OPTUS

Submission in response to
ACCC Consultation Paper

Proposed variation to the NBN Co Special Access Undertaking

Public Version

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Section 1. EXECUTIVE SUMMARY

1.1 The NBN has a critical role to play in Australia's digital future and delivering the economic and social benefits that can flow from the digital economy. Building the NBN has been a major task but building the network does not by itself deliver these benefits. After spending more than $50bn on the infrastructure, it is critically important to the future of Australia that the pricing model and service levels support the potential of the NBN.

1.2 Optus submits that the regulation of NBN should focus on the wider economic and social benefits of the NBN rather than focusing narrowly around achieving a predetermined rate of return. To do this, the regulatory regime must support the efficient utilisation of this important national infrastructure.

1.3 The proposed variation to NBN Co's Special Access Undertaking (SAU) does not do this. Optus considers the proposed variation falls considerably short of what is needed to promote the long-term interests of end-users (LTIE) and should be rejected.

1.4 NBN Co is proposing a regulatory regime that would apply to 2040. Locking in a regime for such a long period of time is unreasonable and introduces material risks of unintended consequences that could lead to material detrimental outcomes for consumers and businesses. For such a regime to be considered reasonable, it must include robust processes that ensure efficient costs and prices, minimum service levels that promote the interest of consumers, and provide clear rules over the roles and responsibilities of the ACCC and NBN Co. Importantly, it should also seek to maximise the economic and social benefits from this infrastructure by ensuring it is used to its fullest capabilities by consumers and businesses.

1.5 The SAU falls well below these goals. And rather than adopt a regulatory system that is even consistent with accepted practices, NBN Co has offered a set of complex and obtuse processes which appear designed at limiting independent oversight and review. Further, NBN Co has offered no evidence that its proposed pricing reflects the efficient costs of the NBN, nor that the pricing would result in the efficient utilisation of the NBN.

1.6 NBN Co's proposal is at odds with regulatory best practice, the legislative criteria and ignores all ACCC and industry feedback that was provided during industry workshops over the last twelve months.

1.7 The proposed SAU variation should rejected for the following reasons:

(a) There is no link between the modelled costs of the NBN and the wholesale prices proposed in the short to medium term.

(b) Proposed pricing is likely to further depress the use of NBN — both in terms of number of connections and consumer usage.

(c) There is no commitment to a base level of service against which efficient costs can be assessed nor to delivering a level of service that meets customers' expectations.

(d) The proposed provisions that allow for ACCC oversight are unnecessarily complex and prescriptive, which will likely have the effect of preventing effective oversight.

(e) Insufficient evidence has been presented as to whether the recovery of fixed and sunk costs sufficiently minimises the efficiency loss associated with above marginal cost pricing.

NBN Co should not expect to recover its full historic costs

1.8 Notwithstanding the considerable costs required to roll out the NBN, Optus does not support NBN Co being able to recover its full historic costs. While some proportion of historic costs should be allowed, a blanket guarantee that all costs incurred be recovered is not consistent with the legislative criteria and is not consistent with competitive market outcomes nor promoting the greatest use of the NBN by consumers and businesses.

1.9 NBN Co should not be permitted to recover inefficient costs incurred during the NBN build. There is little doubt that NBN has made inefficient build decisions; costs such as the payments made to Telstra and Optus should not be recoverable nor should any inefficient overbuild of NBN Co's own network infrastructure. The recovery of such costs will only result in underutilisation of what was intended as a national asset crucial to achieving Australia's digital economy goals and wider economic and social benefits.

1.10 The focus of this SAU should prioritise generating enough revenue so it can continue upgrading and investing to meet future demand rather than prioritising the achievement of set commercial returns.[1] NBN services need to be provided at the lowest possible costs to ensure all Australians have affordable access to good quality broadband and all the associated benefits of greater access to digital services thereby helping to deliver the initial NBN policy objectives.

Proposed pricing will lead to poor outcomes

1.11 The proposed SAU will result in material price increases for consumers at a time when Australians are facing significant cost of living pressures. NBN Co pricing will likely lead to double digit price increases across the most used NBN products.

1.12 The combined impact of these price changes is that RSPs will need to utilise the 25 Mbps service to keep retail prices at the current 50 Mbps retail level. As a result, Australia will likely see even less efficient usage of the NBN – a network that is capable of delivering superfast 1 Gbps services could result in many consumers moving back down to 25 Mbps maximum speeds. This is neither consistent with the LTIE nor the objectives of the NBN.

1.13 Even more concerningly is the recognised disconnect between NBN Co's pricing model and the underlying costs as well as current or future demand. The ACCC must resist pressure to allow for NBN Co to continue to raise its prices on the basis that it must recoup potentially imprudent and inefficient costs incurred during the national rollout phase. Failure to address this issue will only perpetuate NBN's incentives to over recover, leading to higher prices that will ultimately force end-users off the network.

There is a better approach

1.14 It does not have to be this way. It is possible to deliver wholesale pricing that results in a triple-win outcome – a win for consumers (who get better services, meeting the needs of modern digital lifestyles); RSPs (who are able to provide non-loss making services); and the NBN (who is able to generate positive returns through achieving the required ARPU levels).

1.15 Optus has proposed alternative pricing which enable NBN Co to maintain its expected revenue growth through fixed AVC-only wholesale prices. It is time to reject the "same for more" price structure, where NBN Co receives revenue growth automatically.

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[1] Former ACCC Chair Rod Sims, Senate Estimates, February 2022

Revenue growth should come from a "more for more" model, encouraging customers to move up speed tiers. To achieve this, the price differential between standard NBN plans (50 Mbps) and high speed tiers high speed tier plans (100 Mbps and above) should be reduced.

1.16 This is the price model that the current Chair of NBN implemented when she ran Chorus, New Zealand's NBN equivalent. In New Zealand the most common plan is now 300/100 Mbps which shows there is benefit from increasing overall speeds for consumers. This is the pricing model that should be adopted in Australia.

The ACCC must reject this SAU variation and directly regulate

1.17 Optus submits there are sufficient reasons for the ACCC to assess the proposed SAU as failing to meet the legislative criteria. Importantly, in its current state, the ACCC does not need to take a view on whether the BBM and associated costs reflect efficient costs. The proposed pricing, lack of service level commitments, and ineffective mechanisms for ACCC review, by themselves result in the proposed SAU being inconsistent with the legislative requirement to be reasonable and promote the LTIE.

1.18 Whilst pricing is an important aspect of the SAU, it cannot be considered in isolation to non-price terms and conditions and specifically NBN's service performance. The current NBN service levels fall a long way short of customer expectations, especially given the importance of broadband services to all aspects of society and the economy. As an example, expecting customers to live with multiple drop-outs over several days before a fault situation is triggered is simply not acceptable. Continual poor performance coupled with material price increases in simply not good enough. The proposed SAU does not contain sufficient mechanisms to achieve a set of modern day and fit for purpose service levels and performance standards

1.19 The ACCC should reject the proposed SAU as NBN Co has failed to discharge its legislative obligation to demonstrate the proposal is reasonable. Optus recommends that the ACCC intervenes directly and issue an Interim Access Determination to set prices and minimum service levels that promote maximum usage of the NBN. Optus submits the IAD should adopt the pricing structure used in New Zealand which has demonstrated how properly managed wholesale pricing can deliver positive outcomes for consumers, retailer and wholesale networks.

Section 2. PROPOSED PRICING IS NOT REASONABLE

2.1 When assessing whether the proposed price and price control framework promotes the LTIE, the ACCC must have regard to the extent to which they are likely to result in the achievement of the three objectives:

(a) Promoting competition in markets for listed services;

(b) Achieving any-to any connectivity; and

(c) Encouraging the economically efficient use of and investment in infrastructure used to supply (or likely to become capable of suppling) the services.

2.2 This section discusses the key elements that must be assessed when undertaking this assessment.

(a) First, the correct approach to assessing whether prices are efficient is discussed.

(b) Second, we show that the failure to base prices on efficient costs means the ACCC cannot a priori assess the proposed pricing as meeting the legislative criteria.

(c) Third, the ACCC must then have regard to the likely impact the pricing has on downstream markets and consumer impacts. This section shows the proposed pricing will lead to material retail price increases and to a chilling of demand for NBN services and usage of broadband over the NBN. We examine the pricing impacts against the criteria agreed to in the set of industry working groups.

(d) Fourth, this section outlines why the proposed BBM is largely irrelevant since it has no impact on actual outcomes in the market. Specifically, there is no mechanism to ensure inputs are efficient and there is no mechanism to ensure outputs lead to real world outcomes (i.e. prices).

(e) Fifth, we show that NBN Co has not answered the pertinent question with respect to recovery of fixed and sunk costs – whether it minimises the efficiency loss associated with above marginal cost pricing.

2.3 Finally, Optus notes that industry's assessment of these proposals have been hampered by NBN Co's reluctance to release its modelling for review. The model was only made fully available for review on 13 July, just one week before submissions were due. Such limited review does not enable meaningful comments by interested parties. However, this works against NBN Co as it has the burden to demonstrate to the ACCC that the proposed SAU is reasonable and promotes the LTIE. Optus' (and others') inability to provide detailed comments on the modelling is a result of NBN Co's actions and as such the ACCC cannot be confident that the evidence before it is suitable as a consequence of this inadequate consultation. The ACCC should not assess the evidence as being reasonable.

2.4 In conclusion, Optus' analysis shows that NBN Co has not discharged its obligations to demonstrate that its SAU pricing proposals are reasonable. The ACCC must therefore reject the proposed SAU.

What are efficient prices?

2.5 The ACCC has to assess the proposed pricing arrangements (level, structure and future change processes) against the legislative criteria. In assessing the impact on efficiency, the ACCC notes that that it will examine efficiency from an economic perspective which consists of three components:

(a) 'Productive efficiency' which is the efficient use of resources within each firm to produce goods and services using the least cost combination of inputs;

(b) 'Allocative efficiency' which is the allocation of goods and services across the economy in a way that is most valued by consumers. It can also refer to the allocation of production across firms within an industry in a way that minimises industry-wide costs; and

(c) 'Dynamic efficiency' refers to the efficiencies flowing from innovation leading to the development of new services or improvements in production techniques. It also refers to the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time.[2]

2.6 The Competition Tribunal has commented that productive and allocative efficiency related to "the most efficient use of the resources and technology currently available to a firm, in any given time period."[3] Furthermore, allocative efficiency will be "best promoted where the price of a service reflects the underlying marginal cost of providing the service."[4]

2.7 Dynamic efficiency is a concept that involves consideration of adaptation by firms to the evolving supply and demand forces in the market.[5] It involves two elements:

(a) Preserving incentives for innovation and investment;[6] and

(b) Ensuring ongoing competition which forces firms to seek to improve their goods or develop new goods as part of the battle.[7]

2.8 Dynamic efficiency takes into account investment decisions by the access provider, now and in the future. This requires regulated prices to be set at levels allowing recovery of efficient investments (irrespective of whether they are sunk). Specifically, dynamic efficiency takes into account the trade-off between short term and middle (or long) term dimensions in order to guarantee adequate returns to an investment.

