



NBN Co Submission on ACCC Draft Notice to Vary NBN Co SAU

July 2013

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1 Overview

NBN Co welcomes the ACCC's 4 July 2013 Draft Notice to Vary the Special Access Undertaking (SAU) and the accompanying Response to Submissions.

In preparing this response, NBN Co has very carefully considered the variations to the SAU specified in the Draft Notice to Vary and the small number of additional matters discussed in the Response to Submissions that were not reflected in variations. This is a targeted response that focuses on those aspects of the Draft Notice to Vary where NBN Co believes some further refinement is required to:

- Fully and clearly implement the ACCC's intended changes, as they were described in the Response to Submissions;
- Further simplify the drafting of the SAU. For example, as suggested by the ACCC, the inclusion of a conferral of power in relation to product withdrawal facilitates the removal of the concepts of Reference Offers and Non-Reference Offers;
- Appropriately recognise NBN Co's legitimate business interests, by providing a degree of additional certainty in relation to the future operation of the SAU, in a manner consistent with the parameters provided by the Draft Notice to Vary;
- Align some definitions with those in the Wholesale Broadband Agreement (reflecting minor developments or refinements since the SAU was lodged); and
- Tidy or correct minor drafting issues.

This response is accompanied by the SAU, marked up to show the refinements NBN Co proposes. NBN Co has also provided a clean copy of the SAU. To assist in navigating, proposed drafting refinements are identified in boxes in this response (using clause number references as in the marked-up SAU rather than in the Draft Notice to Vary) and the marked-up SAU includes embedded comments referencing back to the relevant section of this response.

2 Interaction between the SAU and the telecommunications access regime

2.1 Conduct concerning elements of the telecommunications access regime

2.1.1 Conduct about including terms and conditions in SFAAs

In section 2.1.1.1 of the Response to Submissions, the ACCC proposes the following amendments to the SAU:

- removal of the incorporation clauses: clauses 1H.5.1 (dispute management), 1H.6 (information and rights management) and 1H.7 (risk management) of Schedule 1H and clause 1J.2(a) (Service levels) of Schedule 1J, which require the inclusion of the associated terms and conditions in SFAA; and
- removal of all references to SFAAs in clauses requiring NBN Co to ensure that certain terms in SFAAs have particular characteristics.¹

NBN Co does not have any further comments on these amendments.

2.1.2 Conduct about updating SFAAs in response to Access Determinations and Binding Rules of Conduct ('regulatory recourse')

In section 2.1.1.2 of the Response to Submissions, the ACCC proposes the following amendments to the SAU:

- deletion of clauses 1B.1.2 (Pricing not subject to regulatory recourse) and 1B.2 (Regulatory recourse) of Schedule 1B; and
- deletion of clauses 6.1 (Obligation to align SFAA with Special Access Undertaking to the extent inconsistent) and 6.2 (On-going obligation to ensure consistency of SFAA with Special Access Undertaking) of the Main Body of the SAU.²

NBN Co does not have any further comments on these amendments.

2.1.3 Conduct about updating SFAAs in response to Facilities Access Decisions

In section 2.1.1.3 of the Response to Submissions, the ACCC proposes to delete clause 1B.2.3 (Facilities Access Decision) Schedule 1B from the SAU.³

NBN Co does not have any further comments on these amendments.

2.1.4 Conduct about production and maintenance of SFAAs

In section 2.1.1.4 of the Response to Submissions, the ACCC proposes the following amendments to the SAU:

- amendment of the first sentence of clause 6.3 (Obligation for NBN Co to produce and maintain SFAA) of the Main Body to read "in relation to the supply of the NBN Access Service and the Ancillary Services *and the Facilities Access Service*"; and

¹ Response to Submissions, p.14

² Response to Submissions, p.19

³ Response to Submissions, p.20

- deletion of the second sentence of clause 6.3 (Obligation for NBN Co to produce and maintain SFAA) of the Main Body (the commitment that NBN Co may include terms and conditions about the Facilities Access Service in SFAAs).⁴

NBN Co has no further comments on these amendments.

2.1.5 Conduct about development of SFAAs ('Multilateral SFAA forum')

In section 2.1.1.5 of the Response to Submissions, the ACCC proposes the following amendments to the SAU:

- deletion of clauses 1B.3.1(e)-(h) and (j)-(k) of Schedule 1B;
- amendments to clause 1B.3.1 to allow Consumer Advocacy Groups to participate in the multilateral SFAA forum; and
- amendments to clause 1B.3.1(c) to include a commitment that NBN Co will convene the forum no later than 12 months prior to the expiration of the current SFAA term.⁵

NBN Co has no further comments on the first two of these amendments.

With regards to the third amendment, relating to clause 1B.3.1(b), NBN Co proposes two minor refinements to clarify the operation of this clause. The Final Notice to Vary should amend clause 1B.3.1(b) to clarify that NBN Co publishes each SFAA (not just versions of the SFAA) under the *Competition and Consumer Act 2010* (not pursuant to the SAU), but will do so in accordance with clause 6 of the SAU.

Proposed change to Draft Notice to Vary

Amend clause 1B.3.1(b).

2.2 Conduct concerning changes to the SAU over time

2.2.1 Conduct about submitting variations to the SAU ('replacement modules')

In section 2.1.2.1 of the Response to Submission, the ACCC proposes the following amendments to the SAU:

- the inclusion of a replacement module process that includes a commitment by NBN Co to make a replacement module application and an obligation for the ACCC to make a replacement module determination if it does not accept the application;
- the inclusion of NBN Co's proposed drafting for the matters that must be addressed via the replacement module process, but with some variations; and
- the inclusion of NBN Co's proposed drafting in relation to the criteria that the ACCC will have regard to when exercising its replacement module determination power, but with some amendments to be consistent with the legislative criteria for the making of an Access Determination.⁶

⁴ Response to Submissions, p.21

⁵ Response to Submissions, p.23

⁶ Response to Submissions, p.29

NBN Co has no further comments on these amendments in general, but does have some comments on specific elements related to the length of the Regulatory Cycle and content of the Replacement Module Application. NBN Co is also proposing a clause to clarify the effect of Replacement Module Determinations.

2.2.1.1 Length of the Regulatory Cycle

The ACCC proposes the following amendments to the SAU in relation to the length of the Regulatory Cycle:

- NBN Co should propose the length of the Regulatory Cycle in its Replacement Module Application; and
- If the Replacement Module Application is not accepted, the ACCC should select the length of the Regulatory Cycle when making the Replacement Module Determination.

NBN Co has no further comments on the intent of these amendments, but notes that the Draft Notice to Vary omits an appropriate provision to the effect that a Regulatory Cycle is limited to being of either 3, 4 or 5 Financial Years in duration. NBN Co submits that it is important to set a baseline for the Regulatory Cycle in order to ensure that the Replacement Module process is a meaningful one. NBN Co's future investment decisions on long-term network upgrades may be influenced by the length of the next Regulatory Cycle. In this regard, it is clearly important to know, ahead of lodging a capex forecast in a Replacement Module Application, the boundaries around the length of the Regulatory Cycle will be and it is not safe to assume that the capex forecast would be invariant to this factor.

NBN Co proposes that an explicit provision be included so that the length of a Regulatory Cycle is appropriately bounded.

Proposed change to Draft Notice to Vary

Amend clause 4.5(e)(i) and Attachment C definition of Regulatory Cycle.

2.2.1.2 Content of the Replacement Module Application

The ACCC proposes the following amendments to the SAU in relation to the content of the Replacement Module Application:

- RAB Roll Forward Arrangements – make the amendments described in section 2.4.2.3 of the Response to Submissions; and
- Tax change events – make the amendments described in section 2.4.1.1 of the Response to Submissions.

NBN Co has comments on both of these amendments, and these are addressed in sections 5.2.3.2 and 5.1.4 below.

2.2.1.3 Effect of Replacement Module Determinations

NBN Co notes the ACCC's view that any Replacement Module Determination must always be consistent with all of the provisions of Modules 0 and 2, since it would not be in the long-term interest of end-users or reasonable for parts of the SAU to be inconsistent with each other.⁷ The same line of reasoning applies for the interaction between an access determination and the SAU; that is, it would not promote the LTIE for an access determination and an operational SAU to be inconsistent with each other, and the *Competition and Consumer Act 2010* clearly acknowledges that such a situation is possible and may occur by having a provision (section 152CBIA) that deals with any such inconsistency. NBN Co submits that whilst the ACCC may not seek to make 'inconsistent' terms and conditions, future interactions between Replacement Module Determinations and the SAU may in effect give rise to consistency issues, which would place NBN Co in the 'invidious position of being required to comply with contradictory provisions of the SAU'.⁸

Accordingly, NBN Co submits that the Final Notice to Vary should include clause 4.8(i). This clause clarifies that section 152CBIA applies to a Replacement Module Determination as if those determinations were access determinations under section 152CBIA. In effect, the SAU prevails to the extent of any inconsistency over a Replacement Module Determination. These provisions therefore preserve the legislative hierarchy in circumstances where NBN Co has conferred a power on the ACCC. While the ACCC's powers are specified in detail in the Replacement Module Determination clauses of the SAU, NBN Co submits that it is necessary that the SAU specifies and preserves the hierarchy established by Part XIC in a conferral circumstance.

Proposed change to Draft Notice to Vary

Insert clause 4.8(i).

2.2.2 Conduct about the midpoint review of Module 1

In section 2.1.1.2 of the Response to Submissions the ACCC proposes that the mid-point review mechanism should be removed from the SAU. In addition the ACCC proposes that the PDF Processes, the Customer Engagement Processes and the dispute management provisions should be specified for a period of 5 years.⁹

NBN Co has no further comments on these amendments.

2.3 SAU extension mechanisms

2.3.1 Extension of the Initial Regulatory Period (Module 1)

In section 2.1.3.1 of the Response to Submissions the ACCC proposes to delete clause 4.3 of the SAU.¹⁰

NBN Co has no further comments on this amendment.

⁷ Response to Submissions, p.28

⁸ Response to Submissions, p.28

⁹ Response to Submissions, p.32

¹⁰ Response to Submissions, p.33

2.3.2 Extension of the SAU term

In section 2.1.3.2 of the Response to Submissions the ACCC proposes to vary clause 7.3(b) to provide that the criteria to be applied by the ACCC in deciding whether to approve the extension (of the term of the SAU) will be reflective of the statutory criteria that the ACCC must consider when assessing a new undertaking or a variation to an undertaking.¹¹

NBN Co agrees that the criteria to be applied for an SAU extension should be reflective of the statutory criteria. For this reason, an extension of the SAU term should be considered by the ACCC subject to section 152CBD(5C) of the CCA relating to an authorised refusal under section 151DA(2) or (3).

NBN Co submits that the Final Notice to Vary should amend clause 7.3(b) to include a reference to section 152CBD(5C) of the CCA.

Proposed change to Draft Notice to Vary

Amend clause 7.3(b)

¹¹ Response to Submissions, p.33

3 Services to which the SAU relates

3.1 Uncertainty in relation to the ACCC's ability to set terms and conditions

In section 2.2.1 of the Response to Submissions the ACCC proposes the following amendments:

- an acknowledgement that the ACCC may declare services;
- an acknowledgement that the SAU does not affect NBN Co's obligations under the SAOs in respect of ACCC-declared services;
- an acknowledgement that regulatory determinations are not rendered inconsistent with the SAU to the extent that they relate to a service that falls within the SAU service descriptions but is not an Offer that NBN Co is required to supply under this Special Access Undertaking; and
- the amendment of clauses referring to the fulfilment of obligations under the SAU and the SAOs that might otherwise be inconsistent with the above.¹²

NBN Co does not have any further comments on the first, second and fourth of these amendments.

In relation to the third amendment, NBN Co has concerns regarding clause 1A.7.2 (now clause 1A.8.2) and proposes that this clause be deleted in the Final Notice to Vary. Clause 1A.8.2 attempts to determine in advance that a Regulatory Determination made in relation to any service, including an ACCC-Declared Service that falls within the scope of the services declared by the SAU, but that is not an Offer that NBN Co is committed to supply under the SAU, will never be inconsistent with the SAU for the purposes of section 152CBIA or section 152CBIB. The scope of such a Regulatory Determination (eg by the terms and conditions it may set) is not otherwise confined by this clause and could be very broad. In effect, this clause attempts to exclude any Regulatory Determination in relation to a service (that falls within the scope of the NBN Access Service but is not an Offer) from being inconsistent with the SAU. NBN Co does not agree that the SAU should attempt to define what matters may or may not be inconsistent with it when dealt with in future Regulatory Determinations, as this is a matter to be determined on a case by case basis pursuant to Part XIC.

