



Proposed variation to the NBN Co Special Access Undertaking

Consultation paper

August 2023

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission
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Abbreviations and acronyms

ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
AVC	Access virtual circuit
BBM	Building block model
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CPI	Consumer Price Index
CVC	Connectivity virtual circuit
FTTP	Fibre to the premises
FTTN	Fibre to the node
IAA	Internet Association of Australia
ICRA	Initial cost recovery account
LTIE	Long-term interests of end-users
Mbps	Megabits per second
NBN	National Broadband Network
NBN Co	National Broadband Network Company Limited
NNI	Network-network interface
SAU	Special access undertaking
SAO	Standard access obligations
TC-4	Traffic class 4
WACC	Weighted average cost of capital
WAPC	Weighted average price control
WBA	Wholesale broadband agreement

1. Executive summary

NBN Co has lodged a further proposed variation to its special access undertaking (SAU), which specifies the default rules by which it will provide access to the NBN. We have now commenced consultation on the further proposed SAU variation and are calling for submissions from stakeholders, which are due on 13 September 2023.

The SAU establishes a framework for regulating access to the NBN, including rules by which maximum prices are determined and other measures aimed at promoting competition and encouraging efficiency. It can play an important role in maximising the economic and public benefits of the NBN. It must serve the long-term interest of end users.

The SAU commenced in 2013 and now requires a fundamental update to ensure it is fit for purpose and is effective in promoting good consumer outcomes. For example, the SAU currently does not cover access technologies that were later incorporated into the NBN after the SAU was accepted. Further, the regulatory controls under the current SAU do not appear to be effective in providing incentives to NBN Co to operate prudently and efficiently, and do not appear to sufficiently reflect how NBN Co supplies its products and sets prices in practice.

To update the SAU, NBN Co must propose a variation to the SAU, which the ACCC must assess against the relevant statutory criteria, including having regard to the submissions that we receive during consultation. We can decide to either accept or reject an SAU variation proposal based on our assessment against the statutory criteria.

The revised SAU variation proposal follows significant ACCC assessment and stakeholder consultation

We have been engaging with industry and other stakeholders since 2021 on the long-term regulatory arrangements for the NBN under the SAU. The ACCC convened an industry forum and industry working groups in 2021 to discuss potential options for reforming the regulatory framework, and to assist NBN Co in developing its SAU variation proposal. NBN Co lodged an SAU variation proposal in March 2022, but later withdrew it following stakeholder feedback.

NBN Co submitted a second SAU variation proposal in November 2022. The ACCC consulted on this SAU variation proposal and released a draft decision in May 2023. Although the draft decision was to reject the November 2022 SAU variation proposal, we found that many of the initiatives proposed by NBN Co had the potential to bring significant benefits and represented a significant improvement from the SAU currently in operation. Some of these positive elements from the November 2022 SAU variation proposal included:

- a weighted average price control (WAPC) as the primary form of price control, which aims to strengthen incentives to achieve revenue, cost, and demand targets
- providing ex-ante and ex-post oversight over the prudence and efficiency of expenditures through a replacement module determination process
- incorporating a service standards framework, with the aim of better coordinating regulation of the price and quality of access to the NBN
- specifying the balance of the initial cost recovery account (ICRA) at \$12.5 billion, well below the amount that would result from a continuation of the current methodology, with the aim of providing additional long-term certainty while allowing a reasonable

opportunity for NBN Co to achieve and then maintain a standalone investment grade credit rating during the SAU term.

- an initial resetting of prices for residential grade wholesale offers and adopting the 25/5 megabits per second (Mbps) speed tier as the entry level wholesale offer
- initially limiting increases in the WAPC to no more than the change in the Consumer Price Index (CPI) until the point of cost recovery
- requiring that NBN Co consult on its expenditure and pricing proposals, with the aim of promoting investment in projects of most value to its customers and to reduce the risk of unnecessary price rises.

However, the ACCC also highlighted a range of likely shortcomings with the November 2022 SAU variation proposal, which led to its draft decision to reject the SAU variation proposal. The ACCC was not satisfied that all elements of the long-term framework under the SAU variation proposal would result in access terms that promote the long-term interests of consumers over the duration of the SAU.

First, the process to periodically reset regulated access terms and other regulatory controls contained limitations that were not reasonable and risked access terms coming into effect by default that would not promote efficiency and competition. Further, the principle requiring the ACCC to adjust NBN Co's revenue allowances during the post-2032 period to provide NBN Co a reasonable opportunity to achieve its credit rating objective did not depend on NBN Co operating and investing efficiently. This would have permitted NBN Co to be compensated for the additional cost of achieving its credit rating objective that results from inefficiency, and risk price shocks for consumers.

We also found the pricing and service quality commitments for the first regulatory cycle (from 1 July 2023 to 30 June 2026) would be unlikely to address existing drivers of poor consumer sentiment towards NBN services. On pricing, NBN Co's proposed model left open a broad range of cost outcomes when using the standard 50 Mbps wholesale service. It was therefore unlikely that retailers could have efficiently manage the residual cost uncertainty without further support from NBN Co. On service quality, NBN Co's proposed benchmark service standards would likely be superseded by new commercial access arrangements soon after the SAU variation proposal would come into effect. Proposed benchmarks also lacked any commitment to consult with retailers about addressing known causes of poor quality over the first regulatory cycle.

After an initial round of consultation on the draft decision, the ACCC then conducted and facilitated a series of targeted consultations on some revised proposals from NBN Co, which responded to issues raised by the ACCC in the draft decision or stakeholder feedback. The issues considered included alternative pricing models for 50 Mbps (and lower speed services), network-network interface (NNI) pricing commitments, mechanisms to consult on and review benchmark services standards in the first regulatory period, the treatment of third-party funding and the role and operation of the low-income and digital inclusion forum that NBN Co had previously proposed to convene.

The revised SAU variation proposal builds on its previous proposal and on feedback received to-date

The revised SAU variation proposal retains the elements of the November 2022 SAU variation proposal endorsed by the ACCC in the draft decision. It also contains important changes to areas where the ACCC had highlighted deficiencies, where stakeholders had

raised concerns, or matters that were subject to the further targeted consultation following the draft decision.

The key changes NBN Co has made in its August 2023 SAU variation proposal, as compared to its November 2022 proposal, are as follows:

- a new power allowing the ACCC to extend the decision-making period for making a replacement module determination by up to six months, in the event that it is unable to make a determination within the specified timeframes, and the power for the ACCC to specify what information must be provided at commencement of the replacement module process
- changes to the credit rating objective for the post-2032 period that seek to address concerns about the ACCC having to ensure NBN Co has a reasonable opportunity to achieve and maintain a standalone investment grade credit rating notwithstanding efficiency considerations or potential for prices shocks
- a new 'floor and ceiling' pricing model that seeks to provide additional certainty to retailer service providers (retailers) over the cost they will incur, and to NBN Co over the revenues it would earn, for the supply of 50 Mbps (and lower) speed services
- reducing prices for some NNI services in 2024 and committing to a complete a price review of NNI prices by 2027
- conferring an additional power for the ACCC to designate the entry level offer that is to be the subject of a more restrictive price control so that any change in designation can take effect from commencement rather than part way through the next regulatory cycle
- expanding the remit of the low-income forum and enhancing NBN Co's related public reporting commitments
- enhancements to the process for engaging with stakeholders on service improvement initiatives for the first regulatory cycle
- additional reporting in the first regulatory cycle on service improvement priorities and NBN Co's delivery of service standards
- clarification of the treatment of third-party funding of capital expenditures, to ensure that capital expenditures that have already been funded by third parties do not enter the regulatory asset base and are not factored into future prices.

The August 2023 SAU variation proposal appears to address areas of concern identified by stakeholders

The ACCC will carefully assess the revised SAU variation proposal, applying the statutory criteria, including considering submissions received from stakeholders. However, our preliminary observation is that the August 2023 SAU variation proposal appears to represent a significant improvement from the November 2022 SAU variation proposal and appears to represent the foundations of an effective long-term regulatory framework for access to NBN Co's regulated services.

NBN Co has proposed changes to all specific areas of its SAU variation proposal that the ACCC had identified as of concern, or which otherwise were subject to further consultation following the draft decision. Further the proposed changes appear to address the then identified issue or objective being sought.

For example:

- NBN Co's further proposed changes to the general regulatory structure (i.e., the replacement module process and credit rating objective post-2032) appear to reduce the risk of access terms coming into effect by default that would not promote efficiency and competition, or compensate NBN Co for inefficiency or risk price shocks
- further, the changes to the proposed pricing model appear to mitigate the core issue of cost uncertainty associated with the 50 Mbps product, while balancing NBN Co's legitimate interests, including having a reasonable opportunity to transition to annual cost recovery
- the further commitments to engage with stakeholders on service quality in the first regulatory cycle would appear to encourage the adoption of practicable measures to address the drivers of poor service quality experienced by customers
- the further changes to the treatment of third-party funding appear to give greater certainty that capital expenditure subject to such funding will not enter the regulatory asset base and hence would not be factored into future prices.

Further details and our current observations on the specific elements of the SAU variation proposal are discussed in section 4.

The ACCC must assess the SAU variation proposal against the statutory criteria

The ACCC must now assess NBN Co's SAU variation proposal against the relevant statutory criteria in section 152CBD(2) of the *Competition and Consumer Act 2010* (CCA), including whether the proposed variation promotes the long-term interests of end-users (LTIE) and whether the terms and conditions are reasonable. The ACCC will assess the SAU variation proposal in its entirety and the interaction of the varied terms with the unchanged provisions of the SAU. Based on this assessment, the ACCC must decide whether to accept or reject the variation that NBN Co has proposed.

This consultation paper sets out the key elements of NBN Co's SAU variation proposal that have changed since November 2022 and seeks stakeholder feedback on these changes to inform the ACCC's assessment. Although this consultation paper focusses on the changes in the current SAU variation proposal compared to the November 2022 SAU variation proposal, we are consulting on the whole SAU variation proposal and stakeholders and members of the public are welcome to comment on any aspect of NBN Co's proposed SAU variation. The November and March 2022 SAU variation proposals and related consultation materials are available on the ACCC [website](#).

We are inviting submissions on NBN Co's proposed SAU variation proposal until COB Wednesday 13 September 2022.

After submissions close, the ACCC will proceed as quickly as possible in its assessment of the SAU variation proposal, considering submissions received. The ACCC is mindful of the extensive consultation undertaken to date on this matter and a desire from industry to reach a decision. We will draw upon views expressed in earlier submissions (as set out in section 2) and seek to finalise this process as soon as practicable, with the aim of providing certainty to industry about the long-term regulatory arrangements and to allow parties to enter new commercial arrangements.

2. Background and consultation

2.1. Current SAU in operation

NBN Co's current SAU commenced in December 2013. The SAU establishes principles and a framework for regulating access to the NBN until June 2040, or until the Government relinquishes control. The current SAU will continue to operate until a variation to the SAU is accepted by the ACCC. An overview of NBN Co's current SAU is at [Appendix A](#).

2.2. Previous consultation and stakeholder engagement

Since 2021 the ACCC has engaged extensively with NBN Co, access seekers and other stakeholders on the NBN regulatory framework under the SAU. We have chaired stakeholder forums and working groups to foster stakeholder engagement in the development of each SAU variation proposal. We also undertook public consultations on the NBN SAU variation proposals submitted by NBN Co in March 2022 and November 2022 respectively before each was withdrawn¹.

An important output from the industry working groups that met in 2021 was the development of five key outcomes that could guide NBN Co's development of a SAU variation proposal. They are that:-

- NBN Co has the opportunity to earn the minimum revenues it needs to meet its legitimate financing objectives, including to transition to a stand-alone investment grade credit rating
- NBN end-users are protected from price shocks and from prices that are higher than necessary in later years
- the regulatory framework provides incentives for NBN Co to operate efficiently and promote efficient use of the NBN
- retailers have greater certainty over the costs that they will face when using the NBN
- there is a clear and robust quality of service framework so retailers and end-users know what to expect from NBN services, including a review mechanism so that service standards remain fit for purpose.

An overview of stakeholder engagement and consultation prior to the lodgement of the August 2023 SAU variation proposal is at [Appendix B](#).

2.3. August 2023 SAU variation proposal

On 14 August 2023 NBN Co withdrew its November 2022 SAU variation proposal and lodged another SAU variation proposal with the ACCC (the August 2023 SAU variation proposal). The August 2023 SAU variation proposal was published on the ACCC website on 16 August, along with supporting documents, which included:

¹ The March 2022 NBN SAU was withdrawn in July 2022, the November 2022 NBN SAU in August 2023.

- a covering letter, which provides additional context for the submission, including a description of each of the documents
- a comparison between the changes made in the August 2023 variation proposal to the previous November 2022 SAU variation proposal
- NBN Co's supporting submission, to explain the rationale behind NBN Co's proposed changes to the SAU
- an explanatory table of the key changes made in NBN Co's SAU variation proposal
- the core services building block model (BBM) for the 2009-2023 and the 2024-2040 periods to assess essential variables and the effect that the proposed SAU variation would have on NBN Co's revenue constraint (NBN Co also provided a BBM handbook for both time periods)
- a set of forecasts in support of NBN Co's SAU variation proposal including capital and operating expenditure, revenue and asset lifetimes
- WAPC models for the 2024-25 financial year and the 2025-2026 financial year to assist stakeholders and the ACCC to assess the proposed WAPC model in the SAU
- an indicative pricing roadmap to 30 June 2026 to facilitate the assessment of NBN Co's SAU proposal

The SAU variation proposal and the public versions of the supporting material are available on the ACCC website. The ACCC has published the August 2023 SAU variation proposal in full and the public versions of NBN Co's supporting material, which contained limited redactions. We note that NBN Co has provided confidential versions of the BBM and supporting forecasts. Additionally, NBN Co provided an updated version of its supporting submission on 22 August 2023 to correct an error in Figure 5 (page 40). The updated supporting submission is available on the ACCC website.

