⁴.
24. Importantly, and as foreshadowed in paragraph 17 above, NBN Co requires the ability to disclose information to Telstra. Accordingly, reference to an "Other NBN Co Customer" in the provision proposed in paragraph [22(a)], primarily contemplates disclosure to Telstra in connection with the interaction of the NBN with Telstra's network and the transition from Telstra's network to the NBN.

3.7 Consent for disclosure

ACCC concern

25. The ACCC raised the following concern in its Draft Decision:

"Further, the terms and conditions do not appear to require NBN Co to obtain consent from access seekers each time that information is proposed to be disclosed. For example:

- *Clauses 1.9 and 1.10 of Annexure 2 to Schedule 1H require access seekers to give NBN Co broad, general forms of consent in relation to sections 152AYA, 152BEA and 152EBC of the CCA. These clauses deem consent to have been given by the access seeker for the purposes of those sections,*

⁴³ Draft Decision, p 193.

⁴⁴ Draft Decision, p 191.

which undermines those statutory protections. The ACCC considers that where consent is required by statute prior to disclosure, the consent should be requested at each and every time that disclosure is required rather than mandated by the SAU, SFAAs and Access Agreements.

- *Disclosure may occur without consent, as long as either a confidentiality regime or notice are provided.*⁴⁵

NBN Co response to ACCC concern

26. NBN Co proposes to address the ACCC's concerns by using the LBAS provisions in respect to consent. This means that:

- a. there are no deemed consent provisions relating to the Competition and Consumer Act 2010 (CCA), except to the extent that this falls under the permitted exclusion that disclosure is required by law. Accordingly, where consent is required under statute, NBN Co will seek consent on a case by case basis.

*This seeks to ensure that the confidentiality provisions are not "onerous, in that it requires access seekers to waive protections provided by statute in order to obtain supply of the declared service"*⁴⁶; and

if NBN Co is required by law to disclose a Customer's confidential information, it must give the Customer as much notice as possible, in writing, in order that a Customer has an opportunity to protect its confidential information. As in the LBAS, notice is not required in the very narrow circumstances of disclosure to the ACCC in connection with the terms of access agreements.

⁴⁵ Draft Decision, p 193.

⁴⁶ Draft Decision, p 193.

4 Intellectual Property – Supply Context

4.1 General comments

1. NBN Co proposes to comply with the ACCC's recommendation to remove Annexure 2 of Schedule 1H from the SAU, and to finalise the Information and Rights Management in Module D of the WBA via commercial engagement with Customers and Access Seekers.
2. NBN Co has carefully assessed the concerns the ACCC expressed in its Draft Decision regarding certain Information and Rights Management provisions submitted in the draft SAU in December 2012. NBN Co wishes to inform the ACCC of the way NBN Co proposes to revise Module D of the WBA to address the ACCC's comments.
3. In doing so, NBN Co notes that LBAS and the Model Terms do not include provisions in respect to intellectual property rights (IPR).

4.2 Absolute discretion regarding consent and NBN trade mark

ACCC concern

4. The ACCC raised the following concerns in its Draft Decision:
 - *"The absolute discretion for the parties to refuse consent and set the terms for the use of any trademarks, service marks, logos or branding ('marks') may undermine the ability of access seekers to supply downstream products based on NBN services. At the very least, it would not be possible for access seekers to market such products without referring to the acronym "NBN", for which NBN Co has lodged a trademark application. On the other hand, NBN Co is less likely to need to use access seeker IPRs in order to supply its services. The reciprocal rights conferred by this provision therefore have a greater effect on access seekers than on NBN Co.*
 - *NBN Co holds or has lodged applications for a number of NBN-related trademarks. If granted, these would provide NBN Co with exclusive rights to control the use of the trademarks within the scope of the registrations, which NBN Co could do in a way that imposed onerous terms and adversely affect the interests of access seekers. Clause 5.6 of Annexure 2 to Schedule 1H further provides NBN Co with absolute discretion to set the terms for use of these trademarks. It thus constrains the ACCC's ability to make Access Determinations or Binding Rules of Conduct in this respect."⁴⁷*

NBN Co response to ACCC concern

5. NBN Co:
 - a. accepts that "Customers have an interest in being able to use NBN Co's IPRs (such as trademarks and interfaces to business/operating systems) to market and supply downstream products based on NBN services without being required to agree to onerous terms"⁴⁸; and

⁴⁷ Draft Decision, p 195.

⁴⁸ Draft Decision, p 194.

- b. notes that the ACCC recognises that "NBN Co has a legitimate interest in protecting and retaining control of its IPRs and branding to protect the value of its investment in developing those IPRs"⁴⁹.

However, it is common commercial practice that this tension be addressed through the mechanism of the owner of IPR managing licences to use its IPR in its own discretion. This is because it may be necessary, following appropriate due diligence on the intended use of the IPR, to impose conditions on a proposed use that may damage the IPR.

6. On this basis, NBN Co proposes to remove clause 5.6 (which prohibits a party using the other party's IPR without consent (which may be withheld in the IPR owner's discretion) from Module D of the WBA and to manage IPRs in accordance with legal requirements, including the Trade Marks Act 1995 (Cth) (noting that, in any event, this clause did not deal with IPR in a manner that differs from the legislative position).
7. NBN Co's Brand Use Guidelines describe the terms on which NBN Co permits the use of its trade marks and other brands in relation to NBN Co's products and services. Those Brand Use Guidelines apply to all third parties, not just Customers and Access Seekers. It is common practice for companies to maintain guidelines pertaining to the use of their brands. Accordingly it is not intended that the Brand Use Guidelines form part of the WBA.
8. NBN Co intends its terms for the use of its brand, including trademarks, to be commercially sound but also reasonable. NBN Co has been proactive in developing and offering product identifiers⁵⁰ through a process of customer engagement. The product identifiers are intended to assist Customers to inform end users that the product or service uses the NBN network and the relevant wholesale access speed.

4.3 Third party IPRs

ACCC concern

9. The ACCC raised the following concerns in its Draft Decision:

"If a customer submits materials to NBN Co containing third party IPRs, it must indemnify NBN Co if NBN Co suffers or incurs losses in connection with NBN Co's use of those third party IPRs. However, there is no corresponding liability from NBN Co in relation to third party IPRs. In fact, NBN Co only warrants "to the best of its knowledge" that the use of its products will not infringe third party IPRs, and also places significant limitations on the licence that it is granting for the use of those rights. Given that it is far more likely that a customer would be using NBN Co (and thus third party) IPRs than vice versa, this could leave access seekers exposed to the risk of infringing third party rights by using NBN Co's products (to which they have no alternative). This could reduce access seeker incentives for innovation and therefore adversely affect dynamic efficiency. The ACCC considers that this should be a reciprocal indemnity and that NBN Co should provide stronger warranties of non-infringement of third party IPRs"⁵¹.

