

# nbn Special Access Undertaking Variation 2022 – Supporting submission

## Part G: Statutory Assessment

November 2022

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# Structure of Submission

This Submission describes the proposed material changes to the SAU and explains why this comprehensive package of regulatory obligations and constraints meets the relevant statutory criteria by which such an SAU variation must be assessed. The Submission also describes the specific commitments proposed in respect of the First Regulatory Cycle (FY24 to FY26). Detailed information can be found in the following chapters:

|   |   |                   |
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| <b>Executive summary and key narratives</b>                 | Introduction  | Part A chapter 1  |
|   | Summary of how the Variation addresses ACCC and industry feedback | Part A chapter 2  |
|   | State of competition  | Part A chapter 3  |
|   | Demand for higher speeds will continue to grow                    | Part A chapter 4  |
|   | The rationale for investing in fibre                              | Part A chapter 5  |
|   | The Variation supports economically efficient outcomes            | Part A chapter 6  |
| <b>Pricing and price controls</b>                           | Pricing structure and levels                                      | Part B chapter 7  |
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| <b>Non-price terms</b>                                      | Incorporation of MTM technologies                                 | Part C chapter 9  |
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| <b>ACCC roles and powers</b>                                | Replacement Module provisions                                     | Part D chapter 13 |
|   | <b>nbn</b> proposes an expanded role for the ACCC                 | Part D chapter 14 |
|   | Price review mechanism  | Part D chapter 15 |
| <b>Key inputs to nbn's Regulated Revenue Requirement</b>    | Recovery of initial costs   | Part E chapter 16 |
|   | Regulatory Asset Base and <b>nbn's</b> cost allocation approach   | Part E chapter 17 |
|   | WACC  | Part E chapter 18 |
| <b>Efficiency of nbn's Expenditure and Demand Forecasts</b> | Cost pass-through mechanism                                       | Part F chapter 19 |
|   | Expenditure assessment framework                                  | Part F chapter 20 |
|   | Specific commitments in respect of the First Regulatory Cycle     | Part F chapter 21 |
|   | Expenditure forecasts   | Part F Appendix A |
|   | Demand forecasts  | Part F Appendix B |
| <b>Statutory assessment</b>                                 | The Variation satisfies the Statutory Criteria                    | Part G chapter 22 |
|   | Statutory role of the ACCC  | Part G chapter 23 |
| <b>Guide to the SAU and other background materials</b>      | Overview of the SAU   | Part H chapter 24 |
|   | <b>nbn's</b> mandate and regulatory framework                     | Part H chapter 25 |
|   | Statement of Expectations   | Part H chapter 26 |



## 22 The Variation satisfies the Statutory Criteria

The Variation represents an integrated package of proposals, which **nbn** considers meets the relevant statutory assessment criteria, including (as relevant) that the terms of an SAU variation are reasonable and will promote the long-term interests of end-users (**LTIE**).

This chapter gives an overview of how the Variation satisfies the statutory criteria.

### 22.1 Statutory assessment

#### 22.1.1 Overview of the relevant statutory test

The ACCC must assess an SAU variation against specific statutory criteria.<sup>1</sup> Detail on the statutory framework and criteria of 'reasonableness' and promoting the LTIE is set out in chapter 23.

In section 22.2 below, **nbn** provides an overview of how the Variation satisfies the general statutory criteria of 'reasonableness' and promoting the LTIE.

#### 22.1.2 Terms and conditions relating to compliance with Category B SAOs

For terms and conditions relating to compliance with the Category B SAOs (subsection 152CBA(3A)),<sup>2</sup> the ACCC must not accept an SAU variation unless it is satisfied that such terms and conditions are consistent with the Category B SAOs and are reasonable.

In the ACCC's 2013 final decision on the SAU lodged by **nbn** on 19 November 2013 (**Final 2013 Decision**), the ACCC categorised clauses about the following matters as relating to compliance with the Category B SAOs:

- terms and conditions of supply of product components;
- the commitment to supply NBN offers;
- prices and charges;
- the methodology for the calculation of the RAB;
- conditions for including capital expenditure into the RAB in Module 1;
- calculation of the ABBRR;
- operation of the ICRA;
- operation of the building block revenue period; and
- calculation of inflation and real values.

<sup>1</sup> CCA, ss 152CBD(2) and 152CBG(4).

<sup>2</sup> Broadly, the Category B SAOs under section 152AXB of the CCA impose:

- a requirement for an NBN corporation to supply a declared service on request to a service provider in order that the service provider can provide Carriage Services and/or Content Services;
- a requirement for an NBN corporation to permit interconnection to telecommunications facilities it owns or controls, if requested to do so by a service provider, for the purpose of enabling the service provider to be supplied with declared services in order that the service provider can provide Carriage Services and/or Content Services; and
- a requirement for an NBN corporation that supplies a declared service by means of conditional-access customer equipment to supply on request any related service that is necessary to enable a service provider to supply its relevant retail service and/or Content Services by means of the declared service and using the equipment.



While the framework and specific details proposed in the Variation differ in many material respects from the current SAU accepted in 2013, **nbn** considers that the categorisation used by the ACCC in the Final 2013 Decision remains relevant to their assessment of the Variation, even if the nature of their assessment under each of the categories might change.

## Compliance

**nbn** submits that in accordance with subparagraph 152CBD(2)(b)(ii), the ACCC should regard the terms and conditions in the Variation relating to compliance with the Category B SAOs as consistent with the applicable SAOs because:

- the terms and conditions of the Variation are consistent with the Category B SAOs in that they conform to **nbn**'s obligations under section 152AXB, by providing Access Seekers with supply of the declared services, and by permitting interconnection;
- there are no terms and conditions in the Variation that are inconsistent with applicable SAOs and as such the terms and conditions of the Variation are likely to be consistent with applicable SAOs; and
- where there may be terms and conditions in the Variation that may place appropriate conditions upon the manner in which the Category B SAOs will be complied with, those conditions do not amount to any inconsistency with the Category B SAOs.

**nbn** also submits that the ACCC should regard the terms and conditions in the Variation relating to compliance with the Category B SAOs as reasonable.

### 22.1.3 Conduct in relation to access

For conduct and terms and conditions in relation to access under subsection 152CBA(3B), the ACCC must not accept an SAU variation unless it is satisfied that the specified conduct will promote the LTIE, and that the related terms and conditions are reasonable.

In the Final 2013 Decision, the ACCC categorised clauses about the following matters as conduct and terms and conditions upon which **nbn** will engage in conduct relating to access under subsection 152CBA(3B):

- production and maintenance of SFAAs;
- development of SFAAs;
- dispute management;
- replacement module process;
- developing and maintaining procurement rules;
- issuing notices to access seekers and the ACCC prior to the end of the ICRA period;
- submitting regulatory information to the ACCC;
- issuing Tax Change Events Proposals;
- giving the ACCC a Price Review Notice and a Price Review Proposal; and
- withdrawal of a product.



## Compliance

**nbn** submits that the ACCC should regard the conduct specified in the Variation in relation to access under subsection 152CBA(3B) as promoting the LTIE and the related terms and conditions as reasonable.

### 22.1.4 Conduct in relation to additional activities

For conduct in relation to the activities specified in section 152CBA(3C), the ACCC must not accept an SAU variation unless it is satisfied that any conduct in relation to the additional specified activities will promote the LTIE.

In the Final 2013 Decision, the ACCC categorised clauses about the following matters to be conduct under subsection 152CBA(3C):

- activities relating to the network design rules, permitted variations and network changes;
- the POI and rollout provision; and
- the product development provisions.

As described below, product development provisions remain relevant and are specified in the Variation. **nbn** also continues to specify commitments regarding POI establishment and closure in the Subsequent Regulatory Period. By contrast, new rules apply to network investments, and the mass rollout of the **nbn**<sup>®</sup> network is now complete. Accordingly, the provisions about these matters that were relevant to the Final 2013 Decision are no longer relevant to the Variation.

## Compliance

**nbn** submits that the ACCC should regard the conduct specified in the Variation in relation to additional activities specified in subsection 152CBA(3C) as promoting the LTIE.



## 22.2 Assessment

| No.   | Topic and SAU reference   | Proposed regulatory commitments  | Assessment against statutory criteria |
|---|---|--|---------------------------------------|
| <b>A. Pricing construct and related price controls</b>  |   |  |                                       |
| <p>1.</p> <p><b>New TC-4 pricing constructs</b></p> <p>(clauses 2B.3.1, 2B.3.3, 2B.5, Attachment E to Module 2)</p> | <p><b>nbn</b> makes commitments relating to new pricing offers and commitments about the process and timelines for implementing those commitments to assist RSPs to plan for the transition to the new pricing constructs. <b>nbn</b> will:</p> <ul style="list-style-type: none"> <li>introduce AVC-only pricing for <b>nbn</b>® Ethernet Home Fast (100/20 Mbps) and higher TC-4 speed tier offers;</li> <li>introduce AVC / CVC bundles for <b>nbn</b>® Ethernet supplied with TC-4 speed tiers of 50 Mbps (or Wireless Plus) and lower TC-4 speed tier offers (except for Satellite), with: <ul style="list-style-type: none"> <li>CVC TC-4 overage charged at \$8 per <u>utilised</u> Mbps, which is locked in and will be reduced according to a committed schedule until it is removed altogether by 1 July 2026 (at which stage all TC-4 AVC / CVC bundles will have transitioned to AVC-only pricing); and</li> <li>automatic twice-yearly updates to CVC TC-4 inclusions until the transition of all TC-4 offers to AVC-only pricing, sharing the impact of any actual CVC usage increase or decrease 50/50 with RSPs;</li> </ul> </li> <li>introduce a 12/1 voice-only offer at a substantially lower wholesale price (\$12 pm);</li> <li>move to utilisation-based billing for CVC TC-4 on fixed line and fixed wireless access technologies. Utilisation will be based on the peak utilisation of relevant speed tiers on all CVCs ordered by a RSP during the busiest hour across the relevant CSA;</li> <li>account for the introduction of new planned <b>nbn</b> products (Smart Places Offer, Fixed Wireless Home Fast and Superfast) and their transition to the new TC-4 pricing constructs; and</li> <li>retain two-part pricing on Satellite TC-4 offers, with provisioning-based CVC billing.</li> </ul> <p>The new price-related commitments have been formulated to apply to the products to be supplied subject to the existing service standards set out in WBA4, with some targeted improvements described in chapter 10 of Part C of this Submission.</p> <p>The transition to the new pricing construct must happen within three months of ACCC acceptance of the Variation (see item 5 below).</p> | <p><b>nbn</b>'s price commitments (which will be implemented within three months of ACCC acceptance of the Variation) promote the LTIE in the following ways:</p> <ul style="list-style-type: none"> <li>The AVC-only pricing constructs provide greater cost certainty for RSPs, which will encourage greater take-up and use of the <b>nbn</b>® network and promote competition for broadband services.</li> <li>The Bundled TC-4 Offers balance RSP objectives of wholesale price certainty and flexibility for RSPs in developing retail offers, which use certain <b>nbn</b> offers as an input. They also provide a transition path to AVC-only pricing across all TC-4 fixed line and fixed wireless services by 1 July 2026.</li> <li>RSPs will benefit from greater long-term predictability of wholesale pricing because CVC inclusion adjustments will be made twice-yearly via a formula defined in the SAU.</li> <li>Introduction of a voice-only offer, at almost half the price of the existing entry level offer, will encourage greater take-up of services on the <b>nbn</b>® network and promote retail competition for voice-only services.</li> <li>Utilisation-based billing will provide simplicity and transparency for RSPs; improving efficiency for RSPs, which in turn will benefit end-users.</li> <li>End-users will benefit from the new pricing constructs being available in relation to Smart Places and the proposed Fixed Wireless higher speed tiers at the same time as other TC-4 services.</li> <li><b>nbn</b> commits to continue to offer a two-part AVC / CVC pricing construct in respect of Satellite TC-4 offers, which provides RSPs with the greatest degree of flexibility in developing retail products which use certain <b>nbn</b> offers as an input, thereby promoting competition and encouraging efficient use of the network.</li> </ul> <p>See chapter 7 of Part B of this Submission for more detail.</p> |                                       |