2.9 Dynamic efficiency also looks at competitive entry and the additional competitive pressure to reduce costs over time. This takes into account the chilling effect on competitive investment as a result of high access prices leading to less-than-optimal levels of independent infrastructure investment.[8] Higher access prices would promote further investment by access providers, but may also discourage competitive investment by access seekers.

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[2] ACCC, Proposed variation to the NBN Co Special Access Undertaking - Consultation paper, May 2022 pp. 14-15.
[3] Re Qantas Airways Ltd [2004] ACompT 9 (12 Oct 2004), [160]
[4] Re Telstra Corp Ltd [2006] ACompT 4 (June 2006), [94]
[5] Re Qantas Airways Ltd [2004] ACompT 9 (12 Oct 2004), [159]
[6] Re Duke Eastern Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), [63]
[7] Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009), [33]
[8] Application by Telstra Corp Ltd [2009] ACompT 1 (22 May 2009), [156]

2.10 Efficiency considerations (allocative, productive and dynamic) typically lead to pricing which is based on long run marginal costs (LRMC) – where marginal cost principles promote allocative efficiency and the long run time perspective captures dynamic efficiency considerations.

2.11 We also observe that this same economic reasoning was confirmed and used recently by the Tribunal.[9] The Tribunal acknowledged that marginal cost pricing for natural monopolies, with fixed sunk costs, is not sufficient to promote continued investment. Efficient pricing should allow for recovery of some portion of sunk costs. The Tribunal made no comments on the amount or value of the sunk costs that should be recovered, but noted that recovery of sunk costs attracts an inefficiency due to the above marginal cost price level. The Tribunal observed that recovering sunk costs:

> *… carries an inefficiency: users will, at the margin, use less of the service than they would if it were charged for at marginal cost, and that reduction in usage has an economic cost to the community*[10]

2.12 This is consistent with the detailed reasoning above. Economics is clear on this – short term efficiency is maximised by marginal cost pricing, but this may have implications for dynamic efficiency in the medium-long term in the presence of fixed costs. The question for the ACCC becomes a balancing act between the allocation/productive inefficiencies created by above marginal cost pricing and the investment/dynamic efficiencies promoted through fixed/sunk cost recovery. In other words, while investment incentives should be retained, there is little long-term benefit in enabling a gold-plated network that results in prices too high for consumers to properly utilise.

2.13 The relevant question is not whether sunk costs should be recovered, but what is the appropriate amount that maintains the incentive for efficient ongoing investment while still promoting the efficient utilisation of the NBN by Australian consumers. This is the key issue for the ACCC in its assessment of the pricing elements of the proposed SAU.

<u>What does this mean for NBN pricing?</u>

2.14 With the transition from build to steady state, NBN Co is at an inflection point. For the last decade of the existing SAU, NBN Co has focused on building the NBN. However, with the NBN completed, the focus should be on efficient utilisation of the NBN and ensuring revenue is sufficient to maintain the network. There are two clear questions for efficient pricing:

(a) what is the level of forward looking LRMC that is required for ongoing efficient services and investment; and

(b) how to treat historic costs so as to maintain incentive for ongoing investment while not damaging incentives of customers to use the network.

2.15 The question for the ACCC to assess is how do these efficient costs flow through to pricing and customer usage of the NBN. In other words, does the price level and structure reflect efficient costs and does it promote the LTIE.

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[9] Application by Port of Newcastle Operations Pty Ltd [2019] ACompT 1 [339]-[356]
[10] Ibid., at [356]

2.16 Optus strongly recommends that most effective and efficient approach to determining prices that promote the LTIE is to:

(a) Determine the LRMC of NBN ethernet services in the fully built steady state environment;

(b) Set wholesale prices on the basis of these LRMC;

(c) Assess the extent to which historic losses should be recovered with regard to dynamic efficiency and ongoing competition and consumer benefit;

(d) Recover these across wholesale prices in a manner which minimises the welfare losses associated with above LRMC prices.

2.17 We assess the pricing elements in NBN Co's SAU application using these criteria below.

2.18 Importantly, NBN Co has the evidentiary burden to demonstrate to the ACCC that its SAU proposal meets the above criteria. Where NBN Co has not done so, the ACCC cannot be confident that the undertaking is reasonable and must then reject the application.

NBN pricing proposals

2.19 NBN Co proposes to replace its main product and pricing constructs. In particular, NBN Co's SAU variation proposal includes:

(a) A new flat monthly charge construct for residential grade 100 Mbps and higher speed offers. These speed tiers currently make up less than 20% of NBN residential grade services.

(b) For most other residential grade offers of 50 Mbps or less (covering more than 80% of current NBN residential grade services), new bundled offers that provide for access and a CVC utilisation allowance. For the bundled offers, if the bundled CVC allowances are exceeded in aggregate, a volumetric CVC charge of $8/Mbps/month applies to the CVC overage. CVC use for these products will be determined and charged for on the basis of peak utilisation rather than peak provisioning.

(c) CVC allowances in the bundled offers (excluding the 12/1 Mbps products) could be adjusted every 6 months. This would be an automatic adjustment equal to 50% of the change in average aggregate peak CVC utilisation for a preceding 6 month period compared to the same period in the year prior divided by two (to reflect the adjustment is applied for a 6 month period).

(d) Changes to its entry level broadband pricing to provide closer alignment of the 25 Mbps offer to the 12 Mbps offer, (compared to the existing SAU and WBA4 commercial offers).

(e) A proposed new 12 Mbps voice-only offer priced initially at $12 per month.

2.20 These changes are proposed to apply for the remainder of the SAU term until 2040, subject to other provisions allowing for the substitution of new price offers and the annual adjustment of prices under the price controls.

Optus views

2.21 NBN Co has failed to provide evidence to demonstrate that the proposed prices promote the LTIE. The first test – that prices reflect the efficient cost of service (LRMC) – is not established due to there being no connection between the prices proposed and the BBM supplied by NBN Co.

2.22 Where it cannot be established that the proposed pricing reflects efficient costs, the ACCC should look at other factors to assess whether the pricing promote the LTIE. Optus submits that the ACCC should take a principles-based approach to pricing. Specifically, pricing structure and levels should provide incentives that:

(a) Encourages the efficient utilisation of the network,

(b) Provides certainty for RSPs over time; and

(c) Allows NBN Co to grow its ARPU to support ongoing efficient maintenance and investment in the network ('more for more').

2.23 These principles reflect the issues that have been discussed with NBN Co, industry and the ACCC during the industry workshop held during 2021. There was agreement amongst RSPs that these are the appropriate principles against which pricing should be assessed.[11]

2.24 These principles are not new. In 2017, we asked Frontier Economics to provide its expert views on the NBN pricing structure. While the report is now five years old, Frontier's expert views remain valid. The recommendation of the report was to materially reduce or remove the variable charge component of NBN pricing to promote more efficient utilisation of the NBN. Frontier Economics stated the benefits of the NBN:

> *… flow from the use of broadband services which the NBN will make available. Access to the network is not enough. To deliver on these objectives, the NBN must support the future demand of consumers for high speed broadband. This, in turn, means that usage of the network must be affordable and designed to promote such usage.*[12]

2.25 Importantly, Frontier recommended that any "*new pricing approaches should be evaluated based on how these change the combination of economic and social returns rather than solely whether the NBN will be less profitable under the new pricing approach*." Further, Frontier stated:

> *The NBN's greatest advantage over competing technologies is its ability to handle very large amounts of data throughput at low additional cost. The pricing model adopted by NBN Co should accentuate this advantage rather than neutralise it by charging excessively for data throughput.*[13]

2.26 NBN pricing should be assessed against how it accentuates this advantage rather than neutralise it by charging excessively for throughput. Frontier recommended several improvements to the pre-2017 NBN price structure, options including bundles, materially lower CVC levels, and no CVC pricing.

2.27 Optus acknowledges that the last change in the wholesale pricing structure (the introduction of bundles in 2017) improved the outcomes of the NBN. However, that was five years ago and the market has continued to move with drastically increased usage and throughput expectations. Incremental CVC price levels remain high ($8/Mbps far

[11] These principles reflect the principles agreed to in industry workshops during 2021, as reflected in the ACCC Summary of industry working groups report.
[12] Frontier Economic, 2017, Realising the objectives of the NBN: A new pricing approach, p.6
[13] P.3

above the marginal cost) and NBN Co has refused to increase included CVC within bundles which will drive increased costs and retail prices.

2.28 It is time for another change and to remove CVC all together to finally unleash the potential of the NBN.

NBN proposals

2.29 NBN Co proposes new individual product price caps to apply to the new product offers over the remaining undertaking term and a modified annual revenue cap.

2.30 The proposed caps on the annual movement in individual product prices vary between products or product groups and comprise:

(a) flat monthly charge offers: CPI+3% per financial year for the first regulatory period and the greater of CPI or 3% in subsequent regulatory periods;

(b) bundled product offers: CPI for the bundle product prices over the SAU term;

(c) CVC overage charge of $8/Mbps: no ability for NBN Co to make nominal or real increases over the SAU term;

(d) all other offers: CPI-1.5% per financial year over the SAU term that applies at present.

SAU pricing results in material price increases for consumers

2.31 Optus has applied the proposed SAU pricing to our forecasted and planned customer base and customer usage profiles. It is clear that the proposed wholesale pricing will result in material retail price increase for the 50 Mbps tier (which represents 79% of the Optus base and 55% across all of industry).

Figure 1 **[CIC]**

Source: NBN SAU

2.32 The proposed SAU pricing has the following important implications.

2.33 First, the relative cost differential between the 25 Mbps and 50 Mbps tiers is materially increased. Currently, the cost to provide 25 Mbps and 50 Mbps differs by a small amount **[CIC].** Currently, this incentivises RSPs to offer 50 Mbps as the base product in the market. However, the impact of the large price increases for 50 Mbps services **[CIC]** relative to 25 Mbps services **[CIC]** reverses this incentive for RSPs. The impact of the proposed SAU pricing promotes the 25 Mbps tier as the main retail product.

2.34 The combined impact of these price changes is that RSPs will need to utilise the 25 Mbps service to keep retail prices at the current 50 Mbps retail level. In other words, if consumers do not wish to face material price increase, they will need to move down to the 25 Mbps speed tier. As a result, Australia will likely see even less efficient usage of the NBN – a network that is capable of delivering superfast 1 Gbps services could result in many price conscious consumers moving back down to 25 Mbps maximum speeds. This is neither consistent with the LTIE nor the policy objectives of the NBN.

