



Australian
Competition &
Consumer
Commission

Variation to NBN Co Special Access Undertaking

Draft decision

March 2017

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List of abbreviations and acronyms

| | |
|--------|---|
| ABBRR | Annual Building Block Revenue Requirement |
| ACCAN | Australian Communications Consumer Action Network |
| ACCC | Australian Competition and Consumer Commission |
| ADSL | Asymmetric Digital Subscriber Line |
| AER | Australian Energy Regulator |
| AVC | Access Virtual Circuit |
| CCA | Competition and Consumer Act 2010 (Cth) |
| CCC | Competitive Carriers Coalition |
| CLC | Carrier Licence Condition |
| CPI | Consumer Price Index |
| CVC | Connectivity Virtual Circuit |
| DBD | Dimension Based Discounting |
| FTTB | Fibre to the Building |
| FTTdp | Fibre to the Distribution Point |
| FTTN | Fibre to the Node |
| FTTP | Fibre to the Premises |
| HFC | Hybrid Fibre Coaxial |
| ICRA | Initial Cost Recovery Account |
| LTIE | Long-term interests of end-users |
| LTRCM | Long Term Revenue Constraint Methodology |
| MDF | Main Distribution Frame |
| MDU | Multi-dwelling Unit |
| MRP | Maximum Regulated Price |
| MTM | Multi-Technology Mix |
| NBN | National Broadband Network |
| NBN Co | NBN Co Limited |
| NNI | Network to Network Interface |
| NTD | Network Termination Device |
| OSI | Open System Interconnection |
| PDF | Product Development Forum |

| | |
|-------|--|
| PIR | Peak Information Rate |
| POI | Point of Interconnection |
| RFS | Ready for Service |
| RSP | Retail Service Provider |
| SAM | Service Area Module |
| SAOs | Standard Access Obligations |
| SAU | Special Access Undertaking |
| SFAA | Standard Form of Access Agreement |
| TC | Traffic Class |
| ULL | Unconditioned Local Loop |
| ULLS | Unconditioned Local Loop Service |
| UNI | User Network Interface |
| WADSL | Wholesale Asymmetric Digital Subscriber Line |
| WBA | Wholesale Broadband Agreement |

Glossary

Access agreements – an agreement between a carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid access agreement are set out in section 152BE of the *Competition and Consumer Act 2010*.

Access determinations – written determinations made by the ACCC relating to terms and conditions for access to a declared service.

Access seeker – a content service provider or carriage service provider that makes, or proposes to make, a request to NBN Co for access to its services, as defined in section 152AG of the *Competition and Consumer Act 2010*.

Ancillary services – NBN Co defines this as the services supplied by NBN Co that facilitate the supply of the NBN access service, but excludes the facilities access service.

Access virtual circuit (AVC) – an Ethernet-based Layer 2 virtual connection that carries traffic to and from an end-user on the NBN Co network.

Carriage service – this is defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

Co-existence period – the co-existence period is the period during which, to ensure quality of service to its customers, NBN Co is required to adjust the normal operations of the FTTB and FTTN network by way of a downstream power back-off to accommodate the simultaneous supply of NBN services and services supplied over the public switched telephone network.

Content service – this is defined in section 15 of the *Telecommunications Act 1997* as a broadcasting or online service

Customer – NBN Co defines this as a carrier or carriage service provider that has entered into, or is otherwise subject to, an access agreement with NBN Co.

Connectivity virtual circuit (CVC) – NBN Co defines this as an Ethernet-based Layer 2 virtual capacity for the transport of customer traffic from multiple end-users within a connectivity serving area on an aggregated basis and presented at the NNI at the POI associated with that connectivity serving area.

Data transfer rate – the number of binary bits per second of data passing through an interface during a given time.

Eligible service – this is defined in section 152AL of the *Competition and Consumer Act 2010* as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons).

Facilities access service – described by NBN Co as a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a point of interconnect for the purpose of interconnecting its network with the NBN Co network.

Layer 2 – the data link layer of the OSI model. Layer 2 provides a logical connection between two physically connected devices and is independent of the underlying physical medium (Layer 1) required to make the connection.

Listed carriage service – a carriage service of the type listed in section 16 of the *Telecommunications Act 1997*, that is, a carriage service between two points where at least one point is in Australia.

Long-term revenue constraint methodology (LTRCM) – the methodology for determining the amount of revenue NBN Co would be able to earn via its prices over the SAU term. The key components are annual revenue requirements, a regulatory asset base and the initial cost recovery account.

NBN access service – the overarching service covered and declared by the SAU. It is currently defined as a Layer 2 service supplied on the NBN Co network between and including: a UNI on a NTD; and the NNI at the POI associated with the relevant NTD, for the purpose of enabling an access seeker to supply carriage or content services. NBN Co has proposed changes to the definition of the NBN access service.

NBN Co – means NBN Co Limited ABN 86 136 533 741

NBN Offer – the set of products supplied by NBN Co comprising the product components, multicast services, platform interfacing offer, sandpit offer, NBN Co co-location offer, facilities access offer and standard business offer. NBN offers include products introduced during the SAU term, but do not include other charges. NBN Co has proposed extending this to include the enhanced fault service levels offer.

Network boundary points – the current SAU defines the network boundary points of the NBN Co network as the end-user side of the UNI and the access seeker side of the NNI.

Network termination device (NTD) – the device on the customer end of an access network used to send and receive signals sent across the physical access medium.

Network to network interface (NNI) – a physical interface between the NBN Co network and the access seeker's network at the POI.

Open System Interconnection (OSI) model – the open system interconnection model, which is the framework developed by the International Standards Organisation to provide worldwide standards for computer communications.

Other charge – NBN Co defines this as an ancillary charge associated with the supply of a product component, product feature, ancillary service or type of facilities access service.

Peak information rate (PIR) – the maximum data throughput that may be delivered by the NBN service.

Point of interconnection (POI) – the geographical point where traffic stops being carried on the network of the access seeker and is given to the network owned by NBN Co to carry.

Product development forum (PDF) – NBN Co describes this as the primary forum through which customers may submit new product ideas, provide input on the development of new and existing products, and obtain information from NBN Co on its current and future product offerings.

PDF processes – the provisions of Annexure 1 to Schedule 11 of the SAU. These provisions describe how NBN Co will engage with customers via the product development forum on the development and withdrawal of products.

Ready for service (RFS) – ready for service areas are areas where the design and construction phases at the premises have been completed and are ready to be connected to the NBN.

Remediation – in the SAU variation remediation means, in relation to FTTB and FTTN products, any action determined by NBN Co as reasonable to ameliorate the line rate at the UNI used to serve the premises so that it is capable of achieving the PIR objective.

Special access undertaking (SAU) – a voluntary undertaking given to the ACCC by a supplier of a telecommunications service specifying the terms and conditions upon which it agrees to supply a listed carriage service or a service which facilitates the supply of a listed carriage service.

SAU modules – the SAU has a modular structure. Module 0 provides the overarching structure and applies for the full term of the SAU. Module 1 covers the initial regulatory period until 30 June 2023. Module 2 covers the subsequent regulatory period from 1 July 2023 to 30 June 2040.

Service description – for the purposes of this paper, service description refers to the following elements of the SAU: the definitions of the NBN access service and ancillary services in Attachment A; the definitions of the UNI and NNI in schedule 1A.3; and the associated definitions in the SAU dictionary (Attachment C).

Standard access obligations (SAOs) – obligations imposed on providers of services declared under Part XIC of the CCA with regard to access, technical and operational standards, fault detection and rectification and supply of the service.

Standard form of access agreement (SFAA) – a document published on the NBN Co website which sets out terms and conditions on which NBN Co is obliged to enter into in an access agreement with an access seeker upon request, and declares the services to which it relates.

The SAU – the SAU given by NBN CO Limited to the ACCC on 19 November 2013.

The SAU variation – NBN Co's proposed SAU variation, given to the ACCC on 27 May 2016.

User-network interface (UNI) – The current SAU defines the UNI as the physical interface on the NTD. This is the physical port into which the end-user's equipment connects to NBN Co's network.

Wholesale broadband agreement (WBA) – the WBA sets out comprehensive price and non-price terms in relation to the supply of NBN Co's services and the processes for providing NBN Co's customers with operational and technical information in relation to those services. The WBA is an SFAA.

Executive Summary

The NBN Co Special Access Undertaking (the SAU) is a key part of the regulatory framework that governs the price and other terms upon which NBN Co will supply its services to access seekers until 2040. The SAU was accepted by the Australian Competition and Consumer Commission (ACCC) in December 2013 following an extensive assessment and consultation process.

On 27 May 2016 NBN Co submitted a proposed variation to the SAU to incorporate additional NBN technologies into the SAU. Under the framework specified in Part XIC of the *Competition and Consumer Act 2010*, the ACCC must either accept or reject the proposed SAU variation. The ACCC considers that most of the proposed changes to the SAU are appropriate to include the multi-technology mix model. However, the ACCC's view is to reject the SAU variation on the basis that a limited number of proposed changes to specific non-price terms and conditions do not meet the legislative criteria for assessing the variation. The ACCC considers that minor amendments to the proposed changes could be made to address its concerns on these matters.

The SAU variation

The main purpose of the proposed variation is to incorporate fibre-to-the-node (FTTN), fibre-to-the-building (FTTB) and hybrid fibre coaxial (HFC) to reflect the current multi-technology mix (MTM) model for the National Broadband Network (NBN). NBN Co has proposed to do this by amending the SAU service description and related provisions to explicitly reflect the new technologies, including defining key network elements for the new technologies. The effect of these changes is to expand the application of the SAU provisions to the new technologies, in addition to the existing technologies already covered by the SAU.

NBN Co proposes to make a number of other changes to the SAU through the variation. These include provisions that would allow NBN Co to provide FTTN and FTTB services at lower data rates than otherwise provided for by the SAU for nodes where NBN services are being provided simultaneously with exchange fed legacy services (co-existence) or for lines requiring remediation. The co-existence and remediation provisions are proposed to apply for the remainder of the SAU term. NBN Co has also proposed variations in respect of NBN Co's rollout information commitments, the provisions relating to the appointment of dispute resolution advisors, a formula used in calculating the long-term revenue constraint methodology (LTRCM) as well as changes to include certain MTM-specific NBN offers and other charges.

Section 152CBD(2) of the *Competition and Consumer Act 2010* (CCA) sets out the criteria for assessing the proposed variation to the SAU. The ACCC can only accept or reject a variation. In deciding whether to accept or reject the variation, the ACCC must assess whether changes to:

- the terms and conditions under the variation in relation to compliance with the Category B standard access obligations (SAOs) are consistent with those obligations and are reasonable
- any conduct under the variation in relation to access will promote the long term interests of end-users (LTIE), and that the related changes to terms and conditions are reasonable, and
- any conduct under the variation that relates to certain specified matters will promote the LTIE.

The ACCC notes that most of the changes proposed by NBN Co would remain in effect until the end of the SAU term in 2040. In assessing the proposed variations to the SAU against the statutory criteria, the ACCC must be satisfied that the proposed changes are reasonable and in the long-term interests of end-users over the term of the SAU.

The ACCC's assessment of the proposed variation to the SAU is not a reassessment of each existing provision in the SAU. The scope of the ACCC's assessment is limited to an assessment of the varied terms, the effects of the varied terms, and the interaction of the varied terms with unchanged provisions in the SAU.

The ACCC considers that while the text of most of the pricing provisions remains unchanged in the SAU, there is an interaction between the existing pricing provisions and NBN Co's proposed variation to extend the definitions of the services covered by the SAU to include the MTM technology. Put simply, the proposed variation has the effect of extending the pricing provisions to services not covered by the existing SAU. The SAU pricing provisions therefore formed part of the ACCC's assessment to the extent they apply to the MTM services.

The ACCC did not specify in its consultation paper that its assessment would include the application of the existing SAU terms to the MTM services. It is therefore seeking comment from interested parties that there are grounds for it to be satisfied that the proposed variation to apply the SAU price terms to the MTM services is reasonable.

Views on general approach to the SAU variation

The ACCC has considered the proposed variation to the SAU, supporting materials provided by NBN Co and submissions received from interested parties. It has now reached a preliminary view on the proposed variation.

The ACCC agrees with the overall approach NBN Co has adopted to incorporate the MTM technologies into the SAU. For example, the amendments to the service description and other related changes (such as defining each technology type as an NBN Co Network and specifying the location of the User Network Interface), which are proposed to apply until 2040, will provide a high degree of certainty to access seekers about the services NBN Co will provide over the term of the SAU. The ACCC considers this will promote efficient use of NBN Co services, provide for efficient investment by NBN Co and by access seekers in their own infrastructure, and promote competition in downstream markets for services provided over the NBN. The ACCC also notes that most of the changes made by NBN Co relating to service description are consistent with the SAU framework that was consulted on and accepted in 2013.

Views on specific non-price matters

The ACCC has reached the preliminary view that there are a number of specific proposed changes to the SAU that would not promote the LTIE and are not reasonable.

First, NBN Co has proposed a further change to the definition of NBN Co Network to include any other network introduced or varied by NBN Co in accordance with the product development and withdrawal provisions in the SAU. The effect of this proposed provision is that new services on new networks introduced by NBN Co would be subject to the SAU without NBN Co having to submit an SAU variation. Under this approach, key terms that would describe a new technology, such as User Network Interface and network definition, would not be set out in the SAU. Instead, many of these terms would be left to be specified in NBN Co's Wholesale Broadband Agreement, which can be varied by NBN Co and is not subject to an ACCC assessment or consultation through an ACCC process.

The ACCC considers that this represents a significant departure from the current and accepted framework, where key SAU provisions relating to service description are set in the SAU for the duration of the SAU term and provide the framework within which future changes to detailed service description provisions in the Wholesale Broadband Agreement (WBA) can be made. The ACCC's preliminary view is that this change is not reasonable as it will not provide a sufficient level of certainty to access seekers of the potential services to be provided over new technologies over the SAU term. In turn, this would not promote efficient use of NBN services, provide for efficient investment or promote competition in downstream markets.

Second, NBN Co has proposed to remove a provision within the NBN Access Service definition which specifies that the User Network Interface is also the network boundary point for all technology types. With this change, the definition of network boundary point would be set out in the WBA and may be subject to change. The ACCC considers that the current provision, which is locked in for the full term of the SAU, provides a high degree of certainty to access seekers and end-users about the service to be provided, especially in regards to maintenance responsibilities.

The ACCC considers that removing the network boundary point from the SAU and having it subject to change through the WBA is not in the LTIE as it would not provide a sufficient level of certainty to access seekers or end-users and deviates from current and accepted framework of locking key terms relating to service description for the full SAU term.

Third, the ACCC is not satisfied that locking in the proposed co-existence and remediation provisions for the remainder of the SAU term would be reasonable or in the LTIE. While the ACCC agrees in principle with including specific provisions for co-existence and remediation, the ACCC is concerned that the proposed provisions would not provide efficient and reasonable outcomes over the term of the SAU. This is because the provisions would give NBN Co broad discretion over the circumstances in which an FTTN or FTTB node is placed into the co-existence period or when a line is placed into remediation and the period for which these provisions would apply.

Further, the lack of information commitments to access seekers and end-users about services that are subject to co-existence or remediation could lead to uncertainty for end-users and may result in end-user decisions being based on poor information about the data rates they can expect.

The ACCC considers that current arrangements for co-existence and remediation have not been in place long enough for it to be satisfied they will remain reasonable for the term of the SAU. Although NBN Co is likely to initially have strong incentives to end the co-existence period and remediate copper lines in a timely manner in order to increase uptake of higher value services and promote increased traffic on the NBN, the ACCC has recognised that NBN Co's incentives are likely to change over time and it may not face the same incentives later in the SAU period.

Promoting the LTIE

As noted above, under Part XIC the ACCC must be satisfied that any conduct under the SAU, or proposed variation to the SAU, will promote the LTIE.

While the SAU is a key part of the framework under which the NBN is regulated, it does not specify all terms and conditions of access to NBN Co's services. To this end, Part XIC establishes a regulatory framework that is broader than the SAU. It is important to note that there is no provision under Part XIC for the ACCC to otherwise vary or set aside the terms of a SAU or variation to the SAU once it has been accepted by the ACCC.

The ACCC is of the view that many aspects of the proposed variation are reasonable and that its concerns about specific matters could be addressed through some changes that balance NBN Co's objective to incorporate the MTM model, provide long-term regulatory certainty and ensure that the SAU variation promotes the LTIE. Having said that, the ACCC is only able to accept or reject the proposed variation to the SAU. Based on its preliminary views on the three matters discussed above, the ACCC's draft decision is to reject the proposed variation to the SAU in its current form. As part of the draft decision, the ACCC has set out changes that it considers would address the concerns that have been identified. However, it will consider other options to address concerns that will encourage investment and innovation in downstream markets and promote the LTIE.

Rollout information commitments

NBN Co has proposed changes to its SAU rollout progress information commitments to include FTTN, FTTB and HFC technologies. It has also proposed other changes which it submits would expand and clarify these commitments. The ACCC notes that NBN Co provides a range of information to access seekers and end-users outside of its SAU commitments and that it has incentives to provide information that is timely and accurate to encourage the take up of NBN services.

The ACCC notes that some changes that have been proposed may be considered to represent a reduction in NBN Co's current rollout information commitments.

The ACCC considers that, in imposing commitments to provide rollout information in the SAU, there is a balance to be reached which ensures that access seekers have sufficient information at an early stage to meet their planning and business decisions and that NBN Co can provide information that is sufficiently accurate. More granular and earlier information is only useful insofar as it achieves a minimum level of accuracy.

The ACCC considers that most of the proposed changes are likely to assist access seekers to plan for and market NBN services. However, the ACCC is seeking views from interested parties as to whether the proposed changes strike the right balance between NBN Co's business interests and the need for access seekers to have timely and granular information that will allow them to plan and supply NBN services, which in turn will promote competition.

The ACCC is satisfied that NBN Co will continue to make relevant public information available on its website but is interested in views of stakeholders about the proposed change to remove the requirement to publish information.

Consideration of SAU pricing provisions in assessment of SAU variation

The ACCC has also considered issues raised in submissions by Optus and the Competitive Carriers Coalition (the CCC) relating to the SAU pricing provisions and the extent to which the ACCC is required to consider the SAU pricing provisions in its assessment of the proposed SAU variation.

The ACCC considers that it must assess whether the SAU price terms that would apply to services provided over the MTM technologies satisfy the statutory criteria. Although the price terms for these services are largely the same as the prices for the equivalent services under the current SAU (except for the inclusion of a number of MTM-specific services), the ACCC considers that the effect of the SAU variation is to make the SAU price terms apply to the additional services supplied over the MTM technologies, and are therefore included in the ACCC's assessment of the SAU variation.

In considering whether it is reasonable for SAU price terms to apply to services provided over the MTM technologies, the ACCC considers that there are a number of strong arguments in favour of NBN Co's proposed approach. These include the following factors:

- NBN Co should have the opportunity to recover costs over the long term,
- the SAU provides incentives for NBN Co to price services efficiently in order to increase traffic on the NBN and uptake of higher value services,
- the SAU price terms include the ability to rebalance prices in a revenue neutral manner which would be extended to include the MTM services under the proposed SAU variation,
- the SAU pricing model is technology neutral and is based on the service an end-user receives, rather than the specific access technology, and
- pricing MTM services outside the SAU through another framework may lead to complexity and uncertainty.

However, the ACCC did not specifically raise the application of the SAU pricing provisions to services provided over the MTM technologies in its consultation paper. Before reaching a view on the proposed pricing approach, the ACCC is seeking views from interested parties on this aspect of the SAU variation.

1 Introduction

1.1 Purpose

On 27 May 2016, NBN Co Limited (NBN Co) submitted a proposed variation to its Special Access Undertaking (SAU) to the Australian Competition and Consumer Commission (ACCC).¹ NBN Co's current SAU was accepted by the ACCC in December 2013 following an extensive assessment and consultation process.

The SAU sets in place the principles for regulating access to the National Broadband Network (NBN) until June 2040. It provides the framework for governing prices and other terms upon which NBN Co will supply services over the NBN. The SAU is largely drafted in a technology neutral way. However, there are several provisions in the SAU which reflect the previous NBN model, which would be delivered using a combination of fibre-to-the-premises (FTTP), fixed wireless or satellite technology platforms.

The main purpose of the SAU variation is to incorporate three new network architectures within the SAU to reflect the current NBN model. These technologies are fibre-to-the-node (FTTN), fibre-to-the-building (FTTB) and hybrid fibre coaxial (HFC). NBN Co also proposes to make a number of other changes to the SAU through the SAU variation, including:

- the introduction of 'co-existence' and 'remediation' provisions for FTTN and FTTB services
- changes to rollout information commitments in the SAU, and
- a number of other amendments, including changes to the appointment of a dispute resolution advisor, introduction of new NBN offers and incorporating initial maximum regulated prices for offers in respect of the new technologies, and modifying one of the formulas used in calculating NBN Co's long-term revenue constraint methodology (LTRCM) determination.

The ACCC has released this draft decision to seek views from interested stakeholders on its draft decision to reject the proposed SAU variation. Stakeholder submissions will inform the ACCC's final decision as to whether the proposed variation to the SAU should be accepted or rejected.

1.2 Overview of the current SAU

The current SAU forms a key part of the framework that governs the terms upon which NBN Co will supply NBN services to telecommunications companies, including wholesale and retail service providers (RSPs). The SAU, which was approved by the ACCC in December 2013, sets in place principles for the regulation of access to the NBN until June 2040.

