

NBN Co Special Access Undertaking

Telstra's response to the ACCC Consultation Paper – variation of NBN Co Special Access Undertaking

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Abbreviations, acronyms and key definitions

Capitalised terms in this submission have the meanings set out in this submission. Capitalised terms that are not defined within this submission, have the meaning given to those terms in the NBN Co SAU and in the Draft Decision.

ACCC	Australian Competition and Consumer Commission
ACCC Regulatory Decisions	Binding Rules of Conduct and Access Determinations
AD	Access Determinations
AER	Australian Energy Regulator
BROC	Binding Rules of Conduct
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Consultation Paper	ACCC's consultation paper entitled " <i>Consultation Paper – variation of NBN Co Special Access Undertaking</i> ", dated April 2013
CVC	Connectivity Virtual Circuit
December 2011 SAU	NBN Co's Special Access Undertaking, as lodged by NBN Co on 5 December 2011 (withdrawn on 7 September 2012)
Draft Decision	ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013
ICRA	Initial Cost Recovery Account
LTIE	Long term interests of end-users
LTRC	Long Term Revenue Constraint
NBN	National Broadband Network
NBN Co	collectively, NBN Co Limited and NBN Tasmania Limited
NBN Co SAU	NBN Co's Special Access Undertaking, as lodged on 18 December 2012
NER	National Electricity Rules
NGR	National Gas Rules
NPTC	Non-price terms and conditions
POI	Point of Interconnection
Previous Submission	Telstra's response to the ACCC Consultation Paper, 18 January 2013, together with the letter from Telstra to the ACCC dated 11 February 2013 re. charging for Service Qualification Enquiries
RSP	In this submission, Telstra uses the terminology "RSP" to describe both (a) a direct customer of NBN Co that is a wholesale or retail service provider, and (b) a direct customer of NBN Co that is a retail service provider only. Accordingly, the term "RSP" should be interpreted in a manner consistent with its context within this submission.
SAU	Special Access Undertaking
SBO	Standard Business Offer
SFAA	Standard form of access agreement
Supporting	NBN Co's supporting submission entitled " <i>Supporting Submission: NBN</i> "

Submission	<i>Co Special Access Undertaking</i> dated 28 September 2012
WBA	Wholesale Broadband Agreement

1. Executive Summary

1.1. Introduction

- Telstra welcomes the opportunity to provide feedback on the proposed variations to the special access undertaking (**SAU**) lodged by NBN Co Limited and NBN Tasmania Limited (collectively, **NBN Co**) with the Australian Competition and Consumer Commission (**ACCC**) on 18 December 2012 (**NBN Co SAU**). These variations are set out in the ACCC's "Consultation Paper – variation of NBN Co Special Access Undertaking - April 2013" (**Consultation Paper**) to be read in conjunction with the views expressed in the "ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012 – April 2013" (**Draft Decision**).
- Telstra's priority is to ensure that a high quality customer experience, both in terms of migration to the NBN and ongoing supply, is achieved on the NBN. To this end, Telstra is committed to offering its customers who will connect to the NBN (at both a wholesale and retail level) an end-to-end service experience which is at least the same (in terms of quality, performance attributes and timeframe commitments) as the end-to-end service experience of equivalent end-users and downstream customers today. It is important that Telstra is able to provide certainty for end-users as to terms of supply and price, and to respond expediently to cater for the needs of end-users.
- In general, Telstra supports the views expressed by the ACCC in its Draft Decision and the variations that it proposes in its Consultation Paper. Subject to a number of refinements proposed by Telstra in this submission, and provided there is vigilance on the part of the ACCC to ensure NBN Co constructively re-engages with industry to settle more appropriate terms of supply, Telstra believes the ACCC's proposed SAU design is likely to facilitate reasonable outcomes that promote the long term interests of end-users (**LTIE**).
- This submission responds to the views expressed by the ACCC in its Draft Decision and the variations it proposes in its Consultation Paper. It is focused on finding solutions to the issues that Telstra considers are unresolved.

1.2. Design of the SAU

- Telstra recognises that the design of the NBN Co SAU must be effective over the long term. In this respect, Telstra supports many of the ACCC's proposals, including:
 - decoupling the NBN Co SAU, Binding Rules of Conduct (**BROC**) and Access Determinations (**AD**) (BROCs and ADs, together, **ACCC Regulatory Decisions**) from the standard form of access agreement (**SFAA**) to enable those documents to operate on a "standalone basis" (i.e. independent of the SFAA);
 - ensuring that price terms (along with non-price terms) are subject to ongoing regulatory oversight;
 - the use of existing statutory processes for varying / submitting the NBN Co SAU, rather than the variation / extension processes proposed by NBN Co; and
 - that clause 5 of the main body of the NBN Co SAU (and thereby the terms and conditions in Modules 0 and 2, collectively) should not be a fixed principles term and condition.

- These proposed changes are positive. However, there remains a risk that the incentives inherent in the NBN Co SAU design (even after the implementation of the ACCC's proposed variations) may not be sufficient to ensure NBN Co engages constructively with RSPs in the short term to settle terms of supply that are fair and reasonable. With no complete alternative terms of supply available, an SFAA-based access agreement remains at this time the only practical means by which RSPs can take supply from NBN Co.
- It is therefore essential that the ACCC remains alive to this risk and is vigilant to ensure industry is able to settle on a fair and reasonable set of supply terms (both in the SFAA and in SFAA-based access agreements) as soon as possible.
- Furthermore, and consistent with its Previous Submission, Telstra remains of the view that:
 - RSPs who take supply under an SFAA-based access agreement should not be forced to migrate to an updated SFAA-based access agreement (either at the end of its term or in order to get the benefit of any ACCC Regulatory Decisions), rather they should have the right to elect to transition or to extend supply under current terms; and
 - ACCC Regulatory Decisions should not be bundled with other changes to the SFAA such that an RSP who takes supply under an SFAA-based access agreement is obliged to take other NBN Co unilateral amendments to the SFAA in order to get the benefit of the ACCC Regulatory Decisions.
- Although Telstra agrees with the ACCC that the SFAA Forum proposal in the NBN Co SAU does not provide an acceptable engagement model, constructive re-engagement by NBN Co on the terms of the SFAA is now very important and its significance should not be diminished through lack of a formal engagement model in the NBN Co SAU.
- Finally, Telstra continues to hold the view that the proposed term of the NBN Co SAU creates difficulties in assessing and confirming reasonableness and Telstra's view is that the Initial Regulatory Period should be reduced to 6 years.

1.3. Product Terms and Conditions

- Telstra supports a product approach that maintains the construct established by the NBN Co SAU but also preserves the ACCC's power to declare NBN services in the future (and for the NBN Co SAU to extend to these declared services).
- Telstra also supports many of the ACCC's proposals to improve the application of the product development and withdrawal commitments in the NBN Co SAU (including those in relation to previous "roadmap" exemptions, confidentiality and intellectual property).
- Consistent with Telstra's Previous Submission, it is critical that the consultation commitments in relation to the development of new products, and the transition arrangements for outgoing products, are effective and robust. This is particularly the case in circumstances where the proposed product construct provides for the scope of the NBN Co SAU to "expand" and "shrink" as products are developed and withdrawn.

- Telstra remains concerned about the efficacy of the consultation commitments in the NBN Co SAU, and proposes variations in this submission that it considers are both balanced and constructive in dealing with these concerns. The proposed variations also adopt the ACCC's proposal to involve consumer advocacy groups in the consultation processes, which Telstra considers to be a positive step for end-users.
- Telstra does not support the proposal by the ACCC that it have the power to prevent NBN Co from withdrawing products. Telstra believes that it is more appropriate for the ACCC to use its statutory powers to declare services in the event that it considers a service should be offered. Telstra therefore proposes that the NBN Co SAU clarifies that a product cannot be withdrawn by NBN Co if that product has been declared by the ACCC, rather than give the ACCC the power to prevent any product from being withdrawn.

1.4. Price terms and conditions

- Telstra agrees with the ACCC's proposed variations which provide for the ACCC to be able to determine prices for new products, and previously zero-priced products. However, in relation to Service Qualification Enquiries (other than where undertaken in bulk), the NBN Co SAU should provide certainty for RSPs from the outset that they will not be charged for this basic and essential function.
- The NBN rollout is in its early stages and it is not yet known how it will affect demand for data or what additional downstream services it will provide to end-users.
- One area where this uncertainty manifests is with the price of the Connectivity Virtual Circuit (**CVC**). The cost to RSPs of CVC capacity is one of the key risks the industry faces in providing services over the NBN. This risk reflects the fact that CVC capacity is integral to the delivery of all NBN-based services (that is, it cannot be substituted for an alternative service) and there is significant uncertainty as to how much CVC capacity will be required to support end-users over time.
- Given this risk, and the broader risk that NBN Co's pricing for various services will not be responsive to changes in end-user preferences and will not allow RSPs to economically respond to these changes, Telstra agrees with the ACCC that the NBN Co SAU prices should be subject to periodic revenue neutral price rebalancing conducted by the ACCC. This appropriately recognises that under the current NBN Co SAU, NBN Co may otherwise set prices that will translate into retail price increases for end-users, and potentially generate inefficient retail market outcomes, contrary to the LTIE.
- Furthermore, Telstra considers that specific transparency requirements with respect to CVC prices will provide greater industry certainty, ensure that NBN Co is upholding its commitment to adjust prices as demand evolves, and may reduce the need for ACCC intervention to rebalance prices in the near term.
- Telstra supports greater ACCC oversight of NBN Co expenditure, both in Module 1 and Module 2. The introduction of a confined but robust review mechanism is required to ensure there is an incentive for prudent expenditure and promotion of the LTIE. Telstra considers an ex-post review power should be applied consistently across Module 1 and Module 2.

1.5. Non-price terms and conditions

- Telstra supports the removal of the detailed non-price terms and conditions from the NBN Co SAU. Telstra also acknowledges and accepts the ACCC's concerns about setting high-level non-price related commitments at this time.
- It is now imperative that NBN Co re-engages with industry on the terms of its SFAA. Telstra hopes that the concerns raised by the ACCC in its Draft Decision will encourage NBN Co "back to the table" and will lead to a reconsideration of some of its fundamental risk allocation positions.
- Telstra supports the inclusion of commitments that enable compliance with downstream regulatory obligations and agrees (subject to a number of minor amendments) with the ACCC's position on NBN Co's POI related commitments.

2. Design of the SAU

2.1. Introduction

Telstra's priority is to ensure that a high quality customer experience, both in terms of migration to the NBN and ongoing supply, is achieved on the NBN. To this end, it is important that Telstra is able to provide certainty for end-users as to terms of supply and price.

In general, Telstra supports the ACCC's proposed changes to the SAU design. The ACCC is advocating an undertaking that stands independent of any other document or instrument in the Part XIC legislative hierarchy, and remains largely independent of the SFAA. Subject to a number of refinements proposed by Telstra in this submission, Telstra believes the ACCC's proposed SAU design is likely to facilitate reasonable outcomes that promote the LTIE.

The key issue that now remains for industry is not necessarily one of design. With no alternative terms of supply available, an SFAA-based access agreement remains the only practical means by which RSPs can take supply from NBN Co. In this regard, there is nothing inherent in the SAU design (even after the implementation of the ACCC's proposed variations) that ensures NBN Co will constructively re-engage with industry to settle more appropriate terms, both in its SFAA and in its SFAA-based access agreements.

It is essential (for RSPs and their end-users) that the ACCC remains alive to this risk and is vigilant to ensure industry is able to settle on a fair and reasonable set of supply terms as soon as possible.