NBN Co response to ACCC concern

10. NBN Co proposes to address the ACCC's concerns by:
 - a. removing the words 'to the best of its knowledge' in clause 5.2(d) to ensure that NBN Co warrants that the supply and use of an Ordered Product, in accordance with the terms of the access agreement, will not infringe third party IPRs embodied in that Ordered Product; and

⁴⁹ Draft Decision, p 194.

⁵⁰ Please refer to <http://www.nbnco.com.au/product-identifier.html>

⁵¹ Draft Decision, p 195.

- b. maintaining the reciprocal IPR indemnities in the WBA, which are currently included in 3.2 of Annexure 3 of Schedule 1H in the SAU. Those indemnities were not limited to the degree of NBN Co's knowledge (such that NBN Co indemnified the Customer and its Related Bodies Corporate and Personnel for losses relating to third party claims that the use of an Ordered Product in accordance with the access agreement infringes third party IPRs).

This will ensure that the warranty and corresponding indemnity are entirely reciprocal.

11. Where NBN Co grants a conditional licence for Customer's to use and sub-licence the NBN Co IPRs embodied in any Ordered Product, it does so on the basis of its due diligence on the potential effects of third party use of its, and third party, IPRs embodied in that product. It also takes into account upstream conditions imposed on NBN Co from third party IPR owners.
12. NBN Co considers that it is common practice for IPR owners to place licence restrictions on the purposes for which IPRs may be used by the licensee to ensure that risks of damage to its IPRs are foreseeable. It is appropriate for the owner to have the opportunity to undertake appropriate due diligence prior to deciding whether to give a licence to that particular use, and if so whether any conditions are appropriate to adequately protect the owner's interests in the IPR.
13. This was the basis for the Ordered Product licence currently in the SAU, whereby NBN Co granted the Customer a licence for the term to use the NBN Co and third party IPRs embodied in an Ordered Product solely to the extent required for the Customer to use and commercialise the Ordered Product. It also granted a right to sub-licence such IPRs to its Related Bodies Corporate to enable the Customer to use and commercialise the Ordered Product and its Downstream Customers to use the Customer Product or Downstream Product. These licences relate to IPRs embodied in the Ordered Product, such that the Customer will be able to use the product as intended without infringing any NBN Co or third party IPR in the product). NBN Co does not propose to amend the scope of these licences for the reasons given above.

5 Confidential Information and Intellectual Property – Product Development Forum

5.1 Approach to PDF confidentiality and intellectual property provisions

ACCC concern

1. In its Draft Decision, the ACCC identified a number of specific concerns in relation to confidentiality and intellectual property in the PDF context which led the ACCC to express the preliminary view that:

"[...] the effect of the confidential information and intellectual property rights terms could be that customers are discouraged from participating in the Product Development Forum...."

In light of these issues, the Consultation Paper on the Notice to Vary proposes that clauses 5 and 6 in the PDF Processes be removed. The effect of this removal would be that terms and conditions about the handling of confidential information and intellectual property rights would be subject to commercial negotiation between NBN Co and its customers. The removal of these terms from the SAU would also mean that they could be the subject of any later ACCC regulatory determinations.⁵²"

NBN Co response to ACCC concern

2. NBN Co proposes to:
 - a. maintain the PDF processes in the SAU in order to ensure consistent and transparent consultation of both Customers and Access Seekers and to facilitate participation by a Consumer Advocacy Group (as recommended by the ACCC), whilst removing clauses 5 and 6 from Annexure 1 of Schedule 1I from the SAU;
 - b. include the rights and obligations with respect to the treatment of confidential information and intellectual property rights (**IPR**) associated with product development in the WBA, and to finalise those arrangements via further commercial engagement with customers; and
 - c. utilise a standalone agreement or deed, accessible on NBN Co's website, to put confidentiality and IPR arrangements in place for participation in the PDF by non-Customers, for example Access Seekers or a Consumer Advocacy Group.
3. NBN Co intends that the provisions regarding confidential information and IPR in relation to participation in the PDF will substantially align with the confidentiality and IPR provisions in the WBA that relate to the supply of services under the access agreement, except where variations are necessary due to the difference in the relationships between the parties and the information and materials exchanged. Please also refer to sections 3 and 4 of this Appendix, which further detail NBN Co's proposed approach in respect to confidentiality and IPR (albeit in the supply context).
4. As identified by the ACCC in its Draft Decision, NBN Co's ambition for the PDF, and its multi-party consultation process, is to support the development of tools to meet the evolving demands of end users and to provide information to Customers and Access Seekers in order to assist them to plan appropriate investment strategies⁵³.

⁵² Draft Decision, p 83-84.

⁵³ Draft Decision, p 82.

5. It is therefore not NBN Co's intention to discourage the use of the PDF system through the application of onerous confidentiality and IPR protections. However, NBN Co is keen to establish a process where participants in the PDF can have confidence that the value of the information they contribute to the PDF will be protected from disclosure to competitors. NBN Co also considers that it is critical that any confidential information and IPRs in material submitted to the PDF be identified as early as possible, so that these can be appropriately managed and protected. Further, NBN Co intends that the rights and obligations proposed are mutual for all participants in the PDF to ensure a level playing field –noting that it is intended that NBN Co initiated product ideas will also be included in the PDF process.

5.2 PDF Confidentiality

NBN Co response to ACCC concern

6. The ACCC raised the following concerns in its Draft Decision in respect to confidentiality in the PDF context:

"The ACCC's preliminary views about the confidentiality terms are as follows.

A number of clauses make it unclear whether confidential information will be adequately protected — for example:

- *When confidential information is disclosed to third parties under clauses 5.3(c)(v)(B) and (vi) and clause 5.4, the requirement that the recipient of the confidential information must ensure that a person to whom it is to be disclosed is made subject to the same confidentiality obligations to those set out in clause 5 of the PDF Processes may be overridden by lesser obligations.*
- *When confidential information is disclosed to third parties under clauses 5.3(c)(iv), (ix) and (x) and clause 5.4, the party whose confidential information is to be disclosed is not given an opportunity to query or challenge the disclosure and/or the breadth of, or basis on which, the information is to be disclosed.*
- *In clause 5.7(a), the reference to 'internal governance processes' is broad and does not restrict what may be included in the internal governance processes; and this clause does not impose any obligations that the information be retained in confidence.*

In addition, the definitions of confidential information that apply to customers and NBN Co are not reciprocal, as NBN Co is not required to identify which of its information is confidential.⁵⁴"

NBN Co response to ACCC concern

7. In relation to disclosure of confidential information to third parties, NBN Co intends in this context (as in the supply of services context, but with some refinements for the PDF context), to follow the approach taken in the LBAS terms. However, NBN Co also considers that it is beneficial to enhance certain elements of the LBAS terms and require the recipient to ensure that any third party to whom it discloses the discloser's confidential information is under an obligation of confidentiality if the disclosure or use is for the purposes of the PDF process. Please refer to section 3 of this Appendix for further detail.

⁵⁴ Draft Decision, p 83.