The SAU has a modular structure which 'locks in' matters for different periods of time. This structure balances regulatory certainty for NBN Co with flexibility to change certain elements or to determine certain matters at different points in time over the term of the SAU. The SAU contains three modules:

- **Module 0** applies for the term of the SAU and provides the overarching structure and context to the other parts of the SAU. It sets out the relevant background, including the scope and term of the SAU, the structure of the SAU document, fixed principles

¹ Submitted in accordance with section 152CBG(2) of the *Competition and Consumer Act 2010* (CCA).

terms and conditions and provisions for the variation, withdrawal and extension of the SAU. Module 0 also contains four attachments which provide the service descriptions, terms and conditions relating to the facilities access service, SAU dictionary of defined terms and the initial products list.

- **Module 1** covers the initial regulatory period from the commencement of the SAU until 30 June 2023. The module is intended to broadly align with the rollout phase of the NBN. It specifies how the NBN access service, ancillary services and the facilities access service will be implemented and includes price terms for NBN offers and other charges. It also includes provisions for the long term revenue constraint methodology, which is a mechanism to encourage efficient expenditure and allow NBN Co to recover its costs over time. In addition, module 1 sets out non-price terms and conditions relating to dispute resolution, provision of certain information and product development and withdrawal.
- **Module 2** covers the subsequent regulatory period and applies from 1 July 2023 to 30 June 2040. Some schedules in module 2 closely mirror the schedules in module 1, while others are unique to module 2. This module sets out the long-term arrangements for determining NBN Co's required revenue, price reviews and the development and withdrawal of NBN Co's products. This module will operate alongside additional 'replacement modules' which will contain forecasts of NBN Co's revenue and expenditure, as well as other detailed terms and conditions proposed by NBN Co.

While the SAU is largely drafted in a technology neutral way, there are a number of existing provisions which reflect the previous Government's intention that the NBN be delivered using a combination of FTTP, fixed wireless or satellite technology platforms.

1.3 Legislative Hierarchy

The SAU is a key part of the framework under which the NBN is regulated. However, it is important to note that the SAU does not specify all terms and conditions of access to NBN Co's services. To this end, Part XIC of the *Competition and Consumer Act 2010 (Cth)* (CCA) establishes a regulatory framework that is broader than the SAU.

Under Part XIC NBN Co must comply with Standard Access Obligations (SAOs). Part XIC also allows for the terms and conditions on which NBN Co supplies declared services to be set out in different instruments:

- Access Agreement – a commercial contract between the access provider and an access seeker which sets out negotiated terms and conditions of supply for an agreed period of time,
- Special Access Undertaking – an undertaking given by the access provider in connection with the provision of 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 of the terms and conditions for compliance with any or all of the SAOs, or requiring compliance with any or all of the SAOs in a manner specified in the rules, and
- Access Determination – written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry.

Part XIC establishes a hierarchy between these instruments to allow parties to identify which terms and conditions for compliance with the SAOs are to apply in relation to a declared service, particularly in the event of inconsistency between the instruments. Essentially, terms and conditions about a particular matter in an instrument that is higher in the above list will

prevail over terms and conditions about the same matter specified in an instrument that is lower in the list.

There is no provision under Part XI for the ACCC to otherwise vary or set aside the terms of a SAU once it has been accepted by the ACCC.

1.4 The SAU variation and supporting documents

NBN Co's proposed SAU variation consists of an execution document and a marked up version of NBN Co's current SAU. The varied terms are denoted by underlined words for additions and struck-out words for deletions. The remainder of the SAU is unchanged.

NBN Co also lodged a number of supporting documents with the SAU variation. These consisted of a cover letter, supporting submission and three expert reports:

- The cover letter provides some context for the submission, including a description of each of the documents and the associated confidentiality status.
- NBN Co's supporting submission seeks to explain the rationale behind its proposed changes to the SAU. It provides some context for the variation to the SAU, an outline of the proposed changes to the SAU and a description of the statutory requirements. NBN Co then sets out its assessment of the variation as a whole against the statutory requirements and an assessment of each category of changes proposed in the variation.
- The expert report by Janusz Ordover and Allan Champine was commissioned by NBN Co to provide advice on whether or how the Government's transition from a predominantly FTTP model to a mixture of technologies would impact on the incentives and constraints applicable to NBN Co over the term of the SAU. The report argues that the incentives provided by the current SAU for NBN Co to act efficiently are not affected by the inclusion of the new technologies.
- The expert report by Analysys Mason was commissioned by NBN Co to review the prudence and efficiency of NBN Co's methodology and process for determining which type of network it will deploy in particular geographic areas and NBN Co's initial design of its FTTN, FTTB and HFC networks. NBN Co provided a confidential version and a public version of this report to the ACCC. Analysys Mason concluded that the methodology and processes used by NBN Co for determining which type of network it will deploy in a particular geographic area are prudent and efficient. Analysys Mason found that NBN Co's design of its FTTN/FTTB network reflects an efficient and prudent network design (notwithstanding the fact that certain components of the design and industry incentives to support the competitive deployment of these networks are still in a state of development). Analysys Mason also found that NBN Co's design of its HFC network reflects an efficient and prudent network design on the whole, although there are potential issues that NBN Co recognises and is addressing.
- The expert report by Dr Steven Bishop and Professor Bob Officer was commissioned by NBN Co to assess whether the rate of return approach and principles in the SAU are reasonable when applied to the FTTB, FTTN and HFC technologies. The report argues that the current method for calculating NBN Co's rate of return remains appropriate with the inclusion of the new technologies.

NBN Co's proposed variation to the SAU and the public versions of its supporting documents are available on the ACCC website.²

² See: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation/sau-variation-documents>

1.5 Consultation

On 20 July 2016, the ACCC released a consultation paper to assist stakeholders in making their submissions. Although a number of specific questions were included in the consultation paper, stakeholders were invited to raise other matters related to the proposed variations that were not canvassed by the ACCC.

Submissions to this process closed on 26 August 2016. The ACCC received 10 submissions from interested parties, and 3 supplementary submissions. A full list of submissions received by the ACCC is included at Appendix B. Public versions of the submissions are on the ACCC website.

Having considered the submissions received in response to the consultation paper, the ACCC has now prepared this draft decision for further consultation. Following consideration of submissions to the draft decision, the ACCC will then release its final decision. The ACCC's final decision will be published on the ACCC's website.³

The ACCC encourages industry participants and other interested parties to make submissions to this draft decision, including reasons to support their views.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The confidential version of the submission should clearly identify the commercial-in-confidence material by bookending the confidential material with an appropriate symbol of 'c-i-c'. The public version should ensure that all confidential material has been removed and replaced with 'c-i-c'. The ACCC has prepared guidelines for parties wishing to submit confidential information to communications inquiries.

The ACCC-AER information policy: the collection, use and disclosure information sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website.

The ACCC prefers to receive submissions in electronic form, in either PDF or Microsoft Word format which allows the submission text to be searched. Submitters should ensure that redacted information is not searchable or otherwise able to be disclosed. Please email submissions by **5pm Friday, 21 April 2017** to nbn@acc.gov.au and copy to:

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ACCC

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1.6 Structure of this draft decision

This consultation paper is structured as follows:

- Chapter 1 provides an introduction and overview of the SAU variation consultation process,

³ See: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation>

- Chapter 2 describes the ACCC's approach to assessing the SAU variation,
- Chapters 3-7 set out the ACCC's assessment of the major changes proposed by NBN Co in the SAU variation,
- Appendix A outlines the relevant statutory criteria for assessing the variation, and
- Appendix B lists the submissions received by the ACCC to date.

2 Assessment approach

2.1 Scope of assessment

As stated in the consultation paper, the ACCC's assessment of the SAU variation is not a reassessment of each existing provision in the SAU. The scope of the ACCC's assessment is limited to an assessment of the varied terms, the effects of the varied terms, and the interaction of the varied terms with unchanged provisions in the SAU.

In its supporting submission, NBN Co stated that the variation is denoted by underlined words, which are additions to the original wording in the SAU, and words that are struck out as deletions from the original wording in the SAU. It also acknowledged the ACCC's assessment will include an assessment of the interactions of the subject matter of the variation with the existing SAU provisions.⁴

The ACCC must not accept an SAU variation unless it is satisfied that it meets the criteria set out in section 152CBD(2) of the CCA.⁵ Broadly, the ACCC must assess whether changes to:

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

Appendix A explains the ACCC's approach to the statutory criteria dealing with the terms 'long term interests of end-users' and 'reasonableness'.

In the consultation paper, the ACCC sought views from stakeholders on specific terms that were varied and the interaction of the varied terms with unchanged provisions of the SAU. In respect of proposed variations to NBN offers and other charges, the ACCC noted that it was broadly satisfied with the approach NBN Co had adopted to apply existing price terms to the MTM technologies. It did not however, seek comment on the SAU pricing provisions as they apply to MTM services.

NBN Co's proposed SAU variation introduces prices for services provided over the MTM technologies in a number of ways. For most of the products to be delivered over MTM technologies, NBN Co has generally proposed to apply the same price terms that apply to functionally equivalent products in the current SAU (e.g. as they apply to FTTP, wireless or satellite products). However, NBN Co has also proposed a small number of price terms that are specific to the MTM technologies (e.g. where the functional features differ from the products currently set out in the SAU).

Where the price terms specified for MTM products differ from those that apply to functionally equivalent products in the current SAU, these are set out as additions to the original wording

⁴ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 2.

⁵ Section 152CBG(4) states that section 152CBD applies to the variation in a corresponding way to the way in which it applies to an undertaking.

in the SAU in NBN Co's variation. It is clear that these price terms fall within scope of the ACCC's assessment.

In respect of the other price terms that would apply to MTM products, NBN Co has proposed to apply the same price terms as for functionally equivalent products in the current SAU. Although the text of those price provisions does not change, the ACCC considers there is an interaction with the changed terms in NBN Co's proposed variation. NBN Co's proposed variation expands the definitions of the services covered by the SAU to include the MTM networks which has the effect of extending the existing pricing provisions to services not covered by the current SAU.

Therefore, the ACCC considers the proposed application of the existing pricing provisions to the MTM services falls within the scope of the current assessment. This position is consistent with the ACCC's final decision to accept the SAU in 2013 and the ACCC's consultation paper on the proposed variation to the SAU.

The ACCC has considered the SAU pricing provisions as they apply to MTM services in Chapter 7. However, the existing price terms as they apply to the existing technologies included in the SAU are not to be reassessed in considering the proposed variation.

2.2 Timeframe for assessment

The CCA specifies that the ACCC must make a decision to accept or reject a proposed variation within six months of receiving the proposed variation. If the ACCC does not make a decision within the statutory time period, it is deemed to have accepted the variation.⁶

The ACCC may extend (or further extend) the decision-making period by giving written notice to NBN Co. Each extension may be for no more than three months. The ACCC must explain in its notice why it was unable to make a decision on the SAU during the original (or previously extended) decision-making period.⁷

In addition to the ACCC's ability to extend the decision making period, the decision-making period is also extended by the following events.

- the period in which the ACCC is undertaking a public consultation in accordance with section 152CBD(2)(d). The extension period begins on the date the ACCC published the variation and invited submissions until the last day for submissions specified by the ACCC when it published the variation.⁸ Any further consultation on the proposed variation does not extend the decision-making period.
- any period during which the ACCC has requested further information under section 152CBH from NBN Co and is waiting for NBN Co to respond. The extension period begins on the date the ACCC requests the information from NBN Co until the day NBN Co provides the information.⁹

The ACCC published NBN Co's proposed variation and supporting material on the ACCC website on 31 May 2016 and invited submissions.¹⁰ In July 2016, the ACCC released a consultation paper to assist interested parties in preparing their submissions. The ACCC's consultation period ended on 26 August 2016.

⁶ CCA. s.152CBG(7).

⁷ CCA. ss.152CBG(9) and (10).

⁸ CCA. s.152CBG(8)(a).

⁹ CCA. s.152CBG(8)(b).

¹⁰ Section 500(2) of the *Telecommunications Act 1997* specifies that the ACCC must allow at least 28 days for submissions.

Having considered stakeholder submissions to the consultation paper, the ACCC has prepared this draft decision. The ACCC is now inviting submissions on this draft decision until **21 April 2017**.

The ACCC must accept or reject the proposed SAU variation by 23 May 2017¹¹. The ACCC intends to make its decision as soon as it is practicable to do so, taking into account the scale and complexity of the issues to be assessed, and the proposed duration for the operation of the SAU.

¹¹ The ACCC's decision making period is extended by two 'clock stopping' events which are (i) the length of the consultation period once the ACCC has published the variation and invited submissions for the first time, and (ii) any period during which the ACCC has formally requested further information from NBN Co under section 152CBH of the CCA. On 8 February 2017, the ACCC's decision making period was extended by 3 months to 23 May 2017.

3 Service description

Key points

- The ACCC considers that the proposed amendments to the definition of the NBN access service to incorporate MTM services will provide a high degree of certainty to access seekers about the services NBN Co will provide over the SAU term. The ACCC considers this will promote efficient use of services, provide for efficient investment by NBN Co and by access seekers in their own infrastructure, and promote competition in downstream markets for services provided over the NBN.
- The ACCC considers that the proposal to broaden the definition of NBN Co network to include 'any other telecommunications network' will not provide a sufficient level of certainty to access seekers around services to be provided over new technologies. In turn, this would not promote efficient use of NBN services, provide for efficient investment or promote competition in downstream markets.
- The ACCC considers that removing the network boundary point from the SAU is unlikely to provide a sufficient level of certainty to access seekers or end-users.
- The ACCC considers that its concerns are likely to be addressed by removing reference to 'any other telecommunications network' from the definition of NBN Co network and to reinstate the provision specifying the network boundary point within the NBN access service definition.

'Service description' refers to the following elements of the SAU:

- the definitions of the NBN Access Service and Ancillary Services in Attachment A
- the definitions of the User Network Interface (UNI) and Network to Network interface (NNI) in schedule 1A.3, and
- the associated definitions in the SAU dictionary (Attachment C).

Service description is a key component of the SAU as it defines the scope of NBN Co's commitments and the services to which these commitments apply. The SAU service description defines the declared services that NBN Co will provide to RSPs under the SAU. Several components of the service description are contained in module 0 and apply for the full term of the SAU, while other elements of the service description are contained in modules 1 and 2.

The main purpose of the SAU variation is to incorporate the MTM technologies (FTTN, FTTB and HFC) within the SAU. NBN Co proposes to do this by expanding the service description for the NBN Access Service. The current SAU defines the NBN Access Service as a Layer 2 service supplied over the NBN Co network between and including the UNI (at the end-user's premises) and the NNI (at the point of interconnection (POI)).¹² The service description also defines the network boundary points of the NBN Co network as the end-user side of the UNI and the access seeker's side of the NNI.

This chapter sets out the ACCC's assessment of the proposed changes to the SAU service description and its draft decision.

¹² NBN Co, Special Access Undertaking (SAU), November 2013, Attachment A, clause 2(a), p.11.

3.1 Proposed changes to the SAU

3.1.1 Changes to NBN Access Service, UNI and other related terms

The NBN access service is defined as a Layer 2 service supplied on the NBN Co Network (further defined below) between a UNI on a network termination device (NTD) and the NNI associated with the relevant NTD.¹³ In the SAU variation, NBN Co proposes to amend the definition of the NBN access service to specify that the service will be provided:

- to a UNI used to serve a Premises, rather than a UNI on an NTD, and
- to a NNI used to serve that Premises, rather than a NNI associated with the relevant NTD.¹⁴

In its supporting submission, NBN Co submits that these changes are consistent with the changes to the definition of the UNI and make the NBN access service more technology neutral.¹⁵

NBN Co proposes to expand the definition of the UNI in clause 1A.3.1. In the SAU variation, the UNI is defined as the physical interface to which NBN Co supplies the NBN access services to an end-user's premises. It is then further specified by network type as follows:

- for fibre, wireless, satellite and HFC services, the UNI is a physical port on the NTD
- for FTTN services where the premises is not a multi-dwelling unit (MDU), the UNI is either the physical port on the telecommunications outlet or passive NTD, and
- for FTTB and FTTN services where the premises is an MDU, the UNI is the physical port on which the jumper cable terminates on the customer side main distribution frame (MDF).¹⁶

NBN Co proposes to change the definition of the UNI as the UNI will not be located on an NTD for all network types (as is currently the case). NBN Co does not supply an NTD as part of services supplied over NBN Co's FTTN and FTTB networks.¹⁷ To reflect that the UNI will not be located on an NTD for all services, NBN Co has proposed a number of changes to the definition of the NBN access service and associated definitions in the SAU dictionary.

NBN Co also proposes to amend a number of definitions and add new definitions to the SAU dictionary for the various network elements that support the proposed UNI definition, including telecommunications outlet, passive NTD, jumper cable and customer side MDF.¹⁸

Further, NBN Co proposes to add the following footnote in reference to the term 'Layer 2':

*"Where an active or powered NTD is not supplied by NBN Co as part of the NBN access service, an NBN Co compliant device will need to be connected to the NBN access service in respect of the relevant premises"*¹⁹

¹³ NBN Co, Special Access Undertaking (SAU), November 2013, Attachment A, clause 2(a), p.11.

¹⁴ NBN Co, *First variation to NBN Co SAU* (SAU variation), May 2016, Attachment A 2(a), p.11.

¹⁵ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.19.

¹⁶ NBN Co, *First variation to NBN Co SAU* (SAU variation), May 2016, Schedule 1A, p.69.

¹⁷ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.19.

¹⁸ For example, the definition of an NTD has been modified to specify an active or powered device and specifically exclude a passive NTD. The definition of a premises has been broadened to include common areas in an MDU. See NBN Co, *First variation to NBN Co SAU* (SAU variation), May 2016, Attachment C, pp.38 and 45.

¹⁹ NBN Co, *First variation to NBN Co SAU* (SAU variation), May 2016, Attachment A, p.12.

NBN Co submits that the additional footnote has been added for clarity and to highlight that an active or powered NTD will need to be connected where such a device is not supplied by NBN Co as part of the NBN access service (as is the case with services supplied over the FTTN and FTTB networks).²⁰

3.1.2 Broadened definition of NBN Co Network

NBN Co proposes to amend the definition of NBN Co Network (which currently comprises NBN Co's fibre, wireless and satellite networks) to include the following elements:

- the NBN Co FTTB Network
- the NBN Co FTTN Network and
- the NBN Co HFC Network.

Further, NBN Co proposes to amend the definition of NBN Co Network to include:

*any other telecommunications network or other network elements, platforms, systems and functions owned or controlled by, or operated by or on behalf of, NBN Co or any Related Body Corporate of NBN Co over which any Product introduced or varied in accordance with Schedule 1I (Product Development and Withdrawal) or Schedule 2D (Product Development and Withdrawal) is supplied by NBN Co...*²¹

In its supporting submission, NBN Co submits that the effect of the current definition of NBN Co Network is that most aspects of the SAU (including price controls and product development and withdrawal provisions) only apply to services provided over NBN Co's fibre, fixed wireless and satellite networks.²² Expanding the definition of the NBN Co Network to specifically reference FTTN, FTTB and HFC would extend these SAU commitments to these technologies.²³

Additionally, NBN Co submits that the approach of expanding the scope of NBN Co Network would facilitate the incorporation of future network variants. NBN Co submits that if it decides to develop and supply services over a fibre to the distribution point (FTTdp), it would be able to do so without having to vary the SAU.²⁴

3.1.3 Removal of the network boundary point definition

NBN Co proposes to remove the definition of the network boundary point by removing clause 2(c) of attachment A from the current SAU.²⁵

In its supporting submission, NBN Co indicates that it would be redundant to have a network boundary point definition in the SAU that duplicates the definition of the NBN access service. NBN Co also submits that it is not practical to include a detailed network boundary point definition in the SAU as such a definition would need to be drawn from NBN Co technical documents. NBN Co considers that these definitions may change over the term of the SAU, therefore, it is more appropriate to include those details in the Wholesale Broadband Agreement (WBA)/Standard Form of Access Agreement (SFAA) which will specify the relevant network boundary points for each technology.²⁶

²⁰ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.19.

²¹ NBN Co, *First variation to NBN Co SAU (SAU variation)*, May 2016, Attachment C, p.35.

²² NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, p.18.

²³ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, p.18.

²⁴ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.19.

²⁵ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Attachment A, clause 2(c), p.11.

²⁶ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, pp.19-20.

3.2 Submissions

3.2.1 Changes to NBN Access Service, UNI and other related terms

Submissions from Telstra and Optus generally support NBN Co's proposed changes in regards to the UNI definition to facilitate the inclusion of FTTB and FTTN.²⁷ The ACCC did not receive submissions in regards to the changes to the NBN access service and to the layer 2 definition.

However, Optus submits that it does not support extending this practice to future NBN access technologies without a robust discussion through the product development forum (PDF).²⁸

Dr Mark Gregory submits that removing the requirement for NBN Co to provide an NTD is likely to reduce performance and reliability, leads to uncertainty around maintenance responsibility and makes it difficult to gather access network performance data.²⁹ NBN Co indicated that the changes made to the definition of the UNI (in respect of FTTB and FTTN) and the NBN access service are similar to the service descriptions used in the ACCC's SBAS declaration and the wholesale ADSL service respectively. NBN Co's submits that its changes to the UNI and NBN access service definitions are consistent with the ACCC's approach.³⁰

3.2.2 Broadened definition of NBN Co Network

Telstra, Optus and the CCC raised concerns around extending the definition of NBN Co Network to include 'any other telecommunications network'.

