



Proposed variation to the NBN Co Special Access Undertaking

Final decision

October 2023

Acknowledgment 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
Land of the Ngunnawal people
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Glossary

2013 SAU is the Special Access Undertaking proposal lodged by NBN Co on 19 November 2013 and accepted by the ACCC on 13 December 2013 as varied up to and including 1 April 2021.

2023 SAU variation proposal is the Special Access Undertaking proposal lodged by NBN Co on 14 August 2023.

Access Virtual Circuit (AVC) is a virtual circuit that provides access to the end-customer premise from the **Point of Interconnect (PoI)**. The NBN AVC specifies certain service features such as the speed tier. A more complete description is provided in Clause 1A.3.2 of the varied SAU.

Annual Building Block Revenue Requirement (ABBRR) is the annualised form of NBN Co's forecast efficient costs, which include a return on investment and depreciation, operating costs, and tax allowances, used in setting the weighted average price cap. It is calculated using the **building block model (BBM)**.

Building block model (BBM) is a financial model used to calculate a regulatory asset base and annual building block revenue requirement.

'Competitive services' refers to services that are categorised from time to time under the varied SAU as competitive. A competitive service is not subject to all the same requirements that apply to a **core regulated service** under the varied SAU.

'Connectivity Virtual Circuit (CVC)' is a virtual circuit that carries communication traffic to and from the end-user premises. The CVC aggregates traffic across **Access Virtual Circuits (AVCs)** in a connectivity serving area. A more complete description is provided in Clause 1A.3.3 of the varied SAU.

Consumer Price Index (CPI) measures the percentage change in the price of a basket of goods and services consumed by households. Where this report refers to the CPI, unless otherwise stated, it is referring to the annual percentage change in value of the Consumer Price Index (All Groups – Weighted Average of Eight Capital Cities) published by the Australian Bureau of Statistics for a specified quarter. For instance, the CPI used in setting the WAPC and other price caps under the varied SAU is the published CPI for the most recent December quarter. In some cases, the varied SAU requires the use of a forecast CPI value. For instance, setting the ABBRR includes estimating expected inflation, which is to be done by reference to the forecasts of CPI inflation made by the Reserve Bank of Australia in its Statement of Monetary Policy.

Consumers is another term used for end-users of NBN services and includes businesses unless clearly intended otherwise.

'Core services' is a simplified term for **'core regulated services'** which is used in the varied SAU. It comprises all products and services supplied by NBN Co other than **competitive services**.

'Credit rating objective' is a simplified reference to the principle relating to NBN Co's opportunity to achieve quantitative financial metrics that are consistent with achieving an investment grade credit rating with a stable outlook from one or more established and reputable rating agencies, such as Moody's, Fitch Ratings and Standard and Poor's, as assessed on a stand-alone basis and from the perspective of a prudent and efficient network operator with a benchmark efficient capital structure. This objective is a further matter to be taken into consideration when making reset determinations during the post-2032 regulatory period.

End-users – Persons that use communications services supplied by RSPs over the NBN.

Initial Cost Recovery Account (ICRA) is an item in NBN Co's regulatory accounts that aggregates NBN Co's capital adjusted losses incurred over the initial regulatory period (Module 1). The varied SAU amends its balance, as well as its accumulation and drawdown rules.

'Integrated operating plan' is the business plan that NBN Co develops each year on a whole of organisation basis. NBN Co's commitments for the **first regulatory cycle** have been based on the integrated operating plan for financial year 2023 (**'IOP23'**).

Low income and digital inclusion forum (or the Low income forum) is the forum established under cl 2B.7 of the varied SAU. Generally speaking, the objective of the Forum is to promote the interests of low-income consumers and other consumer demographics that could be disadvantaged in connecting to the NBN and accessing digital (online) services.

March 2022 SAU variation proposal is the Special Access Undertaking proposal lodged by NBN Co on 29 March 2022 and withdrawn on 27 July 2022.

Network to network interface (NNI) is the interface between the networks of NBN Co and RSPs. A more complete description is provided in Clause 1A.3.4 of the varied SAU.

Non-core services is another term used in this report for **competitive services**.

November 2022 SAU variation proposal is the Special Access Undertaking proposal lodged by NBN Co on 29 November 2022 and withdrawn on 14 August 2023.

'Regulatory asset base (RAB)' is a pool of assets that are recognised for regulatory purposes (e.g., determination of return on and of capital for setting an annual building block revenue requirement).

'Regulatory cycle' is the period to which the **reset determination** relates and is generally to be for 3, 4 or 5 years. The **first regulatory cycle** is for a shorter period, ending on 30 June 2026.

'Regulatory period' is a period in respect of which different aspects of the Varied SAU will operate. There are 3 regulatory periods as follows: "the initial regulatory period" (Module 1) ended 30 June 2023; "the subsequent regulatory period" (Module 2) operates until 30 June 2032; "the post-2032 period" (Module 3) commences on 1 July 2032. Aspects of the SAU that apply throughout the SAU term are contained in Module 0. There could be multiple **regulatory cycles** within a **regulatory period**.

'Resellers' refers to RSPs that use wholesale access services of a directly connected RSP.

'Reset process' is a simplified term for **replacement module process** which is used in the varied SAU. This is the process by which the ACCC makes a **replacement module determination** (referred to in this decision as a **reset determination**) in respect of the **regulatory cycle**.

'Reset determination' is a simplified term for **regulatory module determination** which is used in the varied SAU. The ACCC makes a **reset determination** to specify terms and conditions relating to access to the core NBN services in relation to the regulatory cycle.

'Reset proposal' is a simplified term for **replacement module application** which is used in the varied SAU. NBN Co makes a **reset proposal** for the ACCC to consider during the **reset process**.

'Residential grade services' is a simplified term for services that are supplied using the NBN ethernet broadband service with traffic class 4 (best efforts traffic class).

'Retail service providers (RSPs)' is a simplified term for persons that have rights to use the NBN in order to supply retail services to end-users. RSPs can directly connect to the NBN (also referred to as access seekers), or use wholesale access services of a directly connected RSP.

Standard access obligations are the category B standard access obligations that apply to NBN Co, specified in s 152AXB of the *Competition and Consumer Act 2010* (Cth). These include obligations on NBN Co to supply declared services if requested by an RSP and to permit interconnection with NBN Co facilities.

Varied SAU refers to the SAU as varied by the acceptance of the **2023 SAU variation proposal**.

Weighted Average Price Cap (WAPC) is a maximum limit on the rate of change in the weighted average price of a basket of services. The WAPC to apply to NBN Co during the subsequent regulatory period is specified in Schedule 2D of the varied SAU and is the primary regulatory control on prices for NBN Co's core service offers in that period. In summary, the WAPC is calculated using a formula that aggregates the price changes for relevant NBN offers for a given period by using weights.

Wholesale Broadband Agreement (WBA) sets out the terms and conditions of access to NBN Co's services and products and constitutes NBN Co's standard form of access agreement. The current agreement is WBA4 with WBA5 currently under negotiation.

1. Executive summary

We have decided to accept the variation that NBN Co proposed to its special access undertaking (SAU) in August 2023. The variation implements fundamental reforms to the SAU, first approved in 2013, to make it more effective in promoting the long-term interests of consumers that rely on the NBN for their broadband access.

The SAU establishes a framework for regulating access to the NBN, including rules by which maximum wholesale prices are determined and other measures that have important implications for competition and efficiency. Hence, the SAU plays an important role in maximising the economic and public benefits of the NBN.

However, the access terms specified in the 2013 SAU only applied to services supplied on access technologies that were in place when it was accepted. Further, the broader regulatory framework that it established no longer provides incentives for NBN Co to operate and invest prudently and efficiently.

To update the SAU, NBN Co must propose an SAU variation, which the ACCC assesses against the relevant statutory criteria. We can decide to either accept or reject an SAU variation, but we cannot do so conditionally or substitute terms that we consider to be more reasonable than those proposed to us, or more likely to promote the long-term interests of end-users. We consider the submissions that we receive when consulting on the proposal in making our decision.

This variation to the SAU was developed in response to views that stakeholders have provided to us as well as NBN Co since 2021, including at stakeholder forums and working groups and in written submissions.

During this time NBN Co proposed (and later withdrew) 2 prior variations to the 2013 SAU. Some of the important reforms that will result from this decision were contained in the SAU variation proposal that NBN Co gave in November 2022. These included:

- adopting a weighted average price control (WAPC), instead of a revenue cap, 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 new reset process
- incorporating a benchmark service standards framework, with the aim of allowing better coordination in the 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 in current nominal terms, 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 stand-alone investment grade credit rating during the SAU term
- an initial resetting of prices for residential grade wholesale offers, including the introduction of flat rate monthly charging for higher speed tiers and its extension in 2026 to lower speed tiers
- 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 Consumer Price Index (CPI). When NBN Co reaches annual cost recovery, which is currently projected for the 2030 financial year, this price control would transition to a CPI-X basis until FY2032. Price increases for individual wholesale offers would also be capped at a maximum of either CPI or the higher of CPI and 5% per annum up until 30 June 2032. From FY2033, the ACCC would have more discretion to specify maximum prices for wholesale offers in its reset determinations

- discontinuing the widespread use of discounting practices that created access cost uncertainty for retailers of NBN services
- requiring that NBN Co consult with stakeholders (including representatives of low-income groups) on its expenditure and pricing proposals, and including 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.

Notwithstanding the November 2022 SAU variation proposal containing the above measures, we reached a draft decision to reject it in May 2023. This was because we were not satisfied that the proposed variation met the criteria for acceptance. In particular, we were not satisfied that the proposed variation would have resulted in access terms that were reasonable and promoted the long-term interests of consumers. This was because of:

- limitations in the proposed process to periodically reset regulated access terms and other regulatory controls which were not reasonable as they risked access terms coming into effect by default that would not encourage efficiency or promote competition
- the potential that the ACCC would have been required to increase NBN Co's regulatory allowances from 2032 to provide it an opportunity to meet specific financial metrics even if it had not operated and invested in a prudent and efficient way.

We also found other limitations in the proposed access terms for the first regulatory cycle (which would operate to 30 June 2026). We considered that:

- the proposed benchmark service standards would likely be superseded before or soon after the SAU variation would come into effect, and the SAU variation would not commit NBN Co to effective consultation with retailer service providers (RSPs) about measures that could be applied to efficiently address known causes of poor quality over the first regulatory cycle
- the pricing model proposed in the SAU variation left open a very broad range of cost outcomes when using the standard 50 Mbps wholesale offer over this period, and it is unlikely that RSPs could efficiently manage the residual cost uncertainty without further support from NBN Co.

In our view these limitations made it much less likely that over this period NBN Co would efficiently address the drivers of poor consumer sentiment towards NBN services, or work to remove inefficient costs from the NBN supply chain, as well as would delay competition benefits from being realised in retail markets.

We also found that the SAU variation should bring greater clarity over the operation of the proposed Low-income Forum so that the perspectives of low-income and disadvantaged consumers would be properly considered when NBN Co makes decisions of importance to them.

We encouraged NBN Co to take 2 actions before we made a final decision on an SAU variation. The first was to provide assurances that it will quickly resolve the ongoing competition concerns with its network-to-network interface (NNI) charges, which smaller RSPs continued to raise as impediments to expanding their operations over the NBN and competing more directly with incumbents. The other was for NBN Co to publish its initial pricing roadmap and supporting worksheets for the first regulatory cycle.

We consider that the 2023 SAU variation has responded appropriately to these draft findings, with:

- a revised process for access terms and regulatory arrangements to be periodically reset, including changes that provide further time for us to make our determinations and better ensure that the information we require will be available sooner in the process
- an important change to the principles that will guide our determinations from 1 July 2032 so that these do not allow NBN Co's regulatory allowances to be increased for costs that result from imprudent or inefficient operations or investments
- further changes to the product and pricing measures, and price control arrangements, which include:
 - applying a floor and ceiling pricing model for lower speed tier bundled offers and reporting in more detail on daily connectivity virtual circuit (CVC) utilisation to give more certainty to access seekers on the access costs they will face during the first regulatory cycle when using these offers
 - reducing the CVC overage charge for these offers, increasing the CVC inclusion on the 50 Mbps speed tier bundle offer and making provision to bring forward the first update to the CVC inclusions, offset against assessing CVC overage on a line by line rather than pooled basis
 - allowing the voice-only access offer to also be used for supply of basic data connectivity
 - lowering NNI charges, and providing credits when upgrading NNIs, to support retail entry and expansion, and committing to a further review in 2027
 - making enhanced fault service offers subject to the SAU and allowing for changes to the designated entry level offer (that is subject to a tighter price control) to take effect more quickly
 - strengthening the remit and operation of the low income and digital inclusion forum and associated reporting
- new commitments for further consultation and public reporting on service performance improvements via a new annual service improvement plan and service performance review, with a view to efficiently addressing drivers of poor service quality within existing pricing
- further updates to the benchmark service standards so that they are no worse than those that NBN Co's most recent market offers
- changes to the building block model (BBM) proposal to improve its accuracy, including requiring that capital contributions and the funded assts are treated consistently.

As a consequence of these further changes, we are satisfied that the 2023 SAU variation meets the statutory criteria for its acceptance.

In making this decision, we have also confirmed findings that we have made previously that certain matters do not provide grounds to reject the SAU variation. Such matters of most significance to stakeholders relate to the proposed product and pricing proposal for the first regulatory cycle. In this regard, we consider it would be reasonable for the AVC price of the standard 50 Mbps wholesale offer to increase by \$5 to \$50 per month. We note that this increase is part of a rebalancing that is unlikely to materially change the average cost to access the NBN.

Further, it would be reasonable for the cost of wholesale offers to progressively increase in nominal terms over the medium term, and for CVC charges to be phased out over the first regulatory cycle, as NBN Co has proposed.

We reached this view as we will have the opportunity under the varied SAU to update the WACC methodology before NBN Co's price cap will be set based on forecast changes in its efficient costs, as well as to disallow investment that is not prudent and efficient so that it does not enter the regulatory asset base. In addition, new losses will no longer be carried forward for recovery in future periods.

We consider this approach to pricing access is necessary for NBN Co to have a reasonable opportunity to recover its efficient forward-looking costs. In our view, as matters stand, NBN Co's revenues are materially below its efficient cost of providing access, and growth in demand alone could not reasonably be anticipated to make good this shortfall.

In our view it would be better to commence an orderly transition to efficient pricing now, and that this occurs gradually over time and that households and businesses are protected from sharper price increases in later years.

Further, although the SAU variation includes some matters that we do not support, we are satisfied that these will not have a material bearing on whether overall it is reasonable and likely to promote the LTIE. These matters relate to the first regulatory cycle and concern points of detail on the approach to calculating the WACC. We also note that the independent expenditure consultant could not reach a conclusive view that significant forecast expenditures are prudent and efficient.

Various actions will flow from our decision to accept the SAU variation.

Most immediately, NBN Co has stated that it will make unconditional its next commercial offer to RSPs with a view to it commencing from 1 December 2023, which has been the clear preference of most RSPs that have provided submissions. This commercial agreement is a means by which the new pricing arrangements and benchmark service standards that are specified in the varied SAU for the first regulatory cycle will flow through to RSPs.

Over a similar timeframe, NBN Co will also:

- make available its pricing strategy for the first regulatory cycle along with its initial pricing roadmap and tariff list, as well as publish its first annual service improvement plan and commence consultation over the second plan
- lodge its proposed cost allocation manual, as the first step towards introducing accounting separation arrangements by the end of December 2024.

We will now focus our efforts on development of a record keeping and reporting rule that we have proposed for monitoring and reporting on the quality of NBN services, and considering the information that we will require in respect of our role under the varied SAU. We will also start to plan for stakeholder engagement in the next regulatory reset.

2. Background and consultation

2.1 The 2013 SAU

NBN Co's SAU commenced in December 2013. The 2013 SAU establishes principles and a framework for regulating access to the NBN until June 2040, or until the Government relinquishes control. The 2013 SAU continues to operate until the ACCC accepts a variation to it, or it is withdrawn. An overview of NBN Co's 2013 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 NBN 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 5 key outcomes that could guide NBN Co's development of a SAU variation proposal:

1. 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.
2. NBN end-users are protected from price shocks and from prices that are higher than necessary in later years.
3. The regulatory framework provides incentives for NBN Co to operate efficiently and promote efficient use of the NBN.
4. Retailer service providers (RSPs) have greater certainty over the costs that they will face when using the NBN.
5. There is a clear and robust quality of service framework so RSPs 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 over the course of the SAU variation process is at Appendix B.

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

2.3 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 2023 SAU variation proposal). The 2023 SAU variation proposal was published on the ACCC website on 16 August 2023, along with supporting documents, including:

- 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 2023 SAU variation proposal to the previous November 2022 SAU variation proposal
- NBN Co's supporting submission, to explain the rationale behind NBN Co's 2023 SAU variation proposal
- an explanatory table of the additional changes NBN Co made as part of the 2023 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 2023 SAU variation proposal will 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 2023 SAU variation proposal including capital and operating expenditure, revenue and asset lifetimes
- weighted average price cap (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 variation proposal
- an update on NBN Co's approach to the annual service improvement plan for 2023–24 (which it subsequently provided on 7 September 2023).

The 2023 SAU variation proposal and the public versions of the supporting material are available on the ACCC website. The ACCC has published the 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.

The ACCC received 14 submissions in response to its 2023 consultation paper, which are listed in Appendix B. We have considered each of these submissions.

We have also considered relevant materials submitted as part of NBN Co's March 2022 and November 2022 SAU variation proposals, including stakeholder feedback submitted in response. Materials from these previous SAU variation proposal processes are available on the ACCC website.

This report sets out the ACCC's final decision on NBN Co's 2023 SAU variation proposal, after applying the relevant statutory criteria and submissions received. We refer throughout our final decision to the 'varied SAU'. This is a reference to the SAU as varied by our acceptance of the 2023 SAU variation proposal.

We thank all stakeholders for their engagement throughout this process.

2.4 Structure of paper

The final decision is structured as follows:

- Section 3 sets out the legislative framework covering the SAU variation process.
- Section 4 outlines how the varied SAU will operate in practice.
- Section 5 discusses key elements of the 2023 SAU variation proposal and includes our findings on matters relevant to whether they will promote the LTIE and whether terms are reasonable.
- Section 6 provides the ACCC's overall assessment of the 2023 SAU variation proposal against the legislative criteria.
- Appendix A provides an overview of the 2013 SAU.
- Appendix B details ACCC stakeholder engagement and consultation throughout the SAU variation process.
- Appendix C discusses the ACCC's approach to assessing the long term interests of end users (LTIE).

3. Legislative framework

3.1 Telecommunications access regime

3.1.1 Object of the telecommunications access regime

Part XIC of the *Competition and Consumer Act 2010* (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.

3.1.2 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 3 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 2013 SAU was accepted by the ACCC, 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.

3.1.3 Setting regulated terms and conditions of access to NBN services

While the varied 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 RSPs 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 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 determinations 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 varied SAU 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 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, RSPs 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 WBA4.

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 will 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 been made yet, a consultation draft proposed setting a baseline that will not limit a statutory infrastructure provider from offering better service standards.

3.2 Assessment approach

The ACCC must decide to accept or reject a SAU variation proposal 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.²

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 C.

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 will be consistent with any Ministerial pricing determination. However, no relevant Ministerial pricing determinations are in effect.

The CCA specifies 3 reasons why the ACCC must not reject a variation. These reasons relate to:

- a fixed principle term or condition³ 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.

Finally, section 152CBD provides that 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.⁴

2 CCA, section 152AB(2).

3 CCA, section 152CBAA.

4 CCA, subsection 152CBD(4).

4. How the varied SAU will operate in practice

NBN Co has proposed significant changes to several elements of the SAU regulatory framework. These are presented in more detail in section 5. This section provides a concise overview of how discrete components of the varied SAU will work in combination.

Under the varied SAU, the reset process (referred to in the varied SAU as the replacement module process) will determine the terms and conditions of access to the core services and other important matters for the new regulatory cycle.

NBN Co will prepare a reset proposal (referred to in the varied SAU as a replacement module application) in the lead up to a new regulatory cycle in accordance with the processes and requirements specified in the varied SAU, including stakeholder consultation.

The ACCC will then specify the access terms and conditions for the regulatory cycle in a reset (replacement module) determination. The length of the regulatory cycle will be between 3 and 5 years. This will be one of the matters that the ACCC determines in the reset process.

4.1 NBN Co will consult with stakeholders in preparing regulatory proposals before each regulatory cycle

The first step in establishing the access terms and conditions for a regulatory cycle is for NBN Co to develop and submit its reset proposal to the ACCC.

The ACCC will provide NBN Co with a minimum of 12 months' notice to submit a reset proposal for the upcoming regulatory cycle. The notice will specify the date by which NBN Co must submit the proposal, which will be between 9 to 18 months prior to the current regulatory cycle end date. The notice may also require NBN Co to provide information and documents in support of its application to the ACCC.

To illustrate these timeframes, the first regulatory cycle operates from 1 July 2023 to 30 June 2026. This means that NBN Co will submit its reset proposal for the second regulatory cycle between 1 January and 30 September 2025, with the ACCC issuing its notice between 1 January and 30 September 2024.

In the subsequent regulatory period, NBN Co must include all the content required under the varied SAU in its reset proposal. These include:

- a BBM proposal
- an entry level offers proposal
- a service standards proposal
- other ancillary information.

NBN Co must also provide any supporting information requested by the ACCC.

As part of developing its reset proposals, NBN Co will be required to consult with its stakeholders, such as RSPs and consumer advocacy groups, on its proposed expenditures and service standards for the regulatory cycle, amongst other matters. NBN Co must provide its stakeholders reasonable notice and opportunity to participate in the consultation. NBN Co will provide a summary of stakeholder views and how it will address them in its reset proposal.

Consultation with stakeholders is a central component of NBN Co's reset proposal. The key objective of this consultation is for NBN Co to be well informed about RSP and consumer preferences concerning access matters including potential service quality improvements, and their associated cost and price impacts. This will give greater confidence that NBN Co's proposed expenditures are targeted towards achieving outcomes that consumers value and are willing to pay for. NBN Co's ability to demonstrate this will be a key consideration in the ACCC's assessment of whether NBN Co's proposals represent efficient investment and expenditure.

We expect NBN Co to conduct consultations in a manner that allows stakeholders to contribute effectively on their key areas of interest and concern. We also expect NBN Co to continually evolve its processes through each iteration to ensure it continues to meet these objectives.

4.2 ACCC will consult and assess the proposal and make a reset determination for each regulatory cycle

The next step in the reset process is for the ACCC to assess the reset proposal submitted by NBN Co. The ACCC will consult with stakeholders, assess the proposal, and make a reset determination based on its assessment.

The reset determination establishes a set of access terms and conditions for the upcoming regulatory cycle. It will also address the other matters that will be raised in the reset proposal. How these access terms and conditions and other matters are considered in practice is described further below.

The ACCC will make its reset determination within 20 business days of the end of the current regulatory cycle. If, however, the ACCC is unable to make a reset determination within this timeframe, it may extend the decision-making period by up to 6 months. The ACCC must determine the various components of the reset determination in accordance with the principles and requirements specified in the varied SAU. The ACCC will have regard to the matters set out in section 152BCA(1) of the CCA, which are the matters it considers when making an access determination relating to access to a declared service.

There are additional rules applying to reset processes that occur in the subsequent regulatory period. The varied SAU makes clear that the ACCC can consult with stakeholders, which we expect to do following our standard consultation processes. The ACCC is also to release a draft reset determination decision, and can request further information from NBN Co.

The ACCC will conduct its assessment and establish the access terms and conditions of the replacement module determination through the steps described below.

4.2.1 The ACCC will determine minimum benchmarks for service quality

For the first regulatory cycle, the varied SAU specifies the benchmark service standards that will apply.⁵ The ACCC will determine the minimum service quality benchmarks for the following regulatory cycles in its reset determination. These benchmarks will form a significant input to NBN Co's proposed expenditure forecasts. These forecasts are reviewed for prudence and efficiency in achieving the service quality benchmarks. If the ACCC determines that the expenditure is prudent and efficient, we will factor it into NBN Co's regulated revenue allowances and prices.

The varied SAU requires NBN Co to include an obligation to meet or exceed the specified benchmark service standards as part of its standard form of access agreement. In addition, NBN Co is required to consult, and report on, service improvement priorities and delivery of service standards each financial year of the first regulatory cycle.

During the subsequent regulatory period, NBN Co must include in its reset proposal:

- a service standards proposal with a set of proposed benchmark service standards
- a date by which NBN Co proposes to include in its standard form of access agreement an obligation to meet or exceed them.⁶

The ACCC can specify benchmark service standards and a commencement date in its reset determination that differ from those proposed in NBN Co's reset proposal.⁷

Incorporating the assessment of benchmark service standards into the reset process will allow service quality to be considered at the same time as expenditure forecasts and pricing proposals through a single process. This provides a mechanism to allow price-quality trade-offs to be considered by NBN Co in formulating its proposals for each regulatory cycle. It will also allow the ACCC to consult on these trade-offs and consider them as part of its reset determinations.

Further, benchmark service standards may be reviewed mid-regulatory cycle in specified circumstances during the subsequent regulatory period.⁸ The ACCC may initiate a review of benchmark service standards if a systemic service standard event occurs, or a retail service standard regulation is made or varied during a regulatory cycle. NBN Co may also propose changes to benchmark service standards, together with a related cost pass-through application, provided it first consults access seekers.

The ACCC has the power to accept or reject any proposed changes to the benchmark service standards resulting from a mid-cycle review. We may also make a determination setting out changes to the benchmark service standards where we initiated a review. This is the case where we decide to reject NBN Co's service standard response to that review.

4.2.2 The ACCC will determine the cost base for supplying core regulated services

The cost base for each regulatory cycle will be determined based on the minimum benchmark service standards for that regulatory cycle among other matters.

For the first regulatory cycle, the varied SAU specifies a set of proposed expenditure forecasts, the weighted average cost of capital (WACC), and other inputs into the annual building block revenue

5 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A, Attachment I.

6 NBN Co, *August 2023 SAU variation*, Main Body, clauses 5.2(e)(iv) and 5.6.

7 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.9(a)(ii) and (e).

8 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.

requirement (ABBRR). This revenue requirement represents an annualised form of NBN Co's efficient costs, including a return on investment and depreciation. Module 4 of the varied SAU specifies these values.

From the second regulatory cycle, NBN Co will include its proposed expenditure forecasts and other ABBRR inputs in its reset proposal. The proposed expenditure forecasts will need to reflect the benchmark service standard commitments set out in the reset proposal. The ACCC will consider these proposed inputs and either adopt them, or otherwise determine the inputs itself, in making the reset determination.

The varied SAU specifies the methodology and principles for determining the inputs used to inform the ABBRR in the subsequent regulatory period. These include operating and capital expenditure forecasts, WACC and cost allocation principles. NBN Co will be required to follow these methodologies and principles in preparing its reset proposal. The ACCC will also be subject to the same requirements in assessing NBN Co's proposals and when determining these inputs in its reset determinations.

The ACCC will determine how NBN Co recovers the balance of its historic losses that are being recognised in the varied SAU

In the initial years of the subsequent regulatory period, NBN Co is not expected to earn enough revenue to recover its ABBRR. In this period, prices for NBN Co's products will be set through a price path determined independently of its ABBRR. This price path will provide a pathway for NBN Co to reach a state of cost recovery, when it will be able generate sufficient revenue to recover its ABBRR (this is discussed further in the following section). NBN Co forecasts that it will reach this point in 2029–30 based on the assumptions and projections used in its BBM. NBN Co will not be entitled to defer recovery of any losses incurred over this period under the varied SAU.

For each year after reaching the point of cost recovery under the varied SAU, NBN Co's allowable revenues will be determined by adding a portion of the initial cost recovery account (ICRA) to the ABBRR.

The ICRA represents a portion of NBN Co's historical losses that it has accumulated to date. The varied SAU specifies an opening ICRA balance of \$12.5 billion (expressed in nominal terms) as of 1 July 2023. This represents a significantly smaller amount than the balance recorded in the regulatory accounts that NBN Co has prepared under the 2013 SAU.

NBN Co is seeking to recover this \$12.5 billion balance from its allowable revenues over the SAU period, which it considers necessary to have a reasonable opportunity to achieve and maintain a standalone investment grade credit rating with a stable outlook. The ACCC considers this amount will be sufficient to provide this reasonable opportunity, taking into account NBN Co will also be paying dividends to its government shareholders from its revenue allowances over this period.