2.35 A further impact of greater use of the 25 Mbps product is that the variable CVC component remains a large proportion of the total service cost. This undermines the aim to provide greater certainty to RSPs.

2.36 Second, households that wish to maintain their current level of service and remain on the 50 Mbps speed tier, will face material retail price shocks over the next two years. For Optus, the wholesale cost to provide 50 Mbps services increases by **[CIC]** in June 2024. This will directly flow through to retail price increases.

2.37 It is reasonable to expect consumer reaction to this material price increase in the NBN product that the majority of the market consumes. As noted, we expect that the majority of consumers currently on 50 Mbps plans may choose to maintain the current retail spending and move down to 25 Mbps retail plans.

2.38 Third, the proposed pricing provides limited incentives for consumers to move beyond 100 Mbps services. The wholesale price for the 250 Mbps plan increases by **[CIC]** over the period to FY24. Such a drastic increase will not encourage consumers to move up speed tiers. Optus understands one of the objectives of the price changes is to move consumers onto high-speed tiers – this could be a result of the initial June 2023 pricing, with the 100 Mbps wholesale tier cost moving to $60 – but this effect will soon be negated by the price growth through the SAU. Importantly, the difference between the 50 Mbps and 100 Mbps tiers is reduced not by making 100 Mbps more attractive, but by drastically increasing the cost of the 50 Mbps product. Optus expects that consumers will find it increasingly difficult to justify the incremental jump to 100 Mbps plans given the increasing cost of 50 Mbps plans.

2.39 Fourth, the proposed pricing will continue to encourage inefficient NBN bypass to mobile based broadband products. Optus has consistently argued that 5G and 4G fixed wireless should **not** be substitutes for fixed broadband in a competitive market. A key reason consumers choose fixed wireless over fixed broadband is the poor quality and high price of the NBN. Unfortunately, rather than fix the issues with the NBN product, we observe that NBN Co is forecasting in the SAU documents continual movement towards fixed wireless stating that it expects net churn to 4G and 5G network operators of 3.1% in FY23 (263,000 customers) and 3.3% in FY24 (283,000 customers). This amounts to ~$10 to $14m of revenue per month lost for FY23 and double in FY24 as a result of NBN network performance and pricing decisions.

2.40 Optus believes there are very clear market implications as a result of the proposed SAU pricing:

(a) Customers that remain on the NBN 50 Mbps tier could see significant **[CIC]** price increases over the next two years.

(b) A material number of the existing NBN 50 Mbps customer base will likely move down to the NBN 25 Mbps speeds in order to maintain their current retail spending.

(c) There will be limited movement to 100 Mbps and above tiers due to the high price point of the 100 Mbps tier and the large price steps between the 100 Mbps and 250 Mbps tiers.

(d) Inefficient bypass of the NBN by mobile services will increase due to the perceived poor value of the NBN.

2.41 The analysis of the impact on Optus' costs and retail pricing shows that the proposed SAU pricing is unlikely to promote the LTIE. First, there is no evidence that the prices reflect the efficient costs of the NBN. Further, the proposed prices are likely to result in less usage of the NBN – in terms of lower speed tier and likely lower bandwidth usage. Furthermore, it is likely to incentive MNOs to further promote inefficient bypass of the NBN by mobile services. None of these outcomes promote the LTIE and are therefore not reasonable.

There is a better way forward

2.42 Optus has learnt from customer behaviour in relation to NBN pricing changes. We support the principles outlined by industry and the ACCC in the 2021 industry workshops. We repeat that pricing structure and levels should provide incentives that:

(a) Encourage the efficient utilisation of the network,

(b) Provide certainty for RSPs over time; and

(c) Allow NBN Co to grow its ARPU to support ongoing efficient maintenance and investment in the network ('more for more').

2.43 We believe it is possible to deliver wholesale pricing that results in a triple-win outcome – a win for NBN Co, a win for retail industry and a win for Australian consumers.

2.44 Optus considers that NBN can still achieve its yearly revenue targets with an AVC-only construct across all tiers, which will provide much needed certainty for RSPs and retail pricing. This can be achieved through cheaper prices for individual wholesale speed tiers which will enable consumers to upgrade their speed plan and enable NBN to retain more consumers on their network. Optus predicts that our proposed pricing would further increase the mix of high speed tiers (100+ Mbps) to 26% in FY23.

2.45 Further, we consider that NBN Co is able to meet its revenue growth target – not through guaranteed CPI-based price increases, but rather by giving consumers better products and enabling consumers to choose to move up the NBN value ladder. Incentivising this behaviour should be key to the ACCC's thinking.

2.46 Optus proposes a model that:

(a) Adopts AVC-only pricing to ensure certainty around wholesale pricing for RSPs;

(b) Allows NBN ARPU growth through a "more for more" approach and upselling;

(i) No "same for more" price rises to improve NBN profitability, growth should come from a "more for more" model, moving customers up speed tiers

(ii) Reduce price differential between standard NBN plans (50 Mbps) and high speed tiers (HST) plans (100+ Mbps) to move customers up speed tiers

(iii) Increase upload speed on higher end plans to provide customers more value to upgrade and therefore increase revenue

Optus data shows that adopting these recommendations would likely lead to material upgrade potential for NBN Co. **[CIC]** In New Zealand the most common plan is now 300/100 Mbps which shows that when the pricing is appropriate, consumers do take up higher speed tiers with higher upload speeds.

(c) Supports entry level pricing;

(i) Lower pricing on lower speed tiers (25/5 Mbps) to reduce the digital divide between high income and low income earners.

(ii) The current wholesale cost between 25/5 and 50/20 speed tiers (including some estimated overage) results in $1-2 saving for

RSPs, removing the commercial incentive to offer 25/5 Mbps at a lower entry price point for Australians.

2.47 While it is not necessary for the ACCC to set efficient pricing in this regulatory process, Optus observes that there are numerous pricing proposals that would promote the efficiency criteria while **still maintaining** NBN Co's revenue targets in its business plan. In other words, even if we accept that NBN Co's revenue targets represent the efficient cost-recovery profile (which Optus notes NBN Co has failed to provide sufficient evidence to support), it is possible to set prices that result in outcomes that promote the LTIE, rather than those proposed in the SAU variation which leads to outcomes that do not promote the LTIE.

2.48 Optus submits that wholesale AVC-only pricing with reduced variance between speed tier prices can deliver NBN revenue targets by shifting ~8% of the current base to high seed tiers (100 Mbps and above) by FY23, equivalent to 710,000 additional services shifted onto NBN 100+ Mbps plans.

2.49 This can be achieved by lowering SAU pricing on NBN 50Mbps and HST pricing by ~$5. Optus believes that significant shifts in the wholesale speed tier mix is achievable based on previous campaigns:

(a) **[CIC]**.

(b) **[CIC]**

(c) NBN Focus on 50 campaign delivered significant uplift to the 50 Mbps speed tier

2.50 Optus' proposed pricing alternative is shown below. Importantly, it removes the need for prices increases on the 50/20 Mbps tier to maintain profitability. In other words, NBN Co's revenue growth comes from consumers **choosing** to pay more because they see value in the product (i.e. they are getting 'more for more') – rather than being **forced** to pay more through mandatory CPI or usage linked price increases.

2.51 Optus has estimated the potential wholesale market shift across speed tiers as a result of an AVC-only wholesale market, with low level entry pricing and appropriate price differentials between speed tiers. The impact on NBN revenues for FY23 is shown below. We note that the estimated revenue is consistent with the $430-450m revenue target NBN Co has for FY23.

Figure 2 Proposed priicng FY23

Plan Type	Price ($)	Current Mix (%)	Implied Service (#)	Target Mix (%)	Target Services (#)	Vol Shift Required (#)	Monthly Revenue ($m)
Voice Only	**$12**			5%	0.44m	+0.44m	$5.3m
12/1	**$30**	10%	0.88m	0%		-0.88m	$0.0m
25/5 (BYO)	**$45**	14%	1.21m	20%	1.76m	+0.55m	$79.2m
50/20	**$48**	58%	5.13m	49%	4.31m	-0.82m	$207.0m
100/20	**$55**	16%	1.37m	14%	1.23m	+0.39m	$67.8m
100/40	**$60**			6%	0.53m		$31.7m
250/25	**$65**	2%	0.16m	4%	0.35m	+0.19m	$22.9m
1000/50	**$75**	1%	0.05m	2%	0.18m	+0.13m	$13.2m
Total		**100%**	**8.80m**	**100%**	**8.80m**	**0.00m**	**$427.0m**

Source: Optus

2.52 We further forecast that this pricing will lead to further revenue growth in FY24 as more consumers move up speed tiers. Based on our retail experience, we forecast material wholesale revenue growth based purely on consumers choosing to upgrade their speed tiers. This process could growth NBN Co's FY24 revenue by 13% to $483.5m.

2.53 For NBN to achieve our estimated FY24 Revenue Objectives without an increase in our proposed pricing, NBN will need to shift ~30% of the current base onto high speed tiers (100 Mbps and above), equivalent to ~2.7m additional services.

2.54 We acknowledge that this may be challenging given the context that a significant proportion of the footprint (copper-based access technology) is unable to achieve these speeds. NBN Co has been provided additional funding by Government to invest further in fibre access lines. However, this proposed pricing approach would encourage NBN Co to efficiently use this extra capital to roll out fibre where it is needed and where customers demand it.

2.55 We note that our estimate of NBN Co's FY24 Revenue target is based on the assumption that NBN Co will increase prices in FY24 by the full amount allowable under the SAU Price Cap formula (CPI + 3%, where CPI = 3%). We acknowledge that NBN Co may not intend to increase prices in FY24 by the full allowable amount under the SAU Price Caps, which means the FY24 revenue objective may be lower than what we have assumed.