8. NBN Co recognises that the reference to 'internal governance processes' is broad, however, this is intentional. NBN Co submits that this provides flexible protection for participants of the PDF, whilst remaining fair in its mutual application to all participants. NBN Co is not in a position to understand the way in which the obligation to return, delete or destroy another PDF participant's confidential information operates within other participants' businesses. NBN Co is therefore reluctant to dictate to PDF participants the remit of legitimate business reasons for the refusal to take such action. Ultimately this provision does not limit the duties of confidentiality in respect to the PDF, and the recipient will continue to be under a duty of confidentiality to the discloser in respect to the discloser's confidential information.
9. NBN Co proposes to ensure that the identification of confidential information is reciprocal - information will be confidential if the PDF participant identifies it as such on disclosure under the PDF process, or if it can reasonably be inferred to be confidential from the circumstances in which it is disclosed.

5.3 PDF Intellectual Property Rights

ACCC concern

10. The ACCC raised the following concerns in its Draft Decision in respect to IPR in the PDF context:

"The ACCC's preliminary views about the intellectual property rights terms are that:

- *no benefit appears to be given to a customer if NBN Co develops products based on that customer's product idea or third party's intellectual property;*
- *the requirements that a customer identify exactly the intellectual property it is submitting and the exact nature of the rights in third party material provided by the customer as part of the PDF Processes may be onerous and complicated for some customers;*
- *some of the clauses make it unclear whether customer intellectual property rights will be adequately protected; and*
- *the provisions could impose potentially significant costs on customers for failing to identify third party intellectual property rights.⁵⁵"*

NBN Co response to ACCC concern

11. In relation to the ACCC's first stated concern, it is unclear why a PDF participant should benefit from the use of third party IPR in developing a product through the PDF process (assuming the third party is not a PDF participant); rather it would be the third party IPR owner who should benefit.

⁵⁵ Draft Decision, p 83.

12. As detailed in its original supporting submissions on the SAU, NBN Co considers that it is appropriate to place the responsibility with PDF participants for identifying their IPR (and confidential information), including imposing costs on PDF participants for failing to identify intellectual property (and confidential information) as required. The PDF participant, not NBN Co, is in the best position to understand the value of its IPR (and confidential information) and to be responsible for identifying it. Recognising and taking steps to legally protect an IPR can be a complex and onerous process for any business, however this does not mean that the PDF process should be used as an alternative means for a PDF participant to investigate whether a third party had a prior claim to that intellectual property. NBN Co considers that it is reasonable for a PDF participant to indemnify NBN Co for the failure to identify to NBN Co third party intellectual property rights of which the PDF participant aware.
13. In the PDF context, NBN Co will only be permitted to use the IPR to (internally within NBN Co) analyse the usefulness of, and develop a product idea. If NBN Co desires to use the IPR in a product or service, or to incorporate the IPR into materials to be circulated outside NBN Co, a further licence will need to be negotiated at that stage.

6 Risk Management

6.1 Background

Risk allocation principles

1. The Draft Decision states the following principles:
 - a. risk should be borne by the party who is best placed to prevent or mitigate the risk⁵⁶;
 - b. NBN Co has a legitimate interest in providing access on terms which encourage the protection of its network and equipment from damage by customers, downstream customers or end users and that absent liability provisions, any such damage might increase NBN Co's costs and reduce the ability of NBN Co to recover its costs; and
 - c. efficient risk allocation will give the parties incentives to establish and comply with operational and technical processes that contribute towards safe and reliable operation of networks and therefore reduce overall losses.
2. NBN Co agrees with these principles.
3. NBN Co also accepts that it should be liable for events that are within NBN Co's control (such as property damage or personal injury which it causes), but should not be liable for all losses flowing from those events where NBN Co is not in the best position to prevent or mitigate those losses (i.e. indirect losses flowing from those events).
4. NBN Co has undertaken a detailed review of the Risk Management approach in the WBA, and accepts that the drafting of a number of the Risk Management provisions may be unclear and overly complex and may have resulted in a misunderstanding of the operation or intent of certain of the provisions referred to in the Draft Decision. As a result of this analysis, NBN Co has undertaken a significant revision of Module E.
5. In making changes to Module E of the WBA NBN Co has had regard to:
 - a. the ACCC's concerns;
 - b. NBN Co's prior engagement with Customers and Access Seekers;
 - c. the Model Terms;
 - d. which party (if any) is in a position to control or mitigate each category of risk through its own actions;
 - e. the approach taken by courts in Australia, England and the United States in allocating liability to utility providers for economic loss suffered by downstream users; and
 - f. approaches to risk in other regulated network industries for best practice models.
6. In respect to the last of these factors, NBN Co notes that the ACCC refers to the September 2012 draft decision of the Australian Energy Regulator (**AER**) in respect to Envestra's Access Arrangement⁵⁷. NBN Co agrees that precedent from other network industries provides guidance as to the appropriate allocation of certain risks between a service provider, Customers and End users.

⁵⁶ Draft Decision, p 197.

⁵⁷ Draft Decision, p 198, footnote 963.

7. NBN Co, as a wholesale-only open access network provider of Layer 2 Ethernet access, is in effect providing the 'pipes' which are used by its customers to enable them to provide services to end users. The NBN is a network to which multiple end users will increasingly be connected but with whom NBN Co has no contractual relationship. NBN Co does not control the services that are provided by its Customers to end users and does not have any ability to manage the activities of end users in connection with the network.

Liability for direct losses

8. NBN Co expressly accepts and does not seek to limit its liability for direct losses where its negligence (or the negligence of its related bodies corporate, personnel or contractors) occasions personal injury, death or damage to tangible property. NBN Co indemnifies Customers for such claims from End Users. NBN Co accepts it is in a position to manage this risk and should bear the risk if it does not do so appropriately.

Liability for economic loss

9. A key issue for any operator of a network that has multiple connections is how to manage third party claims against the network operator, especially for economic loss that might arise if its network fails (even as a result of its own negligence). The issue arises because the financial return to the operator of the network and the value of the assets it has at its disposal are dwarfed on a daily basis by the value of the transactions and business profits earned by end users which rely on the network.
10. A requirement that the network operator accept the risk of such claims in effect requires the network operator to become an insurer of all loss that arises in connection with its network. The response of a rational network operator would then be to either: (a) incur the expense necessary to make the network incapable of failure (which would very significantly increase the costs to end users); or (b) insure against such risk - which would be equivalent to insuring against business interruption which might be suffered by every end user of the network (which would also very significantly increase the costs to end users).
11. It is not correct to assert that because a person's act or omission is the ultimate cause of a loss (even a foreseeable loss), that the person should bear all liability for it however arising. In fact, it is well settled that the law has recognised the need to avoid creating a situation where the defendant's liability is disproportionate with the extent to which the standard of their conduct fell below that of a reasonable person. The issue has been examined by Courts specifically in the circumstances of events which have affected the delivery of utility services to large numbers of commercial and household consumers.
12. An allocation of liability should be recorded in the agreement which appropriately reflects the well settled tenets of tort law if, as is the case with a potential failure of the NBN Co network, a negligent act on the part of NBN Co has the potential to impose on it liability 'in an indeterminate amount... to an indeterminate class'. The problem was expressed by Mason J in the High Court's decision in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* as follows:

*"The principal disadvantage of the foreseeability test as an exclusive criterion of liability for financial loss is that it would impose on an individual defendant a liability "in an indeterminate amount ... to an indeterminate class", in the words of Cardozo C.J. in *Ultramares Corporation v Touche*(84). A minor act of negligence may put out of action a public utility or facility, e.g. a power station or bridge, which serves a large community, with the result that a large class of persons may sustain financial loss thereby. Yet to adapt the words of Viscount Simonds in *The Wagon Mound* (85), "it does not seem consonant with current ideas of justice or morality*

*that for an act of negligence, however slight or venial", the actor should be made liable for all the foreseeable consequences in terms of financial loss."*⁵⁸

13. When put in a more modern commercial context, Gillard J in the Supreme Court of Victoria also identified the need to limit the liability of Esso, a utility gas supplier, for financial losses suffered by a large number of commercial customers following the failure of the gas supply as a result of an explosion at Esso's gas processing plant at Longford⁵⁹. While acknowledging that the affected commercial users of gas numbering 43,000 and the domestic users comprising 1.1 million were not an "indeterminate group"⁶⁰, he found that Esso should not be liable for all of their financial losses. In the case of the commercial customers he found that the extent to which they were vulnerable to a loss of the gas supply was able to be managed by each business. Each of them ought to have been aware of the possibility of a failure of the gas supply and therefore could have made the business decision to install additional equipment to cover any interruption in supply from Esso or taken out their own business interruption insurance⁶¹. In the case of domestic customers, he considered they were not vulnerable because they should have been aware of a possibility of a failure of the gas supply and could have simply purchased items to meet any such interruption, or do nothing and change their living habits⁶².
14. While the courts have recognised that, as a matter of principle, it is not appropriate for a utility supplier to be liable for all of the losses that flow from the failure (even negligent failure) to provide a service, the manner in which that principle is applied and the legal analysis on which it is founded has varied considerably from case to case.
15. To avoid this uncertainty, NBN Co (like other telecommunications network providers and utilities) therefore seeks to ensure that it clearly records in clear terms in its contracts a limitation of liability which excludes economic loss occasioned to end users by negligent acts or omissions of NBN Co and which reflects the well settled principles of tort law articulated by the courts referred to above. This is intended to encourage Customers, Downstream Customers and End Users to take appropriate steps to manage the risk of such economic loss. By contrast, as noted above, NBN Co expressly accepts and does not seek to limit its liability for direct losses where its negligence (or the negligence of its contractors, related bodies corporate and personnel) occasions personal injury, death or damage to tangible property. NBN Co indemnifies Customers for such claims from End Users and Downstream Customers. NBN Co accepts it is in a position to manage this risk and should bear this risk if it does not do so appropriately.
16. This key concern was raised with the Australian Energy Regulator (**AER**) in relation to the Jemena access arrangement for Jemena's NSW gas distribution network. Like NBN Co, the service provider for that network did not have any relationship with end users and had no ability to manage acts or omissions by third parties connected to the network. In that access agreement, the AER accepted certain provisions which provide a relevant reference point for the Risk Management provisions in Module E of the WBA.

⁵⁸ *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* 136 CLR 529 at 591.

⁵⁹ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27

⁶⁰ *Ibid* at [936]

⁶¹ *Ibid* at [1070] and [1101].

⁶² *Ibid* at [113].

17. NBN Co notes that a key difference between an established gas distribution network and the NBN is that the risks and liabilities arising from the injection, transportation and use of gas are well-established and parties in that supply chain are accustomed to liability regimes which manage risk appropriately in that context. Notably, NBN Co does not consider that the Jemena access agreement goes far enough in managing NBN Co's liability in the circumstances of a new network which is still being rolled out. NBN Co draws the ACCC's attention to the following example provisions, which more closely reflect the well settled principles of tort law articulated by the courts referred to above:

a. Optus Wholesale Terms (cl. 17):

"You indemnify and will keep Optus indemnified against any Loss suffered or incurred by Optus in connection with an End-User claim (including a claim based in negligence) in any way related to an Individual Service, the Services or the Agreement."

b. APT Allgas Access Arrangement effective 1 July 2011 - 30 Jun 2016:

"The User indemnifies APT Allgas and its employees, agents and contractors, against all liabilities, losses, damages, costs and expenses suffered or incurred by APT Allgas or its employees, agents and contractors as a result of:

breach by the User of its obligations under this Access Agreement;

(i) breach by the User of any of its warranties made or deemed to have been made under this Access Agreement;

(ii) damage to any Receipt Point, any Delivery Point, any Metering or any other part of the Network, that is caused by the act or omission of the User or any of the User's End Users or any of their respective employees, agents, contractors or invitees;

(iii) death or personal injury of any person resulting from an act or omission of the User or any of the User's End Users or any of their respective employees, agents, contractors or invitees;

(iv) any claim by any third party, including any of the User's End Users, in respect of any injury, loss, damage, costs or expenses of any kind arising out of or in connection with this Access Agreement or resulting directly or indirectly from the operation, maintenance, repair, administration or management of the Network or any part of it; and

(v) the imposition of costs, charges, royalties, excises or taxes."

Retail level regulation and losses that cannot be excluded

18. NBN Co acknowledges that a limitation on NBN Co's liability for economic loss occasioned to end users by negligent acts or omissions of NBN Co is likely to have the following consequences:

- a. it is likely that Customers will exclude liability to their downstream customers to the extent they are permitted to do so under law or have negotiated to do otherwise; and
- b. Customers will be responsible for downstream customer losses under the ACL consumer guarantees to the extent that the ACL does not permit Customers to exclude liability for such losses.

19. The previous paragraphs show why it is appropriate for NBN Co to exclude such liability. NBN Co submits that a careful analysis of the ACL consumer guarantees regime demonstrates this is appropriate to allocate liability for failure to comply with the ACL consumer guarantees to the Customer and otherwise allocate risk of economic loss to downstream customers / end users.