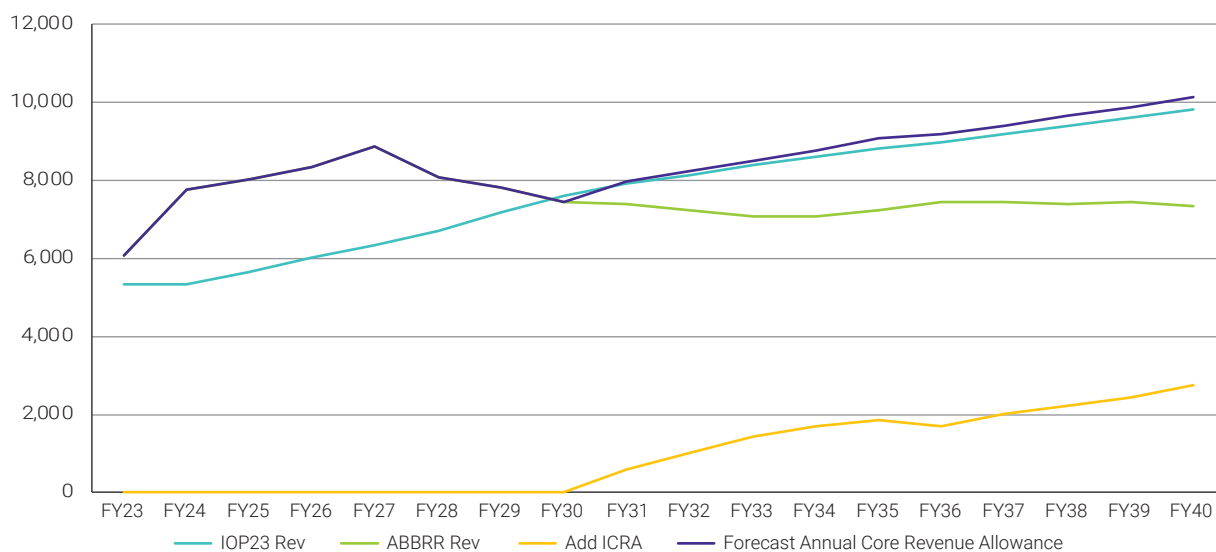
For each regulatory cycle after NBN Co reaches the point of cost recovery, the ACCC will specify in its replacement module determination the ABBRR and ICRA drawdown amount for each year of the regulatory cycle. The ICRA drawdown amounts are to be determined so that NBN Co can achieve and maintain the quantitative financial metrics consistent with a standalone investment grade credit rating, within as short a timeframe as practicable and while avoiding price shocks.

The sum of ABBRR and ICRA drawdown amount will form the annual regulated revenue allowance. This will then act as the basis for setting the overall weighted average price cap (WAPC), which will act as the primary regulatory control on prices.

The total amounts NBN Co can recover over the Module 2 period (2023–24 to 2031–32) and the Module 3 period (2032–33 to 2039–40) are specified in the varied SAU. Any residual ICRA amounts

NBN Co has not recovered at the end of these periods will be extinguished, i.e., set to zero and not carried forward for recovery in future years.

Figure 1: ABBRR, ICRA draw down and 2023 integrated operating plan (forecast) nominal revenue



Source: NBN Co’s BBM.

Figure 1 shows that NBN Co’s forecast annual revenue ‘IOP23 Rev’ for its core services is initially below NBN Co’s forecast annual core revenue allowance. This is the maximum amount of revenue that NBN Co could expect to achieve from supplying the core services under the expenditure related measures contained in the varied SAU. From around FY2030, forecast annual revenues and annual core revenue allowance closely align.

This initial forecast shortfall in revenue arises from NBN Co currently not recovering its yearly efficient costs, its forecast level of demand and expenditure, and the price control arrangements specified in the varied SAU. The price control arrangements limit changes in average price to be no more than the annual change in the Consumer Price Index in this period.

Until FY2030, the forecast annual core revenue allowance is the same with the annual building block revenue requirement ‘ABBRR Rev’ for these services, although only the former is visible on the chart.

In FY2030, NBN Co’s revenues from its core services are forecast to catch up with the level required to meet the annual building block revenue requirement. The inclusion from this time of the ICRA drawdown amounts ‘Add ICRA’ in the forecast annual core revenue allowance gives additional headroom for NBN Co to continue to grow revenues in recognition of the initial shortfall that incurred.

A weighted average price cap links price, costs and ICRA recovery in Module 2

Module 2 of the varied SAU introduces a weighted average price cap (WAPC) as the primary regulatory control on prices for NBN Co’s core service offers during the subsequent regulatory period.

Until NBN Co reaches the point where its annual revenues align with its regulatory allowances, projected to occur around the 2030 financial year, the annual increase in the WAPC is limited to increases in CPI. From that time, the annual change in the WAPC will be determined by a $CPI - X$ formulation, where the ‘X value’ is driven by changes in NBN Co’s regulatory allowances.

The value of the regulatory allowances will in turn depend on the forecast of efficient operating expenditure and annual capital charge, the ICRA draw-down amount and forecasts of demand. As such, the formula will be calibrated so that forecast revenues from the regulated prices and demand will align with the regulatory allowances that result from its BBM costs inclusive of an annual ICRA drawdown amount. The ICRA draw down component will be specified having regard to the principle that price shocks are to be avoided.

The varied SAU also establishes individual price controls to apply in the subsequent regulatory period to NBN Co's residential grade core service offers. These are the offers that NBN Co provides with 'traffic class 4 priority'. Residential grade offers that NBN Co supplies on its fixed line and fixed wireless networks are to be no more than 5% or CPI (whichever is higher). The exception is the entry level broadband offer, which is limited to CPI increases.

For the speed tiers that remain subject to connectivity virtual circuit (CVC) charges over the first regulatory cycle, the product price controls (and their representation in the WAPC) are based on the average of the combined access virtual circuit (AVC) and CVC overage charge incurred during each year.

Products with 100 Mbps and higher speed tiers are to be offered on a flat monthly charge under the varied SAU. That is, these products will cease to accrue CVC related charges from shortly after the 2023 SAU variation proposal being accepted.

The remaining products (i.e. those with 50 Mbps and below speed tiers) will continue to be offered on an AVC/CVC bundled basis until they transition to flat rate offers by 1 July 2026.

The CVC overage charge will reduce progressively over the first regulatory cycle. From commencement, this charge will reduce to \$5.50/Mbps per month, to \$4.50/Mbps per month in 2024–25, to \$3.50 Mbps per month in 2025–26 and set to zero thereafter.

The CVC allowances for the bundled offers will be adjusted every 6 months over the first regulatory cycle, with the purpose of offsetting around half the change in peak daily CVC usage associated with the relevant speed tiers.

By 1 May of each year within the subsequent regulatory period, NBN Co must publish a binding tariff list for the forthcoming financial year and a roadmap of prices for the next 3 financial years. Subsequent year tariff list prices are not able to differ significantly from roadmap prices previously published for that year, due to the operation of a mechanism that will maintain relativities between monthly prices to within \$1 per month of the relevant roadmap pricing.

NBN Co must also publish a statement of pricing intent for each regulatory cycle in the subsequent regulatory period. Once issued, the statement can only be varied in consultation with RSPs. The tariff lists and pricing roadmaps prices issued during the regulatory cycle are to be consistent with the statement of pricing intent.

4.3 The reset process changes from July 2032

The reset process, which will determine key matters ahead of each regulatory cycle, will operate until the end of the SAU term. However, the reset process will change in important respects from 1 July 2032.

Before this time, each reset determination will be made in accordance with the prescriptive rules contained in Module 2 of the varied SAU. When Module 3 commences on 1 July 2032, most of the prescriptive rules will not be mandatory, however the ACCC may still decide to apply them.

The rules that will no longer be mandatory include those that specify how the benchmark service standards and maximum prices for the SAU services are to be set. For example, the ACCC could directly set maximum prices for NBN Co services rather than apply the formulaic, CPI based approach that is specified in Module 2 of the varied SAU.

The scope of matters that must be included in a reset determination will also reduce, although the ACCC will have discretion to include further matters beyond those expressly required.

The ACCC may also issue a statement of approach that identifies the methods we will use in specifying matters in our reset determination and what information NBN Co must include in a reset proposal post-2032.

For instance, NBN Co will not be required to include proposed benchmark service standards in a reset proposal post-2032 unless requested in the ACCC statement of approach. The ACCC can, in any case, specify benchmark services standards in a reset determination along with the date by which NBN Co must include them in the standard form access agreement.

However, Module 3 will carry over some important elements of the Module 2 framework, including the use of a BBM to set annual regulatory allowances with similar rules for determining the annual ICRA drawdown amounts.

5. ACCC assessment of key aspects of the 2023 SAU variation proposal

5.1 General regulatory framework

Key points

- The ACCC will continue to determine detailed terms and conditions of access for each regulatory cycle through the reset process.
- The varied SAU contains a range of significant changes to the general regulatory framework. These changes relate to:
 - implementing the reset process through an ACCC conferral of power
 - alternative arrangements to apply when the ACCC makes reset determinations for the period from 1 July 2032, where higher level rules and principles will apply
 - new requirements for NBN Co to include certain information, and to adequately consult with stakeholders, as part of its reset proposals
 - changes to the matters that the ACCC will consider in making a reset determination
 - providing for the varied SAU to expire earlier than 30 June 2040 if the Commonwealth government privatises NBN Co.
- The varied SAU includes key process changes, including the ability for the ACCC to specify the information NBN Co must provide with reset applications, the ability for the ACCC to extend decision making timeframes if it is unable to make a reset determination within specified timeframes, and a credit rating objective that provides a suitable balance with principles of efficiency and minimising price shocks. These are improvements on NBN's previous SAU variation proposals.
- We consider the general regulatory framework provisions in the varied SAU are reasonable and promote the LTIE. In particular, because:
 - we consider that the changes to the reset process will result in a more streamlined process and ensure the ACCC can make reset determinations that promote the LTIE over the SAU period
 - the post-2032 arrangements appropriately balance flexibility to determine terms of access that respond to contemporaneous circumstances, while also providing a degree of certainty about how key elements will be determined in future
 - the credit rating objective principle will ensure the ACCC can continue to apply all relevant and required principles in making reset determinations.

5.1.1 Overview of NBN Co's 2023 SAU variation proposal

Under the varied SAU, the ACCC will continue to determine detailed terms and conditions of access for each regulatory cycle through the reset process, although with important changes to how this will occur. Key features of the proposed changes are as follows:

- The reset process, which establishes certain detailed terms and conditions for each regulatory cycle, will be self-contained within the SAU through conferring relevant powers on the ACCC under section 152CBA(10A) of the CCA.⁹
- In the period from 1 July 2032 (the post-2032 period), the varied SAU (a new module 3) will specify high level rules and principles that will apply to reset proposals and determinations.¹⁰
- The scope of matters which NBN Co must include in its reset proposals and which the ACCC must determine in reset determinations will be expanded to reflect changes in the proposed framework under the SAU. The additional matters to be considered in the reset process include benchmark service standards, the WAPC, and ICRA drawdown amounts.¹¹
- A new clause will allow the ACCC to require NBN Co to provide specific information upfront when it lodges a reset proposal.¹²
- NBN Co will be required to provide a reasonable opportunity for access seekers and consumer advocacy groups to provide input into reset proposals.¹³
- 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 the ACCC is unable to make a reset determination within the specified timeframes.¹⁴
- New principles that will require the ACCC to do the following in setting revenue allowances as part of its reset determinations in the post-2032 period:
 - Set the 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 will be assessed by reference to quantitative financial metrics consistent from one or more established and reputable rating agencies).¹⁵
 - Set the forecast nominal annual building block revenue requirement having 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.¹⁶
- A new clause that will provide for the varied SAU to expire on the earlier of 30 June 2040 or a change of control occurring. This will be triggered either by the Commonwealth government ceasing to hold more than 50% 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.¹⁷

9 NBN Co, *August 2023 SAU variation*, Main Body, clauses 5.2 and 5.8.

10 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.10.

11 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.2 and 5.8.

12 NBN Co, *August 2023 SAU variation*, Main Body, clauses 5.3–5.6.

13 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.7.

14 If, at the end of this period, the ACCC has still not made a replacement module determination, NBN Co's replacement module application will be taken to have been accepted. See clause 5.8(e), Main Body August 2023 SAU variation.

15 NBN Co, *August 2023 SAU variation*, Module 3, Schedule 3B.3.6(b).

16 NBN Co, *August 2023 SAU variation*, Module 3, Schedule 3B.3.2(d).

17 NBN Co, *August 2023 SAU variation*, Main Body, clause 3.2.

NBN Co had included many of these elements in its November 2022 SAU variation proposal. The further changes NBN Co made in its 2023 SAU variation proposal relate to the ability for the ACCC to extend decision making timeframes for the making of reset determinations, the ability for the ACCC to request upfront the information NBN Co must include in its reset proposals and refinements to the proposed credit rating principle to provide a more suitable balance with principles of efficiency and minimising price shocks.

5.1.2 Stakeholder feedback

Although stakeholders agreed with many aspects of the proposed general regulatory framework in the November 2022 SAU variation proposal, stakeholders initially expressed significant concerns around several aspects. Stakeholders raised concerns about the lack of ability for the ACCC to extend its decision making timeframe when it is unable to make a reset determination within the specified timeframes. This, in combination with the prospects of incomplete information when assessing reset proposals, created the risk of access terms being determined by default that do not promote the LTIE. Further, stakeholders raised concerns that the proposed credit rating objective in the November 2022 SAU variation proposal would require revenue allowances to be determined based on achievement of credit rating objectives, notwithstanding any efficiency considerations or price impacts.¹⁸

Stakeholders agreed with the ACCC's draft decision to reject the November 2022 SAU variation proposal and the ACCC's position on the reset process and proposed credit rating objective, for reasons which largely aligned with the concerns we had highlighted. Stakeholders also generally supported these concerns being addressed as NBN Co had proposed to us prior the draft decision.¹⁹

In submissions on the 2023 SAU variation proposal, stakeholders commented on a limited range of matters relating to the general regulatory framework.

ACCAN noted that, although the requirement for NBN Co to consult and engage with consumer advocacy groups on proposed expenditure is a welcome development, there is no commitment by NBN Co to resource engagement. ACCAN indicated that absent or ineffective consumer engagement has the potential to result in material harm, through the inefficient allocation of NBN revenues and the creation of regulatory uncertainty. ACCAN recommended the ACCC and NBN Co consider what resourcing would be required to ensure the long-term sustainability of consumer representation and engagement with NBN expenditure.²⁰

Telstra also commented on the need to ensure effective engagement in implementing the framework under the varied SAU. Telstra indicated that the ACCC, NBN Co and industry must continue to work together to ensure the delivery of a high quality NBN service that meets the needs of consumers. Telstra also agreed that active and responsive engagement by NBN Co is essential and the ACCC should carefully monitor how effective this engagement is going forward.²¹

Commpete reiterated points raised in its submission to our draft decision on the November 2022 SAU variation proposal, that the credit rating objective is not consistent with the LTIE and therefore should not be reflected in the varied SAU. Commpete further noted that meeting credit rating objectives is entirely the responsibility of NBN Co's management and board. However, Commpete acknowledged the proposed changes to the credit rating objective are an improvement, and echoed the ACCC's

18 ACCC, *Variation to the NBN Co Special Access Undertaking - Draft decision*, April 2023, Section 4 for further discussion on stakeholder submissions to the November 2022 SAU variation.

19 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, Section 4 for further discussion on stakeholder submissions to the May 2023 draft decision.

20 ACCAN, *Submission re proposed variation to the NBN Co SAU*, 11 September 2023, p 3.

21 Telstra, *Submission to ACCC consultation on proposed variation to the NBN Co SAU*, September 2023, p 2.

point that we must be able to have regard to all relevant matters without giving primacy to credit rating objectives.²²

5.1.3 ACCC assessment

We consider the general regulatory framework provisions in the varied SAU are reasonable and promote the LTIE.

First, the changes to key aspects of the reset process (i.e. implementation through a conferral of power on the ACCC under section 152CBA(10A) of the CCA; the ability for the ACCC to specify the information that NBN Co must include in reset proposals; expanding the scope of matters to be considered in the reset process; and the ability for the ACCC to extend decision making timeframes) achieve a more streamlined, balanced and effective process for determining access terms ahead of each regulatory cycle.

The reset process will promote efficient use of, and investment in, infrastructure and promote competition over the SAU period. The key changes also mitigate against the risk that access terms that do not promote efficiency or competition will be determined by default due to limits on ACCC decision making and insufficient information on which the ACCC can base its decision.

Further, the framework under the varied SAU will provide an appropriate balance between flexibility for the ACCC and a degree of structure for NBN Co on the reset processes and timings. The ACCC can request information be included in reset proposals and can extend the timeframe for making a reset determination, but only by a maximum of 6 months. Structure around timeframes and a defined end point to the process is consistent with NBN Co's legitimate business interests.

Second, the arrangements to apply from 1 July 2032 under the new Module 3 will require the ACCC to make reset determinations according to high level principles and any ACCC statement of approach rather than the prescriptive rules in Module 2 that apply to the subsequent regulatory period. This will ensure flexibility for the ACCC to continue to make reset determinations that promote efficient use of, and investment in, infrastructure and promote competition in downstream markets, having regard to market conditions and NBN Co's operating environment in the latter years of the varied SAU period.

Third, the new provisions requiring NBN Co to consult with its customers and consumer representative bodies in developing its regulatory applications will better allow NBN Co to target its investments and other business initiatives to consumer preferences. The new consultation requirements improve the likelihood that NBN Co's products and services meet consumer needs, including developing new offers and features for which consumers are willing to pay, thereby promoting efficient use of, and investment in, infrastructure.²³

We acknowledge feedback provided by Telstra and ACCAN on the importance of effective stakeholder engagement and the central role it plays under the new SAU framework. We will work closely with NBN Co and other stakeholders on how NBN Co can most effectively engage with its stakeholders. For example, we may work with NBN Co on the content, format and timing of information to be provided so each stakeholder can effectively contribute on matters most important to them. We will also be guided by experience of other regulated sectors, where effective stakeholder engagement is a key feature.

22 *Commpete, Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023, p 2.

23 Similarly, the low income and digitally disadvantaged forum is another new consultative mechanism that will assist NBN Co in better meeting consumer demand and otherwise supporting vulnerable consumers.

Fourth, the change of control provision that provides for expiry of the SAU if the government privatises NBN Co, will allow regulatory arrangements to apply following privatisation to be determined at, or closer to, the time. This will give additional assurance that in this scenario the terms of access will continue to promote efficient use of, and investment in, infrastructure and promote downstream competition.

Finally, the credit rating objective to apply from July 2032 will complement provisions around the ICRA and ICRA recovery framework, to provide a reasonable opportunity for NBN Co to achieve and maintain a standalone investment grade credit rating subject to avoiding price shocks. This will assist NBN Co to access capital markets and provide incentives to pursue efficient investments. Further, the credit rating objective is constructed to complement other elements of the framework for ACCC assessment of NBN Co's expenditure, which is aimed at ensuring only efficient investments can be included in the regulated cost base. Importantly, it is now clear that the credit rating objective is a further matter to which the ACCC will have regard along with each of the other mandatory considerations for making a reset determination rather than a necessary feature of the determination.

The credit rating objective achieves an appropriate balance between NBN Co's legitimate business interests and the interests of those who have the right to use NBN Co's services. It is also in the long term interests of consumers for NBN Co to have a reasonable opportunity to be financially viable, subject to it operating in a prudent and efficient manner. In combination with other aspects of the varied SAU relating to the ICRA and ICRA drawdown arrangements, the credit rating objective will provide NBN Co with a reasonable opportunity to achieve and maintain a standalone investment grade credit rating.

However, the ACCC will still need to consider the potential for price shocks when determining the cadence at which the ICRA could be drawn down, and importantly the objective is no longer expressed in a way that is likely to weaken NBN Co's incentives to operate and invest in a prudent and efficient manner. In this regard, the credit rating objective is to be considered from the perspective of a prudent end efficient operator in NBN Co's position with benchmark efficient capital structure. We consider this is consistent with both NBN Co's legitimate business interests and the interests of persons who have the right to use NBN services.

5.2 Initial cost recovery account (ICRA) balance and drawdown arrangements

Key points

- Under the varied SAU, NBN Co will be entitled to recover a portion of its historical losses through drawdown of the ICRA over the SAU period subject to the following limitations and conditions:
 - A restatement of the ICRA balance to \$12.5 billion (in nominal terms) as at 1 July 2023, below the balance of around \$44 billion that would have applied under a continuation of the 2013 SAU.
 - NBN Co will not be able to accumulate any new annual revenue shortfalls to recover in future.
 - The ACCC will determine the amount of the ICRA that NBN Co can draw down over a regulatory cycle through the reset process. The ACCC will set the ICRA drawdown amounts at a cadence designed to minimise price shocks. From July 2032, it will additionally consider the credit rating objective with a view to allowing recovery of the ICRA over the remaining term of the SAU.
 - Any remaining balance of the ICRA that NBN Co has not drawn down by the end of the SAU period will be extinguished – that is set to zero. Similarly, any remaining balance of the ICRA portion marked for recovery only in the subsequent regulatory period will also be set to zero at the end of that period.
- The restated ICRA balance and the ICRA drawdown arrangements will provide NBN Co with a reasonable opportunity to achieve and maintain a standalone investment grade credit rating while subject to minimising price shocks. This in turn will provide NBN Co with improved access to capital markets and promote efficient investment in the NBN.
- The ICRA amount and drawdown arrangements are reasonable and will also promote the long-term interests of end-users. In this regard, it is in consumers' long term interests for NBN Co to have clear incentives to operate in an efficient and prudent manner and to have the access to capital markets necessary to fund investment in the network and its products and services. It is also in end-users' long term interests for the ACCC to determine the rate at which the ICRA is drawn down with a view to avoiding price shocks.
- Further, the restated ICRA balance provides additional cost certainty to RSPs and so is consistent with their interests.

5.2.1 Overview of NBN Co's proposal

NBN Co currently does not earn sufficient revenue to recover its annual building block revenue requirement (ABBRR), which is the amount it must earn to recover its long term efficient costs, including a return on investment. The 2023 SAU variation proposal provides a pathway for NBN Co to reach a position where it will be expected to earn enough revenue to recover its ABBRR. After this point, NBN Co will then be allowed to recover a portion of the losses it had accumulated, which is reflected in the ICRA opening balance as of 1 July 2023.

The framework specifying the opening ICRA balance and the mechanism for incorporating ICRA recovery into revenue allowances in the subsequent regulatory period is set out in clauses 2G.3 and 2G.4 of the 2023 SAU variation proposal. The 2023 SAU variation proposal specifies an opening core services ICRA balance of \$12.5 billion (in nominal terms). This is significantly lower than the current ICRA balance.²⁴

NBN Co seeks to recover the \$12.5 billion by adding a portion of this amount (the ICRA drawdown amount) to the ABBRR in determining its revenue allowances over the varied SAU period. In both the subsequent regulatory period (during which module 2 will apply) and the post-2032 period (during which module 3 will apply), the timing and size of the ICRA drawdown amounts will be determined through the reset process. In making reset determinations during this period, the ACCC must ensure the ICRA drawdown amounts provide NBN Co a reasonable opportunity to achieve and maintain a standalone investment grade credit rating, while avoiding price shocks (see section 5.1 for further discussion on the credit rating objective).

NBN Co will be able to recover up to \$1.27 billion of the ICRA (in 2022–23 terms) over the subsequent regulatory period, which operates until 30 June 2032.²⁵ NBN Co will only be entitled to recover this amount after it reaches cost recovery, which NBN Co expects to occur in 2029–30 based on its current projections. NBN Co will not include any new losses incurred over this period in the ICRA or any other deferred cost recovery mechanism. Any portion of the \$1.27 billion that NBN Co does not recover by the end of 2031–32 will be extinguished. NBN Co will then have an opportunity to recover up to \$11.23 billion of the ICRA (in 2022–23 terms) in the post-2032 regulatory period.²⁶ Any unrecovered portion of the ICRA is extinguished at the end of the SAU period.

NBN Co submitted that an ICRA balance of \$12.5 billion is sufficient to achieve its credit rating objective.²⁷ NBN Co also provided an expert report by Castalia in support of its proposal on the opening ICRA balance.²⁸

Except for changes relating to updated CPI forecasts, NBN Co's proposed opening ICRA balance and ICRA drawdown arrangements under the SAU variation are substantially unchanged from the November 2022 SAU variation proposal.

5.2.2 Stakeholder feedback

In previous rounds of consultation on the November 2022 SAU variation proposal, stakeholders generally expressed support for the reduction in the opening ICRA balance to \$12.5 billion as of 1 July 2023, and the associated ICRA drawdown arrangements. Some of the more specific feedback included that it would act as constraint on future prices, reduce uncertainty associated with a large ICRA balance and would promote more efficient outcomes, aid predictability and transparency, and ensure recovery against past losses is not greater than required to maintain a standalone investment grade credit rating.²⁹

Telstra noted that, although the ICRA balance had significantly reduced compared to current arrangements, the ICRA would still reflect historically inefficient expenditure. Telstra also indicated its

24 The ICRA balance would be expected to be around \$44 billion as of 1 July 2023 had the previous arrangements continued.

25 NBN Co, *August 2023 SAU variation*, Module 2, clause 2G.3.1(d)(ii).

26 NBN Co, *August 2023 SAU variation*, Module 2, clause 2G.3.1(d)(iv).

27 NBN Co, *Special Access Undertaking Variation 2022 supporting submission, Part E: Calculation of NBN Co's revenue requirement*, November 2022, p 11.

28 NBN Co expert report, Castalia, *Economic effects of ICRA*, December 2022.

29 ACCC, *Variation to the NBN Co Special Access Undertaking - Draft decision*, April 2023, p 27 for further discussion on earlier submissions on the SAU variation relating to ICRA arrangements.

view that NBN Co could achieve key credit rating objectives with smaller price increases than those proposed by NBN Co.³⁰

Stakeholders did not comment on specific aspects of NBN Co's proposed ICRA balance and ICRA drawdown arrangements in consultation on the 2023 SAU variation proposal, although a number of stakeholders provided general comments of support for the arrangements.³¹

5.2.3 ACCC assessment

We consider the 2023 SAU variation proposal provisions relating to the ICRA balance and the ICRA drawdown arrangements are reasonable and will promote the LTIE.

The ACCC supports the position that NBN Co should have a reasonable opportunity to achieve and maintain a standalone investment grade credit rating. It is in the LTIE for NBN Co to have a reasonable opportunity to be financially viable, subject to acting in an efficient and prudent manner. The ACCC has maintained this position throughout the industry working groups in 2021 and SAU variation process.

We consider the ICRA arrangements under the varied SAU will provide NBN Co reasonable opportunity to transition to a point of cost recovery and then debt repayment so it can reach a standalone investment grade credit rating. The restated ICRA balance of \$12.5 billion as of 1 July 2023 is sufficient for NBN Co to achieve and maintain a standalone investment grade credit rating over the SAU period, while paying dividends to its Government shareholders. This will provide NBN Co with improved access to capital markets and promote efficient investment in infrastructure.

The key elements of the ICRA drawdown framework (which are that the ACCC determines the annual ICRA drawdown amounts through the reset process, that no new losses will be added to the ICRA, and that remaining ICRA balances at the end of the subsequent regulatory period and the end of the varied SAU period will be extinguished), will place the risk of inefficient expenditure or cost overruns on NBN Co. This will provide strong incentives on NBN Co to invest in infrastructure in an efficient manner.

We also consider the arrangements achieve a balance between NBN Co's legitimate business interests and the interests of those that have the right to use NBN Co's services, namely NBN Co's customers and end-users. NBN Co will have a reasonable opportunity to achieve and maintain a standalone investment grade credit rating, however this will be subject to the principle of avoiding price shocks. Importantly, the arrangements retain our ability to set make reset determinations that provide appropriate incentives for NBN Co to operate and invest in the NBN in a prudent and efficient manner. The ACCC considers providing NBN Co with a reasonable opportunity to meet this objective, subject to minimising price shocks and without weakening incentives to be prudent and efficient, is consistent with NBN Co's legitimate business interests.

Further, the ICRA drawdown arrangements, which do not allow any new losses to be included in the ICRA and provide for any unclaimed ICRA amounts to be extinguished, place the risks of inefficiency and cost overruns on NBN Co. This insulates NBN Co's customers and end-users from these risks and is therefore consistent with the interests of persons who have the right to use NBN services.

30 Telstra, *Submission in relation to NBN's proposed SAU variation*, 17 February 2023, pp 36-37; Telstra, *Submission to ACCC NBN Co Special Access Undertaking Draft Decision*, 2 June 2023 p 13.

31 See for example Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

The opening ICRA balance will provide NBN Co reasonable opportunity to achieve credit rating objectives and is therefore reasonable and will promote the LTIE

We consider the opening ICRA balance of \$12.5 billion will be sufficient to provide NBN Co with a reasonable opportunity to achieve and maintain a standalone investment grade credit rating with a stable outlook, while paying dividends to its Government shareholders.

We engaged Sapere Research Group (Sapere) to provide an independent view on the ICRA balance (as of 1 July 2023) that would be required to provide NBN Co with a reasonable opportunity to achieve and maintain a standalone investment grade credit rating. We released Sapere's report and discussed its methodology and findings in detail in the draft decision.³²

In summary, we requested Sapere calculate the ICRA balance based on the additional revenue NBN Co would require above the ABBRR to transition to a standalone investment grade credit rating. We requested Sapere undertake a range of scenario testing and analysis on both benchmark firm and actual firm perspectives, the latter of which incorporates NBN Co's actual debt levels and projections of debt as contained in NBN Co's integrated operating plan (IOP).