In any case, NBN Co does not agree that a Regulatory Determination of the type referred to in clause 1A.8.2 could never be inconsistent with the SAU. By way of an example, the ACCC could determine terms and conditions applicable to an ACCC-Declared Service that falls within the scope of the NBN Access Service (but is not an Offer that NBN Co commits to supply), and those terms and conditions could be inconsistent with the SAU – such as by not allowing costs from this new product to be included into the RAB, where the SAU would otherwise permit it to be. Such terms and conditions of the Regulatory Determination would be inconsistent with the SAU and, in accordance with Part XIC, such a Regulatory Determination should have no effect to this extent.

¹² Response to Submissions, p.36

NBN Co does not see the need for clause 1A.8.2. Instead to address the ACCC concerns that appear to have given rise to the inclusion of clause 1A.8.2, NBN Co has proposed refinements to clause 1A.8.1(b). The purpose of these refinements is to extend the application of this clause beyond the obligation to supply ACCC-Declared Services. The refined wording is broader than the original clause 1A.8.1(b) and clarifies that the SAU does not affect NBN Co's obligation to supply, whether that obligation arises under section 152AXB or under terms and conditions of supply as imposed on NBN Co by the ACCC. This clause therefore avoids any doubt that NBN Co is required to supply services, where there is an obligation imposed on NBN Co under Part XIC to do so, and that the SAU does not affect those obligations.

Similar changes need to be made to the relevant clauses in Module 2.

Proposed change to Draft Notice to Vary

Amend clauses 1A.8.1(b) and 2A.2.1(b). Delete clauses 1A.8.2 and 2A.2.2

3.2 Compliance and consistency with the SAOs

3.2.1 Offers to supply

In section 2.2.2.1 of the Response to Submissions, the ACCC proposes that all references to 'Offer to supply' be replaced with "supply", or drafting that refers to the implementation of obligations through the supply of services.¹³

NBN Co has no further comments on this amendment.

3.2.2 Conditions prior to supply

In section 2.2.2.2 of the Response to Submissions, the ACCC proposes to delete clause 1A.3.1(iii) and change references to "Customer" with "Access Seeker" (and that consequential amendments also be made), except in the proposed new Annexure 1 to Schedule 1I in relation to dispute management.¹⁴

NBN Co has no further comments on this amendment.

3.2.3 Product component bundling

In section 2.2.2.3 of the Response to Submissions, the ACCC proposes the following amendments to the SAU:

- Clause 1A.3.2(a) (now clause 1A.4.2(a)) should be retained, but varied to permit NBN Co to require purchase of a UNI, a CVC and an NNI in conjunction with the purchase of an AVC, provided that NBN Co must not require purchase of a CVC or an NNI if the access seeker already has an existing CVC or NNI appropriate for use with the relevant AVC; and
- Clause 1A.3.2(b) should be deleted.

¹³ Response to Submissions, p.37

¹⁴ Response to Submissions, p.38

NBN Co understands the intent of the ACCC's proposed variations, but has identified a number of implementation issues that should be addressed. As noted by the ACCC in its Response to Submissions, NBN Co must not require purchase of a CVC or NNI if the access seeker already has any existing CVC or NNI "*appropriate for use* with the relevant AVC" (emphasis added). However, the variation proposed by the ACCC does not address any of the technical or operational issues associated with the supply of a CVC or an NNI in conjunction with an AVC. For example:

In relation to the supply of a CVC, the following factors come into play:

- technical compatibility (e.g. a CVC of the same traffic class as the AVC is required to supply a service – thus, a multicast domain is required to provide a multicast service, even if the access seeker already has a TC-4 CVC)
- scale and capacity limitations of the CVC (beyond 4000 AVCs, a new CVC is required);
- migration of services (access seekers may be required to purchase another CVC as an interim measure while migration occurs).

In relation to the supply of an NNI, the following factors come into play:

- technical compatibility;
 - for diverse-chassis mode, NNI bearers must be purchased in pairs;
 - for different interfaces rates (e.g. 10G, 1G) separate NNI Groups must be purchased;
- scale/capacity limitations of the NNI;
 - beyond 4000 CVCs, a new NNI Group must be purchased;
 - beyond 8 NNI Bearers, a new NNI Group must be purchased;
- migrations (access seekers may be required to purchase another CVC as an interim measure while migration occurs).

The amendments to clause 1A.4.2(b) address the above points by providing an exception to the stated prohibition for "reasons of technical compatibility, network operations, capacity or scale associated with the supply of the CVC or NNI". These words reflect the scope of relevant factors, as described above.

In addition, there are technical reasons why the supply of an AVC of one traffic class requires that it be purchased in conjunction with the supply of an AVC of a different traffic class. For example, the supply of a Multicast AVC requires an underlying TC-4 AVC to provide a backchannel data path. The amendment to clause 1A.4.2(a) addresses this point.

NBN Co has therefore proposed amendments to clause 1A.4.2 to address these issues, so that NBN Co is able to require that AVCs, CVCs and NNIs "appropriate for use" with an AVC are purchased by access seekers.

Proposed change to Draft Notice to Vary

Amend clauses 1A.4.2 and 2A.3.

3.2.4 Layer 3 awareness

In section 2.2.2.4 of the Response to Submissions, the ACCC is proposing to amend clause 1A.2.6 such that:

- The AVC and CVC may incorporate some limited Layer 3 awareness, including:
 - voice telephony services provided using a UNI-V;

- multicast services provided over the NBN Co Fibre Network; and
- the following optional features on the AVC:
 - DSCP for priority encoding;
 - DHCP Option 82 support; and
 - PPOE Intermediate Agent support.
- The Layer 3 awareness must only be to the extent required to support the supply of a Layer 2 service and must not extend to the routing or forwarding of Access Seeker traffic using public Internet Protocol addresses.¹⁵

NBN Co has no further comments on this amendment.

¹⁵ Response to Submissions, p.41

4 Product development, product withdrawal and reference offers

4.1 Product development and variation

4.1.1 Term of operation of the PDF Processes

In the Response to Submissions (section 2.3.1.1), the ACCC proposes an amendment to reduce the term for which the PDF Processes will operate to the first five years of Module 1.¹⁶

NBN Co has no further comments on the intention of this amendment, but suggests two refinements in the Final Notice to Vary.

First, there needs to be a workable approach to Network Changes once the current PDF processes expire after five years and in the event that a replacement set of PDF processes are not in place. NBN Co's proposed changes in this regard are discussed in section 5.2.2.4 below.

Secondly, it would provide increased certainty to Access Seekers if the PDF Processes set out in the SAU continued to the end of the Financial Year in which the 5-year anniversary of the SAU Commencement Date falls, rather than exactly on the anniversary date itself. This would ensure consistency of the product development process over a complete Financial Year.

Proposed change to Draft Notice to Vary

In relation to the second refinement, amend clause 11.1.1(b).

4.1.2 Commitments by NBN Co to consult with consumer advocacy groups

In section 2.3.1.2 of the Response to Submissions, the ACCC proposes an amendment to the SAU so that Consumer Advocacy Groups can participate in the Product Development Forum (PDF), subject to interested parties registering an authorised representative with NBN Co and agreeing to the terms and conditions set out in the PDF Processes.¹⁷

NBN Co has no further comments on the intention of this amendment, but suggests a refinement in the Final Notice to Vary.

The current definition of Consumer Advocacy Groups covers any type of group representing any form of consumer interests. NBN Co proposes that the definition of these groups should include reference to the fact that the group should be one that deals with telecommunications interests of end-users.

Proposed change to Draft Notice to Vary

Amend the definition of Consumer Advocacy Group in the Dictionary at Attachment C of the SAU.

¹⁶ Response to Submissions, p.43

¹⁷ Response to Submissions, p.47

4.1.3 Provisions which establish rights and obligations on NBN Co and its customers about how consultation will occur

In section 2.3.1.3 of the Response to Submissions, the ACCC proposes amendments that would remove clauses 5 and 6 of the PDF Processes, and include clauses in Module 1 and Module 2 of the SAU that allow NBN Co to require Access Seekers and Consumer Advocacy Groups to enter into confidentiality and intellectual property rights agreements. The ACCC also proposes that a power be conferred on the ACCC to determine the terms and conditions of those confidentiality and IPR agreements in the event of disagreement between parties.¹⁸

NBN Co has no further comments on the intent of these amendments, but proposes some minor refinements to the drafting in relation to the ACCC's conferred power to address some practical issues of implementation.

Proposed change to Draft Notice to Vary

Amend clauses 11.3.2(e) and 11.3.2(f).
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4.1.4 Provisions which allow for consultation to not be undertaken in particular circumstances

In section 2.3.1.4 of the Response to Submissions, the ACCC proposes the following variations in relation to when consultation would be undertaken:¹⁹

- retain the provisions which exclude minor product variations, but remove the words “acting reasonably, NBN Co determines”;
- amendments to the provisions that exclude products that NBN Co is obliged to offer as a result of a licence condition;
- amendments to make it clear that the product development and variation processes apply to all Ancillary Services, types of Facilities Access Services and NBN Co-initiated product ideas; and
- amendments to the provisions that would have excluded products covered by or contemplated within the Initial Product Roadmap, in favour of a specified list of “Initial Products” that are included in the SAU.

NBN Co has no further comments on these proposed amendments, but proposes some refinements to the list of Initial Products to be included in the SAU, to reflect other product features (specifically, data transfer rates for AVC and CVC) that have already been announced by NBN Co in either its Product and Pricing Overview documents or in its Product Roadmap, and which have already been consulted on.

Proposed change to Draft Notice to Vary

Amend Attachment D of the SAU.

¹⁸ Response to Submissions, pp.48-49

¹⁹ Response to Submissions, pp.50-51

4.1.5 Additional variations proposed by Telstra

In section 2.3.1.5 of the Response to Submissions, the ACCC lists a number of variations that have been proposed by Telstra in relation to Schedule 11, Schedule 2E and the PDF Processes, and seeks industry views on these proposals.²⁰

NBN Co is willing to accept many of the variations proposed by Telstra, and has provided detailed drafting amendments to implement them.

