



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

NBN Co Special Access Undertaking variation

Final decision

April 2021

1. Executive summary

This report sets out the ACCC's final decision on the proposed variation to the Special Access Undertaking (SAU), which was lodged by NBN Co on 8 May 2019. The purpose of the SAU variation is to extend the expiration date of three sets of non-price provisions from their initial expiry date of 30 June 2019 until the end of module 1 of the SAU on 30 June 2023.

After assessing the SAU variation against the relevant criteria under Part XIC of the *Competition and Consumer Act 2010*, and having regard to submissions made during the ACCC's consultation process, we consider the relevant criteria has been satisfied and have accepted the SAU variation.

The SAU variation relates to three sets of non-price provisions in the SAU with expiry dates of 30 June 2019. These are:

- Clauses 1D.8 to 1D.12 – processes for obtaining customer endorsement for certain network design changes,
- Clause 1H.5 and Annexure 1 to Schedule 1H – requirements for NBN Co to specify dispute resolution arrangements in its wholesale broadband agreement and processes for appointment and ACCC approval of dispute resolution advisors and pool members, and
- Annexure 1 to Schedule 1I – product development forum (PDF) processes, which cover forum membership, submissions and assessment of new product ideas and consultation processes.

During the initial assessment of the SAU in 2013, we considered that these were relatively unique and untested procedural provisions and that setting a fixed expiry date (of 30 June 2019) would provide the opportunity for us to review their effectiveness based on operational experience during the first five years of the SAU.

Following our initial consultation on the SAU variation in 2019, in which stakeholders raised concerns about the PDF, NBN Co decided to undertake a review of its PDF arrangements more generally. We agreed that this review would be a worthwhile exercise and decided to defer a decision on the SAU variation until NBN Co had completed this review. This process was then significantly delayed by the impacts of the COVID-19 pandemic, but NBN Co has now finished its review. As a result, NBN Co has implemented, or will implement, a range of improvements to its PDF arrangements aimed at improving transparency and consistency in the process.

Although NBN Co has made these improvements, it has done so without having to make any further changes to the PDF processes set out in the SAU, which are the subject of the SAU variation. However, we consider that extending the PDF processes will provide an effective framework for NBN Co to implement its improvements for the rest of module 1. We are satisfied that the PDF terms are reasonable, and that extending these provisions to the end of module 1 will promote the long-term interests of end-users (LTIE).

We are also satisfied that extending the provisions for customer endorsement of network design changes and dispute resolution appointments meet the relevant statutory criteria, for the reasons set out later in this report, and have therefore accepted the SAU variation.

We will continue to monitor the operation of these provisions until the end of module 1, including the outcome of the annual review of PDF arrangements to which NBN Co has committed. After this point, there is scope for these provisions to be subject to commercial negotiations or a future SAU variation, including as part of the forthcoming module 2 process.

2. Introduction

2.1. Background

NBN Co's Special Access Undertaking (SAU) is a key part of the regulatory framework that governs the terms on which NBN Co supplies services to access seekers. The SAU adopts a modular structure whereby different sections apply for specified periods. Module 1 applies from the date the SAU was accepted on 13 December 2013 until 30 June 2023 and module 2 applies until the end of the SAU on 30 June 2040.

Within the SAU there are three non-price provisions that were designed to have a fixed expiry date of 30 June 2019 rather than apply for the entire duration of module 1. This was because these processes were relatively unique and untested and we considered that some experience of their operation would be required to assess whether they are operating as intended and producing the intended outcomes for NBN Co and access seekers.¹

2.2. Overview of the SAU variation

On 8 May 2019, NBN Co lodged a proposed variation to its SAU with the ACCC as allowed under the *Competition and Consumer Act 2010 (CCA)*.²

The purpose of NBN Co's SAU variation is to extend the expiration date of three non-price provisions that expired on 30 June 2019 so that they would instead expire at the end of module 1, on 30 June 2023. The expired provisions are:

- the endorsed network change provisions in clauses 1D.8 to 1D.12 of the SAU,
- the dispute resolution provisions in clause 1H.5 and Annexure 1 to Schedule 1H of the SAU, and
- the detailed Product Development Forum (PDF) processes in Annexure 1 to Schedule 1I of the SAU.

Collectively these provisions will be referred to in this report as the expired provisions. The provisions are described in more detail in section 4 of the report.