2.2. Telstra's understanding of the ACCC SAU design

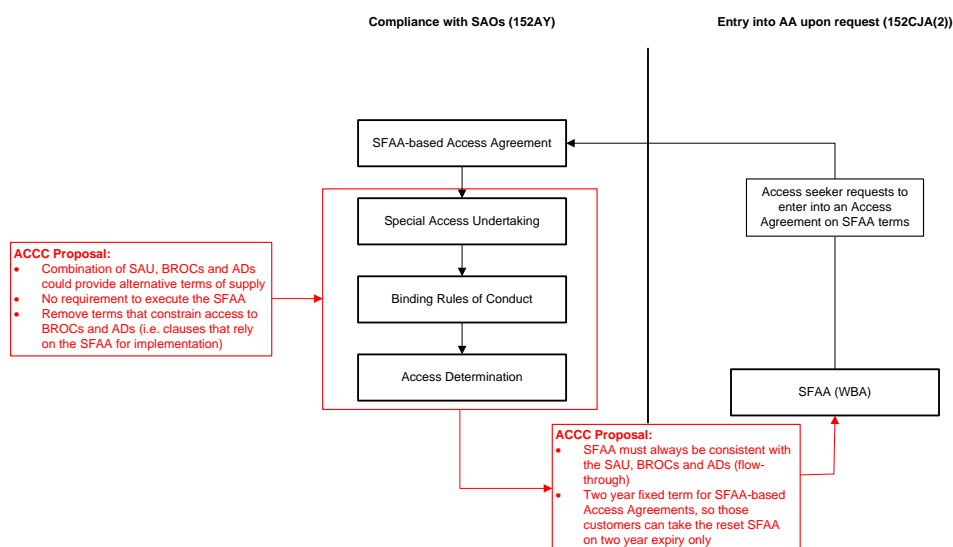
Consideration of the ACCC's suggested changes is not a simple exercise. The NBN Co SAU is a very complex document, both in terms of substance and in the manner in which the various modules and the Part XIC access regime are expected to interact.

Accordingly, Telstra believes all stakeholders would benefit from a further review of NBN Co's SAU once the ACCC's variations have been settled and consolidated into the undertaking. It is only once this has occurred that the "full picture" can be assessed.

At a fundamental design level, Telstra understands that the ACCC SAU design proposal works in the manner set out in Figure 1 below. It is this fundamental design assumption that drives Telstra's feedback in this submission.

See following page for Figure 1.

Figure 1: ACCC SAU design



Telstra's assessment of the proposed ACCC SAU design changes, and the content of this section 2, is framed around the following key design assumptions:

- **27 year term with modular design.** Acceptance by the ACCC that the NBN Co SAU has a term of 27 years, with no change to the proposed term of each Module i.e. Module 0 (for the full term), Module 1 (for a 10 year Initial Regulatory Period) and Module 2 (from expiry of the Initial Regulatory Period until the end of the term).
- **Decoupling the SAU from the SFAA.** Decoupling of the SFAA from the NBN Co SAU commitments (with the exception of a clause which ensures consistency between the NBN Co SAU and the SFAA), so that the NBN Co SAU commitments operate on a "standalone" basis.
- **Decoupling ACCC Regulatory Decisions from the SFAA.** Removing provisions that provide for ACCC Regulatory Decisions to be "given effect" through the SFAA and improving provisions that ensure SFAAs are consistent with ACCC Regulatory Decisions (the ACCC also suggests an alternative option to simply remove express linkages between ACCC Regulatory Decisions and the SFAA).
- **Retaining SFAA maintenance / publication.** Retaining commitments from NBN Co to publish and maintain the SFAA with a maximum two year, co-terminus fixed term.
- **Removing SFAA Forum procedures.** Removing the commitments from NBN Co that relate to the procedures for considering and implementing issues raised through the SFAA Forum.
- **Reverting to statutory processes for any changes.** Removing or varying various provisions in the NBN Co SAU that set out processes for variations, updates or extensions to the NBN Co SAU, so that these matters are dealt with through the statutory variation and acceptance processes designed for this purpose.
- **Rejecting use of fixed principles.** Rejecting the categorisation of Modules 0 and 2 as fixed principle terms and conditions.

Each of these features is assessed in detail below.

2.3. 27 year term with modular design

Telstra supports the modular design of the NBN Co SAU but, as previously noted,¹ Telstra continues to hold the view that the overall term of the NBN Co SAU (some 27 years), when this term is necessary only for provisions for regulatory certainty on cost recovery, creates difficulties in assessing reasonableness and relevance over time.

In relation to the term for Module 1, Telstra continues to advocate a materially shorter Initial Regulatory Period. For the reasons set out in its Previous Submission, Telstra believes an appropriate term for Module 1 is no more than 6 years. Furthermore, assuming the midpoint review is removed (as suggested by the ACCC and endorsed by Telstra), Telstra believes that those matters that would otherwise have been subject to the midpoint review (to the extent these are still contained within the NBN Co SAU following the implementation of the ACCC's variations) should have commitment periods of no more than 3 years.

2.4. Decoupling the SAU from the SFAA

The decoupling of the NBN Co SAU from the SFAA is one of the key structural changes set out in the ACCC's Draft Decision and Consultation Paper.

Telstra agrees with the ACCC that the SFAA should remain consistent with the NBN Co SAU at all times. Telstra also agrees with the ACCC's view that RSPs should not be forced to take supply under an SFAA-based access agreement in order for the commitments in the NBN Co SAU to be effective.

While the ACCC's proposed structure is intended to address this by making the NBN Co SAU operate on a "standalone" basis, the Draft Decision and Consultation Paper do not provide clear guidance on how this will occur. Even with the variations proposed by the ACCC, the NBN Co SAU is not able to operate on its own.

As there is no practical alternative means of supply available to RSPs (i.e. an alternative to an SFAA-based access agreement) at this time, it is now imperative that NBN Co constructively re-engages with industry on the terms of its SFAA. To this end, it is important that the ACCC actively encourages this engagement and, where required, must be willing to use its regulatory determination powers to provide alternative terms and conditions which are in the LTIE.

2.5. Decoupling AD / BROC implementation from the SFAA

The Draft Decision and Consultation Paper advocate the removal of the previous linkages between ACCC Regulatory Decisions and the SFAA. Implementation of ACCC Regulatory Decisions should no longer be contingent on the SFAA. Two options are provided in the Consultation Paper, and both appear to advocate the removal of the "regulatory recourse" model set out in the NBN Co SAU.

Consistency between the SFAA and ACCC Regulatory Decisions

Telstra supports a regime that ensures the SFAA remains consistent with ACCC Regulatory

¹ Telstra included a detailed discussion relating to the term of the NBN Co SAU in *Telstra's response to the ACCC's Supplementary Consultation Paper*, 5 April 2012 and again in *Telstra's response to the ACCC Consultation Paper*, 18 January 2013.

Decisions.

However, and consistent with its Previous Submission, Telstra believes that:

- RSPs who take supply under an SFAA-based access agreement should not be forced to migrate to an updated SFAA-based access agreement (either at the end of its term or in order to get the benefit of any ACCC Regulatory Decisions), rather they should have the right to elect to transition or to extend supply under current terms; and
- ACCC Regulatory Decisions should not be bundled with other changes to the SFAA such that RSPs who take supply under an SFAA-based access agreement are obliged to take other NBN Co unilateral amendments to the SFAA in order to get the benefit of the ACCC Regulatory Decisions. Telstra believes that the new SFAA should distinguish between these “regulatory changes” and “unilateral changes”.²

Telstra believes that further changes to the NBN Co SAU will be needed to address these points.

Alternative terms of supply

Consistent with Telstra’s position on the decoupling of the SFAA from the NBN Co SAU, if ACCC Regulatory Decisions are to be available independently of the SFAA, they must necessarily be fully developed, and be able to operate, on a “standalone” basis. The Draft Decision and Consultation Paper do not provide clear guidance on how this will occur and Telstra’s comments raised in the context of section 2.4 above apply equally to this scenario.

Managing potential discrimination

Telstra notes that the effect of the ACCC SAU design is that ACCC Regulatory Decisions that are inconsistent with an RSP’s SFAA-based access agreement will only be available to that RSP upon expiry of that RSP’s SFAA-based access agreement (either from the reset SFAA or some alternative regulated terms of supply).³ In contrast, the benefit of ACCC Regulatory Decisions will be immediately available to new access seekers (either from the then current SFAA or some alternative regulated terms of supply).

In its Draft Decision, the ACCC acknowledges the potential for discrimination in this scenario and concludes that “*an inquiry about a proposal to make an Access Determination would provide a suitable opportunity to consider how to take account of NBN Co’s non-discrimination obligations...*”⁴

In Telstra’s view, industry would benefit from the ACCC clarifying how this will be addressed, as part of its deliberations on the NBN Co SAU.

² In Telstra’s Previous Submission, it noted concerns with NBN Co’s right to unilaterally amend terms of supply. Telstra’s concerns in this regard remain, but it expects the new regulatory recourse regime and the re-setting of the SFAA to provide oversight of this at a high level.

³ Telstra appreciates that ACCC Regulatory Decisions will be available to the extent they are “not inconsistent” with the NBN SAU or the terms of an access agreement - consistent with the legislative hierarchy set out in Part XIC of the CCA.

⁴ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 45.

2.6. Retaining SFAA maintenance and publication

The Draft Decision and Consultation Paper support NBN Co's commitment to publish and maintain the SFAA. The ACCC also supports an SFAA with a maximum two year, co-terminus fixed term.

Maintaining an SFAA

Telstra also supports NBN Co's commitments to produce and maintain an SFAA over time. However, as noted above, a decision to enter into an SFAA-based access agreement is currently made without the existence or knowledge of any potential alternative terms of supply and in an environment where the SFAA is largely provided on a "take it or leave it" basis. Again, constructive engagement by NBN Co on the terms of the SFAA is very important at this time.

Transitioning

The ACCC Draft Decision and Consultation Paper do not contemplate the mechanisms by which RSPs transition from one set of terms to another (either between SFAA-based access agreements or between SFAA-based access agreements and ACCC Regulatory Decisions).

It can be expected that there will be certain terms that have been triggered under expiring access agreements and which remain "in flight" at the time that RSPs are required to transition to the new SFAA (or some alternative regulated terms of supply). These might include ordering or provisioning processes which have not been completed or disputes that have not yet been resolved.

Clarity on transitional issues is important. This could potentially be addressed in a number of ways, including through the grandfathering of certain expiring terms or giving RSPs the option to elect to take the updated terms in relation to processes that are "in flight".

It is also important, when transitioning, that RSPs are able to opt to remain on current terms (without being forced onto a new agreement) whilst independently gaining access to the benefit of ACCC Regulatory Decisions. This is noted in section 2.5 above.

2.7. Removing SFAA Forum procedures and implementation

Despite extensive bilateral and multilateral engagement to date, the current terms of the SFAA have not been satisfactorily settled. Based on the various submissions provided as part of this consultation process, and the observations in the ACCC Draft Decision, Telstra's concerns with the SFAA appear to be shared by the ACCC and other RSPs.

Accordingly, while Telstra agrees that the SFAA Forum proposal in the NBN Co SAU does not provide an acceptable engagement model (Telstra raised a number of concerns in its Previous Submission), constructive re-engagement by NBN Co on the terms of the SFAA is now very important.

The proposed variations in the Consultation Paper strip the SFAA Forum of most of its procedural substance. Instead, there are relatively simple commitments to establish a forum for the development of the SFAA. In effect, NBN Co is free to set its own terms of engagement in relation to the SFAA.

While Telstra appreciates the reasons for this approach, the solution proposed by the ACCC does not address Telstra's core concerns, i.e. NBN Co's approach to its SFAA terms and the lack of an effective engagement model to facilitate resolution of outstanding issues.

As set out in Telstra's Previous Submission:

- NBN Co should be required to consult and meaningfully engage with RSPs in relation to all the changes that it proposes to introduce in its SFAA, including those that relate to the flow-through of ACCC Regulatory Decisions or NBN Co SAU commitments;
- the ACCC should have a direct and relevant role in assessing (or even formulating) the flow-through of ACCC Regulatory Decisions or NBN Co SAU commitments;
- consultation processes should begin as early as feasible. When it comes to the flow-through of ACCC Regulatory Decisions or NBN Co SAU commitments, this timing could be coordinated with the ACCC to enable early engagement; and
- there should be an effective avenue for engagement initiated by RSPs (including managing changes to the SFAA suggested by RSPs). While the previous "Contract Development Process" did not ultimately achieve the outcomes intended, the objectives were sound and a more refined version of this may provide an appropriate engagement model.

Above all, it is important that any ACCC variations are not seen as a "dilution" or acceptance of anything other than a focussed and constructive engagement in relation to the terms of the SFAA. As noted in section 5 (Non-price terms and conditions), it is more apparent than ever that the SFAA requires significant and material refinement.