While Telstra supports a variation to the SAU to incorporate new technologies (including potential future technologies), it considers that NBN Co's proposed amendments create potential uncertainty as to the future provision of products by NBN Co. Telstra submits that NBN Co could expand its activities to compete directly with private investments in competitive markets. Telstra submits that the ability to include future technologies should be constrained to network types used to provide the NBN access service as defined in the WBA.³¹

Optus submits that by automatically capturing new technologies within the SAU, the proposed changes generally increase uncertainty to access seekers, limit ACCC oversight for the next 24 years and are likely to increase NBN Co's bargaining power.³²

The CCC did not make a submission on the inclusion of FTTB, FTTN and HFC networks into the SAU. However, it submits that the incorporation of future telecommunications technology is inherently uncertain and as such it is not reasonable for the ACCC to effectively grant

²⁷ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 23. Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 7.

²⁸ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 23.

²⁹ Gregory, Mark, *Submission to the ACCC inquiry on the NBN Co SAU variation lodged 27 May 2016*, 25 August 2016, p.2.

³⁰ NBN Co, *Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, p. 2.

³¹ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p.6.

³² Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, pp.4 and 24.

NBN Co wide ranging exemptions from the regulatory regime in Part XIC in relation to products that do not yet exist.³³

In its supplementary submission, NBN Co submits that a mechanism for incorporating a broader range of access technologies within the scope of the NBN Access Service provides for a more time and cost efficient means of managing the SAU in a dynamic technology environment.³⁴

In response to specific concerns, NBN Co submits that these concerns are unfounded because they are based on a number of misunderstandings regarding the purpose, operation and effect of the proposed mechanism for incorporating new access technologies over time. NBN Co submits that:

- when a new access technology is introduced, the effect of the variation would be to expand the scope of the NBN access service (e.g. to incorporate provision of the service over FTTdp)
- all other aspects of the NBN access service are unchanged (e.g. it remains a Layer 2 service between and including a UNI used to serve a Premises and the NNI used to serve that Premises)
- the products provided over the new access technology would still need to be developed in accordance with the SAU PDF arrangements, involving consultation on proposed prices, service level and technical attributes, and
- once the relevant products are introduced, the ACCC would have the reserve power (under Schedules 1C and 2B) to set different Maximum Regulated Prices (MRPs) for associated new NBN Offers or Other Charges up to two years after introduction.³⁵

3.2.3 Removal of the network boundary point definition

Telstra and Optus have concerns regarding the removal of the network boundary point. Both submit that the removal of the definition of the network boundary point is not necessary (nor is it appropriate).

Optus submits that the definition of network boundary point has important implications particularly in respect of service activation, fault rectification and installations. The definition enables all parties to understand where a service is being delivered to and who is responsible for maintaining the various elements that constitute an end-to-end broadband service.³⁶ Further, Optus submits that allowing NBN Co to remove definition of network boundary point means that NBN Co will be free to alter network boundary points as it sees fit.³⁷

Telstra submits that the definition of network boundary point should be retained within the SAU to provide ongoing certainty and clarity to this key network element of the NBN. It

³³ Competitive Carriers Coalition, *Submission in response to the ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016*, 2 September 2016, pp.9-10.

³⁴ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, p. 5.

³⁵ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, p. 5.

³⁶ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p.23.

³⁷ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 24.

submits that a clear understanding of the network boundary is pivotal in determining commercial and operational decisions and supported retaining the current definition.³⁸

In response to the concerns raised by Optus and Telstra, NBN Co's supplementary submission reiterates its views presented in its supporting submission. That is, that it would be redundant to have a network boundary point definition in the SAU that essentially duplicates the definition of the NBN access service and that it is appropriate to leave technical details to be defined in the WBA/SFAA.³⁹ NBN Co also submits that it would be problematic to include a more detailed network boundary point definition in the SAU because it would need to reference NBN Co's technical documents, which would mean that the definition may not remain appropriate over the term of the SAU.

3.3 ACCC assessment

In its April 2013 SAU draft decision and December 2013 SAU final decision, the ACCC explained its rationale in relation to its assessment of service description. The ACCC referred to its previous assessment of the FANOC special access undertaking, where the ACCC noted that an FTTN service with specifications that address certain elements would be likely to provide access seekers with sufficient flexibility and control over the access service to allow any-to-any connectivity and enable access seekers to compete effectively and make appropriate decisions in relation to the efficient use of and investment in infrastructure.⁴⁰

The ACCC considers that the NBN access service will promote competition between access seekers in downstream markets for listed services. In these respects, such a service description would therefore be likely to promote the long-term interests of end-users and is also consistent with the ACCC's views in the FANOC draft decision on the appropriate characteristics for a bitstream service.⁴¹

Further, as mentioned above, service description is a key component of the SAU as they specify the services to which these commitments apply. The ACCC therefore considers that some elements of service description should, to the extent possible, apply for the full term of the SAU so that the SAU can operate effectively and provide regulatory certainty for both NBN Co and access seekers.

Similarly, in the case of the SAU variation, the ACCC has assessed whether NBN Co's proposed changes to the service description in the SAU will promote the LTIE and are reasonable. The ACCC has considered the interests of persons who have rights to use the declared services, NBN Co's legitimate business interests and the operational and technical requirements necessary for a safe and reliable operation of a carriage service.

The following sections set out the ACCC's draft views on its assessment of whether the proposed changes to the service description satisfy the legislative criteria as set out in the CCA.

³⁸ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, pp.7-8

³⁹ NBN Co, *Supplementary submission to the ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, pp. 6-7.

⁴⁰ ACCC, *NBN Co Special Access Undertaking (SAU) – Draft decision*, April 2013, p. 73; ACCC, *NBN Co Special Access Undertaking (SAU) – Final decision*, December 2013, pp. 69-70.

⁴¹ ACCC, *NBN Co Special Access Undertaking (SAU) – Draft decision*, April 2013, p. 73; ACCC, *NBN Co Special Access Undertaking (SAU) – Final decision*, December 2013, pp. 69-70.

3.3.1 Changes to NBN Access Service, UNI and related terms

The ACCC has considered NBN Co's proposed changes to the NBN access service, the UNI definitions and to the Layer 2 definition. The ACCC considers that these changes will promote the LTIE and are reasonable. The application of the NBN access service over the MTM technologies will provide access seekers a wider range of technologies. The additional technologies will allow access seekers to supply a variety of services to end-users in all geographic areas, hence reducing barriers to entry and promoting competition.

The proposed changes will also promote the economically efficient use of and investment in infrastructure by providing access seekers with certainty as to what declared services NBN Co will provide under the SAU, including by specifying key elements of those services (such as the UNI) for the full term of the SAU. Locking in key aspects of service description for the remainder of the SAU term for new technologies will enable access seekers to make an informed decision about the infrastructure they require if they wish to offer a wider variety of products to their customers in different geographic areas. Further, the ACCC agrees with NBN Co that the proposed changes will assist NBN Co in prioritising and planning its future investment in infrastructure in response to access seekers' demand.⁴² The ACCC considers that the proposed changes will lead to efficient investment in infrastructure by both access seekers and NBN Co.

Optus submits that the proposed variations are unlikely to have any impact on NBN Co's legitimate business interests.⁴³ However, the ACCC disagrees with Optus and considers that the changes to the NBN access service and to the UNI definitions are likely to be consistent with NBN Co's legitimate business interests. The proposed changes will provide regulatory certainty to NBN Co to develop and offer a range of specific products over the FTTB, FTTN and HFC networks. The ACCC also agrees with NBN Co that the proposed changes will provide NBN Co with a degree of commercial flexibility to account for evolving technology while allowing NBN Co to achieve an appropriate commercial return on its investments.⁴⁴

Dr Mark Gregory submits that removing the requirement for NBN Co to provide an NTD is likely to reduce performance and reliability. The ACCC notes that although specific reference to the NTD would be removed from the definition of NBN access service, the definition of UNI would specify that the UNI is on the NTD for FTTP, fixed wireless, satellite and HFC services. These changes mean there will be no impact on existing SAU services in regards to the NTD.

Further, the ACCC considers that the changes to the NBN access service and to the UNI definitions are reasonable and necessary because they relate to operational and technical requirements necessary for the introduction of the MTM within NBN Co's access network.

For the reasons mentioned above, the ACCC's draft decision is to accept NBN Co's proposed changes to the NBN access service, to the UNI and to the Layer 2 definitions in the SAU.

3.3.2 Broadened definition of NBN Co Network

The ACCC agrees that it is necessary to broaden the definition of NBN Co network in order to incorporate the MTM technologies into the SAU and therefore supports NBN Co's amendments to include the FTTB, FTTN and HFC networks.

⁴² NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 51.

⁴³ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 24.

⁴⁴ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 49.

In respect of broadening the definition of NBN Co Network to also include ‘any other telecommunication network’, the ACCC recognises this could facilitate the inclusion of a broad range of access technologies over time without the need for NBN Co to submit another SAU variation. The SAU PDF processes would require NBN Co to consult on the introduction of new products, and the ACCC would retain an ability to set the MRP within two years of the introduction of a new product by NBN Co. In that regard, the ACCC accepts that NBN Co’s proposal would provide for a more streamlined process for NBN Co to have services provided over new technologies covered by the SAU, while maintaining a commitment to consult via the PDF on new products and ACCC oversight on initial prices for new products.

However, the ACCC is concerned that under NBN Co’s proposed approach, key elements relating to service description such as definitions for UNI and NBN Co network would not be specified in the SAU for new technologies. Although the ACCC would have the ability to review a maximum price for a new NBN offer or other charge by making a resetting regulatory determination within 24 months, these other key elements of service description would be left to be specified in NBN Co’s WBA, which can be varied by NBN Co and is not subject to ACCC assessment or consultation through an ACCC process.

This differs from the current framework for service description, where the SAU provides an overarching framework that locks in key elements for the full term of the SAU period. More detailed provisions relating to service description can be determined through the WBA. These detailed provisions can then be varied through future changes to the WBA, but any such changes would need to be in accordance with the overarching framework provided by the SAU. The ACCC considers the current framework provides long-term certainty to access seekers about the services they will receive from NBN Co over the SAU term and in turn promotes competition, efficient use and efficient investment. The ACCC also considers this arrangement to be consistent with the interests of those parties that have a right to use NBN Co services. It is also consistent with NBN Co’s legitimate business interests, as it can vary detailed provisions around service description to adjust to changing needs.

The ACCC considers NBN Co’s proposed approach represents a significant departure from the current and accepted framework. The ACCC’s preliminary view is that this change will not provide a sufficient level of certainty to access seekers of the potential services to be provided over new technologies over the SAU term. In turn, this would not promote efficient use of NBN services, provide for efficient investment or promote competition in downstream markets. While it would provide more flexibility for NBN Co to determine service descriptions terms for newly introduced products through the WBA, the ACCC does not consider the proposed variation to be in the long-term interests of access seekers.

Further, given the dynamic nature of the industry and improvements in technology, there is a high degree of uncertainty about the nature of the services NBN Co may seek to introduce during the term of the SAU. By including ‘any other telecommunication network’ within the definition of NBN Co Network, NBN Co would set key service description terms through the WBA instead of through an SAU variation, which NBN Co has done for MTM services. The ACCC considers that there are considerable benefits in new technologies being included in the SAU through an SAU variation. It provides a consistent framework for all technologies and allows for a formal assessment and consultation process against the statutory criteria, which balances the interests of NBN Co and access seekers.

3.3.3 Removal of the network boundary point definition

As discussed above, Telstra and Optus have expressed concern over the removal of the definition of the network boundary point. They submit that the definition of network boundary

point should be maintained as this will assist in parties understanding who is responsible for maintaining the key elements of the NBN access network.

The ACCC agrees with the concerns raised by stakeholders. The current definition of the NBN network boundary points in clause 2(c) of attachment A is locked in place for the full term of the SAU (which expires in 2040). The ACCC considers that the current provision provides a high degree of certainty to access seekers and end-users about the service to be provided, especially in regards to maintenance responsibilities. The ACCC considers that removing this from the SAU is likely to increase uncertainty for access seekers and ambiguity around maintenance responsibilities.

The ACCC considers that this uncertainty is unlikely to promote the interests of access seekers. Further, because the network boundary point could be subject to change this could reduce incentives for access seekers and end users to invest efficiently in customer-end equipment and other related infrastructure (such as in-building wiring).

The ACCC acknowledges that NBN Co's current WBA defines the NBN Co network boundary points and that this definition appears to provide more detail than the corresponding SAU definition.⁴⁵ However, the WBA is an evolving document and NBN Co has the ability to make changes without ACCC oversight. While the SAU requires that NBN Co consult with access seekers and consumer advocacy groups on possible future changes, it is ultimately NBN Co's decision on whether to implement the changes.⁴⁶

The ACCC considers that this uncertainty may make it more difficult for access seekers to plan for the costs of maintenance and the costs of doing business in general. This uncertainty may also impede competition by increasing retail prices unnecessarily and discouraging access seekers from innovating new services for end users

Removing the definition of the network boundary point may also impede the economically efficient use of and investment in infrastructure. The ACCC considers that access seekers are likely to make efficient use of the NBN and related infrastructure only if they have certainty of who is responsible for maintaining the network.

The ACCC is not persuaded that removing the definition of the network boundary is necessary to reflect the introduction of the MTM technologies. While NBN Co has pointed to the duplication of the definition in the SAU and the WBA in support of the variation, the ACCC considers that the SAU framework provides more certainty for access seekers.

In accepting the original SAU, the ACCC considered the SAU service description should be locked in for the full term of the SAU. This included the high level description of the NBN access service as a Layer 2 service supplied on the NBN Co network between and including the UNI and NNI and associated definitions, including the network boundary points. The ACCC considers that the network boundary points remain a key component of the SAU service description.

3.4 Draft decision

The ACCC's draft view is that the proposed changes to service description terms aimed at incorporating MTM services into the SAU are reasonable.

The application of the NBN access service over the MTM technologies will provide access seekers a wider range of technologies, which will allow access seekers to supply a variety of

⁴⁵ NBN Co, Wholesale Broadband Agreement: Dictionary
http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-dictionary_20161205.pdf, p. 60.

⁴⁶ NBN Co, Special Access Undertaking (SAU), November 2013, Schedule 1B, clause 1B.3, p. 57.

services to end-users in all geographic areas, hence reducing barriers to entry and promoting competition. The proposed changes, including to lock-in key elements, such as UNI and NBN Co network for each technology type, are likely to promote efficient use of NBN Co's services and promote efficient investment. The ACCC also considers this to be consistent with NBN Co's legitimate business interests and the interests of access seekers and end-users.

However, the ACCC considers that the further change to the definition of NBN Co Network to include any other network introduced or varied by NBN Co in accordance with the product development and withdrawal provisions in the SAU is not reasonable. The ACCC's draft view is that this proposed change will not provide a sufficient level of certainty to access seekers of the potential services to be provided over new technologies over the SAU term. In turn, this would not promote efficient use of NBN services, provide for efficient investment or promote competition in downstream markets.

Further, the ACCC considers that the proposal to remove the network boundary point from within the definition of NBN access service is not reasonable. The ACCC considers that removing the definition from the SAU is likely to increase uncertainty for access seekers and introduce ambiguity around maintenance responsibilities, as the network boundary point would be subject to change through future changes to the WBA. The ACCC considers that uncertainty around these matters is not consistent with the interests of access seekers or end-users and could reduce incentives for efficient investment in certain customer-end infrastructure.

However, the ACCC considers that its concerns could be addressed through changes that balance NBN Co's objective to incorporate the MTM model, provide long-term regulatory certainty and ensure that the proposed variation promotes the LTIE. These changes include removing the reference to other networks introduced or varied by NBN Co from the definition of NBN Co network (and thereby limiting the definition to specific networks over which services are currently supplied) and reinstating the provision specifying the network boundary point within the NBN access service definition.

4 Co-existence and remediation

Key points

- NBN Co has proposed to include co-existence and remediation provisions into the SAU as key supply terms to apply for the remainder of the SAU. The ACCC agrees in principle with including specific provisions for co-existence and remediation.
- The proposed co-existence provision would allow NBN Co to apply a power back-off to its downstream services to accommodate the simultaneous supply of services during the co-existence period. The remediation provision would allow NBN Co to conduct remediation to the acquired copper network if the line is not able to meet the Peak Information Rate (PIR) objective. In both cases, NBN Co would be allowed to supply services at lower data rates than otherwise provided for by the SAU.
- However, the ACCC is concerned that the proposed provisions are likely to give NBN Co broad discretion over the circumstances in which an FTTN or FTTB node is placed into the co-existence period or when a line is placed into remediation and the period for which these provisions would apply. The ACCC is not satisfied that locking in these provisions for the remainder of the SAU term will ensure efficient and reasonable outcomes over that period.
- The lack of information commitments to access seekers and end-users about services that are subject to co-existence or remediation could lead to uncertainty for end-users and may result in end-user decisions being based on poor information about the data rates they can expect.
- The ACCC considers that its concerns are likely to be addressed by removing the proposed provisions from module 2 and to limit application of the provisions to a fixed period in module 1. This will give NBN Co and the ACCC, in consultation with industry, the opportunity to assess whether the provisions have resulted in efficient outcomes. At that point, the provisions could be extended in existing or modified form.

NBN Co has proposed to include 'co-existence' and 'remediation' provisions into the SAU as key supply terms in modules 1 and 2. Module 1 applies until June 2023 and module 2 applies for the remainder of the SAU, until June 2040.

The co-existence period is the period after a FTTN or FTTB service area has been declared 'ready for service' (RFS) but before the pre-existing copper services in the service area have been switched off.⁴⁷ That is, it is the period in which NBN Co and Telstra simultaneously supply services over the copper network in a particular area. The new clauses would allow NBN Co to apply a 'power back-off' to its downstream services to accommodate the simultaneous supply of services during the co-existence period.

The remediation period occurs when NBN Co is required to undertake reasonable actions to ameliorate the line rate for services provided via NBN Co's FTTN or FTTB networks so that it is capable of achieving the PIR objective. The new clauses would allow NBN Co to conduct remediation to the acquired copper network if the line is not able to meet the PIR objective for various reasons.

⁴⁷ NBN Co, *First variation to NBN Co SAU (SAU variation)*, Schedule 1A, clause 1A.4.4 and Schedule 2A, clause 2A.4. pp. 71 and 231.

This chapter sets out the ACCC's assessment of the proposed co-existence and remediation provisions and its draft decision.

4.1 Proposed changes to the SAU

4.1.1 Co-existence provisions

NBN Co has proposed a new clause 1A.4.4 in module 1 of the SAU variation (and corresponding new clause 2A.4 in module 2) which provides that during the co-existence period, the PIR (and the lower end of any PIR range) at the UNI for each Access Virtual Circuit (AVC) TC-4 bandwidth profile will be:

- for the FTTB Network a minimum of 25 Mbps PIR downlink and 5 Mbps PIR (TC-4) uplink, and
- for the FTTN Network, a minimum of 12 Mbps PIR downlink and 1 Mbps PIR (TC-4) uplink.

The co-existence period will likely affect FTTN services more than FTTB services due to the distances between the node and the end-user premises (as compared to FTTB where the node is within the building). To take this difference into account, NBN Co is offering different speed tiers for FTTN and FTTB services during the co-existence period.

4.1.2 Remediation provisions

NBN Co has proposed a new clause 1A.4.5 in module 1 of the SAU variation (and a corresponding new clause 2A.5 in module 2) setting out a remediation provision. The proposed remediation clauses allow NBN Co to conduct remediation to the acquired copper network if the line is not able to meet the PIR objective for various reasons. The new clauses also provide that until remediation for the premises is completed, the downlink line rate and uplink line rate at the UNI used in the premises may be significantly less than the downlink PIR and uplink PIR of the bandwidth profile ordered by the RSPs.⁴⁸

NBN Co advises that remediation may involve more extensive activities than usual service assurance processes so, by their nature, remediation activities will occur over a more extended time period. Therefore, the purpose of the remediation provisions is to acknowledge that there may be an ongoing and significant effect in terms of the downlink line rate and uplink line rate until remediation is completed.⁴⁹

4.2 Key issues raised in submissions

4.2.1 Provisions do not promote the LTIE

Optus, ACCAN and Dr Mark Gregory submit that the proposed provisions do not promote the LTIE.

⁴⁸ NBN Co, *First variation to NBN Co SAU (SAU variation)*, May 2016, Schedule 1A, clause 1A.4.5, p. 71.

⁴⁹ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 21.

Optus submits that the co-existence provisions are unlikely to promote competition and the efficient use of infrastructure because the introduction of these provisions introduces significant doubts over quality of service.⁵⁰

Both Optus and ACCAN raised concerns that the provisions limit the speed offered to end-users, even though the end-users have acquired a particular speed tier. They argued that the lack of transparency around this may result in inefficient use of the network by end-users.⁵¹ ACCAN, in particular, is concerned that end-users will continue to pay for services that they are not receiving and will have limited ability to seek redress.⁵²

Dr Mark Gregory submits that the arguments for the co-existence and remediation provisions benefit Telstra and are to the detriment of the remainder of the telecommunications industry and consumers. He argues that for a competitive telecommunications market to develop, customers should be shifted onto the NBN as quickly as possible. Dr Gregory submits that the changes provide increased flexibility to NBN Co and Telstra to delay the completion of the NBN rollout for difficult to get to premises.⁵³

4.2.2 Lack of time and information commitments

A major concern from stakeholders is the lack of information commitments from NBN Co for advising RSPs of when the co-existence period would likely occur and when a service will be placed into remediation, as well as how their services will be affected.