Figure 3 Proposed pricng FY24

<table>
<tr><th>Plan Type</th><th>Price ($)</th><th>Current Mix (%)</th><th>Implied Service (#)</th><th>Target Mix (%)</th><th>Target Services (#)</th><th>Vol Shift Required (#)</th><th>Monthly Revenue ($m)</th></tr>
<tr><td>Voice Only</td><td>$12</td><td>0%</td><td></td><td>1%</td><td>0.05m</td><td>+0.05m</td><td>$0.5m</td></tr>
<tr><td>12/1</td><td>$30</td><td>10%</td><td>0.90m</td><td>0%</td><td></td><td>-0.90m</td><td>$0.0m</td></tr>
<tr><td>25/5 (BYO)</td><td>$45</td><td>14%</td><td>1.24m</td><td>12%</td><td>1.08m</td><td>-0.16m</td><td>$48.6m</td></tr>
<tr><td>50/20</td><td>$48</td><td>58%</td><td>5.25m</td><td>40%</td><td>3.56m</td><td>-1.69m</td><td>$170.6m</td></tr>
<tr><td>100/20</td><td>$55</td><td rowspan="2">16%</td><td rowspan="2">1.40m</td><td>27%</td><td>2.43m</td><td rowspan="2">+1.21m</td><td>$133.7m</td></tr>
<tr><td>100/40</td><td>$60</td><td>2%</td><td>0.18m</td><td>$10.8m</td></tr>
<tr><td>250/25</td><td>$65</td><td>2%</td><td>0.17m</td><td>10%</td><td>0.90m</td><td>+0.73m</td><td>$58.5m</td></tr>
<tr><td>1000/50</td><td>$75</td><td>1%</td><td>0.05m</td><td>9%</td><td>0.81m</td><td>+0.76m</td><td>$60.8m</td></tr>
<tr><td>Total</td><td></td><td>0%</td><td>9.00m</td><td>100%</td><td>9.00m</td><td>0.00m</td><td>$483.5m</td></tr>
</table>

Source: Optus

2.56 The purpose of this exercise is to not provide a definitive alternative approach, but to demonstrate to the ACCC that there are alternative reasonable pricing approaches which can deliver NBN Co the revenue target it has set itself (without examining whether these are efficient). There is no reason why NBN Co could not adopt such pricing, which we submit is materially more efficient that the proposed SAU approach and achieves outcomes that promote the LTIE.

2.57 This again demonstrates that NBN Co has not provided sufficient evidence for the ACCC to be confident that the proposed pricing is reasonable and meets the legislative criteria. NBN Co has not attempted to examine alternative pricing approaches, nor has it provided evidence that the proposed SAU pricing is likely to lead to efficient outcomes. As such, NBN Co has failed to discharge its evidentiary burden.

Building Block model

2.58 As outlined above, the legislative criteria require that prices reflect the efficient costs of the NBN. It is necessary to first, identify the marginal costs of providing services over the NBN; and second to assess the minimum necessary mark up to maintain ongoing investment incentives while still maintaining incentives for usage. Typically, regulated entities would offer a BBM (or similar approach) to demonstrate that the proposed price path meet these obligations.

<u>NBN SAU proposals</u>

2.59 NBN Co's SAU variation proposes a similar approach to the composition of the annual building block revenue requirement (ABBRR) and RAB roll forward as the current SAU. Similar to the current framework, NBN Co proposes that ABBRR and its components (including forecasts of operating and capital expenditure) be assessed by the ACCC periodically on an ex-ante basis before the start of each regulatory cycle. NBN Co has also provided forecasts of the ABBRR and its components for an initial regulatory cycle of two years commencing 1 July 2023 and specified them in the SAU variation in Module 3. For subsequent regulatory cycles, the ABBRR and related inputs will be proposed by NBN Co and assessed by the ACCC through the replacement module process.

2.60 NBN Co also proposes to introduce:

(a) additional fixed principles into the SAU in relation to how the values for the RAB and ABBRR for core services are determined. If accepted, these fixed principles would operate alongside existing fixed principles relating to how total RAB and ABBRR are determined.

(b) A ‘financeability’ test as part of its proposed building block model framework.

2.61 Under the proposed ‘financeability’ test, a number of financial indicators would be calculated using the core services ABBRR and other benchmark values for debt and interest expense. These would then be used to calculate an overall rating. If the overall rating fails to meet the necessary threshold for the benchmark credit rating (Baa2), the core services ABBRR would be adjusted upwards to ensure this benchmark credit rating is met. This upward adjustment would take place either by adjusting the return on equity or depreciation profiles.

Optus views

2.62 While NBN Co has offered a BBM, it has not linked the outcomes of the model to efficient prices; nor has it explained how the forward price path relates to BBM outcomes. The ACCC has highlighted this noting it is not clear at which future date the annual price control mechanism would start to operate and that price proposed operate independently of the BBM.

2.63 As noted above, there is no link between the outputs of the BBM and the proposed pricing in the SAU. This leads to the obvious question around how the BBM is able to promote the LTIE if it does not impact pricing. The BBM cannot be regarded as reasonable as it does not reflect the direct costs of providing the service. Optus submits the BBM is not reasonable as it does not reflect the direct costs of providing the service and therefore, does not promote the LTIE.

2.64 Optus further notes that our ability to provide meaningful comments has been hampered by NBN Co’s refusal to provide a model which interested parties could provide comments. A public model was released on 13 July, and as such did not provide sufficient time for review and consultation. NBN Co has the burden to provide sufficient evidence to the ACCC to demonstrate its SAU proposal is reasonable. The failure of NBN Co to provide adequate time for input from interested parties means it has failed to discharge this burden and that the ACCC should not place any weight on the BBM.

2.65 Finally, we submit that the ACCC does not need to make a finding as to whether the BBM proposed in reasonable in its own right. Optus has shown above that even if we assume the annual revenue forecasted by NBN Co is efficient, the proposed pricing through which the revenue is acquired from customers is not reasonable and does not promote the LTIE. In other words, the ACCC can find the BBM to be reasonable but not the SAU on balance due to the detrimental impact of the proposed pricing.

Recovery of Accumulated losses

2.66 One of the main issues for this reasonableness assessment of the SAU is the efficiency of recovering past sunk investments. As outlined above, the test for assessing efficiency of cost recovery in fixed cost industries, like telecommunications, is balancing the extent to which prices need to be set above marginal cost to promote efficient investments, while minimising any above marginal cost mark-up – as it depresses the optimal level of consumption. That is the test that NBN Co must answer.

2.67 However, NBN Co has not provided sufficient evidence on this issue. NBN Co asserts that sunk costs need to be recovered. The discussion in the NBN Co submission focuses on the absolute question that sunk costs must be recovered.[14] Indeed, they have sought the advice of Frontier Economics on this. Yet this is not the correct question as there is no debate whether sunk costs should be recovered – the issue is the extent of recovery, the timing of recovery, the impact on pricing, and the impact on the efficient usage of the assets. None of these questions are answered by NBN Co in its submission; and as such, NBN Co has not provided the evidence required to demonstrate the SAU amendments are reasonable.

2.68 It is important to note that the value of the Initial Cost Recovery Account (ICRA) is not the cost incurred by NBN Co to hold the debt incurred for its past investment. ICRA is a regulated construct with no connection to actual financing costs. Much of the current value of ICRA represents the regulatory WACC value not the actual capital cost and not the associated financing cost.

2.69 As proposed above, for this SAU to reasonable it must:

(a) Determine the LRMC of NBN ethernet services in the fully built steady state environment;

(b) Set wholesale prices on the basis of these LRMC;

(c) Assess the extent to which historic losses should be recovered with regard to dynamic efficiency and ongoing competition and consumer benefit;

(d) Recover these across wholesale prices in a manner which minimises the welfare losses associated with above LRMC prices.

2.70 As discussed above, NBN Co has failed to demonstrate any of these elements. With regard to the efficiency of its proposed historic cost recovery, NBN Co has not provided an estimate of the actual value of its historic costs, nor has it provided an assessment how its proposed recovery minimises the welfare losses associated with above LRMC prices.

2.71 Optus submits there is insufficient evidence before the ACCC for it to assess the SAU proposal as reasonable against the reasonableness criteria. The ACCC must therefore reject the proposed SAU variation.

[14] NBN Co, submission March 2022, s.8.1.3.

Section 3. SERVICE LEVELS

3.1 Optus has concerns that the current framework proposed in the SAU variation will not promote the LTIE. In summary, this is because:

(a) The proposed approach relies on commercial negotiation to set the service level framework in the WBA, yet this approach has proven inadequate in the past for establishing service standards that promote the LTIE;

(b) There are no changes to the existing service level framework in the WBA besides the addition of a new utilisation commitment;

(c) There are no minimum commitments as part of the SAU and no clear linkage between price and service quality; and

(d) There is limited regulatory oversight/backstops in addressing service quality issues.

3.2 Further, NBN Co should be subject to a reporting framework that provides transparency and accountability as monopoly infrastructure providers do not necessarily face the same pressures or incentives to address quality of service issues as operators in a competitive market.

Commercial negotiations have not proven successful at addressing service issues

3.3 NBN Co submits that commercial negotiations are the most appropriate mechanism for setting service level standards.[15] However, Optus' experience of the NBN rollout and in negotiating WBAs over the last decade clearly demonstrates that commercial negotiation taking precedence in establishing service levels does not lead to outcomes that promote the LTIE. It has taken many years and regulatory intervention to start addressing some long-standing service performance issues, and to have in place a more balanced service level framework designed to provide stronger incentives to NBN Co to deliver better experience for end-users.

3.4 Fundamentally, NBN Co is a monopoly and it is extremely difficult to negotiate balanced outcomes when there is such an imbalance of bargaining power. In order to provide national fixed line retail telecommunications products, access to the NBN is required and RSPs must enter into an access agreement with NBN Co. There is no other comprehensive national fixed line access provider.

3.5 In its submission to the Part XIC Regulatory Reform consultation in 2009 (the major reforms to Part XIC ahead of the NBN rollout), the ACCC noted that the incentive for an access provider to negotiate with access seekers depended on two principal factors:

(a) Whether the access provider is subject to competitive constraint; and

[15] NBN Co, NBN Co, NBN Special Access Undertaking Variation 2022 – Supporting submission, March 2022, p. 188.

(b) Whether the access provider is vertically integrated (has a related company operating in the same market for which the access products are an input).[16]

3.6 The ACCC also noted that other determining factors included:

(a) Incomplete information (where one party may have greater information than others) which can introduce strategic behaviour and lead to inefficient outcomes;

(b) The number of industry participants and the complexity of issues (negotiating where there are more than two participants or multiple issues introduces the possibility of delay and an inefficient outcome); and

(c) The credibility and extent of the regulatory backstop if the negotiation fails – negotiated access is more likely to occur where the potential for regulatory intervention is perceived as credible.[17]

3.7 While NBN Co is not vertically integrated, it is still the monopoly last mile fixed line access provider and there is no other national fixed line access provider acting as a competitive constraint on NBN Co.

3.8 Additionally, there are significant information asymmetries between NBN Co and access seekers, a high number of industry participants, complex issues and increasingly complex access terms, as well as a lack of clarity in regulatory oversight.

3.9 Optus' experience of negotiating WBAs over the last decade demonstrates that the majority of the factors noted above are present and give rise to a significant imbalance in bargaining power which continues to negatively impact RSPs, competition and end-users. This imbalance in bargaining power is evidenced by the delays in addressing service level and rollout issues that have led to poor end-user experience.

3.10 For example, since negotiations for the first wholesale broadband agreement began, Optus has requested for improvements in the service level framework to ensure RSPs were adequately supported in relation to Customer Service Guarantee (CSG) Performance Standards. Optus previously provided retail services that had to meet the CSG performance standards for connections, fault repair and keeping appointments over its own network and over Telstra's legacy network. Consistent with this, once the NBN began being rolled out Optus sought to continue providing retail voice services in accordance with the CSG performance standards and requested NBN Co's WBA adequately reflect and support the retail CSG obligations and framework.