2.8. Reverting to statutory processes for any SAU changes

In its Previous Submission, Telstra raised a number of concerns with the NBN Co SAU processes for dealing with the evolution of the NBN Co SAU over time. This included the "replacement module" approach and the "midpoint review". The ACCC also identified concerns with the proposed process to extend the term of the NBN Co SAU.

Telstra supports the removal of the "replacement module" structure and the "midpoint review". Telstra also supports the use of the existing statutory processes for varying⁵ or accepting⁶ the NBN Co SAU – as proposed by the ACCC – rather than the processes proposed by NBN Co. This not only simplifies the NBN Co SAU but ensures its relevance over time is tested against statutory criteria designed for this purpose.

2.9. Use of fixed principles

While Telstra, in principle, supports the use of fixed principles, Telstra has concerns about locking in all of the provisions of Modules 0 and 2 for the full 27-year term and with designating all of these provisions as "fixed principles terms and conditions". Telstra believes that a number of provisions within Modules 0 and 2 are neither appropriate for the long term nor do they warrant the additional protection afforded to "fixed principles terms and conditions". Telstra's Previous Submission provided more detail in this regard.

⁵ s.152CBG of the CCA.

⁶ s.152CBD of the CCA.

Given this, Telstra supports the ACCC's preliminary view in relation to the NBN Co SAU fixed principles terms and condition. Telstra understands that this would require removal of clause 5 from the body of the NBN Co SAU.

2.10. Compliance monitoring

As stated in its Previous Submission, the implementation of an appropriate compliance reporting regime would be a welcome and positive addition to the NBN Co SAU.

Telstra believes the commitments in Schedule 1G are not adequate to ensure the ACCC (and industry more generally) is able to monitor NBN Co's overall compliance. It is vital that NBN Co's compliance with the NBN Co SAU is able to be objectively measured and assessed by the ACCC, and that the ACCC is able to take appropriate action where it considers that there is a need to do so.

An obligation to be transparent about compliance will provide a far more efficient and effective outcome for all stakeholders (including the ACCC) than if the ACCC or RSPs are required to identify breaches before they are addressed.

Telstra refers to its Previous Submission for more detail in this regard.

3. Products and Services

3.1. Introduction

As previously noted, Telstra's priority is to ensure that a high quality customer experience, both in terms of migration to the NBN and ongoing supply, is achieved on the NBN. To this end, it is important that Telstra is able to respond expediently to cater for the evolving needs of end-users.

In this section Telstra responds to the ACCC's views and proposals in relation to the services to which the NBN Co SAU relates, product development and product withdrawal. Telstra also responds to the ACCC's request for submissions in relation to the involvement of consumer advocacy groups in the product development and withdrawal processes.

3.2. Services to which the SAU relates

Telstra supports the product construct that has been adopted in the NBN Co SAU and has stated in its Previous Submission that it does not object to a technology neutral and broadly defined product description for the NBN Access Service that allows the NBN Co SAU to "expand" and "shrink" as the NBN product suite changes.⁷ However, Telstra has also consistently stated that this product construct, and the use of a broadly defined and technology neutral service description, highlights the need for:

- appropriate incentives to ensure the suite of NBN products continues to evolve in line with customer expectations and global benchmarks;⁸
- product development processes that encourage participation by RSPs (the intellectual property and confidentiality clauses of the PDF Processes were seen, in particular, to be barriers to participation);⁹
- greater clarity about where NBN Co intends to draw the line between the NBN Access Service and Ancillary Services, so that RSPs have confidence that they know precisely what they will receive as part of the NBN Access Service, and for those service features or components that fall outside of this scope, whether the NBN Co SAU will apply to these as Ancillary Services;¹⁰ and
- more effective and robust consultation processes for the development of new products.¹¹

The views expressed by the ACCC in its Draft Decision, and the ACCC's proposals in the Consultation Paper, address many of these concerns. For example:

- the ACCC has proposed that its power to declare NBN services be preserved by the

⁷ Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, p 48.

⁸ Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, p 48.

⁹ Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, pp 55-59.

¹⁰ Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, pp 50 and 51.

¹¹ Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, pp 51-55.

NBN Co SAU.¹² Telstra is confident that this will provide appropriate incentives for NBN Co to continue to evolve its product suite and provides certainty for RSPs that regulatory intervention is available in the event that this does not occur;

- the ACCC proposes to remove the confidentiality and intellectual property clauses from the PDF Processes.¹³ Of course, as discussed in section 2 of this submission, it is imperative that NBN Co now re-engages constructively on this issue so that a fair and reasonable commercial outcome can be settled, and the ACCC must be prepared to intervene (unconstrained by the NBN Co SAU) in the event that NBN Co continues to insist on unreasonable terms; and
- the ACCC has proposed that there be regulatory oversight for the setting of initial prices for new products or for any increase to a zero-priced service.¹⁴ As Telstra understands it, this proposal means that the ACCC will have the power to intervene should NBN Co seek to introduce charges for new products. Telstra's views about this proposal are set out in section 4, however, in the context of Telstra's concerns about Ancillary Services, this proposal will assist to address these concerns.

The ACCC has not, however, addressed Telstra's concerns about the need for more effective and robust product development consultation processes. This is an important issue for Telstra and is discussed in section 3.3 below.

Telstra also continues to be concerned about the lack of clarity regarding NBN Co's Network Termination Device responsibilities. This concern was raised and explained by Telstra in its Previous Submission but is not expressly addressed by the Draft Decision or Consultation Paper. If this issue is not addressed by the NBN Co SAU, Telstra notes that the ACCC will have the power to intervene (unconstrained by the NBN Co SAU) in the event that a satisfactory commercial resolution cannot be reached with NBN Co. This approach is consistent with the ACCC's approach to removing certain non-price terms from the NBN Co SAU, and therefore Telstra submits that this issue be addressed in the same way if the NBN Co SAU does not provide the clarity Telstra is seeking.

In response to the other product-related ACCC proposals:

- Telstra supports limiting the exemption for Layer 3 awareness functionality so that it applies only to those services that have been specified in the NBN Co SAU. This is consistent with Telstra's Previous Submission; and
- Telstra supports the ACCC's proposal to remove the discretion for NBN Co to bundle products beyond that which is authorised by section 151DA of the CCA. The authorisation that section 151DA provides is intended to ensure that NBN Co has the flexibility to bundle products for the purpose of achieving uniform national pricing, without the risk of prosecution under Part IV or Part XIB of the CCA. The inclusion of clause 1A.3.2 could have the effect of further limiting the ACCC's powers to take action in relation to bundling of products which is not reasonably required to achieve uniform national pricing, even if that conduct has an anti-competitive effect. NBN Co has not

¹² ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 69.

¹³ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, pp 82-84.

¹⁴ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 116.

established that this outcome would be in the LTIE, and therefore Telstra supports the ACCC's proposal to remove clause 1A.3.2.

3.3. Product development and withdrawal

Product development

Telstra supports many of the ACCC's proposals to improve the product development commitments in the NBN Co SAU. For example, Telstra supports the ACCC's proposals to:

- remove the various matters that are exempt from the product development commitments, and to clarify their application to Ancillary Services and Product Ideas initiated by NBN Co;¹⁵
- remove the confidentiality and intellectual property clauses from the PDF Processes;¹⁶ and
- provide for the expiry of the PDF Processes after 5 years.¹⁷

However, as noted in section 3.2, Telstra remains concerned with the lack of effective and robust consultation processes in relation to product development.

As an example, in its Draft Decision the ACCC expresses the view that the TC_2 and TC_3 Product Features have not been well defined.¹⁸ Telstra agrees with this view, but notes that this is most likely because NBN Co is yet to develop products that have these Product Features. If the product development consultation processes are sufficiently robust and well defined (including by ensuring that the PDF Processes apply to *all* products which NBN Co is yet to supply, whether or not they are included in the Reference Offers and Non-Reference Offers), the concerns that the ACCC has raised could be resolved by ensuring that these consultation processes provided a genuine opportunity for RSPs to be engaged in the development of the TC_2 and TC_3 Product Features.

In its Previous Submission Telstra proposed a balanced and constructive solution to address its concerns. This solution sought to build on, rather than replace, the consultation commitments in the NBN Co SAU.

Telstra has set out its proposed solution below. This proposal is largely the same as the proposal that was made in Telstra's Previous Submission, however, Telstra notes that this revised proposal also adopts the ACCC's proposal to involve consumer advocacy groups in the consultation process, which Telstra considers to be a further positive step for end-users.

Subject matter	Telstra's proposal
Scope of PDF Processes	Telstra notes the ACCC's proposal to remove exclusions for Ancillary Services and for products covered by or contemplated in NBN Co's Initial Product Roadmap. Telstra also notes the ACCC's proposal to clarify that the PDF Processes apply to Product Ideas that NBN Co

¹⁵ ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, dated April 2013, p 24.

¹⁶ ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, dated April 2013, p 23.

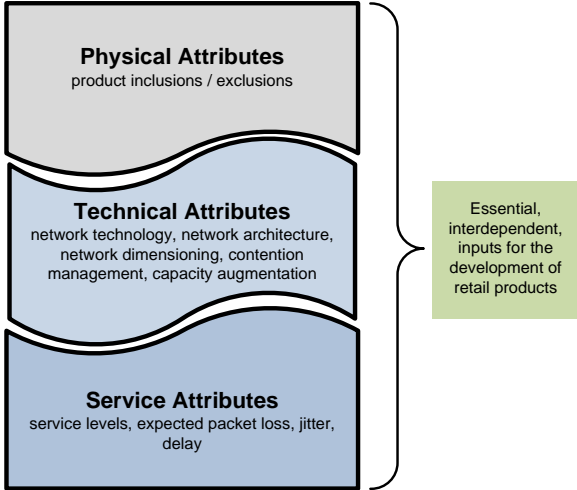
¹⁷ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 79.

¹⁸ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 75.

Subject matter	Telstra's proposal
	<p>has organically developed (in addition to those that have been submitted to NBN Co).</p> <p>To avoid confusion about what is included and excluded from the PDF Processes (including for Facilities Access Services and products that are specified in the Reference Offers and Non Reference Offers but are yet to be delivered by NBN Co), Telstra proposes that the PDF Processes simply apply to <i>all</i> NBN products and services which NBN Co is yet to deliver as a commercial offering.</p>
<p>Product Ideas Register</p>	<p>Telstra welcomes NBN Co's commitment to publish and maintain a register of Product Ideas and considers this to be a positive feature of the PDF Processes. At a minimum, the following information should be required to be included in the register:</p> <ul style="list-style-type: none"> • information that NBN Co possesses in relation to the Product Idea (subject to confidentiality requirements); • the date that the Product Idea was received by NBN Co, or was developed by NBN Co; • the date that Product Idea was included in the register; • the status of NBN Co's decision regarding the development of the Product Idea (e.g. accepted / rejected / pending); and • the status of the development of that Product Idea (e.g. finalised / pending / ceased). <p>The register should be updated as soon as possible after a Product Idea is received, or has been organically developed, by NBN Co.</p>
<p>Assessment Phase</p>	<p>A requirement to undertake mandatory consultation in relation to NBN Co's assessment of a Product Idea, and ultimately the decision whether to invest in its development, should be enshrined in the PDF Processes.</p> <p>The decision about whether to proceed with development is a matter that concerns all of industry and should not occur in isolation.</p> <p>Equally, the decision about whether to proceed should also be informed by the views of consumer advocacy groups, and Telstra believes that it is at this stage of the product development process that it is most appropriate for consumer advocacy groups to be consulted. Consultation with consumer advocacy groups at later stages of the process is unlikely to be as effective because they will more than likely involve more complex technical issues associated with the proposed product.</p> <p>RSPs and consumer advocacy groups must have confidence that they will be given the opportunity to put forward their views, and have them considered, as part of NBN Co's assessment during the</p>