Telstra submits that it would be appropriate for NBN Co to provide clarity to RSPs and end-users about the expected performance of their service, especially if NBN Co believes that performance may be impacted by the simultaneous supply of legacy services.⁵⁴ Optus submits that information asymmetry and timing of notifications remains a concern and that further certainty should be provided in relation to information on affected FTTN and FTTB services during the co-existence period.⁵⁵

Optus argues that there appears to be a lack of firm commitments made by NBN to inform RSPs that a service will be placed into remediation.⁵⁶ Optus also submits that there is limited transparency in relation to the timeframes associated with the completion of the remediation work.⁵⁷ Optus states that informing end-users about the performance of their service is an

⁵⁰ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 28.

⁵¹ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 28; ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, p.3.

⁵² ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, p.3.

⁵³ Gregory, Mark, *Submission to the ACCC inquiry on the NBN Co SAU variation lodged 27 May 2016*, 25 August 2016, p.3.

⁵⁴ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 9; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p.25.

⁵⁵ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 26.

⁵⁶ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 27.

⁵⁷ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 27.

issue that is likely to arise as an RSP is unable to ascertain the line quality to premises prior to the point of sale, therefore, issues cannot be raised until the service has been activated.⁵⁸

Telstra indicates that the WBA contains more information regarding remediation timeframes than is proposed to be included in the SAU. Although Telstra considers that the arrangements in the WBA are sufficiently clear, the timeframes for remediation could be improved.⁵⁹ Telstra suggests that a shorter maximum timeframe of 90 days should be set for a Standard Remediation Solution (as opposed to 140 business days) and a maximum timeframe of 120 business days should be set for a Custom Remediation Solution (at present, no timeframe is included for a Custom Remediation Solution).⁶⁰

In its supporting submission, NBN Co argues that its interests are aligned with access seekers in terms of minimising the number of premises subject to remediation and the amount of time taken to complete the necessary actions.⁶¹ NBN Co also explains that in most cases, the underlying cause of any problems will be addressed through the usual service assurance processes, without the need to conduct remediation.⁶²

4.2.3 Lack of appropriate redress

Some stakeholders submit that there is a lack of appropriate redress for the lower service levels associated with remediation. ACCAN argues that during remediation periods, end-users should automatically receive discounts for the lower service level or be able to change or cancel their plans without cost.⁶³ Telstra considers that RSPs should be able to obtain redress from NBN Co as the fact that a service requires remediation is not something that is in the control of RSPs.⁶⁴

4.2.4 It is too early to lock in these provisions

Both Telstra and Optus indicate that it is too early to lock in co-existence provisions for the duration of the SAU. Telstra argues that it has long standing concerns with the definition of the co-existence period that NBN Co currently includes in the WBA and has proposed to include in the SAU. Telstra indicates it continues to have discussions with NBN Co regarding our concerns with the definition and scope of co-existence period and until that definition is finalised it may be difficult to achieve alignment between the SAU and the WBA.⁶⁵ Optus argues that it is too early to lock in co-existence and remediation provisions for the duration

⁵⁸ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 28.

⁵⁹ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11.

⁶⁰ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11.

⁶¹ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 22.

⁶² NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 21.

⁶³ ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, p. 3.

⁶⁴ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11.

⁶⁵ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p.10

of the SAU as RSPs have had limited experience to assess whether the current provisions in the WBA are effective.⁶⁶

Telstra also acknowledges the work of Communications Alliance⁶⁷ in their submission, arguing that it would be helpful to ensure alignment between the SAU, access agreements and the industry agreed solution in the long term. Telstra suggests that a useful first step would be to restrict the application of co-existence, both in terms of scope and timeframe.⁶⁸

4.2.5 Consistency with WBA

NBN Co submits that the new clauses in the SAU variation are consistent with the relevant supply terms in the WBA, which access seekers were consulted on and agreed to through the PDF. NBN Co also submits that the SAU provisions are deliberately expressed at a relatively high level, leaving more detailed terms (such as how and when NBN Co will communicate with access seekers on co-existence matters) to be specified in the relevant SFAAs and to be agreed with access seekers over time.⁶⁹

However, both Telstra and Optus raise concerns with NBN Co's argument that the co-existence provisions should be accepted on the basis that they are consistent with the WBA.⁷⁰ Telstra advises that it has long standing concerns with the definition of 'co-existence period' which is in the current WBA.⁷¹ Optus notes that no inference should be drawn from clauses agreed to in the WBA as an NBN service cannot be supplied in absence of an agreement. Optus further notes that the SAU should be used to limit the terms and conditions that can be imposed by NBN Co on industry.⁷²

4.2.6 Inclusion of the co-existence and remediation provisions in Module 2

Stakeholders have differing views on whether the co-existence and remediation provisions should be included in both modules 1 and 2 of the SAU.

Telstra and Optus submit that co-existence is transitory in nature and should have a natural end date once legacy services have been migrated to the NBN.⁷³ Further, Telstra argues that given its concerns with the definition and scope of the co-existence period that are still under negotiation, a useful first step would be to restrict the application of co-existence both

⁶⁶ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 26.

⁶⁷ The ACCC understands that Communications Alliance (Working Committee 58) is currently developing a set of documents that will specify mandatory technical requirements that must be met when considering the interference that may occur when competing access technologies are deployed. The ACCC considers that this may help to improve certainty for stakeholders in the future.

⁶⁸ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p.10.

⁶⁹ NBN Co, *Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, p.4.

⁷⁰ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 9.

⁷¹ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 9.

⁷² Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p.25.

⁷³ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 10; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 25.

in terms of scope and timeframe.⁷⁴ ACCAN also submits that co-existence clauses should not be included in module 2.⁷⁵

Conversely, NBN Co argues that the co-existence provisions should be included in module 2 because:

- it is currently uncertain as to exactly when the transition will be complete in all areas to be served by FTTN and FTTB and it may extend into module 2
- the provision is expressed at a relatively high level and is expected to be appropriate even if it continues to be relevant in module 2, and
- if the co-existence period ceases to be relevant in module 2, there is no harm from continuing to have the provision in the SAU as it is uncertain as to when exactly the transition will be complete in areas served by the FTTB and FTTN networks and it may extend into module 2.⁷⁶

Regarding remediation, NBN Co and Telstra argue that the provisions should be included in module 2, while ACCAN and Optus argue that they should not.

NBN Co submits that remediation is not transitory in nature and may be required at any time during the operation of the SAU. This is because remediation is not unique to the rollout phase of the NBN, rather it may be required at any time (for example, if the copper degrades).⁷⁷ Telstra also considers that remediation clauses should be included in module 2 as it would provide more certainty to NBN Co and RSPs than if such provisions were included in replacement modules.⁷⁸

ACCAN submits that remediation clauses should not be included in module 2.⁷⁹ Similar to co-existence, ACCAN considers that the issues that require there to be a remediation period are transitory in nature. Optus is of the view that it is too early to lock-down the remediation rules in the SAU for a 24 year period and that it is better to rely on the terms in the WBA/SFAA agreements.⁸⁰

4.3 ACCC assessment

The ACCC has classified the co-existence and remediation provisions as terms and conditions specified in the variation in relation to compliance with the Category B SAOs. Therefore, the ACCC is required to assess whether the provisions are consistent with the Category B SAOs and are reasonable.

Section 152AH of the CCA sets out the matters the ACCC must have regard to in determining whether particular terms and conditions are reasonable as set out in Appendix A. In determining whether particular terms and conditions are reasonable, the ACCC should

⁷⁴ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 10.

⁷⁵ ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, p. 3.

⁷⁶ NBN Co, *Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, p. 5.

⁷⁷ NBN Co, *Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, p. 5.

⁷⁸ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11.

⁷⁹ ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, p. 3.

⁸⁰ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p.28.

have regard to several factors. The most relevant criteria for the co-existence and remediation provision are the LTIE, the interests of persons who have rights to use the declared services and NBN Co's legitimate business interests.

The ACCC agrees that some provisions regarding co-existence and remediation should be included in the SAU to allow NBN Co to supply its services at a lower speed during the co-existence and remediation periods. However, the ACCC considers that it is too early to lock in the proposed clauses in the SAU for a period of 24 years. The ACCC is also concerned about the lack of information commitments from NBN Co to access seekers and end-users. This lack of information could lead to uncertainty for end-users and result in end-user decisions being based on poor information about the data rates they can expect. Further, the ACCC is not satisfied that NBN Co will continue to have strong incentives beyond Module 1 to ensure end-users are placed out of co-existence and remediation as quickly as possible as NBN Co's operating environment will change over the course of the SAU term, particularly in Module 2. The ACCC does not consider the provisions as proposed are reasonable and promote the LTIE.

These matters are further discussed below.

4.3.1 Including specific co-existence and remediation clauses in the SAU

The ACCC agrees with NBN Co that some provisions regarding co-existence and remediation should be included in the SAU and are likely to be consistent with NBN Co's legitimate business interests. These provisions acknowledge that there is a technical requirement for NBN Co to supply services at a lower speed to limit interference with copper services and that it is appropriate for NBN Co to make modifications to its services in some instances. The ACCC considers that it is reasonable for NBN Co to be exempt from the standard PIR requirements during the co-existence period. The ACCC also considers that there are legitimate circumstances where NBN Co will need to conduct remediation.

Optus was the only party to specifically comment on whether co-existence and remediation should be incorporated into the SAU. Optus submits that the proposed variations are unlikely to have any impact on NBN Co's legitimate business interests or efficient investment incentives.⁸¹ The ACCC acknowledges Optus' views, however, it still considers that there is a link between the variations and NBN Co's business interests. NBN Co has a requirement under Category B SAOs to supply a declared service to access seekers so that they in turn are able to provide carriage services to end-users.⁸² The ACCC acknowledges that NBN Co will need to conduct remediation to the services it provides in some circumstances.

4.3.2 Locking in co-existence and remediation provisions for remainder of SAU term

The ACCC agrees with NBN Co that co-existence would generally last for 18 months when legacy and NBN services are provided simultaneously and 3 years in the case of special services. The ACCC also notes that the current WBA contains target timeframes to complete remediation.

However, the proposed provisions under the SAU variation would provide NBN Co with the ability to place nodes and lines into the co-existence period and remediation respectively

⁸¹ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 28.

⁸² CCA, s. 152AXB(2).

under a wide range of circumstances and to determine the period for which a node or line remains in the co-existence period or in remediation.

The ACCC is not satisfied that the proposed provisions will ensure efficient and reasonable outcomes over the remainder of the SAU term in their current form. The ACCC considers that the provisions are drafted in a way that creates the risk of precluding any ability for the ACCC to intervene if the provisions result in inefficient or unreasonable outcomes during the SAU period. Further the ACCC considers that current arrangements for co-existence and remediation have been in place for only a relatively short period of time. The ACCC considers that more experience under the current arrangements is needed in order to have them remain fixed in place for any extended period of time. In that respect, the ACCC agrees with Telstra and Optus' views in that they have had limited experience in assessing the effectiveness of the provisions in the WBA due to the provisions being in place for a limited period of time.

The range of circumstances in which NBN Co could apply co-existence or remediation is broad. It is difficult to forecast how the provisions may be used by NBN Co in the future. However, the ACCC has identified a number of possible outcomes of locking in the proposed provisions for the remainder of the SAU terms.

First, the proposed co-existence provisions expressly state that NBN Co can apply the co-existence period to enable supply of exchange-fed services, special services or 'other services to the Premises using the public switched telecommunications network'. This means co-existence could be applied in more situations than just simultaneous supply of NBN and legacy services between NBN ready for service and the switching off of legacy services, and for simultaneous supply of special services. Although the ACCC considers that NBN Co currently has incentives to end a co-existence period as soon as practical, there may be circumstances where it would be in fact, benefit NBN Co to prolong such a period.

For example, if new copper access technologies are developed in future, the proposed provisions would allow NBN Co to provide slower data rates while such services are tested or rolled out. In such circumstances, the ACCC considers that an extension of the co-existence period for new technologies may not be in the long-term interests of access seekers or end-users. The ACCC cannot be satisfied that applying co-existence in these instances will likely promote competition, efficient use of FTTN and FTTB infrastructure or promote efficient investment for the full SAU term. Further, in these cases end-users on the NBN Co FTTN and FTTB networks would receive lower levels of services. The ACCC considers this would unlikely to be in the interests of access seekers or end-users of FTTN and FTTB services.

Second, the proposed definition of co-existence period would allow NBN Co to place a node into co-existence when it considers it necessary to do so, without any constraints or limitations about when it will not apply co-existence. By having the provisions apply for the full term of the SAU period, NBN Co would be able to apply co-existence in future for a need it considers necessary. This includes the possibility that NBN Co could apply co-existence to a node for which co-existence had already been lifted. The ACCC considers this situation could be relevant in the case of newly developed copper access technologies (as discussed above), although there could be other reasons why NBN Co may seek to reapply co-existence. Although there may be situations in future where this may be reasonable, the ACCC cannot be satisfied that reapplying co-existence after it has been lifted will likely promote competition, efficient use of FTTN and FTTB infrastructure or promote efficient investment for the full SAU term. Further, it will likely be inconsistent with the interests of access seekers or end-users of FTTN and FTTB services.

Third, NBN Co could keep a node in the co-existence period in cases where there are end-users that are difficult to migrate to the NBN, including for special services. The ACCC

considers that the possibility of NBN Co maintaining the co-existence period in a service area as an alternative to finding solutions to migrate difficult to migrate customers would reduce incentives to bring service areas out of the co-existence period in a timely manner. This would not promote efficient use or efficient investment in affected FTTN and FTTB service areas. Further, this would not be in the interests of affected customers on the NBN Co network who would not be able to access services with higher data rates.

Fourth, NBN Co would be able to keep certain lines in remediation for extended periods. The ACCC acknowledges that some copper lines that require remediation will take longer to bring up to the required standard than others. The ACCC considers that NBN Co will have incentives to develop solutions for copper lines that require remediation in most instances. However, the ACCC considers that in cases of the most difficult to rectify lines, the proposed remediation provisions would allow NBN Co to keep a line in remediation as an alternative to developing an appropriate solution for that line. This again would not promote efficient use or efficient investment in affected FTTN and FTTB service areas. Further, this would not be in the interests of affected customers on the NBN Co network who would not be able to access services with higher data rates.

The ACCC considers that NBN Co currently has incentives to end the co-existence period and remediate copper lines in a timely manner in order to increase uptake of higher value services and promote increased traffic on the NBN.

However, over the term of the SAU, NBN Co's incentives are likely to change as NBN Co's operating environment changes. While the ACCC considers some form of co-existence and remediation provisions to be appropriate, the ACCC is not satisfied that NBN Co will continue to have strong incentives for the full SAU term. The ACCC considers that for competitive markets to develop, services should be placed out of co-existence and remediation in a timely manner to ensure the increased take up of services and increased traffic on the NBN.

4.3.3 Information to access seekers and end-users about co-existence and remediation

The ACCC notes that the co-existence and remediation clauses as currently drafted do not contain any commitments to provide information regarding co-existence or remediation to access seekers or end-users.

While NBN Co states that the co-existence period will typically last for a period of 18 months, this could be extended in some cases until all special services are migrated to the NBN which could take at least three years in some instances.⁸³

The ACCC is concerned that the lack of specific timeframes may cause uncertainty for access seekers regarding the types of services they are able to offer to their customers and how long access seekers (and end-users) may need to wait before remediation is finalised. NBN Co has only very limited interaction with end-users, which places reliance on RSPs to keep customers informed about the technical limitations of their service.

The ACCC is also concerned that the proposed remediation clauses do not contain adequate information commitments from NBN Co to inform RSPs as to when a service will be placed into remediation and what the impact on their services would be. As a result, RSPs may not be aware if their speed has been reduced due to remediation. This makes it

⁸³ In its submission to the consultation paper, NBN Co states that, consistent with clause 22.4(a) of the Migration Plan, the disconnection timeframe for a special service class is 36 months provided that Telstra does not dispute the equivalence of an NBN service (described in a White Paper) to the special service class provided over the copper network.

difficult for RSPs to make accurate representations to their customers in relation to the speed they can expect from their service.

The ACCC acknowledges that the WBA contains more detail with respect to remediation than is proposed to be included in the SAU. For example, the WBA Operations Manual stipulate that in the case of a Standard Remediation Solution, NBN Co will set a target date of no more than 140 business days from the date the remediation case first opened.

While the WBA provides some certainty to access seekers including in relation to timeframes in which a remediation must be completed, it is important to note that the WBA document applies over a relatively short period of time compared to the term of the SAU. The ACCC therefore does not consider that the provisions as currently proposed provide a long term certainty to access seekers.

Notwithstanding this, the ACCC recognises that it may be possible to address these concerns through other measures, such as prominent disclosures in NBN Co's contractual and operational materials. The ACCC considers that such measures could be highly effective in providing adequate information to access seekers about services that are subject to co-existence or remediation. However, there is the possibility that more formal information requirements may be required, for example through specific information provisions being included in the SAU, if these other methods do not prove to be effective.

4.4 Draft decision

The ACCC's draft view is that including a specific co-existence provision is appropriate to address the technical limitations associated with the simultaneous supply of FTTN or FTTB services and legacy copper services in the transition to the MTM. The ACCC also considers that including a specific remediation provision in the SAU is appropriate to allow NBN Co to address problems with the copper lines used to supply FTTB and FTTN services.

However, the ACCC is not satisfied that locking in the proposed co-existence and remediation provisions for the remainder of the SAU term would be reasonable or in the LTIE. The ACCC is concerned that the proposed provisions would not provide efficient and reasonable outcomes over the term of the SAU in circumstances where NBN Co has broad discretion over the circumstances in which an FTTN or FTTB node is placed into the co-existence period or when a line is placed into remediation and the period for which these provisions would apply.

Further, the lack of information commitments to access seekers and end-users about services that are subject to co-existence or remediation could lead to uncertainty for end-users and may result in end-user decisions being based on poor information about the data rates they can expect.

The ACCC considers that current arrangements for co-existence and remediation have not been in place long enough for it to be satisfied they will remain reasonable for the term of the SAU. Although NBN Co is likely to initially have strong incentives to end the co-existence period and remediate copper lines in a timely manner in order to increase uptake of higher value services and promote increased traffic on the NBN, the ACCC recognises that NBN Co's incentives are likely to change over time and it may not face the same incentives later in the SAU period.

The ACCC considers that its concerns are likely to be addressed by removing the provisions from module 2 and to limit application of the provisions to a fixed period within module 1. The ACCC considers that the current arrangements for co-existence and remediation have not been in place long enough to have them apply for the duration of module 1. The ACCC is of the view that more experience must be gained under the proposed provisions to determine whether they are operating effectively to do so. Further, co-existence and remediation is most likely to be most prominent during and shortly after the rollout. The ACCC considers that locking in the proposed provisions for the duration of module 1 would prevent any review of the provisions during the rollout.

This approach is consistent with the approach adopted in the current SAU for certain matters (customer engagement for network design changes, PDF processes and dispute resolution) where the ACCC was not satisfied it was reasonable to lock in provisions for the duration of module 1. This will give NBN Co and the ACCC, in consultation with industry, the opportunity to assess whether the provisions have been operating effectively and have resulted in efficient outcomes. At this point the provisions could potentially be extended until the end of module 1, either in their existing or a modified form, through an SAU variation. Upon entering module 2, NBN Co would be able to include provisions relating to co-existence and remediation in replacement modules, which would range in length between three and five years.

5 Rollout information

Key points

- NBN Co has proposed several changes to its SAU rollout progress information commitments to include FTTN, FTTB and HFC technologies. It has also proposed a number of changes which it submits would expand and clarify the SAU rollout progress information commitments.
- The ACCC must not accept NBN Co's SAU variation unless it is satisfied that NBN Co's proposed changes to the rollout information commitments promote the LTIE.
- The ACCC recognises that NBN Co's proposal would extend the rollout information provisions in a way which would ensure this information is available to access seekers to plan for and market NBN services.
- However, the ACCC also recognises that other changes to the rollout information provisions may represent a reduction in NBN Co's commitments in order to ensure the accuracy of the information provided. The ACCC therefore seeks to better understand the extent to which the proposed changes strike the right balance between providing information as early as possible while ensuring its accuracy.
- NBN Co has also proposed to introduce a requirement that access seekers enter into terms before it will provide NBN rollout progress information which may introduce a degree of uncertainty for access seekers.
- The ACCC considers that NBN Co's proposed variation would no longer require it to publish information, but instead would only make information available to access seekers. Despite this change, the ACCC is satisfied that NBN Co will continue to make relevant public information available on its website but is interested in views of stakeholders about this change.

The SAU commits NBN Co to publishing a range of information on its construction plans and forecasts with respect to its FTTP and fixed wireless networks, and the status of its Points of Interconnect (POI) as part of the non-price terms and conditions set out in Schedule 1H of the SAU. These commitments are important for promoting competition in downstream markets.