The variations proposed by Telstra, and NBN Co's response to each of them, are as follows:

- Products Ideas register must contain additional information and updates about the status of product ideas under consideration and development:
 - NBN Co is happy to provide decisions and notice of which products NBN Co is choosing to develop via the PDF.
 - Amendments are provided in a new clause 4.3(d) of the PDF Processes to implement this.
- NBN Co should be required to consult with the PDF on its initial assessment on whether to develop a process idea (in particular when NBN Co decided not to proceed with developing a product idea):
 - NBN Co considers that the PDF Processes already implement a number of elements of Telstra's proposed variation. In particular, NBN Co notes that:
 - Clause 5.4(a) requires NBN Co to publish a summary of Product Ideas that it decides to develop, following its initial assessment.
 - Clause 5.6 of the PDF Processes requires NBN Co to publish a notice giving specific reasons for NBN Co deciding not to develop a particular Product Idea.
 - However, NBN Co will amend the PDF Processes to provide for access seeker and Consumer Advocacy Group input to its initial assessment, via the insertion of a new clause 4.3(f) in the PDF Processes.
- A 'Product Construct Paper' should contain proposed price-related terms:
 - NBN Co is prepared to include proposed price terms as early in the product development process as possible, and proposes an amendment to clause 5.4(a) of the PDF Processes to implement this.
- The consultation process that is proposed in the 'Idea Development Plan' should be subject to overriding principles:
 - NBN Co considers that the PDF Processes already implement the substance of Telstra's proposed variation in relation to over-riding principles. In particular, NBN Co notes that:
 - Clause 6.1(a) requires that if NBN Co does not convene workshops, it will seek the input of Access Seekers and Consumer Advocacy Groups through alternative means suited to the particular Product Idea;
 - Clause 6.2(c) results in NBN Co issuing updated Product Construct Papers and associated documents as required. However, for clarity, NBN Co proposes to amend clause 6.2(c) to say that "NBN Co **will** from time to time" rather than "may";

²⁰ Response to Submissions, p.55

- Clause 5.4(c) requires NBN Co to provide Access Seekers and Consumer Advocacy Groups with information regarding the consultation processes that will be used to develop the Product Idea, and this Idea development must be updated as the Product Idea is developed through workshops (clause 6.2(c)(ii));
- Clause 7.1(b) requires that NBN Co will ensure that reasonable timelines are provided for formal submissions on a Product Idea.
- In addition, NBN Co refers to the Product development principles included in clause 11.1.2.
- To address a number of other issues raised by Telstra in relation to the consultation process, NBN Co proposes to make the following changes to the PDF Processes:
 - Introduce the notion of reasonable timeframes in relation to the convening of workshops under clause 6.2(a)
 - Include a positive obligation to consider and have regard to, the views and submissions put forward by participants. This will be achieved by the inclusion of a new clause 8(b) after the existing clause 8(a).
- Each product idea must be required to specify and consult on three product attributes before the product is introduced commercially (a 'PASS' test):
 - NBN Co notes that the Product Construct Paper which NBN Co is required publish under clause 5.4 of the PDF Processes, and which it must update when the product development process is finalised under clause 8(c) of the PDF Process, includes the majority of the elements proposed by Telstra as part of the "PASS" test. NBN Co will modify the definition of the Product Construct Paper to ensure that it also includes reference to the technical specifications of the product, as well as to require NBN Co to consult on those technical attributes.
- NBN Co must publish and maintain an 'Integrated Product Roadmap' that outlines how IT support and operational support are being developed for new products under development:
 - NBN Co already provides such updates, and hence has no objections to this proposal. NBN Co proposes to amend the commitments currently in clause 11.2 that refer to the "Product Roadmap" to cover the integrated product roadmap.

Proposed change to Draft Notice to Vary

Amend clauses 11.2 and 11.3.5, and clauses 4.3(d), 4.3(f), 5.4(a), 6.2(a), 6.2(c), and 8(b) of the PDF Processes.

4.1.6 Additional variations proposed by the ACCC

In addition to the proposed variations that are discussed above, the ACCC has marked-up a number of other changes to the SAU which are not explicitly discussed in its Response to Submissions. These are addressed in this section only where NBN Co has further comments.

4.1.6.1 Deletion of clause 1J.3.4

NBN Co is concerned by the ACCC's proposed deletion of part (b) of clause 1J.3.4 from the SAU. The intent of the clause as drafted is to ensure that any requirement to supply a product that requires a network change is subject to prior endorsement of that required network change for the purposes of prudently incurring capital expenditure (and potentially operating expenditure) in connection with that network change. Such endorsement is important, because without it NBN Co would not be able to include this capital expenditure in the Regulatory Asset Base for recovery over time.

NBN Co notes that part (a) of clause 1J.3.4, which the ACCC also proposes for deletion, has effectively just been moved to the ACCC's proposed new clause 11.1.1(c), and as such there is no need to retain former clause 1J.3.4(a).

Proposed change to Draft Notice to Vary

Reinstate former clause 1J.3.4(b) as clause 11.3.7.

4.2 Product withdrawal and reference offers

4.2.1 Product withdrawal notification and disallowance

4.2.1.1 NBN Co's proposed product withdrawal disallowance power

In section 2.3.2.1 of the Response to Submissions, the ACCC proposes amendments to partially adopt NBN Co's proposed approach to conferring a power on the ACCC to disallow product withdrawals, including amendments that require NBN Co to notify the ACCC, consumer advocacy groups and access seekers of its intention to withdraw a product, and conferring a power on the ACCC to disallow that withdrawal during the notice period provided by NBN Co.²¹

NBN Co has no further comments on the intent of these amendments, which adopt a similar approach to that proposed by NBN Co in its May Submission, but proposes a small number of refinements.²²

- In clause 1J.5.2(c)(ii) and clause 2D.6.2(c)(ii), the ACCC proposes that it "may have regard to" a specified set of factors in making a withdrawal disallowance decision but proposes NBN Co "will have regard to" the same set of factors when deciding whether to withdraw a product. NBN Co considers that the distinction between "may" and "will" is significant in this context, and that the use of "may" introduces an asymmetry into the assessment process. NBN Co considers that it is reasonable that the ACCC should have regard to the same factors as NBN Co in assessing whether it objects to a product withdrawal (in addition to the other matters that it will have regard to), and these clauses should be amended to say "will have regard to" in relation to the ACCC's decision making.

²¹ Response to Submissions, p.56

²² In this section, the references to Schedules 1J and 2E relate to the December 2012 SAU clause references. In the amended drafting provided by NBN Co with this submission, the corresponding schedules are 11 and 2D, due to the removal of the schedules dealing with Reference Offers.

- In clause 1J.5.2(f)(ii) and clause 2D.6.2(f)(ii), the ACCC has introduced the option of a 5-year timeframe in which NBN Co may be excluded from re-applying to withdraw a product. The rationale for this is not discussed in the Response to Submissions. NBN Co considers that 5 years is too long a period for such an exclusion, and that a shorter period of 2 years, as proposed in NBN Co's May Submission should be applied. Given that the ACCC will still have an objection power in relation to that subsequent product withdrawal, if the ACCC still considers that it would not promote the LTIE to withdraw the product, then it would be able to ensure that this did not occur.
- In clause 2D.1.1(a), the ACCC has retained a requirement in relation to NBN Co's compliance with network changes in Module 2. This drafting is redundant as the network change process no longer has a role to play in Module 2. The clause required NBN Co to comply with any applicable requirements in relation to the identification, selection, consultation and endorsement of any network change. However, the requirements concerning the process for network changes and expenditure on network changes in the Subsequent Regulatory Period are not yet known. NBN Co cannot at this stage commit to compliance with unknown requirements. Of course, as these requirements become known during the Subsequent Regulatory Period, they will become important aspects of the overarching prudency process and NBN Co will be required to comply with them in order to have capital expenditure recognised in the RAB – however these procedures will not be known until then and commitments around compliance cannot be made until they are known.

NBN Co therefore proposes to delete this clause.

Proposed change to Draft Notice to Vary

Amend clauses 11.5.2(c)(ii), 11.5.2(f)(ii), 2D.6.2(c)(ii) and 2D.6.2(f)(ii) and delete clause 2D.1.1(a).

4.2.1.2 Interaction between product withdrawal disallowance power and Reference Offer – Non-Reference Offer distinction

In section 2.3.2.1 of the Response to Submissions, the ACCC expresses the preliminary view that the removal of the concepts of Reference Offers and Non-Reference Offers in favour of a reliance on the product withdrawal conferral of powers could vastly simplify the operation of the SAU, and seeks the views of interested parties.²³

NBN Co strongly supports the ACCC's view, and proposes drafting that implements this simplification, **while replicating the commitment to keep fixed in nominal terms until 30 June 2017 the Maximum Regulated Prices of what would otherwise have been Reference Offers**. The proposed drafting also extends this commitment to the 25/5 Mbps AVCs for the Fixed Wireless and Long Term Satellite networks, as this AVC speed tier was not announced by NBN Co when the December 2012 SAU was lodged.

With these proposed changes (and supported by other amendments proposed by the ACCC in relation to ACCC oversight of new Prices for currently Zero-Priced Offers), there is no disadvantage to Access Seekers from removing the Reference Offer concept from the SAU; indeed, there is some considerable advantage to Access Seekers, the ACCC and NBN Co from having a more streamlined, less conceptually complex SAU.

²³ Response to Submissions, p.59

The removal of the concept of Reference Offers and Non-Reference Offers has drafting consequences throughout the SAU, which will not be described in any detail here, but which are all shown in the marked-up version of the SAU provided by NBN Co with this submission. NBN Co has also provided a clean version of the SAU, which makes the simplification of the SAU self-evident.

Proposed change to Draft Notice to Vary

Remove the concept of Reference Offers and Non-Reference Offers from the SAU and replace with a concept of NBN Offers.

4.2.2 Other product withdrawal related issues

4.2.2.1 Product withdrawal required by law or Shareholder Minister

In section 2.3.2.2 of the Response to Submissions, the ACCC proposes amendments that would require NBN Co to provide written notification of such a withdrawal to Access Seekers, consumer advocacy groups and the ACCC within 20 business days of receiving notice that it is required to withdraw a product, and to consult with and consider any feedback received in relation to the impending withdrawal.²⁴

NBN Co has no further comments on this amendment.

4.2.2.2 Additional variations proposed by Telstra

In section 2.3.2.2 of the Response to Submissions, the ACCC describes additional variations proposed by Telstra which it considers appear to have the potential to increase the extent to which Access Seekers can plan for making changes to their business models and other downstream investments as a result of NBN Co's decision to withdraw a product. The ACCC is considering whether to implement the variations proposed by Telstra.²⁵

NBN Co is willing to accept many of the variations proposed by Telstra, and has provided detailed drafting amendments to implement them.

The variations proposed by Telstra in relation to the minimum information that NBN Co should be required to provide in respect of a product to be withdrawn, and NBN Co's response to each of them, are as follows.

- NBN Co's assessment of each of the matters that it is required to have regard to when considering the withdrawal (that is, the factors set out in clause 11.5.2(b) of the SAU);

NBN Co has proposed a new clause 11.5.1(c)(ii) of the SAU to address this issue (and equivalently in Module 2).

- minimum information about NBN Co's proposed transitional arrangements for migration to an alternative product:
 - NBN Co's proposed 'go to' product;
 - NBN Co's proposed timeframes for transition to the 'go to' product;
 - details of testing of the 'go to' product; and
 - details about trials and phasing-in processes for transition to the 'go to' product.

²⁴ Response to Submissions, p.60

²⁵ Response to Submissions, p.61

NBN Co has proposed a new clause 11.5.1(c)(i) of the SAU to address this issue (and equivalently in Module 2).

- NBN Co's proposal to consult with RSPs and consumer advocacy groups in respect of these matters and reasons why NBN Co considers this proposal to be reasonable and appropriate in the circumstances.

NBN Co has proposed an amendment to clause 11.5.1(d) (and equivalently in clause 2D.6.1(d)) of the SAU to ensure that NBN Co is required to consult on the matters referred to by Telstra.

However, given the product withdrawal disallowance power that has now been conferred on the ACCC, NBN Co considers that there is limited utility in NBN Co providing its reasons as to why the transitional arrangements are reasonable and appropriate for every product withdrawal. If access seekers do not consider that the product withdrawal and transitional arrangements are appropriate, NBN Co will need to provide its rationale to the ACCC on a case-by-case basis, but it is unnecessary to have to justify each and every proposal if access seekers and the ACCC do not have an issue with them.

Proposed change to Draft Notice to Vary

Amend clauses 11.5.1(c), 11.5.1(d), 2D.6.1(c) and 2D.6.1(d).

5 Price-related terms and conditions

5.1 Pricing of individual products

5.1.1 Initial price levels

In section 2.4.4.1 of the Response to Submissions, the ACCC proposes only one amendment in relation to NBN Co's initial price levels, which is that the restoration charge and its associated definitions be removed from the SAU, and be settled through commercial negotiations between NBN Co and Access Seekers.²⁶

NBN Co has no further comments on this amendment.

5.1.2 Incentives to set new prices at levels that promote efficiency and competition

5.1.2.1 Variation in relation to prices for new products

In section 2.4.1.2 of the Response to Submissions, the ACCC proposes an amendment to the SAU to permit (in circumstances where commercial agreement cannot be reached and the price proposed by NBN Co is not considered to be reasonable by the ACCC), the Maximum Regulated Price for a new NBN Offer, or Other Charge (and also for the new Price for a previously Zero-Priced NBN Offer or Other Charge) to be set at the level that is specified in a Regulatory Determination (or Regulatory Determinations) that has particular characteristics.²⁷ The ACCC also proposes consequential amendments to remove references to NBN Co determining Prices, NBN Co applying Other Charges, and the Initial Pricing Principles.²⁸

While NBN Co understands and accepts the intent of the ACCC's amendment, NBN Co has a number of comments in relation to the detailed design and drafting of the amendment and also in relation to the consequential amendments.