20. The ACL provides consumers with basic and guaranteed levels of protection for the goods or services which they acquire. It provides statutory remedies where a supplier fails to comply with a consumer guarantee and prohibits the exclusion of such liability. However, it does not seek to protect the end user from all loss. To do so would expose suppliers to potentially unlimited losses. The inability to control a business' exposure to such losses may result in a significant increase in price or that the supply of certain goods or services may no longer be viable. The remedies provided in the ACL also recognise that not all potential consumer loss is compensable. This is explained further in paragraphs 46 to 49 below.
21. The allocation of liability to Customers for losses under the non-excludable ACL consumer guarantees is also an appropriate allocation of risk and consistent with the principle that responsibility should lie with the party who is best placed to manage and mitigate the relevant risk. The Customer is the supplier of services to consumers for the purposes of the ACL. The Customer is the party which has a contract with the consumer. It is the price paid by the consumer to the Customer which determines whether the consumer guarantees apply. NBN Co has no involvement in these matters. It simply provides an input into the services that are supplied to consumers by the Customer.
22. A Customer might assert that an act or omission by NBN Co could cause the Customer to breach a consumer guarantee, that the Customer would be liable to its downstream customers in this circumstance and that NBN Co should bear this risk. However, section 267 of the ACL provides a supplier with clear protections where a failure to comply with a consumer guarantee arose due to circumstances beyond the supplier's control. This is explained further in paragraphs 39 to 45 below.

Removal of Risk Management Rules from SAU

23. The Draft Decision recommends that the Risk Management rules should be removed from the SAU. NBN Co will comply with the ACCC's recommendation and proposes to finalise the Risk Management provisions in Module E of the WBA via further commercial engagement.
24. NBN Co intends to address the ACCC's comments on the Risk Management rules in a manner which is consistent with the principles noted above and the allocation of risk that has been considered appropriate in other network industries.
25. Rather than simply amend the specific provisions referred to in the Draft Decision, NBN Co intends to simplify and clarify the Risk Management rules as a whole. NBN Co's specific response to each of the matters raised in section 6.6 of the Draft Decision is set out below.

6.2 Limited liability - NBN Co negligence

ACCC concern

26. The ACCC raised the following concern in its Draft Decision:

"The ACCC notes that extensive protections in favour of NBN Co may mean it has less incentive to establish robust operational processes to minimise risks, which in turn has adverse implications for the efficient operation of infrastructure and the safe and reliable operation of networks. Provisions that have this effect include:

- *The limitation of liability for claims arising out of NBN Co's negligence in circumstances where the negligence causes personal injury, death or damage to tangible property. In addition, although NBN Co's liability for such claims is unlimited for direct loss, indirect loss is wholly excluded in these circumstances.⁶³*

⁶³ Draft Decision, p 199.

NBN Co response to ACCC concern

27. NBN Co would like to redress any misunderstanding contained in or stemming from the first sentence of the bullet point highlighted in paragraph 26 above. NBN Co did not seek to limit its liability for direct loss flowing from NBN Co's negligence in cases where NBN Co's acts or omissions cause personal injury, death or property damage.
28. In clause 2.7(a) of Annexure 3 to Schedule 1H of its December SAU submission, it stated:
- "To the extent permitted by law, NBN Co excludes all liability for any and all Losses suffered or incurred by the Customer to the extent such Losses are caused or contributed to by:*
- (a) any and all:*
- (i) Claims brought against a Customer by a third party to whom Customer provides products or services under a contract between the Customer and the third party to the extent that liability could have been lawfully excluded, restricted or limited under that contract;*
- (ii) Downstream Customer Losses;*
- (iii) events that fall within paragraph (b) of the definition of Excluded Event [i.e. NBN maintenance, NBN upgrade or relocation or replacement of any Point of Interconnect (POI)];*
- except to the extent that such Claims or Losses fall within clauses 2.3(d)(i), 2.3(d)(ii), 2.3(d)(iii), or 3.4(b)(i).*" (underlining added)
29. Clauses 2.3(d)(i)-(iii) provided that NBN Co's liability will be uncapped in respect to any negligent or wilful acts or omissions of NBN Co that cause or contribute to death or personal injury or damage to Tangible Property, or for any acts or omissions of NBN Co constituting fraud.
30. In addition, under clauses 3.3 and 3.4(b)(i) NBN Co provided an indemnity to the Customer for all Losses incurred by the Customer or its Related Body Corporate or Personnel arising from or in connection with:
- a. the:
- i. negligence or wilful act or omission of NBN Co, its Related Bodies Corporate or any of their respective Personnel or third party suppliers; or
- ii. NBN Co Network, the NBN Co Platform or any NBN Co Equipment; and
- b. any damage to, or loss of, Tangible Property of the Customer and/or any third party to the extent caused or contributed to by NBN Co, its Related Bodies Corporate or any of their respective Personnel or third party suppliers.
31. It is the case that each party's liability for indirect loss relating to such liabilities was capped under clause 2.5.
32. NBN Co will remain responsible for direct loss stemming from personal injury, death or property damage to which it is both directly and causally related.
33. In respect to the second sentence in the bullet point highlighted in paragraph 26, NBN Co submits that it is reasonable in commercial supply contacts to exclude indirect or consequential loss arising from negligent damage to property or personal injury. The rationale for this position is similar to that articulated in paragraphs 9 to 15 above (albeit applied in the context of economic loss flowing from the damage to the property or personal injury, rather than stand-alone economic loss).
34. NBN Co notes that the exclusion of indirect loss arising from negligent damage to property or personal injury is mutual - and does not believe that its customers would be prepared to accept liability to NBN Co for indirect loss incurred by NBN Co in the event of the customer damaging its equipment or injuring any person.

35. Furthermore, the Model Terms (clause C.11) recognise the reasonableness of this proposition and exclude liability of the parties under the corresponding indemnity "to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such liability actually was excluded or reduced), by the Innocent Party in its contract with such end-user or third person".
36. Finally, the Jemena access arrangement referred to in paragraph 16 (above) (in clause 28.4) expressly excludes liability for indirect loss arising from personal injury or property damage caused by the other party.

6.3 Exclusion - Downstream Customer loss

ACCC concern

37. The ACCC raised the following concerns in its Draft Decision relating to the treatment of downstream customer risk proposed by NBN Co:

"The ACCC notes that extensive protections in favour of NBN Co may mean it has less incentive to establish robust operational processes to minimise risks, which in turn has adverse implications for the efficient operation of infrastructure and the safe and reliable operation of networks.

Provisions that have this effect include:

- The exclusion of liability for loss suffered by downstream customers, even if it is caused or contributed to by NBN Co. Access seekers are effectively required to enter into "no liability" contracts with downstream customers, which may not be possible in relation to large customers or where retail-level regulation applies, or to incur the costs of absorbing the risk themselves.*
- The exclusion of all liability that NBN Co may have in respect of claims made by customers of the access seeker, if the liability could have been lawfully excluded/limited in the contract between the access seeker and the downstream customer⁶⁴;*

"There are general exclusions of NBN Co's liability in relation to downstream customers, for example, for customer losses caused or contributed to by downstream customers, or for activities in connection with the supply of customer products to downstream customers. There are also indemnities that only apply to NBN Co, for example, customers are required to indemnify NBN Co against downstream customer claims, such as claims for downstream customer loss, to the extent the claim is caused or contributed to by the customer⁶⁵;

"The ACCC considers that this allocation of risk could give access seekers incentives to include and enforce strong protections in contracts with downstream customers or end-users. This may result in contractual terms that require downstream parties to bear liability for risks over which they do not have any control, or which another party is able to more effectively manage⁶⁶; and

"For example, the provision that excludes NBN Co's liability for any losses that the access seeker could have excluded in downstream contracts gives access seekers an incentive to pass on liability to their downstream customers or end-users. In the event that access seekers are not able to pass risk to end-users through contractual terms, they may raise prices to cover the costs of managing that risk⁶⁷.