Subject matter	Telstra's proposal
	<p>assessment phase.</p> <p>The consultation processes that NBN Co uses should also be subject to overriding principles, to ensure that the processes that NBN Co proposes to use are appropriate and effective. The overriding principles that Telstra proposes are equivalent to those proposed by Telstra in relation to the development phase of a Product Idea (set out further below).</p>
Decision to Develop	<p>As soon as possible after NBN Co makes a decision to approve or reject development of a Product Idea, this should be communicated through an update of the Product Idea register.</p> <p>Notification should also occur where NBN Co decides to cease developing a Product Idea.</p> <p>Importantly, where NBN Co decides to reject a Product Idea or to cease developing a Product Idea, NBN Co should provide reasons for this.</p>
Product Construct Paper	<p>Telstra welcomes NBN Co's commitment to the preparation of a more detailed "Product Construct Paper" in circumstances where the decision to proceed with developing a Product Idea has been made. Telstra is also generally supportive of the type of content that NBN Co proposes to include in the Product Construct Paper.</p> <p>Importantly, however, the Product Construct Paper should also include information about the proposed price-related terms of supply.</p>
Development Phase	<p>Mandatory consultation should occur throughout the development phase of each Product Idea.</p> <p>Telstra welcomes NBN Co's commitment to the development of an "Idea Development Plan" but believes that it is important to enshrine a set of overriding principles that will guide its development.</p> <p>The overriding principles that Telstra proposes are as follows:</p> <ul style="list-style-type: none"> • Product Construct Papers should be regularly updated each time material changes are made. This will ensure that RSPs are kept abreast of developments at appropriate stages throughout the development process. • As a minimum requirement, RSPs must be given the opportunity to make formal submissions in response to the matters included in the Product Construct Paper (and each update to the Product Construct Paper). This will provide RSPs with an opportunity to put forward their views (and have them considered) as the Product Idea develops. • The Idea Development Plan must include a proposal regarding the use of workshops and other forums as part of the

Subject matter	Telstra's proposal
	<p>consultation process and must provide reasons why NBN Co considers this proposal to be reasonable and appropriate in the circumstances (including where NBN Co determines that it will not undertake any workshops or other forums). This will incentivise NBN Co to develop a proposal that has been properly considered and is appropriately balanced.</p> <ul style="list-style-type: none"> • The Idea Development Plan must include a proposal regarding the use of both bi-lateral and multi-lateral consultation as part of the consultation process and must provide reasons why NBN Co considers this proposal to be reasonable and appropriate in the circumstances. Again, this will incentivise NBN Co to develop a proposal that has been properly considered and is appropriately balanced. • NBN Co must ensure that lead-times afforded to participants for lodgement of submissions and participation in workshops and other forums are reasonable. This will give RSPs confidence that they will be given sufficient time to consider the issues at hand and participate meaningfully in the consultation process. • NBN Co should be required to continuously review (and, if appropriate, revise) the Idea Development Plan to ensure that it continues to be relevant and appropriate, and to ensure that appropriate adjustments are made in the event that circumstances change. • Finally, NBN Co should be subject to a positive obligation to consider, and have regard to, the views and submissions put forward by participants. This is essential to providing industry with confidence that the consultation processes will afford them a genuine opportunity to participate and have their views considered.
<p>“PASS” Test</p>	<p>In previous submissions Telstra has identified three fundamental attributes that must be known about each product in order for RSPs to have the requisite degree of certainty about that product. These three attributes are illustrated in Figure 2 below.</p> <p style="text-align: center;">See following page for Figure 2.</p>

Subject matter	Telstra's proposal
	<p style="text-align: center;">Figure 2: Fundamental product attributes</p> <div style="text-align: center;">  <p>The diagram consists of three stacked boxes. The top box is grey and labeled 'Physical Attributes' with sub-points 'product inclusions / exclusions'. The middle and bottom boxes are blue and labeled 'Technical Attributes' and 'Service Attributes' respectively. The 'Technical Attributes' box lists 'network technology, network architecture, network dimensioning, contention management, capacity augmentation'. The 'Service Attributes' box lists 'service levels, expected packet loss, jitter, delay'. A large right-facing curly bracket groups all three boxes, pointing to a green callout box on the right that says 'Essential, interdependent, inputs for the development of retail products'.</p> </div> <p>As Figure 2 illustrates, these product attributes are interdependent and it is not possible for RSPs to develop retail products if only part of this product "package" is known.</p> <p>Accordingly, Telstra proposes that a test (which Telstra refers to as the "PASS" test) be applied to each Product Idea before it is introduced as a commercial proposition. See Telstra's Previous Submission for more details.</p> <p>The "PASS" test would require NBN Co to establish, as a pre-condition to the introduction of a new product:</p> <ul style="list-style-type: none"> • that the product attributes, technical attributes and services attributes of the Product Idea are complete and have been fully documented; and • that NBN Co has undertaken consultation in relation to these matters as required by the PDF Processes.
<p>Integrated Roadmap</p>	<p>Telstra notes that, in practice, the theoretical development of a product is of little value unless that product is supported by NBN Co's IT systems and operational capabilities.</p> <p>It is therefore critical for RSPs to understand how each of these key elements (i.e. product development, IT support and operational support) will "come together", so that RSPs are able to plan and deploy resources appropriately and efficiently.</p> <p>To this end, Telstra proposes that NBN Co commit to publishing and maintaining an "integrated roadmap". The roadmap would identify</p>

Subject matter	Telstra's proposal
	<p>each Product Idea that is under development and would contain the quarterly development programs (covering the ensuing 12 month period) through which IT and operational support for that Product Idea are to be developed.</p> <p>The road map should then be updated each quarter as new quarterly development programs are released.</p>

Product withdrawal

ACCC power to prevent withdrawal

The ACCC proposes that the NBN Co SAU give the ACCC the power to prevent NBN Co from withdrawing products.¹⁹ As noted in section 3.2 above, the ACCC has also proposed that the NBN Co SAU preserve the ACCC's statutory powers to declare NBN services in the future (and Telstra supports this proposal).

Telstra therefore believes that it is more appropriate for the ACCC to use its statutory powers to declare NBN services in the event that it considers a service should be offered by NBN Co, and does not support the ACCC's proposal that it be given the power to prevent NBN Co from withdrawing a product. To this end, Telstra proposes that the NBN Co SAU clarify that a product cannot be withdrawn by NBN Co if that product has been declared by the ACCC, rather than give the ACCC the power to prevent any product from being withdrawn.

This does not mean that Telstra supports NBN Co having absolute discretion to determine when and how it may withdraw products. As explained further below, Telstra continues to be concerned about the commitments that apply to product transition and the level of transparency that applies to NBN Co's assessment of each of the matters that it is required to have regard to when deciding to withdraw a product.

Transitional arrangements

The ACCC has requested further submissions regarding NBN Co's commitments about the transitional arrangements to apply for transition from a withdrawn product to a replacement product.²⁰ Telstra raised this as a concern in its Previous Submission and welcomes the opportunity to provide additional feedback in this submission.

The NBN Co SAU currently requires NBN Co to give notice of the transitional arrangements that it "may" put in place to migrate customers to an alternative product.²¹ It also provides that NBN Co will discuss and consider in good faith any feedback received from customers in relation to the impending withdrawal of a product, such as migration.²² Telstra welcomes these commitments, but is concerned that they provide too much discretion for NBN Co to decide how much information it will provide, when this information will be given, and how it will consult.

¹⁹ ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, dated April 2013, p 25.

²⁰ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 94.

²¹ NBN Co SAU, cl 11.5.2.

²² NBN Co SAU, cl 11.5.3(c).

Telstra also notes the ACCC's proposal that notice of a product's withdrawal be given to the ACCC and consumer advocacy groups at the same time as to RSPs. Telstra supports this proposal and considers it to be a further positive step in the interests of RSPs and end-users alike.

Telstra therefore proposes that, at the time of giving written notice to RSPs, the ACCC and consumer advocacy groups of its intention to withdraw a product, NBN Co be required to provide the following minimum information in respect of the product to be withdrawn:

- NBN Co's assessment of each of the matters that it is required to have regard to when considering withdrawal. In its Previous Submission, Telstra proposed that NBN Co also be required to have regard to the wider social impact of the withdrawal (for example, impacts to disability services and payphone services). Telstra continues to advocate for this requirement, particularly in light of the ACCC's proposals regarding the inclusion of consumer advocacy groups. The effect of Telstra's proposal is to require NBN Co to not only have regard to these matters (including the wider social impact), but to be transparent with RSPs, the ACCC and consumer advocacy groups about its assessment of these matters;
- the following minimum information about NBN Co's proposed transitional arrangements for migration to an alternative product:
 - NBN Co's proposed "go to" product;
 - NBN Co's proposed timeframes for transition to the "go to" product;
 - details of testing of the "go to" product; and
 - details about trials and phasing-in processes for transition to the "go to" product; and
- NBN Co's proposal to consult with RSPs and consumer advocacy groups in respect of these matters and reasons why NBN Co considers this proposal to be reasonable and appropriate in the circumstances. This will incentivise NBN Co to develop a proposal that has been properly considered and is appropriately balanced.

NBN Co should also be required to provide updated information to, and consult with, RSPs and consumer advocacy groups each time material changes are made to this information.

Exemption for prohibited products

The withdrawal of a Product, Product Component, Product Feature, Ancillary Service or type of Facilities Access Service that NBN Co is required to withdraw or is prohibited from providing under section 41(3) of the NBN Companies Act is excluded from the operation of the product withdrawal commitments.²³

In its Previous Submission, Telstra noted that it does not believe this warrants a complete exemption from the NBN Co SAU. In its Draft Decision the ACCC requested further

²³ NBN Co SAU, Sch 11, cl 11.1.3(b)(iv) and cl 11.5.3.

submissions on this issue.²⁴

Telstra's view remains unchanged from its Previous Submission. Telstra understands the need for NBN Co to ensure it is able to comply with its statutory obligations. However, this can be achieved without providing a blanket exemption from the product withdrawal commitments. For example, if the responsible Minister uses his or her powers to require the withdrawal of a product, Telstra expects that the Minister will have regard to the NBN Co SAU when developing the terms of any direction to NBN Co to cease supplying a particular service. In these circumstances it will be possible for NBN Co to comply with its commitments in the NBN Co SAU as well as its statutory obligations.

Telstra therefore submits that the exemption should be limited so that it only applies to the extent that NBN Co is prevented by law from complying with the product withdrawal commitments. In other words, the exemption should only apply in circumstances where NBN Co will, by complying with the NBN Co SAU commitments, be in breach of the law.

Non-circumvention

In its Previous Submission, Telstra noted that clause 11.5.1 of the NBN Co SAU provides that NBN Co will not implement a product withdrawal for the purpose of circumventing, or avoiding the operation of, the Individual Price Increase Limits under clause 1C.4 and clause 1D.4. Telstra is concerned that this clause implies that it is permissible for NBN Co to implement a product withdrawal to circumvent other provisions of the NBN Co SAU. Telstra therefore submits that this clause applies to *all* commitments in the NBN Co SAU, and not just the Individual Price Increase Limits under clause 1C.4 and clause 1D.4.

3.4. Service Qualification Enquiries

Telstra has previously raised concerns about the prospect that NBN Co may introduce charges for submitting Service Qualification Enquiries.²⁵ These concerns arise due to the capacity for NBN Co to introduce charges for services which are zero-priced at the time the NBN Co SAU is accepted.

Telstra notes the ACCC's proposal that the ACCC should be able to determine prices for zero-priced products,²⁶ and this is something that Telstra supports (see section 4.2.2). However, Telstra submits that the NBN Co SAU should provide certainty for RSPs from the outset that charges will not be applied to Service Qualification Enquiries.

Service qualification is a necessary and unavoidable step to activating a service. In other words, it is not possible for an RSP to activate a service unless they have first submitted a Service Qualification Enquiry. It follows that the NBN Co SAU must provide certainty for RSPs that they will not be charged for using this basic function when attempting to activate a service.

As noted in its Previous Submission, however, Telstra acknowledges that the service qualification function may be used by RSPs to undertake bulk Service Qualification Enquiries

²⁴ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 94.

²⁵ Telstra, letter to the ACCC dated 11 February 2013 re. *ACCC Consultation Paper in relation to the NBN Co 2012 Special Access Undertaking – charging for Service Qualification Enquiries*.

²⁶ ACCC *Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 116.

which are not connected with service activation. In these circumstances, Telstra accepts that it is reasonable for NBN Co to impose an appropriate charge.

3.5. Consumer Advocacy Groups

The ACCC has requested submissions from interested parties in relation to the role that “consumer advocacy groups” could play in relation to product development and withdrawal processes and the appropriate definition to be given to “consumer advocacy group”.

Telstra supports the inclusion of consumer advocacy groups in the product development and withdrawal processes and has set out its views about the role they could play in section 3.3 of this submission. This section is therefore focussed on providing Telstra’s suggested approach in developing an appropriate definition for “consumer advocacy group”.