First, NBN Co is concerned about the potential for existing demand and revenue streams to be undermined by the price that the ACCC may set for a new NBN Offer or new Other Charge. NBN Co notes the requirement in the Draft Notice to Vary for the ACCC to have regard to the characteristics, costs, revenues, and demand for other existing products supplied by NBN Co when making a Regulatory Determination and the obligation on the ACCC under Part XIC of the CCA to have regard to NBN Co's legitimate business interests in making such Regulatory Determinations. However, this requirement does not put any floor under the possible outcome that may result from ACCC intervention on new product pricing. This means that every time NBN Co introduces a new Offer or a new Other Charge there would be a risk that NBN Co could be made worse off (through ACCC intervention) than if it had never introduced the new NBN Offer or new Other Charge. As a consequence, NBN Co would face mixed incentives to engage in ongoing product development, which is both contrary to NBN Co's legitimate business interests and to the LTIE.

To address this, NBN Co proposes that the ACCC must be satisfied that the specified price for the NBN Offer or Other Charge will not result in financial detriment to NBN Co compared to a situation in which NBN Co did not introduce the NBN Offer or Other Charge. This provides a conceptually simple and robust baseline, and represents the minimum commercial outcome consistent with NBN Co having appropriate incentives to voluntarily engage in new product development.

²⁶ Response to Submissions, p.67

²⁷ Response to Submissions, p.72

²⁸ Response to Submissions, p.75

Secondly, NBN Co is concerned that there is no provision in the Draft Notice to Vary to adjust the Forecast Nominal ABBRR, Forecast Real ABBRR and Annual Forecast Revenue in Module 2 in the event that these forecasts are affected by the ACCC setting Maximum Regulated Prices via a Regulatory Determination (or Regulatory Determinations) or via a Price Review Arrangement.

Given the significance of these forecasts to the calculation of the ICRA at the end of each year, NBN Co proposes a new clause in the LTRCM in Module 2 that will allow for the Forecast Nominal ABBRR, Forecast Real ABBRR and Annual Forecast Revenue to be adjusted to the extent necessary to account for the incremental effects on those forecast amounts. The necessary adjustments are to be as specified, if at all, in the relevant Regulatory Determination, and as specified in the relevant Price Review Arrangement. NBN Co's proposed refinements recognise, that in making a Binding Rule of Conduct, the ACCC may consider that because of the urgent need to act it is not practicable to account for the matters related to adjustment of the Forecast Nominal ABBRR, Forecast Real ABBRR and Annual Forecast Revenue.

Thirdly, NBN Co considers that the current drafting as set out in the Draft Notice to Vary leaves open the possibilities of retrospective and ongoing prospective application of Regulatory Determinations in setting Maximum Regulated Prices. NBN Co proposes a number of drafting refinements to clarify that the effect of a relevant Regulatory Determination (that is, one made within the 24 month period provided for in the Draft Notice to Vary) is to set the Maximum Regulated Price for a new NBN Offer, new Other Charge, previously Zero-Priced NBN Offer or previously Zero-Priced Other Charge with effect on and from the date the ACCC made that Regulatory Determination until the end of the Financial Year in which the Regulatory Determination was made (or earlier if the ACCC makes a subsequent Regulatory Determination eg if an BROC is closely followed by a subsequent Access Determination). NBN Co's proposed refinements also address the possibility of the ACCC issuing a number of Regulatory Determinations (for example a Binding Rule of Conduct followed by an Access Determination) during the course of the 24 month period by referring explicitly to a Regulatory Determination or Regulatory Determinations.

Fourthly, NBN Co is concerned that the Draft Notice to Vary has made it unclear as to who sets "Prices" under the "Maximum Regulated Prices", which leaves open the possibility that the ACCC could issue Regulatory Determinations that directly set Prices even though this does not appear to be the intention of the changes proposed by the ACCC in the Draft Notice to Vary. To address this, NBN Co proposes reinstating drafting in the Final Notice to Vary to clarify that NBN Co determines Prices for NBN Offers and Other Charges, including initial Prices and new Prices for Zero-Priced NBN Offers and Other Charges. This drafting makes clear, however, that the Prices determined by NBN Co are up to or equal to the applicable Maximum Regulated Prices (which may have been set by the ACCC via a Regulatory Determination or Price Review Arrangement). Accordingly, the role of the ACCC and NBN Co in price setting is clearly stated.

Fifthly, NBN Co considers that the Initial Pricing Principles should be retained in the SAU because they provide Access Seekers with transparency in regard to how NBN Co has arrived at the initial prices for new Offers and new Other Charges and New Prices for currently Zero-Priced Offers and Other Charges. NBN Co has reviewed the drafting of the Initial Pricing Principles to ensure that there is no conflict with the ACCC's ability to subsequently set Maximum Regulated Prices in relation to new NBN Offers or Other Charges or new Prices for previously Zero-Priced NBN Offers or Other Charges in the 24 month window described in the Draft Notice to Vary.

Proposed change to Draft Notice to Vary

Amend clauses 1C.5.1 and 2B.2.2, insert clause 2C.4, amend clauses 1C.1.3, 1E.1.4, 1E.2.4, 2B.1.4, 2C.1.2(a), and insert clauses 1C.6 and 2B.4.

In preparing these amendments, NBN Co has utilised the ACCC's Draft Notice to Vary as the base. The resulting clause 1C.5 is now somewhat complex and NBN Co would welcome the opportunity to work with the ACCC to see whether the drafting could be further streamlined for readability before it is included in a Final Notice to Vary,

5.1.2.2 New prices for zero-priced reference offers and zero-priced other charges associated with the supply of reference offers

In section 2.4.1.2 of the Response to Submissions, the ACCC proposes an amendment to the SAU to incorporate most aspects of NBN Co's proposed New Price Disallowance power, but with modifications to extend the power to all Zero-Priced items. In parallel, as discussed above, the Draft Notice to Vary allows the ACCC to set the Maximum Regulated Price in respect of a previously Zero-Priced NBN Offer or Other Charge within 24 months of NBN Co introducing a new Price.²⁹

While the ACCC states that the New Price Disallowance power is unobjectionable, it nonetheless questions the necessity of the power in light of the variations proposed by the ACCC in the Draft Notice to Vary.

NBN Co shares this view, and accordingly proposes amendments to remove the New Price Disallowance power from the SAU. In so doing, however, NBN Co proposes to retain the pre-conditions and 6 months' notice period for introduction of a new Price for a currently Zero-Priced NBN Offer or Other Charge. This will give greater certainty to Access Seekers in regard to the future pricing of currently Zero-Priced NBN Offers and Other Charges. This also results in further simplification of the SAU.

Proposed change to Draft Notice to Vary

Amend clauses 1C.5.4 and 2B.3.

5.1.3 Ability for relative price levels to change in response to unforeseen circumstances

In section 2.4.1.3 of the Response to Submissions, the ACCC proposes amendments to the SAU that combine a number of aspects of the Integrated Price Review Mechanism proposed by NBN Co in its May Submission with the following six features: a single review may occur in Module 1; three criteria that must be satisfied for a review; net revenue neutrality should be assessed over the term of the SAU; the review should consider the reasonableness of one or more Maximum Regulated Prices; the threshold to commence a review should be that the ACCC considers such a review should occur; and another review cannot be implemented until a previous review has been implemented.³⁰

NBN Co has no further comments on the intent of the amendment. However, NBN Co has a number of comments on the detailed design and drafting of the mechanism as set out in the Draft Notice to Vary.

²⁹ Response to Submissions, p.74

³⁰ Response to Submissions, p.79

First, NBN Co remains concerned about the possibility that a price rebalancing may have a detrimental effect on NBN Co's medium term cash flows. NBN Co notes that the Price Review Criteria in the Draft Notice to Vary require the ACCC to take into account the characteristics, costs, revenues and demand for other NBN Offers and Other Charges and also (via the reference to section 152AH) to have regard to NBN Co's legitimate business interest in determining a Price Review Arrangement. Although these provisions are welcome, they do not recognise the importance of medium term cash flow stability for NBN Co's ability to efficiently (and cost effectively) finance its ongoing operations. It is foreseeable that the risk of NBN Co's medium term cash flows being significantly lowered as a result of price rebalancing may have a detrimental impact on NBN Co's future debt raising. This would be contrary to NBN Co's legitimate business interests and the LTIE (because of the potential implications for future expenditure).

To address this, NBN Co proposes a conceptually simple refinement - that the Price Review Criteria include a requirement that the ACCC must have regard to the objective of minimising the difference in NBN Co's net revenues over the five year period from when the Price Review Arrangement commences, comparing a scenario with the Price Review Arrangement against a scenario without the Price Review Arrangement. It is important to note that this factor is expressed as an objective and is one of the factors that ACCC is required to consider as part of the Price Review Criteria.

Secondly, NBN Co is concerned that there is no provision in the Draft Notice to Vary to adjust the Forecast Nominal ABBRR, Forecast Real ABBRR and Annual Forecast Revenue in Module 2 in the event that these forecasts are affected by the ACCC setting Maximum Regulated Prices via a Regulatory Determination (or Regulatory Determinations) or via a Price Review Arrangements. NBN Co's proposed refinements to address this are discussed in section 5.1.2.1 above.

Thirdly, NBN Co is concerned that the meaning of the term "no material difference" is undefined, and could be open to wide range of possible interpretations. Within the context of the price review mechanism as proposed in the Draft Notice to Vary, there is actually no in principle reason why a concept of materiality is needed at all. A Price Review Arrangement sets a Maximum Regulated Price (or Maximum Regulated Prices) that flow through to forecast net revenue via some assumptions in regard to the relationship between prices and demands for all NBN Offers and Other Charges. It would therefore be possible to set a Maximum Regulated Price (or Maximum Regulated Prices) so as to exactly achieve net revenue neutrality on a forecast basis. However, as this may result in a Maximum Regulated Price (or Maximum Regulated Prices) being specified in a Price Review Arrangement to an unworkably large number of decimal places, it would be more practical to include a well defined materiality concept that would allow some flexibility to set Maximum Regulated Prices to the commercially relevant number of decimal places.

NBN Co therefore proposes that a defined term "Material Difference" be included in the price review mechanism, and be defined to be an amount of plus or minus \$1 million as at the SAU Commencement Date, with this amount to be indexed at CPI over the term of the SAU. NBN Co considers that this will provide sufficient flexibility in specifying Price Review Arrangements. As regards the choice of the \$1 million dollar figure in the definition of "Material Difference", this represents an amount that NBN Co considers would provide sufficient flexibility on the first occasion that a Price Review Arrangement could come into effect (1 July 2018) and provides flexibility later in the SAU term, as the number of forecast years of Net Revenue between the date of the Price Review Arrangement and the end of the SAU diminish.

Fourthly, NBN Co considers that in the net revenue neutrality test within the Price Review Criteria, the meaning of the term “the expected costs that would be inputs to the ABBRR” is ambiguous. For example, it is unclear whether this is intended to capture Capital Expenditure or the depreciation of and return on that Capital Expenditure. To address this, NBN Co proposes that a refinement be made in the Final Notice to Vary to instead refer to “the sum of expected Operating Expenditure, Capital Expenditure and tax”. This makes clear the items to be netted off expected Revenue in applying the net revenue neutrality test.

Fifthly, NBN Co submits that the ACCC’s decision making in regard to a Price Review Arrangement needs to be subject to the same conditions in regard to uniform national pricing as apply to ACCC decisions on Access Determinations and SAUs. NBN Co therefore proposes refinements to the Draft Notice to Vary that incorporate appropriate references to sections 152CBD(5A) and 152BCB(3C) of the CCA. NBN Co is subject to uniform national pricing and the ACCC’s decision making powers need to be exercised within that overarching framework.

Sixthly, NBN Co notes that, for reasons that are not explained in Response to Submissions, clause 2F.2.7(a)(ii) in the Draft Notice to Vary specifies that a Price Review Arrangement in Module 2 must be between 3 and 5 years long. This is, unlike in Module 1, in which the length can be as short as 1 year. NBN Co proposes an amendment to the Draft Notice to Vary so that a Price Review Arrangement in Module 2 must be between 1 and 5 years long.