The August 2023 SAU variation proposal reflects many of the elements of the November 2022 SAU variation proposal. However, there are differences in relation to the following important aspects:

- Credit rating objective
- 50/20 pricing certainty issues
- NNI pricing
- Entry level offer
- Third party funding
- Benchmark service standards
- Low income forum

The changes between the November 2022 and August 2023 SAU variation proposals are discussed in section 4. While this consultation paper focuses on the changes from the November 2022 SAU variation proposal, as indicated in the executive summary, stakeholders are welcome to provide feedback on any aspect of the SAU variation proposal.

2.4. Consultation

The ACCC is consulting interested parties before deciding to either accept or reject the SAU variation proposal. The ACCC has published the SAU variation proposal and public versions of the supporting material on its website and invites submissions by 13 September 2023. The ACCC has also released this consultation paper to assist interested parties in preparing their submissions.

The ACCC currently intends to make a final decision as soon as practicable this year. Subject to affording procedural fairness and considering stakeholder submissions, we currently intend to proceed straight to a final decision without making any draft decision. We are proposing this course in circumstances where the August 2023 SAU variation proposal we are consulting on has, for the most part, already been the subject of extensive consultation and stakeholder engagement (see [Appendix B](#)). Further, the areas that have not yet been the subject of consultation are relatively few and been the subject of pre-lodgement engagement with stakeholders which was facilitated by the ACCC. In addition, we are cognisant of industry's request for pricing certainty and a timely resolution of the NBN regulatory framework.²

The ACCC will consider submissions to this consultation paper when making its final decision. We will also consider relevant submissions to the November 2022 SAU variation consultation paper and draft decision to the extent relevant, in particular where the current and November 2022 variation proposals adopt the same approach to matters and, submissions were made on those matters for the November 2022 variation proposal. We will also consider relevant issues raised in response to the March 2022 proposed variation.

Submissions to the consultation

The ACCC encourages interested parties to make submissions that are responsive to this consultation paper and any other issue concerning the August 2023 SAU variation proposal. Submissions should include detailed reasons and information to support views, with reference to the relevant statutory criteria, which are discussed in section 3 of this paper.

To enable an informed and consultative process, all submissions will be published on the ACCC website. Submitters are encouraged to provide a public submission that keeps confidentiality redactions to a minimum. The ACCC's approach in this consultation to assessing any confidentiality claims and disclosure of information is set out in [Appendix C](#). The ACCC prefers to receive submissions in electronic form, in either PDF or Microsoft Word format which allows the submission text to be searched.

Please email submissions by 5pm on 13 September 2023 to nbn@acc.gov.au and copy to:

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² On 14 July 2023 the ACCC chaired an online meeting with stakeholders in relation to NBN Co's review of the 50/20Mbps pricing proposal. Stakeholders at the meeting raised concerns over the delay in finalising the NBN SAU.

2.5. Structure of paper

The remainder of this consultation paper is structured as follows:

- Section 3 sets out the legislative framework covering the SAU variation process
- Section 4 outlines key changes to the SAU variation proposal
- Appendix A provides an overview of the current SAU and arrangements from 1 July 2023
- Appendix B chronicles ACCC stakeholder engagement and consultation prior to the lodgement of the August 2023 NBN SAU variation proposal
- Appendix C sets out the ACCC's approach to handling information received during this consultation
- Appendix D discusses the ACCC's approach to assessing the LTIE.

3. Legislative framework

3.1. Telecommunications access regime

Object of the telecommunications access regime

Part XIC of the CCA sets out the telecommunications access regime. The object of the telecommunications access regime is to promote the LTIE of carriage services and services provided by means of carriage services.

Regulation of access to NBN services

NBN Co must only supply services that are declared under Part XIC of the CCA. Services that are, or are capable of being, supplied by NBN Co may become declared services. Services can become declared in the following three ways:

- NBN Co can provide the ACCC with an SAU in relation to a service or proposed service
- NBN Co can publish a standard form of access agreement that relates to access to a service
- the ACCC can declare an NBN service following a public inquiry.

The NBN access service was declared when the current SAU was accepted by the ACCC in December 2013, along with ancillary services and, to the extent required for interconnection, the facilities access service.

Declaration of an NBN service is significant as this requires NBN Co to comply with the category B standard access obligations (SAOs) specified in the CCA. These include obligations to supply the declared service if requested by a service provider and to permit interconnection of facilities.

Setting regulated terms and conditions of access to NBN services

While the SAU forms an important part of the regulatory framework for the NBN, the terms and conditions of access and on which NBN Co is required to comply with the category B SAOs may be specified in one or a combination of different instruments. These include:

- access agreements - commercial contracts between the access provider and an access seeker which set out negotiated terms and conditions of supply
- special access undertakings accepted by the ACCC - documents given by the access provider agreeing to be bound by the relevant SAOs and proposing the terms and conditions on which it will offer access to its services
- binding rules of conduct - written rules made by the ACCC where there is an urgent need to make such rules, specifying any or all the terms and conditions for compliance with any or all the SAOs, or requiring compliance with any or all of the SAOs as specified in the rules
- access determinations - written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry, specifying any or all the terms and conditions for compliance with any or all of the SAOs.

Part XIC of the CCA establishes a hierarchy to allow parties to identify which terms and conditions are to apply, particularly in the event of inconsistency between the various instruments that may be in effect.

Essentially, terms and conditions about a particular matter in an instrument that is higher in the above list will prevail over inconsistent terms and conditions about the same matter specified in an instrument that is lower in the list. For instance, commercially negotiated and agreed terms and conditions (set out in an access agreement) between NBN Co and retailers will prevail over regulated terms in a varied SAU, binding rules of conduct and access determinations that are made by the ACCC, to the extent of any inconsistency between these terms. In other words, a varied SAU, binding rule of conduct and an access determination would have no effect to the extent of any inconsistency with the access agreement.

The ACCC assessment of the SAU variation proposal is important in the context of the legislative hierarchy. Once the ACCC accepts a variation proposal, there is no provision under Part XIC of the CCA for the ACCC to vary or set aside the terms of the resulting SAU. Any binding rules of conduct or access determination made by the ACCC in respect of access to the NBN and compliance by NBN Co with the category B SAOs will have no effect to the extent of any inconsistency with the SAU as varied for so long as the SAU remains in effect.

Part XIC also provides for NBN Co to formulate and publish standing offers, known as a standard form of access agreement. A standard form access agreement is not itself an access agreement and does not form part of the Part XIC legislative hierarchy. Rather, retailers can request NBN Co to enter into an access agreement on the terms of a standard form access agreement. WBA4 is the current standard form access agreement. NBN Co has entered into access agreements based on it.

For completeness, other forms of regulation can potentially affect the terms of access to an NBN service. The statutory infrastructure provider regime established by Part 19 of the *Telecommunications Act 1997* commenced on 1 July 2020. Under that regime, the Minister may determine minimum service standards, benchmarks, and performance standards for nominated statutory infrastructure providers. NBN Co has been designated as the default statutory infrastructure provider.

The terms contained in any such statutory infrastructure provider instrument would prevail over all other terms in the regulatory hierarchy, including terms in commercially negotiated access agreements from the time that those agreements are next varied or new agreements entered. While no such instrument has yet been made, a consultation draft proposed setting a baseline that would not limit a statutory infrastructure provider from offering better service standards.

3.2. Assessment approach

The ACCC must decide to accept or reject a proposed SAU variation after assessing it against the legislative criteria. This includes assessing it in accordance with section 152CBD(2) of the CCA.

The ACCC must not accept a proposed variation unless:

- the terms and conditions specified in the variation in relation to compliance with the category B SAOs are consistent with those obligations and are reasonable

- any conduct that is specified in the variation in relation to access referred to in section 152CBA(3B) will promote the LTIE, and the related terms and conditions are reasonable
- any conduct that is specified in the variation in relation to certain matters referred to in section 152CBA(3C) will promote the LTIE.

In determining whether a particular thing promotes the LTIE, the CCA requires the ACCC to consider the extent to which the thing is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communications between end-users
- encouraging the economically efficient use of, and economically efficient investment in the infrastructure by which these services are supplied, and any other infrastructure by which these services are, or are likely to become capable of being supplied.³

The ACCC cannot consider any other objectives in assessing the LTIE.

The ACCC considers the term LTIE refers to the end-users' economic interests, which include sustainably lower prices, increased quality of service and greater diversity and scope in product offerings. The ACCC's approach to assessing the LTIE is discussed in [Appendix D](#).

Broadly speaking, this assessment can involve a balancing of costs and benefits to end-users over time and involve a range of potentially competing considerations. The ACCC does not consider the assessment of an SAU variation proposal is a reassessment of each existing provision in the SAU. However, consistent with its approach to previous SAU variation proposals, the ACCC will consider the varied terms, their effects, and their interaction with unchanged provisions of the SAU, i.e. it will consider the proposed variation in the context of the whole SAU.

The ACCC must also be satisfied that the undertaking as varied would be consistent with any Ministerial pricing determination. However, no relevant Ministerial pricing determinations are in effect.

The CCA specifies three reasons why the ACCC must not reject a variation. These reasons relate to:

- a fixed principle term or condition⁴ that is identical to one in the original SAU in all respects, provided the variation was given during the notional fixed period, and none of the qualifying circumstances exist, for the original fixed principle term or condition.
- price related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co.
- a refusal by NBN Co to permit interconnection or supply services that is authorised by the CCA because it is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co.

³ CCA, section 152AB(2).

⁴ CCA, section 152CBAA.

Finally, the ACCC must refuse to accept an SAU variation proposal if it provides that a term or condition is a fixed principle term or condition for a notional fixed period, and the ACCC considers that it should not be a fixed principle term or condition, or the notional fixed period or qualifying circumstances for the fixed principle term or condition specified in the variation should not be the notional fixed period or qualifying circumstances.⁵

Timeframe for assessment

Under Part XIC of the CCA, the ACCC must decide to either accept or reject a proposed variation within 6 months of receiving it, subject to any permitted extensions to this period. If the ACCC does not make a decision within the statutory time period, it is deemed to have accepted the variation.

The ACCC may extend (or further extend) the time for assessment by a period of not more than 3 months in accordance with section 152CBG (9) of the CCA. The ACCC must give written notice to NBN Co explaining why the Commission is unable to decide on the variation within the six-month (or previously extended) period and publish the notice on the ACCC website.⁶

In addition, the ACCC's decision-making period will also be extended by the following:

- the period in which the ACCC is undertaking the first public consultation
- any period during which the ACCC has requested further information from NBN Co under section 152CBH and is waiting for NBN Co to respond.

⁵ CCA, subsection 152CBD(4).

⁶ CCA, subsections 152CBG(9) and (10).

4. Key changes to SAU variation proposal

This section sets out the key elements of NBN Co's August 2023 SAU variation proposal as compared to its November 2022 proposal. It also sets out the ACCC's current views on these elements based on consultation to-date.

Our current view is that the August 2023 SAU variation proposal is a material improvement from its November 2022 proposal on each of the elements discussed in this section. The proposed changes appear to represent appropriate responses to issues the ACCC raised in the draft decision to reject the November 2022 SAU variation, and further issues raised in subsequent consultations following the draft decision.

It is important that stakeholders have an opportunity to raise any new or residual issues that they would like us to consider in assessing the SAU variation proposal. While many of the new elements of the August 2023 SAU variation proposal have been the subject of pre-lodgement consultation that the ACCC has facilitated, there may be additional views that stakeholders may now wish to contribute. The ACCC invites comments from stakeholders on the specific elements discussed in this section and on the ACCC's current views, although stakeholders may make submissions on any aspect of the SAU variation proposal.

4.1. General regulatory framework

November 2022 SAU variation proposal

In its November 2022 SAU variation proposal, NBN Co proposed to maintain the modular structure of the SAU, but with some important modifications. The key modification NBN Co sought to the general regulatory framework of the SAU was to establish two distinct regulatory periods, with different arrangements applying in the periods before and after 30 June 2023. Features of the proposal included (in summary):

- the replacement module process, which establishes certain detailed terms and conditions for each regulatory cycle, would be self-contained within the SAU through conferring relevant powers on the ACCC under section 152CBA(10A) of the CCA
- in the period from 1 July 2032 (the post-2032 period), the SAU as varied (a new module 3) would specify high level rules and principles that would apply to replacement module applications and determinations
- the scope of matters which NBN Co must include in its replacement module applications and which the ACCC must determine in replacement module determinations would be expanded to reflect changes in the proposed framework under the SAU. The additional matters to be considered in the replacement module process included benchmark service standards, the WAPC, and ICRA drawdown amounts
- NBN Co would be required to provide reasonable opportunity for access seekers and consumer advocacy groups to provide input into replacement module applications.
- A new clause that would provide for the SAU to expire on the earlier of 30 June 2040 or a change of control occurring. This could be triggered either by the Commonwealth

government ceasing to hold more than 50 percent of the shares in NBN Co, or 20 business days after the Commonwealth government publishes a change of control notice, stating it intends to take steps to relinquish control over NBN Co. This would allow for the reconsideration of regulatory arrangement in the event of a change of control

- a proposed principle to apply in the post-2032 period that would require revenue allowances to be set to allow NBN Co a reasonable opportunity to achieve and maintain, for the duration of a regulatory cycle, a stand-alone investment grade credit rating with a stable outlook.