NBN Co did not propose to make any other changes to its SAU other than those required to extend the expiration date of the expired provisions.

2.3. Timeline and consultation

On 20 May 2019, the ACCC published a short paper on its website and sought views from interested stakeholders in response to NBN Co's proposed SAU variation.³ In response we received three submissions from stakeholders.⁴

Submissions raised some concerns about accepting the proposed SAU variation, particularly in relation to NBN Co's PDF processes. We sought more information from NBN Co to assist with our assessment. Towards the end of 2019, NBN Co notified us that it was prompted by views in the submissions to review the current PDF arrangements through its own separate

¹ ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, p. 59.

² NBN Co is able to submit a SAU variation to the SAU in accordance with section 152CBG(2) of the *Competition and Consumer Act 2010 (Cth)* (CCA).

³ ACCC, *NBN Co SAU variation: extension to non-price terms*, available <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation-extension-to-non-price-terms/consultation-on-nbn-cos-sau-variation>

⁴ The ACCC received submissions from ACCAN, Optus and Telstra as part of its initial consultation. NBN Co provided a supporting submission with its proposed SAU variation and then a supplementary submission. Public versions of all submissions to our consultation are available on our website: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation-extension-to-non-price-terms/consultation-on-nbn-cos-sau-variation>

consultation process with industry. We considered this would be beneficial and decided to defer making a final decision until the process had been completed.

While NBN Co's consultation with industry on the PDF arrangements continued during 2020, it was delayed due to the COVID-19 pandemic. NBN Co informed us that the consultation process was finalised in October 2020 and it issued a close out paper to PDF members in November 2020. NBN Co also provided a further supporting submission to the ACCC.⁵

We have extended our decision making deadline a number of times to allow NBN Co to finalise its separate consultation process and to provide sufficient time to consider its outcomes, which are relevant to our assessment decision.^{6,7}

2.4. Outline of report

This final report sets out the ACCC's assessment of NBN Co's proposed SAU variation against the relevant legislative criteria. These sections are structured as follows:

- Section 3 sets out the legislative criteria that must be considered,
- Section 4 sets out our assessment against the legislative criteria, and
- Section 5 sets out our final decision.

⁵ NBN Co's subsequent supporting submission is available on our website.

⁶ The ACCC is able to extend its assessment deadline on its assessment of an SAU variation where appropriate. Our notices to extend our assessment deadline are set out on our project page.

⁷ Although the decision making period has extended beyond six months, the extension to the decision making period is allowed under CCA, s. 152CBG(9)..

3. ACCC approach to assessment of SAU variation

3.1. Legislative framework

Part XIC of the *Competition and Consumer Act* (the Act) sets out the assessment criteria that the ACCC must apply to its assessment of an SAU, and any variation of the SAU. Specifically, section 152CBD(2) sets out the statutory criteria which the ACCC must apply to its assessment of any variation before it makes a final decision to accept or reject the proposed variation. The ACCC must consider whether the extension is reasonable, having regard to whether the terms and conditions promote the long-term interest of end-users (LTIE) and the other reasonableness matters.

Broadly, the ACCC must not accept the variation unless:

- the terms and conditions specified in the variation in relation to compliance with the category B standard access obligations (SAOs), are consistent with those obligations and are reasonable,
- any conduct that is specified in the variation in relation to access referred to in section 152CBA(3B) will promote the long term interests of end-users (LTIE), and any related terms and conditions are reasonable, and
- any conduct that is specified in the variation in relation to certain matters listed in section 152CBA(3C) will promote the LTIE.

Promoting the LTIE

To determine whether a particular thing or service promotes the LTIE, the ACCC must have regard to the objectives of whether it:

- promotes competition in the markets for these services,
- achieves any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- encourages the economically efficient use of, and the economically efficient investment in, the infrastructure by which these services are supplied and any other infrastructure by which these services are, or are likely to become, capable of being supplied.⁸

Reasonableness

To determine whether a particular thing is reasonable, the ACCC must have regard to:

- whether it promotes the LTIE,
- the legitimate business interests of the carrier or carriage service provider,
- the interests of persons who have rights to use the declared service,
- the direct costs of providing access to the declared service,
- operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.⁹

⁸ CCA, s. 152AB(2).

⁹ CCA, s. 152AH.