Finally, in the same way as NBN Co has included a clause in the Replacement Module section when conferring powers on the ACCC to preserve the legislative hierarchy, NBN Co has similarly included a clause in relation to Price Review Arrangements which clarifies that a Price Review Arrangement has no effect to the extent of any inconsistency with the SAU. This is effected by applying section 152CBIA to a Price Review Arrangement as if such an arrangement were an access determination under that section.

Proposed change to Draft Notice to Vary

Amend clauses 1G.3.8, 2E.2.7 and 2E.2.8.
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5.1.4 Tax change events

In section 2.4.1.4 of the Response to Submissions, the ACCC proposes a number of amendments to the SAU in relation to the treatment of tax change events. These amendments involve: changing the definition of tax change events (providing for positive and negative tax change events and excluding any pass through from third parties) and limiting its application to Module 1, with arrangements in Module 2 to be addressed in each Replacement Module; providing for the ACCC to oversee changes to the price controls due to tax change events in Module 1; and providing for the arrangements regarding any variations to the LTRCM in Module 2 as a result of a tax change event to be addressed in each Replacement Module.³¹

NBN Co has only two further comments on these amendments.

³¹ Response to Submissions, p.85

First, in regard to the definition of “Relevant Tax”, NBN Co notes the ACCC’s amendments do not include the last two limbs of the original definition of “Tax Change Event”, and proposes an amendment to the Draft Notice to Vary to change the word “means” to “includes” in the Relevant Tax definition. Accordingly, the SAU definition of Relevant Tax would then define in a non-exhaustive way the taxes that may be passed through to Customers. Any other taxes not listed in the definition of Relevant Tax would be passed through by commercial agreement between NBN Co and Access Seekers or, in the absence of agreement, determined by the ACCC according to the regulatory hierarchy.

Secondly, in regard to the timeframe within which NBN Co must publish a statement in relation to a Tax Change Event in Module 1, NBN Co notes that the 60 Business Days specified in the Draft Notice to Vary may be unworkable. NBN Co proposes an amendment to the Draft Notice to Vary to change the timeframe to 12 months, which is more appropriate given that it can take an extended period of time to determine the effects of some Tax Change Events.

Proposed change to Draft Notice to Vary

Amend the definition of “Relevant Tax” in the Dictionary in Attachment C, and clause 1G.2.2(a).

5.2 Long Term Revenue Constraint

5.2.1 Overarching issues with the long-term revenue constraint methodology

5.2.1.1 Interaction between the price controls and LTRCM

In section 2.4.2.1 of the Response to Submissions, the ACCC proposed amendments to the SAU to clarify the interaction between the price controls and the LTRCM.³²

NBN Co has no further comment regarding the broad intent of these amendments (to ensure that these sections of the SAU operate as intended and will be understood to operate in this manner by those considering the terms of the SAU in future). However, as discussed in section 5.1.2.1, the amendments made by the ACCC (such as in clause 1F.1.5 of the Draft Notice to Vary), have had the effect of making it unclear as to who determines “Prices” (as distinct from “Maximum Regulated Prices” in respect of which the ACCC has a role). NBN Co’s proposed amendments to the Draft Notice Vary to address this point also serve to clarify the interaction between the price controls and the LTRCM by clarifying that NBN Co determines Prices “up to or equal to the applicable “Maximum Regulated Price” and in accordance with the LTRCM. References to these proposed amendments are set out in section 5.1.2.1 above.

5.2.1.2 Mechanics of ACCC assessment of LTRCM components and transitional issues

In section 2.4.2.1 of the Response to Submissions, the ACCC discusses two transitional issues: whether it is necessary to have clauses in the SAU to provide for the opening values of the RAB and the ICRA at the start of each Regulatory Cycle in Module 2 to be based on estimates for periods where actual information is not known (the Draft Notice to Vary includes amendments for this purpose); and whether it is necessary to have clauses in the SAU provide for an estimate of any under or over-recovered amount of Revenue to be carried forward between Regulatory Cycles during the Building Block Period in Module 2 to be included in a Replacement Module Application.³³

³² Response to Submissions, p.88

³³ Response to Submissions, p.88

On the first of these transitional issues, NBN Co submits that the RAB and the ICRA should be treated as regulatory accounting concepts, and based on actual values (or, where relevant, ACCC determined values based on actual values). There is no apparent benefit from, and some risk involved in, using estimates instead of actuals in this context. As such, the provisions included in the Draft Notice to Vary to allow for estimates to be used should be deleted.

In regard to the RAB, there is already provision in the Draft Notice to Vary for forecasting the RAB for the purpose of calculating the Forecast Nominal ABBRR in Module 2, and NBN Co proposes an amendment so that the relevant clause also covers forecasting the opening value of the RAB in the first Financial Year in a Regulatory Cycle. In regard to the ICRA, there is no calculation in the SAU that explicitly includes reference to a forecast value of the ICRA; however, the provision in regard to likely Methodology Change Event notices implicitly requires NBN Co to forecast the ICRA, but that forecast will be based on the actual value of the ICRA up to whatever is the current point in time.

On the second of these transitional issues, NBN Co submits that in, regard to the carry-forward of under or over recovered amounts in the Building Block Period in Module 2, the SAU provides for this to happen automatically and there is no need for estimates of any carried forward amounts to be made as part of a Replacement Module. In this regard, it is important to note that the SAU is silent in Module 2 in regard to whose role it is to calculate the relevant amounts of such carry forward or what reporting will be provided to the ACCC in regard to compliance with these aspects of the LTRCM. This is deliberate, and leaves open the possibility of (and the flexibility for) the ACCC using its RKR and other powers under the CCA to address these matters as appropriate over time.

Proposed change to Draft Notice to Vary

Delete clauses 2D.4.4(b), 2D.6.2(b) and 2D.6.3(c) from the Draft Notice to Vary, and amend clause 2C.7.7(a).

5.2.1.3 Half-WACC adjustment to capital expenditure

In section 2.4.2.1 of the Response to Submissions, the ACCC proposed amendments to the SAU to embed the assumption that cash flows associated with Capital Expenditure, Operating Expenditure and Revenue occur at the end of a Financial Year. However, the ACCC went on to state that it “would also consider it reasonable to consistently assume that cash flows occur in the middle of the year on average.”³⁴

NBN Co has reflected further on the issues associated with the cash flow timing assumptions and proposes two amendments to the Draft Notice to Vary. First, NBN Co proposes that in Module 1 a consistent mid-year cash flow timing assumption should be made across Capital Expenditure, Operating Expenditure and Revenue. NBN Co notes the ACCC’s comments that it would consider such an approach to be reasonable and, in any event, NBN Co considers that a mid-year timing assumption is more realistic than an end of year assumption in Module 1.

Secondly, NBN Co notes that the proposed amendments to relevant formulae are consistent with the Allen Consulting Group report to the ACCC of March 2002 regarding cash flow timing assumptions³⁵.

³⁴ Response to Submissions, p.93

³⁵ Allen Consulting Group (ACG), Report to the ACCC - Working Capital, Relevance for the Assessment of Reference Tariffs, March 2002

Thirdly, NBN Co proposes that in Module 2, the cash flow timing assumptions to apply for a particular Regulatory Cycle should be addressed as part of the relevant Replacement Module Application. This has the distinct advantage of being able to account for changes in cash flow timing over the course of Module 2, and for the assumption made in respect of a particular Regulatory Cycle to be based on recent experience and future expectations at the point in time that a Replacement Module is being assessed. Consistent with this approach, NBN Co has reviewed how the NPV=0 criterion is expressed in relation to forecasting the Nominal ABBRR over a Regulatory Cycle, and considers that the term “recognised” should be changed to “incurred” in the context of making timing adjustments in respect of relevant cash flow inputs.

NBN Co has proposed in the attached drafting all of the necessary changes to relevant formulae in both Module 1 and Module 2. Although the formulae are now more involved in some cases, they remain conceptually and computationally straightforward.

Proposed change to Draft Notice to Vary

Amend clauses 4.6(c), 1D.2.1(b), 1E.4.1, 1E.5.1(a), 1E.6.2(a), 1E.9.1(a), 1E.10(b), 2C.2.1(e), 2C.5.3(a), 2C.7.3(a), and 2C.7.7(a).

5.2.2 Long-term revenue constraint methodology in Module 1

5.2.2.1 Administration of long-term revenue constraint methodology

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes an amendment to the SAU to include a mechanism under which the ACCC will have a direct role in the administration of the LTRCM in Module 1. This mechanism reflects the drafting proposed by NBN Co in its May Submission; however, the ACCC has also proposed some amendments to the methodologies for calculating the individual components of the LTRCM – these are discussed further below.

NBN Co has no further comments on the intent of the amendment, but has three comments in regard to the procedural aspects surrounding an LTRCM Determination.

First, NBN Co considers that the timeframe for the ACCC making an LTRCM Determination should be 9 months rather than 12 months. Although NBN Co proposed a 12 month timeframe in its May Submission, on reflection this could result in NBN Co not receiving the ACCC’s LTRCM Determination in respect of one year until the same day that it lodges its reports to the SAU in respect of the subsequent year. This is problematic given the cumulative nature of many of the calculations in the LTRCM (relating to the RAB and the ICRA), and the possibility that there may be some relevant guidance in an LTRCM Determination in regard to how NBN Co should report on certain matters in subsequent years.

Secondly, NBN Co considers that, in addition to the existing requirement in the Draft Notice to Vary that the ACCC must publish a draft LTRCM Determination, the mechanism should also include a requirement to consult on the draft LTRCM Determination and consider any submission received. This will provide for appropriate consultation with interested parties on the draft LTRCM Determination.

Thirdly, NBN Co is concerned that the mechanism in the Draft Notice to Vary has no explicit recognition of the need to protect NBN Co’s confidential information in an LTRCM Determination. As part of making an LTRCM Determination, the ACCC may be provided with a range of confidential information by NBN Co and this must be subject to appropriate protections.

NBN Co has proposed appropriate refinements to the Draft Notice to Vary in regard to each of these procedural aspects.

Proposed change to Draft Notice to Vary

Amend clause 1E.1.2.

5.2.2.2 Capital expenditure (primary test)

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes to vary the conditions for determining whether Capital Expenditure can be included in the RAB. The primary variations made are to the Prudent Cost Condition and the process for determining capex values when the ACCC is not satisfied that the Prudent Design Condition or the Prudent Cost Condition have been met.³⁶

NBN Co has no further comments on the intent of the amendments proposed by the ACCC. However, NBN Co has a number of comments on the detailed design and drafting of the approach as set out in the Draft Notice to Vary.

First, NBN Co has moved the ‘historical benchmarking’ clause which the ACCC inserted into the Prudent Cost Condition as clause 1E.4.1(c) into clause 1D.3.1(b)(ii). This change means that to the extent that the ACCC is not satisfied that Capital Expenditure meets either or both of the Prudent Design Condition or the Prudent Cost Condition (or the ‘deemed’ categories of expenditure) then this historical benchmarking approach should be applied by the ACCC to determine the amount to roll into the RAB. This benchmarking should not be limited to failures to meet the Prudent Cost Condition.

It is possible that some Capital Expenditure may, in some circumstances, fall outside the scope of the Network Design Rules or Permitted Variations (and not have been through the Network Change process). In these circumstances, Access Seekers may still obtain a benefit from the Capital Expenditure and accordingly the ACCC should be able to determine a level of Capital Expenditure that should be included in the RAB. If the “historical benchmarking” approach is not applied to the Prudent Design Condition, then the Capital Expenditure will not be recognised in the RAB and is inconsistent with NBN Co’s legitimate business interests.

Secondly, NBN Co has moved the “arm’s length” and “commodities market” conditions into clause 1D.4.1(b) and (c) when dealing with satisfaction of the Prudent Cost Condition. NBN Co submits that these conditions should not be limited to factors when considering the extent to which competitive process has been engaged in. The intention of including the “arm’s length” transactions category is to ensure that transactions that involve arm’s length parties negotiating appropriate terms and conditions are recognised as a legitimate and efficient method of procuring Capital Expenditure. Similarly, Capital Expenditure on goods and services purchased in commodities markets are also efficiently incurred. In both cases,

Thirdly, NBN Co has included as an “exceptional circumstance” in clause 1D.4.2(b)(i), a legal or regulatory requirement imposed on NBN Co regarding a particular procurement. If NBN Co is required to procure a good or service in accordance with such a requirement, NBN Co submits that this is a relevant factor the ACCC should take into account when assessing compliance with the Prudent Cost Condition.