⁶⁴ Draft Decision, p 199.

⁶⁵ Draft Decision, p 197.

⁶⁶ Draft Decision, p 200.

⁶⁷ Draft Decision, p 200.

NBN Co response to ACCC concern

Retail level regulation - customer liability for failure to comply with ACL consumer guarantees

38. NBN Co acknowledges that a consequence of the application of the principles set out above is that Customers may be responsible for downstream customer losses under the ACL consumer guarantees to the extent that the ACL does not permit Customers to exclude liability for such losses.
39. NBN Co submits that a careful analysis of the consumer guarantees demonstrates this is an appropriate allocation of risk. The Customer is the supplier of services to consumers for the purposes of the ACL. The Customer is the party which has a contract with the consumer. It is the price paid by the consumer to the Customer which determines whether the consumer guarantees apply. NBN Co has no involvement in these matters. It simply provides an input into the services that are supplied to consumers by the Customer.
40. Under the ACL, there are only 3 guarantees that apply to the supply of services to a consumer:
- a. that services will be rendered with due care and skill (section 60);
 - b. that services will be fit for any disclosed purpose or intended result (section 61); and
 - c. that services will be provided within reasonable time of contract if no time specified (section 62).
41. These guarantees apply to the services that are provided by the supplier (the Customer) to the consumer (the downstream customer or end user). They do not apply to the upstream network operator nor to the services that operator provides to the supplier.
42. In the context of the NBN, the risks covered by the consumer guarantees arise solely as between the Customer and its downstream customers and NBN Co submits that the Customer is the party who is best able to manage those risks:
- a. **care and skill:** Section 60 applies to the services that are supplied to the consumer by the supplier. It is the care and skill of the supplier to which this guarantee applies. It does not apply if there is a lack of care or skill by some upstream third party;
 - b. **fit for purpose:** Section 61 applies in a circumstance where the consumer makes known to the supplier that it is acquiring the services for a purpose or to achieve an intended result. NBN Co has no involvement in the communications between the supplier and its customers. NBN Co cannot know whether a consumer has disclosed a purpose or intended result; and
 - c. **time:** Section 62 addresses the time of supply of services to the consumer if no time is specified. Again, the relevant supply is the supply of services by the supplier to the consumer.
43. A Customer might assert that an act or omission by NBN Co could cause the Customer to breach a consumer guarantee, that the Customer would be liable to its downstream customers in this circumstance and that NBN Co should bear this risk.
44. However, the ACL provides a supplier with clear protections where a failure to comply with a consumer guarantee arose due to circumstances beyond the supplier's control. Section 267 provides that a consumer may not take action against a supplier of services for failure to comply with the fit for purpose and time guarantees where that failure occurred:
- a. only because of an act, default or omission of, or a representation made by, a person other than the supplier or an agent or employee of the supplier; or
 - b. a cause independent of human control that occurred after the services were supplied.

45. This limitation does not apply to the due care and skill guarantee. This is appropriate. A failure by the supplier to exercise due care and skill cannot occur because of an act of a third party or a force majeure event. The supplier should be responsible for losses which arise because of their failure to exercise due care and skill.

End user liability

46. NBN Co acknowledges that a consequence of the application of the principles set out above is that it is likely that Customers will exclude liability to their downstream customers to the extent they are permitted to do so under law or have negotiated to do otherwise. However, NBN Co considers that it is a flawed argument to say this is unreasonable. NBN Co submits that it is, in fact, reasonable as this reflects the established principles of consumer protection law and will not in any event affect the scope of the remedies to which end customers will be entitled under the ACL as against NBN Co's Customers.

47. The ACL provides consumers with basic and guaranteed levels of protection for the goods or services which they acquire. It provides statutory remedies where a supplier fails to comply with a consumer guarantee and prohibits the exclusion of such liability. However, it does not seek to protect the end user from all loss. To do so would expose suppliers to potentially unlimited losses. The inability to control a business' exposure to such losses may result in a significant increase in price or that the supply of certain goods or services may no longer be viable.

48. The remedies provided in the ACL also recognise that not all potential consumer loss is compensable. The remedies available to consumers under the ACL are clearly specified:

- a. if a failure to comply is not a major failure, the consumer may require the supplier to remedy the failure within a reasonable time and if the supplier fails to comply with such a requirement the consumer may otherwise have the failure remedied and recover all reasonable costs from the supplier or terminate the contract;
- b. if a failure to comply cannot be remedied or is a major failure, the consumer may terminate the contract and recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services; and
- c. where a supplier is not permitted to exclude consequential loss and damages, the consumer may by action against the supplier recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

49. It is not the policy of the ACL for a wholesale provider in NBN Co's position to bear the liability for all potential downstream customer loss. The services to be supplied by NBN Co to the Customer are wholesale services. The ACL statutory guarantees do not apply to the wholesale supply of services, as set out in paragraph 39 above. In addition, the ACL permits suppliers to consumers (where the ACL statutory guarantees apply) to exclude consequential loss and damages for services which are not ordinarily acquired for personal, domestic or household use (unless it would be unfair to exclude liability). That is, even where the statutory guarantees do apply, the ACL policy is that the exclusion of consequential loss and damages is appropriate in these circumstances. The services to be supplied by NBN Co to the Customer are not ordinarily acquired for domestic, personal or household use. If it were the case that the statutory guarantees applied to NBN Co's supply (which they do not), the ACL would not preclude NBN Co excluding liability for consequential loss. NBN Co's proposal to exclude liability for consequential loss is therefore consistent with the policy of the ACL.

Requirement for Customer to exclude liability in Downstream Customer contracts

50. Consistent with the explanation above regarding the consumer guarantees regime in the ACL and the analysis set out in paragraphs 6 to 17 above, both the Model Terms and in the Jemena access arrangement referred to in paragraph 16 (above) contain terms requiring or incentivising the access seeker to include exclusions of liability in their downstream user contracts.
51. In the case of the Model Terms, clause C.11 provides that parties are not liable to each other in respect of certain third party claims brought by an end-user or other third party to the extent that the liability could have been excluded or reduced in the relevant contract with the end-user or third person.
52. The Jemena access arrangement contains (in clause 28.9) an express requirement for the "User" (analogous to the Customer in the NBN contract) to include in all its supply arrangements a provision that:

"limits or excludes the User's liability to those persons, to the extent reasonably practicable, and in particular in relation to transportation of Gas, the operation of the Network and any Service provided by the Service Provider (whether under this Agreement or otherwise)."