Sapere found that a minimum ICRA balance of \$8.2 billion as of 1 July 2023 would be required to allow NBN Co to recover sufficient revenue above ABBRR over the SAU period to transition to and maintain a standalone investment grade credit rating based on NBN Co's actual financial position and projections. This result assumes any revenues NBN Co earns above ABBRR will be used to pay down debt.

Sapere also examined a range of dividend payment scenarios, where any revenue NBN Co earns above ABBRR is used to pay down debt and to provide a dividend stream to shareholders. Sapere found a range of opening ICRA balances between its baseline of \$8.2 billion and the proposed balance of \$12.5 billion could support future dividend streams under a range of reasonable assumptions.

These findings indicate that the proposed opening ICRA balance of \$12.5 billion as of 1 July 2023 will be sufficient to provide a reasonable opportunity to achieve and maintain a standalone investment grade credit rating with a stable outlook. The findings also indicate there is significant scope for future dividend payments.

We consider that, on balance, the opening ICRA balance is reasonable and appropriate considering other elements of the ICRA recovery framework and the broader context of the varied SAU. This includes the fact that the opening ICRA balance will be locked in and only adjusted in line with the detailed ICRA drawdown provisions specified in the varied SAU. NBN Co is not guaranteed to recover this amount, which will provide strong incentives on NBN Co to invest and operate efficiently and engage in efficient financing practices. Further, it is important that the regulatory arrangements leave scope for NBN Co to pay reasonable dividends to shareholders in future. We consider this is in the legitimate business interests of NBN Co.

The provisions and approach to setting and drawing down the ICRA are reasonable and will promote the LTIE

NBN Co is not guaranteed to achieve or maintain a standalone investment grade credit rating under the arrangement in the varied SAU. That will depend on NBN Co operating in a prudent and efficient manner. Similarly, NBN Co is not guaranteed to recover all, or any minimum portion of the ICRA, over the SAU period.

³² See Sapere Research Group, *Revenue required for investment grade credit rating*, 1 May 2023 and ACCC, *Variation to the NBN Co SAU – Draft decision*, April 2023 for further details and discussion of Sapere's methodology and findings.

NBN Co will only be able to recover the ICRA once it reaches its breakeven point, which is expected to occur in 2029–30 based on current projections. Further, any unrecovered ICRA will be extinguished at the end of the SAU term – that is set to zero. If NBN Co is delayed in reaching the breakeven point, through either lower than forecast revenues or higher than expected or inefficient expenditure, NBN Co will have less opportunity to recover the ICRA over the SAU term.

The setting of the opening ICRA balance and rules for ICRA drawdown is also independent of NBN Co's actual financial arrangements, as they are, rather, based on a benchmark firm with an efficient capital structure. This will provide NBN Co with the incentive to operate and invest efficiently. NBN Co will bear the risk if it operates inefficiently or undertakes inefficient investments, has lower demand or revenues that will impede its ability to drawdown the ICRA or if it otherwise undertakes inefficient financing practices. We therefore consider that the proposed opening ICRA balance and framework for drawing down ICRA are reasonable and will promote the LTIE.

Determining ICRA drawdown amounts before each regulatory cycle achieves an appropriate balance between flexibility and certainty

We consider the process for determining the ICRA drawdown amounts before each regulatory cycle through the reset process will achieve an appropriate balance between flexibility and certainty. This will allow NBN Co to consider the then prevailing market conditions in preparing its reset proposals and allow it to propose ICRA drawdown amounts that best reflect these conditions at the time. It will give scope to the ACCC to give similar consideration in making its reset determinations.

The ICRA drawdown amounts themselves will be determined consistent with the Module 2 rules during the subsequent regulatory period and the Module 3 rules in the post-2032 period. Importantly, the ICRA drawdown amounts to be included in the regulatory revenue allowance are subject to the principle of minimising price shocks. We consider that the provisions and processes for determining ICRA draw down amounts ahead of each regulatory cycle are reasonable and promote the LTIE.

5.3 Building block model (BBM) approach and implementation

Key points

- The 2023 SAU variation proposal introduces a new framework for calculating NBN Co's regulated revenue allowances based on BBM proposals.
- We consider that the provisions that make up this framework are reasonable and will promote the LTIE. This is because:
 - we consider the framework encourages the economically efficient use of, and investment in, the infrastructure used to provide the SAU services and result in outcomes that are likely to be reasonable and promote the LTIE
 - under the framework, NBN Co has the incentive to prepare its BBM proposals in a robust manner and provide the information that the ACCC needs to properly assess these proposals
 - there will be better transparency over the calculation of the matters specified in BBM proposals via the building block models and handbooks that will accompany the BBM proposals, including on matters such as the treatment of capital contributions
 - NBN Co has the incentive to engage constructively with RSPs and consumer advocates so they can assist in shaping BBM proposals before they are lodged
 - the ACCC has scope to either adopt or vary the proposed expenditures where expenditures do not align with the expenditure objectives or do not represent prudent and efficient practices.
- We are not satisfied that the methodology used to calculate the WACC for the first regulatory cycle, including the panel of firms against which NBN Co's rate of return is benchmarked, will be appropriate to adopt in the future. However, these matters of methodology are unlikely to be material for the first regulatory cycle and can be revisited as part of future reset determinations.

5.3.1 Overview of NBN Co's proposal

Building block model proposals in the subsequent regulatory period

Under the 2023 SAU variation proposal, NBN Co is required to provide reset proposals to the ACCC regarding matters to apply during a regulatory cycle, including the length of the regulatory period, regulated revenue and other allowances, the value of the regulated asset base and inputs to those calculations.³³ As part of this 2023 SAU variation proposal, NBN Co is required to consult with stakeholders in preparing, and the ACCC can specify certain information NBN Co must provide in support of its reset proposals, including in relation to its BBM proposals (this is discussed further in section 5.1).

NBN Co is required to prepare and present its BBM proposals in a manner that is broadly consistent with those used in other regulatory frameworks for essential services. These models transparently

³³ The precise matters to include in each application will depend on whether the application is made in respect of the subsequent regulatory period or the post 2032 regulatory period, and if in the latter period, any direction that the ACCC has given in an ACCC Statement of Approach as to the proposals to be included in an application. See NBN Co, *August 2023 SAU variation*, Main body, clause 5.2.

calculate values for different types of cost categories, including operating costs, tax costs and capital costs (which are in turn calculated from the value of the asset base, the allowable return on capital invested, the annual depreciation allowance and work in progress allowance). Each 'block' of costs is then built up in the model to output the relevant regulatory allowance.

NBN Co included a BBM proposal for the first regulatory cycle as part of the 2023 SAU variation proposal.³⁴ NBN Co provided the building block models and BBM handbooks that explain how it has calculated the expenditure values contained in this BBM proposal.³⁵ We discuss expenditure values for the first regulatory cycle in section 5.7.

NBN Co's regulated revenue allowances must be based on reasonable forecasts of the costs it will incur in prudently and efficiently investing in and providing access to its services. For capital costs, the ACCC will further assess actual expenditures before admitting only prudent costs into the regulated asset base. We discuss the proposed rules and processes for determining the prudence and efficiency of forecast and actual expenditures in section 5.6.

In the subsequent regulatory period, the BBM proposal is also to include settings for the weighted average price control. These settings include whether NBN Co expects to first recover its annual costs within the regulatory cycle, and if so the relevant financial year in which this will occur, the ICRA drawdown amount, and the 'X value' that will then be applied in its price cap formula.³⁶ We discuss the weighted average price cap in section 5.5.

Annual building block revenue requirement (ABBRR)

Part A of Schedule 2G sets out how the Forecast Nominal ABBRR and Forecast Nominal Core Services ABBRR will be calculated in the Subsequent Regulatory Period. Schedule 2G.2 defines the ABBRR, which must at a minimum specify and include the following elements:³⁷

- forecast operating expenditure for the specified financial year, which is to include any operating expenditure to be incurred pursuant to the Telstra Arrangements or the Optus Arrangements
- forecast nominal regulatory depreciation for the specified financial year
- return on capital for the specified financial year, calculated by reference to a rate of return and the forecast nominal regulatory asset base (RAB) at the start of the specified financial year
- forecast tax allowance for the specified financial year.

Clause 2G.2.3 states that an annual construction in progress allowance (ACIPA) will be included in the calculation of the ABBRR.

Regulatory asset base (RAB) values

Part B of Schedule 2G sets out how the RAB and the core services RAB portion will be calculated and rolled forward during the subsequent regulatory period. Schedule 2G.5 defines the calculation of the RAB, including the roll forward amounts. The opening RAB for a financial year comprises the core services RAB at the start of the year plus core services capital expenditure for the year, less core services disposals for the year and less core services depreciation for the year.³⁸

The value of assets rolled forward from the initial regulatory period is to be based on the value of actual expenditures that satisfy the criteria in schedule 1D. For future regulatory cycles, the value of assets to be rolled forward will include actual capital expenditure within the regulatory cycle

34 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A, Attachment J.

35 These supporting materials are available on the ACCC website [here](#).

36 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.3.

37 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.1.

38 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.5.

which the ACCC determines was (or is likely to be) incurred prudently and efficiently in achieving the Expenditure Objectives (clause 2G.5.10(d)(iii)(A)).

The ACCC is to have regard to the expenditure factors when determining whether NBN Co's Capital Expenditure was (or is likely to be) incurred prudently and efficiently (clause 2G.5.10(e)(ii)).

Clause 2G.5.5 describes the approach to depreciation, including the use of weighted average remaining asset lives to calculate depreciation for asset classes. Section 5.3.1.2 in the BBM handbook provides an explanation and example of how weighted average remaining asset lives are calculated.

Capital contributions

In defining the calculation of the RAB for the subsequent regulatory period, Schedule 2G.5 provides for the treatment of capital contributions.³⁹

Under the 2013 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.⁴⁰

Our discussion paper on the 2023 SAU variation proposal noted NBN Co's approach to capital contributions. The approach is to depreciate capital contributions from the time the relevant asset enters the regulated asset base and over the same period as that asset, so that the calculated value of NBN Co's regulated asset base will now be based more closely on net expenditure. This approach improves transparency for stakeholders and provides assurance that the prices that RSPs and end-users face for access to the NBN will not be inflated by investments to which other parties had originally contributed.

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 when the varied SAU will come 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 ending 30 June 2024 and depreciating over 10 years.⁴¹

Weighted average cost of capital (WACC) parameters

Schedule 1E.6 provides the rate of return formula used to determine the weighted average cost of capital (WACC) in the subsequent regulatory period. The formula is to be used to estimate a WACC that is commensurate with the efficient financing costs of a benchmark firm with a similar risk to that which NBN Co faces in supplying the services that are the subject of the SAU.⁴²

NBN Co has proposed parameters to estimate this rate of return for the first regulatory cycle as part of its BBM proposal that forms part of the 2023 SAU variation proposal.⁴³ These parameters, including the CPI forecast, risk-free rate and market risk premium, have been estimated as of May 2023. These have flow-on effects on other BBM parameters.⁴⁴

As we noted in the discussion paper, the scope and magnitude of the above changes do not appear material and have limited impact on the forecast revenue allowances for the first regulatory cycle.

39 See for example NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.5.3, 2.G.5.4, etc.

40 This risk could have otherwise arisen as NBN Co approached annual cost recovery and its weighted average price cap moves to a CPI – X formulation. Until that point is reached, NBN Co's price cap would remain bound by CPI.

41 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.5.11 and 2G.5.5.

42 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.4.

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

44 NBN Co, *NBN SAU Variation 2023 – Supporting submission*, 14 August 2023, p 30.

5.3.2 Stakeholder feedback

Aussie Broadband is supportive of the changes which allow the ACCC to require NBN Co to provide further information when it lodges a reset proposal.⁴⁵ It notes clauses 5.2 (c)(ii) and 5.2 (d)(ii), which requires NBN Co to provide the information requested by the ACCC.⁴⁶

Aussie Broadband believes that the changes put forward under the SAU variation proposal improve transparency and welcome the changes to treatment of capital contributions.⁴⁷

In its submission, Telstra indicates that it:⁴⁸

- supports the decision by NBN Co to adopt a more consistent approach to the treatment of capital contributions from government and third parties
- supports NBN Co's more transparent approach to the BBM public explanatory notes for asset classes and weighted average asset lives
- supports NBN Co's approach for the depreciation of assets commissioned pre-FY24 to be treated separately from depreciation for assets commissioned from the start of FY24
- accepts that the SAU variation attempts to address the risk of inefficient investment by conferring the ACCC with sufficient powers to request information and documents in future expenditure reviews.

Telstra had sought confirmation that NBN Co's regulatory allowances will also be reduced by the value of the remediation credits that are issued under the commercial agreement it has for the supply of infrastructure services to NBN Co. NBN Co submits that it has offset these credits against its operating costs as this is already required by the SAU.⁴⁹

5.3.3 ACCC assessment

Overall, we consider the provisions that make up the framework for setting regulatory allowances based on a BBM proposal in the subsequent regulatory period are reasonable and will promote the LTIE.

In our view, this is likely to result in outcomes that will encourage the economically efficient use of, and economically efficient investment in, the infrastructure used to supply the SAU services. This in turn will lead to better price and quality outcomes for end-users that are in line with their long-term interests.

Further, the approach to BBM proposals is likely to lead to outcomes that balance NBN Co's legitimate business interest in earning an appropriate return on its investment with the commercial interests of RSPs. This is because the BBM proposals will:

- be calibrated to provide NBN Co with an opportunity to earn an appropriate return that is commensurate with the risks it faces.
- be accompanied with supporting information that gives transparency relating to how the BBM proposals have been prepared and the regulatory allowances that have been calculated
- be developed in consultation with RSPs as well as consumer representatives.

45 Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 1.

46 Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

47 Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 3.

48 Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co SAU*, September 2023, pp 4–5.

49 NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, p 25.

In this regard, we consider the proposed approach is broadly consistent with models that have proven effective in other regulated sectors that adopt BBM approaches.

We note that, under the varied SAU, the ACCC can require NBN Co to provide specified information or documents in support of a reset application or to assist in making a reset determination. We are satisfied that we will likely have access to the information necessary to assess the proposed ABBRR, RAB and other matters contained in a BBM proposal. Similarly, we are satisfied that the ACCC could also exercise the conferred powers to assist in monitoring and enforcing compliance with the matters specified in a reset determination.

We also note the change in treatment of third-party capital contributions increases transparency over NBN Co's sources of funding and the regulatory revenue allowances that NBN Co will require. These steps to improve transparency are likely to assist in setting regulatory allowances to encourage prudent and efficient investments, as well as to give certainty to access seekers that they will not pay for assets that NBN Co did not fund.

We remain of the view that the selection of comparator firms in estimating the WACC for the first regulatory cycle is deficient. As we noted in the draft decision on the November 2022 SAU variation proposal, NBN Co has used a broad-based sample for this cycle which appears to include some firms that are a poor proxy for NBN Co, while potentially omitting others that appear suitable for inclusion.⁵⁰

Further, we note that it is desirable to use financial parameter values that are current as at the time that the ACCC makes a reset determination. In this regard, the use of May 2023 values for the first regulatory cycle should not be seen as a precedent for our future reset determinations.

That said, the proposed WACC values for the first regulatory cycle are unlikely to have a material impact on outcomes for the first regulatory cycle. Consequently, as part of making future reset determinations, the ACCC will look closely at all aspects of NBN Co's WACC proposals and adjust these where appropriate to do so, including the selection of the comparator firms and the currency of the financial parameters used in the WACC formula.

⁵⁰ ACCC, *Variation to the NBN Co Special Access Undertaking - Draft decision*, April 2023, pp 68–69.

5.4 Product and pricing

Key points

- We consider that the product and pricing measures that apply under the varied SAU are reasonable and will promote the LTIE.
- The 2023 SAU variation proposal introduces a new pricing model for recurring charges and other changes that will provide RSPs with greater certainty over access costs in the subsequent regulatory period. This will improve the ability of RSPs to enter or expand, set efficient prices for their retail offers and invest in product differentiation, which will promote competition and encourage more efficient use of the NBN.
- The rebalancing of the recurring access charges is likely to lead to more efficient use of the NBN, as well as encourage efficient investment in NBN infrastructure, as the new prices are targeted at encouraging price-sensitive customers to stay connected and to consider moving to a higher yielding access product.
- It is also in NBN Co's legitimate commercial interest in being given a reasonable opportunity to recover its efficient costs, which sharper or across the board price reductions will work to prevent.
- The commitments to maintain the low income forum will assist in protecting low income and disadvantaged customers as NBN Co further develops its pricing under the varied SAU. It will be important to the success of this forum that its governance does not preclude the forum from efficiently developing initiatives to provide appropriate support for these consumers.

5.4.1 Overview of NBN Co's proposal

NBN Co's 2023 SAU variation proposal makes significant changes to the product and pricing constructs for the residential grade services supplied over its fixed line and fixed wireless networks.⁵¹ These services account for the vast majority of NBN Co's services. The pricing of these services has been the focus of stakeholder concerns over the course of the SAU variation process.

One key change is a new flat monthly charge construct for 100 Mbps and higher speed tier offers, that will remove variable CVC charging for these products from soon after the commencement of the varied SAU. The remaining lower speed tier products will also be subject to this new charging structure from 1 July 2026, following a transition process over the first regulatory cycle.

The CVC overage charge that will continue to apply to the lower speed tier bundled offers will reduce from soon after the commencement of the varied SAU, and then for each financial year of the first regulatory cycle. These charges will be set at zero from the start of the second regulatory cycle on 1 July 2026.⁵²

These lower speed tier bundle offers are also to be subject to a new 'floor and ceiling' pricing model during the first regulatory cycle. The specified pricing elements that are to apply to each such bundled offer are outlined in Table 1 below.

⁵¹ The commencing prices and CVC inclusions (as applicable) are listed in Attachment E of Module 2 of the 2023 SAU variation.

⁵² NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2E.2.2(d).

Table1: TC-4 bundled offer 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

Under the floor and ceiling pricing model, a daily charge is calculated for each service based on the floor price of the relevant bundle offer and any CVC overage that it attracts that day. CVC overage is calculated by deducting the CVC inclusion from the average CVC utilisation in the peak hour and multiplying by the overage price. The daily charge so calculated is then capped so it cannot exceed the ceiling price. The monthly charge is then determined by multiplying the average of the daily charges for the service by the number of days in the month. NBN Co’s submission in support provides a more detailed description and examples of how the calculations are to be made.⁵³

The CVC overage calculations are to be made based on each service’s CVC utilisation and inclusion values. Currently this calculation has been done on an aggregate basis which allows CVC inclusions to be pooled. This had the effect of allowing CVC inclusions that were not fully used on one service to be drawn upon by services that exceeded their inclusion.

There are 2 further changes concerning how CVC is to be charged on the lower speed tier bundled offers while these charges remain. CVC overage is to be charged based on utilised CVC capacity, rather than provisioned CVC capacity as applies currently.⁵⁴ This will reduce exposure to CVC overage charges for days when provisioned CVC capacity is not fully used. CVC inclusions are also to be adjusted formulaically every 6 months, with the intention of offsetting around half the expected growth in peak CVC usage over time.⁵⁵ This will give more assurance than has applied to date over the timing and amount of these increases.

We note that the method for calculating the bundle offer charges expressly requires pro-rating of monthly charges, which is consistent with NBN Co’s established commercial practice. Pro-rating in this context means adjusting the amount of the monthly charge to reflect changes to the service that occurred within the month, such as cancelling the service. NBN Co is committing to continue this practice for its monthly access charges in its next commercial access agreement, WBA5.⁵⁶ NBN Co has clarified 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 varied SAU.⁵⁷ Given this, it appears clear that an access determination could require pro-rating to be applied to monthly charges more generally should NBN Co look to move away from its current practice.⁵⁸

Importantly, the new pricing will be implemented as pricing offers under the varied SAU, rather than continuing with the practice that NBN Co developed of setting effective prices by discounting from SAU offers. This change provides more clarity and certainty over the pricing as discounts could have been withdrawn with little notice outside the price controls. It also means that the prices under the

53 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2F.4.1 and 2E.2.2 (e) and NBN Co, *NBN SAU Variation 2023 – Supporting submission*, 14 August 2023, Appendix E.

54 NBN Co, *August 2023 SAU variation*, Module 2, Attachment E, clause 3.1 (a).

55 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.5.1.

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

57 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.1.7.

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

prior commercial offer (WBA4) are a much better reference point for considering the effect of the new pricing, rather than the prices specified in the 2013 SAU.

Some notable price differences between the prices that will apply soon after the varied SAU commences and the current WBA4 commercial offers are:

- a rise of \$5 per month in the minimum charge for 50 Mbps fixed line and Wireless Plus services (from \$45 to \$50)
- a reduction in the overage charge for bundled offers from \$8/Mbps per month to \$5.50/Mbps per month (and lower in each subsequent financial year of the first regulatory cycle as indicated in Table 1 above, before becoming \$0/Mbps per month thereafter)
- \$3 to \$10 per month reductions of the minimum charges of services of 100 Mbps or more
- \$11 per month reduction in the minimum charge for 25 Mbps services (from \$37 to \$26 per month)
- a \$2.72 per month increase in the cost to acquire the 12 Mbps broadband access service⁵⁹
- the availability of a new basic bundled offer priced at \$12 per month suitable for voice and low data usage, (down by \$10.50 per month from the existing commercial voice-only offer of \$22.50 per month).

NBN Co is also committing to lower a number of its upfront and monthly recurring NNI charges. The varied SAU will also no longer require NNI capacity to correspond 1:1 with CVC capacity, by allowing CVC 'overbooking'.⁶⁰

The NNI pricing commitments under the 2023 SAU variation proposal include:

- a 50% reduction in the 1G NNI and virtual NNI monthly recurring charges
- 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 in the amount of the setup fees for the 1G NNIs under a new simplified migration process (available from 31 March 2024 to 30 June 2027)
- a provision for the review of NNI charges by no later than 30 June 2027.⁶¹

The 2023 SAU variation proposal does not commit NBN Co to develop a special offer for low income or disadvantaged consumers. However, it commits NBN Co to establish a low-income and digital inclusion forum to identify initiatives to improve access to the NBN for low-income, vulnerable and unconnected consumers.⁶²

The varied SAU will specify mandatory aspects of the forum's terms of reference such as its scope, membership rules, frequency of meetings, reporting and chairing arrangements.

NBN Co will be required to have regard to the views and feedback provided by the forum on initiatives to improve end-user access to NBN services, and NBN Co's proposed access pricing and product withdrawals. It will also be required to report to forum members ahead of each forum meeting, and

59 The \$2.72 cost increase comprises a \$1.90 per month increase in the minimum charge from \$22.50 to \$24.40, and the removal of the CVC inclusion of 0.15 Mbps that increases exposure to CVC overage charges by \$0.82 per month.

60 This change is facilitated by the change in CVC provisioning from a Committed Information Rate (CIR) to a Peak Information rate (PIR) basis other than for the NBN satellite network from the price transition date as specified in NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.1.4 (c).

61 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.3.4, 2B.6.2, 2B.6.3 and Appendix E.

62 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.7. NBN Co has constituted the forum, with 3 meetings held to date.

publish a report each year, on NBN Co's initiatives undertaken and how the views of forum members have been considered.⁶³

NBN Co has forecast in its draft indicative pricing roadmap that it will reduce some of its service transfer charges, along with enhanced service charges and satellite access reactivation charges. NBN Co has offered these reductions as part of its proposed commercial arrangements and has indicated they will be introduced into the varied SAU via the tariff list and indicative pricing roadmap should the commercial offer be accepted.⁶⁴

5.4.2 Stakeholder views

Throughout the SAU variation process stakeholders largely focused on 4 aspects of NBN Co's pricing arrangements:

- the certainty that the pricing model provides on the access costs that they will incur
- the level of prices
- impediments to entering or expanding, including the level of fixed charge components and transfer fees, and
- support for low income and disadvantaged consumers.

Stakeholder concerns focussed on the continued role of CVC charging for NBN products and the cost uncertainty that this creates for RSPs in setting their retail offers. Several access seekers expressed a preference that CVC charging be removed entirely, while some were content with it remaining for lower speed tier offers.⁶⁵

NBN Co adjusted its approach to CVC pricing over the course of our consultation on NBN Co's proposed SAU variations with a view to addressing these concerns. First, in its March 2022 SAU variation proposal, NBN Co committed to remove CVC charges on higher speed tiers and provide a more certain mechanism to partially respond to increasing CVC demand by increasing inclusions.

Then, in its November 2022 SAU variation proposal, NBN Co proposed to progressively reduce the CVC charge (in addition to increasing inclusions) prior to its reduction to zero at the beginning of the second regulatory period on 1 July 2026.⁶⁶ Although stakeholders recognised the changes could assist with cost certainty, the consensus view was that they did not go far enough, with several continuing to propose that the CVC charges be removed entirely.⁶⁷

In its 2023 SAU variation proposal, NBN Co made further changes to respond to the ongoing concerns of stakeholders, along with the observations we had outlined in our draft decision on the November 2022 SAU variation proposal.⁶⁸ These included further reductions in the CVC charge, and establishment of bounds around the total access charge, via the daily 'floor and ceiling' price mechanism. NBN Co identified 3 possible variants on this model, before proposing the version that gained most support amongst stakeholders.⁶⁹

63 NBN Co, *August 2023 SAU variation*, Module 2, clause 2B.7.

64 The reduced 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 the variation proposal and apply under the SAU from the price transition date. See NBN Co, *Indicative 3 Year SAU Pricing Roadmap*, August 2023, tables 8.1, 9.2 and 9.8.

65 ACCC, *NBN Co Special Access Undertaking – Summary of industry working group outcomes*, December 2021, p 10.

66 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, p 32.

67 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, pp 33–34.

68 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, pp 42–43, 45–46.

69 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, pp 19–20.

Although not universal, some stakeholders (ACCAN and RSPs)⁷⁰ expressed their support for the floor and ceiling model in their recent submissions as they considered it would deliver increased cost certainty. Other RSPs expressed only qualified support for moving to this model, indicating that their first preference would be to retain features of previously proposed pricing models such as CVC pooling.⁷¹ A reseller RSP additionally opposed the timing of the model's introduction due to uncertainty as to whether its upstream provider could pass through the new pricing by 1 December 2023, NBN Co's intended start date should the SAU variation be accepted.⁷²

In terms of the level of the recurring monthly charges, most stakeholders were concerned by NBN Co's approach to rebalancing the AVC charge components. Stakeholders welcomed the price reductions for some product offers but saw as problematic the proposal to raise the bundled price of the 50 Mbps offer. Their view was that the increase in this charge component from \$45 to \$50 was not justified. In addition, they expressed concern should the price of the 50 Mbps and 100 Mbps offers converge as this would remove an important opportunity for retail product differentiation.

NBN Co submitted that it expects the average uplift in yield on the 50 Mbps product averaged across all RSPs would be around 1%, and reductions in yield on other speed tiers on a weighted average basis. NBN Co submitted that the commencement of the new pricing arrangements would not materially increase its wholesale yields.⁷³ Access seekers did not however shift their views on this matter in their most recent submissions, with some stating that NBN Co could address these continuing concerns by offering additional transitional support.⁷⁴

Smaller RSPs raised concerns over the level and structure of NNI charges.⁷⁵ The concerns centred around the cost advantage these charges provided to larger RSPs, as it was economic for them to use higher capacity NNIs which resulted in a lower cost per customer. NBN Co responded initially, in the November 2022 SAU variation proposal, with some discounts to its monthly recurring charges for its smallest NNI (1G) and virtual NNI (vNNI) products.

The smaller RSPs welcomed these changes although continued to express concerns about whether they would be effective in overcoming their NNI related costs disadvantages.⁷⁶ In our draft decision on the November 2022 SAU variation proposal, we encouraged NBN Co to further consider its approach. In response, NBN Co made further changes to these charges in the 2023 SAU variation proposal. These included lowering other NNI charges and offering rebates to assist RSPs scale up to larger NNIs (10G), as well as a review of NNI charging in accordance with the varied SAU after the first regulatory cycle.

These further changes were supported by RSPs, although some indicated that the further review should be conducted sooner with a view to either aligning these charges with costs of NNI

70 ACCAN, *Submission re proposed variation to the NBN Co SAU*, 11 September 2023; XIntegration, *Re: NBN Co SAU Variation (August 2023)*, 6 September 2023; Launtel, *Public response to NBN's updated SAU submission to the ACCC dated 16th August*, 12 September 2023; Swoop, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023; Multiwave Networks, *Email re ACCC NBN SAU Consultation Response*, 13 September 2023. Challenger firms made the related point that the floor and ceiling model would also assist in overcoming problems associated with CVC charge waivers as they approached scale in particular areas.

71 Telstra, *Submission to ACCC consultation on proposed variation to the NBN Co SAU*, September 2023; Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023.

72 More Telecom & Tangerine Telecom, *RE: ACCC Consultation Paper (The Consultation Paper) dated August 2023 and the Proposed Variation to the NBN Co Special Access Undertaking (SAU) dated August 2023*, 12 September 2023.