Additional minor amendments proposed to be made throughout clause 1D.3 (Prudently Incurred Capital Expenditure) and clause 1D.4 (Prudent Cost Condition for Capital Expenditure) are:

³⁶ Response to Submissions, p.97

- Changing “if the ACCC is satisfied” to “to the extent the ACCC is satisfied”, to clarify that Capex will be considered prudent to the extent it satisfies the relevant test, i.e. it is not a binary “yes” or “no” as implied by “if”.
- Inclusion of reference to “an item or category” of Capex, to clarify that the assessment of prudence is made in respect of individual items of Capex, not to the overall total Capex that has been incurred.

Proposed change to Draft Notice to Vary

Amend clauses 1D.3.1, 1D.4.1 and 1D.4.2.
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5.2.2.3 Capital expenditure (minor expenditure limit)

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes an amendment to accept NBN Co’s proposal to retain the Minor Expenditure Limit at a \$50 million threshold.³⁷

NBN Co has no further comments on this amendment.

5.2.2.4 Capital expenditure (customer engagement process)

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes the following amendments:

- reduce the term of the customer engagement provisions relating to network changes to the first five years of Module 1; and
- require NBN Co to engage with consumer advocacy groups on proposed network changes.³⁸

NBN Co has no further comment on the second of these amendments. In relation to the first of the amendments, as discussed in section 4.1.1 above, NBN Co suggests two refinements in the Final Notice to Vary.

First, there needs to be a workable approach to Network Changes once the current PDF processes expire after five years and in the event that a replacement set of PDF processes are not in place. NBN Co proposes that a minor variation be made to clause 1D.6 (Prudent Design Condition for Capital Expenditure) to allow the ACCC to approve a network change if there is no active customer engagement process in place. This ensures there is no ‘gap’ in the SAU which would prevent an otherwise prudent network change from being able to be adopted and any associated Capital Expenditure included in the RAB.

To support this change, NBN Co also proposes that the definition of ‘network change’ should continue to operate for the full period of Module 1, rather than expire after 5 years as it would if the ACCC’s proposed variation is accepted in its current form. This definition does not involve any element of customer consultation or ACCC determination, and thus its retention for the entirety of Module 1 is not inconsistent with the ACCC’s intention that customer consultation clauses expire after 5 years. The change is implemented by moving the definition of Network Change in 1D.8.1 to the Dictionary in Attachment C of the SAU.

³⁷ Response to Submissions, p.102

³⁸ Response to Submissions, p.103

Secondly, increased certainty would be provided to Access Seekers if, in the ACCC's proposed new clause 1D.1(b), the PDF Processes set out in the SAU continued to the end of the Financial Year in which the 5-year anniversary of the SAU Commencement Date falls, rather than exactly on the anniversary date itself. This would ensure consistency of the product development process over a complete Financial Year, and be simpler to manage in assessing NBN Co's compliance with its overall prudence commitments.

Proposed change to Draft Notice to Vary

Amend the Dictionary (Network Change definition), and clauses 1D.6(c), 1D.8.1 and 1D.1(b).

5.2.2.5 Operating expenditure

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes amendments to the operating expenditure prudence test, which require that the ACCC is satisfied that opex is either in a deemed prudent category, has been contracted to a third party and incurred in a manner consistent with a revised prudent cost condition, or for all other opex, is consistent with past opex that had been included in the ABBRR in a prior financial year.³⁹

NBN Co has no further comments on the intent of the amendments proposed by the ACCC. However, NBN Co has a number of comments on the detailed design and drafting of the approach as set out in the Draft Notice to Vary.

NBN Co has made similar amendments to the Operating Expenditure clauses as it has done in relation to Capital Expenditure in relation to "arm's length" transactions and commodities markets, as described in section 5.2.2.2, as well as considering legal and regulatory requirements imposed on NBN Co as a factor in whether the ACCC is satisfied that Operating Expenditure has been incurred in a prudent manner.

Additional minor refinements proposed to be made throughout clause 1E.8 (Prudently Incurred Operating Expenditure) are:

- Removal of "and the ICRA" from the phrases which describe the inclusion of Operating Expenditure in "the ABBRR and the ICRA" – Operating Expenditure is not directly included in the ICRA, or in the calculation of the ICRA, but only flows through indirectly via the interaction of the ABBRR with NBN Co's Revenue.
- Changing "if the ACCC is satisfied" to "to the extent the ACCC is satisfied", to clarify that Operating Expenditure will be considered prudent to the extent it satisfies the relevant test, i.e. it is not a binary "yes" or "no" as implied by "if".
- Inclusion of reference to "an item or category" of Operating Expenditure, to clarify that the assessment of prudence is made in respect of individual items of Operating Expenditure, not to the overall total Operating Expenditure that has been incurred.

Proposed change to Draft Notice to Vary

Amend clause 1E.8.

³⁹ Response to Submissions, p.105

5.2.2.6 Rate of return

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes an amendment to the SAU to replace references in Module 1 to a “nominal vanilla WACC” with references to a “rate of return”.⁴⁰

NBN Co has no further comments on this amendment.

5.2.2.7 Taxation allowance and gamma

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes amendments to the SAU to remove a specific a value for gamma, to provide for the ACCC to assess a proposal for gamma if required during Module 1, and to accept the changes proposed by NBN Co in its May Submission in relation to non-tax deductible items.⁴¹

NBN Co has no further comments on these amendments.

5.2.2.8 Regulatory depreciation

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes an amendment to the SAU to specify that asset lifetimes will be determined “having regard to”, rather than “in a manner consistent with”, NBN Co’s audited accounts.⁴²

NBN Co is concerned that the effect of this amendment could be such that an asset lifetime that is consistent with NBN Co’s audited accounts and which is reasonable in the circumstances will not necessarily be adopted by the ACCC. To address this, NBN Co proposes a refinement to the Draft Notice to Vary so that asset lifetimes will be determined “in a manner consistent with NBN Co’s audited accounts, to the extent the ACCC is satisfied this is reasonable”.

Proposed change to Draft Notice to Vary

Amend clause 1E.9.1(a).

5.2.2.9 Annual construction in progress

In section 2.4.2.2 of the Response to Submissions, the ACCC proposes amendments to the SAU to accept the drafting in NBN Co’s May Submission in relation to clarifying that only prudently incurred expenditure should be treated as construction-in-progress.⁴³

NBN Co has no further comments on these amendments.

5.2.3 Long-term revenue constraint methodology in Module 2

5.2.3.1 Criteria and methodologies for determining forecasts

In section 2.4.2.3 of the Response to Submissions, the ACCC proposes amendments to the SAU to:

- remove the principles on which capital and operating expenditure forecasts must be based, with the exception of the deemed prudent categories carried forward from Module 1 relating to the Telstra and Optus arrangements;
- allow the method to be adopted for forecasting regulatory depreciation in Module 2 to be determined at the time of the Replacement Module process;

⁴⁰ Response to Submissions, p.108

⁴¹ Response to Submissions, p.110

⁴² Response to Submissions, p.111

⁴³ Response to Submissions, p.112

- remove the matters that will be had reference to in calculating the forecast return on capital and the specification, within the fixed principle component, that the return on capital be calculated as a nominal vanilla WACC;
- insert a new clause, that does not form part of the fixed principle component, specifying that the forecasted rate of return in Module 2 must be a nominal vanilla WACC calculated having regard to the risks involved in making investments; and
- remove the factors taken into account when determining forecasts of the tax allowance in Module 2.⁴⁴

NBN Co has no further comments in regard to the first and last of these amendments (relating to capital expenditure, operating expenditure and tax), but does have some limited comments in relation to the other three.

In regard to forecasting regulatory depreciation, NBN Co has no further comments on the high level intent of the amendment. However, NBN Co is concerned that the Draft Notice to Vary does not include a provision that makes clear that the forecast regulatory depreciation to be included in the Forecast Nominal ABBRR is net of the CPI indexation of the opening value of the RAB. To address this, NBN Co proposes the inclusion of a clause (outside the fixed principle component) that makes this clear and also provides an appropriate link through to provisions in the Draft Notice to Vary on forecasting the Real RAB.

In regard to the return on capital and the rate of return, NBN Co has no further comment on the intent of the amendments. However, NBN Co proposes two small refinements to the drafting of the relevant provisions in the Draft Notice to Vary. First, there is a need to clarify that the return on capital is calculated by reference to a rate of return and the forecast nominal RAB “at the start of” the Financial Year – without this clarification the clause is under-defined. Secondly, in the clause (outside the fixed principle component) that defines the rate of return to be a nominal vanilla WACC, it is more meaningful to refer to having regard to the risks in making the investment “in the Relevant Assets” – without these additional words, the relevant context for the investment is not appropriately anchored to NBN Co’s context.

Proposed change to Draft Notice to Vary

Insert clause 2C.2.1(b) and amend clauses 2C.2.1(a)(iii) and 2C.2.1(d).

5.2.3.2 Terms and conditions relating to rolling forward the RAB

In section 2.4.2.3 of the Response to Submissions, the ACCC proposes amendments to the SAU to adopt parts of NBN Co’s proposed drafting on RAB Roll Forward (from its May Submission) and to:

- include additional options for how capital expenditure and regulatory depreciation will be treated in rolling-forward the RAB to allow capital expenditure and regulatory depreciation to be treated in accordance with other methods for the roll-in of capital expenditure to and roll-out of depreciation from the RAB;
- remove the detailed criteria by which the ACCC would be required to undertake its ex-post assessment of capital expenditure
- restructure the relevant clauses so that all provisions relating to the content of the RAB Roll Forward Proposals are included in Module 2, rather than in a mixture of Module 0 and Module 2; and

⁴⁴ Response to Submissions, p.116

- clarify that the return on capital to be included in the Forecast Nominal ABBRR is to be based on a forecast of the RAB Roll Forward.⁴⁵

NBN Co has no further comments on the last three of these amendments, but does have a number of comments in relation to the changes the ACCC has proposed to how the RAB Roll Forward equation is expressed, how the options for RAB Roll Forward are specified and the relative status of those options in the ACCC's assessment of a RAB Roll Forward Proposal.

First, NBN Co is concerned that the proposal to change the RAB Roll Forward equation so that it is expressed on a Regulatory Cycle basis rather than an annual basis creates ambiguity as to how to apply any option for the RAB Roll Forward that relies on knowing in which year within a Regulatory Cycle capital expenditure was rolled into the RAB. An obvious example of a method that relies on this information, is calculating depreciation based on the value of capital expenditure rolled into the RAB (rather than using the forecast depreciation used to calculate the Forecast Nominal ABBRR). To address this, NBN Co proposes amendments (in the Module 0 provisions on the RAB Roll Forward Proposal and the Module 2 provisions on RAB Roll Forward) to revert to an annual basis for the RAB Roll Forward equation, and notes that the use of an annual basis does not imply anything in regard to how, for example, any ex-post review of capital expenditure should occur. Such issues would be addressed in the RAB Roll Forward Arrangements in respect of a particular Regulatory Cycle.

Secondly, NBN Co is concerned that there is not a clear sequence of options for either the method for determining the amount of capital expenditure to be included in the RAB, or the method for determining depreciation. NBN Co considers that specifying such a sequence (with a clear role for the ACCC in assessing the reasonableness of options in the order of the sequence), would provide an appropriate measure of stability and predictability for NBN Co, Access Seekers and their end-users in regard to future RAB Roll Forward Arrangements. To this end, NBN Co proposes amendments to the provisions in relation to the treatment of capital expenditure in the RAB Roll Forward and to the provisions in relation to depreciation for the Roll Forward. These sequential options build on the approach used by NBN Co in its May Submission, requiring that initial consideration be given to certain specified options (such as straight line depreciation), but ultimately provide significant flexibility for the RAB Roll Forward Arrangements to adapt to prevailing circumstances.