Assessment criteria to apply to the three expired provisions

The ACCC considers that the expired provisions should be assessed according to the following criteria:¹⁰

- (a) any variation to the endorsed network change provisions should be assessed according to whether the provisions promote the long-term interests of end-users,¹¹
- (b) any variation to the dispute resolution provisions should be assessed according to whether it promotes the long-term interests of end-users, and that any related terms and conditions are reasonable,¹² and
- (c) any variation to the PDF processes will promote the LTIE, and any related terms and conditions, are reasonable.¹³

4. ACCC assessment

This section sets out the ACCC's assessment of the expired provisions against the relevant assessment criteria. The ACCC is required to assess whether extending each of the three sets of provisions to 30 June 2023 meets the relevant criteria.

4.1. Endorsed network change customer engagement

4.1.1. Overview

One of the key prudency conditions specified in the SAU is the prudent design condition. Broadly speaking, in order for capital expenditure to meet the prudent design condition it must be materially consistent with the network design rules or a permitted variation in the first instance.

In addition, the network design rules can be changed for reasons other than those specified in the permitted variations through a customer engagement and endorsement process. Some of the key elements of this process are as follows:

- procedures for identifying and selecting network design options,
- criteria for assessing network design options,
- procedures for consulting with and seeking endorsement of network design changes from access seekers and customer advocacy groups, and
- a dispute resolution mechanism in cases where customer endorsement cannot be reached.

During module 1 of the SAU, NBN Co is not required to implement a product idea or introduce a new product which requires a network design change, unless the network design change has been endorsed by access seekers or the ACCC (through the relevant endorsement processes in the SAU), and NBN Co decides to proceed with that network design change.¹⁴

These endorsement processes are an important part of assessing the prudency and efficiency of NBN Co's capital and operating expenditure. They should encourage efficient investment because access seekers and consumer advocacy groups (and potentially end-

¹⁰ ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, pp. 53, 54, 76.

¹¹ CCA, s. 152CBA(3C), s 152CBD(2)(cb) and s 152CBG(4).

¹² CCA, s. 152CBA(3B), s 152CBD(2)(ca) and s 152CBG(4).

¹³ CCA, s. 152CBA (3B) s. 152CBA(3C), s 152CBD(2)(ca), s 152CBA(2)(cb) and s 152CBG(4). In our 2013 SAU final decision, we also considered that the product development and variation provisions may also be categorised as conduct in relation to access under subsection 152CBA(3B), so the ACCC also assessed whether the terms and conditions in relation to the conduct are reasonable. We have followed the same approach for our assessment.

¹⁴ NBN Co, SAU, November 2013, Schedule 11, clause 11.3.7.

users) inform NBN Co whether network design choices are efficient and deliver network capacity and service quality that end-users desire and for which, they are willing to pay.¹⁵

4.1.2. Submissions

ACCAN, Optus and Telstra all noted that NBN Co has never used the endorsed network change approach. Both ACCAN and Telstra noted that NBN Co has preferred the use of the permitted variation process to make network changes and Optus considered that this prevents making an assessment on whether an extension is reasonable. Telstra submitted it would prefer NBN Co to use the endorsed network change process to implement network design changes.¹⁶

NBN Co submitted that it has not used the endorsed network change process to implement network changes because all capital expenditure in respect of network changes has been made in accordance with the network design rules or a permitted variation to the network design rules. Nevertheless, it considered that the operation of these provisions until the end of module 1 (30 June 2023) would continue to encourage efficient investment in (and operation of) its network, which is one of the elements of the “reasonableness” criterion.¹⁷ NBN Co also commented that although these provisions have not been used, it is important that an avenue for access seekers to endorse those network changes outside of permitted variations remains in place.¹⁸

4.1.3. ACCC views

In the 2013 SAU final decision, we indicated that the customer endorsement process for network design changes would be an important component of the prudency arrangements in module 1. We considered they would allow access seekers and consumer advocacy groups to inform NBN Co about whether network design choices are efficient and deliver network capacity and service quality that end-users desire and for which, they are willing to pay.

In practice, however, the customer endorsement processes have not been used. All network changes have been made in accordance with the network design rules or through permitted variations. Furthermore, we consider there is a strong possibility this process will not be used in module 1 given NBN Co’s progress with the rollout and the scope of the permitted variations. However, we consider the customer endorsement option for network design changes should be retained should a deviation from the network design rules that is not covered by the permitted variations be required or desirable.