NBN Co liability for downstream acts or omissions

53. In response to the ACCC's concern referred to in paragraph 37(b) above that "There are general exclusions of NBN Co's liability in relation to ... customer losses caused or contributed to by downstream customers, or for activities in connection with the supply of customer products to downstream customers" and "customers are required to indemnify NBN Co against downstream customer claims... to the extent the claim is caused or contributed to by the customer", NBN Co makes the following observations.
54. For the reasons set out in this submission, NBN Co considers that:
 - a. the exclusion of NBN Co's liability for downstream losses that it has not caused is an appropriate allocation of risk. This is because NBN Co does not have any control over the acts or omissions of the Customer or any downstream customers which result in losses suffered by a Customer. This will not disincentivise NBN Co to establish robust operational processes to minimise risks - NBN Co will continue to endeavour to ensure the safe and reliable operation of the network where it is in a position to control the mitigation of risk, in order to manage liability for service level rebates to Customer; and
 - b. NBN Co does not have control over the supply by the Customer of products to downstream customers, except to the extent that NBN Co fails to operate the network in accordance with its service level commitments or creates a hazard to persons or property.
55. NBN Co considers that it is appropriate for this loss to sit with the Customer because to place this responsibility solely with the access provider ignores the contribution of other factors, such as the actions of the Customer involved in supplying services to the end user.
56. For example, whilst NBN Co uniformly supplies all of its Customers with NTD equipment it should not be responsible to downstream customers for any failure in the supply of services via the NTD equipment (except to the extent that NBN Co has a liability to the end user under consumer protection law as the manufacturer of the equipment). This is because NBN Co does not control the manner of use of the NTD equipment by the end user (this is regulated by the Customer-end user relationship and shaped by the nature of the product supplied by the Customer). As detailed in section 1.2.3 of this Appendix, NBN Co considers that the provision of service level rebates to Customers and implementation of corrective action satisfies NBN Co's responsibility in respect to service level failures that are caused or contributed to by NBN Co.

57. Where Customers contract with large sophisticated downstream customers, the downstream customer may negotiate a position whereby the Customer accepts a greater degree of risk. It is reasonable that this risk sit with the Customer, as the Customer is in control of weighing up its increased risk in the context of offering specific products to that downstream customer (and this balancing of benefit and risk is likely to involve a negotiation of price). As the Customer is not restricted to a regulated margin on its running costs like NBN Co, the Customer has greater commercial flexibility to decide, on a case by case basis, whether to accept both this increased risk and a reduction in its margin.
58. If NBN Co were to be responsible for a degree of downstream risk which it is not at liberty to control, Customers would not be motivated to negotiate reasonable outcomes with large downstream customers as this risk could be passed up to NBN Co. As a result, NBN Co would be liable for an unlimited quantum of loss, which it is not able to either foresee or control. This would effectively put NBN Co in the position of insuring the use of the network. This is particularly unreasonable as this is a risk unlikely to be covered by any insurance market at an acceptable cost and NBN Co is unlikely to be able to apply the same contractual caveats typically insisted on by the insurance industry. Further this would not result in the end user being better protected from this risk, as this would necessarily have an impact on the cost of NBN Co's network services. Unless this cost was recoverable by NBN Co as opex (pursuant to the arrangements in the SAU), then NBN Co would presumably have to make a decision not to incur the relevant cost, with consequential implications for service quality. In sum, NBN Co is not best placed to manage this risk.
59. It is also not the case that NBN Co (or indeed the Customer) is better able to effectively manage the risk of the end user's consequential losses relating to any service interruption, safety incident, or property damage. The extent of such consequential and pure economic loss is only foreseeable, and therefore mitigated, by the end user.
60. NBN Co notes that the ACCC 's view in its "Final Determination - Model Non-Price Terms and Conditions, November 2008" (**Model Terms Determination**) supports NBN Co's above reasoning where it states that:
- a. "where conduct is caused by an end-user, the ACCC considers that the service provider with the relationship with that end-user is in the better position to discourage the conduct or prevent its recurrence"⁶⁸; and
 - b. "The ACCC considers that a service provider should not be required to compensate for, or indemnify against, losses that it has no control over, including losses that another party could have reasonably avoided or mitigated"⁶⁹.

6.4 Asymmetry of indemnities

ACCC concern

61. The ACCC concisely summarises the mutual indemnities included in NBN Co's December SAU submission, as:

"[...] each party will pay to the other party on demand an amount equal to all losses suffered or incurred as a result of the first party's actions where the losses arise from:

- *any breach of the confidentiality provisions of the parties' Access Agreement;*
- *any third party claims alleging an infringement of that third party's intellectual property rights;*

⁶⁸ Model Terms Determination, p 20.

⁶⁹ Model Terms Determination, p 20.

- any death or personal injury of any person to the extent that it is caused or contributed to by a negligent act or omission or any wilful acts or omissions that cause or contribute to that death or personal injury in connection with the parties' Access Agreement; or
- any damage to tangible property in connection with the parties' Access Agreement.⁷⁰

62. However, the ACCC raised the following concern in its Draft Decision:

"[...] there are indemnities that only apply for the benefit of NBN Co, for example, access seekers must indemnify NBN Co against downstream customer claims to the extent the claim is caused or contributed to by the access seeker. However, there is no reciprocal indemnity from NBN Co. In fact, NBN Co has specifically excluded such liability. Similarly, access seekers are prevented from making claims against NBN Co's subcontractors or suppliers, even if they have caused or contributed to a loss"⁷¹

NBN Co response to ACCC concern

63. Reflective of the comments made above in respect to downstream customer loss, NBN Co submits that it is not appropriate for NBN Co to be held accountable for downstream customer claims that NBN Co did not cause or to which NBN Co did not contribute. NBN Co considers that an indemnity from the Customer protecting NBN Co against claims from downstream customers (who have suffered or incurred loss that is not attributable to the acts or omissions of NBN Co or its related parties) is consistent with the gas industry model illustrated in the Jemena access arrangement approved by the AER.
64. NBN Co further submits that it is reasonable for claims against NBN Co's subcontractors or suppliers to be prohibited as the mutual personal injury, death and property damage indemnities provided by NBN Co and the Customer require the indemnifying party to pay the indemnified party on account of Loss caused or contributed to by the indemnifying party, its Related Bodies Corporate or any of their respective Personnel or third party suppliers (provided that the third party supplier is not the indemnified party).
65. It is both administratively efficient and desirable to ensure that each counterparty (the indemnifying party) is able to satisfy claims from the other party (the indemnified party) that relate to losses created by their Personnel or third party suppliers, and then to manage its own exposure under the terms of the relevant employment or third party supply contracts.
66. NBN Co proposes to make it clearer in the WBA that the indemnities as between NBN Co and Customer are mutual except to the extent appropriate given the asymmetric relationship of a supplier and customer.