| No. | Topic and SAU reference   | Proposed regulatory commitments  | Assessment against statutory criteria  |
|-----|---|--|--|
| 2.  | <p><b>Path to \$0 CVC Overage / transition to AVC-only pricing on lower speed tiers</b><br/>(clauses 2B.4, 2E.2.2(d))</p>   | <p>As noted above, <b>nbn</b> will commit to:</p> <ul style="list-style-type: none"> <li>transition to AVC-only pricing (i.e., \$0 per Mbps CVC TC-4 Overage Charge) on what will initially be Bundled TC-4 Offers, by no later than 1 July 2026; and</li> <li>reduce the CVC TC-4 Overage Charge on Bundled TC-4 Offers by at least \$1 per Mbps each financial year, starting at \$8 per Mbps in FY24.</li> </ul> <p>This will mean re-balancing AVC / CVC (TC-4) charges which make up the Bundled TC-4 Offers for fixed line and fixed wireless at the start of FY25, FY26 and FY27, which will occur consistent with the WAPC commitments. Re-balancing means no change in the industry average combined price (AVC fixed charge + CVC Overage), other than is permitted to occur under the price controls that apply to such services. The annual price control proposed to apply to the re-balanced prices in each of these years will be governed by the WAPC (item 6 below), the TC-4 sub-cap price control and, for 25/5 Mbps services, the entry level offers price control.</p>  | <p><b>nbn</b>'s price commitments promote the LTIE in the following ways:</p> <ul style="list-style-type: none"> <li>in the retail environment where RSPs offer only fixed-price products, the removal of the CVC charge promotes competition as RSPs will have certainty as to prices; and</li> <li>the transition to AVC-only pricing on lower speed tiers manages the legitimate business interests of <b>nbn</b> and is in the LTIE because it balances <b>nbn</b>'s opportunity to recover its costs while achieving an efficient transition that affords RSPs the opportunity to manage the potential issues associated with those end-users who are lower data users.</li> </ul> <p>See chapter 7 of Part B of this Submission for more detail.</p>   |
| 3.  | <p><b>Rules applicable to maximum prices in the Subsequent Regulatory Period</b><br/>(clauses 2B.1.6, 2B.2, 2C.4, 2C.5, 2F.5, 2F.6, Attachment E to Module 2)</p> | <p><b>nbn</b> commits to the following obligations in respect of NBN Offers during the Subsequent Regulatory Period:</p> <ul style="list-style-type: none"> <li>that its prices for NBN Offers will not be higher than their specified Prices in the Tariff List at any point in time;</li> <li>to allow the ACCC to make determinations to change the maximum price of a new NBN Offer or Other Charge within 24 months of its introduction by <b>nbn</b>;</li> <li>to allow the ACCC to make determinations to change the maximum price of a previously zero-priced NBN Offer or Other Charge within 24 months of the NBN Offer or Other Charge ceasing to be zero-priced;</li> <li>if the ACCC considers that any of the Prices in the Tariff List do not comply with <b>nbn</b>'s obligations (as applicable) in relation to: <ul style="list-style-type: none"> <li>the WAPC formula;</li> <li>individual price controls; or</li> <li>the price relativity restrictions,</li> </ul> </li> </ul> <p>then the ACCC may issue a notice to <b>nbn</b> requiring it to demonstrate compliance, and if not satisfied that <b>nbn</b> is compliant, then direct <b>nbn</b> to update the Tariff List so that the prices are compliant;</p> | <p>These commitments will promote the LTIE because:</p> <ul style="list-style-type: none"> <li>RSPs and end-users will be protected from price shocks as <b>nbn</b> will be constrained in its ability to raise prices.</li> <li>The ACCC will have an ongoing regulatory oversight role and have the ability to review and reset prices in certain circumstances. Specifically: <ul style="list-style-type: none"> <li>The ACCC will have the ability to reset the maximum price of an NBN Offer or Other Charge within 24 months of that NBN Offer or Other Charge being first introduced or no longer being zero-priced.</li> <li><b>nbn</b>'s overall pricing construct will be subject to ongoing ACCC oversight through the ACCC's power in relation to Pricing Review Events.</li> </ul> </li> </ul> <p>Providing the ACCC with these roles means that <b>nbn</b> will remain incentivised to discover efficient prices, while also balancing the need for RSPs to have greater price certainty. <b>nbn</b>'s incentives to discover efficient prices are demonstrated by the fact that <b>nbn</b>'s effective prices have historically been significantly lower than allowed under the SAU's price controls.</p> |



| No. | Topic and SAU reference   | Proposed regulatory commitments  | Assessment against statutory criteria  |
|-----|---|--|--|
|     |   | <ul style="list-style-type: none"> <li>• to allow the ACCC to issue a notice to <b>nbn</b> to provide a rectification plan should a Pricing Review Event occur, and to either accept or reject that rectification plan and make an alternative rectification plan which directs <b>nbn</b> to make changes to the Tariff List. A Pricing Review Event includes:               <ul style="list-style-type: none"> <li>○ where the ACCC reasonably considers a Price in the Tariff List is inconsistent with <b>nbn</b>'s current Statement of Pricing Intent, or</li> <li>○ where a discount applied to more than 50% of TC-4 AVCs in a TC-4 Offer Group in a financial year; and</li> </ul> </li> <li>• for the proposed new Fixed Wireless Home Fast and Fixed Wireless Home Superfast speed tiers (to apply when <b>nbn</b> introduces those speed tiers), to establish prices which align with the fixed line Home Fast and Home Superfast Prices to give industry confidence that these speed tiers will move to Flat Rate offers at the point that transition occurs for the existing fixed line higher speed tiers (and subject to the ACCC maximum price resetting power in the first 24 months after the speed tiers are introduced).</li> </ul> | <p>The new rules applying to discounting (as outlined in item 10 of this table) strengthen the role of Prices governed by the WAPC and individual price controls which further promotes the LTIE.</p> <p>See chapter 8 of Part B of this submission for more detail.</p>   |
| 4.  | <p><b>TC-2 AVC/CVC bundle construct (Bundled TC-2 Offers)</b><br/>(clause 2B.3.2)</p> | <p><b>nbn</b> commits to introducing the Bundled TC-2 Offers (initially reflecting the discounted monthly recurring charges that apply under the TC-2 Business Bundles Discount offered under the WBA today) by the later of 1 July 2023 and three months after SAU acceptance. Consistent with the current TC-2 Business Bundles Discount, the Bundled TC-2 Offers will include:</p> <ul style="list-style-type: none"> <li>• an amount of included CVC TC-2 capacity that matches the AVC TC-2 bandwidth profile; and</li> <li>• an Enhanced-12 (24/7) fault rectification service inclusion.</li> </ul>   | <p>The starting maximum prices for these Bundled TC-2 Offers will align with the discounted monthly recurring charges that apply under the TC-2 Business Bundles Discount offered under the WBA today, which covers over 99% of TC-2 services supplied today and includes a TC-2 Overage Charge of \$17.50. The alignment of the CVC TC-2 inclusions to the AVC TC-2 bandwidth profile means RSPs will not face variable CVC TC-2 cost uncertainty from the TC-2 Overage Charge. This proposal provides RSPs and end-users with greater price transparency and certainty, and protection from price shocks. As such, these commitments ensure efficient use and investment in the <b>nbn</b><sup>®</sup> network, promote competition and are in the LTIE.</p> |
| 5.  | <p><b>Transition to new SAU pricing construct</b><br/>(clause 2B.1.4)</p>             | <p><b>nbn</b> commits in the SAU to first supplying the new Flat-Rate Offers, Bundled TC-4 Offers and Bundled TC-2 Offers by the later of 1 July 2023 and three months after SAU acceptance. Until then, <b>nbn</b> commits to no changes to existing pricing. All current NBN Offers that are replaced by these new NBN Offers will be withdrawn on the same date as the new offers are first supplied.</p>   | <p>This proposal minimises the potential for price shocks as <b>nbn</b> transitions to new pricing constructs. This promotes competition and is in the LTIE.</p> <p>See chapter 8 of Part B of this Submission for more detail.</p>  |



| No. | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria   |
|-----|--|--|---|
| 6.  | <p><b>A weighted average price control (WAPC) as the main form of economic control during the Subsequent Regulatory Period</b><br/>(clause 2D.2)</p> | <p>During the Subsequent Regulatory Period, <b>nbn</b> proposes to adopt a WAPC over all <b>nbn</b> services with limited exceptions (e.g., ‘Competitive Services’).</p> <p>Under a WAPC, the X-factor control applied to a weighted basket of prices is ordinarily set so as to allow forecast revenue for each Financial Year over a set period of time to equal allowable building block revenues for those years.</p> <p>However, given that <b>nbn</b>’s revenue is currently under-recovering allowable BBM revenues, <b>nbn</b> proposes a transition to ‘cost reflective’ price levels, where the WAPC will allow basket prices to increase each year on average (on a ‘use-it-or-lose-it’ basis) at:</p> <ul style="list-style-type: none"> <li>the annual percentage change in CPI – during an initial glidepath period (i.e., before <b>nbn</b> is expected to first achieve its Core Services ABBRR, currently expected to be between FY30-32); and thereafter</li> <li>at a percentage which will provide <b>nbn</b> with the opportunity to recover the sum of its forecast annual WAPC Revenue Requirement (based on allowable BBM revenues and a set amount of ICRA) over the Regulatory Cycle in present value terms.<sup>3</sup></li> </ul> <p>Ancillary SAU services which are charged on a ‘time and materials’ basis will be excluded from the WAPC calculation and remain subject to an individual price cap and control. Further, other services such as ‘Competitive Services’, build works, new developments charges, tower and duct access charges, continuity related charges and other charges in relation to Core Regulated Services approved in writing by the ACCC will be excluded from the calculation of the WAPC.</p> <p>New services are included in the WAPC from the date of introduction. Services that have been or are to be withdrawn are dealt with through the allocation of quantities to successor offers.</p> | <p>Subjecting <b>nbn</b>’s Core Regulated Services to the WAPC (and additional price controls described in the next row) will ensure that prices for those are reflective of the efficient costs to supply those services.</p> <p>Thus, <b>nbn</b>’s WAPC proposal promotes:</p> <ul style="list-style-type: none"> <li>efficient use of the <b>nbn</b> network by providing an incentive to set prices to reflect their underlying cost of supply;</li> <li>allocative efficiency by providing a financial incentive for <b>nbn</b> to maximise revenue (subject to applicable individual price controls) by adapting its relative prices over time; and</li> <li>dynamic efficiency by providing a financial incentive for <b>nbn</b> to invest in (and encourage RSPs to invest in) products that meet the evolving needs of end-users.</li> </ul> <p>The way in which new and withdrawn services are dealt with through the WAPC is done in the least distortionary way possible and therefore the efficiency properties of the WAPC are retained to the greatest extent possible. <b>nbn</b>’s Competitive Services will not be subject to a WAPC (or the additional price controls described below). This is appropriate and reasonable given these services (which initially include Enterprise Ethernet, Business Satellite Services and Satellite Mobility for Large Commercial Passenger Aircrafts) are subject to the most competition. Those services will continue to be subject to Part XIC of the CCA more generally (including <b>nbn</b>’s SAOs and non-discrimination obligations, and the ACCC’s information gathering powers) and the prospect of being regulated again in the future (through the ACCC’s ability to re-categorise a Competitive Service as a Core Regulated Service in the RMD process at item 15).</p> <p>See chapter 8 of Part B of this Submission for more detail.</p> |

<sup>3</sup> In particular: For years of a Regulatory Cycle which are forecast to be in this ‘subsequent phase’ of the WAPC (i.e., after the initial glidepath period or ‘initial phase’), the X-factor in the WAPC will be set prior to the start of that Regulatory Cycle so as to allow the average of basket prices to change in each relevant year of the Regulatory Cycle at a percentage that is expected to provide **nbn** with the opportunity to recover the sum of its forecast annual WAPC Revenue Requirement (based on allowable BBM revenues and a set amount of ICRA) over the Regulatory Cycle in present value terms.



| No. | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria  |
|-----|--|--|--|
| 7.  | <p><b>Additional price controls</b><br/>(clauses 2E.2.2, 2E.2.3)</p>                                 | <p>During the Subsequent Regulatory Period, <b>nbn</b> proposes to supplement its WAPC (see item 6) with the following features:</p> <p><b>TC-4 Fixed Line and Fixed Wireless services</b></p> <ul style="list-style-type: none"> <li>an individual sub-cap price control at the percentage change in CPI on the ‘entry level’ TC-4 service (initially the 25/5 Mbps speed tier) – where the TC-4 service which is the ‘entry level’ may change each Regulatory Cycle through the replacement module process; and</li> <li>an individual sub-cap price control of 5% or the percentage change in CPI (whichever is greater) on all other TC-4 services.</li> </ul> <p>To the extent that TC-4 Fixed Line and Fixed Wireless services will continue to have a bundled pricing structure in the First Regulatory Cycle, these sub-cap price controls will apply based on the industry average ‘combined price’ of that service (i.e., the average price paid for the speed tier, comprising the fixed AVC-CVC bundle charge and the industry average average charge for the speed tier).</p> <p><b>TC-4 Satellite services</b></p> <p>Individual sub-cap price controls will apply to TC-4 Satellite services (noting these have a two-part (AVC-CVC) pricing structure), with:</p> <ul style="list-style-type: none"> <li>an individual sub-cap price control at the percentage change in CPI for all Satellite AVC TC-4 speed tiers;</li> <li>a commitment not to increase the price of Satellite CVC TC-4 from its current level at \$15.75 per Mbps during the Subsequent Regulatory Period; and</li> <li>a commitment not to increase the price of the CVC Class Offers supplied in conjunction with the Satellite CVC TC-4 from their current levels during the Subsequent Regulatory Period.</li> </ul> | <p><b>nbn</b>’s proposed sub-caps on individual services, together with the WAPC, minimise the risk of price shocks and will help to deliver greater pricing certainty to RSPs, promoting efficient use of the <b>nbn</b><sup>®</sup> network and investment in communications infrastructure. The price control on the entry level TC-4 service further encourages greater take-up of the <b>nbn</b><sup>®</sup> network. See chapter 8 of Part B of this Submission for more detail.</p>   |
| 8.  | <p><b>Statement of Pricing Intent, Tariff List and Pricing Roadmap (including restriction on</b></p> | <p>By no later than 1 May preceding the first financial year of each Regulatory Cycle in the Subsequent Regulatory Period, <b>nbn</b> will publish a Statement of Pricing Intent in relation to the prices for NBN Offers in respect of the NBN Access Service, which sets out the financial objectives <b>nbn</b> seeks to achieve, the pricing strategies that <b>nbn</b> intends to adopt, any intended changes to pricing structure, and areas of likely product innovation and development that are expected to influence price changes.</p>  | <p><b>nbn</b>’s proposed rolling commitments for updating its Statement of Pricing Intent, Tariff List and Pricing Roadmap (including the restrictions on price relativities for the indicative prices in the second year of the Pricing Roadmap) provide a high level of transparency and price certainty for RSPs, which supports RSPs’ ability to optimise and position their retail service offerings. This, in turn, promotes retail competition for <b>nbn</b> based services. See chapter 8 of Part B of this Submission for more detail.</p> |



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|     | <p><b>changes to price relativities)</b><br/>(clauses 2B.2.2, 2B.2.3, 2B.2.4, 2C.2, 2B.1.6)</p> | <p>By 1 May preceding each financial year of the Subsequent Regulatory Period, <b>nbn</b> must publish:</p> <ul style="list-style-type: none"> <li>• an annual Tariff List which states the Price for each NBN Offer and Other Charge, each other WAPC Charge Component, and the CVC inclusions for each Bundled TC-4 Offer and Bundled TC-2 Offer, for that financial year which complies with the WAPC framework and relevant side-constraints / sub-caps and is consistent with the Statement of Pricing Intent; and</li> <li>• a three-year Pricing Roadmap – where the first year’s prices in the roadmap are those stated in the Tariff List; the second and third year’s prices are indicative, but comply with the WAPC price controls and are consistent with the Statement of Pricing Intent.</li> </ul> <p>The indicative prices for the second year of the Pricing Roadmap are subject to additional commitments which restrict the extent to which <b>nbn</b> can change the relativities of these indicative prices when included in the Tariff List.</p> <p>The prices in that annual Tariff List would become maximum prices under the SAU for the upcoming financial year, to the extent that relevant services meet the SAU service descriptions (and are therefore price-regulated by the SAU).<sup>4</sup></p> <p>When the Pricing Roadmap is updated in the following year, the previous second year prices will become the new Tariff List prices (and must reflect the restrictions on changes to pricing relativity), the previous third year prices can be updated to become the new second year prices (and then become subject to the pricing relativity restrictions), and new indicative third year prices will be published.</p> <p><b>nbn</b> can update a Tariff List during the financial year to reflect changes to previously zero-priced offers, new NBN Offers or Other Charges, to reflect lower prices, and a number of other circumstances specified in clause 2B.2.3(d) of the Variation.</p> |                                       |