Without the customer endorsement process in place, any network design changes outside of the network design rules or permitted variations, would need to be subject to ACCC approval. We consider that customers are best placed to inform NBN Co on efficient network design changes. We also note the ACCC still has a role under the customer endorsement processes, but only after customer engagement is unsuccessful in bringing about endorsement of design changes. For these reasons we consider the customer endorsement arrangements are preferable and should apply to the end of module 1.

The ACCC has considered the assessment of the customer endorsement process in our 2013 final decision document, having regard to the assessment criteria, and maintains the views from that assessment. In summary, we consider that extending the customer endorsement provisions to the end of module 1 will promote the long-term interests of end-users. We continue to consider that the processes, if required, will allow access seekers and consumer advocacy groups to inform NBN Co about whether network design choices are

¹⁵ ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, p. 99.

¹⁶ ACCAN, *Variation to the NBN Co Special Access Undertaking – expiring non-price provisions consultation*, 10 June 2019, p. 6; Optus, *Submission in response to ACCC Consultation Paper – Proposed variation to the NBN Co SAU: extension of expiring non-price provisions*, p. 2 & Telstra, *Submission to ACCC consultation on variation to NBN Co SAU: extension to non-price terms*, pp. 1-2.

¹⁷ NBN Co, *Submission to the ACCC – Variation to the NBN Co Special Access Undertaking*, 13 November 2020, p. 2.

¹⁸ NBN Co, *Submission to the ACCC – Variation to the NBN Co SAU*, p. 2.

efficient and deliver network capacity and service quality that end-users desire and for which they are willing to pay.

4.2. Dispute resolution provisions

4.2.1. Overview

The SAU includes several commitments with respect to dispute management and the process NBN Co and access seekers can follow in the event that a dispute cannot be resolved commercially within a specified timeframe.

These provisions also set out the approach NBN Co must follow for seeking the ACCC's approval in relation to:

- the nomination and appointment of dispute resolution advisors and a pool of persons who may be selected as members of an arbitration panel ('pool members'),
- the termination and replacement of resolution advisors and pool members,
- the setting of terms of appointment for resolution advisors, pool members and panel members, and
- guidelines to be applied by a panel when considering a dispute.

The SAU confers powers on the ACCC to approve the matters described above, to direct NBN Co to terminate a resolution advisor or pool member, and to give directions to a resolution advisor in relation to the performance of his or her duties.

The dispute management provisions in the SAU are intended to ensure the independence of the decision makers in disputes between NBN Co and its customers and therefore to promote the efficient, consistent and unbiased resolution of disputes.¹⁹

4.2.2. Submissions

ACCAN submitted that these provisions have not promoted the LTIE as they haven't supported the resolution of conflicts between service providers and NBN Co or helped to improve services. Further, ACCAN considered that retailers are opting to attempt to resolve disputes with NBN Co through private negotiations, rather than through the formal dispute resolution processes. It points to the fact that so far, no disputes have been escalated to the formal process, notwithstanding the considerable number of consumer complaints that have arisen in relation to the migration process.²⁰

Optus submitted it is unaware of any disputes that have undergone this process and without practical application of the provisions it is difficult to conclude as to their reasonableness.²¹

NBN Co noted that although there have been no relevant disputes under the SAU to date, the dispute resolution provisions provide a useful framework to ensure that any disputes that arise in the future are resolved in an impartial and unbiased manner. Further, NBN Co submits that having the ability to resolve disputes without the need to trigger formal processes is in the LTIE.²² NBN Co also submitted that these provisions will promote the efficient resolution of disputes, by creating a predictable and well-established framework for resolving such disputes in a timely way.

4.2.3. ACCC views

¹⁹ ACCC, *NBN Co Special Access Undertaking Final Decision*, p. 106.

²⁰ ACCAN, *Variation to the NBN Co Special Access Undertaking – expiring non-price provisions consultation*, 10 June 2019, p.7.

²¹ Optus, *Submission in response to ACCC Consultation Paper – Proposed variation to the NBN Co SAU: extension of expiring non-price provisions*, pp. 3-4.

²² NBN Co, *Submission to the ACCC – Variation to the NBN Co Special Access Undertaking*, 13 November 2020, p. 3.