In its draft decision, the ACCC indicated its general support for the changes NBN Co had proposed to the general regulatory framework. However, it also considered that certain aspects of the proposed variations had some significant shortcomings that would create a risk of terms of access being established in future regulatory cycles that would not promote the LTIE. Shortcomings outlined by the ACCC included the:

- deemed acceptance of replacement module applications if the ACCC is unable to make its replacement module determination within specified timeframes, which would risk access terms coming into effect by default that would not promote efficiency and competition
- inability for the ACCC to request information to be included upfront in replacement module applications
- principle that would require the ACCC to adjust NBN Co's revenue allowances during the post-2032 regulatory period to give NBN Co a reasonable opportunity to achieve its credit rating objective not being premised on NBN Co operating and investing efficiently. This would have permitted NBN Co to be compensated for the additional cost of achieving its credit rating objective that results from inefficiency, and risk price shocks for consumers.

However, the ACCC also indicated that further potential changes NBN Co had later proposed in its March 2023 letter could address concerns raised by the ACCC and stakeholder submissions, specifically:

- the introduction of a new clause allowing the ACCC to require NBN Co to provide specific information upfront when lodging a replacement module application
- provision for the ACCC to extend its decision-making timeframe for a replacement module determination by up to 3 months at a time, up to a maximum of 6 months.

Stakeholders that commented on the proposed changes to the general regulatory framework in the November 2022 SAU variation proposal agreed with the concerns raised by the ACCC. Stakeholders also generally indicated support for NBN Co's proposed changes.

Despite broad support for the further changes proposed by NBN Co, some stakeholders raised concerns regarding consumer engagement and the role of the credit rating objective. The Australian Communications Consumer Action Network (ACCAN) raised concerns about resourcing constraints and how it may limit effective consumer engagement in the replacement module process. ACCAN, Optus, and Commpete indicated that credit rating objectives do not form part of the LTIE and should not be reflected in the SAU in any capacity. Commpete further noted the meeting credit rating objectives is the responsibility of NBN Co's management and board.

August 2023 SAU variation proposal

In the August 2023 SAU variation proposal, NBN Co has proposed two further changes (from the November 2022 SAU variation) to the provisions around deemed acceptance of replacement module applications if the ACCC has not made a replacement module determination by the start of the relevant regulatory cycle:

- a new clause that makes clear the ACCC can require NBN Co to provide specific information upfront when it lodges a replacement module application⁷
- provision for the ACCC to extend its decision-making timeframe by up to 3 months at a time, up to a maximum of 6 months. If, at the end of this period, the ACCC has still not made a replacement module determination, NBN Co's replacement module application would be taken to have been accepted.⁸

NBN Co submits the proposed changes would ensure NBN Co submits a complete proposal with all information necessary for the ACCC to perform its assessment, and effectively allow the ACCC to extend its decision-making period to up to 24 months after NBN Co lodges a replacement module application. To account for the extended decision-making period, NBN Co has proposed a range of interim measures would apply between the start of the regulatory cycle and the time the ACCC makes the replacement module determination (if extended).

NBN Co has also proposed making the following two further changes to the proposed principle that would require the ACCC to set NBN Co's revenue allowances during the post 2032 period to give NBN Co a reasonable opportunity to achieve its credit rating objective in the November 2022 SAU variation:

- The ACCC would be required to set annual ICRA drawdown amounts to provide NBN Co with a reasonable opportunity to transition, in the shortest timeframe practicable while avoiding price shocks, to a position consistent with achieving and maintaining a stand-alone investment grade credit rating with a stable outlook. This would be assessed by reference to quantitative financial metrics consistent from one or more established and reputable rating agencies.⁹
- The ACCC, when setting the forecast nominal annual building block revenue requirement (the revenue requirement), would be required to have regard to the objective of allowing a prudent and efficient operator in NBN Co's position (and with benchmark efficient capital structure) a reasonable opportunity to maintain a stand-alone investment grade credit rating with a stable outlook.¹⁰

NBN Co submits that these changes would clarify its intention that it is afforded a reasonable opportunity to recover the Module 3 ICRA amount in a way that enables it to transition to a position in which it can satisfy quantitative financial metrics consistent with achieving and maintaining a standalone investment grade credit rating with a stable outlook.

Current observations

NBN Co has, in its August 2023 SAU variation proposal, considered and addressed feedback given by the ACCC in its draft decision and by stakeholders during previous consultation periods.

⁷ Clause 6.2(a), Main Body of the August 2023 SAU variation.

⁸ Clause 5.8(e), Main Body of the August 2023 SAU variation.

⁹ Schedule 3B.3.6(b), Module 3 of the August 2023 SAU variation.

¹⁰ Schedule 3B.3.2(d), Module 3 of the August 2023 SAU variation.

We note that NBN Co's proposed changes to the structure of the regulatory framework is likely to lead to a more effective operation of the replacement module process. The inclusion of provisions which address the ability for the ACCC to request information upfront and to extend the timeframe when making a replacement module determination appear to address concerns raised by the ACCC about the risk of access terms coming into effect by default that would not promote competition or efficiency. We also consider the proposed revisions to the credit rating objective should assist the ACCC to make replacement module determinations in the post-2032 that promote the LTIE. In doing so, the ACCC would be able to have regard to all relevant matters without giving primacy to credit rating objectives.

A key feature of the arrangements proposed by NBN Co is engagement with industry stakeholders and consumer advocacy groups as part of the replacement module process. We consider active and responsive engagement by NBN Co in formulating its regulatory proposals is essential to the effective end-to-end operation of the proposed arrangements. If the ACCC accepts the SAU variation proposal, it will engage closely with NBN Co and other stakeholders on how NBN Co can most effectively engage given resourcing and other constraints. This point has been recognised by NBN Co, who have foreshadowed further collaboration with ACCAN and other stakeholders.¹¹ We also note the experience and guidance material issued in other sectors where stakeholder engagement is a key aspect of the regulatory arrangements.¹²

4.2. Pricing issues

In our draft decision on NBN Co's November SAU variation proposal we expressed the view that the product and pricing arrangements contained in that SAU variation proposal were, on balance, reasonable and would encourage efficient and competitive NBN markets, except as follows:

- There would be residual cost uncertainty that retailers would still face when acquiring services for the 50 Mbps wholesale offer during the first regulatory cycle (to June 2026)
- There was no commitment to effectively address the competition concerns that retailers continued to express over NNI charges
- Important specifications for the working of the low income and digital inclusion forum were not specified in the SAU variation proposal
- Some other matters of detail, such as the year of commencement of a change in the entry level offer.

We considered other key product and pricing elements to be reasonable. These included NBN Co's proposed increase in the bundled charge for the 50 Mbps wholesale offer and the phased withdrawal of connectivity virtual circuit (CVC) charges over the first regulatory cycle. We noted that the former was necessary to provide NBN Co a reasonable opportunity to recover its efficient costs and was to be accompanied by reductions in prices for other wholesale offers.

We considered that the proposed price controls and transparency measures for the subsequent regulatory period struck an appropriate balance between giving flexibility to price efficiently in the wholesale market and providing the degree of cost certainty that

¹¹ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p, 73.

¹² See for example, Australian Energy Regulatory, *Better Resets Handbook: Towards Consumer Centric Network Proposals*, 2021.

retailers require to offer competitive services to the households and businesses that use the NBN. We further noted that stronger commitments over the pricing roadmap could impede efficient wholesale pricing that responds to market conditions and could extend the period required for NBN Co to reach efficient cost recovery. On balance, we were satisfied that the controls and transparency measures were reasonable and would promote the LTIE.

That said, we noted that the price controls were complex and more could be done to demonstrate and explain their operation by NBN Co. Accordingly we encouraged NBN Co to publish its proposed pricing roadmap for the first regulatory cycle and accompanying modelling that shows the conformity of that pricing with the WAPC and other price controls, which NBN Co has since done.

In response to our draft decision, NBN Co provided a series of submissions in which it detailed a number of potential proposed changes to those pricing and product elements where the ACCC and some stakeholders expressed concerns. A number of these were subject to our and other stakeholder feedback to NBN Co. Following this, NBN Co introduced subsequent changes in its August 2023 SAU variation proposal. The feedback from stakeholders, the changes made by NBN Co for the current variation proposal and our current observations on them are detailed in the sections below.

4.2.1. Pricing of 50 Mbps and below bundled offers

Overview

In the draft decision on the November 2022 SAU we noted that the combined access virtual circuit (AVC) and CVC charges for services acquired under the 50 Mbps wholesale offer could fall within a very broad range under the then proposed pricing model for the first regulatory cycle. We noted that a further SAU variation proposal could do more to provide retailers an efficient means by which to manage such residual cost uncertainty.

In this regard, we indicated that if NBN Co were to submit a revised SAU variation proposal, it should consider assessing the respective benefits of applying a billing rule to cap the maximum combined AVC and CVC charge that a service would attract under this wholesale offer, in addition to considering its own proposal to commit to additional reporting on CVC utilisation.

NBN Co subsequently put forward for feedback in June 2023 a potential 'floor and ceiling' pricing proposal for its traffic class 4 (TC-4) bundle offers, i.e., for all TC-4 services that are supplied with a speed tier of 50 Mbps or below.

This potential pricing proposal represented a significant change in approach, as it provided for NBN Co to apply monthly recurring charges for each service within a minimum (floor) and maximum (ceiling) amount. The access charge within this range would depend upon the average daily busy hour utilisation of the service over the billing period. A service that was not active or downloaded less than the CVC inclusion of the bundled charge during the daily busy hour would attract the floor price, while a service that used more CVC than the bundled CVC inclusion during the daily busy hour would incur an additional cost until the price ceiling was reached.

The proposal also served to remove national pooling of CVC allowances and provided for billing of services on a per service basis.

The response from stakeholders to NBN Co's floor and ceiling proposal was mixed. The larger and some emerging retailers were opposed to it, because it removed national pooling

of CVC and the opportunity this provided to manage their exposure to CVC overage charges, and so would result in a higher average access cost. Some smaller retailers supported it because of its simplicity and greater certainty over maximum costs to acquire the bundle offers.

NBN Co provided a new pricing submission on 4 July 2023 that contained three new potential floor and ceiling pricing options to respond to stakeholder concerns with its earlier proposal provided in June 2023. It also signalled that it was no longer prepared to proceed with the pricing offer included in the November 2022 SAU variation proposal after updating forecasts of the demand and revenues that it would generate.

In this regard, NBN Co has indicated that it had forecast that its November 2022 SAU variation proposal would yield an average revenue per user of \$48.49 per month for TC-4 services in 2024. However, NBN Co has estimated that this could reduce by around \$0.80 per month on an annualised basis in that year, with this reduction compounding in future years, should it retain the November 2022 pricing model. This assumes that retailers could achieve a reasonably high degree of cost optimisation.¹³ This is only one of a range of potential outcomes, which would depend on the level of sophistication and accuracy that retailers built into their provisioning models.

The potential pricing options offered in the July submission, as compared to the earlier floor and ceiling proposal, were as follows:

- option 1: Reduce the 50 Mbps floor to \$48, and increase bundled price CVC inclusion from 2.5 Mbps to 2.6 Mbps
- option 2: Reduce the opening overage rate to \$5.50/Mbps (and to \$4.50/Mbps and \$3.50/Mbps in subsequent years), and increase the 50 Mbps bundled CVC inclusion from 2.5 Mbps to 3.5 Mbps
- option 3: Reduce 50 Mbps floor to \$49 and the opening overage rate to \$6/Mbps (and to \$5/Mbps and \$4/Mbps in subsequent years), and increase bundled price CVC inclusion from 2.5 Mbps to 2.6 Mbps.¹⁴

We facilitated a forum for stakeholders on 14 July to provide initial views on the pricing options. We also sought written submissions from stakeholders by 21 July.

The preferences of stakeholders as indicated in their submissions are summarised in the table below. This indicates a majority supported option 2. In a couple of cases those stakeholders that supported option 2 expressed the view that there was little difference between the options.

Our assessment was that option 1 offered the lowest minimum price for the 50 Mbps but at the expense of higher prices for the 12 and 25 Mbps tiers and favoured those access seekers that have less interest in these latter services. Option 2 offered more pricing certainty across all the speed tiers, but at the expense of the highest minimum price for the 50 Mbps. Option 3 was a hybrid of options 1 and 2 that offered compromise outcomes between these two options.

Optus also called for an immediate release of a 3 year binding roadmap to embed future pricing certainty.

¹³ The estimate applied a 75 percent optimised cost base across retailers.

¹⁴ In addition to the pricing options for a SAU variation, NBN Co also proposed complementary financial assistance to retailers to assist them implement new pricing and compensate for delay via complementary commercial arrangements.

Table 1 Stakeholder preferences for NBN Co's July pricing options

NBN Co July option	Stakeholder preference*
Option 1	Optus, AGL, X-Integration (but supports all).
Option 2	TPG (with \$48 floor), Vocus (but raise CVC incl for 25 to 1.75 Mbps), Aussie Broadband, Superloop (with additional CVC incl), Launtel (with 700 Mbps overage waiver), Kinetix (with 700 Mbps overage waiver).
Option 3	Telstra, ACCAN.

* The Internet Association of Australia (IAA) did not indicate a preference.

Telstra suggested that the timely introduction of a low-income product could help address concerns about reduced ability to cross-subsidise lower speed products under the floor and ceiling options.¹⁵

August 2023 SAU variation proposal

In its August 2023 SAU variation proposal NBN Co has adopted a 'floor and ceiling' pricing model for the 50 Mbps and below bundled offers for the first regulatory cycle. The pricing elements that apply to each speed tier are outlined in Table 2 below.