<sup>4</sup> Note that the current SAU price regulates specific services which meet the service descriptions set out in the SAU. While the calculation of the WAPC is proposed to account for a broader range of services than those covered by the SAU service descriptions, **nbn** does not propose to change the SAU service descriptions themselves. In that context, services which fall outside the SAU service descriptions (such as Layer 3 services like Sky Muster Plus) will be accounted for in the WAPC calculation but will not have maximum prices under the SAU WAPC and will remain subject to direct ACCC pricing intervention through the form of access determinations or binding rules of conduct (which is the status quo today).



| No. | Topic and SAU reference   | Proposed regulatory commitments  | Assessment against statutory criteria  |
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| 9.  | <p><b>Pricing principles</b><br/>(clause 2B.2.1)</p>                            | <p>The Variation introduces a set of pricing principles into the SAU which will apply during the Subsequent Regulatory Period to provide certainty over <b>nbn</b>'s long-term pricing intentions for services for which prices are included in the Tariff List and Pricing Roadmap. The SAU will require <b>nbn</b> to have regard to the pricing principles when changing prices or setting new prices.</p> <p>In particular, <b>nbn</b> proposes that when changing prices or setting new prices, <b>nbn</b> will have regard to:</p> <ul style="list-style-type: none"> <li>• the efficient costs of <b>nbn</b> supplying services;</li> <li>• the objective of maximising efficient network access and usage;</li> <li>• the objective of maintaining affordable access to its network;</li> <li>• the objective of maintaining a diversity of offers at a reasonable price relative to each other;</li> <li>• the ability of <b>nbn</b>'s customers and end-users to manage price transitions; and</li> <li>• the outcomes of the Low-Income Forum.<sup>5</sup></li> </ul> | <p>The requirement for <b>nbn</b> to have regard to the pricing principles will encourage <b>nbn</b> to set prices that are efficient and cost reflective, maximise access to and use of the network, and seek to maintain a diverse offering of affordable services. As a result, <b>nbn</b> will need to consider the willingness to pay of end-users. This will promote use and take-up of the <b>nbn</b><sup>®</sup> network, provide RSPs with a greater degree of long-term pricing certainty and transparency for RSPs, therefore promoting the LTIE.</p> <p>See chapter 8 of Part B of this Submission for more detail.</p>  |
| 10. | <p><b>Restrictions on nbn's use of discounts</b><br/>(clauses 2C.3, 2C.4.1)</p> | <p><b>Restrictions on TC-4 discounts</b></p> <p>During the Subsequent Regulatory Period, <b>nbn</b> must notify the ACCC and reduce TC-4 Prices if the total value of <b>nbn</b>'s TC-4 revenue in a Financial Year is more than 5% less than the notional TC-4 revenue <b>nbn</b> would have earned if it had charged list prices (i.e., without discounts).</p> <p>If this 5% threshold is exceeded, <b>nbn</b> must reduce its Tariff List Prices such that, had the reduced Tariff List Prices applied in the previous Financial Year, the 5% threshold would not have been exceeded.</p> <p><b>Restrictions on withdrawal of discounts</b></p> <p>During the Subsequent Regulatory Period, the SAU will continue to limit <b>nbn</b>'s ability to withdraw a discount by providing that <b>nbn</b> can only do so in accordance with the terms for reduction, removal or cessation of that Discount specified at the time of initial introduction.</p>  | <p>The rules regarding the use of discounts promote efficient use of the <b>nbn</b><sup>®</sup> network in several ways.</p> <p>First, the discount threshold creates incentives for <b>nbn</b> to reduce the Prices of its products and services rather than engaging in broad-based (and temporary) discounts above a 5% threshold. This directly addresses the concerns of RSPs and the ACCC about the breadth of <b>nbn</b>'s discounting practices, resulting in greater price certainty for RSPs and end-users. Greater wholesale pricing certainty also promotes RSPs' incentives to invest in their networks and services.</p> <p>Further, given that the total value of discounts to be provided by <b>nbn</b> is capped at 5%, it is unlikely that the use of discounts will have the effect of undermining the effectiveness of the maximum pricing commitments. This</p> |

<sup>5</sup> Noting that **nbn** proposes to retain the commitment from its March Variation regarding establishing a multilateral working group to identify possible targeted initiatives to improve access to the **nbn**<sup>®</sup> network for low-income, vulnerable and unconnected users (a 'Low-Income Forum'). See Variation, cl 2B.7.



| No. | Topic and SAU reference   | Proposed regulatory commitments   | Assessment against statutory criteria |
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|     | <p>The Variation also introduces the requirement for <b>nbn</b> to provide RSPs with at least the following notice period for any reduction, removal or cessation of a discount:</p> <ul style="list-style-type: none"> <li>• 1 month's notice for a short-term discount (i.e., with an initial duration of 6 months or less); and</li> <li>• 3 months' notice for a long-term discount (i.e., with an initial duration of greater than 6 months).</li> </ul> | <p>also provides RSPs and end-users greater price certainty and protection from future price shocks.</p> <p>Secondly, by preserving a degree of flexibility for <b>nbn</b> to engage in efficient price discovery, the discounting restrictions:</p> <ul style="list-style-type: none"> <li>• promote efficient use of the <b>nbn</b><sup>®</sup> network. This is evidenced by <b>nbn</b>'s historic discounting practices, which have incentivised the upgrade of services (e.g., to higher speed tiers) and improved the affordability of higher-speed services, as well as driving reductions in congestion during peak usage periods (e.g., through significant CVC discounts);</li> <li>• allow <b>nbn</b> to align and calibrate its commercial incentives with those of RSPs in a rapidly evolving marketplace, for example, through discounts incentivising RSPs to promote upgrades to higher speed tiers (which some RSPs, as <b>nbn</b>'s largest competitors, may not otherwise be incentivised to undertake). This also promotes efficient use of the <b>nbn</b><sup>®</sup> network and efficient investment at both the wholesale and retail layers of the market; and</li> <li>• allow <b>nbn</b> to continue undertaking, within the bounds of the proposed restrictions, a complex price/quality discovery process, which allows <b>nbn</b> to undertake real-world analysis of the end-user value proposition for <b>nbn</b>'s products and their willingness to pay, especially where end-user preferences and the role of broadband continue to evolve rapidly. This encourages efficient use of <b>nbn</b>'s network, as it allows for low-use customers to be retained while providing a ladder from low to higher-value products.</li> </ul> <p>The retention of the SAU's existing restrictions on the withdrawal of discounts, coupled with the new commitments in relation to providing RSPs with minimum notice periods in the event of changes to any discounts, increases the level of pricing certainty afforded to RSPs, which incentivises RSPs to participate in campaigns that take advantages of these discounts, and hence promote efficient use of the network.</p> <p>See chapter 8 of Part B of this Submission for more detail.</p> |                                       |



| No.   | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria |
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| <b>B. Framework for cost recovery and inclusion in the building block model</b> |  |  |                                       |
| 11.   | <p><b>ICRA recovery</b> (clauses 2G.3 and 2G.4; clauses 3B.3.5 and 3B.3.6)</p> <p><b>nbn</b> will cap the total amount of the ICRA that it will be allowed to recover until the end of the SAU term to \$12.5 billion (in FY23 dollar terms). This amount represents the past losses that <b>nbn</b> should have a reasonable opportunity to recover over the remaining term of the SAU to achieve and maintain a standalone investment grade credit rating with a stable outlook, consistent with the GBE Guidelines which require <b>nbn</b> to target an optimal capital structure (specifically a standalone target credit rating of BBB) plus generate a return on equity (being the risk-free rate plus a risk premium appropriate to the GBE). Specifically, <b>nbn</b> will split the capped ICRA amount into two separate amounts – a Module 2 ICRA and a Module 3 ICRA – both of which will only be adjusted in future years in line with inflation and any additional losses after FY23 will be forfeited.</p> <p>This is a once off adjustment to the ICRA and there is no mechanism by which <b>nbn</b> or the ACCC can seek to further adjust the ICRA. On 30 June 2032, the Module 2 ICRA will be \$0 regardless of whether it has been recovered or not. Similarly, on 30 June 2040 the Module 3 ICRA will be \$0 regardless of whether it has been recovered or not.</p> <p>An amount of ICRA will not be included in the WAPC Revenue Requirement until the year after <b>nbn</b> is expected to first achieve its Core Services ABBRR (i.e., the WAPC Factor Change Year). During the Subsequent Regulatory Period, for each Financial Year this is, or occurs after, the WAPC Factor Change Year, the amount of ICRA to be included in the WAPC Revenue Requirement must allow <b>nbn</b> a reasonable opportunity to achieve and maintain, for the duration of that Financial Year and the remaining Financial Years in the Subsequent Regulatory Period, a stand-alone investment grade credit rating with a stable outlook from one or more of the specified established and reputable rating agencies. This is subject to the sum of ICRA amounts included in <b>nbn</b>'s WAPC Revenue Requirement in each Financial Year during the Subsequent Regulatory Period not exceeding the Module 2 ICRA amount.</p> | <p>This proposal responds directly to ACCC and industry concerns that the current size and role of the ICRA creates uncertainty regarding future pricing, and the ACCC proposal that <b>nbn</b> should not be able to recover against past losses other than to the extent necessary to enable <b>nbn</b> to achieve and maintain a standalone investment grade credit rating with a stable outlook. The proposal reflects a clear intent to reset the SAU process and facilitate a forward-looking regulatory model for <b>nbn</b>.</p> <p>The ability to recover accumulated costs is consistent with the LTIE, as the legitimate interests of investors is to recover the return on and of capital over the lifetime of the investment. Given the timing disconnect between <b>nbn</b> undertaking significant investment in the early stages of the build phase, and <b>nbn</b> having a meaningful opportunity to recover the costs of that investment, some accumulation of losses was inevitable and it is efficient for <b>nbn</b> to have the opportunity to recover those.</p> <p>By accepting greater forward-looking risk in relation to market outcomes under the proposal, <b>nbn</b> is providing greater certainty to the market, enhancing competition and thus promoting the LTIE.</p> <p>See chapter 16 of Part E of this Submission for more detail.</p> |                                       |





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| 12. | <b>Expenditure Objectives and Factors</b><br>(clauses 2G.2.5(c) and (d))                      | For each Regulatory Cycle in the Subsequent Regulatory Period, the forecasts of <b>nbn's</b> opex and capex used as inputs into <b>nbn's</b> Forecast Nominal ABBRR and Forecast Nominal Core Services ABBRR must reasonably reflect the prudent and efficient expenditure that an operator in <b>nbn's</b> position would incur in achieving specified objectives (the Expenditure Objectives).<br><br>Several factors must be had regard to in determining whether forecasts reflect the prudent and efficient expenditure that an operator in <b>nbn's</b> position would incur in achieving the Expenditure Objectives, based on the information and analysis reasonably available in the circumstances. | In respect of each Regulatory Cycle, <b>nbn</b> commits to ensure that any Operating Expenditure and Capital Expenditure reasonably reflects what an operator in <b>nbn's</b> position would incur in achieving the Expenditure Objectives. <b>nbn</b> has established the Expenditure Objectives and Expenditure Factors set out in the SAU, by reference to regulatory best practice in Australia and New Zealand, including as applied by the AER, IPART and the NZCC. <sup>6</sup> <b>nbn</b> submits that these Expenditure Objectives and Factors are reasonable and will promote investment in and use of the <b>nbn</b> <sup>®</sup> network as costs that are productively and allocatively efficient will encourage greater take-up and use of the <b>nbn</b> <sup>®</sup> network.<br><br>See chapter 20 of Part F of this Submission for more detail. |
| 13. | <b>nbn consultation with industry ahead of lodging an RMA</b><br>(clause 5.7)                 | The SAU will require <b>nbn</b> to consult with Access Seekers and Consumer Advocacy Groups in relation to <b>nbn's</b> planned and forecast expenditures ahead of lodging an RMA with the ACCC. <b>nbn</b> will also be required to provide the ACCC with a report setting out the feedback it received as part of the consultation and its response to that feedback.  | <b>nbn's</b> proposal will provide certainty to Access Seekers and Consumer Advocacy Groups on <b>nbn's</b> expenditure, which is in the interests of access seekers. Increased transparency under this proposal will also create an incentive for <b>nbn</b> to improve operational and investment decisions that enhance efficiency, thus promoting the LTIE.<br><br>See chapter 13 of Part D of this Submission for more detail.   |
| 14. | <b>Detailed commitments by nbn on a rolling basis and related ACCC role</b> (all of clause 5) | <b>nbn</b> will make detailed price and benchmark service commitments for the First Regulatory Cycle (commencing on and from 1 July 2023) in Modules 2 and 4 of the SAU.<br><br>For the second and each subsequent Regulatory Cycle the ACCC may: <ul style="list-style-type: none"> <li>review and assess <b>nbn's</b> RMA, which must contain prescribed information as set out in Module 0; and</li> <li>make an ACCC Replacement Module Determination (<b>RMD</b>) before the commencement of the Regulatory Cycle to which the RMD relates, where the matters in that RMD may be as</li> </ul>  | To ensure that <b>nbn's</b> investment decisions are efficient and promote the LTIE, <b>nbn</b> proposes to adopt a traditional propose-respond utility-style of regulation which provides the ACCC with the role of putting in place the specific regulatory settings described in Module 0 to apply in each Regulatory Cycle after the First Regulatory Cycle.<br><br>This approach will provide the ACCC with the principal decision-making role of putting in place the regulatory settings, with <b>nbn</b> providing the ACCC with  |