3.11 However, aspects of the WBA and NBN Co's performance still do not adequately support RSPs in meeting retail CSG obligations. While the existing service level framework contains accelerated connections which would support CSG performance standards, such orders are 'capped' at 10% and NBN Co consistently has problems in meeting the performance target of 90 per cent. **[CiC].**

3.12 Optus considers that the imbalance in bargaining power is exacerbated by RSPs having no real alternative to signing access agreements with NBN Co. The published SFOA often has less favourable terms or there are incentives and benefits offered for signing a WBA that would not otherwise be available.

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[16] ACCC, Submission to the Department of Broadband, Communications and the Digital Economy "National Broadband Network: Regulatory Reform for 21st Century Broadband", June 2009, p. 49.
[17] ACCC, Submission to the Department of Broadband, Communications and the Digital Economy "National Broadband Network: Regulatory Reform for 21st Century Broadband", June 2009, p. 49.

3.13 NBN Co has used its bargaining position to pressure RSPs to sign WBAs by withholding discounts or other benefits that would only be available on signing. At the time of negotiating WBA3 in 2017, NBN Co had a range of discounts and benefits that would only become available to an RSP if they signed WBA3. Optus signed WBA3 at that time, but it was agreed that negotiations would continue on outstanding matters, including service level matters, that had not been adequately addressed. Similarly, when the time came for WBA4 to be executed, NBN Co would only make available service health summaries (additional information about service quality that assists in providing better service to end-users) if RSPs signed WBA4. Optus again signed WBA4 despite having outstanding concerns, for example, that WBA4 did not have adequate service levels in place to address service issues like dropouts, because NBN Co's threshold before investigating dropouts was too high (i.e. ten dropouts before a fault could be raised). This is despite Optus raising this issue throughout WBA4 negotiations. Since that time NBN Co has only made slight adjustments to the threshold for monitoring (from 5 to 9 dropouts to 4 to 9 dropouts over 3 calendar days) despite repeated requests since signing WBA4 for better processes for dealing with such service disruption.

3.14 The ability of commercial negotiations to deliver fair and balanced outcomes that promote the LTIE has also been limited by the one-sided nature of NBN Co's powers in the WBA. As such, commercial negotiations have been slow in addressing issues and ensuring there are adequate incentives (such as rebates) in place for NBN Co to address issues and improve service level performance. It was only as a result of increased regulatory scrutiny, three years after the ACCC initiated a wholesale service standards inquiry in 2017, that some issues started being addressed.

3.15 Optus considers that such an imbalance in bargaining power and framework does not lead to fair outcomes that promote the LTIE.

Existing service level framework is no longer reasonable

3.16 NBN Co argues that the existing service level standards in WBA4 were informed by the ACCC's wholesale service standard inquiry and therefore, "there should be no suggestion that WBA service levels are inappropriate for current circumstances".[18] NBN Co notes that in considering the 2012 SAU the ACCC suggested that removal of service levels from the SAU would facilitate effective commercial negotiation and allow such terms to be the subject of later ACCC regulatory determinations. NBN Co argues that these same regulatory and commercial settings continue to be appropriate due to "the continuing evolution of the NBN network and industry processes and technologies for service delivery and assurance activities with the potential for increasing customer satisfaction and greater efficiency".[19] NBN Co notes that if RSPs and NBN Co fail to agree appropriate service levels beyond WBA4, the option of committing to further service levels in the SAU in future regulatory cycles would remain.

3.17 Optus disagrees with NBN Co's proposition that the existing service level framework should be accepted without question as appropriate. This is because:

(a) The existing service level framework in the context of WBA4 has not been subject to a comprehensive LTIE assessment, as the ACCC specifically noted it did not have a legislative role in assessing the entirety of NBN Co's commercial arrangements. Optus noted in its submission to the ACCC's final consultation on NBN Co's wholesale service standards that there remained

[18] NBN Co, NBN Special Access Undertaking Variation 2022 – Supporting submission, March 2022, pp. 188-189.
[19] NBN Co, NBN Special Access Undertaking Variation 2022 – Supporting submission, March 2022, p. 189.

gaps with what was proposed in the service level framework.[20] Further, the court enforceable s. 87B undertaking that NBN Co provided to the ACCC in October 2018 during the course of the ACCC's wholesale service standards inquiry (regarding various service level matters) was not the subject of any consultation with RSPs prior to being lodged with the ACCC. Nor were the matters of that undertaking subject to an LTIE assessment.

(b) The existing service level framework addressed issues that had arisen during the NBN 's rollout phase (that had not been addressed until the ACCC intuited the wholesale service standards inquiry). Optus believes the framework should be reviewed and reconsidered in light of the network now being deemed 'built and fully operational' and should be refined to address issues relevant to the ongoing operation of the network and customer assurance. The two years since the implementation of the WBA4 service level framework allows consideration of NBN Co's performance over time and whether further changes may be needed in to support outcomes that promote the LTIE.

(c) There does not appear to be a reasonable price/quality linkage. A key conclusion from the ACCC's SAU working groups is that there should be some sort of price/quality linkages. In Optus' view, this 'quality' aspect also includes the service level framework. However, the current SAU variation proposes price/product construct changes that effectively will lead to higher costs for RSPs, without any revision/uplift in service level standards (the only change is the additional of the proposed network utilisation commitment). Optus considers that this approach does not promote the LTIE.

3.18 Almost two years after WBA4 was signed, it is useful to reflect on the existing service standards and remaining issues.

3.19 Optus does not consider that using the existing service level framework is an appropriate basis for the SAU's future operation. It does not establish an appropriate baseline service level experience, particularly as the SAU variation is proposing increased prices upon commencement. Optus considers there are issues with the current service level framework that were not adequately addressed by the changes in WBA4. Further, Optus also does not consider that the service level framework contains sufficient incentives for NBN Co to address issues and/or improve service performance in future. As such, Optus does not consider that the service level framework will promote the LTIE.

3.20 Optus' specific concerns with the existing service level framework include:

(a) Thresholds for dropouts and faults. At the time of signing WBA4 Optus did not consider the approach to addressing dropouts was in the interests of end-users;

(b) Timelines for remediation including where work is required for non-serviceable premises to be classed as serviceable. There continue to be extended delays in some remaining premises being made serviceable with no regulatory backstop;

(c) Accelerated connection performance and arbitrary 10% cap on orders. Accelerated connections are intended to support longstanding CSG connection timeframes, yet NBN Co still continues to fail in meeting these obligations even after peak volume rollout has passed. **[CiC]**;

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[20] Optus, Submission in response to ACCC Consultation Paper Inquiries into NBN access pricing and wholesale service standards, September 2020.

(d) Permitted information rate (PIR) commitments and exemptions. Specifically, where areas remain in co-existence, PIR commitments are reduced yet there is no clear oversight or transparency around NBN Co's approach to removing co-existence. In addition, RSPs are required to raise a fault in relation to PIR underperformance despite NBN Co have all the reporting necessary to proactively monitor and identify when a PIR objective is not being met.

3.21 Broader issues with the existing service level framework include:

(a) Inconsistent approaches to service level standards (e.g. timeframes and testing to ensure a new connection is working) across different technologies leading to complexity.

(b) SLAs and reporting that don't fully capture or reflect customer experience. For example, where SLAs are triggered by lodging orders or booking appointments, the inability to do either means service standard commitments are not triggered, which means the poor consumer experience of not being able to lodge an order is not captured. This was evidenced during the Unify issue where RSPs could not book appointments and end-users would have experienced delayed connections. Yet such poor customer experience is not captured or reflected in the service levels or reporting because the service level clock was 'stopped' by NBN Co while waiting for RSPs to book appointments. In such instances, service level reporting provides no transparency over these issues, NBN Co's performance or true end-user experience.

(c) Irregular and inconsistent interpretation and application of exclusion criteria for service levels. Exclusions have the effect of 'stopping the clock' on service level timeframes. Stoppages or missed appointments can occur simply as a result of a tech alleging 'weather' without any independent verification by NBN Co. Again, this does not give an accurate view of NBN Co's performance or end-user experience.

(d) The rebate framework and processes, where rebates require action from RSPs instead of being applied automatically by NBN Co where standards or objectives are not met. Further, there have been significant delays in NBN Co paying multiple rebates since the rebates framework was introduced and there are no timeframe commitments for NBN Co to pay rebates or consequences for delayed payments. This means the rebate framework's effectiveness as an incentive to improve performance is reduced.

3.22 Optus notes that without any new baseline service standard commitments, this leaves the existing service level framework in the WBA as the basis going forward. Ideally, at this point, the existing service level framework would be re-evaluated as part of the SAU process to put in place a framework that will promote the LTIE, noting that circumstances have now changed with the network now being deemed built and operational.

3.23 In these circumstances, Optus considers the service level framework should include matters relevant to the ongoing management, operation and assurance activities of the network. Optus considers the following matters need to be addressed for the service level framework to be considered reasonable and to promote the LTIE:

(a) Include meaningful service performance service levels (e.g. relating to speed and stability measures, that need to be met at other times, not just when faults are raised and closed);

(b) Address NBN Co's current aim to resolve network congestion in 15 business days. This means customers could experience significantly slower speeds than ordered for 15 business days or more and it not be able to raise a fault where the issue relates to an NBN transit issue.

(c) There are no service levels for the volume of outages per month for individual services. This means a customer could have multiple planned outages during business hours on the HFC network for multiple weeks while a network degradation event is investigated and addressed.

(d) The network availability service level currently means NBN Co won't take proactive action to prevent customer outages where an end-user does not report an issue to their RSP. This impacts companies like Optus where end-users may have a 4G backup service in their modem and end-users do not realise there is a service fault and report it.

(e) Fault rectification service level timeframes should apply for calendar days.

(f) Existing network response and rectification service levels should have proposed performance service standards to ensure customers don't experience numerous planned or unplanned outages.

(g) Improved service levels for dealing with dropouts as currently customers may have to suffer multiple dropouts over many days before their issue can be accepted as a fault.

(h) Consequences for failing pay service level rebates in a timely fashion.

3.24 The above matters are focused on customer experience in the ongoing operation of the network and incentives for NBN Co to meet performance objectives and Optus considers it is essential for these to be addressed in a service level framework in future.

3.25 NBN Co argues that setting out service levels in the SAU, even as a baseline, would hamper the development of such service standards by restricting the commercial flexibility Part XIC provides by placing access agreements at the top of the regulatory hierarchy. However, Optus considers that some baseline standards should be considered given the historical difficulties in negotiating fair and balanced outcomes with NBN Co.