Table 2 Proposed floor and ceiling pricing elements by speed tier

Bundle	12 Mbps	25 Mbps	50Mbps
Ceiling price 2023-24	\$55.00/mth		
Floor price 2023-24	\$24.40/mth	\$26.00/mth	\$50.00/mth
Overage prices	\$5.50/Mbps/mth (2023-24), \$4.50/Mbps/mth (2024-25) and \$3.50/ Mbps/month (2025-26)		
Opening CVC inclusion	0 Mbps	0.2 Mbps	3.5 Mbps

We note that these elements make the pricing proposal for these speed tiers equivalent to option 2 put forward by NBN Co in its July 2023 submission.

The floor and ceiling prices apply per AVC on a daily basis. Correspondingly, the CVC overage for the each AVC is determined daily on a per-AVC service basis, with no pooling or aggregation of CVC inclusions across AVCs. The actual monthly charge per AVC is to be determined as an average of the daily charge for the speed bundle and CVC overage applying to that AVC during the month.¹⁶

¹⁵ We respond to this under section 4.2.3 below on the low income forum.

¹⁶ Clauses 2F.4.1 and 2E.2.2 (e), Schedules 2F and 2E, Module 2 of the August 2023 SAU variation and NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, Appendix E.

In addition, the SAU variation proposal commits NBN Co to supply daily and monthly CVC utilisation reports on a per AVC basis to assist access seekers with their business planning and marketing activities.¹⁷

The SAU variation proposal also makes two proposed changes to how the price control arrangements would operate from those contained in the withdrawn November 2022 SAU variation proposal.

The first change is to the calculation of the average combined charge, which is used to calculate an average price for the services sold via bundle offers as an input to the various SAU price controls. This change is consequential to the move to the proposed floor and ceiling pricing model for the bundle offers.¹⁸

The second change sets out how the price controls would operate with the transition of 50 Mbps and below service to flat monthly prices, making provision for these flat rate offers to be *notional* bundled offers in the first year of their introduction for price control reference purposes.¹⁹

The overall price control and transparency arrangements as previously proposed are not altered by the August 2023 pricing proposal.

NBN Co has included some other guidance and commitments in support of its SAU variation proposal. By way of guidance, it has supplied an indicative roadmap and forecast of its compliance with a weighted average price cap over the regulatory cycle. The SAU variation proposal itself requires NBN Co to issue the finalised roadmap at least one month prior to the new SAU pricing taking effect.

Current observations

We observe that NBN Co's floor and ceiling pricing proposal, which is equivalent to NBN Co's option 2 proposal of its July 2023 submission, is expected to:

- provide a narrower range of access cost outcomes across access seekers for the 50 Mbps and below services compared to the November 2022 pricing proposal²⁰
- reduce the average cost to access TC-4 services acquired with a 12Mbps or 25 Mbps speed tier compared to the November 2022 pricing proposal²¹
- maintain an average revenue per-user (\$48.17 in 2023-24) that is similar to its current level (\$48.10 in 2022-23).²²

¹⁷ Clause 2C.6, Schedule 2C, Module 2 of the August 2023 SAU variation.

¹⁸ Clause 2F.4.1, Schedule 2F, Module 2 of the August 2023 SAU variation.

¹⁹ Clause 2F.3, Schedule 2F, Module 2 of the August 2023 SAU variation.

²⁰ NBN Co provides a view on the average cost that three distinct retailer types would likely face under this option in its submission in support. See NBN Co Supporting submission, 14 August 2023, p. 40, Figure 5. Note, NBN Co has corrected this Figure 5 since its submission was first published to reduce the average cost to acquire the 50/20 Mbps bundled offer to \$51.30, \$51.30 and \$51 for each of the retailer types. The costs in Figure 5 are compared with the costs under the November 2022 pricing proposal listed in figures 3 and 4 at p. 39 of the submission.

²¹ See footnote 20 above.

²² NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p.34.

Further, we note the option 2 proposal of NBN Co's July submission, was the one most widely supported by retailers including by several challenger retailers (although for some this was conditional on changes to it).^{23, 24}

The proposal also seems to be consistent with the relevant key outcomes that could guide NBN Co's development of a SAU variation proposal, which were developed under the 2021 working groups consultation process.

Notably the proposal is expected to:

- provide NBN Co with a reasonable opportunity to recover its legitimate costs while continuing to avoid price shocks by lowering the commercial risks to NBN Co arising from its previous pricing model. We note that NBN Co has on more recent forecasts expected the TC-4 bundle products pricing in its November 2022 SAU variation proposal to not be capable of achieving these objectives.²⁵
- offer retailers greater certainty over their costs for the 50 Mbps and below products than has been available to date, and much closer to the certainty provided by the AVC only pricing model for which retailers advocated at the start of the SAU variation process.
- reduce the extent to which costs faced by different types of retailers vary with their ability to optimise. This should help to ensure greater competition between retailers, including by assisting entry and expansion by smaller retailers.
- help promote more efficient use of the NBN by:
 - providing for more certain and stable access costs to support the development of improved retail offers
 - reducing retail transformation costs as retailers are able to realise improved access cost outcomes without incurring the system and labour costs associated with predicting likely CVC usage for individual AVCs
 - underpinning more competitive retail pricing due to greater potential for additional entry or expansion of smaller retailers in the market via the use of NBN access services.

Another apparent beneficial feature of the SAU variation proposal is that it does not have a restriction on the price or quality (speed inclusion) of retail plans that can be supplied when using the wholesale access offers. Accordingly, retailers should be able to use the wholesale offers as they want to support their chosen retail offers including bespoke maximum speed inclusions. Also, retailers should be able to access favourable wholesale cost outcomes without needing to 'up-sell' customers to higher priced retail plans with premium speed inclusions.

We note that NBN Co's has published an indicative pricing roadmap and forecast WAPC with its August 2023 SAU variation proposal. Under the terms of any accepted SAU variation final versions of these materials along with a statement of pricing intent will need to be issued least one month before the price transition date when new prices would take effect.²⁶ These should provide retailers with a high degree of pricing certainty beyond the initial prices in the

²³ See Table 1 above.

²⁴ We note that NBN Co has made provision for the 700 Mbps overage waiver per point of interconnect, calculated daily, in its WBA5 drafting (proposed clause 1.1(b) of the Price List). The availability of this overage waiver was a condition of support by two stakeholders for the option 2 pricing proposal (see Table 1).

²⁵ NBN Co, *Floor and Ceiling – Modified Pricing Options*, July 2023, pp.22-23.

²⁶ Clause 2B.2.5 (b), Schedule 2B, Module 2 of the August 2023 SAU variation.

tariff list, subject to specific allowed variations and the broader operation of the price control framework.

4.2.2. NNI pricing

Overview

In our draft decision on the November 2022 SAU variation proposal we noted that NNI charges continued to be a source of competition concerns notwithstanding some changes to these charges that NBN Co recently made. We considered that these concerns arose from the economies of scale that remained embedded in the NNI price structure which disadvantaged smaller retailers when seeking to compete with larger incumbent retailers.

NBN Co detailed pricing changes it was prepared to commit to in any new variation in a submission provided on 23 May 2023. These consisted of additional reductions in upfront and recurring NNI charges focused on enabling cheaper upgrades to 10 gigabyte (10G) NNIs. It indicated these changes could not be introduced earlier than 1 July 2024 because of existing capacity constraints that would limit how many higher capacity NNIs could be accessed at a point of interconnect.²⁷

In response, some smaller retailers indicated that the potential revised pricing proposal was welcome but that that NBN Co should further align NNI and virtual NNI pricing with attributable costs and that NBN Co should commit to a further review of NNI pricing to better ensure it keeps up with market developments. There was also a call for deferred payments arrangements for NNI set up charges, including in response to NBN Co's 4 July pricing submission.

August 2023 SAU variation proposal

The August 2023 SAU variation proposal would commit NBN Co to reduce upfront and recurring NNI charges. This is with a view to encouraging more efficient use of available NNI capacity, as well as reducing cost disadvantages that entrants may otherwise face in acquiring NNI capacity and upgrading to 10G NNIs as their network utilisation increases. These proposed changes comprise:

- A 50% reduction in the 1G NNI and virtual NNI monthly recurring charges
- Allowing overbooking of TC-4 CVC on NNI and virtual NNIs
- Cost reductions on 10G and 100G NNI set up and activation charges (from 1 July 2024)
- Reduced monthly recurring charges for a first/single 10G NNI at a point of interconnect (from 1 July 2024)
- Rebates for the return of 1G NNIs when upgrading to 10G NNIs at the level of the setup fees for the 1G NNIs under a new simplified migration process (available from 31 March 2024 to 30 June 2027)
- A commitment to review NNI charges by no later than 30 June 2027.²⁸

²⁷ NBN Co, *Response to ACCC draft decision – Network-Network Interface (NNI)*, 23 May 2023, p.10.

²⁸ The first two of the changes listed were also proposed under the November 2022 SAU variation.

Current observations

It appears that the changes to NNI pricing contained in the SAU variation proposal have been responsive to stakeholder feedback and should help to address scale disadvantages suffered by smaller retailers under the former pricing structure. We expect this will help to promote entry and expansion by smaller retailers, thereby promoting increased retail competition. It is not evident to us that the availability of deferred payment arrangements for NNI set-up charges, as proposed by some smaller retailers, would be of significant additional benefit light of the changes to charges NBN Co has made.

We note that NBN Co has indicated that the delay in introducing some of the charge reductions until 1 July 2024 is due to capacity constraints at particular points of interconnection that will limit its ability to supply sufficient higher capacity NNIs until then.²⁹

4.2.3. Low income and digital inclusion forum

Overview

In our draft decision on the November 2022 SAU variation proposal we indicated that the SAU should provide additional commitments concerning the role of the forum and how it would operate.

In this regard, we stated that NBN Co should consider including commitments in the SAU variation:

- to respond to the forum's recommendations in the reports that it provides to forum members, as well as when reporting to the public on the forum's work
- that NBN Co should consider the forum's views before proposing product withdrawals, as the SAU variation proposal would commit NBN Co to do when considering price changes
- that there be provision for effective consultation with forum members ahead of price changes and product withdrawals and reporting to forum members explaining how their views were considered.

In its 2 June 2023 submission NBN Co proposed to strengthen its commitments regarding the forum, including to clarify its remit and to give transparency over the forum's views and NBN Co's response to them.

Telstra submitted that these strengthened commitments remained inadequate and called for the forum to be tasked with developing a baseline low income package; for it to have an independent chair to better drive changes and make the needs of vulnerable customers a priority; and that there be an explicit and measurable objective of improving digital inclusion.

The IAA sought an amendment to the proposed eligibility rules for forum members to include industry peak bodies as another category of member. ACCAN advocated for additional resourcing being made available to enable its participation in the various consultations with consumer groups provided for under the SAU variation proposal.

²⁹ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 48.

August 2023 SAU variation proposal

NBN Co's August 2023 SAU variation proposal appears to offer strengthened commitments in the SAU on the remit of the forum and gives transparency over the forum's views and NBN Co's response to them. The drafting clarifies that forum members can provide views and feedback on initiatives to improve end-user access to NBN services, and NBN Co's proposed access pricing and product withdrawals. It also strengthens NBN Co's public reporting commitments in relation to initiatives undertaken and how the views of forum members have been considered.³⁰

Current observations

We consider that because of the additional commitments around the operation of the forum in the SAU variation proposal (which are described above) that it appears to meet our expectations flagged in the draft decision. This should mean the forum can meet its intended objective of advancing the interests of low income and other end-users that otherwise might not be supported in accessing NBN services. Although not stated in its supporting submission, NBN Co has separately informed us that the IAA is eligible to participate in the forum as a not-for-profit organisation.

In response to Telstra's suggestions for the operation of the forum, we consider that developing a low income package and key performance indicators for digital inclusion is something that forum members can choose to develop, in which case the forum's views and NBN Co's response would be set out in the report on the forum's operations.

In response to Telstra's suggestion for the forum to have an independent chair to better drive outcomes emanating from the forum, we consider there could be merit in this, and encourage NBN Co to continue to consider whether the operation of the forum could be enhanced by an independent chair.³¹

4.2.4. Other pricing issues

Timing of the entry level product review

In our draft decision we raised a concern with NBN Co's proposal,³² to provide for any change to the entry level product designation being deferred until the second year of a regulatory cycle if there were delays in it being specified.³³

In its 2 June 2023 submission NBN Co provided new SAU drafting to enable the ACCC to approve a change in the entry level product ahead of making a replacement module determination, to ensure a change could take effect in the first year of a regulatory cycle.

In the current SAU variation proposal, NBN Co has included new provisions that would enable the ACCC to approve a change in the entry level product ahead of making a replacement module determination, to ensure a change can take effect in the first year of a regulatory cycle. This is proposed by allowing the ACCC to make a transitional entry level

³⁰ Clause 2B.7, Schedule 2B, Module 2 of the August 2023 SAU variation.

³¹ Should NBN Co decide to adopt an independent chair and were the SAU variation to come into effect, NBN Co would need to seek a minor SAU variation to introduce this change.

³² Contained in its 24 March 2023 letter to the ACCC.