We continue to consider the dispute resolution provisions would provide for suitable protections for access seekers in disputes with NBN Co, should the need for formal independent dispute resolution be required. We also consider the ACCC approval of dispute resolution appointments through the SAU will ensure appointment of decision makers that are independent and free from bias, which will promote the efficient, consistent and unbiased resolution of disputes.

We acknowledge the point raised by ACCAN that these processes have not been used in favour of access seekers directly resolving disputes with NBN Co. However, we consider that this experience to date does not detract from the need to have these provisions in place in case they are required in the future. We consider that direct and ongoing engagement between NBN Co and its customers may be more effective in resolving disputes without the need for escalating to the formal process. We also note that the dispute resolution processes relate strictly to disputes about existing contractual terms, and there is scope for access seekers to provide more general input through other processes, such as the product development forum.

In summary, we consider that extending the dispute resolution provisions until 30 June 2023 will promote the long-term interests of end-users and the provisions are reasonable. We consider it would provide for the efficient, consistent and unbiased resolution of disputes in a cost-effective and timely manner should a formal process be needed. We consider this to be in both the interests of NBN Co's customers and NBN Co's legitimate businesses interests.

4.3. Product Development Forum processes

4.3.1. Overview

The product development forum (PDF) is the framework set out in the SAU for NBN Co to consult with customers on the development of new products.

The SAU includes obligations relating to the PDF that operate for the full duration of the SAU.²³ These include a general obligation to consult with access seekers and consumer advocacy groups on new products and to ensure that the PDF is the primary forum through which product ideas are developed, refined and disseminated. As these general obligations apply for the full term of the SAU period, they are not subject to the current SAU variation and are not being assessed by the ACCC.

The SAU also contains more detailed PDF processes that set out how NBN Co will engage with access seekers and consumer advocacy groups. The PDF processes cover the following areas:

- requirements for membership of the PDF,
- specific information requests by access seekers and consumer advocacy groups for development of ideas regarding NBN Co Networks for the purpose of developing product ideas,
- submission of ideas to the PDF,
- NBN Co's assessment of product ideas and processes for providing information about this assessment,
- consultation processes and how NBN Co considers feedback on the development of product ideas (such as through workshops and submissions),
- finalisation of a product, product component or product feature, and

²³ During the Initial Regulatory Period, clause 11.3.1 applies until 30 June 2023. In the subsequent regulatory period, clause 2D.4.1(a) applies.

- NBN Co's approach to communication with PDF members.²⁴

As noted previously, the PDF processes applied for the first five years of the SAU. NBN Co's proposal to extend the application of these provisions beyond June 2019 until 30 June 2023 is part of the SAU variation under consideration.

There are also other aspects to the PDF arrangements that sit outside the SAU framework and are therefore not subject to the current variation assessment.

Our consultation on NBN Co's SAU variation to extend the detailed PDF processes provided an opportunity for access seekers and industry groups to provide their views on the PDF more broadly.²⁵ As noted above, as a result of the submissions received, NBN Co decided to undertake a review of its PDF arrangements.

NBN Co has now finished its review. As a result, NBN Co has implemented, or will implement, a range of improvements to its PDF arrangements aimed at ensuring transparency and consistency in process. These improvements can be implemented without having to make any further changes to the PDF processes, which are the subject of the SAU variation.

4.3.2. Submissions

The PDF arrangements were a focus of all three submissions we received during our consultation. In particular, all stakeholders commented on concerns about the transparency of NBN Co's decisions made through the PDF process.

ACCAN raised a number of concerns about transparency and accountability with the PDF processes. It noted that the PDF operates as a closed forum which prevents ACCAN from being able to engage with its member organisations on matters that directly impact their interests. It also argued that the rules preclude oversight by key regulators, including the ACCC, and that there is limited accountability for the pricing and product decisions reached by NBN Co.²⁶

Optus also raised concerns around PDF processes. Optus argued that PDF processes are opaque and often appear to operate as a 'tick-the-box' exercise rather than a true consultation.²⁷ Optus also raised several other concerns with PDF processes, including:

- transparency around the PDF processes, consultation and decisions (which lack clear explanation for NBN Co's decisions),
- lack of clarity as to when a proposal will be subject to PDF consultation,
- inconsistency and lack of oversight in the processes, with no specific timeframes in which a PDF proposal must be acknowledged or considered, and
- a narrow agenda of topics to consider and lack of ability to raise proposals.