<sup>6</sup> See, for example: AER, *Expenditure Forecast Assessment Guideline*, 29 November 2013: <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/expenditure-forecast-assessment-guideline-2013>; IPART, *Guidelines for Water Agency Pricing Submissions*, November 2020: <https://www.ipart.nsw.gov.au/Home/Industries/Water/Public-water-utilities-we-regulate/Link-documents/Guidelines-for-Water-Agency-Pricing-Submissions-November-2020>; New Zealand Commerce Commission, *Chorus' price-quality path from 1 January 2022 – Draft decision*, Reasons paper, 16 June 2021: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/255752/Chorus-Price-quality-path-from-1-January-2022-Draft-decision-27-May-2021-Updated-16-June-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/255752/Chorus-Price-quality-path-from-1-January-2022-Draft-decision-27-May-2021-Updated-16-June-2021.pdf).



| No. | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria  |
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|     |  | <p>proposed by <b>nbn</b> in its RMA in respect of that Regulatory Cycle or may be as otherwise determined by the ACCC in accordance with the SAU.</p>   | <p>sufficient information through RMAs to enable the ACCC to make those decisions. This process will provide all parties with a high degree of regulatory certainty and predictability thereby encouraging economically efficient investment decisions. Such propose-respond arrangements are common in utility regulation and are reasonable in the context of <b>nbn</b>.<br/>See chapter 13 of Part D of this Submission for more detail.</p>   |
| 15. | <p><b>Categorisation and cost allocation in respect of Core Regulated Services, and Competitive Services, and Cost Allocation Manual</b><br/>(clause 2G.6.4)</p> | <p><b>Categorisation and cost allocation I the Subsequent Regulatory Period</b></p> <p>New products and services which fall within the scope of an existing product or service that is already categorised as a Competitive Service (initially comprising <b>nbn</b><sup>®</sup> Enterprise Ethernet, <b>nbn</b><sup>®</sup> Business Satellite Service and <b>nbn</b><sup>®</sup> Satellite Mobility for Large Commercial Passenger Aircrafts) or a Core Regulated Service (initially all other services) will automatically be deemed to be such a Competitive Service or Core Regulated Service (as the case may be). Otherwise, products and services will automatically be categorised as Core Regulated Services on introduction.</p> <p>Products and services can be re-categorised as follows:</p> <ul style="list-style-type: none"> <li>• <b>nbn</b> may propose, in any RMA, the re-categorisation of a product or service as a Core Regulated Service or a Competitive Service and will ensure that forecast ABBRR and RAB calculations are performed accordingly and in accordance with the Cost Allocation Principles and the Cost Allocation Manual.</li> <li>• The ACCC may, in an RMD, re-categorise a product or service as a Core Regulated Service or Competitive Service, in which event the ACCC will determine the forecast ABBRR and RAB accounting for the re-categorisation and in accordance with the Cost Allocation Principles and the Cost Allocation Manual.</li> </ul> <p><b>Cost Allocation Manual for the Subsequent Regulatory Period</b></p> <p>The Variation gives the ACCC the power to review and approve <b>nbn</b>'s Cost Allocation Manual, or approve a different version of the Cost Allocation Manual which incorporates reasonable changes made by the ACCC.</p> <p>The ACCC may also issue a formal direction to <b>nbn</b> to prepare and submit a revised Cost Allocation Manual addressing particular matters.</p> | <p>It is well recognised that efficient cost allocation rules between products that face different levels of competition will lead to outcomes that are consistent with the LTIE. In particular, the application of clear and consistent Cost Allocation Principles provides transparency to the ACCC and industry that <b>nbn</b> is not cross-subsidising its competitive services (e.g., business-grade Enterprise Ethernet services) with revenues earned from the supply of residential-grade services. This in turn will promote competition in communication markets as well as encourage the efficient use of, and investment in, communications infrastructure.</p> <p>The ACCC's role in reviewing and approving <b>nbn</b>'s Cost Allocation Manual, approving a different version of the Cost Allocation Manual, or directing that <b>nbn</b> submit a new proposed Cost Allocation Manual, increases transparency. The effect of the categorisation process is described in the next row.</p> <p>See chapter 17 of Part E of this Submission for more detail.</p> |



| No. | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria  |
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| 16. | <b>Effect of categorisation of Core Regulated Services and Competitive Services</b><br>(clause 2G.6.4) | In the Subsequent Regulatory Period: <ul style="list-style-type: none"> <li>Core Regulated Services will be subject to the WAPC and additional price controls, Tariff List, Pricing Roadmap and Statement of Pricing Intent publication obligations, and product development and withdrawal requirements.</li> <li>Competitive Services will not be subject to the above obligations.</li> </ul> | Cost allocation between Core Regulated Services and Competitive Services in accordance with clear and consistent principles provides transparency to the ACCC and industry that <b>nbn</b> is not cross-subsidising its competitive services (e.g., business-grade Enterprise Ethernet services) with revenues earned from the supply of residential-grade services. This will promote competition in the wholesale and retail supply of residential and business-grade services, as well as encouraging the efficient use of, and investment in, communications infrastructure.<br><br>See chapter 17 of Part E of this Submission for more detail.   |
| 17. | <b>Ex-post capex review by ACCC</b><br>(clause 2G.5.10)  | The ACCC may conduct ex-post review to determine in an RMD the amount of capital expenditure to be rolled into the Real RAB and Real Core Services RAB Portion at the end of a Regulatory Cycle in the Subsequent Regulatory Period (as well as the values of depreciation and disposals in the roll-forward), in accordance with a specified process, including consultation with <b>nbn</b> .  | <b>nbn</b> recognises that moving to a new ex-ante / forecasting approach used in the BBM and the high degree of demand uncertainty (including due to substitution risk) may result in uncertainty about the level of <b>nbn</b> capital expenditure needed to prudently and efficiently respond to future demand, improve quality of network services and implement Government policy. For these reasons, <b>nbn</b> combines the ex-ante forecasting approach, which is subject to the Expenditure Objectives and Factors and ACCC review, with an ex-post capital expenditure review role for the ACCC. This has several benefits: <ul style="list-style-type: none"> <li>It provides <b>nbn</b> with a level of commercial flexibility to develop new products and prices, subject to regulatory oversight, and the threat of regulatory intervention.</li> <li>The ACCC must have regard to certain decision-making rules and principles which provides <b>nbn</b> a degree of regulatory certainty.</li> <li>It provides confidence to RSPs and industry that <b>nbn</b>'s prices only recover expenditure that is prudently and efficiently incurred, consistent with the achievement of productive and allocative efficiency.</li> <li>It heightens incentives for <b>nbn</b> to make efficient and prudent decisions.</li> </ul> See chapter 17 of Part E of this Submission for more detail. |



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| 18. | <p><b>Cost Pass-Through Events</b><br/>(clause 2D.4)</p>               | <p>The Variation provides that, in the Subsequent Regulatory Period, the WAPC formula includes an adjustment factor that will adjust the cap during a Regulatory Cycle in circumstances where <b>nbn</b> incurs (or is likely to incur) a material change in costs relative to the Forecast Nominal Core Services ABBRR as the result of particular exogenous events or changes to the Benchmark Service Standards approved by the ACCC.</p> <p>This proposal is reflected in the SAU as an ability for <b>nbn</b> to make ‘cost pass-through’ applications to the ACCC for approval within 90 Business Days of the occurrence of a Positive Change Event and a requirement for <b>nbn</b> to make such applications within 90 Business Days of becoming aware of the occurrence of a Negative Change Event.</p> <p>The Variation also provides a role for the ACCC to determine whether a particular cost pass-through event occurred, the material changes in costs of supply that are passed through into <b>nbn</b>’s WAPC in response to the relevant event, and the manner in which <b>nbn</b> passes through such costs.</p> | <p>Cost pass-through arrangements are commonplace in utility access regulation and provide investors with an opportunity to recover unforeseeable costs which have been prudently and efficiently incurred.</p> <p>While <b>nbn</b> faces strong incentives to incur costs efficiently under the WAPC, the effectiveness of these incentives in promoting the LTIE is subject to some limitations in relation to events outside <b>nbn</b>’s reasonable control and which could not have been reasonably foreseen or forecast at the time <b>nbn</b> provided its cost forecasts prior to the relevant period.</p> <p><b>nbn</b>’s cost pass-through arrangements balance the need for <b>nbn</b> to have the opportunity to recover efficient costs which are unforeseen and could not have been forecast, alongside the need for RSPs to have certainty about the types of costs that may be passed through into <b>nbn</b>’s WAPC and ultimately in <b>nbn</b>’s Prices, and to have confidence that only efficient costs will be passed on to RSPs and consumers. The mechanism is in the legitimate business interests of <b>nbn</b>, incentivises appropriate expenditure by <b>nbn</b> and promotes the LTIE. Further, by allowing prices to remain cost reflective, the cost pass-through mechanism promotes economic efficiency.</p> <p>The proposed cost pass-through arrangements, including the materiality threshold, are transparent and provide for ACCC oversight of the efficiency and prudence of <b>nbn</b>’s expenditure in response to cost pass-through events (noting that costs incurred on projects which are the subject of a Government Policy Project Notice will be considered to be prudent, as discussed below) and will create appropriate incentives for <b>nbn</b> to balance price certainty with its legitimate business interests.</p> <p>See chapter 19 of Part F of this Submission for more detail.</p> |
| 19. | <p><b>Government-Policy Project Notices</b><br/>(clause 5.9(c)(i))</p> | <p>A Government Policy Project Notice must meet certain requirements, including (among others) that a draft must be provided to the ACCC 14 days in advance of the final version, it must state that the notice is a Government Policy Project Notice for the purposes of <b>nbn</b>’s SAU and it must be published on the Department’s website.</p>  | <p>As a GBE established to provide high-speed broadband services nation-wide on a wholesale-only basis, <b>nbn</b> operates under a government policy mandate. <b>nbn</b>’s shareholders have issued a SOE that sets out certain Government policies in relation to <b>nbn</b>, including a mandate to operate commercially. <b>nbn</b>’s shareholders also have the power to direct the company.</p>   |



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|     |   | <p>Operating and capital expenditure forecasts must reasonably reflect the prudent and efficient expenditure that an operator in <b>nbn</b>'s position would incur in implementing that project or program (noting that this is one of the Expenditure Objectives).</p> <p>Expenditure <b>nbn</b> incurs to implement the relevant project or program under a Government Policy Project Notice will be deemed to be prudent, but only to the extent the expenditure is incurred or likely to be incurred in a manner that implements the details of the project or program as specified in the notice.</p> <p>In all cases, <b>nbn</b>'s expenditure on a project or program will be assessed separately for efficiency.</p> <p>The ACCC may cap the amount of expenditure included in the ABBRR in respect of such a project at the amount of any cap specified by the Minister in that Government Policy Project Notice.</p>  | <p>For <b>nbn</b> to be a sustainable commercial business it must be clear how Government policy projects are to be funded. It is reasonable for the SAU to recognise that <b>nbn</b> must comply with Government policy if the Government issues a formal notice. Where the Government considers a project to be commercial, or overall a project is consistent with Government policy for the telecommunications industry generally and/or in relation to <b>nbn</b> specifically that the costs are recovered from users of <b>nbn</b>'s services, it is in the LTIE that such decisions are transparent and certain. The Government Policy Project Notice provisions ensure this transparency and provide <b>nbn</b> with greater certainty that the ACCC will not prevent it recovering the efficient costs of such projects, where <b>nbn</b> has no discretion as to what expenditure it will incur. <b>nbn</b>'s proposal will also create an incentive for <b>nbn</b> to implement a Government policy or project in a prudent manner where the Government Policy Project Notice does not specify details of the project or program. This, in turn, promotes investment certainty that supports efficient investment in the <b>nbn</b><sup>®</sup> network and other infrastructure.</p> <p>See chapter 20 of Part F of this Submission for more detail.</p> |
| 20. | <p><b>ACCC may review and reset the WACC methodology each Regulatory Cycle</b> (clause 2G.2.4(d))</p> | <p>For the First Regulatory Cycle, <b>nbn</b> will adopt a standard WACC methodology, applying the Capital Asset Pricing Model (<b>CAPM</b>) approach used by IPART and a trailing average approach for the cost of debt.</p> <p>The SAU provides the ACCC the power to review the WACC methodology every Regulatory Cycle (and reset that methodology through the Replacement Module process), subject to a general rule that the methodology produces a nominal vanilla WACC which is commensurate with the efficient financing costs of a benchmark efficient entity with a similar degree of risk as that which applies to <b>nbn</b> in providing the NBN Access Service, Ancillary Services and Facilities Access Service, having regard to:</p> <ul style="list-style-type: none"> <li>the objective of producing reliable estimates of the market cost of capital in a wide range of plausible market conditions; and</li> <li>the objective of promoting stability in the rate of return over time.</li> </ul> | <p>Providing the ACCC the power to review and reset the WACC methodology each Regulatory Cycle provides confidence to industry that the WACC methodology is able to adapt to best practice over time, whether those adaptations are led by <b>nbn</b> or the ACCC.</p> <p>Setting out high level rules regarding the WACC methodology will provide regulatory certainty and is in the legitimate business interests of <b>nbn</b>. <b>nbn</b> considers that this approach is reasonable, will promote the LTIE and will encourage economically efficient investment in the <b>nbn</b><sup>®</sup> network.</p> <p>See chapter 18 of Part E of this Submission for more detail.</p>   |