6.5 Exclusion - NBN maintenances, upgrade or relocation or replacement of POIs

ACCC concern

67. The ACCC raised the following concern in its Draft Decision:

"The ACCC notes that extensive protections in favour of NBN Co may mean it has less incentive to establish robust operational processes to minimise risks, which in turn has adverse implications for the efficient operation of infrastructure and the safe and reliable operation of networks. Provisions that have this effect include:

⁷⁰ Draft Decision, p 196.

⁷¹ Draft Decision, p 199.

- *The exclusion of liability for losses caused by NBN maintenance, NBN upgrade, or relocation or replacement of any POI, because these are defined as 'Excluded Events'. This provision means that NBN Co would not be liable for loss caused by its acts or omissions, or those of its related bodies corporate, personnel and contractors if the relevant events fall within this definition*⁷².

NBN Co response to ACCC concern

68. NBN Co thinks this rationale is counter-intuitive. It is in implementing robust operational processes that NBN Co will need to undertake maintenance, upgrades, relocations and replacements. The imperative of taking this action is to minimise risks, and ultimately to achieve the efficient operation of infrastructure and the safe and reliable operation of networks. It is essential that NBN Co is not penalised for undertaking proactive measures to support the smooth running of the network for the benefit of all parties.
69. Further, it is also reasonable that NBN Co is not penalised for undertaking reactive measures to address issues where the NBN Co network fails for a reason NBN Co cannot control (like an extreme weather event). In such an event NBN Co will need to undertake repairs, and so it is appropriate that NBN Co is not held responsible for third parties' loss at a time when it is already incurring costs in order to perform its obligations. The reasoning for this is the same as that which justifies force majeure events - the risk is outside the scope of the reasonable control of a party to the supply contract and cannot be prevented or overcome with reasonable care - and so the loss should remain where it falls.
70. As noted in paragraphs 27 to 36 above, NBN Co does not seek to exclude personal injury, death or property damage in relation to NBN maintenances, upgrade or relocation or replacement of POIs where such loss is caused or contributed to by NBN Co.

6.6 Exclusion - failure to meet service levels

ACCC concern

71. The ACCC raised the following concerns in its Draft Decision:

"The ACCC notes that extensive protections in favour of NBN Co may mean it has less incentive to establish robust operational processes to minimise risks, which in turn has adverse implications for the efficient operation of infrastructure and the safe and reliable operation of networks. Provisions that have this effect include:

- *The exclusion of liability for a failure to meet a service level, apart from any service level rebate provided under the service level arrangements.*⁷³

NBN Co response to ACCC concern

72. NBN Co considers that it is appropriate for NBN Co to limit recovery for service level failures to the payment of service level rebates to its Customers. Please refer to our comments in section 1.2.3 of this Appendix.

6.7 Insurances

ACCC concern

73. The ACCC raised the following concerns in its Draft Decision:

⁷² Draft Decision, p 199.

⁷³ Draft Decision, p 199.

"The ACCC notes that extensive protections in favour of NBN Co may mean it has less incentive to establish robust operational processes to minimise risks, which in turn has adverse implications for the efficient operation of infrastructure and the safe and reliable operation of networks. Provisions that have this effect include:

- *The requirement on the access seeker to hold insurances for workers compensation, public liability and product liability insurance, professional indemnity insurance, motor vehicle insurance, given that NBN Co is the supplier of the services for which such insurances would be required to be in effect. In addition, the requirement for NBN Co to be named as an additional insured is likely to result in additional costs for access seekers.*⁷⁴

NBN Co response to ACCC concern

74. The insurance provisions in the draft SAU submitted by NBN Co to the ACCC in December 2012 are mutual. The reason behind this is because, whilst NBN Co is the supplier of the services under the SFAA, the access seeker may be liable, to the extent not excluded or limited, to NBN Co for its acts or omissions that impact on either NBN Co's personnel, property or business. Whilst a party may accept liability under a contract, this is not a security that, at the relevant time, any amounts which that party is liable to pay to the other party will be available. It is standard practice for commercial parties to require each other to effect and maintain insurance policies that cover a degree of the risk that party has accepted under a contract. It is also prudent for a party to insure for loss that it may not be able to recover from its counterparty to the contract or any third party.
75. NBN Co notes that the requirement to hold insurances has not been raised as an issue by Customers or Access Seekers in NBN Co's industry engagement on the draft WBA. This helps to demonstrate that such insurances are common industry practice.
76. It is NBN Co's view that holding insurance does not provide it with the liberty to relax the rigour of its operational processes or its approach to risk. In addition to the commercial and public policy reasons for ensuring the efficient operation of a safe and reliable network, NBN Co is very aware that a poor insurance claim record can result in significant increases to insurance premiums and greater difficulty in obtaining insurance cover. So, it is not in the long-time interests of NBN Co, or third parties benefiting from access to its network, to diminish the effectiveness of NBN Co's operational processes.

6.8 Exclusion of industry-expected representations, conditions, warranties and guarantees

ACCC concern

77. The ACCC raised the following concerns in its Draft Decision:

"The ACCC notes that extensive protections in favour of NBN Co may mean it has less incentive to establish robust operational processes to minimise risks, which in turn has adverse implications for the efficient operation of infrastructure and the safe and reliable operation of networks. Provisions that have this effect include:

- *The extent of the exclusion of representations, conditions, warranties and guarantees, which suppliers would generally be expected to include in commercially negotiated contracts for the supply of goods and services*⁷⁵

⁷⁴ Draft Decision, p 199.

⁷⁵ Draft Decision, p 199.

NBN Co response to ACCC concern

78. NBN Co intends to use the relevant provisions of the Model Terms as a base and update the drafting of the Model Terms (published in 2008) to take account of the introduction of the ACL in 2011.
79. NBN Co is not aware that any other representations, conditions, warranties or guarantees are standard within wholesale agreements relating to the regulated network industries.

6.9 Clarity

ACCC concern

80. The ACCC raised the following concern in its Draft Decision:

"A number of the risk management provisions are unclear and complex, which could make it difficult for some access seekers to understand what they and NBN Co are and are not liable for. For example, clause 3.5 of Annexure 3 to Schedule 1H is quite complex and obscures the fact that NBN Co is not responsible and liable for losses to the access seeker and downstream customers which it has caused or contributed to. Similarly, clause 3.6 is not clearly drafted"⁷⁶.

NBN Co response to ACCC concern

81. The ACCC's draft decision indicates that the basis of certain liabilities in Annexure 3 of Schedule 1H of the December SAU submission were interpreted differently by the ACCC than intended by NBN Co. For example, in respect to NBN Co's liability in negligence where a third person suffers personal injury, death and property damage caused by NBN Co's acts or omissions (see the earlier comments in paragraphs 27 to 36).
82. In light of this and other examples referred to in this submission, it is clear to NBN Co that a simplification and revision of language would be beneficial. As such, NBN Co has disaggregated the liabilities addressed by Module E and restructured the Module to make it significantly more concise and straightforward than the earlier draft.

⁷⁶ Draft Decision, p 200.