Telstra’s approach seeks to ensure that there is certainty about which consumer advocacy groups are required to be consulted, while at the same time providing flexibility for the list of consumer advocacy groups to change over time. Importantly, Telstra’s approach also places some responsibility on consumer advocacy groups to obtain (and then maintain) their registration status so as to ensure that uninterested groups are not included by default. It also places responsibility on consumer advocacy groups to ensure that information they receive is kept confidential and not used improperly.

To this end, Telstra’s proposal is as follows:

- “consumer advocacy group” should be defined by reference to a register that is to be established and maintained by NBN Co. If an organisation is included on the register, it will be treated as a “consumer advocacy group”.
- Organisations who wish to be included on the register will have to make a request to NBN Co. An organisation who satisfies the following eligibility criteria will be entitled to be registered:
 - The organisation must be an incorporated body (to ensure that it is capable of giving confidentiality undertakings in relation to the information they may receive).
 - The organisation should be a not-for-profit organisation.
 - The objectives of the organisation should be to, either: (a) promote the interests of consumers; or (b) promote the welfare of a special interest group.
 - The organisation must not supply telecommunications goods or services or be a related entity of any person that supplies telecommunications goods or services.
 - The organisation must agree to keep confidential any information that it receives from NBN Co which is marked as confidential, on terms which are reasonably necessary to ensure that the information is not disclosed or used for any purpose other than to participate in consultation.
- Each registered organisation should be required to re-confirm, on an annual basis, that they wish to continue to be registered and that they continue to meet the eligibility criteria. If an organisation fails to do so, NBN Co will be entitled to remove that organisation from the register. NBN Co will also be entitled to deregister an organisation if that organisation commits a breach of its confidentiality undertakings

and fails to show cause (to NBN Co's reasonable satisfaction) why it should not be removed from the register as a consequence of the breach.

4. Price Terms

4.1. Introduction

It is important for end-users that NBN Co is subject to the appropriate constraints and commitments to ensure that as a monopoly supplier of a service it has positive incentives to efficiently incur costs and price efficiently in a manner that avoids distorting the downstream retail market outcomes and adversely impacting the LTIE. Avoiding adverse downstream customer impacts is a key priority for Telstra.

This section sets out Telstra's views on the issues raised in section 2.4 of the Consultation Paper in relation to price-related terms and conditions of the NBN Co SAU. This section follows the structure of the Consultation Paper, first setting out Telstra's views on pricing of individual products, followed by comments on the Long Term Revenue Constraint (**LTRC**).

4.2. Pricing of individual products

4.2.1. Initial prices for Reference Offers and Non-Reference Offers (other than Zero-Priced Offers)

In the Draft Decision, the ACCC notes specific concerns with, and requests further information on, a range of initial prices for products specified within the NBN Co SAU. In Appendix B to the Draft Decision, the ACCC lists NBN Co's Standard Business Offer (**SBOs**), Symmetric Access Capacity Offers and Service Management Fees as services for which the Commission is not satisfied that NBN Co's proposed initial prices are reasonable.

Setting aside NBN Co's proposed charges for Service Management Fees (with which Telstra has no specific concerns), the ACCC's concerns highlight the significant uncertainty that exists with respect to the demand for the services in question and the potential for these services to be used to provide a range of downstream services to end-users. Telstra is also concerned that if NBN Co sets the initial price of the SBOs and Symmetric Access Capacity Offers at the levels set out in the NBN Co SAU, many RSPs will consider these services to be over-priced, and will choose not to make the necessary investments in their own networks and product offerings to take-up these services. This is likely to lead to an inefficient use of the NBN.

NBN Co's initial pricing for both the SBOs and Symmetric Access Capacity Offers is likely to lead to RSPs utilising alternative NBN Co service offerings (such as "best efforts" TC-4 CVC connectivity) to deliver services to their end-users, that otherwise would be served with TC-1-based services. For example, under NBN Co's proposal, an RSP would need to pay an additional \$10 for each additional line required by a business customer for fax or EFTPOS facilities, in order to provide quality of service that is comparable to what is currently provided over legacy networks. In this context, RSPs will be faced with a choice between paying higher network charges (and imposing commensurately higher retail charges), or providing a lower quality of service (essentially a "best efforts" service).

Telstra has similar concerns with respect to the pricing of multicast services. At present, NBN Co's pricing of multicast services is unlikely to lead to significant take-up of the capability. The ACCC acknowledges industry concerns with respect to multicast prices but in the Draft Decision:

The ACCC notes that, as discussed in section 5.4.2, NBN Co could, at a future time, reduce multicast prices to encourage take-up if it so chose — if it did so, the price control path would also lower in response. Hence, the SAU would not preclude NBN Co from

responding to future market conditions, while still providing some certainty about pricing over time.

Telstra agrees that NBN Co is free to reduce prices for multicast services (as well as for the SBO and Symmetric Access Capacity Offers) if its proposed initial prices for these services prove to be uneconomic for RSPs and result in lower than anticipated demand. However, Telstra would caution that even if NBN Co addresses these errors over time, the adverse impact on end-users and the long-term efficient use of the NBN may be significant. This is because RSPs are currently determining their product offerings and making the necessary investments in their own networks to offer services over the NBN.

As such, it is important that NBN Co establishes appropriate expectations for the pricing of these services now. Although it may be possible for prices to be reduced in future, expectations will have already been established by that time, and investments made on the basis of those expectations.

Further, the ACCC's stated concerns with respect to the SBOs and Symmetric Access Capacity Offers (as well as the acknowledged uncertainty with respect to multicast services), are evidence of the need for a broad ACCC price review and rebalancing power as proposed by the ACCC in its Draft Decision. Telstra's views on this proposal are set out in section 4.2.3.

4.2.2. ACCC oversight of prices for new products and previously zero-priced offers

In the Consultation Paper, the ACCC proposes variations to the NBN Co SAU which would allow the ACCC to be able to determine prices for new products and previously zero-priced products.²⁷

In light of the significant importance of the NBN to delivering services to end-users now and well into the future, Telstra considers that it is important for there to be a "safety-net" which would ultimately enable the ACCC to be able to determine prices for new products and previously zero-priced products in the event the prices determined by NBN Co for those services are not consistent with the LTIE.

The incentives that NBN Co may face to set initial prices for new products and previously zero-priced products in a manner that promotes efficient growth in demand for those services may vary in strength over time as the network moves through different cycles. NBN Co may face a stronger incentive to price new products and previously zero-priced products at a level that promotes efficient growth in demand for those services when NBN Co is under-recovering its costs, but is likely to face a weaker incentive to do so when it is over-recovering its costs.

As noted by the ACCC, when NBN Co is determining initial prices for new products and previously zero-priced products in a manner which is directed at promoting efficient growth in demand for services, there would be no need for the ACCC to intervene and determine those prices via ACCC Regulatory Decisions. However, to the extent NBN Co does not face sufficiently strong incentives to price new products or previously zero-priced products at a level that promotes efficient growth in demand for services, Telstra agrees that the ACCC should be able to exercise the regulatory determination powers available to it in order to determine prices for these products.

²⁷ ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, dated April 2013, p 26.

Telstra therefore agrees that those clauses in the NBN Co SAU relating to the setting of prices for new products and previously zero-priced offers should be removed.

4.2.3. Ability for relative price levels to change in response to unforeseen circumstances

In the Consultation Paper, the ACCC proposes variations to the NBN Co SAU which would enable NBN Co's prices to be subject to periodic revenue neutral price rebalancing.²⁸ The Consultation Paper notes that the ACCC is still considering the precise form that the variation would take and that the ACCC is seeking views on:

- whether the NBN Co SAU should specify when such rebalancing should occur, and if so, at what times; and
- how revenue neutrality would be determined.²⁹

Significant uncertainties that exist in relation to both how demand for end-user services provided on the NBN will develop over time and the services that may be capable of being provided on the NBN over time. This uncertainty implies that price structures which may appear reasonable today (based on current expectations), may not be reasonable in future and may require adjustment. In light of this uncertainty, Telstra agrees that it is desirable for there to be the ability to rebalance prices.

While the commitments in the NBN Co SAU about changes in prices for Reference Offers, other existing services and new products (once they have been initially priced) provide certainty as to the maximum extent those prices will increase over time, there is nevertheless a clear risk that the prices and price structures at some point in future may not promote the LTIE. That is, although the prices may have been initially set in a manner that was thought to promote the LTIE based on a number of assumptions, those assumptions may not turn out to hold, meaning that the prices are not promoting the LTIE.

For example, it may have been thought that a particular pricing structure, based on an assumption about demand levels of consumers, would promote the LTIE. However, as end-users take up these services, it may be revealed that consumers are using the services in a materially different way from what was assumed. In these circumstances it is appropriate to review whether the prices are promoting the LTIE and if they no longer are, to reset those prices.

Telstra agrees that it would be important in the rebalancing of prices, to do so in a manner that takes into account the legitimate business interests of NBN Co. Building in a concept of revenue neutrality will assist in achieving this.

Subject to the comments made below with respect to CVC pricing, the ACCC could consider the following mechanism to provide for the rebalancing of prices:

- At least once every three years (or more regularly if required by the ACCC), NBN Co provides a report to the ACCC which identifies:
 - all Products and Product Components;

²⁸ ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, dated April 2013, p 27.

²⁹ ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, dated April 2013, p27.

- the Prices for all Products and Product Components that have applied over the three year period prior to the report;
 - the demand for all Products and Product Components over the three year period prior to the report and how that demand has changed from month-to-month over that time;
 - whether NBN Co considers that the current Prices for all Products and Product Components are set at a level that promotes the LTIE; and
 - any changes that NBN Co considers should be made to the current Prices for all Products and Product Components that would better promote the LTIE relative to the current Prices.
- The ACCC publishes the report and seeks comments from interested stakeholders on the report (to the extent the report contains confidential information, appropriate arrangements are made to facilitate the disclosure of that information).
 - The ACCC takes these comments into account, publishes a draft report containing its recommendations (if any) of the changes that the ACCC considers should be made to the current Prices that would better promote the LTIE, and calls for submissions on the draft report.
 - Interested stakeholders, including NBN Co, have an opportunity to respond to the draft report (say 20 business days).
 - Taking into account submissions received, the ACCC publishes a final report either:
 - confirming that current Prices are set in a way that promotes the LTIE; or
 - stating that current Prices are not set in a way that promotes the LTIE, and setting out the changes to current Prices that would be required in order to ensure prices going forward do promote the LTIE.
 - NBN Co is then provided with a specified period (say 10 business days) in which to determine whether it will adopt the ACCC recommendations. If NBN Co adopts the ACCC recommendations, those Prices then apply under the NBN Co SAU.
 - If NBN Co does not do so, this acts as a trigger to enable the ACCC to exercise its regulatory powers to determine prices for the services that were the subject of the ACCC's final report.

Where prices are rebalanced, either by NBN Co adopting the recommendations made by the ACCC in a final report or by the ACCC exercising its regulatory determination powers, revenue neutrality is provided by the ICRA and the LTRC. That is, given the combined operation of the LTRC and the ICRA, any rebalancing would not affect NBN Co's ability to recover sufficient revenue to cover its costs over the long-term (i.e. satisfies the NPV = 0 test).

4.2.4. Regular review of CVC charges

As well as the addition of a broad ACCC price review and rebalancing power, Telstra advocates a review that focuses on the pricing of the CVC Offer (and in particular the “best efforts” CVC Offer, TC-4). The purpose of this additional review mechanism would be to provide much needed transparency around demand for CVC capacity and how the price of

CVC capacity is affecting the cost to serve end-users. This additional layer of transparency would allow for closer monitoring of CVC costs by the ACCC and industry, and would provide scope for CVC pricing to be adjusted in a timely manner in response to changes in end-user demand.

CVC capacity is integral to the delivery of all NBN-based services (that is, it cannot be substituted for an alternative service) and industry faces significant uncertainty as to how much CVC capacity will be required to support end-users over time. Telstra's experience to date demonstrates that NBN-connected end-user demand for bandwidth at peak times has the capacity to deviate quickly and significantly from what has been projected and factored into the structuring of charges, and can also be significantly different from industry experience on legacy networks (see Box 1 below).