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| 21. | <b>Cumulative Inflation Factor calculation</b><br>(clause 2G.1.4)        | The formula under which the Cumulative Inflation Factor is calculated during the Subsequent Regulatory Period for the purposes of <b>nbn</b> 's revenue controls will be amended to determine inflation using the Queensland Competition Authority ( <b>QCA</b> ) glidepath approach <sup>7</sup> across each Regulatory Cycle.   | This approach allows for <b>nbn</b> 's efficient capex and opex to keep pace with the actual inflation rate. This will provide an incentive for economically efficient investment and operational decisions by <b>nbn</b> (i.e., by <b>nbn</b> paying the rate of expected inflation on debt used to fund those investments and operational matters) which will therefore promote the LTIE.<br>See chapter 18 of Part E of this Submission for more detail.  |
| 22. | <b>Principles for demand forecasts</b><br>(clause 2G.2.5(b))             | Demand forecasts which underpin RMA's and RMD's in the Subsequent Regulatory Period must: <ul style="list-style-type: none"> <li>• be based on an appropriate forecasting methodology;</li> <li>• be based on reasonable assumptions about the key drivers of demand;</li> <li>• be determined utilising the best available information, including historical data that can identify trends in demand; and</li> <li>• be determined taking into account current demand and economic conditions.</li> </ul> These principles were adopted by the ACCC in its 2011 Final Access Determination for Telstra Fixed Line Services.  | Specifying principles that will apply to demand forecasts reduces uncertainty and provides transparency and predictability, therefore promoting the LTIE through economically efficient use of the network.  |
| 23. | <b>Accounting separation for different nbn services</b><br>(clause 2I.6) | <b>nbn</b> must, in the Subsequent Regulatory Period, consult with the ACCC in development of proposed accounting separation procedures that establish and maintain accounts for the following key products and services supplied under the SAU: <ul style="list-style-type: none"> <li>• TC-1 services on <b>nbn</b>'s Fixed Line networks;</li> <li>• TC-1 services on <b>nbn</b>'s Fixed Wireless network;</li> <li>• TC-1 services on <b>nbn</b>'s Satellite network;</li> <li>• TC-2 services on <b>nbn</b>'s Fixed Line networks;</li> <li>• TC-4 services on <b>nbn</b>'s Fixed Line networks;</li> <li>• TC-4 services on <b>nbn</b>'s Fixed Wireless network;</li> <li>• TC-4 services on <b>nbn</b>'s Satellite network;</li> <li>• Sky Muster Plus services;</li> <li>• NNI services;</li> </ul> | Accounting separation enhances transparency and certainty over the application of the Cost Allocation Manual (described at item 15 above) to make it clear that <b>nbn</b> is not cross-subsidising its competitive services (e.g., business-grade Enterprise Ethernet services) with revenues earned from the supply of residential-grade services. In particular,, <b>nbn</b> 's accounting separation commitments, including the oversight and approval role of the ACCC, will provide certainty to RSPs and the ACCC that the price of Core Regulated Services is not required to cover higher than efficient costs and <b>nbn</b> 's Competitive Services are efficiently priced to reflect the level of competition they face. This in turn will promote competition in communication markets as well as encourage the efficient use of, and investment in, communications infrastructure. |

<sup>7</sup> Queensland Competition Authority, *Inflation forecasting review 2021*: <http://www.qca.org.au/project/inflation-forecasting/inflation-forecasting-review-2021/>.



| No.   | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria                               |
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|   |  | <ul style="list-style-type: none"> <li>Enterprise Ethernet (this is proposed to be an initial ‘Competitive Service’ under the SAU);</li> <li>Business Satellite Services (this is proposed to be an initial ‘Competitive Service’ under the SAU); and</li> <li>Satellite Mobility for Large Commercial Passenger Aircraft (this is proposed to be an initial ‘Competitive Service’ under the SAU).</li> </ul> <p>The ACCC may then determine Approved Accounting Procedures that reflect the procedures proposed by <b>nbn</b>, or which incorporate reasonable changes. The ACCC has associated compliance powers related to <b>nbn</b> establishing and maintaining consolidated and separate accounts, and directing <b>nbn</b> to propose changes to the Approved Accounting Procedures for approval or amendment by the ACCC.</p> <p><b>nbn</b> must implement the Approved Accounting Procedures (for the products and services described above) on and from 31 December 2024, unless the ACCC approves an extension to this date.</p> | <p>See chapter 12 of Part C of this Submission for more detail.</p> |
| <p>24. <b>Expenditure and Price Reporting</b><br/>(clause 2F.7.1)</p> | <p>By 31 October after each Financial Year in the Subsequent Regulatory Period, <b>nbn</b> will provide to the ACCC a report in respect of the following matters:</p> <ul style="list-style-type: none"> <li><b>nbn</b>’s capital and operating expenditure incurred in that Financial Year including as it compares to the forecast information provided by <b>nbn</b> to the ACCC in support of the relevant RMD; and</li> <li>whether the prices charged for NBN Offers and Other Charges in that Financial Year exceeded the Price in the Tariff List for that NBN Offer or Other Charge at the relevant point in time.</li> </ul> | <p>These transparency measures support the ex-ante regulatory settings and ex-post review of <b>nbn</b>’s capital expenditure. The expenditure and price reporting proposed by <b>nbn</b> in the Variation for the Subsequent Regulatory Period is similar in nature to that provided by <b>nbn</b> under the Module 1 LTRCM compliance reporting, noting of course that the expenditure reporting plays a different role in the Subsequent Regulatory period.</p> <p><b>nbn</b> submits that this approach to ex-post transparency following the end of each Financial Year in the Subsequent Regulatory Period promotes the LTIE by providing transparency over <b>nbn</b>’s actual expenditure, including as it relates to <b>nbn</b>’s forecast expenditure for the relevant period, and providing certainty for RSPs that <b>nbn</b>’s Prices have not exceed the Prices in the Tariff List, promoting efficient use of the <b>nbn</b><sup>®</sup> network, and encouraging efficient investment in communications infrastructure.</p>  |   |



| No.   | Topic and SAU reference  | Proposed regulatory commitments   | Assessment against statutory criteria   |
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| <b>C. nbn's Regulated Revenue Requirement: First Regulatory Cycle commencing on 1 July 2023</b> |  |   |   |
| 25.   | <p><b>Forecast Nominal ABBRR and Forecast Nominal Core Services ABBRR: First Regulatory Cycle</b><br/>(clauses 2G.2.1, 2G.2.2, 2G.2.3)</p> | <p><b>nbn's</b> Forecast Nominal ABBRR for the First Regulatory Cycle, and throughout the Subsequent Regulatory Period, will be calculated by reference to:</p> <ul style="list-style-type: none"> <li>• forecast opex;</li> <li>• forecast nominal regulatory depreciation;</li> <li>• a return on capital, calculated by reference to a rate of return and the forecast nominal RAB; and</li> <li>• a forecast tax allowance.</li> </ul> <p>The Forecast Nominal Core Services ABBRR will be calculated by reference to equivalent elements, with adjustments so that those elements relate only to Core Services (i.e., excluding Competitive Services).</p> <p>In the First Regulatory Cycle, and throughout the Subsequent Regulatory Period, the ABBRR and Core Services ABBRR will also include an Annual Construction in Progress Allowance (<b>ACIPA</b>) as an additional building block.</p> | <p><b>nbn</b> considers that it is reasonable that the methodology for the calculation of the Forecast Nominal ABBRR (and Forecast Nominal Core Services ABBRR) in the First Regulatory Cycle (and throughout the Subsequent Regulatory Period) should contain all of the elements of the ABBRR in accordance with the existing fixed principles terms and conditions in the SAU.</p> <p><b>nbn</b> considers that it is reasonable for the building blocks in the First Regulatory Cycle (and throughout the Subsequent Regulatory Period) to include an Annual Construction in Progress Allowance, to provide <b>nbn</b> the opportunity to earn a return on capital expenditure which has been incurred but not yet placed in service, thus encouraging <b>nbn's</b> investment incentives and promoting the LTIE.</p> <p>See chapter 21 of Part F of this Submission for more detail.</p> |
| 26.   | <p><b>Rate of return on capital: First Regulatory Cycle</b><br/>(Attachment J (Building Block Model parameters) of Schedule 4B)</p>        | <p><b>nbn's</b> nominal rate of return for the First Regulatory Cycle will be 7.677% (FY24), 7.716% (FY25) and 7.782% (FY26).</p>   | <p><b>nbn's</b> rate of return is calculated by reference to a standard and consistent methodology based on the Capital Asset Pricing Model (CAPM) approach used by IPART and a trailing average approach for the cost of debt. The methodology draws upon a large comparator set of industry peers. This methodology has regard to both the short and long-term cost of equity, which produces comparatively stable rates of return over time. This stability promotes efficient investment in infrastructure and provides regulatory certainty, which is in the legitimate business interests of the network provider and therefore promotes the LTIE.</p> <p>See chapter 18 of Part E of this Submission for more detail.</p>  |





| No.   | Topic and SAU reference   | Proposed regulatory commitments  | Assessment against statutory criteria   |
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| <b>D. Service standards and network performance reporting</b> |   |  |   |
| 27.   | <p><b>SAU to set Benchmark Service Standards</b><br/>(clauses 21.2.1, 21.2.5, Attachment I of Schedule 4A)</p>          | <p>The SAU includes a set of Benchmark Service Standards (service levels, performance objectives, rebates and corrective action commitments) and a commitment to include in its SFAA service standards that are no less favourable than the SAU benchmark in the Subsequent Regulatory Period.</p> <p>The Benchmark Service Standards for the First Regulatory Cycle commencing 1 July 2023 will comprise key WBA4 Service Levels, Performance Objectives, Rebates and Corrective Action.</p> <p>Under the SAU Benchmark Service Standards for the First Regulatory Cycle, the consequence of <b>nbn</b> failing to achieve:</p> <ul style="list-style-type: none"> <li>a service level will be payment of any associated rebate (under the WBA); and</li> <li>a performance objective will be corrective action (under the WBA).</li> </ul> <p>The SAU Benchmark Service Standards will not apply to test services, natural disaster or emergency services, services supplied to non-addressable locations, the Cell Site Access Service or Competitive Services.</p> | <p><b>nbn's proposal:</b></p> <ul style="list-style-type: none"> <li>creates a link between the price of services and quality of services provided under the SAU and reduces any perceived risk that <b>nbn</b> will erode quality over time to maximise its profits, which is in the LTIE;</li> <li>facilitates retail competition by providing RSPs with certainty as to service standards; and</li> <li>allows <b>nbn</b> the flexibility of negotiating with its customers on a commercial basis to improve on and/or offer alternatives to the Benchmark Service Standards, through <b>nbn's</b> commercial offers which will evolve over time in response to changing market conditions, consumer preferences and the needs to RSPs.</li> </ul> <p>The rebate scheme and corrective action requirements provide strong incentives for <b>nbn</b> to meet the requisite service levels, balancing <b>nbn's</b> commercial objectives against the interests of end-users.</p> <p>The exception for certain services promotes innovation and encourages <b>nbn</b> to develop new services, which in turn encourages greater take-up and use of the <b>nbn</b>® network; promotes deployment of <b>nbn</b> services to support end-users impacted by natural disasters and emergencies; and ensures consistency in the regulation of Competitive Services.</p> <p>See chapter 10 of Part C of this Submission for more detail.</p> |
| 28.   | <p><b>Broad review mechanism for Benchmark Service Standards ahead of each Regulatory Cycle</b><br/>(clause 21.2.1)</p> | <p>The SAU will include a mechanism whereby <b>nbn</b> proposes Benchmark Service Standards for each Regulatory Cycle (i.e., three to five years) in the Subsequent Regulatory Period as part of its RMA.</p> <p>The ACCC will have the power to set the Benchmark Service Standards to apply for the Regulatory Cycle, which may be the same or different to the service standards proposed by <b>nbn</b> in its RMA.</p>   | <p>This proposal minimises any risk of any market mismatch between market expectations of service standards and those delivered by <b>nbn</b> and is therefore in the LTIE.</p> <p>See chapter 10 of Part C and chapter 14 of Part D of this Submission for more detail.</p>  |



| No. | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria  |
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| 29. | <p><b>ACCC powers to review and change Benchmark Service Standards during a Regulatory Cycle</b><br/>(clauses 21.2.2, 21.2.3))</p> | <p>The SAU will include new mechanisms to allow Benchmark Service Standards to be reviewed and updated during a Regulatory Cycle (i.e., three to five years) in the Subsequent Regulatory Period. These mechanisms will:</p> <ul style="list-style-type: none"> <li>give the ACCC a power to require <b>nbn</b> to provide to the ACCC for approval a proposal which sets out any changes <b>nbn</b> proposes to the Benchmark Service Standards where required for RSPs to comply with new or amended retail-level regulation, or to address systemic and unforeseen issues. If the ACCC rejects <b>nbn</b>'s proposal, the SAU will give the ACCC a power to determine the necessary amendments to Benchmark Service Standards; and</li> <li>allow <b>nbn</b> to propose changes to the Benchmark Service Standards which the ACCC will have the power to accept or reject.</li> </ul> | <p>This proposal allows the ACCC to change or set new Benchmark Service Standards in certain specific circumstances and is intended to cover certain unforeseen events. This proposal minimises any risk of any market mismatch between market expectations of service standards and those delivered by <b>nbn</b> and is therefore in the LTIE.</p> <p>This proposal also ensures that any systemic issues can be addressed in a timely way to reduce such risk.</p> <p>See chapter 10 of Part C and chapter 14 of Part D of this Submission for more detail.</p>   |
| 30. | <p><b>Utilisation management</b><br/>(Attachment I of Schedule 4A: clause 13.4)</p>  | <p>The Benchmark Service Standards for the First Regulatory Cycle include a utilisation management commitment. <b>nbn</b> will, where utilisation of certain shared network resources in the transit backhaul network exceeds 90% for 30 minutes or more on three separate days in a 30-day period, reduce utilisation to below 90% (e.g., appropriate network augmentation) within 15 Business Days.</p> <p><b>nbn</b> must also provide monthly reporting on these matters to affected RSPs.</p> <p>This commitment applies from the time that the AVC-only pricing construct is introduced and will then apply for the duration of the First Regulatory Cycle.</p>  | <p>The utilisation management commitment provides a minimum level of performance which strikes an appropriate balance between efficient use of the <b>nbn</b><sup>®</sup> network and efficient investment in the network.</p> <p>In the transition to TC-4 Flat-Rate and Bundled TC-4 Offers (and the transition of CVC TC-4 from CIR to PIR), RSPs and end-users require certainty that services on the network will continue to meet performance expectations. The commitment to ensure shared network resources operate below 90% utilisation provides RSPs, and by extension end-users, confidence that <b>nbn</b> will continue to ensure the network has sufficient capacity to support end-users' services, while not triggering capacity augmentation when sufficient headroom exists in the network.</p> <p>This commitment, and the associated reporting commitments, promote the LTIE by providing a transparent and robust quality of service commitment to ensure that RSPs and end-users know what to expect from <b>nbn</b> services. This will promote the take-up and use of the <b>nbn</b><sup>®</sup> network. The commitment also ensures <b>nbn</b>'s costs are incurred as efficiently as possible (through the appropriate utilisation threshold).</p> <p>See chapter 10 of Part C of this Submission for more detail.</p> |