In relation to the treatment of capital expenditure, NBN Co proposes that the first option is to roll in actual capital expenditure, and this option is to be used if the ACCC is satisfied that the method is reasonable.

If this is not the case, then NBN Co proposes that the second option, again to be used if the ACCC is satisfied that the method is reasonable, is to allow the amount of capital expenditure rolled-in to the RAB to be related to the forecast capital expenditure as used to calculate the Nominal Forecast ABBRR for that Regulatory Cycle. This option is specified such that if the sum of actual real capital expenditure over the Regulatory Cycle exceeds the sum of the forecast real capital expenditure in respect of that Regulatory Cycle, then the ACCC may determine the amount of the difference that is rolled into the RAB subject to whatever powers are conferred on it as part of the RAB Roll Forward Arrangements for that Regulatory Cycle. In addition, for a particular Financial Year in which actual capital expenditure is less than the relevant forecast, the amount to be rolled-in to the RAB is no less than the amount of actual capital expenditure, but no more than the amount of forecast capital expenditure for that Financial Year. This is intended to provide some flexibility in regard to the incentive properties of this second option, and the details of how this aspect may be specified would be specified in the RAB Forward Arrangements for a particular Regulatory Cycle (which are subject to ACCC assessment as part of the Replacement Module process).

⁴⁵ Response to Submissions, p.120

The final option, if the ACCC is not satisfied as to the reasonableness of either the first or the second option, is to apply a method that is consistent with NBN Co achieving a reasonable likelihood of long term recovery of prudently incurred costs. NBN Co has proposed this rather than the ACCC's approach based around methods used in other regimes because it provides flexibility to both adopt and to innovate, as circumstances demand, but subject to the method being relevant to NBN Co's context.

In relation to depreciation, NBN Co proposes that the first option is real straight line depreciation, and this option is to be used if the ACCC is satisfied that the method is reasonable. To the extent that this is not the case, the second option is to use any other depreciation method that is consistent with NBN Co achieving a reasonable likelihood of long term recovery of prudently incurred costs. In applying the depreciation method in respect of capital expenditure, the relevant amount of depreciation will be based on either the value of capital expenditure rolled-in to the RAB for that Financial Year, or the value of the forecast capital expenditure for that Financial Year as used to set the Forecast Nominal ABBRR, if the ACCC is satisfied that either method is reasonable. If neither of those approaches apply, then the relevant depreciation amount will be based on any other approach that is consistent with NBN Co achieving a reasonable likelihood of long term recovery of prudently incurred costs.

Proposed change to Draft Notice to Vary

Amend clauses 4.7(c), 2C.7.3(a), 2C.7.4 and 2C.7.5.

5.2.3.3 Use of actual versus forecast Revenue in ICRA calculation

The rationale for basing the ICRA roll forward on forecast revenue (as set for a particular Regulatory Cycle), was to reinforce NBN Co's pre-existing efficiency incentives in regards to pricing and product development.

In light of the various changes proposed in the Draft Notice to Vary, NBN Co has reconsidered the design of the ICRA roll forward in Module 2 and, in particular, whether it is useful or necessary to create additional revenue sufficiency risk by using forecast Revenue in that calculation. The alternative is to base the roll forward on actual Revenue, which is consistent with the approach in Module 1, and also lessens some of the issues (related to various forecasts becoming invalid) that may arise in the event that the ACCC chooses to intervene in regard to new product pricing or price rebalancing.

However, consistent with the approach now being taken in the Draft Notice to Vary and in NBN Co's proposed amendments in a number of areas of the SAU, NBN Co considers that there is no need to choose between these two options at this point in time. Rather, it would be better to leave to the Replacement Module process the decision on whether to roll forward the ICRA for a particular Regulatory Cycle in Module 2 based on forecast or actual Revenue.

The attached drafting includes proposed amendments to the Draft Notice to Vary to insert appropriate provisions in the Replacement Module Process in Module 0 and in the LTRCM in Module 2.

Proposed change to Draft Notice to Vary

Insert clause 4.6(d) and amend clause 2C.5.3(a).
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5.3 Additional price-related variations

In its May Submission, NBN Co proposed a small number of relatively minor price-related variations in order to provide increased clarity as to the intended operation of the SAU. These were described in section 5.4 of the May Submission, but do not appear to be addressed in the ACCC's Response to Submissions. These are tabulated below, along with NBN Co's rationale for suggesting that they be included in the Final Notice to Vary. In most cases, these are simple drafting amendments that more explicitly define the NBN Offers so as to avoid ambiguity in future, and also to better align with the drafting of NBN Co's Wholesale Broadband Agreement. The table below differs slightly from that provided in the May Submission as a result of the proposed removal of the concept of Reference Offers and Non-Reference Offers, and as a consequence of other changes proposed by NBN Co in this submission. All of the changes in the table are also shown in the marked-up version of the SAU that accompanies this response.

Table 1 - Price-related variations proposed by NBN Co

Ref	SAU clause reference (in marked-up SAU provided)	Variation proposed by NBN Co	Rationale for proposed variation
1	1C.2.6	Separate out the different CVC traffic classes i so that they each have their own table.	Ensures that there is no doubt about the fact that each CVC line item is a separate offer and that it does not imply that "TC-1 (CIR) and TC-4 (CIR)" means that this combination is an offer in its own right. This ensures that each CVC Offer is uniquely defined and removes any ambiguity in definition.
2	Schedule1C	150kbps (TC-1) be changed to 0.15Mbps (TC-1).	WBA Price list has been modified to 0.15Mbps, and this definition is more technically correct.
3	1C.2.4	Separate out the different traffic classes so that they each have their own row.	Ensures that there is no doubt about the fact that each line item is a separate offer and that it does not imply that "TC-1 and TC-2" means that this combination is an offer in its own right. This ensures that each Symmetric Access Capacity Offer is uniquely defined and removes any ambiguity in definition.
4	1C.2.10	Change to "Multicast AVC Offers <u>s</u> "	Ensures that there is no doubt about the fact that each line item in the price table is a separate NBN Offer, consistent with other tables in this Schedule.
5	1C.2.11	Change to "Multicast Domain Offers <u>s</u> "	Ensures that there is no doubt about the fact that each line item in the price table is a separate NBN Offer, consistent with other tables in this Schedule.
6	1C.2.12 [NEW clause]	Include separate section for "Multicast Media Stream Offers". This would be implemented by: <ul style="list-style-type: none"> • creating a new clause 1C.2.12, which will define the "Multicast Media Stream Offers"; • including the new defined term in the SAU Dictionary; • deleting the reference to "Media Streams" from the Multicast Domain Offer in clause 1C.2.10 (as these will now be separate offers) 	Ensures that each price tier for media streams is a separate NBN Offer, and ensure that that there is only one price point for each Multicast Domain Offer.
7	1C.4.1(f)	Change to "Multicast AVC Offers <u>s</u> "	Aligns with proposed change to 1C.2.10.
8	1C.4.1(g)	Change to "Multicast Domain Offers <u>s</u> ", and	Aligns with proposed change to 1C.2.11.

Ref	SAU clause reference (in marked-up SAU provided)	Variation proposed by NBN Co	Rationale for proposed variation
		do not include part (ii).	
9	1C.3.1(h) [NEW clause]	Include separate section for "Multicast Media Stream Offers"	Aligns with proposed addition of new clause 1C.2.12.
10	1C.3.2(a)	Change the Subsequent Installation charge to "Hourly Labour Rate plus cost of materials, charged for a minimum amount equivalent to 3.67 hours".	Subsequent Installation is currently subject to a minimum charge of \$270, which translates to 3.67 hours at the current Hourly Labour Rate of \$75 per hour.
11	1C.3.2(a)	Change price of NNI 1000BaseT setup from "\$,1000" to "\$1,000"	Typographical error.
12	1C.3.2(b)	Change the name of the activity "Rearrangement/Modification" to "Equipment modification (attendance at Premises required)"	Reflects change made in WBA Price List, and ensures SAU charge is appropriately aligned.
13	1C.3.2(a) to (c)	In the tables, remove the column headed "Chargeable unit".	The information in the column is redundant. It is not relevant for how the charges are applied.
14	1C.3.2(a) to (d)	In the tables, change the column heading to "Chargeable activity".	This accounts for the fact that not all of the charges listed are for a set amount. Some are based on the Hourly Labour Rate, or the Hourly Labour Rate plus cost of materials.
15	Section 1 of Attachment C to the main body	Change the definition of Hourly Labour Rate to "Hourly Labour Rate means, at the SAU Commencement Date, \$75 per hour, rounded up to the next full hour required to perform the relevant activity".	This is to align with how the Hourly Labour Rate applies under the WBA.

6 Non-Price terms and conditions

6.1 SFAA commitments

In section 2.5.1 of the Response to Submissions, the ACCC proposes to delete clauses 1H.6, 1H.7, Annexures 2 and 3 of Schedule 1H, Schedule 1J (including Annexure 1) and Schedule 2F.⁴⁶

NBN Co has no further comments on these amendments.

6.1.1 Dispute management processes

As NBN Co indicated in section 2 of Appendix B of its May Submission, the Dispute Management Rules in Schedule 1H of the SAU are intended to establish a dispute resolution scheme that:

- is applicable to all disputes between NBN Co and Customer under or in relation to agreements under which NBN Co provides services;
- enables NBN Co to comply with its non-discrimination obligations; and
- facilitates the fair, impartial and final resolution of disputes without unnecessary delay or expense, through the application of the provisions of the Commercial Arbitration Act 2010 (NSW) (CAA).

Summary of refined approach

The Draft Decision recommended that the Dispute Management Rules in Schedule 1H should be removed from the SAU. NBN Co indicated in its May Submission that it proposed to accede to this recommendation in part, and attached a revised dispute resolution module at section 7 of Appendix C to its May Submission.

Having regard to the Response to Submissions, and following further consideration, NBN Co proposes to modify the approach described in its May Submission in two respects:

- consistent with the ACCC's draft notice to vary; the removal of material comprising Appendix 2 to the proposed Module into Module G of the WBA and the Dispute Guidelines, as described in more detail below; and
- minor timing and wording adjustments which NBN Co believes are desirable from a timetabling and clarification perspective.

A flow diagram depicting the Dispute Management Process is included in the Appendix to this submission.

Removal of Appendix 2 of Module does not affect safeguards

As indicated in its May Submission, NBN agrees that it is beneficial for the ACCC to play a role in relation to the appointment of the Resolution Advisor and Pool, to remove the perception, and avoid the risk, of a lack of independence of the Resolution Advisor and Panel members, and these safeguards should be set out in the SAU rather than in the terms of an access agreement to which the ACCC is not a party.

Safeguards in Schedule 1H of the SAU

Revised Schedule 1H of the SAU continues to incorporate the following safeguards:

- ACCC approval of Resolution Advisor;

⁴⁶ Response to Submissions, p.125

- ACCC approval of Pool members;
- ACCC approval of terms of appointment of Resolution Advisor, Pool members and Panel members;
- NBN Co appoints Resolution Advisor and Pool members after ACCC approval of appointment and terms;
- ACCC approval of termination of appointment;
- ACCC approval of guidelines; and
- ACCC power to direct Resolution Advisor.

In its May Submission, NBN Co indicated that those provisions of Annexure 1 of Schedule 1H containing the substantive dispute resolution mechanisms governing a particular dispute, will be removed from the SAU.

By way of further refinement, NBN Co proposes this removal also applies to Appendix 2 of section 7 of Appendix C of the May Submission (consistent with the ACCC's Draft Notice to Vary). Arguably those provisions are of their nature more directed to a bilateral or multilateral dispute, than general architecture and regulatory safeguards to which the material in the SAU is directed.

NBN Co proposes to revise Module G of the WBA to incorporate the material previously proposed to form Appendix 2 of the dispute resolution module, save in two respects as follows.

NBN Co proposes that the Dispute Guidelines (to be reviewed and approved by the ACCC under Part C of Schedule 1H), should contain material from clause 2.1 and 2.3(c) of Appendix 2 recording the principles (but not the machinery pertaining to an actual dispute in clauses 2.2 and 2.3(a), (b) and (d) relating to:

- classification of disputes (clause 2.1); and
- the criteria for joinder in industry relevant disputes (clause 2.3).