3.26 Optus is also concerned that the proposed SAU variation does not have any clear linkages between price and service quality. Service quality covers a range of broad performance attributes, including speed, reliability and service level standards. It was generally accepted as part of the ACCC's SAU working groups that there would be clear linkages between NBN Co's proposed pricing approach and service quality.

3.27 However, NBN Co's proposed pricing approach in the SAU variation will effectively lead to higher prices with no improvement in service level standards, except for the addition of a new network utilisation commitment. Optus considers proposed price increases over time without any corresponding uplift in service quality does not promote the LTIE and is not a reasonable approach.

Insufficient regulatory oversight or backstops

3.28 Optus notes that in addressing the above issues, NBN Co considers it appropriate to rely on commercial negotiation. As Optus has also noted, commercial negotiation has not proven effective in promptly and adequately addressing service issues in the last decade of NBN Co's operation. Nor was it effective in establishing clear incentives for NBN Co to comply with service levels and performance objectives (i.e. by establishing a rebate framework for missed service standards). Without clear consequences for failing to meet service levels and performance objectives Optus considers that monopoly providers like NBN Co do not have adequate incentives to meet service levels.

3.29 It was only after the ACCC released a draft access determination as part of its wholesale service standards inquiry that changes were made to the service level framework. And Optus notes it was disappointed the ACCC decided not to pursue finalising an access determination, as what NBN Co proposed in WBA4 did not fully reflect or incorporate what was proposed by the ACCC in the draft access determination.

3.30 In addition, Optus notes that consultation on a Ministerial Determination for SIP performance standards commenced but is yet to be finalised. Currently NBN Co only has a very general SIP connection commitment (of 12 months) related to its SIP obligations. It is not clear any SIP determination will address the issues with NBN Co's service standards as any SIP determination would apply to other identified SIP network providers, not just NBN Co. Therefore, it's not clear either that a SIP determination will be finalised any time soon or if it is, whether it will provide an appropriate regulatory backstop if SIP obligations need to be calibrated for other smaller SIP network providers.

3.31 Optus considers that NBN Co should be able to meet higher standards, at least sufficient to support the retail CSG obligations. As NBN Co is a purpose-built wholesale only company, meeting specified wholesale standards to support retail obligations should have been a core capability since the beginning. Optus considers it would be consistent with the objectives of the SIP regime and promote the LTIE for NBN Co to be subject to higher standards than other SIP retailers.

3.32 In considering the interaction between regulatory backstops and NBN Co's access agreements, it is Optus' view that the ACCC's wholesale service standard inquiry took too long to progress and deliver outcomes to benefit end-users. NBN Co extended the term of WBA4, lodged an undertaking with the ACCC that was expected to be incorporated into access agreements without RSPs having a real and genuine opportunity to negotiate access terms (completely removing any procedural fairness) and it took three years before any further changes to access agreements were made. While the service standard inquiry started just prior to peak volume rollout in late 2017, changes in service standards would have had little impact on the volume rollout given they did not come into effect until WBA4 was signed in late 2020. Optus considers there are too many opportunities for NBN Co to game regulatory and commercial negotiation processes and delay addressing issues.

3.33 Further, there are significant powers under the WBA for NBN Co to unilaterally change terms or processes (including their change rights in the WBA Head Terms) without robust regulatory oversight or backstop. As such, this limited recourse to regulatory oversight means commercial negotiations have failed to deliver fair and balanced outcomes as RSP concerns are rarely addressed or taken into account.

3.34 With the proposed extension to terms of access agreements in the proposed SAU variation, Optus considers the framework and regulatory backstops are not robust enough to impose strong incentives on NBN Co to address service issues promptly via commercial negotiation and therefore do not promote the LTIE.

3.35 Optus' comments on the cost-pass through mechanism and ACCC functions are discussed in the regulatory issues section.

Network utilisation commitment will not be effective

3.36 The only new service level commitment that NBN Co proposes in the SAU is a new network utilisation commitment with a proposed utilisation threshold of 95 per cent and a timeframe of 15 business days for NBN Co to address the issue.

3.37 Optus has concerns that firstly, the 95% threshold is too high. Optus notes that during Covid lockdowns there were sudden demand surges and that setting the trigger at this high a threshold may mean action is not taken promptly enough to avoid end-users suffering poor service experience. Secondly, Optus has concerns that the 15 business day timeframe for NBN Co to resolve any issue is too long. This could leave end-users experiencing congestion with poor service performance for some time before the issue is resolved.

3.38 NBN Co has not provided sufficient detail to explain how this would work in practice. At this stage, Optus is not convinced this is the appropriate way of dealing with such network congestion and Optus does not consider that this is a reasonable approach, nor that it would promote the LTIE.

More transparency over NBN Co's performance is needed

3.39 Service level reporting in the proposed variation is largely the same as existing reporting and transparency measures, with new reporting proposed on network capability and some network availability metrics, such as outages and recurring faults.

3.40 The ACCC also notes that it has the power to consider record keeping and reporting rules (RKRs) and is considering this outside of the SAU variation proposal, either as its own comprehensive reporting framework or as part of the review of the NBN SIO RKR.

3.41 As Optus noted in its comments on the existing service level framework, there is irregular interpretation and application of the exclusions to the service level timeframes. Applying exclusions 'stops the clock' in calculating NBN Co's performance against service level timeframes and if exclusions are broadly applied, this can make NBN Co's performance appear better than what it is. For example, technicians are simply able to refer to 'weather' in order to stop the clock, without there being any linkage to independent information. In contrast, the CSG performance standard only allows certain definitions of weather events to qualify as a mass service disruption exemption to the CSG performance standard timeframes.

3.42 It is important that quality of service monitoring be meaningful and provide transparency of real-world experiences. Broad application of the conditions and exclusions applying to service level timeframes could mean that service level reporting does not give truly transparent oversight of real-world experience.

3.43 Optus considers that along with service level reporting to RSPs, there should be an independent reporting framework in place to provide transparency and accountability over NBN Co performance. Optus has repeatedly called throughout the ACCC's wholesale service standards inquiry and the ACCC's NBN SIO Record Keeping and Reporting Rules (RKR) consultation (in 2021) for increased transparency and quality of service reporting for NBN Co.

3.44 It is common for there to be quality of service monitoring regimes over essential service network providers, particularly where these providers are monopolies and do not face the same incentives to maintain service standards as those in a competitive market.

3.45 Quality of service monitoring has been used to provide increased transparency in other industries such as aviation and energy. Indeed, Telstra was also subject to quality of service monitoring given the risk it could favour its retail operations over access seekers. Quality of service monitoring would provide transparency over performance, NBN Co's role in consumer experience issues and ensures accountability for a monopoly provider's role in service provision, particularly as that monopoly does not compete against other fixed line network providers and does not have the impetus to address quality of service issues that competition provides.

3.46 Optus provided detailed submissions to the ACCC on the proposed metrics the ACCC was considering forming part of a quality of service monitoring regime as part of its NBN SIO RKR consultation in October 2021.

3.47 The ACCC proposed a number of possible service level metrics that NBN Co could report on. Current service level reporting provided by NBN Co to RSPs covers a wide range of reporting against various service levels and includes some of the matters identified by the ACCC (such as performance against connection, fault rectification and appointment keeping service levels). In relation to many of the metrics proposed by the ACCC, NBN Co would already have the data available and has previously reported it to RSPs. Optus refers the ACCC to its submissions on previously proposed metrics and additional metrics that could be subject to monitoring.[21]

3.48 It will be critical that record keeping and reporting obligations be clearly defined, and regard had to how existing service levels and reporting under NBN Co's WBA are defined (or what exclusions may apply) to ensure there is a transparent view of NBN Co's performance and real-world experience.

3.49 Optus would urge the ACCC to implement a record keeping and reporting rule on NBN Co's service performance to assist the ACCC in its regulatory activities under Parts XIB and XIC of the Competition and Consumer Act, improve transparency and accountability, which ultimately encourages better baseline service performance and promotes the LTIE.

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[21] Optus, Proposed changes to the NBN Service in Operation Record Keeping Rules, November 2021. Available at: https://www.accc.gov.au/system/files/Optus%20NBN%20SIO%20RKR%20submission%20%28public%20version%29%2023%20November.pdf

Section 4. REGULATORY ISSUES

4.1 This section discusses issues related to the regulatory processes proposed in the SAU variation. Issues discussed are:

(a) Structure of the SAU and the Replacement Module process; and

(b) ACCC functions and powers;

Structure of the SAU and Replacement Module process

4.2 NBN Co is proposing a similar replacement module process as in the existing SAU, although with some changes. In particular:

(a) A shortened period for the first regulatory period of only two years,

(b) An exception from the requirement to submit 5 years of forecast information; and

(c) Changes to the replacement module application assessment process (such as a new provision that the ACCC is considered to have made a replacement module determination if it has not made a decision on NBN Co's replacement module application by a certain date).

4.3 As the ACCC notes, the SAU has a modular structure which is designed to lock in regulatory settings for a certain period of time, while allowing flexibility for changes over the term of the SAU to reflect industry changes. If accepted, the proposed variation to the SAU is to be in effect until 2040. In this context, and as the ACCC has noted, the arrangements put in place to ensure that the framework remains fit for purpose must be robust.[22] For the reasons set out below, Optus does not consider the revised replacement module process are reasonable and ultimately are unlikely to promote the LTIE.

4.4 In accepting the SAU in 2013, the ACCC noted that "*the ACCC considers that the length of the SAU is appropriate given the modular structure of the SAU, which allows for different matters to be 'locked in' for different periods*".[23] The ACCC added that the modular structure "provides for different arrangements in different periods, allowing a balance between providing certainty about long-term cost recovery and flexibility to respond to changing circumstances"[24] The ACCC also observed that:

> *There are a number of factors, including the risk of NBN Co not recovering its costs in Module 1, that will act to initially provide NBN Co with incentives to invest in and operate the NBN in an efficient manner and to set its prices in a way that will encourage efficient use. However, these incentives are likely to change over the course of the SAU term as NBN Co's operating environment changes. The ACCC has indicated that the SAU should include scope to adjust to NBN Co's changing circumstances to ensure that NBN Co continues to face effective incentives to invest, operate and price its products efficiently.*[25]

[22] ACCC consultation paper, p.4
[23] ACCC Final decision: NBN Co Special Access Undertaking — December 2013, p.8
[24] Ibid, p.9
[25] Ibid, p.59

The ACCC considers that the provisions in Module 2 achieve an appropriate balance between the degree of certainty and flexibility for matters that can be reviewed and determined at various points over this period. In relation to the LTRCM in particular, the ACCC will be able to review matters such as expenditure forecasts and the rate of return on a periodic basis through the replacement module process. This will ensure that any expenditure and return on assets that NBN Co will be able to recover will be prudent and efficient and reflect NBN Co's cost of capital. This will promote efficient investment in NBN Co's network and ensure that appropriate regard is had to NBN Co's direct costs and the economically efficient operation of the network. The ACCC also considers that this process will strike an appropriate balance between the interests of NBN Co and access seekers. It will also allow NBN Co and the ACCC to consider the best regulatory practice at the time.[26]

4.5 As a general comment, Optus agrees that the modular structure and replacement module process of the current SAU provides a suitable compromise between flexibility for the SAU to adjust overtime within the general framework of the fixed principles and legislative objectives for the NBN.[27]

4.6 However, as Optus has noted elsewhere in this submission, key aspects of the proposed SAU variation raise significant concerns about the suitability of the economic regulation of the NBN over the term of the SAU. In particular, the proposed revenue cap arrangements are unlikely to provide the correct incentives for efficient network investment by NBN Co. In combination with the ICRA and roll forward arrangements, it is highly unlikely that NBN Co will have to move to the BBM style proposed pricing framework during the term of this SAU. Optus notes that, even if this does occur, there is insufficient transparency provided over NBN Co's allocation of costs under the proposed BBM. The review of investment plan forecasts and cost allocation transparency is crucial to effective BBM style pricing. Optus also remains concerned that the categorisation process outlined under draft clause 2C.10.5 does not provide sufficient clarity around the distinction between Core and Competitive Services which is crucial given the centrality of this distinction to the overall scope and effectiveness of the regulatory arrangements and in turn the replacement modules process.