| No.                           | Topic and SAU reference  | Proposed regulatory commitments  | Assessment against statutory criteria   |
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| <b>E. Product commitments</b> |  |  |   |
| 31.                           | <b>General product commitments</b><br>(clauses 2H.2, 2H.4, 2H.5, 2H.6)   | <p><b>nbn</b> commits, in respect of products developed using the NBN Access Service (other than Competitive Services) in the Subsequent Regulatory Period, to:</p> <ul style="list-style-type: none"> <li>consult via the Product Development Forum (<b>PDF</b>) in relation to the introduction of new products and product changes that do not constitute a minor product variation;</li> <li>extend the operation of the PDF Processes into the Subsequent Regulatory Period (see item 36 of this table);</li> <li>provide 12 or 24 months’ notice of any product withdrawal (including if <b>nbn</b> amends a product so that it is no longer reasonably capable of delivering at least the same functionality, performance or features); and</li> <li>confer on the ACCC powers to veto the withdrawal of a product, in accordance with a prescribed process.</li> </ul> | <p>As <b>nbn</b>’s only channel-to-market, it is important that RSPs have visibility of future products that <b>nbn</b> proposes to introduce, and that <b>nbn</b> takes an inclusive approach to consulting with RSPs about new products, applicable service levels and product changes.</p> <p>RSPs and end-users also require certainty about the continued existence of products once introduced. The product withdrawal provisions require <b>nbn</b> to provide sufficient notice of a product withdrawal (except where the withdrawal of a product is required by law or a Shareholder Minister or <b>nbn</b> is prohibited from providing the product under section 41(3) of the NBN Companies Act). This is strengthened by the ACCC’s power to object to a product withdrawal having regard to key factors including existing demand for the product, avoidable cost to <b>nbn</b>, alternative products, and the LTIE.</p> <p><b>nbn</b> notes that these provisions were accepted by the ACCC as reasonable/promoting the LTIE in the current SAU and the 2021 variation. <b>nbn</b> submits that the provisions continue to remain reasonable and in the LTIE. See chapter 12 of Part C for more detail.</p> |
| 32.                           | <b>Product-specific commitments</b><br>Various<br>(including clauses 1A.4.4, 1A.4.5, Annexures 1 to 7 of Schedule 1C, clause 2B.1.3) | <p><b>nbn</b> commits to the following for the Subsequent Regulatory Period:</p> <ul style="list-style-type: none"> <li>certain minimum performance standards for MTM products during co-existence with legacy services or during any period of Network Activity or Interference Mitigation; and</li> <li>certain product-specific definitions of what is a “Standard Installation”.</li> </ul>  | <p><b>nbn</b> commits to ensure that its <b>nbn</b>® Ethernet MTM products comply with certain minimum performance standards during co-existence with legacy services or during any period of Network Activity or Interference Mitigation, to align more closely with the commitments made by <b>nbn</b> under the WBA in respect of these standards. <b>nbn</b> also commits to comply with certain product-specific conditions in assessing whether an installation is a “Standard Installation”.</p> <p>Arrangements that better align the SAU with the WBA will minimise the risk of duplicative and potentially inconsistent obligations and processes. Avoiding such duplication is efficient and will promote the LTIE.</p> <p>See chapters 9 and 12 of Part C of this Submission for more detail.</p>   |



| No.                     | Topic and SAU reference  | Proposed regulatory commitments   | Assessment against statutory criteria  |
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| 33.                     | <b>Other product-related matters</b>   | <p>With the passage of time, several SAU terms have become outdated, and <b>nbn</b> sees this current SAU variation process as providing the opportunity to either refresh or remove such terms.</p> <p><b>nbn</b> will remove references to redundant commitments currently set out in the SAU, including to Fibre Multicast (which has recently been withdrawn), TC-3 offers (which have never been launched), the Interim Satellite Service (which ceased operating in 2017), and to more closely align SAU definitions with the WBA where relevant.</p> | <p>It is reasonable that redundant provisions that are no longer effective or relevant to <b>nbn</b>'s operations are removed from the SAU. This provides clarity of the regulatory framework for all parties.</p>   |
| <b>F. Other matters</b> |  |   |  |
| 34.                     | <p><b>Incorporation of MTM technologies</b></p> <p>Various (including in Attachments A, C and D)</p> | <p>Under the Variation, <b>nbn</b> extends its product and pricing commitments to the FTTB, FTTN, FTTC and HFC access technologies. This includes the application of price transparency and certainty commitments, price controls, product development and product withdrawal obligations.</p>  | <p>Extending the SAU framework to the MTM access technologies will provide RSPs and end-users with long-term certainty regarding the regulation of the services supplied over these networks, and remove the current inconsistency caused by these access technologies not being subject to the SAU product and pricing commitments.</p> <p>The SAU framework is designed such that it supports a strong pre-existing set of economic incentives for <b>nbn</b> to incur costs and invest efficiently, price to efficiently recover fixed, common and variable costs from end-users, and ultimately, increase the prospects of long-term cost recovery. Extending the SAU framework to the MTM technologies, including the updated commitments in relation to pricing and Benchmark Service Standards, will have the positive effect of bringing the MTM technologies within that overall regulatory architecture. This will produce economically efficient outcomes for those technologies that meet <b>nbn</b>'s legitimate business interests and the interests of RSPs and end-users.</p> <p>See chapter 9 of Part C of this Submission for more detail.</p> |
| 35.                     | <p><b>Term of SFAAs</b> (clauses 21.3, 4A.3)</p>   | <p><b>nbn</b> commits that:</p> <ul style="list-style-type: none"> <li>for the First Regulatory Cycle of three years, published SFAAs will specify an expiry date resulting in a SFAA term that is no longer than three years and three months; and</li> </ul>  | <p>In the current SAU, there are no commitments made in relation to the maximum terms of any SFAA published by <b>nbn</b> from 1 July 2023. <b>nbn</b> recognises that a maximum SFAA term commitment gives RSPs flexibility in negotiating access agreements with <b>nbn</b> that are negotiated proximately to (and more closely reflect) the prevailing industry and market conditions at the</p>   |



| No. | Topic and SAU reference   | Proposed regulatory commitments   | Assessment against statutory criteria  |
|-----|---|---|--|
|     |   | <ul style="list-style-type: none"> <li>for each subsequent Regulatory Cycle in the Subsequent Regulatory Period, published SFAAs will specify an expiry date resulting in an SFAA term that is no longer than the duration of the Regulatory Cycle.</li> </ul>  | <p>time of supply. In that context, and to align with the shift in <b>nbn</b>'s regulatory framework from 1 July 2023, <b>nbn</b> proposes to extend this commitment to align the term of <b>nbn</b>'s contractual vehicle (SFAA) with that of Regulatory Cycles in the Subsequent Regulatory Period to provide certainty to RSPs, and to ensure a more integrated and consistent set of industry supply terms remain in place. The certainty provided by this new commitment should aid the negotiation of new commercial terms between <b>nbn</b> and RSPs.</p> <p>This commitment promotes the LTIE as it allows for the better coordination of <b>nbn</b>'s regulatory framework to align more closely with the operational activities of RSPs.</p> <p>See chapter 12 of Part C of this Submission for more detail.</p>  |
| 36. | <p><b>Carry-over of Module 1 commitments</b> (clauses 2B.1.3(c), 2I.5, 2H.1, 2H.4, 2I.4.1-2I.4.2)</p> | <p><b>nbn</b> will extend the following commitments currently set out only in Module 1 of the SAU (together with any amendments to those commitments) for the duration of the Subsequent Regulatory Period:</p> <ul style="list-style-type: none"> <li>dispute management provisions;</li> <li>PDF Processes; and</li> <li>closure, relocation and new Points of Interconnect.</li> </ul> <p><b>nbn</b> will also extend the descriptions of what comprises a standard (and non-standard) installation into Module 2, as Other Charges for these installations apply in the Subsequent Regulatory Period.</p> | <p>In the case of the dispute management provisions and PDF Processes, the ACCC recently re-considered these provisions in the context of the SAU variation accepted by the ACCC in April 2021. Carrying forward the detailed dispute resolutions provisions, subject to minor edits in response to RSP feedback on MTM drafting shared by <b>nbn</b> in August 2021, ensures continued ACCC oversight in relation to these procedures and appointees.</p> <p>Carrying forward the detailed PDF Processes (that were recently extended for Module 1 in April 2021) to the Subsequent Regulatory Period ensures that product development continues to occur in an open and consultative way. <b>nbn</b> has proposed only minor amendments to the PDF Processes in Module 1 (which are reflected in the new Module 4 commitments), to remove provisions relating to the Product Ideas Register. These amendments reflect that the Product Ideas Register is of limited utility to industry, particularly given recent improvements made to the PDF.</p> <p>Continuing the established POI procedures ensures that RSPs, and therefore end-users, are not impacted by unexpected changes to the location of interconnection between RSP and <b>nbn</b> networks.</p> <p>Extending the descriptions of what comprises a standard installation (and non-standard installation) into the Subsequent Regulatory Period, together</p> |



| No. | Topic and SAU reference   | Proposed regulatory commitments  | Assessment against statutory criteria  |
|-----|---|--|--|
| 37. | <p><b>ACCC powers in the Post-2032 Regulatory Period</b><br/>(clause 5.10, Schedules 3A and 3B)</p> | <p>nbn proposes that from 2032, the ACCC will have the power to reset nbn’s pricing, service standards and product development/withdrawal regulation framework which applies under the SAU from 2032 through the RMA/RMD process, subject to:</p> <ul style="list-style-type: none"> <li>the SAU retaining the existing propose-respond framework of regulation; and</li> <li>the terms of, and matters set out in, any RMA or RMD for a Regulatory Cycle within the Post-2032 Regulatory Period allowing nbn a reasonable opportunity to earn Revenues in that Regulatory Cycle equal to the sum of the Annual Regulated Revenue Allowance for each Financial Year in that Regulatory Cycle (in terms of net present value). The Annual Regulated Revenue Allowance for a Financial Year within a Regulatory Cycle must be set to allow nbn a reasonable opportunity to achieve and maintain, for the duration of that Regulatory Cycle, a stand-alone investment grade credit rating with a stable outlook from one of the specified rating agencies.</li> </ul> <p>The Variation achieves this by reducing the term of Module 2 of the SAU from 2040 to 2032 and introducing a new ‘Module 3’. This Module 3 introduces a significant change to the regulatory framework governing access to nbn’s network by implementing a principles-based approach using the propose-respond model. This gives the ACCC a substantive role and will allow it to address any concerns that may arise in the future about the outcomes the SAU arrangements deliver for RSPs and end-users.</p> | <p>with the inclusion of the descriptions for MTM and satellite access technologies, ensures RSPs have continued certainty in these descriptions and the consequential pricing impacts.<br/>See chapter 12 of Part C of this Submission for more detail.</p> <p>The significant expansion of the ACCC’s role from 2032 should provide long-term confidence to RSPs and end-users that the price and non-price regulation to which nbn will be subject remains fit-for-purpose. This will encourage efficient use of, and investment in, communications infrastructure. When making an ACCC RMD for a Regulatory Cycle during the Post-2032 Regulatory Period, the ACCC must take into account the matters set out in section 152BCA(1) of the CCA and any other matters the ACCC considers to be relevant. This is a reasonable approach given that the matters set out in section 152BCA(1) are the factors that the ACCC must take into account if it were to proceed with regulating through an access determination. Given the significant regulatory certainty that nbn is forgoing in respect of the Post-2032 Regulatory Period, it is appropriate that Module 3 requires that the terms of any RMD for a Regulatory Cycle must allow nbn a reasonable opportunity to achieve and maintain, for the duration of that Regulatory Cycle, a stand-alone investment grade credit rating with a stable outlook. This principle is consistent with nbn’s legitimate business interests, and inclusion in Module 3 will encourage efficient investment in the nbn® network.<br/>See chapter 14 of Part D of this Submission for more detail.</p> |
| 38. | <p><b>Change of control clause</b><br/>(clause 3.2)</p>   | <p>The SAU expiry date will be brought forward (from 2040) if the Government relinquishes control over nbn before that time.<br/>A change of control will occur on the earlier of:</p> <ul style="list-style-type: none"> <li>20 Business Days following the day on which a Change of Control Notice is published on the Department’s website; and</li> <li>the day on which the Commonwealth first ceases to have control of nbn.</li> </ul> <p>The Commonwealth Government will have ‘control’ of nbn if it holds, in total, ownership of more than 50% of the shares in nbn.</p>  | <p>This is a significant departure from the current SAU and responds directly to ACCC and industry concerns that the details of the regulatory framework should be revisited in the event of privatisation. nbn’s proposal is transparent and provides certainty to RSPs that the regulatory framework will be revisited and remain fit-for-purpose once nbn is privatised. This certainty will encourage efficient use of, and investment in, communications infrastructure.<br/>See chapter 14 of Part D of this Submission for more detail.</p>   |



## 23 Statutory role of the ACCC

The ACCC must assess the Variation to the SAU against the legislative criteria in subsection 152CBD(2) of the CCA. The ACCC must decide to accept or reject the Variation based on this assessment.

The ACCC must not accept the Variation unless:

- the terms and conditions specified in the Variation relating to compliance with the Category B SAOs in section 152AXB are consistent with those obligations and are reasonable;
- conduct that is specified in the Variation relating to access referred to in subsection 152CBA(3B) will promote the LTIE, and the related terms and conditions of the SAU are reasonable;
- conduct that is specified in the Variation relating to the matters referred to in subsection 152CBA(3C) will promote the LTIE; and
- the Variation is consistent with any Ministerial pricing determination.

Consistent with the approach adopted by the ACCC in its consideration of variations to the SAU proposed by **nbn** in 2016 and 2019,<sup>8</sup> **nbn** submits that the task of the ACCC under section 152CBG is to assess the variation to, rather than the existing provisions of, the SAU against the criteria in section 152CBD (as they apply to variations). This includes an assessment of the interaction of the subject matter of the Variation with the existing SAU provisions.