Telstra considers that there have been, and will continue to be, more rapid developments with respect to demand for the CVC Offer (TC-4), that should be kept under review and responded to in a dynamic way if the pricing of this product is to be, and remain, consistent with the LTIE. NBN Co recognises this at clause 1C.4.2(d) of the NBN Co SAU which provides that NBN Co will annually review the Maximum Regulated Price of the CVC Offer (TC-4) with a view to reducing the price as aggregate demand for that product increases. Clause 1C.4.2(d) provides that relevant to NBN Co's review will be the aggregate demand for capacity and the information in the most recently published NBN Co Corporate Plan.

As noted above, however, there is considerable uncertainty about how demand for products will develop, with this uncertainty likely to be more significant in the short to medium term as RSPs and end-users transition to an NBN environment. While an assessment may be made now about whether initial prices, and the manner in which those initial prices may vary, are in the LTIE, those decisions are being made on the basis on particular assumptions, including as to demand. Where actual demand is materially different to assumed demand levels, it is possible that the prices as determined under the NBN Co SAU will no longer promote the LTIE. Telstra considers that such a situation may arise at various points as the NBN is progressively rolled out and until a certain scale is achieved in respect of the CVC (TC-4) product. This is because:

- end-user demand for broadband capacity at peak times has grown significantly in recent years and is continuing to grow significantly;
- early indications suggest that end-users are demanding higher peak network capacity when connected to the NBN as compared to legacy networks. To this end, NBN Co submitted to the Parliamentary Joint Committee that data usage on the NBN is around 50 per cent more than the average fixed broadband user;³⁰
- based on experience so far, assumptions that NBN Co has made about individual end-user demand have not been realised in practice with demand levels far exceeding those assumptions. NBN Co CEO, Mike Quigley, stated recently that CVC take up is higher than anticipated;³¹
- despite the above points, and NBN Co's recognition that CVC prices should reduce as aggregate demand increases, there has been no change in the price for this product

³⁰ NBN Co Report to Parliamentary Joint Committee on the National Broadband Network Financial and Rollout Data April 2013 p 17.

³¹ Joint Committee on the National Broadband Network – Fifth Report Public Hearing Friday 19 April 2013 - Hansard Transcript p. 20.

(other than the introduction of a limited rebate) since the launch of the CVC service;
and

- as set out in its Previous Submission, Telstra estimates that if the proposed price cap of CPI-1.5% is applied and based on the conservative assumption of a 30 per cent year-on-year increase in usage by the end-user, the amount a RSP will be required to pay for CVC will be equivalent to \$12/SIO/month by 2020. The potential impact on costs (on a per end-user basis) will be far greater if traffic growth reflects historic trends – that is, greater than 30 per cent year-on-year.

These concerns are set out in further detail in Box 1 below.

Box 1: Changes in end-user demand for bandwidth associated with migration to higher speed networks

The cost impact of CVC pricing on RSPs (and consequently, on end-user services) is a function of the amount of capacity RSPs are required to provision to meet the demands of their customers at peak times. To this end, NBN Co's assumptions on the likely amount of CVC required to meet end-user demand appear to be conservative and based on that observed on legacy networks.

Telstra's experience suggests that end-user demand for bandwidth at peak times is fundamentally different across cable and fibre networks (including the NBN), as compared to legacy DSL networks. As end-users join higher speed fixed broadband networks and take up of higher speed tiers demands for bandwidth are distinctly different.

While peak time DSL traffic has continued to grow strongly over the past two years, it remains significantly below peak time traffic on Telstra's HFC network.

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The analysis clearly shows that end-user demand at peak times is increasing significantly on legacy networks but demand for capacity at peak times by end-users connected to the NBN and other higher speed networks (such as Telstra's HFC) is significantly higher compared to what is observed on legacy networks. This suggests that there is a permanent shift in consumption patterns when end-users migrate to higher speed networks.

In light of the above, Telstra submits that there should be a review mechanism in the NBN Co SAU to provide for transparency around current demand for CVC and the associated cost to serve end-users based on this level of demand. This review mechanism should allow for adjustment of CVC charges in a relatively dynamic way to account for changes in patterns of demand and ensure a path of price stability over time.

The ACCC could consider the following mechanism to provide for the review of CVC prices:

- At least once every six months, NBN Co to provide a report to the ACCC which identifies:
 - the prices for all CVC products that have applied over the six month period prior to the report;
 - the demand for all CVC products over the six month period prior to the report and how that demand has changed from month to month over that time;

- whether NBN Co considers that the current Prices for all CVC products are set at a level that promotes the LTIE, including by reference to the effective cost of supplying end-users, based on current demand for CVC; and
 - any changes that NBN Co considers should be made to the current prices for all CVC products that would better promote the LTIE relative to the current prices.
- The ACCC publishes the report and seeks comments from interested stakeholders on the report (to the extent the report contains confidential information, appropriate arrangements are made to facilitate the disclosure of that information).
 - Taking into account the comments received, the ACCC then publishes a draft report containing its recommendations (if any) of the changes that the ACCC considers should be made to the current Prices that would better promote the long-term interests of end-users and calls for submissions on the draft report.
 - Interested stakeholders, including NBN Co have an opportunity to respond to the draft report (say 10 business days).
 - Taking into account the submissions received, the ACCC publishes a final report with its final recommendations.
 - NBN Co is then provided with a specified period (say business 10 days) in which to determine whether it will adopt the ACCC recommendations. If it does so, those prices then apply under the NBN Co SAU.

It should be noted that under the above proposal, NBN Co would not be required to adopt any change to CVC pricing recommended by the ACCC. However, if NBN Co chose not to adopt any such recommendation, the ACCC may decide to exercise its overarching power to rebalance NBN Co charges (discussed above), and include in this rebalancing an adjustment to CVC prices. On the other hand, if NBN Co adopts the ACCC's recommendations, the ACCC may be less likely to exercise its overarching rebalancing power.

Telstra considers such a review mechanism of the CVC Offer will not only provide greater transparency to the ACCC and RSPs but also a higher level of certainty over the evolution of CVC pricing and provide NBN Co with the incentives to respond to evolving end-user demand with respect to CVC.

4.2.5. Summary of Telstra's position on price-related issues (other than LTRC issues)

Telstra submits that, in light of the above issues, a number of amendments are required to those parts of the NBN Co SAU dealing with the proposed price controls. These are summarised in Box 2 below.

Box 2: Telstra's proposed amendments to price-related aspects of the NBN Co SAU (other than LTRC issues, which are discussed in the next section)

1. Removal of those clauses in the NBN Co SAU relating to setting of prices by NBN Co for new products and previously zero-priced offers, including clauses 1D.6 (in Module 1) and 2C.5 (in Module 2).
2. Insertion of a mechanism for periodic review of price structures, as outlined in section 4.2.3 above.

3. Insertion of a mechanism to provide for more regular review of CVC prices during Module 1. A possible framework for this review mechanism is set out in section 4.2.4 above.

4.3. Long term revenue constraint

In its Draft Decision, the ACCC sets out a number of concerns regarding NBN Co's proposed long term revenue constraint (**LTRC**). These include:

- The approach in Module 1 whereby NBN Co administers its own revenue constraint is not standard regulatory practice and may result in NBN Co being overcompensated relative to its efficient costs.³²
- The absence of any ACCC oversight mechanism in Module 1, combined with relatively broad prudency rules, may mean that more than NBN Co's efficient costs are included in the LTRC.
- During Module 2, roll-forward of the RAB based on actual expenditure may create incentives for inefficient investment.
- The length of the regulatory period will impact the strength of efficiency incentives and therefore it should be a matter for consultation and independent decision making in order to ensure that NBN Co is subject to appropriate incentives.³³
- The proposed Module 2 rules about assessment of expenditure forecasts, the rate of return and other LTRC parameters should be less prescriptive at least initially. Closer to the time at which those parts of the NBN Co SAU will have application, NBN Co could propose a variation to the NBN Co SAU to include methodologies and factors to be used in developing these inputs.

Telstra shares a number of these concerns, some of which Telstra has raised in previous submissions.³⁴ In particular, Telstra remains concerned that NBN Co faces only a weak incentive regime, particularly during Module 1. Telstra has also previously noted that given the very long term of the NBN Co SAU and the significance of the services that will be provided on the network, particular care must be taken not to lock in overly prescriptive rules around determination of LTRC parameters.

Telstra agrees that the ACCC should have greater oversight of NBN Co expenditure, both in Module 1 and Module 2. This is necessary to ensure that only prudent expenditure is included in NBN Co's RAB, revenue requirements and ICRA.

The intention of the ACCC to have a greater oversight role can be given effect to through a relatively simple set of amendments to the NBN Co SAU, as follows:

- first, the ACCC should have a role in administering the LTRC during Module 1;

³² ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 135.

³³ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 167.

³⁴ See, for example: Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, pp 19-22.

- second, an ex-post expenditure review power for the ACCC can be introduced, and can be applied consistently across Module 1 and Module 2. The effect of having an ex-post review power would be to ensure that NBN Co does not receive a return on or of imprudent expenditure, and therefore does not have an incentive to undertake such expenditure;
- third, modifications to the prudency rules can be made; and
- finally, during Module 2, the ACCC would need to have the power to review the length of the regulatory period, and its review of replacement module applications should be subject to less prescriptive rules.

Each of these proposed modifications to the NBN Co SAU is discussed in more detail below.

4.3.1. Administration of the LTRC during Module 1

As noted by the ACCC in its Draft Decision, NBN Co's proposal for self-administration of the LTRC during Module 1 would represent a significant departure from standard regulatory practice.³⁵ Like the ACCC, Telstra is not aware of any regulatory regime in which regulated revenues are calculated by the regulated business itself, with court enforcement action being the only remedy available in the event of a dispute. The regime currently applying to Telstra's fixed-line services involves a much higher degree of regulatory oversight, primarily through ex ante review and approval of revenue allowances and prices.

The ACCC notes that given the scope for differing interpretations of some clauses within Module 1, an ex-post compliance approach may not be appropriate.³⁶ The ACCC also notes that NBN Co administering its own revenue constraint may at least create a perception that this is not being done impartially.³⁷ Telstra agrees with each of these observations.

It is therefore important that the ACCC has a role in calculating annual revenue requirements (including the various inputs), and in rolling forward the RAB and ICRA during Module 1. This should not be left to NBN Co to self-administer.

Telstra considers that, at a minimum, values for the RAB, ABBRR and ICRA should be calculated by the ACCC for each year during Module 1. This could be provided for by a simple amendment to Schedule 1F of the NBN Co SAU, to allow the relevant values to be determined by the ACCC, based on information to be provided by NBN Co – for example:

- Clause 1F.1.3(a) could be modified to state that “NBN Co's RAB will be determined *by the ACCC* by reference to...”; and
- Clause 1F.1.3(b) could be modified to state that “*the ACCC will determine the ABBRR* by reference to...”.

These values could be determined for each year on an ex-post basis, by reference to information provided by NBN Co on levels of expenditure in that year.

³⁵ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 135.

³⁶ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 136.

³⁷ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 136.

4.3.2. Review of expenditure during Module 1

In addition to having a role in administering the LTRC, Telstra considers that the ACCC should also review NBN Co's expenditure during Module 1 to ensure that it has been prudently and efficiently incurred.

Telstra has previously raised concerns regarding the lack of any review or oversight mechanism in Module 1. The absence of any review mechanism may provide NBN Co with an insufficient incentive to only incur expenditure that is prudent and efficient. Telstra considers that it is particularly important for NBN Co to have strong incentives for efficiency during Module 1, given that vast amounts of capital expenditure are likely to be incurred during the operation of this module.

It remains unclear why NBN Co should not be subject to a more conventional regulatory oversight model and stronger efficiency incentives during Module 1. The ACCC suggests that a weaker incentive framework may be justified during Module 1 for two reasons:

- first, NBN Co will face more uncertainty than other regulated utilities about how much it is going to spend in any given year, meaning that if were subject to incentive mechanisms based on up-front expenditure approval, NBN Co could be discouraged from making otherwise efficient investments;³⁸ and
- second, NBN Co is likely to face a high degree of "revenue sufficiency risk" for most if not all of Module 1, meaning that the price control may provide incentives for it to invest efficiently during this period.³⁹

Telstra does not consider that either of these factors justifies the application of a weaker incentive regime during Module 1. Many regulated utilities face uncertainty about their future expenditure requirements and, in any event, it is not clear why such uncertainty might mean that an incentive mechanism has the effect of discouraging efficient expenditure. An appropriately designed incentive mechanism should not have the effect of penalising the regulated business for bringing forward or delaying expenditure where it is efficient to do so.