73 NBN Co, *NBN Co SAU variation 2023 – Supporting submission*, 14 August 2023, Appendix B, p 60.

74 AGL Telecommunications and Southern Phone (AGL); *Submission*, 7 September 2023; Swoop, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023; Compete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023; TPG, *Proposed variation to the NBN SAU – public submission*, September 2023.

75 ACCC, *NBN Co Special Access Undertaking – Summary of industry working group outcomes*, December 2021, p 10.

76 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, p 23.

infrastructure, or to safeguard against these charges again becoming a source of material advantage to larger scale RSPs.⁷⁷

Smaller RSPs also expressed concerns over the charges that NBN Co applies when transferring a service to another RSP or reactivating a service. Under WBA4, these charges had previously been reduced from \$22.50 to \$5 per transaction for its fixed line and fixed wireless services. These stakeholders advocated for the charges to be reduced to zero to boost downstream competition.⁷⁸

NBN Co sought to respond to these concerns in its 2023 SAU variation proposal by providing additional certainty around the existing charges and indicating it will implement further reductions on commencement of the variation to charges for satellite reactivation and bulk service transfers that do not require an infrastructure change. Aussie Broadband welcomed these further changes while Compete repeated calls for all transfer related charges to be zero.⁷⁹

From the beginning of the SAU variation process, there was a push by stakeholders for NBN Co to develop product and pricing offers that are suitable for low income customers.⁸⁰ NBN Co proposed a low income forum convened by NBN Co with participation by stakeholders to explore possible initiatives in this regard. While there was quite widespread support expressed for such a forum, stakeholders saw weaknesses in NBN Co's commitments regarding the forum.⁸¹

In their most recent submissions, stakeholders have indicated that the additional specifications provided for the forum are appropriate but have pointed to the potential benefit of the forum being chaired by an independent party.⁸² Stakeholders also reiterated calls for a low income product to be developed as a matter of priority.⁸³

Finally, there was also support amongst stakeholders for new 'low-use' products to be made available ahead of 1 July 2026 when NBN Co's monthly recurring charges also become flat rate offers. These products would be designed and priced to allow consumers that make relatively little use of their NBN service to stay connected without facing significant price increases.⁸⁴

5.4.3 ACCC assessment

In our draft decision on NBN Co's November 2022 SAU variation proposal, we expressed the view that its product and pricing arrangements for the subsequent regulatory period were deficient in a number of ways. We noted that:

- there would be residual cost uncertainty that RSPs would still face when acquiring services for the 50 Mbps wholesale offer during the first regulatory cycle (to June 2026)

77 Compete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023, p. 3; XIntegration, *Re: NBN Co SAU Variation (August 2023)*, 6 September 2023, p 2.

78 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, p 26.

79 Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p. 2; Compete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023, p 4.

80 ACCC, *NBN Co Special Access Undertaking – Summary of industry working group outcomes*, December 2021, p 12.

81 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, p 34.

82 ACCAN, *Submission re proposed variation to the NBN Co SAU*, 11 September 2023, p 2; Telstra, *Submission to ACCC consultation on proposed variation to the NBN Co SAU*, September 2023, p 3; Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 1; Compete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023, p 4.

83 ACCAN, *Submission re proposed variation to the NBN Co SAU*, 11 September 2023, p 2; Telstra, *Submission to ACCC consultation on proposed variation to the NBN Co SAU*, September 2023, p 3.

84 ACCAN, *Submission re proposed variation to the NBN Co SAU*, 11 September 2023; XIntegration, *Re: NBN Co SAU Variation (August 2023)*, 6 September 2023.

- there was no commitment to effectively address the competition concerns that RSPs continued to express over NNI charges
- important specifications for the working of the low income and digital inclusion forum were not specified in the proposal.

We also noted that some other points of detail could be further considered to improve its effectiveness, such as allowing a change in the designation of the entry level offer to take effect more quickly.

We note the 2023 SAU variation proposal contains significant changes that are directed at addressing these concerns. They include:

- adopting the 'floor and ceiling' pricing model for 50 Mbps and below offers, accompanied by lower CVC overage charges and a higher initial CVC inclusion for the 50 Mbps bundled offer
- providing further pricing concessions for NNI charges to commence during 2024 (see above) directed at addressing the cost disadvantages for smaller RSPs created by the existing pricing structure of these charges
- improving certainty over the remit and operation of the low income and digital inclusion forum and the transparency to be given to its views and NBN Co's response to them
- enhancing other features such as additional flexibility for entry level product designations to take effect sooner and reductions in transfer charges.

We consider that with these further changes, the 2023 SAU variation proposal establishes product and pricing commitments that on balance are reasonable and will promote the LTIE. In our view, the varied SAU will offer a suitable degree of access pricing certainty to RSPs in the subsequent regulatory period due to:

- the specification of most NBN Co prices as offers made under the varied SAU rather than as discounts operating outside many of the price controls contained in the SAU as had become standard practice
- the removal of CVC charges from higher speed tier offers soon after the varied SAU commences
- the reduction, phasing down and eventual removal of CVC charges on the lower speed tier bundled offers from the commencement of the second regulatory cycle
- the introduction of the floor and ceiling pricing model for the lower speed tier bundled offers to apply during the first regulatory cycle.

The extra certainty of pricing will boost competition and encourage more efficient use of the NBN. This is because barriers to entry will reduce and RSPs will be better placed to invest in improved retail product offers, with greater certainty over access costs, which are a significant component of their supply costs. The new pricing model will also mitigate the risk of unexpectedly high access costs for individual services and encourage greater efficiency in retailing NBN services.

Similarly, the reforms to NNI charging that allow smaller RSPs to achieve cost outcomes closer to more established rivals will support market entry and expansion. This will promote competition and encourage efficient use of, and investment in, infrastructure.

NBN Co introducing a low income product and consulting on and responding to other matters of concern to low income and other disadvantaged groups, as a result of the introduction of the low income and digital inclusion forum, would also contribute to these outcomes. We do however strongly encourage NBN Co to delegate its role as chair of the forum to an independent person. This will help demonstrate that all participants will have reasonable opportunity to nominate matters within the forum's remit to be discussed at meetings and present their views.

Consistent with our position for the draft decision on the November 2022 SAU variation proposal, we consider the increase in the bundled charge component for the 50 Mbps product is justified. This is because it will enable NBN Co a reasonable opportunity to recover its efficient costs, encourage efficient investment in the NBN and otherwise promote its legitimate business interests.

We also note that the increase in this price component will occur in conjunction with lower CVC overage charges, a higher opening CVC inclusion and the floor and ceiling pricing model, which will serve to temper the impact of the increase and provide for greater price certainty. In addition, there are price reductions for other products, notably the higher speed offers and basic (voice) bundled offer, along with reductions in the CVC overage charge payable on the entry level bundled offers.

We note that NBN Co has not made a formal commitment in the 2023 SAU variation proposal (or its commercial offer) to introduce a cheaper offer to support low use consumers when the remaining bundled offers transition to flat rate offers. However, we consider that NBN Co will likely have a commercial incentive to introduce such wholesale offers to retain customers on its network. This likelihood would likely increase with the degree of competitive pressure NBN Co anticipates it is likely to face in this segment of the market from wireless networks.

We expect that demands from the SAU's product development forum and the variation's low income and digital inclusion forum would also help to drive this. We further note that under the terms of the SAU variation we would have the power to review the pricing of this low use product for up to 2 years from introduction (see next section).

On service transfer charges, we note that a maximum price will be established for individual service transfers of \$5 per transfer, which is in line with current commercial rates (previously \$22.50 per transfer and not included in the SAU).⁸⁵ There is also provision from the price transition date to incorporate into the SAU pricing lower charges for mass service transfer charges from \$5.00 to \$1.50 per service transfer.⁸⁶

We consider that transfer charges of these levels are suitable at this time to help NBN Co recover the costs of managing higher cost manual transfers in some cases that would be hard to for RSPs and customers to bear individually. They also mitigate the risk of potentially inefficient transfer behaviour. At these levels we consider they are reasonable for RSPs to pay and are unlikely to impede competition. Relevantly, we note that smaller RSPs have been relatively successful in increasing market share in recent years with the \$5 individual service transfer fees in place.

The prospective setting of maximum prices under the varied SAU for enhanced service charges and satellite access reactivation fees is also expected to contribute positively to competition outcomes due to the increased certainty this provides. The maximum prices are in line with commercial offers that have recently reduced in price.

We note that most RSPs have expressed a clear preference for the new price arrangements to come into effect as soon as practicable, although a stakeholder raised concerns about the impact of moving too quickly could have on resellers. In this regard, although the SAU variation would allow NBN Co with flexibility to implement the new pricing within the next 4 months, it is likely that it will exercise this discretion to commence pricing on 1 December given the strong representations of support that it has received to do so.

We acknowledge that RSPs that prefer resale models or do not have the scale to directly interconnect with NBN Co could potentially be placed at a temporary disadvantage. This would be the case if their supply arrangements unreasonably prevented them from moving to more advantageous pricing arrangements at around the same time that these becomes available to other RSPs.

85 NBN Co, *August 2023 SAU variation*, Attachment E, table 8.2 and ACCC, *ACCC inquiry into NBN access pricing, Discussion paper*, October 2019, p 30.

86 NBN Co, *August 2023 SAU variation*, Module 2, Attachment E, table 8.2 and NBN Co, *Indicative 3 Year SAU Pricing Roadmap*, August 2023, table 9.8.

In our view however, these potential effects would be short lived and not of a significant scale, as:

- NBN Co and RSPs are actively engaged in onboarding to the new billing and other data reporting that the new pricing model will require to work efficiently, including NBN Co confirming to RSPs that it will commence distribution of AVC utilisation reports from early October 2023.
- NBN Co and wholesalers have appropriate incentives to efficiently implement the new pricing arrangements, and there is no obvious reason why these could not be put in place in time for a 1 December 2023 commencement.
- the price reductions that would accrue on commencement are effectively offset against a higher bundle charge for the 50 Mbps speed tier and other changes that increase yield somewhat. This yield increase tempers the scale of any cost benefit that flows in the near term to RSPs that can immediately access the changed pricing.

We note the transitional funding arrangements that are offered commercially by NBN Co outside the SAU framework. The first component of these arrangements is intended to part compensate for higher access costs that have resulted from the delay in any change to the CVC inclusions in the face of continued growth in demand. The second is a co-investment fund to assist RSPs meet the costs they would incur in updating their systems for the new operating environment that the SAU variation will require.

We consider that commercial measures such as these can lead to more efficient outcomes where they are at a level that can protect against inefficient (high) retail pricing and provide suitable incentives to both NBN Co and RSPs to achieve efficient, least cost implementation of system changes.

5.5 Price control and transparency measures

Key points

- Further, the price control and transparency measures will promote retail market competition and encourage efficient use of, and investment in the NBN, due to the greater certainty that these provide over future pricing, and greater alignment of permitted price changes with efficient costs over time.
- We consider that the price control and transparency measures have regard for NBN Co's legitimate business interests as well as the interests of persons with rights to use the NBN.
- The price control and transparency measures will also promote retail market competition and encourage efficient use of, and investment in the NBN, due to the greater certainty that these provide over future pricing, and greater alignment of permitted price changes with movements in efficient costs over time.
- We have considered RSP concerns about potential disruption arising from the 2 price reviews in the initial year of the varied SAU but have reached the view that any disruption would likely be manageable, while forgoing one or other of the planned price reviews would also have implications for efficiency.
- Consequently, we consider that on balance the price control and transparency measures to apply under the varied SAU are reasonable and will promote the LTIE.

5.5.1 Overview of NBN Co's proposal

The 2023 SAU variation proposal provides for new price cap arrangements in the subsequent regulatory period. These include an overall Weighted Average Price Cap (WAPC)⁸⁷ and price caps for individual wholesale products or product combinations which will cover the vast majority of NBN Co's products and pricing offers. The individual product price caps include a CPI cap for the designated entry level product and the higher of CPI or 5% for other residential grade products.⁸⁸

The ACCC will designate a wholesale offer as the entry level product for each relevant NBN network ahead of each regulatory cycle during the subsequent regulatory period (other than the first regulatory cycle).⁸⁹ NBN Co has designated the 25/5 Mbps speed tier as the entry level product for the first regulatory cycle.⁹⁰

For so long as annual revenue recovery is below the ABBRR, the annual increase in weighted average prices permitted by the WAPC is set at the annual increase in the CPI.⁹¹ Once the ABBRR is achieved for a financial year, the annual WAPC will be determined by reference to a CPI-X formula.⁹² An annual ICRA drawdown amount will be included in the annual regulated revenue allowance from this time, along with BBM costs.

Notably, the X in the CPI-X formula could be negative (i.e., so the formula becomes CPI+X) and so real price increases could be possible if required to recover the annual revenue allowance, including the annual ICRA drawdown amount. Although, protections are provided against an ICRA drawdown amount being so significant as to cause a price shock (discussed in section 5.2 above).

As discussed in section 5.4 above, CVC overage charges for residential grade products are to be phased out over the first regulatory cycle and set at \$0 for 2026–27 onwards.⁹³ The required price reductions for CVC overage can be offset commensurately by rises in the price of the bundle of AVC and CVC charges under the WAPC and the individual price caps. This is because the individual price caps and the WAPC will be applied to an average combined charge (a combination of the AVC or bundle charge and the CVC overage charges) for each product group on a weighted average basis across RSPs, rather than separately to each of the AVC bundled charge and the CVC overcharge charge.⁹⁴

The proposed WAPC and the individual price caps for the subsequent regulatory period apply on a 'use-it-or lose it' basis that does not permit unutilised historical allowable price increases to be carried over from one year to the next (i.e., the WAPC and individual price caps provide for price increases to prior year actual prices, not prior year maximum allowable prices). This approach also applies between regulatory cycles such that no-catch up in prices to meet a forecast revenue allowance for a previous regulatory cycle is permitted.

Product additions and withdrawals are to be accounted for in the WAPC although there will be a short delay for new products being added. NBN Co advises that new products that were introduced in the period from 1 April to the following 31 March will be included in the WAPC for the following financial year.⁹⁵ We understand that that this is so that actual product quantity data are available for weighting the prices of the products for that year.

87 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.2.

88 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2E.2.

89 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.5, Schedule 2B.4.

90 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A.5.

91 The relevant CPI figure for a given financial year is for the 12 months ending on 31 December prior to the start of the financial year.

92 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.2.3, 2D.2.4.

93 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2E.2.2(d).

94 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2F.4.

95 NBN Co, *Special Access Undertaking Variation 2022 – Supporting submission*, Part B: Pricing and price controls, November 2022, p 20.

That said, replaced products will have their demand assigned to the successor product, subject to approval of the ACCC.⁹⁶ These rules help to drive accuracy in the calculation of effective price movements and discourage the inefficient churn of product offers (e.g., to circumvent the price controls on increasing prices for the existing product set).

The varied SAU also includes transparency measures intended to increase pricing certainty in addition to the requirements for pricing changes to conform with the price controls.

During the subsequent regulatory period, NBN Co is to have regard to the specified pricing principles in setting new prices or changing prices.⁹⁷ It will also publish an up-front statement of pricing intent for each regulatory cycle outlining its financial objectives; the pricing strategies it intends to adopt; any intended changes to its price structures; and areas of likely product innovation and development that are expected to influence price changes. The statement of pricing intent can only be varied in limited circumstances and after consultation.⁹⁸

In the subsequent regulatory period, NBN Co must also publish a binding tariff list by 1 May each year for the forthcoming financial year and a pricing roadmap of prices for that and the subsequent 2 financial years.⁹⁹ The published prices are required to be consistent with the statement of pricing intent for the regulatory cycle.¹⁰⁰

Tariff list prices for individual products for a financial year can differ from those specified in the pricing roadmap that had previously been published for that year, subject to price relativities remaining within \$1 of those in the roadmap.¹⁰¹

Discounts are not counted for the purposes of WAPC and individual price cap compliance. This means that changes in the nature or scope of any targeted discounts (such as for certain speed tiers or service locations) would not change the degree of pricing discretion that NBN Co would have when pricing its offers more generally. There are also powers for the ACCC to review discount offers (and NBN Co's pricing conduct more generally) where it offers a significant volume of services under temporary discounts or pricing materially departs from the published statement of pricing intent.¹⁰²

The varied SAU includes a commitment to limit the value of core service product discounts on an annual basis such that NBN Co's otherwise undiscounted revenue is no more than 5% above its discounted revenue. Some discounts, such as for low income offers, would be excluded from this calculation. Should NBN Co exceed the threshold, it would need to convert the amount exceeding the threshold to permanent price reductions in the subsequent year.¹⁰³ There are also minimum notice periods specified for the withdrawal of discounts and a requirement that NBN Co only withdraw discounts in accordance with the terms announced on their introduction.¹⁰⁴

NBN Co gave some insight into its likely pricing in the material that it lodged in support of its 2023 SAU variation proposal. In this regard, NBN Co has supplied an indicative pricing roadmap and forecast compliance with the WAPC over the first regulatory cycle. The varied SAU itself requires NBN Co to issue the finalised statement of pricing intent and pricing roadmap at least one month prior to the varied SAU pricing taking effect.¹⁰⁵

96 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.3.

97 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.2.1.

98 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.2.2.

99 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.2.3, 2B.2.4.

100 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.2.3(b)(iv), 2B.2.4(c)(iii).

101 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2C.2.

102 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2C.4.

103 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2C.4.

104 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2C.3.

105 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2B.2.5(b).

The varied SAU will continue to confer discrete powers on the ACCC in the subsequent regulatory period to support the regulatory product and pricing controls remaining fit for purpose over time. These include a power to object to prices of new products for up to 2 years from introduction¹⁰⁶ and to object to the withdrawal of products.¹⁰⁷

In the post-2032 period, the varied SAU provides that maximum prices and other price certainty measures can be specified in the replacement module determination that the ACCC makes for a regulatory cycle.¹⁰⁸ That is, there is no requirement that the price control elements specified for the subsequent regulatory period, i.e., Module 2, must carry over into the post-2032 regulatory period under the terms of such a determination.

That said, the ACCC's ability to determine price controls in the post-2032 regulatory period would be subject to the framework and high-level principles established under Module 3 of the varied SAU.

5.5.2 Stakeholder views

Early in the SAU variation process stakeholders expressed support for price changes to be governed by a WAPC and individual controls on key product prices.¹⁰⁹

In its March 2022 SAU variation proposal, NBN Co proposed a revenue cap and individual product price controls, with provision for a possible transition to a WAPC at a later stage. NBN Co subsequently developed, for its November 2022 SAU variation proposal, price control arrangements consisting of a WAPC and individual product price controls, which the 2023 SAU variation proposal has maintained.

In responding to the price control arrangements developed for the November 2022 SAU variation proposal, stakeholders submitted that the specified maximum price movements of CPI, or the higher of CPI and 5%, depending on the control, were too generous.¹¹⁰ Stakeholders repeated these concerns in recent submissions, including on the basis that NBN Co's costs would not increase in line with CPI.¹¹¹ However, there was some support for this rate of price change being built into a longer term price path on the basis that it would provide NBN Co with confidence to make efficient investments in its network and services.¹¹² In a similar vein, it was noted that, with a long term price path locked into the SAU variation, RSP and consumers will expect there to be commensurate increases in service quality and value.¹¹³

Telstra and Optus raised concern over the complexity of the WAPC and other price control specifications, which made it difficult to reach a view, in advance, on their appropriateness and to reliably forecast the values they would generate for a given period.¹¹⁴ Optus continued to advocate for a fully binding 3-year pricing roadmap to provide for pricing certainty.¹¹⁵

As the finalisation date for the varied SAU extended beyond the middle of 2023, stakeholders began to express concerns about the timing of the first price review in 2024. Some stakeholders were

106 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2F.5 and Attachment C (definition of Resetting Regulatory Determination).

107 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2H.6.3.

108 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.10.

109 ACCC, *NBN Co Special Access Undertaking – Summary of industry working group outcomes*, December 2021, p 11.

110 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, p 42.

111 Ozot, *Submission in response to NBN Co Special Access Undertaking - SAU variation Aug 2023*, 11 September 2023; More Telecom & Tangerine Telecom, *RE: ACCC Consultation Paper (The Consultation Paper) dated August 2023 and the Proposed Variation to the NBN Co Special Access Undertaking (SAU) dated August 2023*, 12 September 2023.

112 XIntegration, *Re: NBN Co SAU Variation (August 2023)*, 6 September 2023.

113 Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023.

114 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, p 42.

115 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, p 19.

concerned that this review fell relatively soon following the initial price changes occurring after acceptance of an SAU variation.¹¹⁶ This concern was reiterated in the most recent submissions received from a variety of RSPs.¹¹⁷

5.5.3 ACCC assessment

We note that the price control and transparency provisions under the 2023 SAU variation proposal are almost identical to those under the November 2022 SAU variation proposal.

In our draft decision on the November 2022 SAU variation proposal, we stated that we considered that these arrangements struck an appropriate balance between giving flexibility to price efficiently in the wholesale market and providing the degree of cost certainty that RSPs 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 extend the period required for NBN Co to reach efficient cost recovery.

We also encouraged NBN Co to publish more of the material up-front to allow stakeholders to better assess the operation of the price controls and to aid us in making a final decision on the proposal. NBN Co subsequently did this in submitting the 2023 SAU variation proposal, which we note also helps to provide an early indication of the expected prices over the first regulatory cycle that will conclude on 30 June 2026.

Consistent with our earlier findings, and subsequent developments noted above, we remain of the view that these price control and transparency arrangements are reasonable. We consider these arrangements will provide a suitable balance between providing the opportunity for NBN Co to recover its efficient costs and offering sufficient cost certainty to RSPs to plan for price changes.

By way of elaboration, the WAPC provides a path for NBN Co to reach a position of recovery of annual efficient costs, while ensuring that average wholesale prices cannot exceed the annual increase in the CPI.¹¹⁸ In this regard, the WAPC will initially increase at CPI to allow NBN Co's revenues to catch up to its efficient costs over time. We do not consider that NBN Co's efficient costs would increase in line with CPI.

In the interests of economic efficiency, NBN Co is also afforded flexibility under this cap to adjust individual product prices in response to market conditions, subject to the constraints of the applicable individual product safeguard caps. Further pricing certainty for RSPs is provided via the forward-looking statement of pricing intent and pricing roadmap.

We consider the price cap measures as designed appropriately balance the opportunity for NBN Co to recover its efficient costs with an appropriate degree of pricing certainty. In doing so, it has regard for NBN Co's legitimate commercial interests and is likely to promote retail market competition and encourage efficient use of the NBN.

The ACCC powers to object to prices of new products for up to 2 years from introduction, and the withdrawal of products, will enable the ACCC to help safeguard against changes that don't provide for, or serve to undermine, customer choice, competition, and efficient use of the network.

116 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, p 26.

117 AGL, *Submission*, 7 September 2023; Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023; More Telecom & Tangerine Telecom, *RE: ACCC Consultation Paper (The Consultation Paper) dated August 2023 and the Proposed Variation to the NBN Co Special Access Undertaking (SAU) dated August 2023*, 12 September 2023; Telstra, *Submission to ACCC consultation on proposed variation to the NBN Co SAU*, September 2023; TPG, *Proposed variation to the NBN SAU*, September 2023.

118 The CPI value to be used is the annual change in CPI up to 31 December prior to the commencement of the relevant financial year. This is the most recent CPI value that will be available ahead of the tariff list for that financial year being finalised.

We have considered stakeholder views on the timing of the first price review against a few discrete considerations. First, there are some price decreases as well as increases that will occur shortly after commencement of the varied SAU. These price decreases are for higher bandwidth offers, the entry level product and the basic broadband offer, and are intended to encourage more efficient use of the NBN.

Second, on an average basis, prices for the core services do not increase to any significant degree on commencement, making the changes that will occur at the first price review date the first overall average price rise.¹¹⁹ We do, however acknowledge, that the impact could differ between RSPs depending on their product mix.

Lastly, there will likely be disadvantages of either forgoing the initial price changes or the first price review date so that there was only a single price review. These are that this could impede efficient pricing aimed at optimising the use of the NBN and delay NBN Co's achievement of annual cost recovery.

5.6 Expenditure assessment framework

Key points

- The 2023 SAU variation proposal introduces fundamental reforms to how the ACCC will assess the prudence and efficiency of expenditure, including that the ACCC will anchor these assessments to clear expenditure objectives and factors.
- In addition, the 2023 SAU variation proposal commits NBN Co to consult with RSPs and consumer advocates over its proposed expenditures prior to submitting a reset proposal, and includes measures that provide transparency over expenditures that it incurs at the direction of government.
- These reforms will strengthen NBN Co's incentives to invest and operate in a prudent and efficient manner, and lead to outcomes that promote the LTIE.
- The varied SAU will result in NBN Co improving its record keeping, information systems and business planning so that it can demonstrate the prudence and efficiency of its expenditures. This stems from the potential for expenditures to be disallowed when setting regulatory allowances if they are not efficient or prudent, as well as from the conferral of additional powers on the ACCC to require NBN Co to supply information.
- We intend to exercise our powers under the varied SAU with a view to facilitating consumer advocates and other stakeholders participating more effectively in consultation and regulatory processes as their resources allow.
- Given the importance of consumer views to inform expenditure decisions that NBN Co makes, as well as our regulatory assessments of them, we support the consumer advocacy body being resourced to perform this role.

¹¹⁹ NBN Co expects to achieve average TC-4 revenue per-user of \$48.17 in 2023–24 which is close to that of \$48.10 for 2022–23. See NBN Co, *NBN SAU Variation 2023 – Supporting submission*, 14 August 2023, p 34.

5.6.1 Overview of NBN Co's proposal

Reforms to encourage prudent and efficient expenditure

The 2023 SAU variation proposal incorporates important reforms that have the objective of strengthening NBN Co's incentives to invest and operate in a prudent and efficient manner. These include:

- a new test for assessing whether expenditure is prudent and efficient that is informed by specified expenditure objectives and expenditure factors
- more stringent guidance for forecasting demand given the role that these forecasts play in driving expenditures and the risks that biased forecasts pose to cost recovery and pricing outcomes
- new processes to assess whether forecast expenditure, and actual capital expenditure, is prudent and efficient
- new obligations to consult stakeholders ahead of lodging a reset proposal, including on proposed expenditures to be included in a BBM proposal
- measures to provide transparency over expenditures that NBN Co incurs when acting on a specific direction from government along with any accompanying funding that government provides
- a new process to adjust the regulatory allowances during a regulatory period via cost pass through applications for dealing with material developments that could not have been reasonably anticipated.

These are in addition to other important reforms that we discuss elsewhere, including the closing of the ICRA to new losses and the adoption of a WAPC as opposed to a revenue cap, as the principal form of regulatory control, which also have the objective of promoting prudent and efficient expenditure.

Some of these reforms had been contemplated by the 2013 SAU, such as the transition to more rigorous and forward-looking assessments of NBN Co's expenditures following the conclusion of the initial regulatory period.

Tests for prudence and efficiency

Under NBN Co's 2023 SAU variation, the terms prudence and efficiency are not themselves defined, which allows for them to be interpreted in the same manner as they have been in similar regulatory regimes.

That said, the SAU variation does specify expenditure objectives, which the ACCC must apply in deciding whether a network operator in NBN Co's position will prudently and efficiently incur expenditure. These objectives include meeting expected demand, complying with regulatory requirements, delivering projects that government has formally notified, and meeting the prevailing service standards.¹²⁰ Unless the expenditure has sufficient connection to one or more of these objectives, it will likely not be prudent and efficient for NBN Co to incur the expenditure.

In forecasting the prudent and efficient expenditure that an operator in NBN Co's position would incur in achieving the expenditure objectives, the ACCC must have regard to the expenditure factors, which include: historical levels of expenditure, expected end-user willingness to pay, whether RSPs and consumer advocates support the expenditure occurring, current or expected market conditions, whether NBN Co's procurement, governance frameworks and asset management frameworks reflect generally accepted industry practice, NBN Co's ability to finance the expenditure, and substitution

¹²⁰ NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.5(c).

possibilities between operating and capital expenditures. Other matters can also be considered to the extent these are relevant.¹²¹

The expenditure objectives and expenditure factors have developed over the course of our consultation on NBN Co's SAU variation proposals. Most notably, the expenditure factors concerning expected end-user willingness to pay replaced an earlier proposal for this to be a simple reference to end-user demand for NBN Co's products and services.

Demand forecasting requirements

The ACCC will be required to use an appropriate methodology and take account of specific matters when assessing the demand forecasts that are relevant to NBN Co's forecast expenditures in making a reset determination.¹²² These include that demand forecasts are based on reasonable assumptions about key demand drivers, use the best available information, and take account of current demand and economic conditions.¹²³

NBN Co introduced these specific measures to respond to stakeholder concerns raised in respect of its March 2022 SAU variation proposal that the SAU should do more to militate against the significant risk that unreasonable demand forecasts will pose to the price and quality of access to the NBN.

In this regard, a regulated business that consistently underestimated demand would likely deliver poor service quality to customers, while materially overestimating demand could prevent the business from recovering its sunk capital costs without risking inefficiently high prices.