³³ In the circumstance where a Replacement Module Determination had not been made for a forthcoming regulatory cycle by 31 March prior to commencement of that regulatory cycle on 1 July.

offer determination up to 31 March in the financial year immediately prior to the commencement of the new regulatory cycle to specify the entry level product for the first year of the regulatory cycle if a replacement module determination will not be able to be made by that date.³⁴

We consider that the provision in the new SAU variation proposal should give the ACCC the power to approve a change in the entry level product ahead of making a replacement module determination and should address our concern expressed in the draft decision. Accordingly, we consider it should ensure a change in the entry level product can always be specified from the first year of a regulatory cycle, with the result that the entry level product will also be subject to the tighter individual price control applicable to the entry level product, in that year.

1 July 2024 price changes

Several submissions in response to NBN Co's 4 July floor and ceiling pricing proposal called for the removal or deferment of the price changes planned for 1 July 2024 under any accepted SAU variation. This was because the initial pricing changes proposed for a SAU variation would come into effect later than previously envisaged under the November 2022 SAU variation proposal and a second series of changes in a short space of time had the potential for retail market disruption (i.e., end-users would see prices increases within 6 months of each other, on both 1 December and 1 July).

The August 2023 SAU variation proposal has retained the annual price update scheduled for 1 July 2024. NBN Co has justified this on the basis that its average revenue per-user is effectively remaining flat from 2022-23 to 2023-24, which suggests that a further change within the year should not be overly disruptive.³⁵

Our preliminary view is that NBN Co's position is valid, although we acknowledge that the impact of price changes could vary across retailers depending on their product mix. Further, were NBN Co to forgo this price increase, it could mean that efficient cost recovery objectives could be undermined in the short term, opening the potential for steeper price increases or price shocks at a later time.

Service transfer and access reactivation fees

Some submissions to NBN Co's 4 July pricing proposal sought reductions in service transfer fees to help promote retail competition by lowering the cost of acquiring customers already being supplied over the NBN. These submissions were received challenger retailers.

Under its indicative pricing roadmap submitted with the August 2023 SAU variation proposal, NBN Co has made provision for non-infrastructure transfer fees to be reduced from \$5 to \$1.50 per service and for the satellite access reactivation fee to be lowered from \$15 to \$5 (the same as for other access technologies). These would take effect on the price transition date, assuming the SAU variation were to be accepted and the pricing changes were confirmed in the actual pricing roadmap that would be required to be submitted one month prior to this date.³⁶

The former price change will reduce the cost of mass transfers of customers between retailers on commercial basis (for example, when a merger occurs). The latter price change will help to lower the cost of individual service reactivations on the Skymaster service,

³⁴ Clause 2B.4.1, Schedule 2B, Module 2 of the August 2023 SAU variation.

³⁵ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p.60.

³⁶ NBN Co, *Indicative 3 Year SAU Pricing Roadmap*, 14 August 2023, tables 9.8 and 9.2.

including in potential circumstances where a service is reactivated in response to a better retail offer.

Enhanced service fees

NBN Co has also proposed in its August 2023 SAU variation to lower some of the regulated charges for enhanced service levels. The proposed regulated charges would align with the fees that NBN Co already applies under its current commercial wholesale broadband agreement and is intending to incorporate into the next agreement (known as WBA5).³⁷

Pro-rating of monthly charges

Incidental to its new floor and ceiling pricing of bundled offers, NBN Co has added a new provision to the August 2023 SAU variation proposal that clarifies that (apart from the specific provisions that require the basic bundled offer and CVC overage charge components to be pro-rated) daily pro-rating of monthly charges is not a matter that is addressed in the SAU.³⁸ We note that as pro-rating of charges more generally is not addressed in the SAU, it appears clear that a regulatory access determination that addressed this issue could not give rise to any inconsistency.³⁹ That said, we note that NBN Co's established commercial practice is to pro-rate monthly charges and NBN Co has proposed to commit to continue this practice in its next commercial access agreement, WBA5.⁴⁰

Timing for the introduction of new SAU access terms

In their most recent submissions, provided in respect of NBN Co's July floor and ceiling pricing proposal, retailers expressed a clear preference for a quick resolution to the SAU variation process, to allow for the introduction of refreshed commercial pricing under the pending wholesale broadband access agreement (WBA5) by 1 December, or by 1 February if this was not possible.

We have considered this clear preference in developing our current consultation and assessment timeframe.

4.3. Service quality

Overview

The August 2023 SAU variation proposal includes benchmark wholesale service standards for the first regulatory cycle. It also provides a framework by which the benchmark service standards can be set for each regulatory cycle in the subsequent and post-2032 regulatory periods, or reviewed mid-regulatory cycle in specified circumstances during the subsequent regulatory period.

³⁷ Some of the changes to these charges are contained in the indicative pricing roadmap that NBN Co has provided in support of its SAU variation proposal and so would only be confirmed once the actual pricing roadmap is provided following an acceptance of its current SAU variation proposal and apply under the SAU from the price transition date. See NBN Co, Indicative 3 Year SAU Pricing Roadmap, August 2023. Table 8.1.

³⁸ Clause 2B.1.7, Schedule 2B, Module 2 of the August 2023 SAU variation.

³⁹ The hierarchy of commercial and regulatory terms is outlined in Chapter 3 above.

⁴⁰ Proposed clause B1.4 of the WBA5 Head Terms.

November 2022 SAU variation proposal

In our draft decision on the November 2022 SAU variation proposal, we considered the framework for setting benchmark service standards during the subsequent regulatory period and the post-2032 period, and for reviewing those standards in mid-cycle review processes during the subsequent regulatory period, to be generally reasonable and likely to promote the LTIE. However, we did not make the same finding in relation to the benchmark service standards for the first regulatory cycle.⁴¹

For the first regulatory cycle, our draft decision noted that NBN Co had not consulted stakeholders on the proposed benchmark service standards as it proposed to do for future regulatory cycles nor was there a commitment in the SAU variation proposal for NBN Co to consult with stakeholders about measures that could be applied to efficiently address known causes of poor quality. Additionally, we noted that the benchmark service standards proposed for the first regulatory cycle did not reflect standards that were to be adopted under WBA5 or other potential future improvements during that cycle. As such, the service standard benchmarks, as drafted in the November 2022 SAU variation proposal, were likely to be superseded by terms already negotiated under WBA5, limiting the effectiveness of the proposed benchmarks. For these reasons, we were not satisfied that the benchmark service standards for the first regulatory cycle, or framework for changing benchmark service standards over the first regulatory cycle, were reasonable or likely to promote the LTIE.⁴²

We indicated that a future SAU variation proposal could potentially address these concerns if it included a commitment to consult stakeholders on the measures it should prioritise for the first regulatory cycle and incorporate any improvements into the benchmarks. We considered that any consultation and reporting mechanism would likely be of greater benefit if it also allowed for a transparent pathway for investment decisions, leading to improved end-user experience.⁴³

Submissions to our draft decision generally agreed that the inclusion of benchmark service standards, ACCC powers in relation to benchmark service standards, and process to update benchmark service standards represented an improvement to the NBN regulatory framework. However, concerns were raised by Telstra in relation to the ACCC's ability to change service standards mid-regulatory cycle where end-users are impacted by a systemic service standard event. Together with Optus, Telstra also considered that there was a lack of accountability when services were not delivered or regulatory requirements not met by NBN Co. In this regard, Telstra supported the inclusion of a performance incentive scheme within the framework while Optus urged NBN Co, the Government, the ACCC and industry to work together to set appropriate regulated standards. Optus submitted that the rebate framework had failed to incentivise NBN Co to address consumer issues. Of particular concern to Optus were the delays being experienced by some consumers for their lines to be remediated (more than 18 months). Optus also noted that there had been issues with the rebate framework itself, such as accuracy and delays in payments.⁴⁴

In terms of the proposed benchmarks for the first regulatory cycle, stakeholders generally shared the view that the proposed benchmarks would not offer any material improvement to service quality over the course of the first regulatory cycle (i.e. the next three years). Stakeholders submitted that there continue to be gaps between proposed benchmarks and

⁴¹ ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, pp.70-71.

⁴² ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, pp.70-71, 75.

⁴³ ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, p.76.

⁴⁴ Telstra, *Submission to draft decision*, 6 June 2023, pp.4-7. Optus, *Submission to draft decision*, May 2023, p.10. Optus, *Supplementary submission to draft decision*, June 2023, pp. 2, 5-7.

end-user expectations, and that WBA5 negotiations were unlikely to make material improvements to service quality. In line with previous submissions, stakeholders raised service dropouts, faults, network outages and service speeds as ongoing concerns.⁴⁵

NBN Co subsequently proposed,⁴⁶ potential changes to the November 2022 SAU variation proposal which it considered could respond to concerns raised by stakeholders and our draft decision. The potential changes proposed by NBN Co concerned ACCC powers to initiate a mid-cycle review of benchmark service standards, updating benchmark services standards for the first regulatory cycle and new transparency and reporting measures. The potential changes are incorporated in the August 2023 SAU variation proposal (outlined below).

In addition to making changes to the SAU variation proposal, NBN Co also responded to stakeholder concerns on the service standard framework in the SAU variation (some of which are outlined above) in its supporting submission to the August 2023 SAU variation proposal.

August 2023 SAU variation proposal

The August 2023 SAU variation proposal adopts the same approach as the November 2022 SAU variation proposal with respect to most aspects of the framework for specifying benchmark service standards in the first and subsequent regulatory cycles. There are however several important differences with respect to:

- *ACCC initiated mid-cycle review of benchmark service standards* – the definition of a systemic service standard event⁴⁷ provides that a recurring event that impacts end-users can trigger an ACCC initiated review of benchmark service standards under clause 21.2.2(a),⁴⁸ in addition to those that impact retailers
- *Benchmark service standards for the first regulatory cycle* – Attachment I of Schedule 4A,⁴⁹ includes additional improvements to WBA4 service levels in the benchmark service standards in line with current WBA5 negotiations⁵⁰
- *Consultation and reporting measures* - clauses 4A.4.1-3,⁵¹ provides for consultation and publication of a service improvement plan and service performance review each financial year of the first regulatory cycle (until 2026).

⁴⁵ Telstra, *Submission to draft decision*, 6 June 2023, p p.4 & 6; ACCAN, *Submission to draft decision*, 30 May 2023, p.6; Optus, *Submission to draft decision*, May 2023, p.5; Optus, *Supplementary submission to draft decision*, June 2023, pp.6-7. Vocus, *Submission to draft decision*, 30 May 2023, p.5. Bruce Bebbington, *Submission in response to ACCC draft decision*, 30 May 2023, pp.6-7; IAA, *RE: Draft decision - Variation to the NBN Co Special Access Undertaking*, 30 May 2023, p.3.

⁴⁶ NBN Co, *Letter to the ACCC – Response to issues raised in ACCC consultation paper on the variation to NBN Co’s Special Access Undertaking*, 24 March 2023. NBN Co, *NBN Special Access Undertaking variation: response to ACCC draft decision – service quality*, May 2023.

⁴⁷ See Attachment C to the Main Body of the SAU and the definition of ‘systemic service standard event’.

⁴⁸ Schedule 21, Module 2 of the August 2023 SAU variation.

⁴⁹ Module 4 of the August 2023 SAU variation. Clause 4A.3(b)(i) of Schedule 4A, Module 4 provides that capitalised terms which are not defined in Attachment I would have the meanings given to them in the SFAA published in accordance with clause 8 as at 11 August 2023. A current WBA SFAA page can be found here: <https://www.nbnco.com.au/rsp/supply-agreements/wba>

⁵⁰ Improvements to WBA4 service standards not included in the November 2022 SAU variation are in NBN Co’s March 2023 letter and May 2023 submission. Refer to NBN Co, *Letter to the ACCC – Response to issues raised in ACCC consultation paper on the variation to NBN Co’s Special Access Undertaking*, , 24 March 2023, Attachment A. NBN Co, *NBN Special Access Undertaking variation: response to ACCC draft decision – service quality*, May 2023, Table 1, pp.9-10.

⁵¹ Schedule 4A, Module 4 of the August 2023 SAU variation.

Under the August 2023 SAU variation proposal, NBN Co is required to consult access seekers⁵² and publish their feedback on certain matters in its service improvement plan and service performance review.⁵³ The published service improvement plan, which NBN Co is required to publish by no later than 20 business days after the start of each financial year of the first regulatory cycle, must include the initiatives NBN Co is undertaking that year (or plans to undertake that year) for the purposes of enhancing end-user and/or access seeker experience; the intended benefit of those initiatives; planned timeframes for implementing initiatives; forecast capital expenditure and operating expenditure for initiatives; as well as set out those initiatives for which NBN Co is intending to submit a cost pass-through application under clause 2D.5.1.⁵⁴

In terms of NBN Co's delivery of service standards in the first regulatory cycle, clause 4A.4.3⁵⁵ requires NBN Co to review its performance in respect of each service level and each service performance objective set out in its standard form access agreement as well as the relevance and effectiveness of each type of objective to access seeker products. In addition, NBN Co is required to publish a report in relation to its service performance review, which must, amongst other things, consider how service improvement plan initiatives have contributed to NBN Co's performance. The report must also set out any changes NBN Co is considering in response to its review and feedback from access seekers, including any changes it is considering to: service standards in the standard form access agreement, the benchmark service standards or NBN Co's processes. NBN Co clarified in its May 2023 submission that it does not intend to uplift service standard benchmarks unless it is outperforming existing thresholds in the WBA.⁵⁶

While there appears to be no direct financial consequence on NBN Co in the August 2023 SAU variation proposal should it not deliver proposed plan initiatives and improvements, we would expect that there would be a significant reputational risk to NBN Co given proposed reporting requirements under clauses 4A.4.2-3.⁵⁷

Submissions

In supplementary submissions to our draft decision some stakeholders expressed scepticism on whether NBN Co's proposals outlined in its March 2023 letter and May 2023 submission with regards to service standards in the first regulatory cycle would have any meaningful impact in addressing existing consumer issues, or in uplifting service performance. Telstra, for example, noted that any service improvement plan is non-binding and the service performance review backward focussed, aimed at ensuring enhanced service level commitments are made where NBN Co is confident of its ability to meet the commitment.⁵⁸ Launtel, on the other hand, appeared to accept that NBN Co was going to

⁵² In reviewing retailer proposals, NBN Co will consider a range of criteria (such as whether there are more prudent or efficient options that can deliver the desired outcomes) to determine the feasibility of the proposal and whether it should be prioritised above other planned initiatives. Refer to Clause 4A.4.1(c), Schedule 4A, Module 4 of the August 2023 SAU variation.