4.7 As a threshold comment, Optus considers that without addressing these substantive concerns, the proposed replacement module process will remain fundamentally flawed. Given the passage of time since the ACCC accepted the SAU in December 2013 and the concerns about the distortionary impact of NBN Co's cost recovery objectives on efficiency and future pricing, Optus submit that this SAU variation process provides a crucial opportunity to ensure that the SAU remains fit for purpose in the longer term. If the substantive concerns remain unaddressed, the replacement module process must be significantly pared back and designed to maximise flexibility to the greatest extent practicable. Optus makes the following comments on the proposed replacement module process with this in mind.

Assessment process

4.8 The framework for assessing a replacement module, should be based on high level principles, with detail to be determined during the regulatory resets. The proposed assessment process involves the ACCC's assessing various new matters, such as the proposed "Expenditure Factors", that include a disproportionate and unwieldy number of factors that will render the assessment criteria uncertain and prone to disputation. Conversely, the revised assessment framework also mandates that the ACCC have

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[26] Ibid, p.61

[27] Submission in response to ACCC, Variation of NBN CO SAU, public version, July 2013, p.26 and 27

regard to these matters in reaching its determination, with failure to do so potentially nullifying the effect of a determination.

4.9 For example, if the ACCC rejects a replacement module application, it is required to make a replacement module determination for a regulatory cycle in accordance with the SAU criteria.[28] Proposed clause 4.5(d) also states that "for the purpose of, but without limiting, section 152AH(2) of the CCA, when determining whether to accept or reject a Replacement Module Application the ACCC must have regard to the Expenditure Objectives and the Expenditure Factors".[29] Given the inordinate number of Expenditure Factors, Optus submits that assessing whether Capital Expenditure and Operational Expenditure incurred on projects of Government Policy Notice is efficient becomes a largely meaningless exercise. This is exacerbated by the fact that such expenditure will be deemed to be prudent.[30]

4.10 Many of the proposed criteria, such as those under new draft clause 4.7 (LTCRM Proposal) are new to the ACCC's assessment and will require clear and accurate information from NBN Co and the industry in order for the ACCC to correctly determine. There is significant potential for information asymmetries between the ACCC and NBN Co to be exploited by NBN Co thereby undermining the quality and timing of the ACCC's assessment. In this context, Optus is particularly concerned about proposed clause 4.10(j) which provides that the ACCC make its determination within 20 business days of the end of the relevant Regulatory cycle or it is deemed to have accepted NBN Co's replacement module application.[31]

4.11 In Optus view, the prescription of the replacement module process, combined with the apparent detail and complexity of the factors to which the ACCC is to have regard, will ultimately serve to undermine and constrain the ACCC's discretion to reject a replacement module application. Accordingly, Optus submits that the only criteria that the ACCC **must** consider in assessing any replacement module should be the criteria for assessing a SAU variation under the CCA, with any other criteria, such as under draft clause 4.10 (c), to be matters to which the ACCC **may**, rather than must, have regard in reaching its determination.

4.12 Furthermore, while Optus understands the intention behind clause 4.10(j) is to provide NBN Co with certainty about consistency in the RAB and RAB Core Portion at the start of a new Regulatory Cycle,[32] Optus considers that a deeming provision is unduly restrictive, particularly given the range of factors to be considered and the fact that the regulatory settings will be locked in once deemed accepted. Similarly, it remains unclear to Optus what the consequences of a failure by the ACCC to issue a Draft Core Services Revenue Cap Decision by 31 March of the financial year of each Regulatory Cycle may be.[33]

4.13 Optus recognises that the information asymmetry problem, or at least the potential to game is somewhat ameliorated by new proposed powers for the ACCC to revoke a replacement module determination for "wrong information or error" under draft clause 4.11. However, Optus considers that the range of factors that may enliven this power should be expanded, particularly for the purposes of the Second Regulatory Cycle.

4.14 NBN Co has proposed new Module 3 "replacement module framework terms" which is to have effect from 1 July 2023 to 30 June 2025 – a two year term. Module 3 is described

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[28] ACCC Consultation paper, p.17
[29] Draft clause 4.5(d)
[30] Draft clause 4.10(c)(ii)
[31] Draft clause 4.10(j) of the SAU variation
[32] NBN SAU Variation 2022, supporting submission, p.160
[33] Draft clause 4.10(i) of SAU Variation

as setting out the “specific commitments that NBN Co makes in connection with the provision of access to the NBN Access Service, the Ancillary Services and the Facility Access Service for the First Regulatory Cycle”.[34] In the event that suitable substantive regulatory settings can be finalised, an initial regulatory period of 2 years is not fit for purpose

4.15 The 2 year initial regulatory period, combined with the existing notice arrangements, means that the process to develop and then assess the replacement module for the Second Regulatory Cycle must effectively commence no later than 3 months after the First Regulatory cycle commences (i.e. by 1 October 2023 at the latest).[35] As matters key to the determination of RAB, such as the calculation of the RAB Core Services RAB Portion and the Real Core Services ICRA will be assessed for the first time for the purposes of the Second Regulatory Cycle,[36] In this context, Optus submit that a 9 or at the most 12 month timeframe for the ACCC’s assessment may be insufficient.

4.16 Consistent with the views expressed in 2013, Optus supports the transparency provided by the requirement on NBN Co to submit five year forecasts with its replacement module application, even if it proposes a shorter replacement module period.[37] The proposed amendment to clause 4.6(e)(iv) would exclude NBN Co from having to provide the ACCC with the five year forecast information required for subsequent replacement module applications after the First Regulatory Cycle. Optus considers that the loss of transparency that this entails does not promote the LTIE, and is not sufficiently justified by NBN Co to support a finding that it is reasonable under section 152AH of the CCA.

4.17 A utility style regulatory model involves periodic reviews of pricing and evidence of compliance with revenue requirements and any price caps in place. Through the Subsequent Regulatory Period, commencing in 2023, NBN’s RAB and the newly established Core Services RAB Portion will follow a standard regulatory model of NBN Co proposing forecasts of capex for an upcoming Regulatory Cycle, with the ACCC either including expenditure in the forecasts or determining alternative values.

4.18 A forward-looking approach is common across other regulated industries (for example, electricity). The ACCC has noted that in considering regimes in other regulated industries, where appropriate, regard should be had to the extent that common features should be incorporated into the telecommunications industry approach. These critical principles may be met by the proper development of a Building Block Model.[38] While there are important differences between the Australian Energy Regulator’s regulatory reset process for electricity transmission and distribution networks,[39] the fixed principles in the SAU could play a similar role as the National Electricity Rules, albeit at a higher (less prescriptive) level. For the reasons set out above, Optus does not consider that the right balance has been struck.

4.19 Regulatory reset periods of around five years are typical for BBM-based regulation, though Optus recognises that these often apply to utilities such as electricity, which may be less dynamic than the telecommunications sector. On the other hand, more frequent

[34] Draft clause 4.4 of SAU variation

[35] See clause 4.6(b) of the SAU which requires the ACCC to provide NBN Co with no less than 12 months written notice requiring NBN Co to provide a Replacement Module, which NBN Co must lodge within 9 to 18 months of notification. This means that the ACCC must have given NBN Co notice by 21 months prior to the expiry of the module in force.

[36] New craft clause 4.9 of the Module 0

[37] Submission in response to ACCC, Variation of NBN CO SAU, public version, July 2013, p.25

[38] Joint submission to the ACCC – response to Industry Roundtable – public version, p.4

[39] Industry Working Group notes that an important difference between the electricity regime and the NBN context is that the electricity reset process is conducted in accordance with the National Electricity Rules and there are no equivalent rules for telecommunications

reviews may mean less certainty for industry, but also greater assurance that the framework may adapt to rapid change. On balance, and on the understanding that key issues relating to the economic regulation of the NBN can be successfully addressed, Optus considers that the First Regulatory Period should be 3 years rather than 2 and all subsequent regulatory periods 4 or 5 years only, as this is consistent with other regulated utilities in Australia.[40]

4.20 Optus notes that NBN Co's proposal to align the terms of access agreement with that of the length of the Regulatory Cycle appears acceptable for the 2 year term of the First Regulatory Cycle, particularly in light of NBN Co's explanation that an additional three-month buffer would be applied to enable RSPs and NBN Co "to consider the updated regulatory settings for the new Regulatory Cycle" and factor this into any negotiations for WBA5.[41] That said, Optus does not consider that term alignment should always apply and considers that a 5 year access agreement would likely be too long, given the dynamic nature of customer demand and the fact that access agreements are at the top of the "regulatory hierarchy" under Part XIC.

4.21 In summary, Optus considers that the proposed changes to the SAU replacement modules process are not reasonable and will not promote the LTIE. For reasons set out in more detail elsewhere in this submission, the proposed changes will not promote the LTIE as they will not facilitate the economically efficient use of and investment in NBN networks and services. The replacement module, in combination with the proposed roll forward arrangements, will ultimately lead to ongoing higher prices. This will likely incentivise end-users to migrate to alternative services, thereby undermining NBN Co's business case further.