NBN Co currently commits to publishing the following rollout progress information:

- high level 3-year and 1-year FTTP rollout construction plans on an annual basis
- monthly ready for service (RFS) plans that include:
 - forecasts for FTTP and fixed wireless premises that are expected to be RFS within the next six months
 - FTTP and fixed wireless network boundary information, the estimated RFS date, and number of premises within FTTP and wireless, for areas that have entered into the design and construction phase, and
- weekly footprint and rollout region information for FTTP and wireless areas that have reached RFS.⁸⁴

⁸⁴ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Schedule 1H, clause 1H.2, p. 151.

The rollout progress information commitments are most relevant until 2020 when NBN Co expects the NBN network rollout will be complete.

5.1 Proposed changes to the SAU

5.1.1 Rollout progress information

NBN Co proposes to amend the rollout information commitments so that they also apply to FTTB, FTTN and HFC technologies. NBN Co's supporting submission states that expanding the scope of the rollout progress information provisions in this way is consistent with its approach to the SAU variation generally.⁸⁵

The proposed variation also includes a number of other changes which expand and clarify NBN Co's rollout information commitments.⁸⁶ NBN Co submits that the proposed changes to these provisions are responsive to the ACCC's 2015 consultation on the information NBN Co should be required to disclose about its network, as well as ongoing feedback from access seekers on the information they require to support their business.⁸⁷

NBN Co has proposed to change its 3-year rollout construction plan reporting to allow it to report on when it expects to commence work on its fixed line networks by reference to a particular quarter of the year or either the first or second half in a calendar year. NBN Co has also proposed changes to its commitments to provide monthly RFS plans and weekly footprint rollout regions information.

In respect of its monthly RFS plans, NBN Co is proposing to:

- report on the geographic areas that are expected to be RFS in the current and subsequent financial year, and the estimated number of premises within those areas,
- replace the commitment to providing the boundaries of the geographic rollout areas once they enter into the 'design and construction phase' with a commitment to provide boundary information once areas enter the 'construction phase',
- once an area enters into the 'construction phase', report on the estimated number of premises to be served by each access technology, and the calendar month the RFS date will fall in (where RFS is expected within the next 12 months) or calendar quarter (if the expected RFS date falls outside of 12 months), and
- specify the premises expected to be RFS within the next 6-month period, and which NBN access network will be used to serve each premise.

In respect of its weekly footprint and rollout region lists, NBN Co is proposing additional commitments to provide:

- estimates of the number of premises in each geographic area served by each rollout technology, and,
- additional premises specific information, including the applicable rollout technology, service class, and the expected date the premises will be required to be disconnected from the legacy network.

NBN Co has proposed to remove its commitment to publish a 1-year plan on the basis that the commitments in the 1-year construction plan are made redundant by the proposed changes to the 3-year construction plan and the monthly RFS rollout plan.

⁸⁵ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 25.

⁸⁶ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, pp. 25-30.

⁸⁷ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, pp. 29-30.

Additionally, in respect of each of its reporting commitments, NBN Co's proposed variation replaces its commitment to 'publish' rollout information with a commitment to 'make the information available to access seekers (subject to terms of access to that information agreed between NBN Co and each access seeker)'. NBN Co states that this amendment will provide NBN Co with the ability to impose certain conditions on access seekers obtaining rollout information, including that the information must only be used for permitted purposes.⁸⁸ It argues that this information contained in its rollout plans is commercially sensitive to NBN Co, and it is appropriate to place restrictions on which entities receive that information and how the information can be used by an entity.

5.1.2 Points Of Interconnect rollout progress

NBN Co also proposes to vary its commitments to its POI Plan which provides periodic updates on the status of its established Points of Interconnect so that:

- it also reports on rack space available at each established POI, and
- the POI Plan is subject to terms of access agreed between NBN Co and each access seeker.

5.2 Stakeholder submissions

In its submission to the ACCC's consultation paper NBN Co states that:

"The SAU has always been (and should only be) seen as a baseline set of commitments, which are then augmented by commercially rational provision of rollout information, consistent with nbn's incentives to have all RSPs being able to effectively compete to offer services on the nbn.

In the current context, it is difficult to see how the rollout progress information commitments in the SAU variation could not be considered to satisfy the statutory criteria for accepting the SAU variation, given that:

- (a) the relevant criteria for assessing the rollout progress information commitments (following the ACCC's categorisation in the Final SAU Decision) involves the ACCC assessing whether the conduct specified will promote the LTIE (and not whether another SAU variation, perhaps containing a different set of rollout progress information commitments, may be considered to promote the LTIE to a greater extent);*
- (b) in addition to being applied to FTTB, FTTN and HFC, the SAU variation includes an expanded set of rollout progress information commitments that will provide access seekers with additional useful information; and*
- (c) the rollout progress information commitments are non-exhaustive (and non-limiting) in regard to the information nbn currently does, and may over time, provide to access seekers."⁸⁹*

While access seekers have welcomed some of NBN Co's proposed changes to the rollout progress information provisions, some stakeholders have also raised concerns with NBN Co's proposed variations particularly in relation to access seekers' need for timely and detailed rollout information so that they can plan for and market NBN services. Stakeholders

⁸⁸ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 36.

⁸⁹ NBN Co, *Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, p. 6.

also stressed the importance of NBN Co making rollout information publicly available for use by end-users.⁹⁰

Telstra and Optus' primary concern is that the rollout information commitments do not require NBN Co to provide access seekers with detailed rollout progress information that they require to effectively conduct business planning, marketing and sales activities.⁹¹ Telstra emphasised that this deficiency may ultimately impact on consumer outcomes.⁹²

Telstra, in particular, submitted that the information currently provided by NBN Co lacks granularity and accuracy, and is often inconsistent between reports. It stated that the proposed changes in the SAU variation do not go far enough to address these deficiencies. In response to NBN Co's assertion that the rollout information commitments should be seen as a 'baseline' to be augmented by commercially rational information, Telstra submitted that more accountability should be placed on NBN Co to provide information required by access seekers.⁹³

Telstra and Optus' submissions raised a number of specific concerns about the proposed changes that affect the specificity and timeliness in which NBN Co would be required to provide rollout progress reports. These include opposition to the changes that would only require NBN Co to specify the calendar month or quarter for key dates within its reports, and to only provide certain rollout information after an area has entered the construction phase as opposed to the earlier design phase.⁹⁴ Both Telstra and Optus suggest a number of changes to improve NBN Co's rollout information commitments.⁹⁵

Optus raised a concern that allowing NBN Co to require access seekers to enter into contractual terms before receiving rollout information creates a risk that NBN Co may withhold or charge access seekers for rollout information, or force access seekers to waive liability rights for use of the information.⁹⁶

Optus also raised Telstra's role in the NBN-Telstra service delivery agreements and migration process.⁹⁷ Optus submitted that Telstra's role magnifies the need for greater rollout information commitments, consistent with the ACCC's 2015 advice to the Department of Communications recommending that NBN Co be required under a new carrier licence

⁹⁰ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 12; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 30; ACCAN, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, September 2016, submission, pp. 3-4; Eric Dale, *Response to ACCC's request for submissions from interested parties on NBN Co's proposed SAU variation 27 May 2016*, 26 August 2016, pp.1-2; Dr Mark Gregory, *Submission to the ACCC inquiry on the NBN Co SAU variation lodged 27 May 2016*, 25 August 2016, p. 3.

⁹¹ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11. Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 30.

⁹² Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11.

⁹³ NBN Co, *Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 26 August 2016, p. 6; Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 12.

⁹⁴ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 13; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 32.

⁹⁵ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 31.

⁹⁶ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 31.

⁹⁷ Optus, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, p. 33.

condition to disclose certain rollout information (the 2015 CLC advice).⁹⁸ Telstra emphasised that its retail arm does not have an information advantage as a consequence of its role as an NBN Co delivery partner and construction manager.⁹⁹

Submissions from ACCAN and Eric Dale during the consultation process opposed the variations to the rollout information commitments on the basis that they do not require NBN Co to publish rollout information on its website. These submissions argued that rollout information for the coming years (in particular the 3-year construction rollout plan) is of value to end-users.¹⁰⁰ For example, submissions stated that longer term rollout information is valuable to end-users when choosing a service provider, considering whether to enter into a contract with their service provider and the length of the contract, and when making decisions to purchase home network equipment which may or may not be compatible with an NBN service.

A further supplementary submission from ACCAN welcomes NBN Co's recent move to provide individual premises based information on its website (and that this should include transparency over technology type). However, ACCAN also noted the utility of NBN Co publishing information on an area aggregate basis (for example, in the format of the 3-year construction plan). ACCAN submits that it has used the 3-year plan, in conjunction with Telstra exchange data and Department of Communications' analysis, in its tool to assist consumer enquiries about unavailability or performance limitations of internet services due to lack of infrastructure. ACCAN also submits that aggregate advance build information is beneficial to its distribution and tailoring of information to consumers and community groups.¹⁰¹

In its supplementary submission, NBN Co makes several points, including:

- that it makes relevant information available to the general public on its website, separate from the SAU commitments
- the SAU commitments are not intended to limit information that NBN Co has an incentive to provide to access seekers to plan and market the sale of NBN services
- that 'terms of access' to rollout information are those set out in the WBA for NBN customers and a separate agreement for other parties with a legitimate interest to this information,
- the current SAU commitments do not require NBN Co to provide rollout information about fixed wireless networks, but nonetheless it has provided this in each of the 3-year plans it has issued, consistent with its commercial incentives to make this information available, and
- all NBN Co customers have access to exactly the same rollout progress information through NBN Co's customer portal.¹⁰²

⁹⁸ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 31.

⁹⁹ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 13.

¹⁰⁰ ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, pp. 3-4; Dr Mark Gregory, *Submission to the ACCC inquiry on the NBN Co SAU variation lodged 27 May 2016*, p. 3; Eric Dale, *Response to ACCC's request for submissions from interested parties on NBN Co's proposed SAU variation 27 May 2016*, 26 August 2016, pp. 1-4.

¹⁰¹ ACCAN, *ACCAN subsequent submission to the SAU variation*, February 2017, pp. 1-6.

¹⁰² NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, pp 10-11.

5.3 ACCC assessment

NBN Co's rollout information commitments are characterised as conduct undertaken by NBN Co in accordance with subsection 152CBA(3C) of the CCA. Therefore, the ACCC must be satisfied that the NBN Co's proposed variation promotes the LTIE.

In its final decision to accept the SAU in 2013, the ACCC stated that conduct about the provision of rollout information promotes the LTIE by:

- promoting competition – rollout information can reduce barriers to entry into new markets by providing access seekers with information required for developing products, marketing and infrastructure. The provision of this information in a timely fashion enables access seekers to make services available more quickly to end-users.
- encouraging efficient use of and investment in infrastructure – giving access seekers clarity and certainty as to the progress of the rollout of the network will enable them to efficiently plan for operations and investment in downstream services, networks and facilities. This is likely to increase dynamic efficiency in the use of and investment in infrastructure because it enables access seekers to respond to the changing environment.¹⁰³

The ACCC continues to consider these factors relevant to our assessment. Submissions from Telstra and Optus highlight the continuing role this rollout information plays in supporting their business planning, sales and marketing activities.¹⁰⁴

Additionally, the ACCC considers the SAU rollout progress information commitments promote the LTIE to the extent that they provide end-users with information they can use to assess their broadband needs and plan their migration to the NBN.

As set out in chapter 2, the ACCC considers its assessment of the SAU variation is limited to an assessment of the varied terms proposed by NBN Co, the effects of the varied terms, and the interaction of the varied terms with unchanged provisions in the SAU. In respect of the rollout information provisions, the ACCC considers its assessment is of the additional commitments proposed by NBN Co as well as the changes to the existing rollout information commitments.

5.3.1 Extension of rollout information commitments

Primarily, NBN Co's proposed variation would extend the rollout progress information commitments to apply to FTTN, FTTB and HFC technologies and commit it to providing greater detail in respect to certain aspects of its reporting. The ACCC supports the extension of these commitments to apply to FTTN, FTTB and HFC. Particularly, as NBN Co's brownfields FTTP rollout is now largely complete,¹⁰⁵ the focus of NBN Co's fixed-line network rollout has shifted to FTTN, FTTB and HFC networks.

Notably, NBN Co's proposed variation includes commitments to:

¹⁰³ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 30.

¹⁰⁴ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 30.

¹⁰⁵ NBN Co, *Corporate Plan 2017*, p. 47, <http://www.nbnco.com.au/corporate-information/about-nbn-co/corporate-plan/corporate-plan.html>

- provide information on geographic areas that are expected to be RFS in the monthly RFS plan in the time period until the end of the following financial year,
- include the estimated number of premises within each planned RFS area, and once an area has entered the construction phase, an estimate of the number of premises that will be served by each technology, in the monthly RFS rollout plan,
- state the technology type that is being used to serve each premises that NBN Co expects will be RFS within the next 6-months in the proposed footprint list,
- provide greater detail around the information that will be provided within the historical footprint and rollout region lists, including estimates of the number of premises served by each network technology, the network technology used to serve each premises, the service class of each premises, and the expected date from which each premises will be required to disconnect from an existing legacy network, and
- state the remaining rack space at each POI as part of its POI Plan.

The ACCC's preliminary view is that the variation would expand NBN Co's commitment to provide rollout progress information. These expanded commitments would ensure this information is available to access seekers to assist them to make NBN services available to end-users and to plan related operations and investments.

5.3.2 Other changes to current rollout commitments

While the NBN Co's SAU variation would expand the rollout information commitments in the ways discussed above, it would also change current SAU commitments which are relevant to the granularity and timeliness in which NBN Co must provide certain information to access seekers. Notably, the proposed commitments would require NBN Co to:

- in the 3-year construction rollout plan, report when it expects to commence construction in an area by calendar quarter or half (e.g. Q3-2016 or H2-2017), as opposed to the dates on which this is forecast to occur, and
- in the monthly RFS plan:
 - report expected RFS forecasts by month (for the first 12 months of the report) or by quarter for any remaining period rather than the date on which this is forecast to occur, and
 - provide the network boundaries of each planned RFS area once it has entered into the 'construction phase', rather than the 'design and construction phase'.

In respect of these proposed changes to the rollout information provisions, NBN Co states in its supporting submission that these are intended to clarify the drafting of the rollout information commitments.¹⁰⁶

Additionally, the proposed variation would remove the commitment to provide a 1-year plan on the basis that this report would no longer be necessary due to the changes to the 3-year construction plan and monthly RFS rollout plan.

NBN Co states that providing information in the monthly RFS plan once an area has entered into the construction phase (as opposed to the design phase) will allow it to provide more granular information at a time when this information is appropriately stable.¹⁰⁷ The ACCC understands that NBN Co has incentives to provide information at an early stage, and where

¹⁰⁶ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 27.

¹⁰⁷ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 27.

it can, it currently provides RFS forecast information in areas that have not yet commenced construction. Telstra submits that it takes confidence in receiving certain information earlier (even where there is a high degree of error) and in using this information to plan resources on a forward-looking basis.¹⁰⁸

The ACCC notes that Telstra and Optus have raised specific concerns in respect of the extent and accuracy of NBN Co's reporting, including in respect of consistency between its separate reports.¹⁰⁹

Telstra and Optus' submissions also specify ways in which NBN Co should further expand the rollout information provisions in the SAU. The ACCC acknowledges these submissions, but considers they do not form part of the ACCC's assessment where they do not relate to the specific changes proposed by NBN Co.

In respect of the specific proposed changes to the 3-year construction plan and monthly RFS plan described above, the ACCC considers that these changes in themselves may represent a reduction in NBN Co's commitments to provide certain information. However, the ACCC also recognises there is a trade-off between giving more granular information to access seekers early and providing accurate information. More granular and earlier information is only useful insofar as it achieves a minimum level of accuracy.

The ACCC agrees that publishing the 1-year plan would no longer be necessary due to the changes to the 3-year construction rollout plan and monthly RFS plan. However, in respect of the other aspects of the changes to the 3-year construction rollout plan and monthly RFS plan, the ACCC seeks to better understand the extent to which the proposed changes strike the right balance between providing information as early as possible while ensuring its accuracy.

5.3.3 Rollout information subject to 'terms of access'

NBN Co's proposed variation to the rollout information provisions introduces a requirement that access seekers enter into terms before they can be provided NBN rollout progress information. NBN Co notes the commercially sensitive nature of the rollout information which it considers is appropriate to protect, when providing access. Submissions on this requirement are not wholly opposed to NBN Co placing conditions on access seekers' access to NBN rollout progress information, provided those conditions are sufficiently known.¹¹⁰ However, a concern was expressed that the open nature of the proposed drafting could potentially allow NBN Co to impose unreasonable terms on its provision of rollout information.

NBN Co subsequently submitted its intention that the terms of access to rollout information would continue to be set out in its WBA for access seekers or in a separate information agreement for parties who have a legitimate interest in this information but have not signed a WBA.¹¹¹

¹⁰⁸ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 13.

¹⁰⁹ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 11; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 31.

¹¹⁰ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 14; Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p. 31.

¹¹¹ NBN Co *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 28.

The ACCC considers that this amendment may introduce uncertainty around what restrictions NBN Co may seek to put on its provision of rollout information. The ACCC considers that access to rollout information should be facilitated on reasonable terms to assist NBN Co's customers and other access seekers' ability to plan for and sell NBN services. The ACCC notes that submissions do not specifically raise concerns with the terms relating to access seekers' access to, or use of rollout information currently set out in NBN Co's WBA.

The ACCC considers that more certainty could be provided to access seekers if NBN Co provides a clearer commitment on the nature of the proposed terms of access. The ACCC seeks feedback on whether any uncertainty for access seekers by the introduction of this requirement could be addressed by NBN Co further clarifying the nature of these terms.

5.3.4 Removed requirement to 'publish' rollout information

NBN Co's SAU variation would replace its commitment to 'publish' rollout information in respect of each rollout information provision with a commitment to 'make the information available to access seekers'. The ACCC considers that this would remove the current commitment for it to release public information about the rollout.

The ACCC considers that the provision of public information on the NBN rollout is likely to strengthen competition within retail broadband markets to the extent that end-users are able to use that information to assess their broadband needs and plan their migration to the NBN.

The ACCC received submissions opposing the variations to the rollout information commitments on the basis that they would no longer require NBN Co to publish rollout information on its website. These submissions argued that rollout information for the coming years (in particular the 3-year construction rollout plan) is of value to end-users.¹¹²

The ACCC acknowledges that NBN Co currently makes a range of information about the NBN rollout available on its website, including:

- an online tool to check whether NBN services are available at a particular address,
- an interactive map showing locations where NBN services are available, build has commenced, or build preparation activities are underway,
- a list of areas where NBN services are available and where build has commenced, and
- a weekly network rollout progress report showing the number of premises passed and the number of premises activated.

The ACCC notes that in December 2016 NBN Co removed its 3-year construction plan from its website, and added some of the categories of information previously provided in this report to its publicly available network rollout map and address checking tool. Using these online tools, NBN Co updated its address checking tool to allow end-users check the status of premises as either:

- Service available – the end-user can order NBN services,
- Build commenced – NBN Co has issued contract instructions to its construction partner,

¹¹² ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, pp. 3-4; Dr Mark Gregory, *Submission to the ACCC inquiry on the NBN Co SAU variation lodged 27 May 2016*, 25 August 2016, p. 3; Eric Dale, *Response to ACCC's request for submissions from interested parties on NBN Co's proposed SAU variation 27 May 2016*, 26 August 2016, pp. 1-4.

- Build preparation – NBN Co construction partners are conducting build preparation activities,
- Planned – the NBN rollout is being planned for the area, or
- Other fibre provider – premises have access to an existing fibre network.

Additionally, NBN Co recently further updated its address checking tool to state when the NBN network will be available and which technology will be used.¹¹³

The ACCC agrees with submissions of Eric Dale and ACCAN that NBN Co should continue to publish rollout progress information. This information is used by end-users and consumer groups such as ACCAN to assess their broadband needs and plan their migration to the NBN. The ACCC considers that ensuring that end-users have access to relevant information about rollout timing and the technology that will be used would promote competition in retail broadband markets.

The ACCC considers the current public information provided by NBN Co could meet most needs of end-users and that NBN Co is incentivised to continue to publish this information. The ACCC's preliminary view is that the proposed variation to remove the requirement to publish rollout information would not adversely affect the information NBN Co currently makes available to end-users. However, the ACCC would welcome further views on NBN Co's proposal.

5.4 Draft decision

The ACCC considers that in most respects NBN Co's proposed variation represents an improvement to NBN Co's rollout information commitments. The extension of the rollout information provisions to apply to the FTTN, FTTB and HFC technologies and additional commitments to provide greater detail in respect of its monthly ready for service plan, proposed footprint list, and historical footprint and rollout lists would provide certainty that NBN Co will continue to provide this information to access seekers. This, in turn, will allow access seekers to plan for and market NBN services.

The ACCC recognises that other specific changes to the 3-year construction plan and monthly ready for service plan, and removal of the 1-year plan, may represent a reduction in the current SAU commitments. However, these changes may be necessary in order to ensure the accuracy of the information provided. The ACCC therefore seeks to better understand the extent to which the proposed changes strike the right balance between providing information as early as possible while ensuring its accuracy.

The ACCC also recognises concerns raised in regard to NBN Co's proposal to introduce a requirement that access seekers enter into terms before it will provide NBN rollout progress information. The ACCC considers that this change needs to balance the business interests of NBN Co and the need for access seekers to be able to access information in a timely way that will allow them to plan and sell NBN services. The ACCC seeks feedback on whether any uncertainty for access seekers by the introduction of this requirement could be addressed by NBN Co further clarifying the nature of these terms.