⁵³ Clauses 4A.4.2(b)(i) and 4A.4.3(a)(ii)(D) of Schedule 4A, Module 4 of the August 2023 SAU variation require NBN Co to publish access seeker feedback on plan initiatives in the service improvement plan (except in relation to the first financial year) and, effectiveness of service standards, relevance and/or impacts on end user experience in the service performance review.

⁵⁴ Schedule 2D, Module 2 of the August 2023 SAU variation.

⁵⁵ Schedule 4A, Module 4 of the August 2023 SAU variation.

⁵⁶ NBN Co, *NBN Special Access Undertaking variation: response to ACCC draft decision – service quality*, May 2023, p.14.

⁵⁷ Schedule 4A, Module 4 of the August 2023 SAU variation.

⁵⁸ Optus, *Submission in response to ACCC draft decision: NBN Co's response to ACCC draft decision – 50/20 Mbps cost certainty*, June 2023, p.6. Telstra, *Submission to ACCC - NBN Co Special Access Undertaking Draft Decision - Supplementary Submission*, 16 June 2023. p.8.

uplift service standards via fibre upgrades. It sought more information on proposed upgrades and for upgrades to be made more freely available to consumers.⁵⁹

In response, NBN Co submitted that an increasingly competitive broadband market and proposed transparency framework would act as incentives for it to deliver on proposed service improvements. It also submitted that the purpose of the service performance review is to ensure that service standards remain appropriate to meet retailer and end-user expectations while aligned with the capability of the NBN and NBN Co's operations. Additionally, it noted the availability of regulatory oversight in the form of the ACCC's power to trigger a review of service standards during a regulatory cycle where there is a systemic service standard event. In terms of key performance issues raised by retailers in the March and November 2022 SAU variation inquiries in relation to, for example, dropouts and outages, NBN Co noted that it had sought to resolve these without triggering expenditure that would require it to revisit pricing commitments under the SAU.⁶⁰

Current observations

NBN Co's proposed changes seek to address, or introduce a process for addressing, the gaps identified by stakeholders and our draft decision with regards to the benchmark service standards framework in the November 2022 SAU variation.

Under proposed changes, we would be able to initiate a review of benchmark service standards where there is a systemic service event that impacts end-users during a regulatory cycle. Benchmark service standards for the first regulatory cycle would be aligned with current proposed changes to WBA5. Additionally, access seekers would have an opportunity in the first regulatory cycle to provide input into NBN Co's development of service standard improvement priorities as well as NBN Co's review of its performance. Their views and other considerations by NBN Co would be published annually.

We note that NBN Co intends to invite ACCAN (as a consumer advocacy group), Commpete and IAA (as retailer representative bodies) to participate in the consultation process on the service improvement plan.⁶¹ We agree with this approach. We consider that consumer representative bodies could provide valuable insights with regards to the impact of service standards on end-user experience.

In terms of the first service improvement plan, we note that it would be published on NBN Co's website no later than 20 business days after any date on which the current SAU variation proposal is accepted (clause 4A.4.2(c)⁶²). However, a draft service improvement plan has yet to be provided by NBN Co in the materials lodged in support of its proposed SAU variation proposal. We propose to publish on our website, a draft service improvement plan, should one be provided by NBN Co.

Overall NBN Co's proposed changes to the service standard framework appear to be an improvement to the framework set out in the November 2022 SAU variation proposal. We note, for example, that the proposed consultation and reporting framework in the first regulatory cycle has the potential to align service delivery more closely with the expectations of end-users. Under the proposed changes the benchmarks would likely be more consistent with future access agreements than previously. We also expect that changes to our review

⁵⁹ Launtel, *Public response to NBN's proposals concerning speed tier pricing and service standards*, 15 June 2023, pp.1-4.

⁶⁰ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, Appendix B, pp. 67-68 and 71-72.

⁶¹ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, Appendix B, pp. 70-71.

⁶² Schedule 4A, Module 4 of the August 2023 SAU variation.

powers would provide us with the ability to consider the impact of a systemic service event on end-users when assessing whether to initiate a mid-cycle review of benchmark service standards.

4.4. Other issues

4.4.1. Treatment of capital contributions and changes to building block model parameters

Overview

Consistent with the regulatory framework that is specified in the SAU for the subsequent regulatory period, NBN Co proposes that its regulatory allowances are to be based on reasonable forecasts of the costs it would incur in efficiently investing in and providing access to its services. This comprises return on capital, operating expenditure, depreciation and taxation costs.

One input into the cost estimates is the treatment of expenditure received from third parties to fund upfront capital expenditures (otherwise known as capital contributions).

Under the current SAU, capital contributions that NBN Co receives from government or third parties such as developers are not accounted for consistently. This reduces transparency in the BBM and raises the potential for access prices in future years to be inflated for costs that have been funded through capital contributions.

In our draft decision on the November SAU variation proposal, we encouraged NBN Co to include provisions that gave appropriate recognition to such payments, and to the treatment of government grants in particular.

We received submissions from ACCAN and Telstra on third party funding.

ACCAN submitted:⁶³

- Further refinements to the SAU are required to clarify the intended treatment of cash and asset gifts made to NBN Co.
- There is no sound economic basis for the inclusion of assets funded by third parties and gifted assets within NBN Co's regulatory asset base.
- Maintaining separate asset accounts or regulatory asset bases is common practice in regulated sectors, where the combination of gifted assets with regulatory asset base assets may result in over-recovery.

Telstra indicated it agreed that NBN Co needs to consider the treatment of funding received from third parties, and that this should include remediation credits that arise under its commercial infrastructure agreement with NBN Co.^{64,65}

⁶³ ACCAN, *Re: NBN Special Access Undertaking (SAU) Draft Decision - Supplementary submission*, June 2023, p. 3.

⁶⁴ The responsibility to make ducts and pits suitable for upgrades transferred from Telstra to NBN Co. As part of the agreement, any work conducted by Telstra is treated as a credit which reduces operational costs.

⁶⁵ Telstra, *Telstra submission to the ACCC – NBN Co Special Access Undertaking Draft Decision*, June 2023, p. 15.

August 2023 SAU variation proposal

The SAU variation proposal outlines what a BBM proposal for a regulatory cycle within the subsequent regulatory period must include.⁶⁶

In its August 2023 SAU variation proposal NBN Co proposes the following changes in approach to respond to this issue:

- All forms of capital contribution (including both government grants and third-party fundings) that NBN Co receives will be netted off its capital expenditures.
 - In effect, it will net-off depreciation (using the asset's economic life in proportional terms) and the return on capital associated with any capital expenditure funded by capital contribution.⁶⁷
 - For example, if the third party contributed half of the capital required for the investment, the depreciation and return on capital would be offset by approximately a half.
- It would no longer recognise capital contributions as revenues in the year they were received except for the purpose of calculating the tax expense in the BBM revenue allowances.
- NBN Co will keep records in its BBM Excel spreadsheet model,⁶⁸ to demonstrate that this is the case.

NBN Co has also proposed a specific treatment for the government grant that it received in 2022 to fund further investment in its fixed wireless network. Although NBN Co received the grant ahead of an SAU variation coming into effect, NBN Co has agreed to offset the costs associated with the relevant investment by recognising the grant in full in the financial year ended 30 June 2024.

NBN Co has also clarified that it will similarly reduce its forecast operating expenditures and keep records in its BBM Excel spreadsheet for any Telstra remediation credits.

NBN Co has submitted that the proposed changes are consistent with the treatment of capital contributions in other regulatory sectors, and that while it expects the change in treatment will be revenue neutral over the full term of the SAU it would result in a lower net value in its regulatory asset base.⁶⁹

Changes in the BBM parameters

NBN Co has updated the BBM parameters that are proposed in the August 2023 SAU variation for the first regulatory cycle.⁷⁰ The changes reflect several factors including the revised treatment of capital contributions as well as updated parameters such as the CPI forecast and the weighted average cost of capital (WACC).⁷¹ In particular, inflation and

⁶⁶ See for example clauses 2G.5.3 and 2G.5.4, Schedule 2G, Module 2 of the August 2023 variation which both explicitly note that capex is a net of capital contributions.

⁶⁷ This is to be achieved by expressly include a negative asset when capital contribution is received by NBN Co to offset the amount of the capital expenditure funded by the capital contribution in calculation of the BBM revenue allowance. This negative asset class is to be depreciated and rolled forward in the regulatory asset base in a manner that would ensure its depreciation profile broadly aligns with that of the corresponding capital expenditure in the regulatory asset base that is funded by that capital contribution.

⁶⁸ The workings of NBN Co's BBM Excel spreadsheet model is discussed in NBN Co's BBM handbook.

⁶⁹ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 25.

⁷⁰ These parameters are contained in Attachment A to the August 2023 SAU variation as well as in the accompanying BBM Excel spreadsheet.

⁷¹ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 30.

WACC parameters have been updated as of May 2023, which were lower than those that had been applied in the November 2022 variation. These have flow-on effect on other BBM parameters.⁷² The following compares capital expenditure and operating expenditure between the November 2022 and August 2023 variation proposals (see Table 3 in section 4.4.2).

We note however the scope and magnitudes of the above changes do not appear material and have limited impact on forecast revenue requirement in the first regulatory cycle.

Current observations

Our current view is that the August 2023 variation proposal has sought to address the concerns raised in our draft decision and stakeholder submissions. We consider that the approach in the November 2022 SAU variation proposal did not fully account for all types of capital contributions and therefore would not be appropriate. The inclusion of the revised approach to capital contributions, which focuses more directly on net capital expenditure, improves transparency for stakeholders and provides assurance that the prices that retailers and end-users face for access to the NBN will not be inflated by investments to which other parties contributed.⁷³

We also note that the proposed approach to capital contributions will lead to a reduction in net capital expenditure that is forecast for the first regulatory cycle. The majority of this relates to 2023-24 due to the recognition in that year of the government funding received to upgrade the fixed wireless network. This results in a \$703 million decrease in net capital expenditure from the November 2022 SAU variation proposal.⁷⁴

The proposed approach adopts a consistent treatment for all forms of capital contributions with mechanisms in place to ensure reasonable alignment between NBN Co's capital allowances and its own investment (excluding any capital contributions) over time. This is likely to:

- lead to better pricing outcomes for consumers in the long term,
- provide incentives for efficient investment by NBN Co, and
- protect NBN Co's legitimate business interest by providing an opportunity for it to earn adequate return commensurate with the risks it faces.

4.4.2. NBN Co's proposed expenditure for the first regulatory cycle and ACCC powers over future review processes

Overview

Following NBN Co's lodgement of its November 2022 SAU variation proposal, we engaged an independent expert (Grex Consulting) to undertake a review of NBN Co's proposed capital and operating expenditure for the first regulatory period (2023-24 to 2025-26). In particular, the review has been tasked to examine:

⁷² NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 30.

⁷³ This risk could have otherwise arisen under the August 2023 SAU variation proposal from the time that NBN Co reached the point of annual cost recovery and its weighted average price control moves to a CPI – X formulation. Until that point is reached, NBN Co's price cap would be bound by CPI.

⁷⁴ See Table 3 below for net capital expenditure figures.

- The information that would be required to assess the efficiency and prudence of forecast expenditures, and
- The efficiency and prudence of NBN Co's forecast capital and operating expenditures at the program level for the first regulatory cycle, which are derived from its 2023 integrated operating plan forecast.

GreX Consulting was also requested to provide advice on the information systems and other processes that should be established to support future expenditure reviews under the then proposed SAU variation.

In its draft report, GreX Consulting found that some proposed expenditure items for the first regulatory cycle are likely to be prudent and efficient based on information that had been provided for review up to 28 March 2023. However, most of the expenditures by dollar value and number received only qualified or inconclusive ratings based on that information. These included the most significant capital investment programs including the NBN fibre connect programs and the fixed wireless network upgrade.

In our draft decision, we did not reach a conclusive view about the prudence and efficiency of these forecast expenditures. However, we noted that we would revisit this issue for the purpose of any final decision, by which time the GreX Consulting would have assessed further information, including the information tranches that NBN Co had then only recently supplied.⁷⁵

However, we considered the efficiency and prudence of the forecast expenditure for the first regulatory cycle would unlikely have a material pricing impact, and therefore was unlikely to have a material bearing on our decision to accept or reject the SAU variation proposal.⁷⁶ This is because NBN Co's forecast loss making period (during which its weighted average price cap would be set at CPI rather than a CPI-X formulation) extends well beyond the first regulatory cycle, and a power was to be conferred on the ACCC to undertake an ex-post review on the actual capital expenditure. We considered that these factors would result in NBN Co bearing most of the risk for any inefficient expenditure.