Stakeholder consultation

The 2023 SAU variation will introduce a new obligation for NBN Co to consult with access seekers and consumer advocacy groups on the relevant capital and operating expenditure that NBN Co proposes to undertake in an upcoming regulatory cycle. This is to occur prior to NBN Co submitting a replacement module application for the regulatory cycle.¹²⁴

The varied SAU will also require that the replacement module application include a statement of stakeholder views and how they have been considered.¹²⁵ Further, as noted above, the extent to which RSPs and consumer advocates support the expenditure occurring is an expenditure factor to which the ACCC must have regard in assessing expenditures for prudence and efficiency.¹²⁶

Expenditure incurred to meet regulatory requirements

The varied SAU will continue to require that expenditures be assessed having regard to NBN Co's regulatory requirements, with this comprising one of the expenditure objectives.

The 2023 SAU variation proposal defines any regulatory requirement to mean a legal or regulatory obligation or requirement (including those arising from an administrative act or decision) to the extent that it materially affects, or is reasonably anticipated to materially affect, the supply of products or services by NBN Co.¹²⁷

121 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.5(d).

122 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.5(b). These same requirements apply when NBN Co is forecasting the average combined charges when it sets the tariff list for a financial year, which will be necessary during the first regulatory cycle while CVC charges remain.

123 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.5(b).

124 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.7.

125 NBN Co, *August 2023 SAU Variation*, Main Body, clause 5.7.

126 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.5.

127 NBN Co, *August 2023 SAU variation*, Main body, Attachment C definition of Regulatory Requirement.

Importantly, this definition was narrowed over the course of our consultation on NBN Co's previous SAU variations to remove reference to acting in accordance with general government policy. Consequently, expenditures will no longer be treated as prudent and efficient only because they relate to achieving government policy statements that were not legally binding on NBN Co, such as a statement of the government's expectations.

Expenditure incurred to deliver government-directed projects

The 2023 SAU variation proposal requires the ACCC to have regard to any government policy project notice that was in effect during the subsequent regulatory period.¹²⁸ In summary, this is a formal notice given by the Communications Minister to NBN Co and published on the website of the relevant Department.¹²⁹ NBN Co is also required to promptly notify the ACCC of any such notice or variation that it receives.¹³⁰

The notice will identify a project that the Minister has determined necessary to achieve Commonwealth Government policy. In addition to specifying the project and any mandatory aspects,¹³¹ the Notice will also describe how the project is to be funded, and any reporting obligations concerning the project, and can specify a maximum amount that the ACCC can include when setting NBN Co's regulatory allowances.¹³²

The giving of such a notice changes how the ACCC is to assess some of the expenditures associated with the relevant project when making a replacement module determination¹³³ or when determining a cost pass through application that the notice may bring forward.¹³⁴

In this respect, the ACCC must treat the expenditures associated with elements of the project that are specified in the notice as prudently incurred. This is a more limited deeming provision than originally specified in the March 2022 SAU variation proposal, where all expenditures incurred in respect of the project would be taken to be prudently incurred. For instance, the ACCC will not be required to treat expenditures that are attributable to service capabilities or design choices that are not specified in the notice as prudent. The ACCC will assess whether these are prudent in the usual manner.¹³⁵ All expenditures that are incurred in respect of a government policy project notice will still be assessed as to whether they are efficient.

Lastly, the 2023 SAU variation proposal confers a power on the ACCC for the subsequent regulatory period to cap the value of expenditures incurred in respect of a government policy project notice that are to be recognised for regulatory purposes. Such a cap can be set at the level that is specified on the face of the notice.¹³⁶ As this is a cap, the actual allowance could be set lower, if this is appropriate, after applying the modified prudence and efficiency test.

This aspect of the variation proposal introduces a transparent process by which the Government can direct NBN Co to invest and the ACCC can have regard to that direction when assessing the relevant expenditure. In conjunction with the change discussed above to the definition of regulatory requirement, this will allow for additional scrutiny of these expenditures as the ACCC sets NBN Co's regulatory allowances. The notices also allow government an opportunity to make clear its expectations for how the project will be funded, including the extent to which the expenditures

128 In this regard, one of the expenditure objectives is implementing a project or program the subject of such a notice. See NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.2.5(c).

129 NBN Co, *August 2023 SAU variation*, Main body, Attachment C definition of Government Policy Project Notice.

130 NBN Co, *August 2023 SAU variation*, Main Body, clause 6.5.

131 For instance, a technology or other design choice to be made in implementing the project.

132 NBN Co, *August 2023 SAU variation*, Main body, Attachment C definition of Government Policy Project Notice.

133 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.5.10.

134 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.4.

135 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.9 and Schedule 2G.

136 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.9(c)(ii).

could be considered for regulatory purposes, and the way NBN Co should report on its delivery of the project.

Expenditure assessment processes

During the subsequent regulatory period (other than the first regulatory cycle of that period) the 2023 SAU variation proposal provides for the ACCC to assess NBN Co's expenditure:

- when considering expenditure forecasts and setting regulatory allowances in making a reset determination
- when considering how actual capital expenditures that have been or are likely to be incurred within a regulatory cycle are to be included in calculating the opening RAB for the next regulatory cycle in making a replacement module determination for that next regulatory cycle
- in considering a cost pass through application.

We discuss the reset process in section 4 and the basis on which the forecast expenditures flow into regulatory allowances in section 5.3.

The varied SAU will introduce additional rules and processes for reviewing NBN Co's actual capital expenditures during the subsequent regulatory period. This review will occur towards the end of the then current regulatory cycle. The purpose of the review is to determine whether the expenditure in that regulatory cycle was (or is likely to be) incurred prudently and efficiently in achieving the expenditure objectives. The ACCC will then roll into the RAB the expenditure it determines to be prudent and efficient in making its reset determination for the next regulatory cycle.¹³⁷

The ACCC is to base such a determination on circumstances existing at the time that the relevant expenditure was incurred, as well as the information and analysis that an operator in NBN Co's position could be reasonably expected to have considered or undertaken at that time.¹³⁸ This is so the regulatory framework does not act to discourage NBN Co from making all reasonable inquiries to obtain and consider relevant information and analysis that was reasonably available when incurring the expenditure. It also safeguards against hindsight distorting an ACCC determination.

In relation to the post-2032 regulatory period, a less prescriptive set of considerations are set out in Module 3 of the varied SAU. These are discussed at section 4.3.

Cost pass throughs

The 2023 SAU variation proposal introduces the potential for a reset determination to be adjusted during a regulatory cycle in the subsequent regulatory period to pass through certain costs via the regulatory allowances.¹³⁹ These are costs that could not reasonably have been anticipated during the reset process. They include costs arising from a government policy project notice or change in regulatory requirement, a change in wholesale service standards arising either from an ACCC service standards determination or a change in retail regulation, or a natural disaster.¹⁴⁰

¹³⁷ NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.5.10.

¹³⁸ NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.5.10(e)(iv). This restriction on information and analysis that can be considered does not prevent the consideration of current information when assessing capital expenditure that has been forecast but not yet incurred.

¹³⁹ NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.2.4 for an overview of these and 2D.2.5 for how the change to the weighted average price cap due to the acceptance of a cost pass through amount is to be calculated.

¹⁴⁰ See NBN Co, *August 2023 SAU variation*, Attachment C definition of Cost Pass Through Event for a complete listing of matters that can found a cost pass through application.

NBN Co has the option as to whether it makes a cost pass through application unless the cost pass through would reduce its regulatory allowances, in which case it must make the application. Applications are to be made within 90 days of the relevant event unless this timeframe is extended.¹⁴¹

The ACCC may issue a determination specifying the cost pass through amount having regard to the efficiency of NBN Co's actions in responding to the relevant event, amongst other matters. The cost pass through amount relating to a government policy project notice can be capped consistent with the amounts specified in the notice. Unless a determination is made within the specified time limits, which can be extended, the cost pass through amount proposed by NBN Co in its notice will apply to cost increases and a zero adjustment will apply to cost decreases.¹⁴²

The cost pass through determination in respect of a proposed change to a benchmark service standard is subject to NBN Co advising that it will proceed with the relevant proposal.¹⁴³ Cost pass throughs relating to changes in benchmark service standards are discussed further in section 5.10.

The opportunity to apply for a cost pass through is subject to a materiality threshold, which is to discourage applications involving relatively small amounts that NBN Co could manage within its approved regulatory allowances. Over the course of consulting on NBN Co's previous SAU variations the materiality threshold was increased from 0.25% to 1% of core services ABBRR for a financial year.¹⁴⁴

Information, systems and processes to support expenditure assessment

Importantly, the 2023 SAU variation proposal confers additional powers on the ACCC to require NBN Co to supply information and documentation relating to matters arising under the varied SAU. These powers provide assurance that the ACCC will have the information needed to make reasonable decisions in respect of NBN Co's forecast and actual expenditures.

One such power allows the ACCC to specify the materials to be provided in support of a replacement module application, while another enables the ACCC to request the supply of information and documents that it considers reasonably necessary for it to perform or exercise the functions and powers conferred on it under the varied SAU.¹⁴⁵

In section 5.7, we discuss in detail the expenditure report that Grex Consulting provided at our request on NBN Co's forecast expenditures for the first regulatory cycle in the November 2022 SAU variation proposal. As part of this work, we instructed Grex Consulting to report its findings and recommendations on the types of information that should be provided to support future expenditure reviews. We also sought Grex Consulting's views on any changes that NBN Co should make to its information systems and business planning processes so that the necessary information could be readily supplied periodically or on request.

Grex Consulting has now provided its final report that includes these findings and recommendations.¹⁴⁶ In summary, Grex Consulting:

- found that NBN Co could not supply all the information that was reasonably required to make conclusive and unqualified findings on the prudence and efficiency of significant cost categories to be incurred in the first regulatory cycle, including business cases for significant capital expenditures to which it had committed funds

141 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.5 – an event that results in a reduction in regulatory allowances is termed a 'negative change event'.

142 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.5.4.

143 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.6.

144 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2D.4.2; for example the forecast Core Services ABBRR is around \$7.7b for FY24, resulting in a cost pass through threshold of \$77m for that year.

145 NBN Co, *August 2023 SAU variation*, Module 0, clauses 5.2(c)(ii) and 6.3.

146 Grex Consulting, *Independent Expert Report nbn SAU Variation Expenditure*, September 2023.

- recommended that NBN Co should further develop a consistent, tangible, documented process for its expenditure decisions that will enable the ACCC to assess in future reset processes whether the expenditure proposal would result in the lowest cost to consumers over the long term commensurate with the anticipated benefits
- recommended that NBN Co keep records and provide periodic reports that track expenditures and associated benefits, as well as any risks/mitigations including refinements in approach as contingencies arise.

We note that the 2023 SAU variation proposal confers powers on the ACCC that can be exercised to require NBN Co to improve its record keeping and reporting in line with the recommendations that Grex Consulting has made. We consider that the Grex Consulting report provides a sound conceptual basis to assist the ACCC in exercising these powers in this way.

5.6.2 Stakeholder feedback

We received most of the submissions that are relevant to the expenditure assessment rules and processes when consulting on earlier SAU variation proposals. The 2023 SAU variation proposal essentially retained the same rules and processes that had been contained in these earlier proposals. Submissions largely focussed on the theme of minimising the risk of consumers paying higher prices because NBN Co incurred costs that are not prudent and efficient.

Stakeholders shared our concern that the ACCC could be deemed to have made a replacement module determination that incorporated the forecast expenditures contained in NBN Co's replacement module application. Stakeholders were also concerned that the varied SAU may not be effective in driving bona fide consultation over the expenditure proposals before they are finalised and lodged, with submissions noting that stakeholders have not been consulted up to this point on significant capital programs.

Stakeholders noted that the submitted forecasts may not be reasonably based if they do not result from rigorous internal planning processes and the varied SAU did not arm the ACCC to undertake detailed expenditure assessments. In this regard, stakeholders submitted that the varied SAU should include firm commitments from NBN Co to prepare and share business cases that explain the prudence and efficiency of the significant capital expenditure or other cost programs that it proposes for the upcoming regulatory cycle.

In response to these concerns, NBN Co submitted that the varied SAU includes appropriate incentives to put forward business cases or similar cost/benefit analysis with an appropriate level of detail. NBN Co noted that, if it did not appropriately justify its proposed expenditures for an upcoming regulatory cycle, then it faced the prospect that its regulatory allowances would not allow it to recover the associated costs and/or earn a full return on capital. NBN Co did not however consider it appropriate for the varied SAU to itself require the production (or prescribe the form) of such analysis.

We received 2 further submissions relevant to expenditure assessment when consulting on the 2023 SAU variation proposal. The first of these was received from ACCAN, and requests that the ACCC and NBN Co consider the resourcing required to provide the long-term sustainability of consumer representation and engagement with NBN Co's proposed expenditures.¹⁴⁷

The second submission from Aussie Broadband noted the potential for forecasting risk to ultimately be borne by consumers if appropriate controls are not applied.¹⁴⁸ Aussie Broadband pointed to a scenario in which NBN Co failed to meet its forecast demand targets, and then looked to recover its sunk costs and ICRA balance from a smaller pool of consumers.

¹⁴⁷ ACCAN, *Submission re proposed variation to the NBN Co SAU*, 11 September 2023, p 3.

¹⁴⁸ Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

Aussie Broadband also submitted that it was satisfied that the ACCC would be conferred with sufficient powers to specify information and documents required for future expenditure reviews and that this was a suitable approach to addressing its previous concern that necessary information would be withheld if the varied SAU itself did not require its production.

5.6.3 ACCC assessment

The 2023 SAU variation proposal incorporates important reforms to the expenditure rules and processes. These include significant changes to how the ACCC will assess prudence and efficiency during the subsequent regulatory period, including that we will anchor the assessment to the specified expenditure objectives and factors. This is a material improvement to the focus on consistency with procurement rules under the 2013 SAU.

In addition, NBN Co is committing to consult with RSPs and consumer advocates over its proposed expenditures, and has also included measures to give appropriate transparency over spending that results from a government direction and how this will be funded.

We consider these fundamental changes will strengthen NBN Co's incentives to act prudently and efficiently, as well as assist the ACCC to identify instances where this may not have occurred. This in turn will encourage the efficient use of, and investment in, NBN infrastructure and lead to better price and quality outcomes for end-users that are in line with their long-term interests. It recognises the legitimate interests of NBN Co in having a reasonable opportunity to recover its prudently- and efficiently-incurred costs.

We also consider that the 2023 SAU variation proposal responds appropriately to the concerns that stakeholders have expressed regarding the level of consultation and justification that NBN Co has provided on its proposed expenditures to date.

In this respect, we note that NBN Co will now be required to consult stakeholders on its proposed expenditures and provide a statement of their views and how NBN has considered those views, when submitting a replacement module application. In addition, whether RSPs and consumer advocates support an expenditure proposal will become a factor that the ACCC is required to consider in its expenditure assessments when making a replacement module determination. We consider that this approach will lead to NBN Co engaging constructively during pre-lodgement consultation to minimise the potential for the ACCC to disallow NBN Co's expenditures for regulatory purposes.

We strongly support this fundamental change in approach as we consider consultation with RSPs and consumer advocates to be a key mitigation for the risk that NBN Co's expenditure proposals could result in imprudent and inefficient spending. This is because the new consultation measures provide an important opportunity for RSPs and consumer advocates to have their views on expenditure priorities considered, as well as for NBN Co to test its assumptions about demand and consumer willingness to pay with parties who have more direct insight into consumer expectations and preferences.

In addition, we note this provides RSPs and other stakeholders further opportunity to advocate for matters that are in their interests, such as measures that reduce costs, improve quality, or expand the range of products and services on offer. The consultation is also consistent with the legitimate interests of NBN Co to the extent that it enables NBN Co to be more efficient in delivering service improvements of value to its customers, including those which they are willing to pay more to receive.

Accordingly, we would see considerable benefit in RSPs, ACCAN and other stakeholders being able to participate fully in the processes that the SAU variation would establish. We propose to consult on the nature and form of the information that NBN Co is to provide when providing a reset proposal to facilitate stakeholders participating more effectively within their available resources. We also support ACCAN's funding being revisited in a way that recognises that SAU consultation processes would form part of its core functions.

Further, we are satisfied that the proposed expenditure objectives and factors will indirectly lead to NBN Co improving its record keeping, information systems and business planning so that it can better demonstrate the prudence and efficiency of its expenditures in regulatory processes.

Although the 2023 SAU variation proposal does not expressly recite the information that NBN Co will provide in support of its proposed expenditures, it now confers powers on the ACCC to specify the types of information to be supplied in conjunction with a reset proposal. This could include business cases or similar materials that demonstrate the alternative options considered, including the option of not proceeding, and their respective costs and benefits.

Similarly, the conferred powers could be exercised to require the periodic provision of reports that track costs and benefits against forecast to provide an evidence base for expenditure assessments. We discuss these matters further in section 5.7.

5.7 Forecast expenditure for first regulatory cycle

Key points

- The independent expert undertaking the expenditure review was unable to give unqualified findings in support of the prudence and efficiency of all the expenditure categories that make up the forecast expenditures for the first regulatory cycle.
- Although NBN Co made extensive financial material available to the review, it was unable to demonstrate that it had undertaken detailed business case assessments in choosing whether to proceed with significant investments and in selecting its preferred implementation option from amongst viable alternatives.
- Consistent with our previously expressed view in the draft decision on the November 2022 SAU variation proposal, the independent expenditure expert's inconclusive and qualified findings regarding certain forecast expenditure categories for the first regulatory cycle do not detract from our overall assessment that the proposed SAU variation is reasonable and promotes the LTIE in these particular circumstances.
- This is because the expenditure allowances will not materially affect the prices in the first regulatory cycle. Further, there are safeguards to protect any material inefficiency in the expenditures forecast for the first regulatory cycle from leading to adverse pricing impacts in future, and the SAU variation will likely promote efficient investment in and use of the NBN going forward.
- The independent expert has made recommendations relating to the information and systems that NBN should establish to support future expenditure reviews, which we agree with. The varied SAU also confers powers on the ACCC to require NBN to provide such information.

5.7.1 Overview of NBN Co's proposal

In this section we discuss the forecast expenditure that NBN Co has proposed for the first regulatory cycle, which ends on 30 June 2026. These are contained in schedule 4B and Attachment J of the 2023 SAU variation proposal. We also discuss the findings and recommendations that the independent expenditure expert made in its final report on these expenditures.

This builds upon our discussion of the approach to the BBM, including the calculation of NBN Co's Annual Building Block Revenue Requirement (ABBRR) and the rolling forward of the Regulatory Asset Base (RAB) from one regulatory cycle to the next (see section 5.3).

We have also separately discussed the expenditure objectives and expenditure factors that NBN Co has proposed as mandatory considerations when assessing whether expenditures are prudent and efficient (see section 5.6).

Basis of expenditure forecasts

NBN Co detailed its forecast expenditure in its submission in support of its proposed November 2022 SAU variation proposal. This included providing a breakdown of the expenditure forecasts into underlying expenditure categories and amounts. Although this submission was made in respect of an earlier SAU variation it remains relevant as the expenditure forecasts remain essentially the same.

NBN Co submitted that the forecast expenditure for the first regulatory cycle is the result of a robust exercise. In this regard, the forecast expenditure was based on its integrated operating plan (IOP) for 2023, which is the product of an annual whole-of-organisation business planning exercise and approved by management. It is also reviewed and approved/endorsed by its board and submitted to shareholder departments and shareholder ministers.¹⁴⁹

NBN Co also submitted that these expenditure forecasts account for the progressive transition from building to operating the NBN, include only prudent costs, and factor in future efficiency gains.¹⁵⁰ In this regard, NBN Co highlighted that its forecast expenditure reflect a number of productivity gains to be achieved on service assurance, labour costs and capex-related initiatives such as the truck roll reduction program (relevant to Customer Connect), management of the triggers for capacity augmentation, and the Enterprise Simplicity Initiative.¹⁵¹

Overview of forecast operating and capital expenditure

NBN Co's expenditure forecasts for the first regulatory cycle are presented in the following table, split into operating expenditure and capital expenditure. Capital expenditure is presented in terms of gross expenditure, capital contributions/grants, and expenditure net of contributions/grants. As there was a small change in the expenditure forecast in the 2023 SAU variation proposal and the November 2022 SAU variation proposal, both sets of values are presented for clarity.

149 NBN Co, *Special Access undertaking Variation 2022 - Supporting Submission, Part F: Efficiency of nbn's Expenditure and Demand Forecasts*, November 2022, p 22.

150 NBN Co, *Special Access undertaking Variation 2022 - Supporting Submission, Part F: Efficiency of nbn's Expenditure and Demand Forecasts*, November 2022, p 22.

151 NBN Co, *Special Access undertaking Variation 2022 - Supporting Submission, Part F: Efficiency of nbn's Expenditure and Demand Forecasts*, November 2022, p 22.

Table 2: Comparison of forecast expenditure (all services), first regulatory cycle

Nominal (\$000)	2023–24	2024–25	2025–26
Operating expenditure			
November 2022	2,931,865	2,949,735	3,006,680
August 2023	2,918,290	2,921,356	2,961,895
Capital expenditure (includes grants/contributions)			
November 2022 ¹⁵²	3,570,030	2,985,205	3,276,920
August 2023	3,560,428	2,961,651	3,232,175
Capital contributions/grants			
November 2022	99,935	101,095	102,269
August 2023	794,247	106,918	106,835
Net capital expenditure			
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.

As shown in the table, the expenditures forecasts in the 2023 SAU variation proposal remain broadly consistent with NBN Co’s earlier forecasts except:¹⁵³

- the forecast expenditure on rebates has increased by a small amount due to an error made in previously calculating this expenditure category
- the changed treatment of third-party funding, whereby these funds are used to offset the capital expenditure amounts for which they were received rather than recognised as income in the year of receipt, has reduced the aggregate revenue and capital expenditure amounts in the BBM (discussed in section 5.3)
- the indexation factor used to convert the amounts into 2021 values has been updated for more current data, and this has led to a restatement of the expenditure values.

5.7.2 Stakeholder feedback

Stakeholders had expressed 2 concerns with the expenditure forecasts and related BBM items for the first regulatory cycle as proposed in the November 2022 SAU variation proposal. The first was that the review that had been undertaken by Grex Consulting and outlined in its draft report (published by the ACCC with its draft decision on that SAU variation proposal) had not made positive findings that a number of significant items of NBN Co’s forecast expenditure would represent prudent and efficient spending.¹⁵⁴

The related point is that the level of explanation that NBN Co had advanced in its supporting submission for these forecast expenditures fell short of what is required to engage effectively on the proposed expenditures with NBN Co or the ACCC. Stakeholders were concerned that their views could not be considered without better explanation being provided. Telstra supported the introduction

¹⁵² Grants line item has been added back in to ensure a like-for-like comparison.

¹⁵³ NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, p 30.

¹⁵⁴ Telstra, *Submission in relation to ACCC NBN Co Special Access Undertaking draft decision*, 2 June 2023, pp 12–13.

of annual reporting of cost and benefit information to inform future expenditure proposals,¹⁵⁵ while Aussie Broadband submitted that NBN Co should develop explanatory materials that are of a similar nature and form that other regulated firms prepare to support their spending proposals.¹⁵⁶

ACCAN submitted that consumer advocacy groups would similarly be impeded from critically examining expenditure proposals without better explanatory information than what was provided in NBN Co's supporting submission. It was also of the view that the information was of much less detail than what is provided in other essential service sectors.¹⁵⁷

NBN Co responded to these submissions by conferring a further power on the ACCC in the 2023 SAU variation proposal to specify the information that must accompany a reset application. This supplements the conferred power to require the production of information or documents that are reasonably required in connection with the SAU.¹⁵⁸

Aussie Broadband submitted that its concern had been addressed in the 2023 SAU variation proposal as the ACCC will be conferred with sufficient powers to specify information and documents required for future expenditure reviews in the context of a reset process; and does not have any further concerns with this area of the SAU variation proposal.¹⁵⁹

Similarly, Telstra submitted that it accepted that the 2023 SAU variation proposal attempts to address the concern of inefficient expenditure moving forward by conferring the ACCC with sufficient powers to request information and documents.¹⁶⁰

5.7.3 ACCC assessment

NBN Co submitted that its forecast expenditure for the first regulatory cycle can be considered prudent and efficient as they are the product of an extensive business planning exercise as well as reflect expected productivity gains in several areas.¹⁶¹

However, as acknowledged by NBN Co, it is in a state of transition from scale build to a more steady-state phase. We consider that its historical costs do not provide a suitable benchmark for assessing the prudence and efficiency of the forecast expenditure.

Further, NBN Co is also in the process of making significant capital investments, including to overbuild its copper-based networks with fibre, expand the capacity and reach of its fixed wireless network and increase the capability of its HFC network, each of which is exposed to significant technology, procurement and/or demand risks.

To assist in our assessment of NBN's proposed expenditure, we engaged an independent expert (Grex Consulting) to undertake a review of the expenditure forecasts that NBN Co had proposed in the November 2022 SAU variation proposal.¹⁶² Grex Consulting was relevantly tasked to provide its expert advice on, in summary:

- the efficiency and prudence of NBN Co's forecast capital and operating expenditures, which we note are derived from NBN's 2023 IOP forecast

155 Telstra, *Submission in relation to ACCC NBN Co Special Access Undertaking draft decision*, 2 June 2023, pp 12–13.

156 Aussie Broadband, *Re Variation to the NBN Co Special Access Undertaking Draft Decision – May 2023*, 30 May 2023, p 2.

157 ACCAN, *Submission to ACCC NBN Co SAU variation November 2022 SAU*, February 2023, pp 20–21.

158 NBN Co, *August 2023 SAU variation*, 16 August 2023, Main Body, clauses 5.2 and 6.3.

159 Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

160 Telstra, *Submission to ACCC consultation on proposed variation to the NBN Co SAU*, September 2023, p 5.

161 See for example NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, p 31.

162 The forecast expenditure in August 2023 SAU variation remains substantially the same as proposed in the November 2022 SAU variation.

- the type and format of information that NBN Co should keep, maintain and provide to the ACCC for the purposes of the ACCC's review and determination of NBN Co's expenditures in the reset process during the subsequent regulatory period.

We requested that Grex Consulting also provide advice on the systems and processes NBN Co should maintain in order to provide this information to the ACCC.

Grex Consulting prepared a draft report, which we published in April 2023 with the ACCC's draft decision on the November 2022 SAU variation proposal. Since then, in finalising its report, Grex Consulting has considered further evidence and submissions provided by NBN Co. Grex Consulting's final report is available on our website.¹⁶³

We note that Grex Consulting has subsequently been able to provide further assurance over additional, but not all, expenditure items. Where Grex Consulting has found that forecast expenditure is prudent and efficient, we accept these findings.

Specifically, however, Grex Consulting was not able to express unqualified findings regarding the prudence and efficiency¹⁶⁴ of several significant initiatives/categories, which received 'inconclusive' ratings. These included:¹⁶⁵

- Take-up & Usage – HFC capacity (\$277 million)
- Capability – FTTP upgrade and connect (\$3245 million)
- Capability – FW upgrade (\$747 million)
- Direct operating cost – Assurance, restoration & maintenance (\$760 million).

In addition, a number of expenditure items have received 'Qualified Yes' ratings.

A key reason for the inconclusive (as well as qualified) findings is the lack of suitable evidence of the type of matters that are routinely included in a detailed business case process for major initiatives/programs in similar regulated businesses. In this regard, Grex Consulting has noted:

Additionally, a formal, documented process has not been described to ACCC whereby NBN Co has undertaken a detailed business case process to establish why the expenditure item was the best option and to enable ACCC to assess that each item of expenditure results in the lowest cost to consumers over the long term.¹⁶⁶

In its final report, Grex Consulting has outlined the type of materials that should accompany an expenditure proposal, which would include consistent and thorough business case material for all significant expenditures, amongst other things, so that there is a clear record of the rationale for proposing that level of spending. The business case material would document the business need and the alternative options considered for meeting it, use a cost benefit framework to rank alternatives, and provide financial analysis to assess feasibility and affordability of viable options. This would also include commercial risk analysis and management analysis to determine if the preferred option can be delivered in a practical sense and that a suitable governance framework can be established to oversee progress.¹⁶⁷

163 Grex Consulting, *Independent Expert Report nbn SAU Variation Expenditure*, September 2023.

164 The final report expresses a combined rating for each expenditure item.

165 Grex Consulting, *Independent Expert Report nbn SAU Variation Expenditure*, September 2023, Part C, Chapter 7.

166 Grex Consulting, *Independent Expert Report nbn SAU Variation Expenditure*, September 2023, Part C.

167 Grex Consulting, *Independent Expert Report nbn SAU Variation Expenditure*, September 2023, Part D.

We note that NBN Co has indicated its intention to redesign its business planning and record keeping processes going forward, 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).¹⁶⁸

GreX Consulting has also recommended that NBN Co establish an information and reporting framework to better enable tracking of the delivery of expenditure programs. This could comprise the following elements:¹⁶⁹

- An 'Annual reporting template' which would build upon existing information and reporting systems to provide an overall view of significant investments and expenditure categories, such as by developing additional metrics and adding further levels of detail where required.
- A 'Benefit framework' which would accompany the Annual Review Template to assess individual initiatives for their impact and viability, and would provide a view of projected spend with direct and indirect benefits achieved.
- A 'Mechanism for change' which would update on any material changes to proposed expenditures during the regulatory cycle, such as discontinuance or introduction of material spending proposals or material changes to continuing spending proposals.