Finally, the ACCC's considers that, despite NBN Co's proposal to remove the requirement to publish rollout information, it currently provides, and has the incentives to continue to make relevant public information available on its website. However, the ACCC would welcome

¹¹³ NBN Co, media release, 'When will I get the nbn?', 27 February 2017, <http://www.nbnco.com.au/corporate-information/media-centre/media-releases/when-will-i-get-the-nbn.html>

further views on NBN Co's proposal to remove the requirement to publish rollout information from the SAU.

6 Other proposed changes to the SAU

Key points

- NBN Co proposes to make a number of other changes to the SAU including changes to the appointment of a dispute resolution advisor, introduction of new NBN offers and incorporating the initial MRPs in respect of the new technologies, and an amendment to correct one of the LTRCM formulas
- The ACCC considers that it is appropriate for NBN Co to seek the proposed changes to the dispute resolution advisor clauses to ensure efficient and timely resolution of disputes between NBN Co and its customers.
- The ACCC also considers that NBN Co's proposed provisions relating to NBN Offers and Other Charges are reasonable, will promote the LTIE and consistent with both the legitimate business interests of NBN Co and the interests of the persons who have the right to use the declared service.
- Further, the ACCC considers that NBN Co's proposed changes to the LTRCM's formula are reasonable, and that the changes are required to ensure consistent treatment of inflation between periods before and after the SAU commencement date. This will enable NBN Co to have the opportunity to recover costs incurred before the start of the SAU commencement date.

NBN Co proposes to make a number of other changes to the SAU through the SAU variation. These changes relate to dispute resolution, certain NBN Offers and Other Charges specific to MTM services, a formula relating to the long-term revenue constraint methodology (LTRCM), and the definition of standard installations to include FTTN, FTTB and HFC services.¹¹⁴

The proposed variation to the NBN Offers and Other Charges discussed in the chapter relates to new offers and charges specific to MTM services. The application of existing SAU pricing provisions to MTM services is discussed in Chapter 7.

6.1 Appointment of dispute resolution advisor

The dispute resolution provisions of the SAU enable the resolution of disputes that may arise between NBN Co and its customers. Under clause 1H.5.1 of the SAU, NBN Co must state in its SFAA that NBN Co and its customers agree to manage and resolve disputes that may arise in relation to the SFAA in accordance with the dispute management rules. Currently, the dispute management rules under the SAU provide that certain functions and responsibilities are to be performed by an appointee to the role of 'resolution advisor' as defined in Annexure 1 to Schedule 1H of the SAU.¹¹⁵

NBN Co proposes to this provision to enable NBN Co to appoint an additional resolution advisor during the term of the existing resolution advisor if additional support is required. In its supporting submission, NBN Co notes that the appointment of an additional resolution advisor would also provide for appropriate transitional arrangements if the term of one resolution advisor is coming to an end and is not renewed.¹¹⁶ NBN Co further notes that

¹¹⁴ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Schedule 1C: Annexures 3-5.

¹¹⁵ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Schedule 1H: Clause 1H.5.1(b).

¹¹⁶ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 60.

clause 6(a)(iii) of Annexure 1 to Schedule 1H already contemplates multiple resolution advisors.

NBN Co has also proposed to insert a new clause and an associated new definition for 'nominated person' to clarify that a resolution advisor may also be a body corporate with at least one 'nominated person' who remains responsible for overall compliance and decision-making functions of the resolution advisor.

Section 2 of Annexure 1 to Schedule 1H sets out a process for the selection and approval of pool members from which the resolution advisor may select panel members. NBN Co submits that under the current SAU, there is no process for adding new pool members once the initial pool has been established. NBN Co has therefore amended the section to enable the appointment of new pool members over time (i.e. after the establishment of the initial pool).

NBN Co submits that:

... this change will ensure that the pool can be maintained over time to achieve a beneficial balance of skills, experience and expertise, particularly in light of any resignations from the pool during the term of appointment¹¹⁷.

6.1.1 Submissions

Telstra submits that it has no objection to NBN Co appointing an additional resolution advisor, including for transitional purposes or where additional support is required, nor with a resolution advisor being a body corporate. Telstra notes however that it is not clear what circumstances NBN Co is seeking to address through the variations given that the existing dispute resolution process is untested.¹¹⁸

NBN Co acknowledges it has not had any disputes with customers to date but that it has accumulated experience with the appointment of resolution advisor and pool members in accordance with the SAU. NBN Co submits that it is this experience that has informed the small number of changes to clarify, enhance and refine the dispute management provisions.¹¹⁹

6.1.2 ACCC's Assessment

The ACCC considers that it is appropriate for NBN Co to seek the proposed amendments to the dispute resolution advisor clauses to ensure efficient and timely resolution of disputes between NBN Co and its customers. The change to clause 5.3 of Annexure 1 to Schedule 1H to extend the application of the resolution advisor will help to clarify the existing arrangements in relation to the appointment of a resolution advisor. Further, the ACCC considers that the proposed additions to Section 2 of Annexure 1 to Schedule 1H will facilitate the pool selection process, assist in ensuring that the pool can be maintained to achieve a beneficial balance of skills, experience and expertise, and give NBN Co more flexibility in choosing its pool members.

6.2 NBN Offers and Charges

NBN Co proposes to vary parts of the NBN Offers and Other Charges in Schedule 1C to incorporate initial MRPs that specifically relate to FTTN, FTTB and HFC. NBN Co submits

¹¹⁷ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.60.

¹¹⁸ Telstra, *Submission to ACCC Consultation on Variation to NBN Co Special Access Undertaking*, 2016, p.15.

¹¹⁹ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, p. 12.

that these changes are necessary to incorporate the additional technologies or to differentiate the additional technologies from the existing technologies covered by the SAU¹²⁰

Specifically, NBN Co proposes to:

- expand clause 1C.1 of the SAU to incorporate FTTN, FTTB and HFC technologies,
- specify in clause 1C.2.2 a PIR range for certain AVC services delivered over the FTTB and FTTN networks (with the corresponding MRPs proposed in clause 1C.4.1.), and
- expand its other charges in clause 1C.4.2 to include new charges and activities for FTTN, FTTB and HFC.

The ACCC notes that in some cases, the proposed changes result in different charges for different network types in respect of service installation, service modification and service management charges. For example, there is a three-hour minimum charge for labour for equipment modifications on FTTN, FTTB and HFC networks but no such minimum for FTTP equipment modifications.

NBN Co has not changed Schedule 1C to reflect the changes to prices or the introduction of new NBN offers or other charges that had already occurred under the SAU (e.g. the introduction of additional CVC TC-4 on the NBN Co fibre network). These prices became subject to the operation of the SAU through the mechanism of clause 1.C.5.1, which allows for NBN Co to set prices for new products.¹²¹

NBN Co also proposes to reclassify the Enhanced 12 Fault Service Level from being listed as an Other Charge to being listed as NBN Offer. NBN Co submits this change resolves an inconsistency identified in the SAU, whereby Enhanced 12 Fault Service Levels is classified as an Other Charge in clause 1C.4.2, even though it is identified in Attachment D as a Product Feature.¹²² Three other enhanced fault service level offers have also been introduced (Enhanced – 12 (24/7) Fault Service Levels, Enhanced – 8 Fault Service Levels and Enhanced 8 – (24/7) Fault Service Levels).

6.2.1 Submissions

Telstra, Optus, CCC and ACCAN have made submissions regarding the proposed variation to provisions relating to NBN Offers and Other Charges. The key issues raised by these stakeholders are set out below.

NBN Offers

NBN Co has proposed changes to clause 1C.2.2(a) which introduce a number of new AVC offers which are to be delivered using the FTTB and FTTN networks. The data transfer rates for these AVCs are specified as a PIR within a range. In addition, NBN Co has also proposed changes to clause 1C.4.1(c) which sets prices for these new FTTB and FTTN-specific services that are equivalent to existing prices for comparable AVCs.

NBN Co submits that the data transfer rates specified in clause 1C.2.2(a) in respect to FTTB and FTTN and the corresponding prices in clause 1C.4.1(c) are consistent with the WBA.¹²³

¹²⁰ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.23.

¹²¹ Under clause 1C.5(d) and (e) of the SAU, prices for new products may be set by NBN Co. The ACCC may undertake a price review of a new product within 24 months of a price being introduced for these types of products.

¹²² NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 24.

¹²³ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, pp.108,110-111.

NBN Co additionally notes that the product component and features related to the MTM services included in the WBA have been previously consulted on with access seekers.¹²⁴

In submission to the ACCC's consultation paper, ACCAN argues that it is neither appropriate nor reasonable to specify such a wide range for the PIR of these services and to set prices equivalent to the maximum speed of the PIR range. ACCAN considers that such a variance has the potential to mislead customers. In particular, ACCAN notes that the PIR ranges of these services overlap so end-users may be unnecessarily charged more.

Other Charges

Telstra submits that the list of products and services in the SAU variation may cause confusion. For example, NBN Co has not updated all of the charges set out in Schedule 1C, even where those charges have been updated or introduced prior to the lodgement of the proposed SAU variation.¹²⁵

Telstra disagreed that NBN Co should apply different charges for different network types for equipment modification, equipment removal and equipment repair. Telstra submitted that it is not clear that the differences in charges are as a result of differing costs between the access technologies. Telstra argues that applying different charges in this way adds complexity for access seekers and end users and could have the effect of penalising end-users who happen to live in an area where a higher charge is levied, simply by virtue of NBN Co's charging structure.¹²⁶

ACCAN also commented that there are inconsistencies between the 'Other Charges' that apply to the different technologies and these inconsistencies may result in inaccurate selling practices or poor incentives for RSPs to address service issues consistently.¹²⁷

In its supplementary submissions NBN Co explains that while there is a difference in charges for Fibre and Wireless Networks and FTTB, FTTN and HFC for late cancellation and missed appointment, it currently waives the charges for late cancellation and missed appointment applicable to FTTB, FTTN and HFC network. As such, the effective outcome (\$0) is currently the same as Fibre and Wireless¹²⁸ Similarly, the charges for equipment modification, equipment removal and equipment repair is currently waived in respect of Fibre, FTTB, FTTN, HFC and Wireless networks. Therefore no charge currently applies in all cases.

The ACCC notes that submissions from interested parties do not express views as to whether the initial prices for these services are reasonable or otherwise.

6.2.2 ACCC's Assessment

Having regard to the matters it is required to consider, the ACCC's preliminary view is that NBN Co's proposed provisions relating to NBN Offers and Other Charges are reasonable and satisfy the LTIE for the reasons set out below.

¹²⁴ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.22

¹²⁵ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, pp. 15-16.

¹²⁶ Telstra, *Submission to ACCC Consultation on variation to NBN Co Special Access Undertaking*, Public version, August 2016, p. 16.

¹²⁷ ACCAN, *Submission to the ACCC consultation paper on the variation to NBN Co's Special Access Undertaking*, 26 August 2016, pp. 1- 2

¹²⁸ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, p. 15

Asymmetric AVC Offers

NBN Co has proposed three new TC4 AVC offers (and corresponding MRPs) specific to the FTTB and FTTN networks which are specified with a PIR range. The ACCC understands that due to the technical limitations of FTTN and FTTB, the data transfer rate an end user can achieve depends on a range of factors such as the distance between the node and the end-user's premises. This means that while NBN Co can guarantee the minimum PIR range specified (25 Mbps downlink and 5 Mbps uplink), it is not always possible to guarantee the maximums of the ranges specified.

The proposed approach of specifying PIR ranges allows NBN Co to offer the higher speed tiers where possible but does not commit NBN Co to deliver speeds that are not possible due to technical limitations. If NBN Co were required to guarantee the higher speeds (or a higher minimum PIR), it is likely that it would not offer these speed tiers at all.

Further, the ACCC notes that the specified data ranges apply to the PIR of the services. However, the actual end-user experience will depend on a range of factors, including but not limited to the amount of CVC purchased, the time of use and the types of use. The ACCC considers that in many instances it would be highly likely that end-users on FTTN or FTTB with these AVC services (for example a 25-50/5-20 Mbps AVC) will be able to receive services comparable to an end-user on FTTP or HFC with a comparable AVC (in this example, a 50/20 AVC).

However, the ACCC agrees with ACCAN that as the PIR ranges of these services overlap, the maximum PIR at a premise may fall within the specified range of multiple AVC products. This means that it is possible for an access seeker to unnecessarily pay more for the 25-100/5-40 Mbps AVC (\$38 per month) even if the achievable PIR, due to technical limitations of the network, falls within the range of the cheaper 25-50/5-40 Mbps AVC (\$34 per month). However, the ACCC considers that access seekers are best placed to monitor this performance and to not incur unnecessary expenditure on higher speed tiers. The ACCC also notes that the incremental costs of the higher speed tiers (\$4 per month) are likely to represent a relatively small share of an access seeker's per user costs which in addition to the AVC, also includes the cost of CVC and backhaul.

The ACCC considers that the proposed approach is on balance likely to be reasonable and consistent with both the legitimate business interests of NBN Co and the interests of persons who have right to use the declared service.

Enhanced Fault Service Level Offers

The proposed variation to the SAU includes the re-classification of the Enhanced 12 Fault Service Level in respect of the Fibre Network from being listed as an Other Charge to being listed as an NBN Offer. The proposed changes resolve an inconsistency that NBN Co has identified whereby Enhanced 12 Fault Service Levels is classified as an Other Charge in clause 1C.4.2 even though it is identified in Attachment D as a Product Feature. NBN Co submits it is more appropriately classified as an NBN Offer. The proposed variation also includes the addition of three further Enhanced Fault Service Level offers.

The ACCC notes that the reclassification aligns with the WBA, where all the Enhanced Fault Service Levels are classified as a product feature. The ACCC also notes that the Enhanced Service Level offers are optional and provides access seekers with enhanced service levels for rectification of end-user faults which affect the NBN access service. The ACCC considers the changes are necessary as they provide clarity to access seekers in relation to the level of service they can expect at each enhanced fault service level. Further, the ACCC considers the charges to be reasonable as they allow NBN Co to recover its expected costs in providing the relevant service levels, and encourages the growth of downstream services.

Service transfer charges

The service transfer charge that is proposed to apply under the SAU variation is in line with NBN Co's expected costs to support these services and current market benchmarks. For example, the price for a WADSL Completed Type A connection is \$21.16, which is similar to NBN Co's service transfer charge of \$22.50¹²⁹. In addition, Telstra's Wholesale Rate Card price for a Type A Reversal is \$22.50, which is the same as NBN Co's Transfer Reversal Charge.¹³⁰ Telstra's price for a Completed non-Infrastructure Request is \$10 per request for up to 1,999 requests and \$5 for 2,000 or more requests, while NBN Co's per service transfer charge is \$5 for a bulk order of more than 100 service transfers.¹³¹ The ACCC considers the proposed charges are likely to be cost reflective and consistent with existing market prices. The charges will also send appropriate signals to end-users seeking service transfers regarding the costs of the services which will promote its efficient use.

Late cancellation and missed appointment charges

The ACCC considers that the proposed MRP for the late cancellation and missed appointment charges of \$75 and the introduction of incorrect callout fee of \$75 in respect of the FTTB, FTTN and HFC Network are also reasonable. The charge is likely to promote efficiency as it acts as a signal to the end-user not to miss appointments or to make cancellations late in the process. It also allows NBN Co to recover the costs that it incurs each time a late cancellation or missed appointment occurs. The ACCC notes that charges of this nature are standard industry practice and the proposed level of the charges is comparable with those charged by other carriers who perform equivalent activities. For example, Telstra Wholesale charges between \$80 and \$95 ex-GST for late withdrawal of an unconditioned local loop service request.

The ACCC acknowledges Telstra's submission that NBN Co has not updated all of the charges set out in Schedule 1C, even where those charges have been updated or introduced prior to the lodgement of the proposed variation to the SAU.

The ACCC also acknowledges Telstra and ACCAN's concerns that Schedule 1C applies different charges for different network types which could result in inaccurate selling practices or poor incentives for RSPs to address service issues consistently.

The ACCC notes that the SAU is not intended to set out all the terms and conditions of access to NBN Co's services, nor is the proposed variation to the SAU required to do so in order for it to be accepted by the ACCC. The ACCC further notes that NBN Co has not changed Schedule 1C to reflect the changes to prices or the introduction of new NBN offers and charges that have already occurred under the SAU, given that these prices became subject to the operation of the SAU through the mechanism set out in clause 1C.5 of the SAU.

The ACCC also notes that the WBA price list, which is easily accessible to access seekers, provides a comprehensive list of current prices on NBN Offers and Other Charges.

Equipment modification, equipment removal and equipment repair charges

For equipment modification, equipment removal and equipment repair, the proposed MRPs are hourly labour rate charged at a minimum of 3 hours in respect of FTTB and FTTN networks and hourly labour rate charged at a minimum of 3 hours plus cost of materials in respect of HFC network. The ACCC notes that a 'cost of material' component is included in

¹²⁹ ACCC's Fixed Line Services FAD (May 2015), p..202

¹³⁰ Telstra Wholesale Rate Card (version 8.1 as at 16 June 2016).

¹³¹ Telstra Wholesale Rate Card (version 8.1 as at 16 June 2016).

the MRP in respect of the HFC network as material may be required to undertake equipment modification, equipment removal and equipment repair activities unlike in the case of FTTB and FTTN networks. The ACCC also notes that the inclusion of a minimum number of hours in the MRPs in respect of the FTTB, FTTN and HFC networks is intended to account for ticket of work based charging by NBN Co's contractors. The ACCC considers that these charges provide certainty to access seekers and allow NBN Co to recover its prudent costs in providing these services.

Central splitter installation charge

The ACCC notes that the installation of a central splitter is recommended by NBN Co on a case-by-case basis. NBN Co can install a central splitter up front with the initial installation order (charged at a minimum of 2 hourly labour rate plus minimum of \$10 for materials), or later as a modification (charged at a minimum of 3 hourly labour rate plus minimum of \$10 for materials) to either optimise the service or maintain voiceband continuity.

If a professional splitter is requested by the access seeker from NBN Co, then an NBN Co technician will perform a site visit to the premises and identify the relevant lead-in cable and fit a central splitter and the end of that cable.

The ACCC considers that the proposed charges are reasonable. The ACCC is of the preliminary view that they are cost reflective as they are based on the ticket of work charged by NBN Co's contractors. In addition, the cost of materials reflects an estimate of the cost of the device splitter itself. It is also important to note that firstly, a central splitter is a standardised piece of equipment that does not need to be supplied by NBN Co and secondly, the central splitter can be installed by an appropriately licensed cabler – that is, an access seeker does not need to select NBN Co to undertake this work. The ACCC considers that this is likely to promote competition by allowing RSPs to differentiate in terms of quality of service.

6.3 HFC Standard Installation

Under the existing SAU, a standard installation at an end-user's premises is zero priced while a non-standard or subsequent installation attracts a charge based on the hourly labour rate (\$75 per hour). The factors that constitute a standard installation for fibre and wireless services are defined in Schedule 1C.¹³²

NBN Co has proposed new provisions to define a standard installation for FTTB, FTTN and HFC.¹³³ Consistent with the existing SAU, a standard installation for the MTM technologies will attract a zero charge.¹³⁴

For FTTB and FTTN, these provisions are generally consistent with the existing approach for fibre and wireless. For HFC services, a standard installation involves NBN Co mailing the HFC NTD and HFC fly lead to the end-user for self-installation. Self-installation would involve the end-user connecting a HFC modem (the NTD) to the HFC outlet using a coaxial cable (the HFC fly lead).

In addition to a standard HFC installation, NBN Co has proposed introducing a professional HFC-NTD installation under which NBN Co installs all HFC related equipment at the end-user premises.¹³⁵ A professional HFC-NTD installation attracts a fee equal to the hourly labour rate for a minimum of two hours (\$150).

¹³² NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.24.

¹³³ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Schedule 1C, Annexure 3, 4 and 5, pp. 111-112.

¹³⁴ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Schedule 1C.4.2(f), p.97.

¹³⁵ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Attachment C, p. 48.

6.3.1 Submissions

Optus did not raise concerns in relation to the proposed variation to introduce additional annexures to define standard installations for MTM technologies. However, Optus did raise concerns with the inclusion of a self-install component in the definition of a standard HFC installation. Optus considers that self-installation may cause significant problems and frustration for some end-users and could result in these end-users being charged a professional installation fee. Optus argues that the installation of an NTD must remain the responsibility of NBN Co as it is integral to the end-to end wholesale service.¹³⁶

Optus advised that as an existing HFC operator, it has previously considered implementing a self-install model but has not done so due to the practical issues involved.¹³⁷

To address its concerns, Optus submitted that the SAU should be amended to make clear that NBN Co is responsible for the installation of the HFC-NTD, FCL Fly Lead and HFC RF Splitter (if required for a Foxtel connection) with the standard installation.

6.3.2 ACCC Assessment

The ACCC considers that NBN Co's proposed provisions relating to standard installation are both reasonable and promote the LTIE.

Firstly, the ACCC considers that self-installation of the modem in the first instance is the standard practice for other HFC operators such as Telstra and iiNet (who operate a HFC network in regional Victoria) both of which, also charge extra for a professional installation. The ACCC considers that self-installation is likely to be relatively straight forward for the majority of end-users.