NBN Co has agreed with this assessment in submitting its August 2023 variation proposal. That said, it has disagreed with the draft findings that GreX Consulting has made in respect of its forecast expenditures and has provided further information in its submission and to the review as to why it considers all expenditures to be prudent and efficient.⁷⁷

In our draft decision, we also noted the draft recommendations that GreX Consulting had provided concerning the information and processes needed to support future expenditure reviews.⁷⁸ These recommendations included that NBN Co should prepare and maintain business case information for all significant expenditure programs as at the time that management decision was given to proceed. Further, NBN Co should develop information systems that provide effective oversight of progress towards meeting its business case forecasts for ongoing management and regulatory purposes.

In our draft decision, we agreed with these draft recommendations, noting that in our view the initial ex-ante expenditure review would be an important opportunity to better condition NBN Co towards the efficiency and prudence requirements of a revised regulatory structure. Further, we noted that if NBN Co were to provide a revised SAU variation proposal, it should

⁷⁵ ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, p.60-61.

⁷⁶ ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, p.61.

⁷⁷ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p.31.

⁷⁸ ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, p.56.

consider conferring an additional power on the ACCC to specify the information that should accompany a regulatory module application.⁷⁹ Such a power would provide greater assurance that such records would be maintained. This would be additional to existing statutory powers to make record keeping and reporting rules.

We anticipate that Grex Consulting will proceed to finalise its review and update its draft report once it has considered this additional information that NBN Co has provided.

In this regard, we note that the forecast expenditure allowances that NBN Co has sought in its August 2023 variation proposal broadly align in material respects with those that were specified in respect of the November 2022 SAU variation proposal. However, we have continued to engage with NBN Co including to obtain additional information concerning the prudence and efficiency of the capital investments and/or method of operations that NBN Co forecast over the first regulatory cycle.

August 2023 SAU variation proposal

The forecast expenditure proposed in the module 4 of the August 2023 SAU variation proposal broadly aligns with that proposed in the November 2022 SAU variation. The table below shows a comparison for operating and capital expenditure for regulated services in nominal terms.

Table 3: Comparison of forecast expenditure (all services)

Nominal (\$000)	2023-24	2024-25	2025-26
<i>Operating expenditure</i>			
November 2022	2,931,865	2,949,735	3,006,680
August 2023	2,918,290	2,921,356	2,961,895
<i>Capital expenditure (includes grants/contributions)</i>			
November 2022 ⁸⁰	3,570,030	2,985,205	3,276,920
August 2023	3,560,428	2,961,651	3,232,175
<i>Capital contributions/grants</i>			
November 2022	99,935	101,095	102,269
August 2023	794,247	106,918	106,835
<i>Net capital expenditure</i>			
November 2022	3,470,094	2,884,109	3,174,651
August 2023	2,766,181	2,854,732	3,125,340

Source: ACCC analysis; NBN Co, NBN Co Special Access Undertaking: Attachment J Building Block Parameters, November 2022, pp. 348-349; NBN Co, nbn 24-40 Public Core Services Building Block Model: Inputs worksheet, November 2022; and NBN Co, NBN Co Special Access Undertaking: Attachment J Building Block Parameters, August 2023, pp. 365-366.

⁷⁹ ACCC, *Draft decision: variation to the NBN Co SAU*, 2 May 2023, p.55-56.

⁸⁰ Grants line item has been added back in to ensure a like-for-like comparison.

Note: In the November 2022 building block model, NBN Co recorded the fixed wireless grant as a negative capital expenditure item in the building block model. This was added back into forecast capital expenditure in Attachment J to provide a like-for-like comparison with NBN Co's forecast capital expenditure recorded in the August 2023 SAU variation. Net capital expenditure is a comparison between NBN Co's capital expenditure forecast in the November 2022 SAU variation (which excludes the fixed wireless grant) and the net capital expenditure in the August 2023 SAU variation (which excludes the fixed wireless grant and other contributions).

NBN Co has noted that it has updated its forecast for WACC and inflation expectations, as well as a minor correction in the forecast operating expenditure.⁸¹

We note that NBN Co has also adopted a revised approach to how capital contributions is to be treated and as a result forecast net capital expenditure has also been revised (see table 3). Treatment of capital contribution is discussed in more detail in section 4.7.1.

In relation to the ACCC's assessment of NBN Co's expenditure forecast, NBN Co has submitted that "there is no need to reach a conclusive view at this stage", noting there will be an ex-post assessment of capital expenditure in the first regulatory cycle and that operating expenditure has no impact on pricing until it achieves recovery of its annual BBM costs (forecast to be around 2030-31).⁸²

NBN Co also noted that it has provided further materials in response to Grex Consulting's draft report on the expenditure review.

Importantly, NBN Co has acknowledged that there is a need to redesign its business planning and record keeping processes so they align with best regulatory practices, noting

"The IOP and many of **nbn**'s other internal processes were designed in the context of Module 1 of the SAU, which has a different set of expenditure criteria to Module 2. **nbn** is currently augmenting/uplifting these processes to address the future needs of a best practice regulatory assessment of prudence and efficiency (ex-post and ex-ante)."⁸³

Current observations

Some stakeholders commented on NBN Co's proposed expenditure forecast in its November SAU variation. Telstra submitted that NBN Co had not demonstrated efficiency and prudence objectives in the first regulatory cycle and needed to adopt a more rigorous approach to assessing whether spending is efficient and prudent going forward. Telstra was supportive of the recommendations by Grex Consulting involving the expenditure review process, including the need for the ACCC to develop an annual reporting process.⁸⁴

Aussie Broadband submitted that the ACCC should have powers to require NBN Co to prepare, maintain and share with stakeholders and the ACCC the types of information that would be typically required by regulators for expenditure review processes.⁸⁵

We observe that the expenditure forecast in the current SAU variation proposal broadly aligns with those proposed in the November 2022 variation proposal. We note NBN Co have updated their forecast to reflect the changes in the proposed treatment of capital contribution.

⁸¹ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 30.

⁸² NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 31.

⁸³ NBN Co, *NBN SAU Variation 2023 - Supporting submission*, 14 August 2023, p. 31.

⁸⁴ Telstra, *Telstra submission to ACCC NBN Co Special Access Undertaking draft decision*, 2 June 2023, p. 12-13.

⁸⁵ Aussie Broadband, *Letter to ACCC re NBN Co SAU draft decision*, 30 May 2023, p. 2.

While Grex Consulting is still in the process of finalising its report, we anticipate that the focus and structure of the final report is likely to broadly align with that of the draft report. Consistent with our view expressed in the draft decision, we consider that under the current proposed SAU variation proposal the expenditure forecast will unlikely have material pricing impact and the findings of the expenditure review will unlikely have material bearing on our assessment of the SAU variation proposal against the statutory criteria.

We note that the revised SAU variation proposal appears to have addressed our draft finding that the ACCC needs to be conferred with sufficient powers to specify information and documents required for future expenditure reviews in the context of a replacement module process. This is now provided in clause 5.2 (c) (ii) of the proposed variation, and NBN Co is required to provide the information requested by the ACCC under clause 5.2 (d) (ii). The type of information and documents that the ACCC is likely to request and expect to be prepared in anticipation of the exercise of this power includes material of the type recommended in Grex Consulting's draft report. In particular, sections 3 and 4 of Part D the draft report recommend an annual review template tool (incorporating a 'Benefit Framework'), business case documentation for significant projects or initiatives, and report-keeping rules. This additional power in the SAU variation proposal together the ACCC's ability to make any statutory record-keeping rules appear sufficient to enable a robust expenditure assessment regime to be established should the variation proposal be accepted to support the prudence and efficiency objectives of the SAU variation proposal.

Appendix A: Current SAU

NBN Co's current SAU was accepted by the ACCC in December 2013. The SAU sets out principles for the regulation of wholesale access to the NBN until June 2040. It was intended to act as the overarching regulatory framework through which NBN Co would supply its services to telecommunications companies, including wholesale and retailers. The SAU was varied in April 2021 to extend the application of three non-price provisions,⁸⁶ which were originally set to expire after 5 years.

The current SAU contains regulated terms for wholesale access to NBN Co services. It only applies to FTTP, fixed wireless and satellite services, which are the technologies that were included in the initial NBN rollout. As such, multi-technology mix services are not covered by the current SAU. The SAU specifies price and non-price terms and conditions for Layer 2 bitstream services provided by NBN Co. These terms and conditions offer a baseline for commercially negotiated access agreements.

The SAU has a modular structure which 'locks in' matters for different periods of time. This structure provides a degree of flexibility, allowing for some changes to the regulatory settings over the term of the SAU. The current SAU contains three modules numbered from 0 to 2.

Module 0 applies for the whole term of the SAU and provides the overarching structure and context for the SAU. Specifically, Module 0 describes the services the SAU covers and establishes the requirements to publish and maintain standard form access agreements, which can form the basis of the commercially negotiated WBAs. Module 0 also contains fixed principles terms and conditions for NBN Co's long-term cost recovery.

Module 1 contains comprehensive terms and conditions that have applied during the initial regulatory period, which covers the period from the start of the SAU through to 30 June 2023. Module 1 therefore no longer has effect. Module 1 includes the commitment to supply initial NBN offers, initial prices for NBN offers and methods for changing prices over time, the long-term revenue constraint methodology, non-price terms and conditions and product development and withdrawal provisions.

Module 2 commenced on 1 July 2023 and sets out long-term arrangements for determining NBN Co's required revenue for the remainder of the SAU, which runs until 2040. The mechanism for assessing NBN Co's required revenue changes will be based on forecast costs rather than the actual costs (as in module 1). Additionally, module 2 contains the mechanism for NBN Co to submit 'replacement module applications', which seek to vary the SAU to incorporate replacement modules that will operate for 3-5 years. Replacement module applications are subject to ACCC acceptance. Replacement modules will include forecasts of NBN Co's expenditure and other detailed terms and conditions proposed by NBN Co. Module 2 also contains some other provisions that are like module 1 of the SAU. These include the commitment to supply NBN offers, the annual price cap on price increases and the ability to rebalance prices. Also included are product development and withdrawal provisions.

⁸⁶ NBN Co's SAU variation and the ACCC final decision on the variation are available on the ACCC [website](#).

Under both module 1 and module 2, there is no contemporaneous link between the long-term revenue constraint methodology and prices so long as there are historical losses that NBN Co is yet to recover, as reflected in the ICRA.

Arrangements from 1 July 2023 under the current SAU

On 29 June 2023 the ACCC wrote to NBN Co noting that because it had not accepted any replacement module application lodged by NBN Co for the first regulatory cycle of the subsequent regulatory period (commencing 1 July 2023) in the prescribed period, it was therefore required to make a replacement module determination. However, the ACCC also advised that it did not presently propose to make a replacement module determination, in summary, given the ongoing assessment of the SAU variation proposal and the limited practical benefits to consumers or industry of making a replacement module determination, including because any replacement module determination made would likely be superseded by any new arrangements specified in any varied SAU. However, the ACCC reserved its right to do so in the future, noting that NBN Co continues to engage constructively with the ACCC and stakeholders to establish suitable arrangements for this regulatory period through a variation to the SAU. The ACCC's letter is available on its [website](#).

Appendix B: Previous engagement

Initial stakeholder engagement

The ACCC engaged extensively with NBN Co, access seekers and other stakeholders during 2021 on potential changes to the NBN regulatory framework under the SAU.

In June 2021, the ACCC hosted an industry roundtable with NBN Co, broadband retailers, industry groups, consumer bodies and government to canvass views to assist NBN Co in developing an SAU variation proposal.⁸⁷ NBN Co had also notified the ACCC that it intended to lodge a proposed variation to its SAU within 12 months.

The ACCC then chaired a series of industry working groups to discuss aspects of the NBN regulatory framework. The key issues discussed by the working groups included NBN products and pricing, NBN Co's BBM and the regulatory framework and approach. The ACCC published a report summarising matters arising in the working groups in December 2021.⁸⁸

An important output of this engagement was the development of five key outcomes from a varied SAU that could guide NBN Co's development of an SAU variation proposal. These were that:

- NBN Co has the opportunity to earn the minimum revenues it needs to meet its legitimate financing objectives, including to transition to a stand-alone investment grade credit rating.
- NBN end-users are protected from price shocks and from prices that are higher than necessary in later years.
- the regulatory framework provides incentives for NBN Co to operate efficiently and promote efficient use of the NBN.
- retailers have greater certainty over the costs that they will face when using the NBN.
- there is a clear and robust quality of service framework so retailers and end-users know what to expect from NBN services, including a review mechanism so that service standards remain fit for purpose.

March 2022 SAU variation proposal

On 29 March 2022, NBN Co lodged an SAU variation proposal with the ACCC. The March 2022 SAU variation proposal sought to incorporate into the SAU the hybrid fibre coaxial, fibre-to-the-node and other copper-based technologies that it had adopted since 2013. It also proposed significant changes to the SAU framework itself. The key proposed changes included:

- discontinuing its 'bundle discounts' pricing offers and replace these with direct product offers that are subject to maximum price and minimum CVC or shared network

⁸⁷ A summary of the industry roundtable is available on the [ACCC website](#).

⁸⁸ A summary of working group meetings is available on the [ACCC website](#).

capacity inclusions. This includes zero rating the CVC charge as it relates to its higher speed access products, meaning that these can be accessed at a fixed monthly cost

- implementing a different approach to assessing the efficiency of its expenditures and other aspects of its regulatory proposals as was provided for in the existing SAU, albeit with the addition of more-prescriptive rules about how the ACCC undertakes these assessments
- introducing a cost allocation framework to establish separate cost bases for 'core' regulated services (for which SAU price controls and other provisions would apply) and 'non-core' competitive services (for which prices and other key terms would be determined outside the SAU framework)
- revising the methodology by which its weighted average cost of capital would be set
- reforming the process for recovering historical losses by incorporating defined amounts for the recovery of historical losses into the revenue controls.