4.22 With regards to section 152AH of the CCA, Optus submits that the terms cannot be considered reasonable as they will not facilitate the economically efficient operation of NBN services or NBN networks or facilities.[42] The ICRA and associated mechanisms that enable NBN to continually increase its annual revenue cap cannot be regarded as consistent with enabling NBN to recover its allowable and appropriate costs of supplying the service and achieving a normal return on its invested capital as provided for under section 152AH of the CCA.[43]

ACCC functions and powers under the SAU

4.23 The current SAU confers some functions and powers on the ACCC, including to request information, to resolve disputes, to determine terms and conditions, to approve or object to specified conduct by NBN co.[44] Under the proposed variation, additional functions and powers would be conferred. These include conducting ex-post reviews of capital expenditure, assessing cost pass through applications, reviewing proposed changes to price constructs, determining the classification of new products as either competitive services or core services, and conducting an inquiry into whether the form of regulatory control should be changed.[45]

4.24 Optus submits that, as a general principle, any functions and powers that are conferred on the ACCC should not dilute or undermine the ACCC's discretion to act as the final arbiter on SAU price and non-price terms of access. Optus agrees with the ACCC that

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[40] NBN Co Special Access Undertaking – Summary of industry working group outcomes - Attachment A, p.2
[41] Schedule 2F of the SAU variation and NBN SAU Variation 2022, supporting submission, p.163
[42] Section 152AH(1)(f) of the CCA
[43] *Re Telstra Corp* (2001) ATPR 41-812
[44] Final decision: NBN Co Special Access Undertaking — December 2013, p.53 to 55
[45] ACCC Consultation paper, p.47

given the long timeframe for the SAU and impact that acceptance has on the effect of access determinations or binding rules of conduct, it is important to ensure that the functions and powers are of sufficient scope to ensure that the SAU remains consistent with the legislative requirements in the long term.

4.25 Many of the proposed functions and processes appear to reflect, but not exactly duplicate, the ACCC's existing regulatory powers under the CCA. While the CCA does not require the ACCC to perform the functions and powers under the SAU,[46] the establishment of new functions and powers that slightly deviate from the legislative framework creates potential for confusion and in turn a greater likelihood of disputation as to the meaning and effect of these arrangements. Such an outcome is clearly inconsistent with the ACCC's stated objective of establishing a robust framework for oversight of NBN for the term of the SAU.

4.26 Optus appreciates that the decision-making framework needs to balance the objectives of regulatory certainty for NBN Co and RSPs, with a sufficient flexibility to enable the ACCC to respond to issues as they arise. However, as a general observation, Optus considers that the further functions and powers proposed for the ACCC under the SAU Variation are either too prescriptive and unnecessarily constrain the ACCC's discretion with regard to the assessment of important substantive matters, or, with regard to timeframes, are too vague or incomplete. This creates regulatory uncertainty.

4.27 There are also far too many distinct new processes, that diverge at least to some extent from the established assessment framework governing the SAU under Part XIC of the CCA. If needed at all, new powers and functions should be designed to be as simple as practicable with a view to minimising any conflict with the ACCC's existing powers under the CCA.

4.28 Optus also notes that the numerous powers and functions afforded to the ACCC under the SAU variation may place an undue further administrative burden on the ACCC and industry consultation that will likely lead to confusion and consultation fatigue among stakeholders.

4.29 More fundamentally, many of the proposed functions and powers relate to new substantive regulatory measures that, for the reasons set out elsewhere in this submission, must be improved before the ACCC can accept the proposed SAU variation. It is mistaken to believe that many of these substantive issues can be adequately remedied down the track by the inclusion of multiple functions and powers for the ACCC.

4.30 Optus understands that the ACCC cannot reject the SAU variation for a reason that concerns' the fixed principle' that has previously been accepted by the ACCC. However, Optus also notes that this restriction applies only where a SAU variation contains a fixed principle (and any qualifying circumstances) "*that is identical* to the original fixed principles term or condition" that has been accepted by the ACCC.[47] The ACCC has previously noted that "it will only approve terms and conditions as fixed principles where these terms and conditions will not constrain it in a way that will prevent it from ensuring that the SAU only contains terms and conditions which promote the long-term interests of end-users and are reasonable."[48]

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[46] Section 152CBA of the CCA provides that "If the undertaking provides for the Commission to perform functions or exercise powers in relation to the undertaking, the Commission may perform those functions, and exercise those powers, in accordance with the undertaking"

[47] Section 152CBAA(6) of the CCA

[48] Final decision: NBN Co Special Access Undertaking — December 2013, p.109

4.31 Accordingly, and in the interests of ensuring sufficient regulatory flexibility over the SAU term, Optus submits that the restriction on the ACCC's discretion concerning fixed principles must be read narrowly. Optus urges the ACCC to carefully consider the extent to which key fixed principles such as the ICRA and the RAB are actually identical to those previously accepted, given the significant amendments to the manner in which they are to be determined over the Subsequent Regulatory Periods.

4.32 The ACCC notes that "It is not proposed that a broad power of direction to be conferred on the ACCC concerning the treatment of new issues or to step in where express commitments contained in the SAU no longer provide the protections for consumer, competition and efficiency objectives that they were meant to provide."[49] Optus suggests the ACCC consider the need for such a power, particularly in the event that it is minded to approve other aspects of the SAU that Optus has raised concerns about.

4.33 Furthermore, Optus considers that NBN should, to the greatest extent practicable, be seeking to provide transparency over its LTRCM and RAB. This would not seem to be the object of clause 2C.1.3 (Confidentiality) – that appears to enable NBN to limit the degree to which the ACCC can provide transparency by declaring LCTRM and RAB information submitted to the ACCC is confidential.

4.34 Optus provides the following comments on specific functions and powers that serve to highlight the above general concerns in more detail.

Changes between NBN offer types (clause 2B.4)

4.35 Optus is concerned that the proposed "Change of NBN offer type" process links the ACCC's assessment of the proposal too closely with NBN Co's proposed new bundled offer constructs, which, if approved as part of this variation process, may unduly limit the ACCC's discretion to object to such a change proposal. Optus reiterates its view that the proposed bundled offers do not address long standing concerns about the CVC constructs given the vast majority of consumers only acquire speed tiers of 50 Mbps or less. Price increases are built into the proposed CVC price formula which Optus submits will be unlikely to promote the efficient use of the NBN.

4.36 Optus also does not consider that the proposed assessment timeframe is reasonable, noting in particular, that there is no apparent reason why NBN Co should not have already undertaken consultation with access seekers beforehand, or alternatively, immediately upon issuing a notice of its intention of a Change of NBN Offer type (clause 2b.4(a)(i)). The timeframes, particularly for any implementation if and when approved, must afford RSPs sufficient time to make any resultant adjustments to their own retail offerings and manage their customer relationships. Optus rejects NBN Co's claim that the amendments provide certainty for end-users and RSPs.[50]

Forecasts for Forecast Nominal ABBRR and Forecast Nominal Core Services ABBRR (clause 2C.2.5)

4.37 For reasons outlined elsewhere in this submission, Optus has general concerns about the use of forecast expenditure to determine ABBRR and other important aspects of the pricing framework during the Subsequent Regulatory Period covered by Module 2. Optus also considers that a forward-looking assessment of what a "prudent and efficient operator in NBN Co's position, acting in accordance with good industry practice" is unacceptably vague and prone to disputes. This is particularly the case given the

[49] ACCC Consultation paper, p.18
[50] NBN SAU variation 2022 – supporting submission, p.64

exorbitant number of factors that are to be considered in determining whether expenditure forecasts are consistent with clause 2C.2.5(a).

4.38 In addition to the concerns about individual Expenditure Factors highlighted elsewhere in this submission and by the ACCC, Optus considers that when considered collectively with the Expenditure Objectives, they create a highly complex set of decision-making criteria that will not provide the certainty that NBN Co may argue will be achieved through such prescription. This is principally because many of the terms included in the Expenditure Factors are simply not capable of objective assessment or potentially limit the ACCC's capacity to consider information beyond what was available to NBN Co at the time of forecasting its expenditure.

4.39 For example, it is not clear how one may "appropriately account for uncertainty" (clause 2C.2.5(c)(iii)) or properly assess "the robustness of NBN Co's procurement and governance framework, including governance processes that have been applied in respect of historical capital expenditure" (clause 2C.2.5(c)(xi)(C)). Given the high potential for confusion and uncertainty created by the reference to the extensive list of Expenditure Factors Optus does not consider that this is reasonable nor promotes the LTIE.

Cost allocation (Part C Module 2)

4.40 Optus considers that the cost allocation principles, particularly the proposed approach to allocation of "shared costs",[51] provides NBN Co with an unacceptable degree of discretion as to how its costs will allocated. When considered in combination with NBN Co's proposed categorisation process for Core and Competitive Services and the lack of ringfencing guidelines to separate the competitive and regulated parts of NBN Co, there can be little doubt that NBN access prices will not reflect NBN Co's prudent and efficient costs in the long term.[52] This clearly undermines any meaningful capacity to deliver the economic efficiency objectives, particularly productive efficiency, set out under the legislative criteria.

4.41 In this context it is concerning that NBN Co is not required to provide the ACCC with a cost allocation manual until 30 days after the second SAU variation date "and making any material changes to the Cost Allocation Manual".[53] It appears unjustifiable that the ACCC should not have earlier access to, and capacity to rectify, a cost allocation manual that it is to have regard to in determining any allocation and associated adjustments under draft clause 2C.10.4 of Schedule 2C.[54] As such, Optus does not consider that this approach to cost allocation is reasonable nor promotes the LTIE.

Cost pass-through mechanism (Part D Module 2)

4.42 The cost pass through mechanism appears to have a number of limitations, particularly in relation to the Service Standard Improvements. Notwithstanding NBN Co's stated concerns about the impact of sector changes on the ongoing validity of ex-ante assessments of expenditure forecasts,[55] Optus submits that the proposed cost pass-through approach is unreasonable and does not promote the LTIE. For reasons noted in

[51] Draft clause 2C.10.2(b)(iii) provides that "costs that are not directly attributable to a Core Regulated Service or Competitive Service" will be "allocated to reflect causal relationships between supplying service and incurring costs, unless establishing a causal relationship would require undue cost or effort in which case an alternative suitable allocator will be used"

[52] See ACCC Final decision: NBN Co Special Access Undertaking — December 2013, p.94

[53] Draft clause 2C.9(e) of SAU Variation

[54] ACCC consultation paper, p.48

[55] NBN SAU variation 2022 – supporting submission, p.143

the section discussing service levels, Optus considers that as the NBN is now built and fully operational it is appropriate to review the existing service level framework. Optus does not consider it reasonable that NBN Co has effectively proposed an increase in prices but no substantial changes to existing service levels and to lock in a process that any future changes in service levels could be subject to essentially an automatic cost-pass through.

4.43 In this context, it is important that the ACCC is afforded an appropriate and effective supervisory role. As noted by the ACCC, it would appear to be unduly narrow to allow for NBN Co to avoid proceeding with a service standard improvement to any extent if the ACCC does not accept a cost pass through application in full, further undermining efficiency objectives and the promotion of the LTIE.[56]

[56] ACCC consultation paper, p.44