In relation to the hypothesised "revenue sufficiency risk", it is not clear to Telstra whether this will in fact create appropriate incentives for efficient investment. Telstra notes that the analysis underpinning the ACCC's conclusion as to revenue sufficiency risk is highly sensitive to the various assumptions made regarding future cost and demand scenarios.⁴⁰ If demand deviates significantly from current expectations (a likely scenario) then the degree of "revenue sufficiency risk" may be higher or lower than currently projected. Telstra has previously argued against the "split incentive design" of the NBN Co SAU, which has the effect of delaying the application of a more conventional incentive regulation framework.⁴¹ Telstra's preference would be for NBN Co to be subject to a more conventional incentive regulation framework – that is, a framework based around ex ante approval of expenditure and revenue requirements – earlier in the term of the NBN Co SAU. Such an approach would be more consistent with other utility

³⁸ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 142.

³⁹ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 141.

⁴⁰ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, pp 100-101.

⁴¹ Telstra, *NBN Co 2012 Special Access Undertaking: Telstra's response to the ACCC Consultation Paper*, 18 January 2013, pp 19-20.

regulation frameworks, including the framework that currently applies to regulation of Telstra's fixed-line services.

However in the absence of a more conventional incentive regulation framework for Module 1, the next best alternative would be for the ACCC to have an ex-post review power, allowing it to adjust the RAB, ABBRR and ICRA where it considers that expenditure has not been prudently incurred. An ex-post review power would provide some assurance that amounts included in the cost base have been prudently incurred, and would provide NBN Co with at least some efficiency incentive.

Ex-post review powers are common in other utility regulation frameworks. For example, the National Gas Rules (**NGR**) require the RAB for a covered pipeline to be rolled forward based on "conforming capital expenditure" in earlier periods, and allow the AER to exclude amounts from the RAB that are found not to be "conforming".⁴² Similarly, the National Electricity Rules (**NER**) allow the AER to exclude amounts of capital expenditure incurred in earlier periods from a RAB roll-forward, where those amounts do not satisfy the applicable criteria.⁴³

An ex-post review of NBN Co expenditure could occur for each year during Module 1, at the time the ACCC calculates the RAB, ABBRR and the ICRA for that year. Rather than simply rolling in actual expenditure for the year, the ACCC would be entitled to review this and disallow any imprudent expenditure.

Very little amendment would be required to the NBN Co SAU in order to provide for the ex-post review. If the ACCC is calculating the RAB, ABBRR and ICRA based on prudently incurred expenditure (as suggested above), then it would be up to the ACCC to review all relevant expenditure amounts and determine whether they were in fact prudently incurred.

The ex-post review of expenditure would be conducted by reference to the prudence rules set out in the NBN Co SAU. Telstra has a number of comments on these prudence rules, which are set out below.

4.3.3. Prudence rules to apply during Module 1

Telstra has previously expressed concern in relation to NBN Co's proposed prudence rules, both in their current form in Module 1 of the NBN Co SAU and as they appeared in NBN Co's December 2011 SAU. Telstra's key concerns in relation to these prudence rules include:

- These rules are overly reliant on the Network Design Rules, which have not been shown to reflect prudent and efficient network design.⁴⁴ Indeed the ACCC in its Draft Decision says that it has not considered whether the Network Design Rules do reflect an efficient network design, because a number of parameters have been set by the Government.⁴⁵ It is therefore not clear whether expenditure incurred in a way that is "materially consistent" with the Network Design Rules will in fact be prudent and efficient.

⁴² National Gas Rules, Rule 77(2)(b). The criteria for determining whether expenditure is "conforming" are set out in Rule 79.

⁴³ National Electricity Rules, clause S6.2.2A (for distribution) / clause S6A.2.2A (for transmission).

⁴⁴ Telstra, *NBN Co Special Access Undertaking: Telstra's response to the ACCC's supplementary consultation paper*, 5 April 2012, pp 42-43.

⁴⁵ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 143.

- There is broad scope to depart from the Network Design Rules, including in cases of “urgent and unforeseen network issues” or where NBN Co assesses the estimated expenditure to be less than the “Minor Expenditure Limit” of \$100 million.⁴⁶
- The rules do not require NBN Co to vary or depart from the Network Design Rules, where such a variation or departure would be efficient.⁴⁷
- The circumstances in which the prudent cost condition will be satisfied are very broad and would appear to leave scope for inefficiency.⁴⁸ For example, where the NBN Co CEO is satisfied that incurring expenditure is in the best interests of the company, this may not mean that the expenditure is efficient or in the LTIE. Similarly, incurring expenditure on an “arm’s length basis” does not necessarily imply that it will be efficiently incurred in all circumstances.

The ACCC notes that given the breadth of the prudent cost categories, it is likely that the majority of (if not all) capital expenditure incurred during the network rollout period would be likely to satisfy the prudency rules.⁴⁹ This implies the prudency rules in Module 1 are likely to impose little or no constraint on NBN Co’s expenditure during the initial rollout period.

This is concerning to Telstra, as it suggests that there will be no effective mechanism to ensure that only efficient expenditure is incurred by NBN Co during the term of Module 1, and reflected in the RAB, ABBRR and ICRA. As noted above, it is not clear to Telstra that NBN Co will necessarily face an appropriate level of “revenue sufficiency risk” during Module 1 such that it will have incentives to only incur efficient expenditure.

Telstra therefore considers that the prudency rules need to be significantly amended so that they provide a meaningful constraint on NBN Co’s expenditure. If the prudency rules cannot be strengthened to ensure that only efficient expenditure is included in the RAB, ABBRR and ICRA, then they should not be included in the NBN Co SAU at all.

The prudency rules become particularly important if the ACCC is conducting ex-post reviews of expenditure by reference to these rules (as proposed above). If the rules remain broad and accommodative of inefficient expenditure, then any ex-post review process will be significantly hampered. Potentially, the ACCC may be in a position where it is incorporating inefficient expenditure in its calculation of the RAB, ABBRR and ICRA.

Telstra would propose that either:

- the prudency rules currently set out in Schedule 1E of the NBN Co SAU be removed and replaced with a simpler set of prudency criteria which could be applied by the ACCC in ex-post reviews. These criteria could potentially be modelled on those applying in other regulatory frameworks, such as:
 - the principles applying to review of Telstra’s capital expenditure under the ACCC’s access determinations for fixed line services (these access

⁴⁶ NBN Co SAU, clause 1E.6.2(a). For discussion of this issue, refer to: Telstra, *NBN Co Special Access Undertaking: Telstra’s response to the ACCC’s supplementary consultation paper*, 5 April 2012, pp 43-44.

⁴⁷ Telstra, *NBN Co Special Access Undertaking: Telstra’s response to the ACCC’s supplementary consultation paper*, 5 April 2012, p 46.

⁴⁸ NBN Co SAU, clause 1E.4.1. For discussion of this issue, refer to: Telstra, *NBN Co Special Access Undertaking: Telstra’s response to the ACCC’s supplementary consultation paper*, 5 April 2012, pp 43-44.

⁴⁹ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, dated April 2013, p 141.

- determinations contain capital expenditure criteria as a fixed principle – refer to Box 3 below); or
- the criteria for determining whether capital expenditure is “conforming” under the NGR;⁵⁰ or
- alternatively, the prudency rules could be retained, but have substantial amendments made in order to ensure that only efficient expenditure is included in the RAB, ABBRR and ICRA calculations. Necessary amendments to the prudency rules would include:
 - reducing the reliance of these prudency rules on the Network Design Rules, the prudency of which has not yet been tested by the ACCC, and instead requiring capital expenditure to reflect prudent network design;
 - reducing the scope of “permitted variations” to the Network Design Rules, including the exception for “minor expenditure”; and
 - reducing the scope of the prudent cost categories, including to remove the presumption of prudency where the NBN Co CEO is satisfied that incurring expenditure is in the best interests of the company.

One point of detail in relation to the criteria for determining whether capital expenditure is “conforming” under the NGR, and therefore rolls into the RAB is worth noting in the context of the NBN and the obligations placed on NBN Co under the law or by shareholder Ministers. The relevant rule in the NGR provides that capital expenditure is justifiable (and therefore more likely to be considered conforming) if the capital expenditure is necessary to, amongst other things, comply with a regulatory obligation or requirement. The term “regulatory obligation or requirement” is defined in the National Gas Law, and covers legal obligations or requirements, as well as requirements imposed in the relevant jurisdiction the pipeline is located in. Adopting this type of methodology, it is possible to construct a regime that recognises NBN Co may be required by law or by its shareholder Ministers to do things that may not necessarily be considered prudent and efficient by reference to certain economic measures (or which the ACCC cannot be expected to form a view on), as part of an expenditure oversight regime. This is in effect what the regime in the NGR does.

Telstra acknowledges that the prudency rules proposed by NBN Co are complex and that significant amendment would potentially be required. We would therefore be happy to engage in further discussions or consultation on this issue.

4.3.4. Review of expenditure during Module 2

For Module 2, NBN Co has proposed what it refers to as “a conventional utility regulation approach based on the periodic provision of expenditure forecasts to the ACCC”.⁵¹ The framework for Module 2 provides for more ACCC oversight of NBN Co’s expenditure and administration of the LTRC, and potentially creates improved efficiency incentives as compared the proposed approach for Module 1. However, Telstra considers that the Module 2 framework could also be improved so as to provide stronger incentives for efficiency.

Telstra agrees with the ACCC that NBN Co’s proposed rules around assessment of expenditure, rates of return and other LTRC parameters during Module 2 are overly

⁵⁰ National Gas Rules, Rule 79.

⁵¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 46.

prescriptive. As previously noted, given the very long term of Module 2, Telstra considers that it would be unwise to lock in overly prescriptive rules at this stage. Telstra notes that in other regulatory frameworks, these types of rules are either much less prescriptive, or are subject to change from time-to-time either by the regulator or by an independent rule-making body.⁵²

In this regard, it is worth noting that regulatory practice is continually evolving, and is likely to develop significantly over the term of the NBN Co SAU. For example, the ACCC will be aware that the AER is engaging in a significant work program over 2013 which involves reviewing a number of important aspects of the regulatory regimes applying in energy – this includes an examination of incentive regimes that could apply to capital expenditure and the measurement of cost of capital parameters. Telstra submits that the NBN Co SAU should be designed in a manner that allows developments in best practice regulation to be reflected in the NBN Co SAU where it is appropriate to do so.

Telstra therefore agrees with the ACCC's preliminary view that the rules around assessment of expenditure, rates of return and other LTRC parameters in Module 2 should be removed, as it is not clear that they will remain appropriate and reflective of regulatory best practice over the entire term of the NBN Co SAU.

The rules currently in the NBN Co SAU could potentially be replaced with a less prescriptive set of rules, similar to those currently applying as fixed principles in the ACCC's access determinations for fixed line services. An example of one of these less prescriptive rules (in relation to capital expenditure forecasts) is set out in Box 3 below.

Box 3: Capital expenditure rule currently applying as a fixed principle in ACCC access determinations for fixed line services

The following matters are relevant to whether capital expenditure forecasts reflect prudent and efficient costs:

- (a) the access provider's level of capital expenditure in the previous regulatory period;*
- (b) reasons for proposed changes to capital expenditure from one regulatory period to the next regulatory period;*
- (c) whether the access provider's asset management and planning framework reflects best practice;*
- (d) any relevant regulatory obligations, or changes to such obligations, applicable to providing the relevant declared fixed line services; and*
- (e) any other matters relevant to whether forecast capital expenditures reflect prudent and efficient costs.*

Source: ACCC, Final Access Determinations number 1, 2, 3, 4, 5 and 6 of 2011, made under section 152BC of the *Competition and Consumer Act 2010*, 27 June 2012, clause 6.7.

Telstra also shares the ACCC's concerns regarding NBN Co's proposal to update the RAB during Module 2 based on actual expenditure. As noted by the ACCC, this may allow for

⁵² For example, the National Electricity Rules and National Gas Rules are subject to change by the Australian Energy Market Commission.

inefficient and imprudent expenditure to be included in the RAB, and therefore may diminish incentives for efficiency. Telstra agrees that the RAB should only be rolled forward based on *prudent* expenditure.