Secondly, the proposed provisions are likely to ensure that the end-users that do have difficulty with self-installation are sufficiently supported through the professional HFC-NTD installation option. Alternatively, RSPs will also be able to send their own technicians to install the modem for these end-users and it is up to RSPs whether they pass on the installation cost to end-users

Finally, the ACCC considers that a professional installation charge will provide good signals to RSPs and end-users regarding the costs of installation services and will promote efficient use of these services. As professional installation is a costly and in many instances unnecessary activity, setting a non-trivial price will encourage RSPs to only incur this cost where there is a legitimate need to do so. The ACCC notes that the proposed price is consistent with existing market prices and is likely to be cost reflective.

6.4 Changes to the LTRCM formula

The LTRCM is a methodology for determining the amount of revenue NBN Co is allowed to earn via its prices over the term of the SAU. In the course of applying the LTRCM provisions under Schedule 1E of the SAU, NBN Co identified an error in the formula used to calculate the cumulative inflation factor in respect of financial years prior to the first financial year (2013-14). NBN Co has updated the LTRCM clause 1E.9.4(c) in module 1 and clause 2C.1.4(b) in module 2 to correct the formula error.¹³⁸ NBN Co also proposes to insert a

¹³⁶ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, pp.36-38.

¹³⁷ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, p. 37.

¹³⁸ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Schedule 1E, clause 1E.9.4(c) and Schedule 2C, clause 2C.1.4(b), pp. 168 and 240.

clause in module 1 (clause 1E.1.2(c)) to clarify that the ACCC will account for the corrected formula in the next LTRCM determination. NBN Co estimates that the net present value of the adjustment is around \$10 million.¹³⁹

No submissions were received from external parties in respect of this issue.

6.4.1 ACCC Assessment

The ACCC considers that the NBN Co's proposed amendment to the LTRCM's formula in clause 1E.9.4(c) and clause 2C.1.4(b) is necessary and reasonable. The ACCC considers this change is required to ensure consistent treatment of inflation between periods before and after the SAU commencement date and will ensure NBN Co will have the opportunity to recover costs incurred before the start of the SAU commencement date.

¹³⁹ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, pp. 24-25.

7 Application of SAU price terms to MTM services

Key points

- NBN Co's proposed changes to introduce MTM services within the SAU framework have the effect of extending the existing SAU pricing provisions to the new MTM services. These pricing provisions include the initial price levels, the price controls and the revenue neutral price review process.
- In general, the ACCC considers that there are strong arguments in favour of the proposed application of the existing SAU price terms and conditions to the MTM services being reasonable. These include that:
 - NBN Co should have the opportunity to recover costs over the long term,
 - the SAU provides incentives for NBN Co to price services efficiently in order to increase traffic and uptake of higher value services,
 - the SAU price terms include the ability to rebalance prices in a revenue neutral manner; under the SAU variation this ability would be extended to include MTM services,
 - the SAU pricing model is based on the service an end-user receives, rather than the specific access technology, and
 - pricing MTM services outside the SAU through another framework may lead to complexity and uncertainty.
- While the ACCC considers there are grounds upon which it could be satisfied that the proposed variation to extend the SAU pricing provisions to the MTM services is consistent with the Category B SAOs and reasonable, it is seeking further comments or views from stakeholders on this aspect of the SAU variation.

The SAU provides an overarching framework for setting prices for NBN services. The main components of this framework, as relevant to the proposed variation, are the following:

- Clauses 1C.3 and 1C.4, which specify the initial MRPs for each NBN offer set out in clause 1C.2 and other charges
- Clause 1C.5, which specifies how MRPs will be set over time
- Schedules 1G and 2E, which describe the circumstances in which a MRP may be adjusted; and
- Schedule 2B, which outlines NBN Co's pricing commitments in Module 2.

NBN Co has proposed a limited number of changes to clause 1C.2 to extend the pricing provisions in Schedule 1C to services supplied using the MTM networks.

This chapter discusses NBN Co's proposal to apply the existing SAU price terms and conditions to MTM services. The scope of the ACCC's assessment, which is set out in chapter 2, includes consideration of the existing SAU price terms and conditions as they apply to MTM services.

NBN Co has also proposed a number of new prices and other changes that are specific to the MTM networks. These changes are considered in Chapter 6.

7.1 Proposed application of SAU pricing model to MTM services

Schedule 1C of the SAU commits NBN Co to supplying a set of services referred to as 'NBN Offers' (clause 1C.2) and sets out the MRPs for those NBN Offers (clauses 1C.3 and 1C.4.1). It also provides for NBN Co to apply 'Other Charges'. To incorporate the MTM services, NBN Co has proposed a number of changes to clause 1C.2 to specify that the existing NBN Offers may be delivered over an MTM network. NBN Co has also varied the table in Attachment D to the SAU that outlines the product components and features available on each of the networks.¹⁴⁰ This has the effect of applying the MRPs specified in Schedule 1C to the MTM services.

Under the current SAU pricing model, the maximum price that NBN Co may charge for a service is based on the attributes of the service from an end-user's perspective, such as maximum data rate and traffic class. These prices are consistent across the existing network types. For example, NBN Co is permitted under the current SAU to charge up to \$27 per month for a 25/5 AVC of TC4 regardless of whether the AVC is provided over NBN Co's fibre, wireless or satellite networks. NBN Co has proposed extending that approach to include the MTM networks.

NBN Co has not proposed changes to Schedules 1G, 2E and only minor changes to Schedule 2B. Schedules 1G and 2E (which mirrors 1G) describe the circumstances in which a MRP (or group of prices) may be adjusted in modules 1 and 2, respectively. These circumstances include for example, responding to change in NBN Co's tax liability (module 1 only), or a price review initiated by either the ACCC or NBN Co. Schedule 2B outlines NBN Co's pricing commitments in Module 2. Other pricing provisions in the SAU – such as the MRPs for certain NBN Offers set out in clauses 1C.3 – remain unchanged.

NBN Co describes its proposed changes to the SAU as 'limited in scope and mechanical in nature'. Further, it states that incorporating the MTM technologies does not alter 'the underlying regulatory principles, structure and incentives embedded in the SAU which the ACCC has previously accepted as being reasonable'.¹⁴¹

7.2 Stakeholder submissions

The ACCC's consultation paper noted the proposed changes to NBN Offers and Other Charges in the SAU Variation, but did not seek specific views on whether it would be reasonable for the existing SAU price terms to apply to the MTM services. However, submissions from Optus and the CCC addressed the existing SAU pricing provisions both as they relate to the MTM services, and more broadly. NBN Co's supplementary submission responded to concerns raised by Optus and the CCC. The views expressed in these submissions are summarised below.

Optus submission to consultation paper

In terms of assessing the SAU variation, Optus argues that as the revenues and costs associated with the MTM services are already captured in the LTRCM, the ACCC's decision to accept or reject the SAU variation will have no impact on NBN Co's ability to recover costs. As such, the ACCC's assessment of the SAU variation should only focus on whether

¹⁴⁰ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Attachment D, clause 1, pp.63-66.

¹⁴¹ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p.7

the SAU variation promotes competition, the efficient use of NBN infrastructure and the interests of access seekers.¹⁴²

Additionally, Optus submits that the ACCC must consider the relevant counterfactual scenario of maintaining the current scope of the SAU without variation. Under the scenario outlined by Optus, the ACCC would retain the ability to set terms and conditions for the supply of MTM services using the standard access determinations powers under Part XIC of the CCA. Optus considers that the ACCC should retain the option of intervening if circumstances arise that require it to do so.¹⁴³

In terms of the SAU pricing provisions, Optus argues in favour of reforming the current NBN pricing structure to rebalance charges across the AVC and CVC product components.¹⁴⁴ Such a rebalance would, it argues, promote efficient use of the NBN and competition in downstream markets, while at the same time ensuring that NBN Co achieves its required return.¹⁴⁵

Optus submits that the current AVC-CVC pricing structure acts as a disincentive for RSPs to provision higher speed tiers as the current CVC price levels can make it uneconomical to supply adequate bandwidth for end-users. This encourages RSPs to minimise the amount of CVC purchased per end-user which affects the actual performance experienced by customers.¹⁴⁶

Optus points to the changes that have occurred since the SAU pricing construct was accepted in 2013. Specifically, that internet usage is changing from downloading webpages to streaming services and that these services require constant bitstream usage. This makes it more difficult to overcome the cost of CVC capacity through network dimensioning and places greater emphasis on the CVC component than originally envisioned.¹⁴⁷

Competitive Carriers Coalition submission to consultation paper

The CCC submits that it is neither reasonable nor in the LTIE to apply the existing price terms and conditions to the MTM services for the following reasons:

Firstly, the CCC argues that the SAU pricing structure – particularly CVC pricing – has led to demonstrably higher prices for NBN services than for functionally equivalent legacy services. The CCC submits that this is inconsistent with the ACCC's position in its decision on the original SAU that end-users should not be made worse off by virtue of their migration to the NBN.

Secondly, the SAU pricing structure is not economically efficient. The CCC submits that the SAU pricing model forces RSPs to minimise CVC capacity, limits the ability of RSPs to differentiate their offering and could potentially drive small RSPs from the market.¹⁴⁸

¹⁴² Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, p.9.

¹⁴³ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, pp.7 & 9.

¹⁴⁴ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, p.17.

¹⁴⁵ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, p.18.

¹⁴⁶ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, pp.13-15.

¹⁴⁷ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, pp.4,13,15.

¹⁴⁸ Competitive Carriers Coalition, *Submission in response to the ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016, 2 September 2016*, p 7.

Thirdly, with the shift to the MTM, NBN services have more similarity to existing services available over non-NBN networks. The CCC argues that it is critical that MTM services are priced at a level no higher than other currently available services offering equivalent functionality, such as TPG's FTTB service.¹⁴⁹

NBN Co supplementary submission

NBN Co states that the submissions from Optus and the CCC in relation to the existing SAU pricing structure (including CVC pricing) "involve [the] re-opening [of] issues that are settled in the original SAU and hence would involve a re-assessment of the SAU if considered again", and therefore should not be considered within the scope of the ACCC's assessment.

Additionally, NBN Co notes the following:

- Any change to the pricing structure must account for NBN Co's need to recover the significant capital investment involved in the construction of the NBN.
- The SAU prices set a price ceiling and do not prevent NBN Co from lowering prices below this ceiling and NBN Co has clear incentives to encourage take up and utilisation of the NBN. This has been demonstrated through reductions in the CVC price.
- The SAU provides the ACCC with a reserve power to undertake a price rebalance, subject to certain conditions. These provisions are unchanged in the SAU variation.¹⁵⁰

In response to CCC's submission that in order to avoid price shocks, NBN services should be priced no higher than the price of functionally equivalent services, NBN Co argues that:

- consideration of a potential price shock is only relevant to situations which involve a mandatory migration to the NBN (noting that the SBAS declaration will cover other situations), and
- SAU pricing provisions specify a MRP and do not preclude NBN Co from responding to infrastructure-based competition.¹⁵¹

7.3 ACCC consideration

The ACCC does not agree with NBN Co's submission that the application of the existing price terms to MTM services is outside the scope of the ACCC's assessment of the proposed variation to the SAU. The ACCC considers that there is a clear interaction between the pricing provisions and the proposed changes to introduce the new MTM services. The proposed variation has the effect of extending the pricing provisions to services not covered by the existing SAU. The SAU pricing provisions therefore form part of the ACCC's assessment to the extent they apply to the MTM services.

The ACCC considers that the proposed SAU variation on price and charges are characterised as terms and conditions relating to compliance with the Category B SAOs. Section 152CBD(2)(b) of the CCA specifies that the ACCC must not accept the SAU variation unless it is satisfied that the terms and conditions specified in the variation in

¹⁴⁹ Competitive Carriers Coalition, *Submission in response to the ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016*, 2 September 2016, p.8.

¹⁵⁰ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, pp.13-14.

¹⁵¹ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, p.14.

relation to compliance with the Category B SAOs are consistent with those obligations and are reasonable.

In determining whether the pricing provisions are reasonable, the ACCC must have regard to the following factors set out in section 152AH of the CCA:

- whether the terms and conditions promote the long-term interests of end users – in particular, the extent to which the terms and conditions are likely to result in the achievement of the following objectives:
 - promoting competition in markets for listed services, and
 - encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which the listed services are supplied;
- the legitimate business interests of NBN Co and its investment in facilities used to supply the declared service concerned,
- the interests of persons who have rights to use the declared services,
- the direct costs of providing access to the declared service concerned,
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

In 2013, the ACCC adopted a set of three pricing principles to assist in its assessment of the price-related terms and conditions of the original SAU. These principles were used as a framework for considering the reasonableness factors set out above. The ACCC considered that if these principles were met, it would be more likely to be satisfied that the proposed terms were reasonable.¹⁵² These principles are that:

- NBN Co should have the opportunity to recover its efficient expenditure,
- NBN Co should face incentives to only incur efficient expenditure, and
- end-users should not be made worse off.

In assessing NBN Co's proposed application of the existing SAU price terms and conditions to MTM services, the ACCC has considered the reasonableness factors above and the submissions from stakeholders. The ACCC considers that there are a number of strong arguments in favour of the proposed approach. These include the following considerations, which are presented in more detail below:

- NBN Co should have the opportunity to recover costs over the long term
- the SAU provides incentives for NBN Co to price services efficiently in order to increase traffic and uptake of higher value services
- the SAU price terms include the ability to rebalance prices in a revenue neutral manner; under the SAU variation this ability would be extended to include MTM services
- the SAU pricing model is based on the service an end-user receives, rather than the specific access technology, and
- pricing MTM services outside the SAU through another framework may lead to complexity and uncertainty.

¹⁵² ACCC, *NBN Co Special Access Undertaking (SAU) – Final decision*, December 2013, pp.103.

However, the ACCC has not reached a view as to whether the proposed application of the existing SAU pricing provisions to the MTM services is consistent with the Category B SAOs and is reasonable. On this aspect of the proposed SAU variation, the ACCC is seeking further submissions from stakeholders.

NBN Co should have the opportunity to recover costs over the long term

The ACCC considers that the opportunity for NBN Co to recover, but not over recover efficient expenditure remains a relevant consideration when considering NBN Co's legitimate business interests, the direct costs of providing access, the requirements necessary for safe and reliable operation, and economic efficiency.

Optus submits that as the LTRCM provisions already include the MTM access technologies, cost recovery is not a relevant consideration when assessing the SAU pricing provisions.¹⁵³ As such, the ACCC's assessment should only have regard to whether the SAU variation promotes competition, whether it promotes efficient use of infrastructure, and the interest of parties who have a right to use the relevant service.¹⁵⁴

The ACCC agrees that the LTRCM already covers the MTM services and provides a mechanism to recover prudent and efficient expenditure through the initial cost recovery account (ICRA). However, the ACCC disagrees with Optus that cost recovery is not a relevant consideration when assessing the reasonableness of the pricing provisions of the SAU variation.

The ACCC considers that there is a strong interaction between the pricing provisions (which includes the initial prices and price controls) and NBN Co's ability to recover its efficient costs in the long term. This is because while the LTRCM provides a mechanism for long term cost recovery, NBN Co is not guaranteed to fully recover all revenues allowed under the LTRCM during the life of the SAU.

NBN Co's ability to fully recover costs is affected by the low initial prices for entry level services (benchmarked to legacy services), uncertainty around the demand for higher value services and the price controls.¹⁵⁵ Together, these factors constrain NBN Co's ability to increase revenue and recover its expenditure. Although revenue shortfalls during the rollout of the NBN are capitalised in the ICRA, there is a risk that NBN Co will not be able to fully recover its costs during the life of the SAU. The ACCC considered that this revenue sufficiency risk would create incentives for NBN Co to minimise costs and invest efficiently.¹⁵⁶

The ACCC considers that NBN Co's ability to recover no more than its efficient cost continues to be an important consideration in assessing the SAU pricing provisions as they apply to the MTM services. Additionally, the ACCC considers that extending the SAU framework to the new MTM services is unlikely to materially change NBN Co's revenue sufficiency risks and the reasonableness of the SAU pricing provisions with regards to cost recovery.

¹⁵³ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p.12.

¹⁵⁴ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, p.9.

¹⁵⁵ The price controls include the annual price increase limit of CPI minus 1.5 per cent, which means that prices will fall in real terms across the life of the SAU

¹⁵⁶ ACCC, *NBN Co Special Access Undertaking (SAU) – Final decision*, December 2013, pp.11-12.

The SAU provides incentives for NBN Co to price services efficiently in order to increase traffic and uptake of higher value services

In the ACCC's assessment of the price terms and conditions of the original SAU, a key consideration was that end-users should not be made worse off, or face a significant price shock when migrating to the NBN from legacy networks. Specifically, that entry level services (including 12/1 and 25/5 AVC offers) should be priced at a level broadly comparable to functionally equivalent legacy services.

The ACCC considered that the prices for these entry level services would likely have an anchoring effect on demand and constrain NBN Co's ability to charge a premium for higher value services (those without a legacy counterpart). If the prices for higher value services exceed what customers are willing to pay for those services, end-users will be unlikely to take up these services. The ACCC considered that this anchoring effect combined with NBN Co's revenue sufficiency risk would ensure NBN Co faced incentives to price efficiently in order to increase traffic and uptake of higher value service.¹⁵⁷

The ACCC considers that there is evidence of NBN Co's incentives to price efficiently and notes that since the SAU was first accepted in 2013, NBN Co has reduced the price of CVC on three occasions and publically committed to further reductions:

- In December 2013, the ACCC accepted the original SAU which specified a maximum regulated unit price for CVC of \$20 per Mbps per month.
- In February 2016, NBN Co reduced the price of CVC from \$20 per Mbps down to \$17.50 per Mbps. This price change is reflected in the WBA.
- In June 2016, NBN Co introduced the Dimension Based Discounting (DBD) trial. Under the DBD trial, NBN Co discounts the price of TC4 CVC (excluding satellite services) by an amount determined by the industry average CVC capacity provisioned per end user in non-transitional CSAs. At the commencement of the trial, the effective unit price for CVC fell to \$15.75 per Mbps.
- In December 2016, NBN Co further reduced the effective unit price of TC4 CVC to \$15.25 per Mbps as part of the DBD trial.
- In February 2017, NBN Co announced that from June 2017 the DBD pricing scheme will be implemented on an RSP basis rather than an industry average.¹⁵⁸ Under the new proposal, the effective unit price of CVC per Mbps that an individual access seeker will face will depend on its own level of CVC provisioning.

In accepting the original SAU, the ACCC also considered that the AVC/CVC construct would facilitate non-price competition in downstream markets by allowing RSPs to adjust their CVC dimensioning and differentiate in terms of service quality. However, the submissions from Optus and the CCC raise concerns around the ability of RSPs to differentiate in this manner. Optus submits that the current CVC price levels make it uneconomical to supply adequate bandwidth and limit competition.¹⁵⁹ Similarly, the CCC submits that the current pricing model

¹⁵⁷ ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012* – April 2013, p.102.

¹⁵⁸ NBN Co (2016), Media release: New CVC pricing model to drive enhanced broadband service, 17 February 2017 <http://www.nbnco.com.au/content/dam/nbnco2/documents/Media%20Release-New%20CVC%20pricing%20model%20to%20drive%20enhanced%20broadband%20service.pdf>

¹⁵⁹ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, pp.14,17

limits the ability of RSPs to differentiate and will ultimately drive small RSPs from the market.¹⁶⁰

The ACCC notes the concerns of access seekers around the ability of RSPs to differentiate their market offering. However, the ACCC considers that NBN Co's recently announced changes to its DBD pricing scheme (to be implemented on an RSP basis) are likely to facilitate RSP differentiation and in turn promote competition in downstream retail markets. Under this proposal, the CVC discount an access seeker receives will depend on the amount of CVC per end-user it individually purchases. This means that an access seeker who provisions more CVC per user than its competitors will face a lower effective CVC price per Mbps.

In terms of the entry level NBN services, the CCC argues that the SAU prices are demonstrably higher than their functionally equivalent legacy counterparts and that this is inconsistent with the ACCC's position that end-users should not be made worse off. In support of these claims, the CCC submitted a set of worked examples which estimate and compare the wholesale costs of NBN services to ULLS based ADSL services.¹⁶¹

The ACCC notes the difficulty in directly comparing the wholesale costs of NBN services to functionally equivalent legacy services. This difficulty arises from differences in functionality and network architecture as well as the complex nature of traffic engineering. However, the ACCC considers that the methodology used by the CCC to compare costs between supplying ADSL and NBN services is likely to overestimate any cost differential that may exist for a number of reasons.

First, two different methodologies have been used to estimate the wholesale costs of supplying ADSL and NBN services. On the one hand, the CCC has estimated the cost of supplying ADSL services by simply subtracting a profit margin from retail prices. However, to estimate the cost of supplying NBN services, the CCC has estimated the individual costs of each element required to supply an end-to-end service (including technical support, company overheads, domestic backhaul and international internet access).

Secondly, while the ADSL estimates are based on observed retail prices, the NBN estimates do not appear to accurately reflect current market conditions. In particular, the CCC appears to have overestimated the amount of CVC required per end-user. The figures used (3-5 Mbps) are significantly greater than the average CVC per end user reported in the ACCC's NBN Wholesale Market Indicators Report (~1 Mbps).¹⁶²

In practice, the ACCC notes that many RSPs currently offer NBN services and legacy services at similar price points. For example, Optus offers the entry level My Broadband plan with unlimited data allowance at \$80 per month over NBN, HFC and ADSL networks.¹⁶³ Similarly, all of Telstra's current home broadband plans and bundles are advertised as NBN ready or NBN compatible.¹⁶⁴ This observation does in part support the ACCC's original assessment that the SAU prices would facilitate comparable retail prices for entry level services.