### Reasonableness

The ACCC and the Australian Competition Tribunal (**Tribunal**) have noted that the “reasonableness” of terms and conditions is not determined by reference to whether they are the best possible terms and conditions or whether different terms and conditions would be “more reasonable”.<sup>9</sup>

Part XIC of the CCA provides that the ACCC must have regard to the following non-exclusive list in determining whether particular terms and conditions are reasonable:

- whether the terms and conditions promote the LTIE of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of the access provider concerned, and the access provider’s investment in facilities used to supply the declared service concerned;
- the interests of persons who have rights to use the declared service concerned;
- 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.

See section 23.3 below for further detail on the assessment of reasonableness.

<sup>8</sup> See: ACCC, *NBN Co Special Access Undertaking variation*, Final decision, April 2021, where the ACCC assessed only the varied provisions of the SAU (the “expired provisions”): <https://www.accc.gov.au/system/files/SAU%20final%20decision%20draft%20doc%20%28final%20pdf%20for%20website%29.pdf>. See also: ACCC, *Variation to NBN Co Special Access Undertaking*, Draft decision, March 2017, p. 11: “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”: [https://www.accc.gov.au/system/files/D17%2036048%5BV3%5D%20%20NPC%20-%20SAU%20Variation%20-%20Draft%20Decision%20-%20MASTER%20for%20publication%20March%202017\\_0.pdf](https://www.accc.gov.au/system/files/D17%2036048%5BV3%5D%20%20NPC%20-%20SAU%20Variation%20-%20Draft%20Decision%20-%20MASTER%20for%20publication%20March%202017_0.pdf).

<sup>9</sup> Final 2013 Decision, p. 50; *Telstra Corporation Limited* [2006] ACompT 4 at [150]. See also: *Seven Networks Limited (No 4)* (2005) ATPR 42-056 at [119] and *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [404].



### Promoting the LTIE

In considering whether particular terms and conditions or conduct promote the LTIE, regard must be had to the extent to which the terms and conditions or conduct (as relevant) are likely to achieve the following objectives:

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

See section 23.3.1 below for further detail on the promotion of LTIE.

### Timing

If the ACCC does not make a decision about the Variation within six months after receiving the Variation, it will be taken to have made, at the end of that six-month period, a decision under subsection 152CBG(3) to accept the Variation (subject to the “clock-stopping” provisions in subsection 152CBG(8), which provide that certain days are to be disregarded when calculating the six-month period).

The ACCC may extend the period for consideration of the Variation for a period of no more than three months upon written notice to **nbn**, with that notice explaining why the ACCC has been unable to make a decision within the time period. The ACCC may subsequently further extend the period for consideration of the Variation by further periods of no more than three months.

## 23.1 Overview

The ACCC must assess a variation to the SAU against the legislative criteria outlined in subsection 152CBD(2) of the CCA.<sup>10</sup> After considering the variation, the ACCC must decide either to accept or reject the variation.<sup>11</sup>

The ACCC must not accept an SAU unless the ACCC is satisfied that:

- the terms and conditions specified in the variation relating to compliance with the Category B SAOs in section 152AXB are consistent with those obligations and are reasonable;
- conduct that is specified in the variation relating to access referred to in subsection 152CBA(3B) will promote the LTIE, and the related terms and conditions of the SAU are reasonable;
- conduct that is specified in the variation relating to the matters referred to in subsection 152CBA(3C) will promote the LTIE; and
- the SAU is consistent with any Ministerial pricing determination.

Under Part XIC of the CCA, the ACCC cannot refuse an SAU for particular reasons related to fixed principles terms and conditions, as outlined in further detail in section **Error! Reference source not found.** below.

<sup>10</sup> CCA, s 152CBG(4).

<sup>11</sup> CCA, s 152CBG(3).





## 23.2 Consistency with the Category B SAOs

The ACCC must not accept the Variation unless the terms and conditions specified in the Variation relating to compliance with the Category B SAOs in section 152AXB are consistent with those obligations and are reasonable.<sup>12</sup>

Relevantly, the Category B SAOs under section 152AXB of the CCA impose:

- a requirement for an NBN corporation to supply a declared service on request to a service provider in order that the service provider can provide carriage services and/or content services;<sup>13</sup> and
- a requirement for an NBN corporation to permit interconnection to telecommunications facilities it owns or controls, if requested to do so by a service provider, for the purpose of enabling the service provider to be supplied with declared services in order that the service provider can provide carriage services and/or content services.<sup>14</sup>

The requirements for an NBN corporation to comply with the Category B SAOs are subject to a number of exceptions including where there are reasonable grounds to believe that:

- the access seeker would fail to materially comply with the terms and conditions on which the **nbn** corporation complies, or is reasonably likely to comply, with the relevant obligations.<sup>15</sup> The CCA provides a non-exhaustive list of examples of exceptions including evidence that an access seeker is not creditworthy and repeated failures by an access seeker to comply with the terms and conditions on which the same or similar access seekers have been provided;<sup>16</sup> or
- the access seeker would not protect the integrity of a telecommunications network or the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.<sup>17</sup>

## 23.3 Assessment of reasonableness

As stated above, the ACCC must not accept the Variation unless the terms and conditions specified in the Variation relating to compliance with the Category B SAOs in section 152AXB are consistent with those obligations and are reasonable.<sup>18</sup> Part XIC of the CCA provides that, in assessing whether particular terms and conditions are reasonable, regard must be had to the following matters:<sup>19</sup>

<sup>12</sup> CCA, ss 152CBA(3A) and 152CBD(2)(b)(i).

<sup>13</sup> This requirement does not impose an obligation to the extent (if any) the obligation would lead to preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements; preventing an NBN corporation from obtaining a sufficient amount of the service to meet its reasonably anticipated requirements, or preventing a person from obtaining (via the exercise of a pre-request right) a sufficient level of access to the declared service (see s 152AXB(3) of the CCA). In addition, the Category B SAOs include a requirement for an NBN corporation that supplies a declared service by means of conditional-access customer equipment to supply on request any related service that is necessary to enable a service provider to supply its relevant retail service and/or content services by means of the declared service and using the equipment.

<sup>14</sup> CCA, s 152AXB(4).

<sup>15</sup> CCA, s 152AXB(6)(a).

<sup>16</sup> CCA, s 152AXB(7).

<sup>17</sup> CCA, s 152AXB(6)(b).

<sup>18</sup> CCA, s 152AH(1) and (2).

<sup>19</sup> CCA, s 152AH(1).



1. whether the terms and conditions promote the LTIE of carriage services or of services supplied by means of carriage services;
2. the legitimate business interests of the access provider concerned, and the access provider's investment in facilities used to supply the declared service concerned;
3. the interests of persons who have rights to use the declared service concerned;
4. the direct costs of providing access to the declared service concerned;
5. the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
6. the economically efficient operation of a carriage service, a telecommunications network or a facility.

These matters do not limit the matters to which the ACCC may have regard to in considering reasonableness.<sup>20</sup>

The ACCC noted in the draft FANOC Decision that in order to have "regard" to particular matters, it is required to take the matters in section 152AH of the CCA into account and give weight to them as fundamental elements in making its determination.<sup>21</sup>

Further, the ACCC noted in the Final 2013 Decision that the "reasonableness" of terms and conditions is not determined by reference to whether they are the best possible terms and conditions or whether they could be improved.<sup>22</sup> This approach is supported by the Tribunal, which in the context of assessing the reasonableness of Telstra's pricing methodology in *Telstra Corporation Limited* [2006] ACompT 4, noted that:<sup>23</sup>

*In this analysis we are limiting ourselves to asking whether Telstra's charge term and its cost allocation method is reasonable having regard to the statutory matters. We are not concerned to enquire whether any other price term or cost allocation method is more reasonable.*

In relation to price-related terms and conditions which are informed by a service provider's costs, the ACCC has noted that there is no one correct figure in determining reasonable costs, as this will entail matters of judgment. However, the ACCC's assessment will entail determining whether the submitting party's method or approach to calculating its costs is reasonable having regard to the statutory criteria.<sup>24</sup>

In addition, it is established that applying a "with or without" or counterfactual test may assist in a broader assessment of what is "reasonable", but that such a test cannot substitute for consideration of each of the statutory criteria and that ultimately, "reasonableness" is not determined by reference to what would exist in the counterfactual scenario where the relevant undertaking is not accepted.<sup>25</sup> In that context, the ACCC has indicated

<sup>20</sup> CCA, s 152AH(2).

<sup>21</sup> ACCC, *Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service*, Draft Decision, December 2007, p. 2: <https://www.accc.gov.au/system/files/ACCC%20draft%20decision%20on%20FANOC%20SAU%20-%20Dec%2007.pdf>. See also: *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [281]-[282]; *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [267]; and *Application by Telstra Corporation Limited* [2010] ACompT 1 at [143].

<sup>22</sup> Final 2013 Decision, p. 50.

<sup>23</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [150]. See also: *Seven Networks Limited (No 4)* (2005) ATPR 42-056 at [119] and *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [404].

<sup>24</sup> ACCC, *Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service*, Draft Decision, December 2007, p. 22: <https://www.accc.gov.au/system/files/ACCC%20draft%20decision%20on%20FANOC%20SAU%20-%20Dec%2007.pdf>; *Re Optus Mobile Pty Limited & Optus Networks Pty Limited* [2006] ACompT 8 at [19]; *Telstra Corporation Limited* [2006] ACompT 4 at [120]; *Application by Vodafone Network Pty Ltd & Vodafone Australia Limited* [2007] ACompT at [12]; and *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [189].

<sup>25</sup> *Re Seven Network Ltd (No 4)* [2004] ACompT 11 at [119] and *Re Telstra* [2010] ACompT 1 at [145]-[146].



previously that it may apply a “with and without” test when doing so facilitates (as opposed to determines) the ACCC’s analysis in determining the overall reasonableness of the relevant terms and conditions.<sup>26</sup>

The elements involved in assessing reasonableness are discussed further below. The ACCC noted in the Final 2013 Decision that many of these elements are often inter-related and may involve trade-offs that need to be weighed up. Additionally, as the ACCC has recognised,<sup>27</sup> there is significant overlap between:

- the “reasonableness” test that applies to assessing the terms and conditions of the variation in relation to compliance with the Category B SAOs and the terms or conditions applicable to conduct in relation to access; and
- the “long-term interests of end-users” test that applies to conduct in relation to access and conduct in relation to activities specified in subsection 152CBA(3).

### 23.3.1 Promotion of the long-term interests of end-users

Subsection 152AB(2) provides that in considering whether terms and conditions of an SAU promote the LTIE, regard must be had to the extent to which the terms and conditions are likely to achieve the following objectives:

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

The Full Court of the Federal Court in *Telstra Corp Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 reinforced the importance of treating each of the above factors as “a central or fundamental element in the making of the relevant decision”.<sup>28</sup> The Full Court acknowledged that there may be tension between the objectives, and that one may carry more weight in a given case than the others, but found that they must all be considered and weighed in every case.<sup>29</sup> In that case, the Full Court ultimately held that the Tribunal had made an error of law in impermissibly confining itself to consideration of the promotion of competition, and that the error vitiated the Tribunal’s decision in its entirety.<sup>30</sup>

For the purposes of applying the LTIE test, the Tribunal has confirmed that:

- “end-users” include actual and potential customers;
- “interest” should be interpreted in the sense that end-users would obtain lower prices, increased quality of service and increased diversity and scope in product offerings; and
- “long-term” means the period over which the full effects of the decision will be felt.<sup>31</sup>

<sup>26</sup> ACCC, *Assessment of Foxtel’s Special Access Undertaking in relation to the Digital Set Top Unit Service*, Final Decision, March 2007, p. 122: <https://www.accc.gov.au/system/files/public-registers/other/Assessment%20of%20Foxtel%27s%20special%20access%20undertaking.pdf>.

<sup>27</sup> Final 2013 Decision, p. 50.

<sup>28</sup> *Telstra Corp Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at [267].

<sup>29</sup> *Telstra Corp Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at [272].

<sup>30</sup> *Telstra Corp Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at [278].

<sup>31</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].



The ACCC has previously stated that at a high level it considers the expression “long-term” to involve a balancing of the flow of costs and benefits to end-users over time in relation to the objectives in subsection 152AB(2) and that matters that the ACCC is required to take into account are often interrelated and may involve trade-offs that need to be weighed up.<sup>32</sup> Further, as stated above, in considering whether a proposed variation promotes the LTIE and is reasonable, the ACCC may have regard to the counterfactual scenario where the variation is not accepted (although doing so cannot substitute for consideration of each of the statutory criteria).<sup>33</sup> In that context, **nbn** notes that if the Variation is not accepted:

- the current SAU, as accepted by the ACCC in 2013 and varied in 2021, will remain in effect (noting that the expiry date of the current SAU is 30 June 2040);
- the product and pricing provisions of the existing SAU would continue to apply only to particular services provided over **nbn**'s FTTP, fixed wireless and satellite networks, and would not extend to services provided over **nbn**'s MTM networks – thereby continuing the prospect of regulatory inconsistency and ensuring long-term regulatory uncertainty;
- the existing SAU would continue to require **nbn** to offer two-part (AVC-CVC) pricing in respect of **nbn**<sup>®</sup> Ethernet TC-4 services on its fixed line and fixed wireless networks;
- the Maximum Regulated Prices for certain services under the SAU would continue to remain substantially above the effective prices charged by **nbn** under access agreements with access seekers; and
- the LTRCM in the existing SAU would remain unchanged – with the SAU continuing to provide **nbn** with the theoretical regulatory opportunity to recover the entirety of the ICRA over the term of the SAU, in circumstances where the ICRA would continue to grow with any regulatory losses (relative to **nbn**'s ABBRR) and continue to be indexed at **nbn**'s regulated rate of return on capital.

## Promotion of competition

In considering whether competition will be promoted, subsections 152AB(4) and 152AB(5) of the CCA require that regard must be had to the extent to which the thing will remove obstacles to end-users of listed services gaining access to listed services. This consideration does not, however, limit matters to which regard may be had in considering the promotion of competition.