We consider that the findings and recommendations that GreX Consulting has made in its final report to be robust, and we have taken them into consideration for the purpose of reaching our decision on the 2023 SAU variation proposal. These findings and recommendations will also help guide our future exercise of the powers that the 2023 SAU variation confers on the ACCC.

As we have indicated previously, in our view the inability of the independent expenditure expert to reach conclusive or unqualified findings for some expenditure that is forecast for the first regulatory cycle does not detract from our overall conclusion on the SAU variation because of the specific circumstances of that regulatory period. We provided these views in our draft decision on the November 2022 SAU variation proposal¹⁷⁰ and in our discussion paper for the 2023 SAU variation proposal.¹⁷¹

NBN Co has agreed with our view, while other stakeholders have not addressed the point in their submissions.

We reached this view because inefficient operating expenditure in the first regulatory cycle is unlikely to have any material bearing on NBN Co's future regulatory allowances. In this regard, NBN Co has forecast that it will continue to incur annual capital-adjusted losses throughout the regulatory cycle and so NBN Co's WAPC will be linked to inflation rather than depend on changes in its underlying cost base (the price cap arrangement is discussed in detail in section 5.5).

Further, given the changes to setting the ICRA balance and drawdown framework, new losses could no longer be capitalised and carried forward for potential recovery in future years (ICRA is discussed in section 5.2).

In addition, actual capital expenditure will now need to be assessed for prudence and efficiency before it can be admitted into the regulated asset base. This assessment provides an important safeguard against inefficient forecasting of capital expenditure flowing through into future regulatory allowances. An inconclusive or qualified finding regarding forecast capital expenditure is an indicator

168 NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, p 31.

169 GreX Consulting, *Independent Expert Report nbn SAU Variation Expenditure*, September 2023, Part D.

170 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft decision*, April 2023, p. 61.

171 ACCC, *Proposed variation to the NBN Co Special Access Undertaking – Consultation Paper*, August 2023, p 38.

of areas that would likely receive closer scrutiny in this ex-post assessment. This review will be conducted towards the end of the first regulatory cycle.

5.8 Cost allocation

Key points

- The varied SAU requires NBN Co to implement cost allocation and accounting separation measures, commencing with lodging with the ACCC a proposed cost allocation manual within 30 days of the 2023 SAU variation proposal being accepted.
- NBN Co also commits to propose accounting separation arrangements by 31 March 2024 and establish and comply with ACCC approved accounting procedures by 31 December 2024.
- Correctly implemented cost allocation and accounting separation measures encourage more efficient use of NBN Co's regulated services and discourage anti-competitive practices in related wholesale markets.
- The ACCC is satisfied that the cost allocation principles proposed in the varied SAU for the subsequent regulatory period are reasonable and would promote the LTIE.
- Further, the varied SAU specifies a reasonable framework for NBN Co to develop and implement cost allocation and accounting separation measures, with suitable approval and oversight by the ACCC.
- The ACCC can make changes to these arrangements as circumstances change and where issues arise given our ongoing regulatory oversight role.

5.8.1 Overview of NBN Co's proposal

Cost allocation principles

The varied SAU sets out the following cost allocation principles that NBN Co will follow to allocate costs between its core and non-core services:

- costs that are directly attributable to a core regulated service will be allocated to that core regulated service
- costs that are directly attributable to a competitive service will be allocated to that competitive service
- shared costs (i.e., costs that are not directly attributable to a core regulated service or competitive service) will be allocated to reflect causal relationships between supplying services and incurring costs, unless establishing a causal relationship would require undue cost or effort, in which case an alternative suitable allocator will be used
- all costs will be allocated
- no cost should be allocated more than once to any service.¹⁷²

Services supplied by NBN Co in competitive markets are categorised as competitive (i.e., non-core) services, while all other services supplied by NBN Co are categorised as core services.

¹⁷² NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.2.

Cost base and categorisation of core and non-core services

Under the varied SAU, NBN Co has categorised enterprise ethernet, business satellite and satellite mobility services (for large commercial passenger aircrafts) as non-core services.¹⁷³ All other services, including all residential grade services, are categorised as core services.

Under the varied SAU, NBN Co will establish separate cost bases for core and non-core services using cost allocations. This provides for the ABBRR, RAB and ICRA to be allocated between the 2, categories of services.¹⁷⁴ The BBM calculates a core services RAB, core services ABBRR, and core services ICRA, as well as a competitive RAB, a competitive ABBRR and a competitive ICRA allocation. The allocation between core regulated services and non-core competitive services includes further breakdowns of ABBRR elements including core and non-core capex, depreciation, opex and asset disposals, and tax calculations.¹⁷⁵

Core services are subject to the varied SAU's regulatory requirements including maximum regulated prices, price controls, benchmark service standards and product withdrawal restrictions. NBN Co can set prices and other terms for non-core services outside of the varied SAU framework. Sections 5.4 and 5.5 of this decision discuss the regulatory arrangements for pricing under the varied SAU.

Re-categorisation of services

The categorisation of services between core and non-core services and allocation of costs to these services for the subsequent regulatory period will be determined before the start of each regulatory cycle through the reset process for that period.¹⁷⁶

As part of that process, NBN Co may propose that a product or service be re-categorised as a core or non-core service.¹⁷⁷ In doing so, NBN Co must propose the ABBRR, RAB and ICRA values (i.e., for core and non-core services) that account for the proposed re-categorisation, in accordance with the cost allocation principles and the cost allocation manual.¹⁷⁸

The ACCC will have the power to re-categorise a product or service as a core or non-core service, and to allocate BBM costs to account for the re-categorisation, through a determination under the reset process for the subsequent regulatory period. An ACCC reset determination which re-categorises an existing product or service may also determine an updated value of the core services ICRA that accounts for the re-categorisation and is in accordance with the cost allocation principles.¹⁷⁹

Cost allocation manual

The varied SAU requires NBN Co to submit to the ACCC, within 30 days of the variation being accepted, a proposed cost allocation manual.¹⁸⁰ This manual will describe the methodology NBN Co will use to allocate costs between core and non-core services.¹⁸¹ The ACCC has the power to approve a proposed cost allocation manual in either the form it is submitted or a form that incorporates

173 NBN Co, *August 2023 SAU variation*, Main body, Attachment C, Dictionary, 'Competitive services'.

174 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G, Part A & Part B.

175 NBN Co, FY09–FY23 Building Block Model handbook, p 5. NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.3.1 and Schedule 3B.3.5.

176 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.4(c) to (f). Alternatively, pursuant to clause 2G.6.4(b), if NBN Co proposes to introduce a new product or service or vary an existing one, and that product or service, if so introduced or varied, would fall within the scope of a product or service that has already been categorised, then the relevant product or service will be categorised in the same way as the existing one.

177 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.4(c).

178 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.4(c) and (d).

179 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.4(e) and (f).

180 NBN Co submitted a public version of an initial (not yet approved) cost allocation manual with its November 2022 SAU variation proposal. NBN Co's August 2023 SAU variation proposal did not include a revised draft of its proposed cost allocation manual.

181 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.3.

reasonable changes made by the ACCC.¹⁸² The ACCC can, at any time after the 2023 SAU variation proposal is accepted, direct NBN Co to submit a revised cost allocation manual.¹⁸³

The 2023 SAU variation proposal provides for costs to be allocated in accordance with the cost allocation principles in particular circumstances. When allocating costs in accordance with the cost allocation principles in those circumstances, NBN Co will apply, and the ACCC may have regard to, the cost allocation manual.¹⁸⁴

Procedures for accounting separation record keeping, reporting and assurance

The varied SAU requires NBN Co to establish and maintain consolidated and separate accounts for core and non-core services and an accounting separation record keeping, reporting and external assurance framework.¹⁸⁵

The varied SAU requires NBN Co to submit to the ACCC, by 31 March 2024, a document setting out proposed accounting procedures and a methodology for establishing and maintaining consolidated and separate accounts for products and services supplied under the SAU, and associated reporting and external assurance arrangements.¹⁸⁶ NBN Co must consult with the ACCC in developing the proposed accounting procedures and the ACCC can direct NBN Co to incorporate reasonable changes.

NBN Co must establish and comply with approved accounting procedures by 31 December 2024 (i.e., the accounting separation establishment date) unless the ACCC accepts a request by NBN Co for an extension to this period.¹⁸⁷ The ACCC may at any time after it determines approved accounting procedures direct NBN Co to propose changes to the procedures for approval or amendment by the ACCC.¹⁸⁸

5.8.2 Stakeholder feedback

Submissions responding to NBN Co's 2023 SAU variation proposal did not comment on the proposed cost allocation and accounting separation arrangements. However, the arrangements proposed are largely the same as those proposed in NBN Co's November 2022 SAU variation proposal which were the subject of stakeholder submissions.

As noted in the ACCC's April 2023 draft decision, stakeholders questioned whether the proposed arrangements would mitigate the potential risk of NBN Co inappropriately cross subsidising its non-core (i.e., competitive) services from its core services.¹⁸⁹

In this regard, submitters:

- emphasised the importance of a cost allocation framework in appropriately safeguarding against the potential for NBN Co developing inefficient or anti-competitive pricing practices

182 Pursuant to Module 2, Schedule 2G.6.3(c), if the ACCC does not notify NBN Co of its decision in 3 months (or such longer period for notification of the ACCC's decision as a result of the ACCC extending time), the applicable cost allocation manual will be the proposed manual submitted by NBN Co.

183 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.3(f).

184 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2G.6.3(h).

185 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I.6.3 & 2I.6.4.

186 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I.6.

187 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I.6.3 & 2I.6.4.

188 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I.6.5.

189 ACCC, *Variation to the NBN Co Special Access Undertaking – Draft Decision*, April 2023, p 64.

- expressed the view that the indicative draft of the cost allocation manual that NBN Co provided with the November 2022 SAU variation proposal had insufficient detail to provide suitable transparency over how costs would be allocated in practice¹⁹⁰
- indicated support for the use of causal allocators rather than the use of revenue shares which had been proposed by NBN Co in respect of various operating cost categories¹⁹¹
- queried whether the ICRA balance would be allocated across core and no-core services.¹⁹²

5.8.3 ACCC assessment

The ACCC is satisfied that the 2023 SAU variation proposal specifies cost allocation principles for the subsequent regulatory period that are reasonable and promote the LTIE. These principles provide a sound basis for the cost allocation framework set out in the 2023 SAU variation, which NBN Co will be required to develop in a way that will safeguard competition and encourage efficient use of NBN Co's services.

The cost allocation framework set out in the 2023 SAU variation includes requirements for NBN to:

- develop a cost allocation manual, which must be approved by the ACCC
- develop accounting procedures, including external assurance and regulatory reporting arrangements, and incorporating changes that the ACCC reasonably requires
- categorise services into core and competitive services and reflect their costs in the BBM
- establish and maintain consolidated and separate accounts for core and competitive services under arrangements to be approved by the ACCC.

We are satisfied that the cost allocation framework is reasonable and supports outcomes that are in the LTIE. A suitable implementation of the cost allocation framework provides a critical safeguard against potentially harmful outcomes for efficiency and competition. Importantly, this can act to deter anti-competitive conduct as the framework can assist in establishing whether such conduct may be occurring and inform further investigation and compliance / enforcement action should this be required.¹⁹³

Appropriate cost allocations also assist in testing whether charges for core regulated services are designed to recover efficient costs, including a portion of costs justifiably shared across core and non-core services, and are not intended to fund predatory behaviour or shortfalls that are incurred in competitive markets.

Further, accounting reports based on appropriate allocation of costs between NBN Co's core and non-core services will give confidence that NBN Co's access prices for core services are not set at inefficiently high levels. This in turn will encourage efficient use of NBN core services, as well as encourage NBN Co, other network operators and RSPs to efficiently invest in their respective networks and services.

190 Telstra, *Submission to draft decision*, 6 June 2023, p 29; Optus, *Submission to draft decision*, May 2023, p 45; Commpete, *Submission on ACCC's Draft Decision on Proposed Variation to the NBN Co Special Access Undertaking*, 30 May 2023, pp 7-8; ACCAN, *Submission re: NBN Special Access Undertaking Draft Decision*, 30 May 2023, p 26.

191 Optus, *Submission to draft decision*, May 2023, p 45; Commpete, *Submission on ACCC's Draft Decision on Proposed Variation to the NBN Co Special Access Undertaking*, 30 May 2023, pp 7-8; ACCAN, *Submission re: NBN Special Access Undertaking Draft Decision*, 30 May 2023, p 26.

192 Telstra, *Submission to draft decision*, 6 June 2023, p 29 & p 47; Optus, *Submission to draft decision*, May 2023, p 46; ACCAN, *Submission re: NBN Special Access Undertaking Draft Decision*, 30 May 2023, p 6 & p 25.

193 Part XIB of the CCA includes a range of compliance measures available to the ACCC to address anti-competitive conduct in the telecommunications industry.

Several concerns were raised by submitters regarding the indicative draft cost allocation manual NBN Co submitted with its November 2022 SAU variation proposal. We agreed in our April 2023 draft decision on the SAU variation that there was significant scope for improvements to the draft manual. Based on an initial assessment, we considered that the manual's level of detail and the transparency of the proposed approach, the proposed method for allocation of operational costs, and the rationale for cost allocators proposed, required further consideration by NBN Co and additional stakeholder consultation. However, we consider that the cost allocation framework set out in the 2023 SAU variation proposal provides for a process for these issues to be addressed.

We note that NBN Co's submission supporting its 2023 SAU variation proposal stated that it will consider improvements to the draft cost allocation manual submitted with its November 2022 SAU variation proposal, noting the issues highlighted by the ACCC in its April 2023 draft decision and the key themes and concerns raised by stakeholders.¹⁹⁴

Similarly, we intend to seek external expert advice to assist our consideration of whether NBN Co's proposed cost allocation manual and accounting separation arrangements and procedures are fit for purpose or whether changes are required. We will also undertake public consultation on the proposed manual.

Regarding the question of whether recovery of the ICRA will be allocated across NBN Co's core and non-core services, as raised by submitters in response to NBN Co's November 2022 SAU variation proposal, we note that the BBM allows for the calculation of a core services ICRA and a competitive services ICRA allocation, as described in NBN Co's FY09–FY23 BBM handbook and the varied SAU.¹⁹⁵ Sections 5.2 and 5.3 of this decision discuss the regulatory approach to the ICRA and BBM in the 2023 SAU variation proposal.

5.9 Incorporating other access technologies

Key points

- We consider that in principle the SAU should be extended to cover services supplied over additional access technologies, as specified in the 2023 SAU variation proposal, and we are satisfied that the provisions incorporating the further access technologies are reasonable and will promote the LTIE.
- Incorporating additional access technologies will minimise the scope for different network technologies being subject to different regulatory treatments and ensure that the benefits of the new regulated terms of access apply equally across all access technologies.
- We are satisfied that the proposed service specifications relating to the additional access technologies are reasonable and will promote the LTIE. The proposed specifications provide clear definitions to allocate responsibility to NBN Co for parts of the network of which it is in control.

¹⁹⁴ NBN Co, *SAU Variation 2023 – Supporting submission*, 14 August 2023, p 27.

¹⁹⁵ NBN Co, FY09–FY23 Building Block Model handbook, p 5. NBN Co, August 2023 SAU variation, Module 2, Schedule 2G.3.1 and Schedule 3B.3.5.

5.9.1 Overview of NBN Co's proposal

Several important aspects of the 2013 SAU; including price controls and product development and withdrawal provisions;¹⁹⁶ only apply to services provided over NBN Co's fibre-to-the-premises (FTTP), fixed wireless, and satellite networks. This means that these commitments do not extend to the multi-technology mix. The multi-technology mix consists of the fibre-to-the-node, fibre-to-the-basement, fibre-to-the-curb (which each utilise existing copper cables), and hybrid fibre-coaxial networks. Together these equal 73% of NBN Co's services in operation.

The SAU variation broadens the scope of the SAU to include the multi-technology mix and introduces network boundary points for the included technologies. The network boundary point is an important consideration as it is the point where NBN Co's responsibility for the network ends and the customer's responsibility begins.

Specifically, the variation:

- includes new service descriptions in the SAU for each of the new connection types. These descriptions have been developed through WBA negotiations. This also includes explanations of network boundary points for these connection types; additional terms for the fibre-to-the-curb network;¹⁹⁷ and terms covering the installation of each service have been included under Schedule 1C¹⁹⁸
- expands the dictionary to include the new technologies and terms that support the regulation of the multi-technology mix¹⁹⁹
- includes the new technologies in Attachment D (initial products). Schedule 1A also contains new inclusions covering the multi-technology mix on the implementation of the NBN Access Service, Ancillary Services, and the Facilities Access Service
- includes terms and performance objectives for the multi-technology mix services, including during the co-existence period.²⁰⁰ The co-existence period refers to when an NBN connection coexists with legacy ADSL services (using the same copper cable) and other non-fibre services.

5.9.2 Stakeholder feedback

We sought views on incorporating the multi-technology mix services into the SAU, including whether the network boundary points specified for each technology are reasonable.

Many stakeholders have not remarked specifically on the inclusion of the multi-technology mix throughout the SAU variation process.

ACCAN previously submitted (in response to the November 2022 SAU variation proposal) that NBN Co should change the network boundary point for fibre-to-the-curb services to include the network connection device within an end-user's premises. ACCAN also recommended that NBN Co commit to repairing the customer cabling where this would promote public safety.²⁰¹

196 Other aspects of the 2013 SAU apply on a whole-of-business basis and will capture all NBN technologies. These include matters related to NBN Co's cost recovery (such as ICRA, required revenue and the regulated asset base) and the expenditure criteria.

197 The variation introduces similar network boundary points for the fibre-to-the-basement, node, and hybrid fibre-coaxial networks as the fibre, wireless and satellite networks. As noted below, the additional terms make clear that with fibre-to-the-curb the network connection device (which would otherwise fall outside of the network boundary) is within NBN Co's extended service boundary.

198 NBN Co, *August 2023 SAU variation*, Module 1, Schedule 1C and Annexures 3, 4, 5 and 6.

199 NBN Co, *August 2023 SAU variation*, Main Body, Attachment C.

200 NBN Co, *August 2023 SAU variation*, Main Body, Attachment C; Module 4, Attachment I and Module 1, Schedule 1A.4.

201 ACCAN, *Submission to ACCC Consultation Paper on NBN Co's November 2022 proposal*, February 2023, p 27.

NBN Co submitted that the 2023 SAU variation proposal assigns it responsibility for the maintenance of the network connection device as part of the extended service boundary. This approach clarifies that the repair or replacement of network equipment that NBN Co supplies is within scope of the commitments it is giving around service faults and access component reactivations.²⁰²

5.9.3 ACCC assessment

Consistent with our draft decision on the November 2022 SAU variation proposal,²⁰³ we are satisfied the provisions incorporating the multi-technology mix into the SAU are reasonable and in the LTIE. We consider they will give greater certainty to NBN Co, RSPs, and end-users over terms and conditions of access to the NBN. This is because there will now be a single regulatory framework, under the varied SAU, to apply to all NBN Co's access technologies which will reduce complexity and minimise scope for confusion.

We consider that this is reasonable as it is in the legitimate business interests of NBN Co and the interests of access seekers, and indirectly encourages greater efficiency in the use of and investment in networks and services.

We are also satisfied the new service descriptions for the multi-technology mix are reasonable and will promote the LTIE. They provide definitions that are clear and accessible to RSPs, noting that NBN Co has committed in the SAU variation to maintain the network connecting device. This commitment arises from the definition of 'access component reactivation' and other operative terms in the SAU.²⁰⁴ We consider that it is reasonable for NBN Co to focus its SAU commitments more squarely on the network elements that it supplies, including the network connection device.

That said, we note that the SAU does not preclude NBN Co from developing enhanced service offerings to assist end-users identify and repair faults on the cabling they use to connect the network connection device and power their connection.

202 NBN Co, *August 2023 SAU variation proposal supporting submission*, August 2023, p 74.

203 ACCC, *Draft Decision on NBN Co's November 2022 SAU variation proposal*, May 2023, pp 69–70.

204 NBN Co, *August 2023 SAU variation*, Main Body, Attachment E, table 8.1; see together with Attachment C (under the definitions of 'Access Component', 'Access Component Reactivation' and 'UNI') and Schedule 1 clause 1A.3.1(a) and (b)(v).

5.10 Service quality

Key points

- The 2023 SAU variation proposal specifies benchmark service standards for the first regulatory cycle that NBN Co must meet or exceed, as well as a framework by which the ACCC can update these benchmarks over time.
- The minimum benchmark service standards for the first regulatory cycle provide clarity to RSPs and consumers over the minimum service standards they can expect to receive when using the NBN.
- The framework by which the ACCC can require improvements to the benchmarks establishes a more direct link between the regulation of price and quality of access to the NBN. This will in turn encourage efficient investment in, and efficient use of, the NBN, and lead to outcomes that promote the LTIE. This also has regard to NBN Co's legitimate business interests and its investment in facilities.
- The 2023 SAU variation proposal confers powers on the ACCC to specify new benchmarks at, and between, each reset process, and commits NBN Co to consult stakeholders and be more accountable to them for its performance in supplying the SAU services.
- When considered together, we are satisfied that the minimum benchmark service standards for the first regulatory cycle and the general framework for specifying benchmark service standards under the 2023 SAU variation are reasonable and will promote the LTIE. Relevantly we note that the 2023 SAU variation will provide for the benchmark service standards to be efficiently improved over time.

5.10.1 Overview of NBN Co's proposal

The 2013 SAU does not deal with service quality. NBN Co first proposed to introduce measures of this type for its core services in its November 2022 SAU variation proposal.

At that time NBN Co submitted that setting the SAU benchmark service standards in line with commercially agreed service standards, which the ACCC could subsequently update to provide additional or alternate standards, should provide the market with confidence that service level commitments would reflect performance expectations.²⁰⁵

Consistent with this view, the 2023 SAU variation proposal specifies benchmark service standards for the first regulatory cycle, along with a bespoke process to consult and report on measures to improve quality over the first regulatory cycle.

The 2023 SAU variation proposal also allows for the benchmark service standards for the core services to be updated over the SAU term through the inclusion of:

- a framework for setting benchmark service standards at the beginning of each following regulatory cycle
- a mechanism to adjust service standard benchmarks within a regulatory cycle in each regulatory period occurring within the subsequent regulatory period (i.e., until 2032).

205 NBN Co, *Submission to ACCC consultation paper*, 17 February 2023, p 23.

For clarity, these provisions relate to the supply of core services only. NBN Co will determine service standards in respect of competitive services independent of these arrangements.²⁰⁶

A failure by NBN Co to achieve a service standard included in a standard form of access agreement (benchmark or otherwise) will not constitute a breach the SAU, although NBN Co may be required to pay a rebate or undertake corrective action.²⁰⁷ Further, continually failing to meet the benchmark service standards will likely have reputational consequences for NBN Co.

Setting benchmark service standards for each regulatory cycle

The 2023 SAU variation proposal provides different arrangements for setting benchmark service standards for each regulatory cycle in the period until 2032 (the subsequent regulatory period) and post-2032 (the post-2032 regulatory period). NBN Co cannot reduce benchmarks unilaterally whereas the ACCC is able to determine reduced benchmarks in the event of there being significant costs to uphold a benchmark that is of limited value to consumers.

In the subsequent regulatory period, NBN Co must include a service standards proposal for each regulatory cycle, other than the first regulatory cycle, in its reset proposal to the ACCC.²⁰⁸ The service standards proposal must, in turn, have a set of proposed benchmark service standards and a date by which NBN Co proposes to include an obligation in its standard form of access agreement to meet or exceed these benchmarks.²⁰⁹

Each ACCC reset determination must determine the service standards to apply. In doing so, the ACCC will consider the appropriateness of the proposed standard, including whether there is evidence that stakeholders are willing to pay for the new standard. Further, the ACCC must provide NBN Co with a reasonable period to implement and give effect to the specified service standards.²¹⁰

For the post 2032 regulatory period, NBN Co has the option to include proposed benchmark service standards in a reset proposal but is under no obligation to do so unless requested by the ACCC in its statement of approach. Regardless, the ACCC has the option, but not the obligation, to specify benchmark services standards in a reset determination and the date by which they must be reflected in the standard form of access agreement. An ACCC reset determination may be made at any time after NBN Co is required (by the ACCC) to give the ACCC a reset proposal (between 9 and 18 months prior to the end the current regulatory cycle).²¹¹

Reviewing benchmark service standards during a regulatory cycle

Benchmark service standards may be reviewed during a regulatory cycle under the varied SAU. Schedule 2I of Module 2 sets out the circumstances under which the ACCC or NBN Co may initiate a review of benchmark service standards during a regulatory cycle in the subsequent regulatory period.

Under the proposed framework, the ACCC may only initiate a review if a systemic service standard event occurs or a retail service standard regulation²¹² is made or varied during a regulatory cycle.²¹³ NBN Co must (once notified by the ACCC) provide reasons on whether it considers a change to benchmark service standards to be necessary and, where relevant, the details of those changes as

206 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I .2.5. Under the SAU competitive services are defined as NBN Co Enterprise Ethernet, NBN Co Satellite mobility for large commercial passenger aircrafts and NBN Co business satellite service (unless re-categorised as a core regulated service in an ACCC reset determination) and any other product or service categorised as a competitive service under clause 2G.6.4.

207 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I.2.1(c).

208 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.2(e)(iv).

209 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.6.

210 NBN Co, *August 2023 SAU variation*, Main Body, clause 5.9(a)(ii) and (e).

211 NBN Co, *August 2023 SAU variation*, Main Body, clauses 5.2(c)(i) & (f)(iv), 5.8(a)(ii) and 5.10(b)(iv).

212 A retail service standard regulation is defined in the Main Body, Attachment C (Dictionary), p 64.

213 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 2I.2.2(a).

well as the proposed date by which any amendments to the standard form of access agreement are to be made to reflect those changes (a service standards response).²¹⁴

The ACCC has the power under Schedule 21.2.2(c)²¹⁵ to accept or reject NBN Co's service standard response. If the ACCC accepts NBN Co's service standard response, the standard form of access agreement is to be amended as NBN Co proposed. The ACCC may, if it rejects NBN Co's service standard response, make a determination setting out changes to benchmark service standards that are necessary for access seekers to be capable of complying with the new or changed retail service standard regulation; or changes that are proportionate and necessary to address the systemic service standard event.

In both cases, the ACCC must set in its determination a date by which NBN Co is to amend its standard form of access agreement to reflect any changes to the benchmark service standards.²¹⁶ However, if the ACCC does not accept or reject a service standard response or issue an ACCC service standard determination in the prescribed times, there is no change to the benchmark service standards.²¹⁷

Under the proposed framework NBN Co may also make (or be required to make in relation to a negative change event) a cost pass-through application in relation to an accepted service standard response (by the ACCC) or ACCC service standard determination under clause 2D.5.1.

As noted above, NBN Co may also initiate a review of benchmark service standards during a regulatory cycle in the subsequent regulatory period. It must first consult access seekers before submitting its benchmark service standards change proposal and any related cost pass-through application to the ACCC.²¹⁸ The ACCC has the power to accept or reject the change proposal, but not issue its own determination in response. Additionally, the change proposal will not take effect unless the related cost pass-through application is accepted, or taken to have been accepted, in full by the ACCC, or NBN Co provides notice that it is willing to proceed anyway.²¹⁹

In the post-2032 regulatory period, the ACCC has greater flexibility over when it makes a reset determination once the due date for NBN Co's reset proposal has passed. It may also revoke an existing reset determination for a regulatory cycle in the post-2032 period and substitute it with a new determination.²²⁰ As such, it is open to the ACCC to make a new determination on benchmark service standards during a regulatory cycle in the post-2032 period.

When making a decision on service standards, the ACCC must take into account the same matters that it must take into account when making an access determination under section 152BCA(1) of the CCA and, any other matters it thinks relevant to the decision. The ACCC must also not make a decision if it has the effect of the matters set out in sections 152BCB(1), (3B), 3(C) and (4A) of Part XIC the CCA, which also apply when it makes an access determination.²²¹

Benchmark service standards and transparency measures that apply to the first regulatory cycle

The 2023 SAU variation proposal sets out benchmark service standards for the first regulatory cycle. It also introduces a framework for consultation on, and reporting of, NBN Co's service improvement priorities and delivery of service standards each financial year of the first regulatory cycle.

214 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.2(b).

215 NBN Co, *August 2023 SAU variation*, Module 2.

216 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.2(d) & (e)(iii-v).

217 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.2(g).

218 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.3(b)-(d).

219 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.3 (g) and (h).