Optus objected to the PDF provisions simply being extended and considered a further examination of their function was required.²⁸

Telstra submitted that it had no objections to the extension of the non-price provisions to 30 June 2023 but did suggest some improvements that it considered could lead to improved customer outcomes for the PDF process.²⁹ Telstra submitted some enhancements could be made to increase transparency of PDF outcomes such as:

²⁴ Set out in more detail in Schedule 11: Annexure 1 (PDF Processes).

²⁵ These views from industry that relate to the PDF processes are discussed in more detail in section 4.1.2

²⁶ ACCAN, *Variation to the NBN Co Special Access Undertaking – expiring non-price provisions consultation*, 10 June 2019, pp. 8-13.

²⁷ Optus, *Submission in response to ACCC Consultation Paper – Proposed variation to the NBN Co SAU: extension of expiring non-price provisions*, p. 2.

²⁸ See pp. 4-7 of Optus' public submission.

²⁹ Telstra, *Submission to ACCC consultation on variation to NBN Co SAU: extension to non-price terms*, pp. 1-2.

- NBN Co providing more detailed feedback to PDF members for its decisions, and
- if NBN Co continues to use the PDF to consult on pricing proposals (which it is not obliged to do), improvements should be made to reduce the ultimate discretion that NBN Co has in the setting of prices.³⁰

NBN Co's further submission, which it provided after it had completed its consultation process, responded to several issues raised by stakeholders during our initial consultation. NBN Co proposed the following improvements to address stakeholder concerns and improve the PDF's operation:

- *product construct papers and industry consultation papers* – NBN Co would use a single product construct paper for all product ideas irrespective of whether or not the new product or product idea is captured by the SAU. Additionally, NBN Co would treat SAU and non-SAU product ideas in a consistent nature, which otherwise was not required.
- *product ideas review process* – NBN Co has clarified the product idea process and the availability of its account managers to assist PDF members with the process.
- *consultation management* – better management of overlapping consultations through enhanced co-ordination of RSP material and product roadmap along with improved clarity in proposed outcomes of product construct papers.
- *consultation feedback* – NBN Co intends to ensure additional confidence in the transparency of the PDF by allowing members to self-publish submissions to the updated PDF portal and by publishing a summary of submission numbers (both public and confidential). NBN Co will also trial providing more detailed feedback in its closure papers to provide PDF members with a clearer view on how issues have been considered.
- *constraints of confidential information* – NBN Co retained its view that maintaining RSP and NBN Co information through strict confidentiality requirements was necessary. It considers PDF discussions should be restricted to its members rather than open to the public for two reasons: first, it would limit the ability of PDF members to provide open feedback; and secondly, an open forum would increase the complexity of managing the consultation process.
- an annual review of the PDF will be conducted to enable continuous improvement and ensure that the forum is operating as effectively as possible for both PDF Members and NBN Co.³¹

4.3.3. ACCC views

When the ACCC accepted the SAU in 2013, we set out some of the aims of the PDF arrangements and the intended outcomes that could be delivered to access seekers through these arrangements. We considered that the PDF arrangements would help to promote open discussions between NBN Co and PDF members to support the development of products that were desired by access seekers. In turn, this information sharing through the PDF would help to promote the economically efficient use of infrastructure and investment. We also expected that the PDF would help to reduce information asymmetries that would otherwise exist without a process in place for NBN Co and access seekers to discuss product ideas, noting there would need to be appropriate processes in place for the treatment of confidential information.³²

The ACCC notes that the PDF and supporting processes have been used frequently by NBN Co to consult with PDF members on new product ideas. The operational experience to date

³⁰ As noted in Telstra's submission (see p. 2), NBN Co is not required to use the PDF to consult on pricing proposals. The ACCC is considering improvements to NBN Co's pricing in separate processes.

³¹ NBN Co, *Submission to the ACCC – Variation to the NBN Co Special Access Undertaking*, 13 November 2020, pp. 3-6. See NBN Co's submission for a complete list of improvements.

³² ACCC, *NBN Co Special Access Undertaking Final Decision*, p. 76.

has helped to identify aspects of the PDF that can be improved to deliver better outcomes. In addition, stakeholder submissions identified some areas where the PDF could be enhanced by improving information sharing and the discussion of product ideas between NBN Co and PDF members.