The ACCC has previously determined that one means of ensuring that only prudent expenditure is included in the RAB is to remove any “true-up” mechanism, and roll forward the RAB only on the basis of approved forecast expenditure. Under this approach, only expenditure that has been approved by the ACCC on an ex ante basis is included in the RAB, and there would be no true-up for what is actually spent. This is the approach that is currently adopted for Telstra’s fixed-line services RAB, under the fixed principles in the ACCC’s access determinations for these services.⁵³

Alternatively, if there is to be some form of “true-up” for actual expenditure, there should be an ex-post review power to ensure that this expenditure (either the total expenditure amount or perhaps just the expenditure amount above the approved allowance) has been prudently incurred (as is proposed for Module 1 – see above). This approach recognises the possibility that in some circumstances it may be prudent to spend above the approved allowance and that, in these circumstances, those additional amounts could properly form part of the RAB. During Module 2, the ex-post review of expenditure could apply at the time the ACCC reviews a replacement module application. The ACCC would have the ability to review expenditure that is included in the opening RAB value for the new period and disallow any imprudent expenditure (or reject a replacement module application on the basis that the opening RAB includes imprudent expenditure).

The adoption of an ex-post review framework does not necessarily mean that expenditure above that which is determined by the ACCC to be prudent would necessarily be precluded from being included in the RAB forever. To the extent the expenditure is later revealed as prudent it may be possible to include some or all of that expenditure in the RAB at a later point in time. The NGR achieve this through the use of a speculative capital expenditure account (see Rule 84).

4.3.5. Length of the regulatory period during Module 2

As noted by the ACCC in its Draft Decision, the length of the regulatory period can significantly impact on the strength of efficiency incentives faced by the regulated business.

It is therefore not appropriate for the length of the regulatory period to be a matter for NBN Co’s discretion in Module 2. Any alternative regulatory period should be considered by the ACCC under the SAU variation processes in section 152CBG of the CCA.

Telstra therefore supports the removal of those clauses in Module 2 which would appear to exclude ACCC review of the length of the regulatory period and those that compromise the application of the SAU variation processes provided for in section 152CBG of the CCA.

4.3.6. Summary of Telstra’s position on LTRC issues

Telstra submits that, in light of the above issues, a number of amendments are required to those parts of the NBN Co SAU dealing with the LTRC. These are summarised in Box 4 below.

⁵³ ACCC, Final Access Determinations number 1, 2, 3, 4, 5 and 6 of 2011, made under section 152BC of the *Competition and Consumer Act 2010*, 27 June 2012, clause 6.7.

Box 4: Telstra's proposed amendments to LTRC-related aspects of the NBN Co SAU

1. Amendments to Schedule 1F of the NBN Co SAU, to allow values for the RAB, ABBRR and ICRA to be determined by the ACCC during Module 1, based on information to be provided by NBN Co. These would include:
 - amendment of clause 1F.1.3(a) to state that: “NBN Co’s RAB will be determined by the ACCC by reference to...”;
 - amendment of clause 1F.1.3(b) to state that: “The ACCC will determine the ABBRR by reference to...”;
 - amendment of clause 1F.1.3(c) to state that: “Any shortfall in NBN Co’s Revenues relative to the ABBRR in any given Financial Year will be added by the ACCC to the ICRA in accordance with this Schedule 1F”; and
 - insertion of new provisions requiring the ACCC to publish a report no later than 31 December of each year during Module 1, specifying the actual RAB, ABBRR and ICRA values for the previous Financial Year and forecast values for the subsequent Financial Year, based on the information disclosed by NBN Co pursuant to Schedule 1G.
2. Insertion of a new clause 1F.1.3(d) stating that the ACCC may exclude any amount of Capital Expenditure from the RAB or may exclude any amount of Operating Expenditure from the ABBRR, if it is satisfied that such amounts were not prudently incurred.
3. Amendments to the prudency rules to apply during Module 1, to ensure that these are effective in preventing the inclusion of imprudent or inefficient expenditure in the RAB, ABBRR and ICRA. Necessary amendments would include:
 - reducing the reliance of these prudency rules on the Network Design Rules, and instead requiring capital expenditure to reflect prudent network design;
 - reducing the scope of “permitted variations” to the Network Design Rules (clause 1E.6.2), including the exception for “minor expenditure”; and
 - reducing the scope of the prudent cost categories (clause 1E.4.1), including to remove the presumption of prudency where the NBN Co CEO is satisfied that incurring expenditure is in the best interests of the company.
4. Removal those provisions in Schedule 2D which prescribe rules for determining regulatory depreciation (2D.2.1(a)(ii)), the rate of return (2D.2.1(a)(iii)), and the tax allowance (2D.2.1(a)(iv)) and those provisions setting out “relevant considerations for forecasts” (2D.6). These could potentially be replaced with less prescriptive rules, similar to those currently applied as fixed principles in access determinations applying to Telstra.
5. Amendment to clause 2D.7.1(b), so that the RAB roll-forward during Module 2 is to be based on *prudently incurred* Capital Expenditure. This would require a change to the definition of “Real Capital Expenditure” in that clause, so that it refers to prudently incurred Capital Expenditure, rather than actual Capital Expenditure.

5. Non-price terms and conditions

5.1. Introduction

In its Previous Submission, Telstra expressed concern with the treatment of NPTC commitments in the NBN Co SAU.

While Telstra was previously comfortable that implementation and enforcement of certain NPTC commitments would occur through the SFAA,⁵⁴ Telstra was concerned with the level and nature of detail provided in the NBN Co SAU (particularly given the terms did not reflect a meeting of minds between NBN Co and its customers) and the potential for the content to be effectively excluded from regulatory oversight.

It was for these reasons that Telstra suggested inclusion of a series of high-level NPTC commitments. These commitments would not consist of detailed drafting, but would instead guide the development of detailed terms and conditions in the SFAA. It was this “translation” from high-level commitment to detailed drafting that would be subject to commercial discussions and if no resolution was possible, then potentially resolved through regulatory intervention.

In Telstra’s view, this model would preserve the integrity of the commercially negotiated agreement (a valuable component of the legislative hierarchy), enable appropriate regulatory oversight and give all parties confidence that fundamental principles were protected.

The ACCC now proposes to largely remove NPTCs from the NBN Co SAU (with limited exceptions in relation to POI related information sharing and change principles). The ACCC also rejects the inclusion of high-level NPTC commitments in the NBN Co SAU.

5.2. ACCC’s approach to remove detailed NPTCs

5.2.1. NBN Co SAU now largely silent on NPTCs

In general, Telstra supports the ACCC’s proposal to remove the detailed NPTC commitments from the NBN Co SAU. As mentioned above, these NPTC commitments were in no state to be “locked away”, whether from further commercial negotiation or regulatory oversight.

Telstra remains of the view that a set of high-level NPTC commitments in the NBN Co SAU (an approach endorsed by a number of other stakeholders) would provide a robust framework for development of detailed NPTCs. In saying this, however, Telstra acknowledges the ACCC’s concerns with this approach, particularly given that NBN Co’s position remains apart from industry in a number of material ways.

The NBN Co SAU will now be largely silent on NPTCs. While this is certainly a preferable outcome to one where inappropriate NPTCs are quarantined from negotiation and regulatory oversight (a risk if the NBN Co SAU was accepted in its original form), the NBN Co SAU does not bring the parties closer to resolution on these important matters.

5.2.2. ACCC observations on the removed NPTCs

Telstra acknowledges the depth of analysis undertaken by the ACCC in its assessment of the

⁵⁴ Telstra notes that this general structural approach to the NBN Co SAU has been rejected by the ACCC in its Draft Decision.

NPTCs. It is clear that the decision to recommend removal of the detailed NPTCs was made having independently considered the merits of the NPTCs, having regard to their general impact on industry and end-users.

Telstra appreciates the various observations made by the ACCC in relation to the NPTCs and articulated in the Draft Decision. Like the ACCC, Telstra hopes that these observations will motivate NBN Co to reconsider some of its previously immutable positions and return to the negotiating table in a more constructive manner.

In relation to the observations made by the ACCC in its Draft Decision, Telstra agrees with the ACCC and shares its concerns that:

- the SFAA terms and conditions do not “give sufficient weight to the interests of access seekers” and “the drafting lacks reciprocity in a way that creates an imbalance between the interests of NBN Co and access seekers”⁵⁵;
- in relation to the service level regime:
 - the service level terms and conditions will not “encourage the economically efficient use of, and economically efficient investment in, the infrastructure by which the services are supplied”;⁵⁶
 - the service levels specified in the NBN Co SAU are “unlikely to remain appropriate...even during the period until the midpoint review”;⁵⁷ and
 - the “SAU does not ensure that service levels will be maintained or improved during the terms of the SAU”;⁵⁸
- the proposed dispute management terms “do not provide for an efficient, consistent and unbiased dispute management process because the process could lead to outcomes that consistently favour NBN Co”;⁵⁹
- the confidentiality regime is onerous and does not adequately balance the interests of both parties “because it may permit NBN Co to...use or disclose confidential information in a way that results in competitive detriment to access seekers”;⁶⁰
- the intellectual property terms and conditions do not “provide an appropriate balance of NBN Co’s legitimate business interests and the interests of access seekers”;⁶¹ and

⁵⁵ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 174.

⁵⁶ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 181.

⁵⁷ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 182.

⁵⁸ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 185.

⁵⁹ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 189.

⁶⁰ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 193.

⁶¹ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 196.

- the risk management regime is unclear / overly complex (making it difficult assess allocation of liability), it shifts “responsibility to access seekers for a number of matters which NBN Co is best placed to manage” and “appears onerous in a way that suggests the exercise of bargaining power by NBN Co, rather than the protection of any legitimate commercial interest”.⁶²

There are a number of other more specific concerns about the NPTCs raised by the ACCC throughout the Draft Decision. It is important to note that the NPTCs in the NBN Co SAU (upon which the ACCC has reviewed and commented) are a very limited pool of a much wider set of NPTCs. Similar concerns exist within industry in relation to NBN Co’s approach to unilateral change rights, managing risk and responsibilities at end-user premises and the allocation of risk between multiple RSPs (amongst others).

5.2.3. Settling the NPTCs in light of the ACCC’s proposal

The Draft Decision demonstrates that industry concerns about the development and content of NBN Co’s WBA, raised over the past few years, are well founded. The issues raised by the ACCC (and various stakeholders during the NBN Co SAU consultation process) are real. The provisions that concern the ACCC are found in NBN Co’s current SFAA and RSPs are making decisions every day whether to absorb inappropriate risks pushed on to RSPs or pass these through to end-users. This cannot continue and Telstra strongly encourages NBN Co to constructively re-engage with industry on the terms of its SFAA as soon as possible.

To this end, the ACCC needs to remain vigilant to ensure that NBN Co constructively engages with industry to develop workable NPTCs that reflect standard commercial practice in the telecommunications industry.

5.3. Clauses relating to POIs and rollout progress

In general, Telstra supports the ACCC’s position in its Draft Decision and Consultation Paper in relation to the POI and rollout provisions in the NBN Co SAU. These changes largely reflect suggestions made by Telstra in its Previous Submission and strengthen certainty for RSPs.

In relation to closure, relocation and new POIs, Telstra believes the process can be further improved. As noted in Telstra’s Previous Submission:

- any notification of closure or relocation of an established POI should include information regarding the process for migration to the relocated or new POI, including timeframes (a minimum period for transition should be set);
- similarly, notification of closure or relocation of a temporary POI should include the same information as for closure or relocation of an established POI; and
- notification of any POI closure or relocation should not precede the establishment, availability and “ready for service” status of the replacement POI.

5.4. Downstream regulatory compliance

Telstra welcomes the inclusion in the NBN Co SAU of a general commitment to support

⁶² ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, pp 198 - 200.

retail-level regulatory requirements.⁶³

Given NBN Co will (indirectly) set the terms and conditions of downstream supply through the NBN Co SAU and its SFAA, an RSP's ability to meet its own regulatory commitments, whether now or in the future, will be directly affected by the extent to which NBN Co enables this compliance.

The ACCC has not provided any specific guidance in the Draft Decision or its Consultation Paper on the nature of any commitment in this regard. We refer the ACCC to Telstra's Previous Submission for further detail in this regard.

⁶³ ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, dated April 2013, p 176.