220 NBN Co, *August 2023 SAU variation*, Main Body, clauses 5.2(c)(i) & (f)(iv), 5.8(a)(ii) and 5.10(b)(iv).

221 NBN Co, *August 2023 SAU variation*, Main Body, clauses 5.8(b) & (d); Module 2, Schedule 21.2.4.

The benchmark service standards at Attachment I to Schedule 4A²²² include most²²³ WBA4 service levels, and associated performance objectives, rebates (together, service standards). The benchmarks have 2 notable improvements compared to WBA4 service standards:

- a reduction in the number of dropouts that FTTN, FTTC and HFC services must experience before a fault can be notified²²⁴, along with incremental service improvements that were requested and agreed for inclusion in WBA5²²⁵
- new reporting on network utilisation and, inclusion of operational reporting.²²⁶

NBN Co has also proposed to increase the level of utilisation before it is contractually obliged to augment capacity (from 70% to 90%) and for this to be measured over a longer measurement timeframe (from 30 continuous minutes on 3 separate days within a rolling 21-day period to a rolling 30-day period).²²⁷ NBN Co submitted that these revised thresholds allow it be more cost efficient, without compromising service quality given the significant headroom that will remain.²²⁸

These benchmark service standards are similar to those originally proposed in the November 2022 SAU variation proposal except with regards to:

- ACCC initiated mid-cycle review of benchmark service standards²²⁹ – the 2023 SAU variation proposal expanded the scope of a systemic service standard event²³⁰ so that the ACCC may initiate a review of benchmark service standards due to a recurring event that impacts end-users as well as access seekers.
- Benchmark service standards for the first regulatory cycle²³¹ – the 2023 SAU variation proposal incorporates improved service standards in line with current negotiations for the next iteration of NBN Co's wholesale broadband agreement with its customers (WBA5).²³²
- Consultation and reporting measures²³³ – the 2023 SAU variation proposal proposes new consultation and reporting processes in relation to a service improvement plan and service performance review each financial year of the first regulatory cycle (until 2026).

Transparency measures

For each financial year of the first regulatory cycle NBN Co is required under Schedule 4A.4.1 to publish an annual service improvement plan. The first service improvement plan is scheduled to be published within 20 business days after the 2023 SAU variation proposal is accepted by the ACCC.²³⁴

222 Module 4 of the SAU variation.

223 Proposed benchmark service standards do not include WBA4 service levels for services that NBN Co is ceasing to provide (such as multi-cast services, voiceband reinstatement and transition reversals) or services that are provided on an individual contractual basis (such as enhanced fault rectification), and operational targets, which are non-binding and aspirational.

224 The fault dropout threshold is changed from greater than nine to greater than 7 dropouts within a day on which a service fault trouble ticket is raised, or any of the 2 previous calendar days. Refer to NBN Co, SAU variation, Module 4, Attachment I, clause 23.

225 The benchmark service standards include improvements to WBA4 service levels or performance objectives for activations, completion advices, end-user fault rectifications, disconnections, trouble ticket management and service modifications. A full list of the improvements is set out in NBN Co's May 2023 submission. Refer to NBN Co, *NBN Special Access Undertaking variation: response to ACCC draft decision – service quality*, May 2023, Table 1, pp 9–10.

226 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clauses 16.1(b), 16.4 and 24.

227 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clause 13.4.

228 NBN Co, *November SAU 2022 variation – supporting submission – Part C: Non-price terms*, 9 December 2022, p 22.

229 NBN Co, *August 2023 SAU variation*, Module 2, Schedule 21.2.2(a).

230 A systemic service standard event is defined in the Main Body, Attachment C (Dictionary), p 70.

231 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A, Attachment I.

232 Refer to NBN Co, *NBN Special Access Undertaking variation: response to ACCC draft decision – service quality*, May 2023, Table 1, pp 9–10.

233 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A.4.1-3.

234 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A.4.2(c).

NBN Co is not required to consult access seekers on the service improvement plan for the first financial year (Schedule 4A.4.1(a)) but has provided an update on its development of the plan for the 2024 financial year.²³⁵ The service improvement initiatives in the update include:

- the opportunity to migrate underperforming FTTN/FTTC lines to FTTP connections without changing the access requirements where the premise is in the FTTP fibre upgrade footprint
- fixed wireless upgrades including the opportunity to connect approximately 120,000 premises to the upgraded network that NBN Co currently serve by satellite only
- various programs to simplify or otherwise improve the efficiency of RSPs interactions with NBN Co, the specifics of which were not detailed.

NBN Co will be required to consult access seekers on the future annual service improvement plans in the first regulatory cycle. NBN Co must include their views,²³⁶ together with other information, when it publishes the service improvement plan for the year.²³⁷

Under Schedule 4A.4.3, NBN Co must conduct a review of its service standards each financial year of the first regulatory cycle (the service performance review). The review must consider NBN Co's performance against each existing service level and performance objective, as well as their relevance and effectiveness for access seeker products.

NBN Co must also, as part of the review, consult access seekers and publish a report with a summary of their views no later than the end of the first and second financial years. Additionally, the published report must consider, amongst other things, how service improvement plan initiatives have contributed to NBN Co's performance and set out any changes NBN Co is considering for the standard form access agreement, the benchmark service standards or NBN Co's processes.²³⁸

We note that under the 2023 SAU variation proposal we would be able to monitor the delivery of fibre upgrades and resolution of service quality issues via the reporting mechanisms in Schedule 4A. In specified circumstances we will be able to use our powers to initiate a review of benchmark service standards and, have regard to the LTIE and other legislative criteria when reviewing any service standards proposals put forward by NBN Co as part of the reset process.

5.10.2 Stakeholder feedback

Stakeholders support the inclusion of a framework for setting benchmark service standards in the SAU. They also submit that ACCC review powers, and process to update benchmark service standards, represents an improvement to the NBN regulatory framework. While they generally support the changes to the 2023 SAU variation proposal, there are mixed views on whether they are sufficient to address concerns raised regarding the benchmark service standards for the first regulatory period.

Aussie Broadband, for example, submitted that proposed changes in the 2023 SAU variation proposal (which it supported) appeared to address gaps identified by stakeholders in the consultation on the November 2022 SAU variation proposal. ACCAN regarded the 2023 SAU variation proposal as consistent with the LTIE and a substantial step forward from previous SAUs while Ozot did not consider that the 2023 SAU variation proposal was ready for acceptance due to what it regarded as complicated on-boarding arrangements.²³⁹

235 NBN Co, *NBN indicative FY24 Annual service Improvement Plan – ACCC and Industry Update*, 6 September 2023.

236 NBN Co is not required to publish access seeker views in the first financial year. Schedule 4A.4.2(b)(i) of Module 4.

237 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A.4.2.

238 NBN Co, *August 2023 SAU variation*, Module 4, Schedule 4A.

239 ACCAN, *Re: Proposed Variation to the NBN Co Special Access Undertaking*, 11 September 2023, p 1; Ozot, *Submission in response to NBN Co Special Access Undertaking – SAU variation Aug 2023*, 11 September 2023, p 4; Aussie Broadband, *ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

Other stakeholders²⁴⁰ considered it important that the 2023 SAU variation proposal process be resolved as soon as possible to provide certainty and allow sufficient time to implement WBA5 this year. XIntegration noted that the ongoing uncertainty around service standards and pricing had made it difficult to proceed with future plans on the NBN network.²⁴¹ Telstra submitted that while significant further improvements needed to be made, these would be best achieved through the statutory infrastructure provider regime and the reset process rather than the SAU variation process.²⁴² Optus considered that it would be up to NBN Co to provide meaningful engagement to deliver real improvements on known and existing service quality issues in the first regulatory period.²⁴³

In terms of the changes that are proposed under the 2023 SAU variation proposal (relative to the November 2022 SAU variation proposal) we note that:

- Stakeholders support the changes made to the ACCC's powers to initiate a review of benchmark service standards where there is a systemic service event that impacts end-users during a regulatory cycle.²⁴⁴
- Stakeholders consider the proposed alignment of benchmark service standards and WBA5 to be an improvement to the November 2022 SAU variation proposal. Most also noted that these improvements are unlikely to have a material impact on the service quality experienced by end-users. During consultation, stakeholders raised, amongst other things, fault rectification, network outages, service stability and underperforming speeds as ongoing concerns that required, in their view, a change to current service standards.²⁴⁵ Concerns were also raised over what they perceived to be a lack of accountability within the framework when NBN Co does not deliver services in accordance with its own standards. They proposed, amongst other things, a performance incentive scheme and rebates for underperformance and performance incident rectification.²⁴⁶
- Stakeholders support the inclusion of the new transparency measures for the first regulatory period, together with independent monitoring and reporting on service quality and network performance in a record keeping and reporting rule (RKR).²⁴⁷ While there was some scepticism in previous submissions on whether proposed measures would have a meaningful impact in addressing existing consumer issues, stakeholders agreed that active and responsive engagement by NBN Co would be key. Optus considered it important that there is responsive

240 Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co Special Access Undertaking*, September 2023; Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023; Commpete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023; XIntegration, *Re: NBN Co SAU Variation (August 2023)*, 6 September 2023.

241 XIntegration, *Re: NBN Co SAU Variation (August 2023)*, 6 September 2023, p 1.

242 Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co Special Access Undertaking*, September 2023, p 4.

243 Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023, pp 2, 4.

244 Commpete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023, p 4; Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

245 Telstra, *Submission to ACCC NBN Co Special Access Undertaking Draft Decision*, 2 June 2023, pp 4, 6; ACCAN, *Submission to draft decision*, 30 May 2023, p 6; Optus, *Submission in response to ACCC Draft Decision*, May 2023, p 5; Optus, *Supplementary submission to draft decision*, June 2023, pp 6–7; Vocus, *Submission in response to draft decision*, May 2023, p 5; Bruce Bebbington, *Submission in response to ACCC draft decision May 2 2023*, 30 May 2023, pp 6–7; Bruce Bebbington, *Submission on proposed variation to the NBN Co SAU August 2023*, 13 September 2023, pp 1–4; IAA, *RE: Draft decision – Variation to the NBN Co Special Access Undertaking*, 30 May 2023, p 3; Aussie Broadband, *Re: ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2.

246 Telstra, *Submission to Submission to ACCC NBN Co Special Access Undertaking Draft Decision*, 2 June 2023, pp 4–7; Telstra, *Telstra Submission in relation to NBN's proposed SAU variation*, 17 February 2023, pp 4, 8–9, 13; Optus, *Submission in response to ACCC draft decision*, May 2023, p 10; Optus, *Supplementary submission to draft decision*, June 2023, pp 2, 5–7; ACCAN, *Submission to ACCC NBN Co SAU variation November 2022*, February 2023.

247 Aussie Broadband, *ACCC Consultation Paper on the Proposed variation to the NBN Co SAU – August 2023*, 13 September 2023, p 2. Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023, p 4. Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co Special Access Undertaking*, September 2023, p 4.

engagement from NBN Co to address new issues promptly and improve end-user experience. It noted that, in light of increasing prices, end-users should expect more reliable and better performing services otherwise they might downgrade their services or seek other options which undermine NBN Co's ability to achieve its long-term revenue objectives.²⁴⁸ Telstra was of the view that an RKR would ensure that issues can be addressed either mid-regulatory cycle (if systemic) or as part of the reset process.²⁴⁹ Commpete and ACCAN welcomed their inclusion in the consultation process of the service improvement plan (ACCAN also noted that it required funding to do so).²⁵⁰

In response, NBN Co noted that proposed benchmark service standards are premised on associated pricing commitments and expenditure forecasts and that any significant and unplanned expenditure may require it to review its pricing commitments, and potentially divert investment from its core strategy of upgrading copper services to fibre. As such, NBN Co considered that enhanced service level commitments be assessed based on its ability to continue upgrading and maintaining the network, rather than any immediate improvements. Additionally, NBN Co considered it important that it does not introduce and entrench higher service standards on access technologies that are subject to overbuild if such commitments would divert capital expenditure that is more efficiently spent on upgrading the network over time, or would impact its ability to maintain the network to meet existing service quality commitments.²⁵¹

NBN Co submitted that it had sought to resolve key performance issues without triggering expenditure that would require it to revisit pricing commitments under the SAU in relation to:

- dropouts and fault rectification – NBN Co proposed changes to the benchmark service standards that lower the dropout threshold for an end-user fault on FTTN, FTTC and HFC networks
- outage processes – NBN Co was engaging RSPs, including via the Communications Alliance working group, on outage processes and had recently communicated with them on a planned trial for notification processes on the HFC network
- service performance, speed rebates and assurance processes, service information and reporting – NBN Co referred to the rollout of VDSL2 features (since 2021) and other programs that have been implemented under WBA4 and/or ongoing for a number of years.²⁵²

NBN Co considered that a performance incentive framework would be premature until it is in a position to recover its costs. It also disagreed with submissions that suggested that it was not accountable. NBN Co noted that that it faced strong incentives to maintain and improve service levels through the benchmark service standards and, should it be necessary, the ACCC also had the power to set alternate service levels for future regulatory cycles or intervene mid-cycle. Additionally, NBN Co expected that an increasingly competitive broadband market and proposed transparency framework would act as incentives for it to deliver on proposed service improvements.²⁵³

In support of its transparency initiatives, NBN Co noted that the service improvement plan went beyond consultation to enhanced transparency of NBN Co's consideration of access seeker views.²⁵⁴ NBN Co also explained that the fundamental purpose of the service performance review was to ensure that service standards remain appropriate to meet RSP and end-user expectations, while aligned with the capability of the NBN and NBN Co's operations. Additionally, it noted the availability

248 Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023, pp 2, 4.

249 Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co Special Access Undertaking*, September 2023, pp 2, 4.

250 ACCAN, *Submission re: Proposed Variation to the NBN Co SAU*, 11 September 2023, p 3; Commpete, *Submission on ACCC's Consultation Paper on Proposed Variation to the NBN Co Special Access Undertaking (23 August 2023)*, 13 September 2023, p 4.

251 NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, Appendix B, p 67.

252 NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, Appendix B, pp 67–69.

253 NBN Co, *Special Access Undertaking Variation 2023 – Supporting submission*, 14 August 2023, Appendix B, pp 71–72.

254 Schedule 4A.4.2(b)(i) of Module 4.

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.²⁵⁵

5.10.3 ACCC assessment

On balance, for the reasons set out below and considering the minimum benchmark service standards for the first regulatory cycle together with the general framework for specifying benchmark service standards under the 2023 SAU variation, we are satisfied that the provisions and framework are reasonable and will promote the LTIE.

We consider that the framework for specifying benchmark service standards to be sufficiently robust to bring about changes in the benchmark service standards so these efficiently respond to RSP and consumer requirements. Similarly, we consider the additional consultation and regulatory oversight will encourage NBN Co to make changes on matters of most importance to RSPs and consumers. This includes solving for issues that drive poor RSP and consumer outcomes. In this regard we note the following features of the SAU variation:

- A commitment by NBN Co to improve service standards where it is efficient to do so and a price-quality link that is likely to encourage the efficient supply of, and investment in, service quality improvements. It will also take account of the interests of RSPs and end-users together with the direct costs of providing access to the NBN, NBN Co's legitimate business interests, and the economically efficient operation of the carriage services, telecommunications networks and facilities that operate on the NBN.
- ACCC review powers that support transparency and accountability.
- Consultation and other transparency measures to encourage the adoption of standards most valued by end-users.
- Benchmark service standards that provide certainty and clarity to industry and end-users with respect to minimum service standards.

Introduction of benchmark service standards

The incorporation of a framework for specifying benchmark service standards in the SAU has unanimous support from stakeholders. In this respect, we note that under the SAU variation service quality and price considerations are required to be considered simultaneously.

NBN Co submits that the fundamental purpose of including a framework for specifying benchmark service standards in the SAU is to establish a price-quality link to ensure that it is not incentivised to reduce service standards (as an alternative to increasing prices) in order to increase margins.²⁵⁶ We also consider that consideration of service quality as part of the replacement module process in the subsequent and/or post-2032 periods will encourage the economically efficient investment in NBN infrastructure used to supply service quality improvements valued by end-users, and thereby promote the productively, allocatively and dynamically efficient supply of NBN services. Additionally, we consider it reasonable for service quality and associated costs to be considered within the same framework and in doing so, takes account of:

- the interests of RSPs and end-users (who have the right to access and use NBN wholesale services)
- direct costs of providing access to the service
- NBN Co's legitimate business interests of earning a return on its investment.

²⁵⁵ NBN Co, *NBN SAU Variation 2023 – Supporting submission*, 14 August 2023, Appendix B, pp 70–71.

²⁵⁶ NBN Co, *Submission to ACCC Consultation Paper – Proposed Variation to the NBN Co Special Access Undertaking*, February 2023, p 23.

The flexible arrangements in Schedules 2D.4 and 2I of Module 2 further serve to strengthen the price-quality link within the long-term regulatory framework in our view. Under these arrangements the ACCC and NBN Co will be able to respond to particular unforeseen events via a change to the benchmark service standards, financed by a cross pass-through processes. In this way, the framework allows for a review of, and changes to, the benchmark service standards if NBN Co wishes it; if it is necessary for RSP compliance with a change to a retail service standard regulation or; necessary and proportionate to address a systemic service standard event. These arrangements, together with the reset process, will assist in providing a set of benchmark service standards that remain fit for purpose. Additionally, they support the efficient supply of broadband services across the supply chain. By facilitating RSP compliance with retail regulations, the framework also supports the economically efficient operation of the carriage services, telecommunications networks and facilities that use the NBN as an input.

ACCC powers to specify changes to benchmark service standards

We note that the SAU variation confers powers on the ACCC to determine the benchmark service standards for a regulatory cycle via a reset determination. The process to make these determinations and considerations are discussed in section 4.2.

Additionally, in certain circumstances, the ACCC can initiate a review to seek changes to the benchmark service standards during a regulatory cycle, including where NBN Co has not itself proposed a change. This can be done in circumstances where RSPs and/or end-users are adversely affected or, retail regulatory change necessitates a change to a benchmark service standard. Similarly, we will also be able to require NBN Co to make, if it has not done so already, a cross pass-through application in relation to a negative change event.

In exercising these conferred powers, we will be required to consider the long term interests of consumers, along with the interests RSPs (who have the right of access and/or use of the NBN), NBN Co's legitimate business interests and the direct costs associated with any changes in the benchmark service standards, amongst other matters.

We note that NBN Co has included provisions which require the ACCC to use its conferred powers within a particular timeframe. We have previously expressed our view that it is not necessary to specify time limits for these powers. Nevertheless, we consider that the proposed limits provide adequate time to perform our functions and powers under the SAU variation, having regard to all relevant information. In this regard, the SAU variation has included provisions which stop the clock²⁵⁷ or otherwise enable us to extend decision-making timeframes.

Consultation and transparency

We consider the consultation requirements under the SAU variation are reasonable and will promote the LTIE for the reasons set out in section 6.1. We note, for example, that NBN Co is required to consult on, and set out stakeholder views in relation to, any reset proposal²⁵⁸ at the beginning of a regulatory cycle, a benchmark service standards change proposal during a regulatory cycle and, service standard improvement plan and service performance review in the first regulatory cycle. Appropriately, the ACCC also has discretion on the conduct of its consultation on matters arising in connection with the SAU.²⁵⁹

257 The timeframe for making a decision on whether to accept or reject a service standard response and benchmark service standards change proposal; or, make a service standard determination, may be stopped under clause 2I.2.4(b) (Schedule 2I, Module 2) if the ACCC requires (and has not yet received) further information from NBN Co.

258 We consider it implicit that NBN Co would consult on service quality when it undertakes consultation on the expenditure it proposes to undertake for a regulatory cycle. Refer to Clause 5.7 of the Main Body.

259 NBN Co, *August 2023 SAU variation*, Main Body, clauses 6.1–6.3.

We note that NBN Co has committed to consulting with access seekers as well as industry and consumer representative groups under the SAU variation and in supporting submissions. We consider that this level of consultation will assist in aligning service delivery more closely with the expectations of end-users which, in turn, will likely promote end-user take up, and efficient use of, retail broadband services using the NBN. As such, we expect service quality will be improved where it is efficient to do so. That is, where the efficient cost of offering an improved service standard or meeting a higher performance benchmark is in line with, or less than, the value that access seekers and end-users will obtain.

We also note that there could be further opportunities for NBN Co and stakeholders to engage constructively on developing process improvements outside of the SAU consultation mechanisms. In this regard, we will continue to follow developments in the Communications Alliance outages forum.

Benchmark service standards for the first regulatory cycle

We consider that benchmark service standards that will apply to the first regulatory cycle (Attachment I to Schedule 4A, Module 4) provide certainty and clarity to industry and end-users with respect to the minimum service standards they can expect from commencement of the first regulatory cycle. We also consider that the proposed alignment of the SAU and standard form of access agreement,²⁶⁰ together with NBN Co's commitment to meet or exceed benchmark service standards, will provide for the timely introduction of any varied benchmarks into the access agreement, noting that it will still be open to NBN Co and access seekers to agree on better terms in the access agreement.

We note that these benchmark service standards include recent enhancements negotiated to form part of WBA5. That said, most of the benchmarks reflect NBN Co's current service standards, while NBN Co's reduced drop out threshold for notifying service faults only provides a partial response to long-standing concerns raised by stakeholders.²⁶¹

Some RSPs have made clear in their submissions that they consider more should have been done to resolve their concerns in the benchmark service standards to be specified in the varied SAU. However, these RSPs consider it is more appropriate in the circumstances to look to resolve these outstanding issues via the new processes established in the varied SAU.

We also note that NBN Co and some RSPs have submitted that the fibre upgrade initiative that is already underway is a suitable means by which to respond to those of the concerns involving service availability, stability (drop outs), and speed related issues. That said, it is not yet clear that the relevant premises will be efficiently migrated onto fibre, where this is available. We note that NBN Co's pending annual service improvement plans could provide further insight on this, as well as on other service delivery issues which could not be efficiently resolved by migrating the service to fibre.

We consider that, overall, the benchmark service standards for the first regulatory cycle and the framework for specifying benchmark service standards under the SAU variation is reasonable and in the LTIE for the reasons outlined above. Relevantly we note that the 2023 SAU variation proposal establishes processes for benchmark service standards to be incorporated into the 2013 SAU and to then be progressively improved over time. We consider that provides a suitable means to respond to any service quality problems that the initial benchmark service standards may not appropriately address.

260 Under Schedule 4A.2 of Module 4 NBN Co will ensure that any standard form of access agreement is aligned with the first regulatory cycle by 3 months (unless extended by the parties).

261 NBN Co commits to fixing services with fewer dropouts and in less time on the FTTN, FTTC and HFC networks under clause 23 of Attachment I.

5.11 Reporting

Key points

- The 2023 SAU variation proposal commits NBN Co to report on its service quality performance to RSPs, as well as provide an expanded range of operational reports during the first regulatory cycle. These measures provide appropriate support for RSPs and encourage the efficient use of and investment in the NBN.
- NBN Co will also report publicly on the outcomes of its annual service improvement plans and service performance reviews in the first regulatory cycle, which creates additional incentive for it to efficiently respond to the drivers of poor service quality.
- We consider that these measures establish a comprehensive and flexible reporting and transparency framework that can adapt to changes in service standards and expectations over time. We are satisfied these measures are reasonable and will promote the LTIE.
- Stakeholders also support implementation of a reporting framework that provides transparency over service quality that RSPs and consumers receive when using the NBN. The ACCC is currently developing a record keeping and reporting (RKR) rule for NBN Co that will provide such transparency.

5.11.1 Overview of NBN Co's proposal

The 2023 SAU variation proposal sets out benchmark service standards that apply to the first regulatory cycle. It also provides for the associated service performance reporting on these benchmark service standards.

NBN Co's reporting commitments are contained within Module 4, Schedule 4A, Attachment I of the SAU variation. The reporting commitments largely mirror those set out in the current WBA4 reporting arrangements and provide for:

- monthly and quarterly performance reporting to RSPs on its key service level activities such as end-user connections, appointment keeping and fault rectification timeframes²⁶²
- reporting on its corrective action to RSPs when it fails to meet a performance objective relating to various service level activities²⁶³
- operational reporting to RSPs which provide a greater level of granularity on NBN Co's corresponding performance reports for services on its fixed and wireless networks.²⁶⁴

In proposing a change to the utilisation management service standard with a higher utilisation measurement threshold and longer measurement timeframe, NBN Co will provide new network utilisation reporting for RSPs. NBN Co commits to providing monthly network utilisation reports where certain network resources exceed the proposed new utilisation threshold²⁶⁵ and quarterly reports where NBN Co undertook to increase available capacity.²⁶⁶

262 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clause 16.3.

263 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clause 17.

264 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clause 24.

265 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clause 16.4(a).

266 NBN Co, *August 2023 SAU variation*, Module 4, Attachment I, clause 16.4(b).

NBN Co will also introduce new transparency and reporting arrangements relating to its annual service improvement plans and service performance reviews.

For each financial year of the first regulatory cycle, NBN Co is required to publish its service improvement plan for that financial year, no later than 20 business days after the start of each financial year. For the 2024 financial year, the first service improvement plan is to be published within 20 business days after the SAU variation is accepted by the ACCC. See Section 5.10 for further information on the information to be included in the service improvement plans.

The varied SAU also commits NBN Co to publicly report on its annual service performance reviews during the first regulatory cycle. These reviews must consider NBN Co's performance against its service levels and performance objectives as well as their relevance and effectiveness to access seeker products. NBN Co must also publish a report on their reviews no later than the end of the first and second financial years. See Section 5.10 for further information on the information to be included in the annual service performance reviews.

To complement the new pricing framework, the SAU variation commits NBN Co to provide daily and monthly reporting data to RSPs in relation to individual AVC utilisation during the subsequent regulatory period (until 30 June 2032). These reports will provide RSPs with more information regarding their end-user bandwidth consumption behaviours. In turn, this will assist RSPs to be more effective in targeting their offers to better suit consumer requirements.

The 2023 SAU variation proposal does not include reporting commitments previously included in NBN Co's March 2022 SAU variation proposal, which included provision of 6-monthly reports to the ACCC on network capability, outages and recurring faults. The March 2022 SAU variation proposal also provided for the continuation of monthly reports on congestion, network availability, and connection and assurance performance to RSPs and on its website. NBN Co did not include these commitments in its November 2022 and 2023 SAU variation proposals on the expectation that such service quality metrics would be subject to reporting through an ACCC RKR.²⁶⁷

5.11.2 Stakeholder feedback

The majority of submissions in relation to reporting for the first regulatory cycle were received in response to NBN Co's March and November 2022 SAU variation proposals. The 2023 SAU variation proposal reporting proposals do not vary significantly from the November 2022 SAU variation proposal.

Throughout the SAU variation process, stakeholders have consistently expressed strong support for increased reporting by NBN Co, a key theme of which is the need for a comprehensive and transparent service quality reporting framework.²⁶⁸ In addition, there is support for a reporting framework that can adapt to changes in service standards and stakeholder expectations over time.²⁶⁹

²⁶⁷ NBN Co, *SAU variation, Supporting submission Part C: Non-Price Terms*, November 2022, p 30.

²⁶⁸ Telstra, *Submission in relation to NBN's proposed SAU variation*, 17 February 2023, p 51; Optus, *Submission in response to ACCC Consultation Paper NBN Co SAU variation*, February 2023 p 48; Aussie Broadband, *Re Proposed variation to the NBN Co Special Access Undertaking Consultation Paper – January 2023*, 20 February 2023, p 5; ACCAN, *Submission on the NBN CoSAU (November 2022)*, February 2023, p 30.

²⁶⁹ Aussie Broadband, *Re Proposed variation to the NBN Co Special Access Undertaking Consultation Paper – January 2023*, 20 February 2023, p 5; ACCAN, *Submission on the NBN Co SAU (November 2022)*, February 2023, p 30.

Optus expressed support for the new reporting commitments outlined in the SAU variation in their earlier submission, noting that they will increase transparency and regulatory oversight.²⁷⁰ Aussie Broadband also encouraged continuation of NBN Co's voluntary public reporting through its monthly progress reports dashboard.²⁷¹ In addition, submitters sought improvements in NBN Co's operational reporting to RSPs to enable providers to better assist end-users.²⁷²

To enable a comprehensive reporting framework, there is broad support across both recent submissions and previous submissions for the ACCC's development of a RKR for NBN service quality and network performance.²⁷³ In particular, both Telstra and Optus continued to express strong support for the RKR in their recent September submissions.²⁷⁴ NBN Co has acknowledged stakeholder support for a RKR, public reporting and improved operational reporting, and has committed to working with the ACCC and RSPs on these issues.²⁷⁵

5.11.3 ACCC assessment

Consistent with our draft decision in relation to the November 2022 SAU variation proposal, we are satisfied the various service quality reporting provisions in the SAU variation proposal for the first regulatory cycle are reasonable and will promote the LTIE.

Improved service quality reporting will enhance transparency of NBN Co's performance and accountability in meeting their service levels and, in the future, service improvement initiatives. The inclusion of operational reporting will provide for more seamless delivery of services, leading to increased efficiency for the end user. This additional information will also allow for informed decision making, supporting economic efficiency.

Further, we consider the transparency and monitoring provisions within the varied SAU will provide an incentive for NBN Co to continue to uplift its overall service quality to benefit end-users.

We recognise that the 2023 SAU variation proposal includes performance and operational reporting that RSPs currently receive and support the additional reporting commitments proposed by NBN Co relating to network utilisation.