In addition to long-term aspects of the SAU framework, NBN Co submitted the initial price control measures that would apply for the first regulatory period (2023-24 and 2024-25), and a price path that would set maximum allowable prices and CVC inclusions for lower speed offers until 2040.

On 23 May 2022 the ACCC published the SAU variation proposal and consultation paper on its website.

Submissions received in response to the March 2022 SAU variation proposal and consultation paper raised a series of concerns with this SAU variation proposal. In addition, the Minister for Communications wrote to the ACCC on 22 July 2022 expressing support for NBN Co to withdraw the March 2022 SAU variation proposal and submit a revised proposal that would provide pricing certainty to retailers and other changes needed so that it would be capable of acceptance. On 27 July 2022 NBN Co notified the ACCC of its decision to withdraw the SAU variation proposal with a view to making a revised proposal.⁸⁹

Development of a revised proposal August – November 2022

In August 2022, NBN Co published a consultation paper on the changes that it was considering for a revised SAU variation proposal. The ACCC also held a forum in August 2022 to discuss these and other potential changes for inclusion in a revised SAU variation proposal, as well as interim arrangements given the delay stemming from the withdrawn March 2022 variation proposal. The forum was attended by NBN Co, retailers and other stakeholders. The forum agenda and public summary of discussion are available on the ACCC website.⁹⁰

Following the forum, NBN Co continued to engage with the ACCC, retailers and its other stakeholders as it developed its revised SAU variation proposal.

November 2022 SAU variation proposal

On 29 November 2022, NBN Co lodged its revised SAU variation proposal with the ACCC and over the following two weeks the supporting materials to the SAU variation proposal. The

⁸⁹ A copy of the Minister's letter and NBN Co's letter of withdrawal are available on the [ACCC website](#).

⁹⁰ The forum agenda and public summary are available. [here](#)

ACCC released a consultation paper on the SAU variation proposal on 13 January 2023. The ACCC consultation paper, NBN Co's SAU variation proposal and public versions of the supporting material are available on the ACCC website.⁹¹

The November 2022 SAU variation proposal provided for the SAU to cover each of the access technologies the NBN had adopted since the SAU was accepted, along with fundamental revisions to the regulatory framework. These revisions differed in important respects to those proposed in March 2022. They included:

- the adoption of a WAPC, instead of a revenue cap, with the aim of strengthening incentives to achieve revenue, cost, and demand targets, and providing ex-ante and ex-post oversight over the prudence and efficiency of expenditures through a regulatory module determination process.
- the incorporation of a service standards framework, with the aim of allowing better coordination in the regulation of the price and quality of access to the NBN.
- specification of the value of accumulated losses reflected in the ICRA at \$12.5 billion in current nominal terms, with the aim of providing additional long-term certainty while allowing a reasonable opportunity for NBN Co to achieve a stand-alone investment grade credit rating during the SAU term.
- an initial resetting of prices for residential grade access services and the adoption of the 25/5 Mbps speed tier as the entry level broadband access offer.
- the implementation of an average price cap to be set at the CPI until revenues recover costs on an annual basis, then projected to be for the 2030 financial year, and other controls over price increases on individual speed tiers at a maximum of either CPI or 5 percent per annum up until 30 June 2032.
- a requirement for NBN Co to consult with stakeholders (including representatives of low-income groups) on its expenditure proposals, and include provisions aimed at increasing accountability when NBN Co is acting other than on a purely commercial basis, with the aim of promoting investment in projects of most value to its customers and to reduce the risk of unnecessary price rises.

Response to the ACCC consultation paper on the November 2022 SAU variation proposal

The ACCC met with stakeholders to facilitate the making of submissions as part of the public consultation process on the November 2022 SAU variation proposal. We received submissions from 15 stakeholders in February 2023 (available on our [website](#)). In March 2023 we received a letter from NBN Co which outlined changes to aspects of the November 2022 SAU variation proposal that NBN Co would be willing to make should the ACCC not accept it. On their face, many were directed to the matters which had led the ACCC in its draft decision to reject the SAU variation proposal (see below), although other potential changes were also discussed. The ACCC published NBN Co's letter (and annexures to the letter) with its draft decision in May 2023.

Draft decision on November 2022 SAU variation proposal

On 2 May 2023, the ACCC released a draft decision to reject NBN Co's proposed variation to the SAU. We also published an expert report prepared by Sapere Research Group on revenue

⁹¹ The SAU variation and supporting materials are available [here](#).

required for investment grade credit rating and a draft expert report prepared by Grex Consulting on NBN Co's forecast expenditure for the first regulatory cycle.

The ACCC's draft decision found aspects of the SAU variation proposal which significantly weakened its effectiveness, and which were not reasonable or in the LTIE. The draft decision discussed these aspects together with proposed revisions that had the potential to make the SAU variation capable of acceptance. The issues discussed concerned:

- the limitations in the proposed process to periodically reset regulated access terms and other regulatory controls.
- the principle that would require the ACCC to adjust NBN Co's revenue allowances during the post 2032 regulatory period to give NBN Co the opportunity to achieve its credit rating objective.
- the benchmark service standards for the first regulatory cycle, and framework for changing benchmark service standards over the first regulatory cycle.
- the operation of the proposed low-income forum.

Despite the ACCC's draft decision to reject the SAU variation proposal, as noted above, the ACCC also identified in its draft decision initiatives in NBN Co's proposed variation which had the potential to bring significant benefits should they be implemented as part of a robust framework. They included:

- the adoption of a WAPC, instead of a revenue cap.
- ex-ante and ex-post oversight over the prudence and efficiency of expenditures through a replacement module determination process.
- the incorporation of a service standards framework.
- specifying an ICRA balance of \$12.5 billion in current nominal terms.
- the initial resetting of prices for residential grade wholesale offers and adoption of the 25/5 Mbps speed tier as the entry level wholesale offer.
- an initial increase limit in the WAPC to no more than the CPI with a transition to a CPI-X basis once NBN Co reaches annual cost recovery (then until 2031-32); price controls over increases on individual speed tiers set at a maximum of either CPI or 5 percent per annum up until 30 June 2032; and from 2032-33, the ACCC to have more discretion to specify maximum prices for wholesale offers in its replacement module determinations.
- a commitment by NBN Co to consult with stakeholders (including representatives of low-income groups) on its expenditure and pricing proposals, and inclusion of provisions aimed at increasing accountability.

The ACCC's draft decision and accompanying reports are available on the ACCC [website](#).

Response to the ACCC draft decision and development of the current SAU variation proposal

After the publication of the ACCC's draft decision and publication of NBN Co's March 2023 letter (referred to above), NBN Co provided further submissions and material.

- In May 2023, NBN Co published its indicative pricing roadmap for the period from 2023-24 to 2025-26 and released the WAPC models supporting the initial pricing

roadmap. It also provided targeted submissions on network-network interface (NNI) pricing and service quality.

- In June 2023, NBN Co provided targeted submissions on cost certainty for the 50 Mbps product, treatment of grant funding, the entry level offer, and low-income forum.
- In July 2023, NBN Co provided a submission on pricing options for the 50/20Mbps speed tier. The pricing proposal was discussed in an online meeting hosted by the ACCC on 14 July 2023 and the subject of a short and targeted consultation by the ACCC.

The ACCC undertook and facilitated supplementary rounds of consultation on the additional material provided by NBN Co.

Eleven stakeholders (excluding NBN Co) made submissions to our draft decision and NBN Co's additional materials during this time.

Public submissions and material provided by NBN Co are available on the ACCC [website](#).

Appendix C: ACCC approach to handling information

The ACCC/AER Information Policy,⁹² sets out the general policy of the ACCC on the collection, use and disclosure of information.

The ACCC considers that a public and transparent consultation process is necessary to discharge the ACCC's procedural obligations and allow the ACCC to effectively assess the SAU variation proposal in accordance with the legislative framework and given the significance of the proposed changes to the SAU and their potential long-term consequences for Australian consumers and businesses. Hence, the ACCC will only agree not to disclose information that is the subject of a confidentiality claim in limited circumstances.

In these circumstances, the ACCC has also formed the view that making information available to third parties only through limited individual non-disclosure agreements would not be an appropriate means to manage confidentiality claims in this consultation. Hence in this consultation it does not intend to apply the ACCC's confidentiality guideline for submitting confidential material to ACCC communications inquiries.⁹³

The ACCC has published the August 2023 SAU variation proposal in full and the public versions of NBN Co's supporting material. We note that NBN Co has provided confidential copies of the BBM and supporting forecasts.

The ACCC will continue to consider what further information is required for, or of significance to the consultation and should therefore be published, in full or in part.

Disclosure of information

The ACCC will assess any confidentiality claims on a case-by-case basis and in doing so will consider whether it is required to publish information having regard to its statutory and common law duties and functions in each instance and in accordance with section 155AAA of the *Competition and Consumer Act 2010* (Cth) (CCA).⁹⁴

In assessing confidentiality claims, the ACCC will consider whether publication of the information is required to enable effective public consultation and allow it to perform its statutory function of assessing the SAU variation proposal in accordance with the statutory framework. The ACCC will assess whether this requirement outweighs any significant commercial harm a party submits may result from publication. The ACCC will afford procedural fairness in reaching these views.

Process for claiming confidentiality

If a party wishes to make a claim of confidentiality over material provided during this consultation, it should follow the process below:

1. Please submit two versions of the submission:

⁹² The ACCC/AER Information Policy is available on the [ACCC website](#).

⁹³ The Confidentiality guideline is available on the [ACCC website](#).

⁹⁴ The ACCC notes in this regard paragraph 3.1 of the [ACCC-AER Information Policy](#).

- a) a **public** submission that can be published on the ACCC's website, in which all confidential material has been removed and replaced with 'c-i-c'. Please ensure that redacted information is not searchable or otherwise able to be viewed.
 - b) a **confidential** version that clearly identifies the information over which confidentiality is claimed by bookending the confidential material with a marking of 'c-i-c'. Please also highlight for ease of reference the material over which confidentiality is claimed.
2. Information over which a party claims confidentiality must be kept to a minimum so that consultation on all relevant material is not unnecessarily impeded.
3. Please provide a supporting submission that specifically substantiates the confidentiality claim for each item of information over which confidentiality is claimed. Confidentiality claims need to detail why the information is competitively sensitive or otherwise confidential, and why disclosure of the information would be likely to cause significant harm to the person to whom the information is confidential. 'Blanket' claims of confidentiality will not be accepted. The ACCC will notify parties of any additional information required to assess a confidentiality claim.
4. Where the ACCC proposes to publish information the subject of a confidentiality claim, it will provide a right to be heard and to amend or withdraw the information before proceeding to publication with redactions removed.
5. Where the ACCC proposes to not publish information the subject of a confidentiality claim and publishes a redacted submission, it may reconsider that claim at a future date if it becomes evident that publication of the redacted information is required to enable effective public consultation and to allow the ACCC to perform its statutory function of assessing the SAU variation proposal in accordance with the statutory framework. The ACCC will notify with the relevant party and engage with them in relation to how this information can be disclosed.

Appendix D: Long-term interests of end-users

In determining whether a particular thing promotes the LTIE, the CCA requires the ACCC to consider the extent to which the thing is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services
- achieving any-to-any connectivity in relation to carriage services that involve communications between end-users
- encouraging the economically efficient use of, and economically efficient investment in the infrastructure by which these services are supplied, and any other infrastructure by which these services are, or are likely to become capable of being supplied⁹⁵

The ACCC cannot consider any other objectives in assessing the LTIE.

The CCA further provides that:

- in determining whether a thing is likely to result in the achievement of the objective of promoting competition in markets for listed services, the ACCC must have regard to the extent to which the thing will remove obstacles to end-users of listed services gaining access to those services, but may also have regard to other matters.
- in determining whether a thing is likely to result in the achievement of the objective of encouraging the economically efficient use of, and economically efficient investment in the infrastructure, the ACCC must have regard to the following matters, but may also have regard to other matters:
 - whether it is technically feasible for the services to be supplied and charged for having regard to matters such as available technology, the cost involved in supplying the service and the likely effect on the operation or performance of telecommunications networks.
 - the legitimate commercial interests of the supplier, including its ability to exploit economies of scale or scope.
 - incentives for investment in the infrastructure by which the services are supplied.
- the objective of any-to-any connectivity is achieved if and only if each end user is able to communicate with each other end-user who is supplied the same or a similar service, whether or not they are connected to the same telecommunications network.

In determining whether terms and conditions are reasonable, the CCA requires the ACCC to have regard to the following matters:

- whether the variation promotes the LTIE
- the legitimate business interests of NBN Co, and NBN Co's investment in facilities used to supply the services concerned
- the interests of persons who have the right to use the services concerned

⁹⁵ CCA, s. 152AB(2).

- the direct costs of providing access to the services concerned
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, telecommunications network or facility, and
- the economically efficient operation of a carriage service, telecommunications network or facility.

In relation to the objective of encouraging economically efficient use of, and investment in, infrastructure, the ACCC will examine efficiency from an economic perspective consistent with its long-standing approach. The economic concept of efficiency consists of three components:

- **Productive efficiency** refers to the efficient use of resources within each firm to produce goods and services using the least cost combination of inputs.
- **Allocative efficiency** refers to the allocation of goods and services across the economy in a way that is most valued by consumers. It can also refer to the allocation of production across firms within an industry in a way that minimises industry-wide costs.
- **Dynamic efficiency** refers to the efficiencies flowing from innovation leading to the development of new services or improvements in production techniques. It also refers to the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time.