The ACCC has expressed the view that the key issue in determining whether a regulatory decision will promote competition is whether the decision will assist in establishing conditions by which an improvement in competition will be likely to occur.<sup>34</sup> The ACCC has also noted that it would typically consider the extent of the competitive impact and the likelihood of that extent.<sup>35</sup>

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<sup>32</sup> ACCC, *Variation to NBN Co Special Access Undertaking*, Draft Decision, March 2017; *Re Telstra* [2010] ACompT 1 at [143]. The ACCC adopts a similar approach when considering whether declaration of a service under Part XIC will promote the LTIE. See: ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, August 2016, section 5.2.1: <https://www.accc.gov.au/system/files/MEA-Final%20-%20Part%20XIC%20Declaration%20Guidelines%20August%202016%20-%20Published.pdf>.

<sup>33</sup> See also: *Re Telstra* [2010] ACompT 1 at [145]–[146].

<sup>34</sup> ACCC, *Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service*, Draft Decision, December 2007, p. 33: <https://www.accc.gov.au/system/files/ACCC%20draft%20decision%20on%20FANOC%20SAU%20-%20Dec%202007.pdf>.

<sup>35</sup> Final 2013 Decision, p. 47.



This reflects the view of the Tribunal in *Re Sydney International Airport* [2000] ACompT 1 (1 March 2000) on the expression “promote competition”:<sup>36</sup>

*The Tribunal does not consider that the notion of ‘promoting’ competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of ‘promoting’ competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.*

*[The expression “promote competition”] is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial.*

The Tribunal’s explanation of the meaning of the phrase “promote competition” has been consistently followed in subsequent Tribunal decisions. In *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201, the Full Court of the Federal Court approved that understanding of the phrase as used in the telecommunications access regime in Part XIC of the CCA (at [224]-[225]).

### Achieving any-to-any connectivity

The ACCC has noted that the objective of any-to-any-connectivity is particularly relevant when considering services that involve communications between end-users, and has stated that this criterion will be given less weight compared to the other objectives when considering other types of services (such as carriage services that are inputs to an end-to-end service or distribution services such as the carriage of pay television).<sup>37</sup>

### Encouraging economically efficient use of, and economically efficient investment in, infrastructure

The ACCC has previously noted that the phrase “economically efficient use of, and economically efficient investment in, infrastructure”<sup>38</sup> requires considering three components of efficiency:

- **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 the prices of resources reflect their underlying costs so that resources are allocated to their highest valued uses (i.e., those that provide the greatest benefit relative to costs); and
- **dynamic efficiency:** this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

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<sup>36</sup> *Re Sydney International Airport* [2000] ACompT 1 (1 March 2000) at [106].

<sup>37</sup> ACCC, *ACCC Advice to Government on National Broadband Network Points of Interconnect*, November 2010, p. 82: <https://www.accc.gov.au/system/files/ACCC%20Advice%20on%20NBN%20POIs%20Nov2010%20PUBLIC.pdf>.

<sup>38</sup> See, for example: Appendix A to the ACCC’s *Inquiries into NBN access pricing and wholesale service standards*, Final report, November 2020: <https://www.accc.gov.au/system/files/Inquiries%20into%20NBN%20access%20pricing%20and%20wholesale%20service%20standards%20-%20Final%20report.pdf>.



In determining whether a particular measure results in economically efficient use of, and investment in, infrastructure, subsection 152AB(6) of the CCA provides that regard must be had to the following:

- 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;
- 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; and
- the incentives for investment in:
  - the infrastructure by which the services are supplied; and
  - any other infrastructure by which the services are, or are likely to become, capable of being supplied.

The above factors do not limit the matters to which regard may be had in considering whether a term or condition results in encouraging the economically efficient use of, and economically efficient investment in, infrastructure.

Subsection 152AB(7A) of the CCA provides that, for the purposes of determining incentives for investment, regard must be had to the risks involved in making the investment. This clarifying provision was inserted in 2005 to provide greater certainty to investors in telecommunications infrastructure, in circumstances where Australian telecommunications companies were on the verge of making significant investment decisions regarding the deployment of next-generation networks.<sup>39</sup>

The ACCC noted in the Final 2013 Decision that the ACCC will 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.

### 23.3.2 Legitimate business interests

A “legitimate business interest” for a carrier or carriage service provider is the opportunity to recover the efficient cost of providing services and to earn an appropriate commercial return on its investment in the infrastructure used to supply those services.<sup>40</sup> In *Re Telstra Corporation Ltd* [2006] ACompT 4 (2 June 2006), the Tribunal stated that:<sup>41</sup>

*... In the context of section 152AH (1)(b), the expression connotes something which is allowable and appropriate when negotiating access to the carrier’s infrastructure.*

<sup>39</sup> Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* (Cth), pp. 22-25.

<sup>40</sup> Final 2013 Decision, p. 50.

<sup>41</sup> *Re Telstra Corporation Limited* [2006] ACompT 4 (2 June 2006).



*When looked at through the prism of a charge term and condition of access and its relationship to a carrier's cost structure, it is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.*

The Tribunal has also observed that no business has either legitimate business interest in (or a right to) revenues higher than those obtainable in a competitive market.<sup>42</sup> Carriers do, however, have a legitimate business interest in receiving a commercial return on their prudent (past) investment in the infrastructure used to supply services.<sup>43</sup>

### 23.3.3 Interests of persons who have rights to use the declared services

The ACCC has noted that access seekers have an interest in being able to compete for the custom of end-users on the basis of their relative merits: *"However, it is important to distinguish between the interests of access seekers to effectively compete to supply a service in a dependent market from the interests of access seekers being ensured of remaining profitable"*.<sup>44</sup> nbn submits that, consistent with the approach taken by the ACCC with respect to the Final 2013 Decision, it is the former interest to which the ACCC is to have regard in assessing the terms and conditions of the Variation.

### 23.3.4 Direct costs of providing access to the declared service

As the Tribunal has held, the "direct costs" to which paragraph 152AH(1)(d) refers include indirect costs and do not exclude a mark-up on incremental costs to cover the fixed and any common costs of supplying the relevant service: *"Those direct costs are a reference to the total costs of providing access to the relevant declared service which ordinarily include an appropriate allocation of [fixed and common costs] because without the existence of the assets in respect of which the [fixed and common costs] are incurred, the relevant access could not be provided"*.<sup>45</sup>

### 23.3.5 Safety and reliability

In examining this criterion in the context of an ordinary access undertaking submitted by Telstra, the Tribunal noted that a service provider will have sufficient incentive to ensure the safe and reliable operation of carriage services, telecommunications networks or facilities, as long as it receives sufficient revenue to cover the costs of ensuring safe and reliable operations. The Tribunal equated "sufficient revenue" with a price for the service that enabled recovery of efficient costs inclusive of a normal return on investment.<sup>46</sup>

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<sup>42</sup> *Re Telstra* [2010] ACompT 1 at [192].

<sup>43</sup> *Re Telstra* [2010] at [244]. See also ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, August 2016, p. 44: <https://www.accc.gov.au/system/files/MEA-Final%20-%20Part%20XIC%20Declaration%20Guidelines%20August%202016%20-%20Published.pdf>.

<sup>44</sup> Final 2013 Decision, p. 51.

<sup>45</sup> *Application by Optus Mobile Pty Limited & Optus Networks Pty Limited* [2006] ACompT 8 at [137].

<sup>46</sup> *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [277].



### 23.3.6 Economically efficient operation of the network

In relation to examining this criterion, the ACCC has noted the following:

- the phrase “economically efficient operation” embodies the concept of economic efficiency referred to above, including the concepts of productive, allocative and dynamic efficiency;
- the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently;
- it is relevant to consider the economically efficient operation of:
  - retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers; and
  - the telecommunications networks and infrastructure used to supply these services.<sup>47</sup>

Similarly, the Tribunal has noted that:<sup>48</sup>

*The factors that are likely to encourage the economically efficient use of, and the economically efficient investment in, the infrastructure ... are similar to those factors which are likely to lead to the economically efficient operation of a carriage service, a telecommunications network or a facility.*

In addition, the ACCC noted in the Final 2013 Decision that the economically efficient operation of a carriage service, telecommunications network or facility will not be precluded where the carrier or carriage service provider has the opportunity to recover the efficient costs of providing services (and no more). The ACCC stated that if **nbn** is not able to recover its efficient or prudent costs, 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.<sup>49</sup>

## 23.4 Consistency with any Ministerial pricing determinations

The Minister has not made a pricing determination in relation to **nbn**’s Access Service or the Ancillary Services.

## 23.5 Assessment of specified conduct in the SAU

### 23.5.1 Specified conduct in relation to access to the declared service

Subsection 152CBA(3B) provides that an SAU may state that the person giving the SAU will engage in specified conduct in relation to access to the relevant service and will do so on such terms and conditions as are specified in the SAU.

If such conduct is specified in the SAU,<sup>50</sup> then, in accordance with paragraph 152CBD(2)(ca) of the CCA, the ACCC cannot accept the SAU (or a variation to the SAU) unless it is satisfied that the conduct specified will promote the LTIE and that the related terms and conditions are reasonable.

<sup>47</sup> ACCC, *Inquiries into NBN access pricing and wholesale service standards*, Final report, November 2020, pp. 58–59:

<https://www.accc.gov.au/system/files/Inquiries%20into%20NBN%20access%20pricing%20and%20wholesale%20service%20standards%20-%20Final%20report.pdf>, citing *Telstra Corporation Limited* [2006] ACompT 4 at [94]–[95].

<sup>48</sup> *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [279].

<sup>49</sup> Final 2013 Decision, p. 51.

<sup>50</sup> **nbn** has covered this aspect of the legislation framework for completeness, even though no such conduct is actually specified in the SAU Variation.





## 23.5.2 Specified conduct in relation to a listed activity

Under subsection 152CBA(3C) **nbn** may outline in the SAU (or in a variation to the SAU) that it will engage in specified conduct in relation to:<sup>51</sup>

- developing a new eligible service (within the meaning of section 152AL of the CCA); or
- enhancing a declared service; or
- extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied; or
- planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied; or
- an activity that is preparatory to the supply of a declared service; or
- an activity that is ancillary or incidental to the supply of a declared service; or
- giving information to service providers about any of the above activities.

If such conduct is specified in the SAU (or in a variation to the SAU), then in accordance with paragraph 152CBD(2)(cb) of the CCA, the ACCC cannot accept the SAU (or a variation to it) unless it is satisfied that the conduct specified will promote the LTIE of carriage services or of services supplied by means of carriage services.

## 23.6 Assessment of future variations to the SAU and interaction with fixed principles terms and conditions

Given the 'modular' structure of the SAU, the fixed principles terms and conditions in the current SAU will affect the ACCC's current and future assessment of any proposed variations to the SAU

In particular, once an SAU variation is lodged by **nbn**, the ACCC will be required to make a decision to accept or reject the variation under subsection 152CBG(3) of the CCA. This requires the ACCC to carry out an assessment of the variation under section 152CBD of the CCA, the same section that applies to the assessment of an SAU. If the SAU (as varied up to that point) contains a fixed principles term and condition, and the proposed new variation to the SAU (including the current Variation) contains the same fixed principles term and condition, the ACCC's assessment under section 152CBD will be subject to subsection 152CBAA(6) of the CCA. In that context, in the Final 2013 Decision, the ACCC noted that in deciding whether to approve terms and conditions as fixed principles, it will:<sup>52</sup>

*... only approve terms and conditions as fixed principles where these terms and conditions will not constrain it in a way that will prevent it from ensuring that the SAU only contains terms and conditions **which promote the long-term interests of end-users and are reasonable during the SAU term.** (Emphasis added)*

The ACCC also noted that fixed principles terms and conditions should not prevent it from rejecting future SAU variations that may not meet the statutory criteria at the time of assessing a new SAU or a varied SAU, and on that basis, terms and conditions that involve judgment and direction should not be accepted as fixed principles terms and conditions.<sup>53</sup>

<sup>51</sup> CCA, s 152CBA(3C)(a)-(g).

<sup>52</sup> Final 2013 Decision, p. 109.

<sup>53</sup> Final 2013 Decision, pp. 109-110.



## 23.7 Other relevant legislative provisions: nbn's non-discrimination obligations

Part XIC contains **nbn**-specific non-discrimination obligations (**NDOs**), which were a key consideration in the design of the current SAU.

In particular, subsection 152AXC(1) of the CCA states that an NBN corporation must not “discriminate between access seekers” in complying with its Category B SAOs. There are, however, limited circumstances in which discrimination in the supply of services is expressly permitted. This includes where **nbn** has reasonable grounds to believe that an access seeker would fail, to a material extent, to comply with the terms and conditions on which **nbn** complies, or on which **nbn** is reasonably likely to comply, with the relevant obligation.<sup>54</sup> Examples of such circumstances include where an access seeker is not creditworthy or has repeatedly failed to comply with the terms and conditions on which the same or similar access has been provided.<sup>55</sup>

Relevantly for the SAU, the Explanatory Memorandum to the NBN Access Bill states that the ACCC would refer to its explanatory material when assessing an SAU.<sup>56</sup>

In addition, subsection 152AXD(1) of the CCA prohibits **nbn** from discriminating between access seekers in the carrying on of activities related to the supply of declared services.

The relevant “related activities” are:

- developing a new eligible service;
- enhancing a declared service;
- extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- planning for a facility or telecommunications network by means of which a declared service<sup>57</sup> is, or is to be, supplied;
- an activity that is preparatory to the supply of a declared service;
- an activity that is ancillary or incidental to the supply of a declared service; and
- giving information to service providers about any of the above activities.

Section 152CJH of the CCA requires the ACCC, as soon as practicable after the commencement of the section, to publish on its website explanatory material relating to the non-discrimination provisions. On 29 September 2021, the ACCC released its 2021 guidelines on non-discrimination relating to section 152CJH of the CCA and Part 8 of the Telecommunications Act. The ACCC first issued explanatory material about the NDOs in Part XIC of the CCA in 2012. The revised 2021 guidelines were developed following amendments to the CCA and Telecommunications Act, which were made as part of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements Bill 2011* (Cth), p. 148). The concept of non-discrimination in the CCA is currently largely untested and it is likely that the guidelines may need to be periodically reviewed and refined to reflect circumstances that may arise.

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<sup>54</sup> CCA, s 152AXC(2).

<sup>55</sup> CCA, s 152AXC(3).

<sup>56</sup> Revised Explanatory Memorandum to the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements Bill 2011* (Cth), p. 148.

<sup>57</sup> [http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/caca2010265/s152al.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/caca2010265/s152al.html)