We consider the annual service performance reviews, and the public reporting associated with these reviews, will highlight service quality issues, and provide an important basis to improve benchmark service standards in the future. Similarly, the public reporting of the annual service improvement plans will encourage a continued focus on improved service delivery and performance with a focus on end-user experiences. The requirement to consult with access seekers for both processes will ensure that proposed service quality initiatives are focused on addressing known performance issues and that end user preferences and willingness to pay are taken into account.

270 Optus, *Submission in response to ACCC Consultation Paper*, February 2023, p 48.

271 Aussie Broadband, *Re: Proposed variation to the NBN Co Special Access Undertaking Consultation Paper – January 2023*, 20 February 2023, p 5.

272 Telstra, *Submission in relation to NBN's proposed SAU variation*, 17 February 2023, p 15; Optus, *Submission in response to ACCC Consultation Paper*, February 2023, p 48; Aussie Broadband, *Re Proposed variation to the NBN Co Special Access Undertaking Consultation Paper – January 2023*, 20, February 2023, p 5; Launtel, *Submission in response to ACCC Consultation Paper*, February 2023, p 12.

273 Telstra, *Submission in relation to NBN's proposed SAU variation*, 17 February 2023, p 51; Aussie Broadband, *Re Proposed variation to the NBN Co Special Access Undertaking Consultation Paper – January 2023*, 20 February 2023, p 5; ACCAN, *Submission on the NBN Co Special Access Undertaking (SAU) Variation*, February 2023, p 30; Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co Special Access Undertaking*, September 2023, p 4; Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023, p 4.

274 Telstra, *Submission to ACCC Consultation on proposed variation to the NBN Co Special Access Undertaking*, September 2023, p 4; Optus, *Submission in response to ACCC: Proposed variation to the NBN Co SAU*, September 2023, p 4.

275 NBN Co *Submission to ACCC Consultation Paper*, February 2023, p 24.

We acknowledge that the additional reporting for RSPs, relating to AVC utilisation, will not play as important a role given NBN Co's 'floor and ceiling' pricing proposal means that RSPs will not need to identify and optimise those heavy use end-users to achieve a wholesale cost saving. However, we agree with NBN Co that the provision of these reports will still provide value to RSPs in better understanding their end-users' data consumption behaviour. This, in turn, should assist RSPs to match end-users with more suitable plans. These benefits will ultimately benefit end-users.

We also note stakeholders support the ACCC development of a service quality RKR. The ACCC continues to develop a potential RKR to complement the improved reporting and transparency provisions in the 2023 SAU variation proposal and future operational reporting improvements to RSPs via the WBA process. The ACCC expects to have a service quality RKR for NBN Co in place in 2024.

6. Final assessment of 2023 SAU variation proposal

This section provides our overall assessment of the 2023 SAU variation proposal.

We have had regard to information that has been provided by NBN Co and other stakeholders, including information provided in relation to the March 2022 and November 2022 SAU variation proposals. The timeframe which we have considered for the purpose of this assessment is from 1 July 2023 to 30 June 2040, which is the period which the varied SAU applies.

This assessment complements, and should be read in conjunction with, the assessment of key aspects of the 2023 SAU variation proposal discussed in section 5.

The assessment framework that we have applied is outlined in section 3.

The ACCC must not accept an SAU variation unless it is satisfied that (amongst other things):

- the stipulated terms and conditions upon which NBN Co would comply with its standard access obligations are (amongst other things) reasonable
- the conduct of NBN Co that the SAU variation specifies in relation to access to the service will promote the long-term interests of end-users and the terms and conditions on which NBN Co would engage in that conduct that are specified in the variation are reasonable.²⁷⁶

We are satisfied of each of these matters in respect of the stipulated terms and conditions upon which NBN Co would comply with its standard access obligations, and the conduct of NBN Co in relation to access of the service and the terms and conditions on which it would engage in that conduct, that are contained in the 2023 SAU variation proposal.

The ACCC must also not accept the 2023 SAU variation unless satisfied that any conduct specified in the variation in respect of the activities enumerated in s 152CBA(3C) of the CCA (such as developing new eligible services, enhancing a declared service, extending or enhancing the capacity of a facility or telecommunications network, planning for a facility or telecommunications network, and certain activities that are preparatory or ancillary to the supply of a declared services) will promote the LTIE. We are satisfied that any conduct specified in the 2023 SAU variation in respect of the activities specified in s152CBA(3C) of the CCA will promote the LTIE.²⁷⁷

We discuss our assessment of the 2023 SAU variation proposal against the LTIE objectives and each of the reasonableness criteria in sections 6.1 to 6.6 below.

There are also other mandatory conditions that need to be satisfied before we can accept an SAU variation proposal which are discussed in section 6.7. As discussed in that section, we are satisfied that these conditions have been satisfied in respect of the 2023 SAU variation proposal.

²⁷⁶ See section 152CBD(2) paragraphs (b) and (ca) of the CCA. Clause 1 of the Main Body of the 2013 SAU commits NBN Co to comply with the Category B SAOs, which will be continued under the varied SAU.

²⁷⁷ See section 152CBD(2) paragraph (cb).

6.1 Long-term interests of end-users

In assessing whether:

- the conduct of NBN Co specified by the proposed SAU variation in relation to each of access to the service and the activities specified in s 152CBA(3C) of the CCA, and
- each of the terms and conditions on which NBN Co would engage in conduct in relation to access to the service, and the terms and conditions on which it would comply with its standard access obligations specified in the variation (for the purpose of assessing their respective reasonableness).

will promote the LTIE, the ACCC must consider the likely effect they will have on the promotion of competition in relevant markets, the achievement of any-to-any connectivity and the encouragement of the economically efficient use of, and investment in, relevant infrastructure.

6.1.1 Efficient use of and investment in infrastructure

We are satisfied that the conduct, and terms and conditions, of the kind described at the outset in the varied SAU will encourage the efficient use of, and investment in, NBN infrastructure. In this regard, the price-related terms and conditions, as well as the benchmark service standards, in the 2023 SAU variation proposal

- allow a suitable degree of pricing discretion to optimise demand for the NBN based on reasonably anticipated market conditions
- provide for an initial modest uplift in the benchmark service standards and mechanisms for these to be efficiently improved over time.

Further, under the varied SAU:

- NBN Co will have incentives to consult with customers and consumer representative bodies to gain their insights on consumer preferences and willingness to pay for service improvements and other initiatives. This will occur on an annual basis in the first regulatory cycle via the service improvement plan, and then as part of preparing each for future regulatory cycles. This in turn will allow NBN Co to prioritise its spending towards matters that consumers value more highly, and thereby encourage efficient use of and investment in the NBN
- more robust rules and processes will guide the assessment of forecast and actual capital expenditure, for prudence and efficiency, including:
 - the use of clear expenditure objectives and expenditure factors that appropriately anchor the consideration of prudence and efficiency of expenditure
 - additional transparency over spending that occurs at the direction of government, and capital contributions that the government or third parties make
 - an appropriate degree of flexibility to update the methodology and parameters used for calculating the weighted average cost of capital as part of future reset determinations
- the trade-offs involved in setting baseline price and quality can be better considered as both will now be in scope during the reset process, and in considering cost pass through applications that involve service improvements
- RSPs will have better certainty over future access costs via the pricing principles, price controls, and transparency measures to plan their market offers, which will allow them to better target latent demand in NBN markets
- the new reset determination process for the subsequent regulatory period will be more effective in updating the default terms on which NBN Co will satisfy its standard access obligations for

each regulatory cycle. This in turn will promote efficient use of and investment in infrastructure over the SAU period. The key changes in this regard include:

- a conferral of power on the ACCC to make a reset determination without having to first make a decision to reject a proposed variation to the SAU
 - a conferral of power on the ACCC to specify the information NBN Co must provide with its reset proposals
 - expanding the scope of matters to be considered in making a reset determination
 - an ability for the ACCC to extend decision making timeframes within suitable limits; and
 - flexibility for regulatory allowances to be adjusted for events that could not have been reasonably anticipated where these are material, such as for systemic consumer issues, changes in government regulation, or natural disasters, to facilitate necessary spending to efficiently respond to these events
- the varied SAU will allow further flexibility from 1 July 2032 for the ACCC to make reset determinations that promote efficient use of and investment in infrastructure, having regard to market conditions and NBN Co’s operating environment at the time
 - the change of control provision will allow for a fundamental review of the regulatory arrangements to apply following privatisation closer to the time that any privatisation occurs, giving assurance that aspects of the current variation that may no longer be suitable would not be locked in
 - the credit rating objective for the post-2032 period (as revised) will facilitate NBN Co to access capital markets while preserving its incentives to invest and operate in a prudent and efficient manner
 - the opening ICRA balance of \$12.5 billion (in nominal terms) as of 1 July 2023 is sufficient for NBN Co to have a reasonable opportunity to achieve and maintain a standalone investment grade credit rating over the SAU period. This will enable NBN Co to efficiently access capital markets and promote efficient investment in the NBN
 - the new conditions and limitations on drawdown of the ICRA account will strengthen NBN Co’s incentives to invest efficiently, and safeguard against access pricing that impedes efficient use of the NBN
 - while there were limitations in the information provided by NBN Co to enable a conclusive assessment of the prudence and efficiency of its expenditure for the first regulatory cycle, the impact of any inefficient or imprudent expenditure incurred in the first regulatory cycle on prices will be immaterial given that:
 - the expenditure allowances will not materially affect the prices in the first regulatory period
 - there are safeguards to protect against any material inefficiency in the expenditures forecast for the first regulatory cycle leading to adverse pricing impacts in subsequent regulatory cycles.

6.1.2 Promoting competition

We are satisfied that the conduct, and terms and conditions, of the kind described at the outset in the varied SAU will promote competition in supply of listed services, i.e., carriage services or services that facilitate the supply of such services.

This is because the 2023 SAU variation proposal is likely to lower barriers to entry in downstream retail markets, or support greater product differentiation by RSPs, including by:

- providing additional certainty to RSPs on the access costs that they will face and service quality they can expect, such as by removing CVC charges or by providing greater certainty over the timing and nature of annual price changes
- reducing the implicit scale advantages arising from existing pricing structures via the reforms to NNI pricing and adoption of a floor and ceiling pricing model
- mitigating the risk of inefficient pricing or price shocks that RSPs would otherwise need to manage, due to the new consultation requirements and expenditure assessment measures, more effective regulatory processes to set default access terms, and the restatement of the ICRA value and related drawdown rules
- removing inefficient retail costs through better service quality and operational support, and simpler operational processes.

Further, accepting the 2023 SAU variation proposal is likely to also promote competition between NBN Co and other network operators in competitive or potentially competitive markets. This is principally due to the regulatory accounting measures that the 2023 SAU variation proposal will commit NBN Co to establish over the first 15 months of it coming into effect. These measures are to be implemented to mitigate the risk that NBN Co's access offers in competitive markets can be set below the costs that are properly attributable to their supply.

We acknowledge that the transition to the new pricing arrangements introduce a risk of disrupting competition. This risk stems from the current uncertainty as to when access seekers can make complimentary changes to their downstream pricing from commencement, and the first price review date occurring relatively soon after the price transition date. In our view NBN Co and access seekers have strong incentives to mitigate these risks so that competition effects will be moderate and outweighed by the benefits of not delaying the new pricing model as most RSPs have indicated is their preference.

6.1.3 Any-to-any connectivity

We consider that the 2023 SAU variation proposal is unlikely to have any material or direct impacts on realising any-to-any connectivity.

6.2 The legitimate business interests of NBN Co, and NBN Co's investment in facilities used to supply the services concerned

We consider that accepting the 2023 SAU variation proposal is consistent with the legitimate business interests of NBN Co and has due regard for NBN Co's investment in the facilities used to supply the services covered by the varied SAU. This is principally because NBN Co has volunteered the 2023 SAU variation proposal in return for regulatory certainty.

We note the following features of the varied SAU that are relevant to these matters:

- a consistent regulatory framework will apply to the SAU services as a result of the 2023 SAU variation extending the scope of the 2013 SAU to cover all current access technologies
- the 2023 SAU variation will provide NBN Co with an opportunity to be heard, including to propose suitable measures, when the ACCC is exercising powers conferred by the varied SAU

- the 2023 SAU variation will provide NBN Co with a reasonable opportunity (subject to acting in a prudent and efficient manner) to achieve and maintain a standalone investment grade credit rating, including as a result of transitioning pricing over time to its efficient costs, and the restated opening ICRA balance, ICRA drawdown arrangements, and the credit rating objective to apply from 1 July 2032
- the 2023 SAU variation will provide NBN Co with clarity over the expenditure objectives and expenditure factors that will be used to assess its forecast and actual spending, as well as over a permitted average price path that will allow it to reach the point of annual efficient cost recovery, provided it meets its own long-term demand, cost, and revenue targets
- NBN Co will have the opportunity under the varied SAU to seek adjustments to its regulatory allowances for material events that could not be reasonably anticipated when the allowances were set
- NBN Co will have suitable flexibility under the varied SAU to refine its pricing intentions to optimise demand and respond to changing market conditions, without unduly compromising the effectiveness of the cost certainty and transparency measures that are introduced by the 2023 SAU variation.

6.3 The interests of persons who have the right to use the services concerned

We consider the 2023 SAU variation proposal is in the interests of persons who have the right to use the varied SAU services. In this regard we note:

- the 2023 SAU variation proposal provides additional assurance and certainty over NBN Co fulfilling the standard access obligations that it owes to RSPs including via the price transparency and price control measures that will supersede NBN Co's uncertain bundle discounting model
- RSPs, and ACCAN and other consumer representatives will have a greater say over how NBN Co prioritises its spending via the new consultation requirements in the first regulatory cycle and then as part of NBN Co preparing reset applications ahead of each of following regulatory cycle. Relatedly, this consultation makes more likely that NBN Co could efficiently reduce costs, develop new products, and improve service quality, while managing the potential for this to impact pricing, all of which will benefit RSPs and their customers
- RSPs will have additional assurance that they can access service standards that are at least as good as those in market today in all material respects, and that these standards can be uplifted where it is efficient to do so, including when reasonably required to respond to systemic quality issues or by retail regulation
- the new arrangements for assessing expenditures, along with the restatement of the ICRA value and drawdown arrangements, mitigate the risk that RSPs would continue to face in the absence of the varied SAU of inefficiently high access pricing
- the 2023 SAU variation proposal establishes safeguards against RSPs paying higher access prices due to costs that are attributable to competitive services or which have already been recovered, including the capital contribution and cost accounting measures.

In saying this, we note that the varied SAU will not provide for some matters for which RSPs have advocated over the course of our consultation on NBN Co's SAU variation proposals. This includes a call for material price reductions and more immediate quality improvements for the copper-based technologies. Although we accept that these are things that would be in the interests of RSPs, these RSP interests need to be balanced against the encouragement of efficient use of and investment in the NBN, the legitimate interests of NBN Co, and NBN Co's investment in the facilities used to provide the SAU services.

6.4 The direct costs of providing access to the services concerned

We consider that accepting the 2023 SAU variation proposal will result in a consideration of the direct costs of providing access to the SAU services under the regulatory framework that the variation establishes. In this regard, we note:

- the use of BBM proposals to align prices with the efficient costs of access over the subsequent regulatory period, together with the principles to apply in the post 2032 period that similarly require regard to BBM costs when making reset determinations
- the combined consideration to be given to benchmark service standards and pricing measures when making reset determinations
- the opportunity for NBN Co to make cost pass through applications to adjust regulatory allowances for the costs of it efficiently responding to material events occurring during a regulatory cycle.

6.5 The operational and technical requirements necessary for the safe and reliable operation of a carriage service, telecommunications network or facility

We consider that the 2023 SAU variation proposal requires consideration of the operational and technical requirements for safe operation of the NBN and RSP networks and services, such as when determining NBN Co's allowed revenues and pricing under the new regulatory framework.

In this regard, we consider that the access arrangements and regulatory allowances that have been proposed for the first regulatory cycle will not impede the safe and reliable operation of the networks and services.

Further, we note that spending will be consistent with the expenditure objectives, and would be included in setting regulatory allowances, where it would be prudent and efficient for a network operator in NBN Co's position to incur either:

- to comply with legal obligations (including those in respect of operational or technical requirements or the safe or reliable provision of SAU services) arising under statute or an administrative decision made by a regulator; or
- otherwise to maintain or improve the safety or reliability of products and services.

6.6 The economically efficient operation of a carriage service, telecommunications network or facility

We consider that accepting the 2023 SAU variation proposal will promote the economically efficient operation of the NBN as well as other networks and facilities.

In this regard, we repeat the views that we have expressed in section 6.1 above concerning how the varied SAU will encourage more efficient use of and investment in the NBN.

We note that these matters will also promote more efficient use of and investment in the networks and facilities operated by RSPs or other carriers that interconnect with the NBN. This is because the more efficient SAU services will lower the costs and/or increase the use of these networks.

Similarly, the measures that we have discussed above that provide RSPs with greater transparency and certainty over NBN Co's future price and quality intentions, or access to simpler and more effective information and operations support from NBN Co, will facilitate the efficient operation of their networks and facilities.

6.7 Other mandatory factors for acceptance of an SAU variation

As discussed in section 3, section 152CBD of the CCA prescribes other statutory matters that the ACCC must consider in deciding whether to accept or reject a variation to an SAU.

The ACCC must refuse to accept a proposed variation to an SAU if:

- it provides that a term or condition is a fixed principles term or condition and the ACCC considers that it should not be a fixed principles term or condition²⁷⁸
- the ACCC considers that the notional fixed period for a fixed principles term or condition specified in the variation should not be the notional fixed period for the fixed principles term or condition²⁷⁹
- the variation provides that one or more specified circumstances are qualifying circumstance in relation to a fixed principles term or condition specified in the variation, and the ACCC considers that any of the qualifying circumstances should not be qualifying circumstances,²⁸⁰ or
- the variation does not provide that particular circumstances are qualifying circumstances for a fixed principles term or condition specified in the variation, and the ACCC considers that those circumstances should be qualifying circumstances in relation to the fixed principles term or condition.²⁸¹

These are discussed from subsection 6.7.1 below.

In addition, the ACCC must also not accept a proposed variation to an SAU unless it:

- is satisfied the terms and conditions specified in the variation in respect of compliance with the category B SAOs are consistent with those SAOs²⁸²
- is satisfied the undertaking is consistent with any Ministerial pricing determination, and²⁸³
- has published the variation and invited people to make submissions on the variation; and considered submissions received within the time limit specified by the ACCC when it published the variation.²⁸⁴

We are satisfied that the terms and conditions specified in the 2023 SAU variation in respect of compliance with the category B SAOs are consistent with those SAOs.²⁸⁵

278 CCA, s. 152CBD(4)(a).

279 CCA, s. 152CBD(4)(b).

280 CCA, s. 152CBD(4)(c).

281 CCA, s. 152CBD(4)(d).

282 CCA, s. 152CBD(2)(b).

283 CCA, s. 152CBD(2)(c).

284 CCA, s. 152CBD(2)(d).

285 Under Clause 1 of the Main Body of the SAU variation, NBN Co agrees to be bound by the Category B SAOs and will comply with the terms and conditions specified in the undertaking in relation to the SAOs. The Category B SAOs are outlined in s. 152AXB of the CCA.

We also note that there is currently no Ministerial pricing determination in force.

As discussed in section 2.3, the ACCC published the 2023 SAU variation proposal on 16 August 2023 and invited submissions by 13 September 2023. The ACCC has considered these submissions in making its decision.

In addition to the circumstances where the ACCC must not accept the SAU variation proposal, there are 3 reasons for which the ACCC must not reject the SAU variation:

- if the undertaking contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services, the ACCC must not reject the undertaking for a reason that concerns those price-related terms and conditions, or for the reason that it is not satisfied of the matters set out in section 152BD(2)(b)²⁸⁶
- if certain conduct by NBN Co (relating to interconnection and bundling of access services) is authorised under Part XIB of the CCA, the ACCC must not reject the undertaking for a reason that concerns this conduct or for the reason that it is not satisfied of the matters set out in section 152CBD(2)(b) in relation to that conduct;²⁸⁷ or
- if the SAU given by the person that was previously accepted by the ACCC contains a fixed principles term or condition, the ACCC must not reject the variation given by this person during the notional fixed period for the fixed principles term or condition for reasons relating to the fixed principles term or condition.²⁸⁸

We note that as our decision is to accept the SAU variation it is not strictly necessary for us to reach a view on these matters.

That said, the ACCC does not consider that the 2023 SAU variation proposal contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services or provides for conduct by NBN Co (relating to interconnection and bundling of access services) that is authorised under Part XIB of the CCA.

Clause 7.3 of NBN Co's 2023 SAU variation proposal contains several provisions that are fixed principles terms or conditions for the SAU variation proposal term. The ACCC considers that the fixed principles are appropriate for inclusion in the varied SAU, and our assessment of the fixed principles terms or conditions against each of the statutory criteria in respect of those terms and conditions are contained below.

6.7.1 Scope of the fixed principles

Part XIC of the CCA provides for a person giving an SAU to 'lock in' certain matters for a specified period of time using 'fixed principles terms and conditions'. These fixed terms and conditions will apply to subsequent undertakings and variations and provide NBN Co with certainty that those terms and conditions will continue under future access arrangements.

This will affect the ACCC's assessment of any future undertakings as once accepted we cannot reject a proposed undertaking or variation for reasons that concern those conditions. Our approach is therefore not to accept a fixed principle term or condition that will constrain our ability to ensure that future SAU terms are reasonable and likely to promote the LTIE.

The varied SAU given by NBN Co specifies the following terms and conditions as fixed principles terms or conditions, which each pertain to NBN Co's long-term cost recovery and allowable revenue in the subsequent regulatory period:

286 CCA, s. 152CBD(5A).

287 CCA, s. 152CBD(5C).

288 CCA, s. 152CBAA(6).

- the RAB roll-forward equation (clauses 2G.5.1 and 2G.5.3(a))
- the fact that the annual revenue requirements will be calculated using the following building block components – operating expenditure (which is to include operating expenditure to be incurred pursuant to the Telstra and Optus arrangements), depreciation, a return on capital and tax allowance (clause 2G.2.1(a)).

We note that these terms and conditions are already designated as fixed principles in the 2013 SAU. The changes in how the fixed principles are presented in the SAU variation concern renumbering and updating cross references.

In any event, the ACCC considers that the matters proposed to be specified as fixed principles terms or conditions are appropriately confined and suitable for inclusion in the varied SAU. Given they each relate to long-term cost recovery, we consider they will still be reasonable in the context of a future assessment of any new SAU or SAU variation proposal. We also note that specifying matters relating to long-term cost recovery as fixed principles is consistent with prior ACCC/AER regulatory approaches, including gas access arrangements²⁸⁹ and regulated access to Telstra’s legacy fixed-line services.²⁹⁰

Clause 2G.5.1 specifies that the beginning RAB from the varied SAU commencement date (1 July 2023) will be equal to the closing RAB on 30 June 2023 (which is the last day of the regulatory arrangements under the 2013 SAU).

Similarly, clause 2G.5.3(a) ensures that the opening RAB of a regulatory cycle in the subsequent regulatory period (other than the first cycle) will be equal to the closing RAB of the previous regulatory cycle.

Fundamentally, clauses 2G.5.1 and 2G.5.3(a) ensure that the value of NBN Co’s RAB (as previously determined) cannot be reopened at some future time, which could lead to windfall gains or losses to NBN Co.

Clause 2G.2.1(a) specifies that certain building block components will be used to calculate NBN Co’s allowable revenues. These building block components are operating expenditure²⁹¹, depreciation, a return on capital, and tax allowance. However, the manner in which each building block is calculated is not specified by this clause and is not part of the fixed principle term or condition. Clause 2G.2.1(a) is important to providing NBN Co with regulatory certainty that it will have the opportunity to recover its efficient costs, which is important to NBN Co’s long-term cost recovery. We consider that the building blocks used to calculate the allowable revenue are objectively ascertainable, do not involve undue discretion, and will still be reasonable in the context of any future assessment of a new SAU or a SAU variation proposal.

Clause 2G.5.3(a) also specifies that the RAB is to be determined with respect to capital expenditure, disposals, and depreciation, but does not specify how each component will be determined. While these inputs can be determined in several ways, it is generally accepted that capital expenditure, disposals and depreciation are all required to determine the RAB. As discussed in Section 5.3, the ACCC is generally satisfied that NBN Co’s approach to the BBM promotes the LTIE, is reasonable, and provides sufficient transparency to not afford NBN Co with undue discretion.²⁹² Notional fixed period

The notional fixed period for a fixed principles term or condition sets out the time for which the term or condition is fixed. The notional fixed period for each of the fixed principles terms or conditions

289 See for example AER, *Multinet Gas – Access arrangement 2023–28*, clause 4.7. For example, the matters approved by the AER as fixed principles relate to the RAB roll-forward mechanism.

290 ACCC, *2011 Fixed-Line Services Final Access Determinations*, July 2011 pp 127–132.

291 Which is to include operating expenditure to be incurred pursuant to the Telstra and Optus arrangements.

292 The ACCC/AER have historically taken the approach that a fixed principle should be objectively ascertainable and not involve undue judgement or discretion, as otherwise there is uncertainty as to whether the ACCC may reject a variation for the reason that the variation does not comply with those principles.

specified in the proposed SAU variation begins when the varied SAU comes into effect and ends at the expiry of the SAU (the earlier of 30 June 2040 or on a change of control).

Given the ACCC's views about the appropriately confined scope of the fixed principles terms and conditions specified in the 2023 SAU variation proposal, the ACCC considers that the proposed notional fixed period is reasonable. This is consistent with providing NBN Co with greater certainty about its ability to achieve long-term cost recovery over the term of the varied SAU.

6.7.2 Qualifying circumstances

If a qualifying circumstance exists, any restriction placed on the ACCC's assessment of an SAU variation because of a fixed principles term or condition will not apply.

The varied SAU given by NBN Co specifies that the qualifying circumstances for the proposed fixed principles terms or conditions are that the ACCC is satisfied that:

- there is a manifest and material error in the fixed principles terms or conditions, or
- any information on which the fixed principles terms or conditions were based was false or misleading in a material respect.

This is the same as the current qualifying circumstances specified in NBN Co's 2013 SAU. We consider these qualifying circumstances are still appropriate. Given the limited scope of the fixed principles terms or conditions specified in the proposed variation, the ACCC does not consider that there are additional circumstances that should be specified as qualifying circumstances for those fixed principles terms or conditions.

Appendix A: 2013 SAU

NBN Co's 2013 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 wholesalers and RSPs. The SAU was varied in April 2021 to extend the application of 3 non-price provisions,²⁹³ which were originally set to expire after 5 years.

The 2013 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 2013 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 2013 SAU contains 3 modules numbered from 0 to 2.

Module 0 applies for the whole term of the 2013 SAU and provides the overarching structure and context for the 2013 SAU. Specifically, Module 0 describes the services the 2013 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 2013 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 2013 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 apply to vary the SAU to incorporate replacement modules that will operate for 3–5 years. These 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.

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.

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

Arrangements from 1 July 2023 under the 2013 SAU

On 29 June 2023 the ACCC wrote to NBN Co noting that because it had not accepted a 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 2023 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. The ACCC's letter is available on its [website](#).

Appendix B: Stakeholder 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 RSPs, industry groups, consumer bodies and government to canvass views to assist NBN Co in developing an SAU variation proposal.²⁹⁴ 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 2021.²⁹⁵

An important output of this engagement was the development of 5 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.
- RSPs 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 RSPs 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 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

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

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

- 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 RSPs 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.²⁹⁶

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 SAU variation proposal. The forum was attended by NBN Co, RSPs and other stakeholders. The forum agenda and public summary of discussion are available on the ACCC website.²⁹⁷

Following the forum, NBN Co continued to engage with the ACCC, RSPs 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 2 weeks the supporting materials to the SAU variation proposal. The 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.²⁹⁸

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

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

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

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 in the March 2022 SAU variation proposal. 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% 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 November 2022 SAU variation proposal. We also published an expert report prepared by Sapere Research Group on revenue 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 November 2022 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 November 2022 SAU variation proposal 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 November 2022 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 new reset 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% 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 reset 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 to reject the November 2022 SAU variation proposal and development of the 2023 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](#).

Response to the ACCC consultation paper on the 2023 SAU variation proposal

The ACCC received 14 submissions in response to its August 2023 consultation paper. Stakeholders generally expressed a desire for an expediated acceptance of this SAU variation to enable implementation of new commercial terms.

The following is a list of the submissions received by the ACCC, available on our [website](#):

Submission	Date received
X Integration	6 September 2023
AGL	8 September 2023
Ozot	11 September 2023
ACCAN	11 September 2023
More & Tangerine Telecom	12 September 2023
Launtel	12 September 2023
Bruce Bebbington	13 September 2023
Optus	13 September 2023
Aussie Broadband	13 September 2023
MultiWave Networks	13 September 2023
Telstra	13 September 2023
Swoop	13 September 2023
Commpete	13 September 2023
TPG	14 September 2023

Appendix C: 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 supplied.²⁹⁹

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
- 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
- the economically efficient operation of a carriage service, telecommunications network or facility.

²⁹⁹ CCA, s. 152AB(2).

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 3 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.