As mentioned above, NBN Co has made a series of changes to the PDF arrangements following our initial consultation process. We consider that NBN Co's review of its PDF arrangements more generally has led to improvements to its PDF arrangements and addresses some of the concerns of stakeholders regarding transparency and consistency.

We note that the improvements to the PDF and supporting processes have been made without the need for any further changes to the PDF processes set out in the SAU. However, we consider that extending the PDF processes will provide an effective framework for NBN Co to implement its improvements for the rest of module 1. We are satisfied that extending these provisions to the end of module 1 will promote the long-term interests of end-users and the associated terms and conditions are reasonable.

In reaching our decision we have considered the following in our assessment:³³

- The extent to which NBN Co's improvements to the PDF arrangements will foster better engagement between NBN Co and PDF members to improve the development and supply of products that access seekers are willing to pay for. This promotes the economically efficient use of, and investment in, the NBN. We consider the interests of those that use the declared services will be better served through more open and transparent discussions and feedback between NBN Co and PDF members.
- The extent to which NBN Co's improvements to the PDF arrangements will increase the sharing of information and foster consultation about the development and variation of products, prices, technical attributes and service levels for new products. This will reduce information asymmetries between NBN Co, access seekers and consumer advocacy groups and enhance the prospect of aligning supply and demand. This goes towards promoting the economically efficient use of the NBN and promoting efficient investment by both NBN Co in its infrastructure and access seekers in their own downstream infrastructure.
- The extent to which the SAU imposes appropriate obligations on NBN Co, access seekers and consumer advocacy groups about the process of developing and varying products, including the treatment of confidential information and intellectual property. This goes towards encouraging efficient investment in infrastructure, and having regard to NBN Co's legitimate business interests and the interests of those that use the declared services.

We acknowledge ACCAN's concerns about the treatment of confidential information, which restricts its ability to consult with its members. We note ACCAN's suggestion that the PDF should adopt a more open public process.³⁴ We agree that there are likely to be benefits from increased transparency, particularly if PDF members are able to view other members' submissions and the feedback they receive from NBN Co. However, we recognise that appropriate confidentiality will still be required to protect commercially sensitive information. We would welcome further consideration from NBN Co about how reasonable requests to share information can be accommodated.

In summary, we consider that NBN Co has made, or has proposed to make, a number of significant improvements to its PDF arrangements. These include improvements to transparency and consistency of the PDF process, which were some of the main concerns

³³ We note that most of this consideration remains relevant to that in our 2013 SAU final decision and consider that the improvements NBN Co has proposed to make to the PDF arrangements would strengthen the PDF and lead to better outcomes for NBN Co and PDF members.

³⁴ ACCAN, *Variation to the NBN Co Special Access Undertaking – expiring non-price provisions consultation*, 10 June 2019, pp. 11-12.

raised by stakeholders. NBN Co has been able to implement these improvements without the need to vary the PDF processes that are set out in the SAU. NBN Co has also committed to an annual review of the PDF, which will be an important process for ensuring that the framework continues to operate effectively. We consider that the new PDF arrangements should provide an appropriate framework to continue until the end of module 1 of the SAU. Therefore, we consider that extending the PDF processes will provide an appropriate framework until 30 June 2023 and meet the relevant statutory criteria.

5. ACCC's final decision to accept NBN Co's SAU variation to extend the expiration date

The ACCC's final decision is to accept NBN Co's SAU variation to extend the expiration date for the three expired provisions until 30 June 2023. Based on our assessment against the relevant criteria set out in section 3 of the report, we consider that it is reasonable and in the LTIE for these provisions to operate until the end of module 1.

When we accepted the SAU in 2013, we considered that the SAU provisions that are the subject of this variation should be reconsidered after a period of operation to ensure they remained effective and had achieved the desired objectives. The views of stakeholders have assisted our assessment of how the provisions have operated to date and whether they should be extended.

We consider that the improvements NBN Co has made to its PDF processes, and the further changes to which it has committed, address some of the key concerns raised by stakeholders about the PDF framework. We consider that the PDF provisions are reasonable and it would be in the LTIE for them to operate until the end of module 1.

While the dispute resolution framework has not been used to date, we consider that it remains an important element of the SAU and consider the provisions are reasonable and it would be in the LTIE for these provisions to operate until the end of module 1.

The endorsed network change customer engagement processes provide a mechanism to assess the prudence and efficiency of NBN Co's capital and operating expenditure, and their operation until the end of module 1 is in the LTIE.