¹⁶⁰ Competitive Carriers Coalition, *Submission in response to the ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016*, 2 September 2016, p.7.

¹⁶¹ Competitive Carriers Coalition, *Submission in response to the ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016*, 2 September 2016, pp.11-12.

¹⁶² ACCC, NBN Wholesale Market Indicators Report 31 December 2016.

¹⁶³ Optus, Critical Information Summary: \$80 My Broadband – 24 month contract http://smb.optus.com.au/opfiles/Shop/All/cis/Cis%20Documents/CIS_My_Broadband_Plan.pdf

¹⁶⁴ Telstra website, accessed 1 February 2017: <https://www.telstra.com.au/broadband/nbn/how-to-connect>

The ACCC also notes that MTM services are more similar to existing services than was the case with FTTP. They argue that to ensure no price shock to end-users, MTM prices should be comparable to functionally equivalent services such as TPG's FTTB service, which sets a CVC price of \$4 per Mbps.¹⁶⁵ In response, NBN Co submitted that consideration of a potential price shock is only relevant to situations which involve a mandatory migration to the NBN.¹⁶⁶

The ACCC agrees with NBN Co's submission on this point as end-users of the TPG's FTTB service will not be required to migrate to the NBN. Additionally, the non-NBN services are likely to provide some degree of competitive constraint.

The ACCC considers that the incorporation of the MTM services into the SAU framework is unlikely to materially change the revenue sufficiency risks faced by NBN Co and by extension, NBN Co's incentives to increase traffic and uptake of services through efficient pricing. The ACCC also considers that NBN Co may face weaker incentives if the price controls do not apply to all network types.

While the ACCC considers the recently announced DBD by RSP pricing scheme is evidence of NBN Co's incentive to price efficiently, it is too soon to determine the effectiveness of this proposal. The ACCC intends to actively monitor the development of this initiative to determine if and to what degree the discounts promote competition and efficient use of the NBN.

The SAU variation extends the price rebalance provisions to include MTM services

In the SAU variation, NBN Co has not proposed changes to the price review provisions in Schedules 1G.3 (module 1) and 2E.2 (module 2). This has the effect of extending the price review provisions, including the ACCC's ability to conduct a revenue neutral price review, to the MTM technologies.

A revenue neutral price review may be initiated by either the ACCC or NBN Co at various times during the SAU and allows the ACCC to adjust any SAU price or group of prices subject to the constraint that any adjustment must be revenue neutral across the life of the SAU. This constraint ensures that a price review will not adversely affect NBN Co's ability to recover its efficiently incurred costs across the life of the SAU.

In accepting the original SAU, the ACCC considered that NBN Co would face strong incentives to set prices that would lead to efficient outcomes and that the revenue neutral price review process was a key aspect of these incentives. The revenue neutral price review process allows the ACCC to intervene if these efficient outcomes do not eventuate.¹⁶⁷

The submissions from Optus and the CCC do not propose that the ACCC conduct a revenue neutral price review. However, the ACCC notes that some of the concerns raised by Optus and the CCC are the types of concerns that the price review provisions were specifically designed to address. For example Optus argues for the 'need to reform the current charging structure to rebalance charges across AVC and CVC'.¹⁶⁸

¹⁶⁵ Competitive Carriers Coalition, *Submission in response to the ACCC consultation paper 'Variation to NBN Co Special Access Undertaking' dated 20 July 2016*, 2 September 2016, p.8.

¹⁶⁶ NBN Co, *Supplementary Submission to ACCC consultation paper – variation to the NBN Co Special Access Undertaking*, 29 September 2016, p.14.

¹⁶⁷ ACCC, *NBN Co Special Access Undertaking (SAU) – Final decision*, December 2013, pp.89-90.

¹⁶⁸ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, p.17.

The ACCC considers that its ability to intervene and conduct a revenue neutral price review remains an important component of the SAU pricing provisions and is central to the incentive framework of the SAU.

The SAU pricing model is based on the service an end-user receives, rather than the specific access technology

NBN Co's proposed approach to the SAU variation is to extend the existing SAU prices to the MTM services on a like for like basis. This approach means that the MRP for a service does not depend on which access technology is used to supply the service. Instead, the price of a service is based on the attributes relevant to the end-user, including data rate and traffic class.

This approach also means that the MRP for a particular service may not directly reflect the cost to NBN Co of providing that service. For example, the SAU may allow NBN Co to over recover costs on some services but conversely require NBN Co to under recover on others. The LTRCM process should ensure that in aggregate, NBN Co does not over recover its expenditure from all services across the life of the SAU.

The ACCC considers this approach of setting prices based on services received by end-users is appropriate within the context of the SAU. This approach is likely to be in the interest of access seekers and promote competition in downstream markets. This is because end-users (and by extension access seekers) are primarily concerned with quality of service and end-user experience rather than the underlying access technology.

Pricing MTM services outside the SAU through another framework may lead to complexity and uncertainty

In its submission to the consultation paper, Optus submitted that the LTIE would be best promoted by the ACCC rejecting the SAU variation and retaining the power to make access determinations for MTM services under Part XIC.¹⁶⁹

However, the ACCC considers that having separate regulatory instruments apply to different access technologies is likely to increase uncertainty and result in a range of complex practical issues.

For example, the submissions from both Optus and the CCC raise concerns around the price of CVC capacity. However, assuming that the ACCC were to share these concerns and seek to intervene through an access determination, any reduction in the CVC price would only apply for MTM technologies. This is because the SAU would continue to set the CVC price for the existing technologies. This could potentially result in different CVC prices for different access technologies.

The practical application of this is unclear, particularly in instances where a single CVC is used to support both MTM and non-MTM services simultaneously. Because a CVC is used to aggregate the AVC traffic of multiple end-users, it is not possible to identify which percentage applies to a single AVC.

The ACCC considers that a single regulatory instrument that applies for all NBN network types is likely to promote the interest of access seekers by providing a long term certainty and clarity around NBN Co's commitments and obligations.

¹⁶⁹ Optus, *Submission in response to the ACCC consultation paper: Variation to NBN Co Special Access Undertaking*, August 2016, 2016, p.9

7.4 Draft decision

Based on the factors outlined above, the ACCC considers there are strong arguments in favour of extending the application of the existing SAU price terms and conditions to the MTM services. The ACCC considers that this proposal is unlikely to materially change the assessment upon which the original SAU was accepted in 2013.

However, the ACCC notes that in its consultation paper, it sought comments from stakeholders about the proposed changes to NBN offers but did not specify that its assessment would include the application of the existing SAU terms to the MTM services. While it received some submissions on price related matters, the ACCC is now seeking comments from stakeholders about its draft view that there are grounds for it to be satisfied that the proposed variation to apply the SAU pricing terms to MTM services is reasonable.

Appendix A: Legislative Criteria

1.1. Statutory criteria for assessing an SAU variation

The ACCC must not accept an SAU variation unless it is satisfied that it meets the criteria set out in section 152CBD(2) of the CCA.¹⁷⁰ Broadly, this section requires the ACCC to be satisfied that:

- 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,¹⁷¹
- any conduct that is specified in the variation in relation to access referred to in section 152CBA(3B) will promote the long term interests of end-users (LTIE), and that the related terms and conditions are reasonable, and
- any conduct that is specified in the variation in relation to certain matters referred to in section 152CBA(3C) will promote the LTIE.¹⁷²

Section 1.2 of this appendix explains the meaning of the terms 'long term interests of end-users' and 'reasonableness'.

The ACCC must also be satisfied that the varied undertaking is consistent with any Ministerial pricing determination, however there are no relevant Ministerial pricing determinations in force at this time.

In addition to the criteria for accepting an SAU variation, the CCA sets out three reasons why the ACCC must not reject a variation. These reasons relate to price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services,¹⁷³ certain authorised conduct¹⁷⁴ and fixed principles provisions that are in effect.¹⁷⁵

If the ACCC accepts the variation, the ACCC must give a written notice stating that the variation has been accepted, setting out the terms of the variation.¹⁷⁶ If the ACCC rejects the variation, the ACCC must inform NBN Co that the variation has been rejected and provide

¹⁷⁰ Section 152CBG(4) states that section 152CBD applies to the variation in a corresponding way to the way in which it applies to an undertaking.

¹⁷¹ Category B SAOs require NBN Co to: supply a declared service upon request; provide interconnection to facilities upon request; and supply any service using conditional access customer equipment that is necessary in order for a service provider to provide carriage service and/or content service by means of the declared service, upon request.

¹⁷² Specified conduct under section 152CBA(3C) includes developing a new eligible service, enhancing a declared service, extending or enhancing the capability of a facility or network for the supply of a declared service, activities that are preparatory to the supply of a declared service, activities that are ancillary or incidental to the supply of a declared service or giving information to service providers about any of these activities.

¹⁷³ Section 152CBD(5A)(a)-(c) of the CCA specifies that if the varied 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 the price-related terms and conditions.

¹⁷⁴ Section 152CBD(5C)(a) of the CCA provides that 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.

¹⁷⁵ Section 152CBAA(5)(h) of the CCA states that if the ACCC has accepted an SAU given by a person that contains fixed principles terms or conditions that are in effect, the ACCC must not reject another undertaking for a reason relating to the corresponding fixed principles terms or conditions

¹⁷⁶ CCA, ss. 152CBG(3)(5)(6).

reasons for the rejection. If the variation is rejected, the existing terms of the SAU continue to apply.

1.2. LTIE and reasonableness

Long term interests of end-users

In determining whether a particular thing promotes the LTIE, subsection 152AB(2) of the CCA requires the ACCC to only have regard to the extent to which the thing is likely to achieve the following objectives:

- promoting competition in markets for listed services,¹⁷⁷
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users,¹⁷⁸ and
- encouraging the economically efficient use of, and investment in, infrastructure by which services are supplied, and any other infrastructure by which listed services are, or are likely to become capable of being supplied.¹⁷⁹

At a high level, the ACCC considers that the expression 'long term' involves a balancing of the flow of costs and benefits to end-users over time in relation to these objectives. The matters that the ACCC is required to take into account are often inter-related and may involve trade-offs that need to be weighed up. In considering whether the proposed variation promotes the LTIE and is reasonable, the ACCC has had regard to the counterfactual scenario where the variation is not accepted. In the counter scenario, the existing SAU would continue to operate and the ACCC would have recourse to set terms and conditions for NBN services in other regulatory instruments such as a determination.

Promoting competition in markets for listed services

Competition is the process of rivalry between firms, where each firm is constrained in its price and output decisions by the activity of other firms. Competition usually benefits consumers (the end-users) through lower prices, the level of service quality preferred by end-users, and a greater choice of services.

Consistent with the ACCC's assessment of NBN Co's SAU, the ACCC considers that the following markets for listed services are relevant for the purposes of the SAU variation:

- The national retail market or markets for broadband and voice services – retail service providers (RSPs) will require NBN Co's services in order to provide services to end-users.
- Wholesale markets, including the supply of services for use or resale by those RSPs at a range of levels – even though NBN Co provides wholesale services, the expectation is that other service providers will be able to offer 'value-added' wholesale voice and broadband services to RSPs.
- Transmission capability markets – transmission capability refers to links which are used to connect service providers' core networks with points of service delivery (such as exchanges) which are usually provided using optical fibre, but can be provided using digital microwave or satellite systems.¹⁸⁰

¹⁷⁷ CCA, s. 152AB(2)(c).

¹⁷⁸ CCA, s. 152AB(2)(d).

¹⁷⁹ CCA, s. 152AB(2)(e).

¹⁸⁰ Service providers can obtain transmission capability by: building and installing their own physical infrastructure in order to self-supply; acquiring services in an 'unconditioned' state (i.e. dark fibre) and

In determining the extent to which the provisions in the SAU variation are likely to promote competition in the markets for listed services, the ACCC must have regard to the extent to which obstacles to end-users gaining access to these services are removed.¹⁸¹ The ACCC would also typically consider:

- whether the terms and conditions will likely lead to an improvement in competition, and
- the extent of the competitive impact and the likelihood of that extent.

The promotion of competition will not necessarily be achieved merely by an increase in (or prevention of a decrease in) the number of participants in a market. That is, the 'level' of competition in a particular market is not assessed solely with regard to the number of firms in the market. Rather, in assessing the level of competition, the ACCC has considered the vigour of competition between firms, regardless of their number. In this context, the ACCC considers that competition in retail markets will not necessarily always be promoted merely by an increase in the number of RSPs connecting directly to the NBN. This is because any barriers that may exist in connecting directly to the NBN do not by themselves create barriers to entering retail markets. The barriers to entering retail markets that may exist can be addressed through the provision of aggregation and other services by wholesale providers, rather than through the regulation of terms and conditions of access to NBN Co's network.

Ensuring any-to-any connectivity

Any-to-any connectivity is achieved if and only if each end-user of a carriage service that involves communication between end-users is able to communicate with each other end-user who is supplied with the same or similar service, whether or not the end-users are connected to the same telecommunication network.¹⁸²

The any-to-any connectivity requirement is particularly relevant when considering services that involve communication between end-users.¹⁸³ However, the ACCC considers that this criterion is neither promoted nor hindered in the context of other types of services (such as carriage services that are inputs to an end-to-end service) and it will therefore be less relevant in assessing the SAU lodged by NBN Co.

Encouraging efficient investment in and use of infrastructure

In determining the extent to which a particular thing is likely to encourage the economically efficient investment in, and use of, infrastructure, the CCA requires the ACCC to consider a number of matters:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for (having regard to the technology that is in use, available or likely to become available; whether the costs that would be involved in supplying and charging for the services are reasonable or likely to become reasonable; and the effects, or likely effects, that supplying and charging for the services would have on the operation or performance of telecommunications networks),¹⁸⁴

providing their own electronics to condition the fibre; or acquiring services in a 'conditioned' state, such as managed transmission services, which includes the declared domestic transmission capacity service (DTCS).

¹⁸¹ CCA, s. 152AB(4).

¹⁸² CCA, s. 152AB(8).

¹⁸³ Explanatory Memorandum to the Trade Practices (Telecommunications) Amendment Act 1996 (Cth), p. 41.

¹⁸⁴ CCA, s. 152AB(6)(a).

- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope,¹⁸⁵ and
- the incentives for investment in the infrastructure by which the services are or will become capable of being supplied.¹⁸⁶

The ACCC is not restricted to considering these matters when determining whether the provisions in the SAU variation encourage efficient use of and investment in infrastructure.¹⁸⁷

The ACCC assesses the technical feasibility of supplying the relevant service by examining the access provider's ability to provide the service and considering experiences in other jurisdictions where relevant.

The ACCC considers that a legitimate commercial interest of a supplier of services is the ability of the supplier to recover the efficient or 'prudent' costs of providing the services and to earn a normal commercial return on their investment in the infrastructure used to supply those services. The ACCC considers that allowing for a normal commercial return on an investment will provide an appropriate incentive for NBN Co to maintain, improve and invest in the efficient provision of the service.

In considering the incentives for investment in the infrastructure by which the services are or will become capable of being supplied, the ACCC must have regard to the risks involved in making the investment.¹⁸⁸ The ACCC would also typically consider matters such as:

- whether the supplier has the opportunity to recover the prudent and efficient costs of building, operating and maintaining the infrastructure used to supply the declared service under consideration, and
- whether the supplier faces an incentive to invest efficiently in delivering a particular service quality.

In considering whether the economically efficient use of infrastructure is encouraged, the ACCC would typically consider:

- whether access prices allow the access provider the opportunity to recover its prudent and efficient costs, but no more, over the long term, and
- whether the suppliers of services will make timely changes to technology, products, price structures and price relativities in response to changes in consumer preferences.

Finally, the ACCC considers that the phrase 'economically efficient' consists of three components:

- Productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost.
- Allocative efficiency – this is achieved where resources are allocated to their highest value uses, that is, resources are allocated to those uses that provide the greatest benefit relative to costs.
- Dynamic efficiency – this is achieved when industries make timely changes to and investments in technology and products in response to changes in consumer preferences and productive opportunities.

¹⁸⁵ CCA, s. 152AB(6)(b).

¹⁸⁶ CCA, ss. 152AB(6)(c) and 152AB(7).

¹⁸⁷ CCA, s. 152AB(7B).

¹⁸⁸ CCA, s. 152AB(7A).

Reasonableness

Section 152AH of the CCA sets out the matters the ACCC must have regard to in determining whether particular terms and conditions are reasonable. These include whether they promote the LTIE, the legitimate business interests of the carrier or carriage service provider, the interests of persons who have rights to use the declared services, the direct costs of providing access to the declared service, operational and technical requirements necessary for the safe and reliable operation of the service and economic efficiency. The ACCC is not limited to having regard only to these matters.

The first of the matters listed in section 152AH(1) is whether the terms and conditions promote the LTIE of carriage services or of services supplied by means of carriage services.¹⁸⁹ The LTIE has been discussed in the previous section. The other matters set out in section 152AH(1) are as follows.

The legitimate business interests of the carrier or carriage service provider

The ACCC must have regard to the legitimate business interests of the carrier or carriage service provider concerned and the carrier or carriage service provider's investment in facilities used to supply the declared service concerned.¹⁹⁰ The phrase 'legitimate business interests' is interpreted in a manner consistent with the concept of 'legitimate commercial interests' described above. That is, a legitimate business interest for a carrier or carriage service provider that is an access provider, is the ability to recover the efficient cost of providing services and to earn a normal commercial return on its investment in the infrastructure used to supply those services.

This matter also requires consideration of the interests of the carrier or carriage service provider in conducting its business affairs. A carrier or carriage service provider should not be unduly compromised in the conduct of its legitimate business interests simply because it has an obligation to provide access to its services – a carrier or carriage service provider is entitled to have some legitimate control over its relationship with an access seeker to the extent reasonably required to protect its business concerns.

For instance, a carrier or carriage service provider should be able to make appropriate decisions about modifications and upgrades to its networks or to set appropriate requirements for the billing and payment of its accounts.

The interests of persons who have rights to use the declared services

The ACCC must have regard to the interests of persons who have rights to use the declared service concerned.¹⁹¹ In this context, 'persons' is interpreted to include all current and potential access seekers of the service. Access seekers will generally use the service as an input to supply carriage services, or a service supplied by means of a carriage service, to end-users.

Access seekers have an interest in being able to compete for the custom of end-users on the basis of their relative merits. That is, this criterion reflects a consideration of whether the ability of access seekers to compete in the supply of a service in a dependent market is based on the cost and quality of their services relative to each other, rather than a consideration of whether access seekers are ensured of being able to conduct a profitable business.

¹⁸⁹ CCA, s. 152AH(1)(a).

¹⁹⁰ CCA, s. 152AH(1)(b).

¹⁹¹ CCA, s. 152AH(1)(c).

The interests of access seekers also include not being subjected to overly onerous commercial terms simply because of their status as an access seeker. From a non-price perspective, the ACCC would, for example, expect an access seeker to have reasonable notification of proposed changes to a facility or service that affects its business interests or to be consulted in relation to billing and credit matters, suspension of services and other facets of a business where its customer relationship may be impacted.

The direct costs of providing access to the declared service

The ACCC must have regard to the direct costs of providing access to the declared service concerned.¹⁹² Direct costs are those necessarily incurred (or caused) by the provision of access.

Operational and technical requirements

The ACCC must have regard to the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility.¹⁹³

An access provider will not be precluded from ensuring the safe and reliable operation of carriage services, telecommunications networks or facilities where it gains sufficient revenue to cover the costs of the operational and technical requirements necessary for ensuring the safe and reliable operation of carriage services.

Terms of access should also not require work practices that would be likely to compromise the safety or reliability of the carriage service, network or facility. However, terms of access aimed at ensuring the safe and reliable operation of a carriage service, a telecommunications network or a facility should not be used as a barrier to access seekers gaining access.

Economic efficiency

The ACCC must have regard to the economically efficient operation of a carriage service, a telecommunications network or a facility.¹⁹⁴ Economic efficiency in this context has the same meaning as outlined above in the discussion of the LTIE.

The economically efficient operation of a carriage service, telecommunications network or facility will not be precluded where the carrier or carriage service provider is allowed to recover the efficient operating cost of providing services (and no more).

If it were to recover less than this, it may not be able to fund its operations and aspects of service quality may subsequently decline and/or the safe operation of the business may not be guaranteed. If it were able to recover more than its efficient operating costs, it may not be incentivised to operate in an efficient manner (and higher access prices than otherwise may discourage efficient use of the network).

¹⁹² CCA, s. 152AH(1)(d).

¹⁹³ CCA, s. 152AH(1)(e).

¹⁹⁴ CCA, s. 152AH(1)(f).

Appendix B: Submissions to the SAU variation consultation paper

Public submissions to the SAU variation consultation paper are available on the ACCC website.¹⁹⁵ The ACCC received the following submissions:

- ACCAN – public submission
- ACCAN – supplementary submission
- Arthur Marsh – public submission
- Competitive Carriers Coalition – public submission
- Competitive Carriers Coalition – supplementary submission
- Eric Dale – public submission
- Eric O'Malley – public submission
- Mark Gregory – public submission
- NBN Co – public submission
- NBN Co – supplementary submission
- Nicholas Davis – public submission
- Optus – public submission
- Telstra – confidential submission
- Telstra – public submission

¹⁹⁵ See: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation/consultation-paper>