NBN Co proposes to make this distinction because it wishes to commit, and for Customers and the ACCC to be satisfied, that these principles form part of the general architecture of the dispute resolution procedures for all disputes across all access agreements and not differ between access seekers because it relates to the resolution of disputes across multiple access agreements and therefore there is a clear advantage to uniformity of approach on classification and joinder.

The revised approach ensures that:

- the access agreements focus on the mechanism of dispute resolution; and
- the Dispute Management Rules in the SAU cover areas where it is reasonable for the ACCC to be involved to help ensure the integrity of the dispute resolution mechanisms through its impartial implementation.

NBN Co considers that this is in the long-term interests of end-users, as it promotes regulatory certainty in respect of the efficient, consistent and unbiased resolution of disputes.

Proposed change to Draft Notice to Vary

Amend Annexure 1 of Schedule 1H.

6.2 POI related matters

6.2.1 Interconnection at listed POIs

In section 2.5.2 of the Response to Submissions, the ACCC proposes the following amendments to the SAU:

- deletion of clause 1H.4.4 of Schedule 1H of the SAU;
- deletion of the approval process in clause 1H.4.3(b) of Schedule 1H of the SAU, except for parts relating to notification to access seekers;
- amendment of clause 1H.4.5(b) of Schedule 1H of the SAU so that NBN Co will provide access seekers with at least 12 months' notice of the migration of premises from the temporary POI to an established POI;
- include clause 1I.4.5 to clarify that the ACCC would be able to require NBN Co to provide additional information (than what is noted in the SAU) through Regulatory Determinations; and
- amendment of clause 1A.3.5 to include:
 - a new sub-clause 1A.3.5(e) that would require, for fibre and wireless access services, NBN Co to only offer interconnection for a particular CSA at the POI which is generally closest to the end-users in that CSA and consistent with POI planning rules devised to identify the location of the listed POIs to the NBN. The POI planning rules may be amended from time to time with the ACCC's approval; and.
 - a new sub-clause 1A.3.5(f) that would require NBN Co to migrate any premises initially connected to a Temporary POI to an Established POI within 12 months of the opening of the Established POI for those premises.

Alternatively, the ACCC proposes to delete clause 1A.3.5 from the SAU with the effect that the location for interconnections for a CSA is to be determined via commercial negotiations, or failing that a Regulatory Determination.⁴⁷

NBN Co has no further comments on the first three of these amendments.

In relation to amendment four, the addition of clause 1I.4.5 (now clause 1H.4.5), NBN Co submits that this clause is unnecessary as clause 1H.4 is unambiguous and permits the intended operation of Part XIC. The inclusion of clause 1H.4.5 may in fact cause uncertainty as to the intended role for Regulatory Determinations for other POI related matters (other than providing further information) and in other areas of the SAU where such an explicit clarification is not made.

⁴⁷ Response to Submissions, pp.127-129

In relation to amendment five, the amendment of clause 1A.3.5, NBN Co submits that the ACCC's second option (the deletion of clause 1A.3.5) is preferable, and consistent with the criteria for acceptance of the SAU. For example, in relation to proposed sub-clause 1A.3.5(f), while NBN Co has consistently expressed its intention to migrate premises from the Temporary POIs to the Established POIs and is planning on that basis, it is possible that it may not be in the long-term interests of end-users for that to occur within a 12 month period in all instances. It is also possible that, for reasons beyond NBN Co's control, it is not possible for all of the relevant Access Seekers to take the required steps for migration within a 12 month period, for example due to the time required to finalise arrangements (eg with Telstra) for interconnection at the relevant Established POI and/or for backhaul from the Established POI. Deletion will also ensure that there can be no future potential inconsistency between the ACCC's exercise of its existing powers under the CCA and the operation of clause 1A.3.5.

In the event that the ACCC is ultimately not prepared to accept that deletion is consistent with the criteria for acceptance of the SAU, NBN Co submits that clause 1A.3.5 will require further refinement as follows:

- Sub-clause 1A.3.5(a) – restore 'a' between 'NBN Co will specify' and 'POI'.
- Sub-clause 1A.3.5(b) and the opening words ('Except in the circumstances referred to in clause 1A.3.5(f),'):
 - For the reasons identified above, NBN Co does not believe that this proposed commitment is reasonable, in circumstances where NBN Co may be unable to comply with it due to circumstances or factors beyond NBN Co's reasonable control.
 - In any event, the sub-clause is inconsistent with clause 11.4.3(b), which requires NBN Co to give '**at least 12 months' notice** of migration' (emphasis added) of premises from a Temporary POI to an Established POI.
 - NBN Co has been opening Established POIs since April 2012 and would therefore already be unable to comply with this commitment in its current form.
- Sub-clause 1A.3.5(e) – NBN Co suggests that the words 'that is the closest in the NBN Co Network to the CSA,' be deleted, so that the sub-clause requires the Established POI for a CSA to be '...the Established POI determined in accordance with the POI planning rules.....'. 'Closest' is not defined and accordingly there is uncertainty as to what is required for compliance by NBN Co – does closest mean 'geographically' closest for example? In any event, the POI planning rules contain sufficient detail. For example, the planning rules for Regional and Outer Metro POIs which provide for the POI to be in the '*...maximally served Telstra exchange, with a minimum of 2 backhaul transmission operators, is **closer to the mainland state capital city along each of the transmission paths, and the remaining contiguous FSAs (ie non-POI FSAs) are minimally served.***' [emphasis added] – this indicates that generally a POI will be nearer the edge of the AAR closest to the capital city, not the middle, so that premises are not always homed to the geographically nearest POI.
- Sub-clause 1A.3.5(g) should be deleted, as it is not required in addition to sub-clause 1A.3.5(b) and (c), and in any event it is not clear how it is intended to interact with those other provisions, which could give rise to uncertainty.

Proposed change to Draft Notice to Vary

Delete clause 1H.4.5.

Delete clause 1A.3.5.

6.3 Additional variations proposed by NBN Co

In Attachment A of the Response to Submissions, the ACCC has listed a set of minor variations that NBN Co had suggested in its May Submissions, on which it is seeking views on whether to adopt in the Notice to Vary.⁴⁸

NBN Co supports the inclusion of these minor variations in the Notice to Vary, for the reasons set out in its May Submission.

In addition, NBN Co proposes a number of similar minor variations in Schedule 1F (Regulatory Information), as listed below, and shown in the marked-up SAU provided with this response.

- Provide the risk free rate and nominal rate of return as part of the Actual Financial Information each year (by 31 October in respect of the previous Financial Year) rather than as part of the Forecast Financial Information (by 30 June in respect of the next Financial Year). This is more practical given that the sample period for the risk free rate comprises the last 20 business days before the start of the relevant Financial Year.
- Remove the item for “accounting and tax asset lifetimes” in the Proposed Financial Information because it duplicates the information to be provided as part of the Actual Financial Information.
- Remove the requirement to set out Capital Expenditure by Asset Type in an Expenditure Compliance Report because the same information is provided as part of the Actual Financial Information.
- Change the nature of the Expenditure Compliance Report, from a certification to an opinion, to reflect the change to the LTRCM arrangements in Module 1, in particular that the ACCC rather than NBN Co will apply the prudency arrangements.
- Remove the requirement to provide the information for each prior Financial Year as part of the Expenditure Compliance Report in the First Financial Year. Given that all Operating Expenditure and Capital Expenditure prior to the SAU Commencement Date is deemed prudent there would be no utility in this exercise, and NBN Co notes that there is a separate provision for providing Actual Financial Information in relation to Financial Years prior to the First Financial Year.

Proposed change to Draft Notice to Vary

Amend clauses 1F.1.2, 1F.1.3, 1F.1.4, and 1F.2.1, and delete (former) clause 1G.2.2.

⁴⁸ Response to Submissions, p.137

7 Fixed Principles

In section 2.6 of the Response to Submissions, the ACCC proposes to amend clause 5 of the SAU to specify the following clauses as fixed-principles terms and conditions:

- the Regulatory Asset Base roll-forward equation;
- the fact that the annual revenue requirements will be calculated using the following building block components — a return on capital (nominal vanilla WACC x Regulatory Asset Base), depreciation, operating expenditure and tax allowance; and
- the deemed prudent expenditure categories relating to the Telstra and Optus arrangements.⁴⁹

The ACCC states that the only matters in the SAU that should be specified as fixed principles are those relating to long-term cost recovery for which there is no scope for the term or condition to be implemented or operationalised in a future SAU variation in a manner which does not meet the statutory criteria.⁵⁰ In adopting this view, the ACCC states that only the three terms and conditions noted above should be specified as fixed principles.

NBN Co welcomes the specification of these terms and conditions as fixed principles terms and conditions, but for the detailed reasons set out in its May 2013 submission, remains of the view that the Final Notice to Vary should specify all of the terms and conditions of Modules 0 and 2 as a fixed principles term and condition.

Nevertheless, even on the conditions identified by the ACCC (for specifying a term or condition as a fixed principle), NBN Co considers that there are a number of other terms and conditions in the SAU that should be specified as fixed principles, including terms and conditions relating to the roll-forward of the ICRA, the Maximum Regulated Price, Expiry of the SAU and the fixed principles term and condition.

Roll-forward of the ICRA

The ICRA roll forward (clause 2C.5.4) keeps account of the extent to which NBN Co has recovered its costs, as measured by the ABBRR, over the period from the Cost Commencement Date until a particular point in time. The ICRA is, by definition, inextricably linked to long term cost recovery and is a stock of value that needs the same recognition as the RAB. Similar to the RAB, it should not have the future operational and implementation issues discussed in the ACCC's Response to Submissions.

Maximum Regulated Price

The Maximum Regulated Prices for NBN Offers clause (2B.2) is an important counterpart to the RAB and ICRA clauses because it serves to define the relevant price controls within which NBN Co is able to pursue its long term cost recovery. The elements of clause 2B.2 are well defined and designed to enable ready implementation and compliance

⁴⁹ Response to Submissions, p.136

⁵⁰ Response to Submissions, pp.135 -137

Expiry

The expiry of the SAU (clause 3.2) sets out the framework for NBN Co's long-term cost recovery. It underpins all of the clauses in the SAU providing for long-term cost recovery, including those the ACCC proposes to be included as fixed principles terms and conditions. Further, the nature of this clause means that it would not have the future operational and implementation issues discussed in the ACCC's Response to Submissions.

Fixed Principles terms and conditions.

Clause 5.3 of the SAU should be specified as a fixed principle to ensure that the 'fixed principles' status provided to the long-term cost recovery clauses listed in this provision are preserved for the duration of the SAU. As with the expiry clause, the nature of this clause means it would not have the future operational and implementation issues noted by the ACCC.

In summary, NBN Co submits that the Final Notice to Vary should also specify clauses 3.2, 5.3, 2B.2 and 2C.5.4 as fixed principles terms and conditions pursuant to clause 5.3.

NBN Co welcomes the ACCC articulating its understanding of the ACCC's role in assessing SAU variations, including the position that the ACCC is only able to assess (and make a decision to accept or reject) the variation (and not the existing terms in Module 0 and 2).⁵¹

NBN Co submits that the ACCC's position on this matter should be incorporated into the SAU for the avoidance of doubt. In the absence of the SAU specifying all of the terms and conditions in Modules 0 and 2 as a fixed principles term and condition, adopting this approach would provide NBN Co with a level of certainty around the unaffected continuation of the accepted terms and conditions in Modules 0 and 2 during the Replacement Module Process.

To this end, NBN Co proposes that the Final Notice to Vary amend clause 4.4(c) to insert a series of acknowledgements of the ACCC's position with regards to assessment of SAU variations, as stated in its Response to Submissions. NBN Co has specifically drafted these amendments to the Replacement Module Process in a manner consistent with the ACCC's stated position and the operation of Part XIC, thus relying on existing Part XIC mechanisms, while providing NBN Co with a level of certainty.

Proposed change to Draft Notice to Vary

Amend clauses 5.3 and 4.4 (c)

⁵¹ Response to Submissions, pp.135 -137

Appendix – Dispute management process flow diagram

Resolution Advisor (RA)

Pool Members

Pool/Panel Terms

Dispute Guidelines

COMMENCEMENT OF SAU

