

nbn submission to ACCC– Variation to the NBN Co Special Access Undertaking

13 November 2020





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1 Introduction

On 8 May 2019 **nbn** submitted a variation to the SAU in relation to the three provisions that expired at the end of the Financial Year that was 5 years after the SAU Commencement Date (i.e. 30 June 2019):

- the endorsed network change provisions in clauses 1D.8 to 1D.12 (**Endorsed Network Change Provisions**);
- the dispute resolution provisions in clause 1H.5 and Annexure 1 to Schedule 1H (**Dispute Resolution Provisions**); and
- the detailed Product Development Forum processes in Annexure 1 to Schedule 1I (**Detailed PDF Processes**),

(together the **Expired Provisions**). The SAU variation was accompanied by a supporting submission (**Original Supporting Submission**) which provided **nbn**'s arguments in support of the variation. The Original Supporting Submission should be read in conjunction with this subsequent supporting submission.

On 20 May 2019 the ACCC sought feedback from stakeholders on the extension of the Expired Provisions and submissions were received from ACCAN, Optus and Telstra. As detailed further below, a key concern outlined in these submissions was whether the Detailed PDF Processes were delivering the outcomes expected by industry. In response to these concerns, and an existing **nbn** initiative to identify areas of improvement for the PDF, **nbn** undertook a consultation with PDF Members to further explore RSP concerns and implement enhancements to address these concerns (**PDF Improvements Consultation**).

nbn considers that the PDF improvements implemented (or in progress) as a result of the PDF Improvements Consultation will play a significant role in addressing the concerns raised by PDF Members. In addition to the improvements outlined in the consultation closure paper, **nbn** has advised PDF Members that it will put in place an annual review to enable continuous improvement and ensure that the forum is operating as effectively as possible for both PDF Members and **nbn**.

The Detailed PDF Processes remain an effective mechanism for encouraging transparency and consultation in the development of product ideas, and therefore ensuring that **nbn** develops products that access seekers and end-users value. In turn, this encourages efficient investment in, and use of, **nbn**'s network, which is one of the elements of the LTIE test. The most recent improvements to the PDF support these underlying principles of the Detailed PDF Processes (transparency and effective consultation) and should provide PDF Members with an increased confidence in the forum's operation. **nbn** submits that the improvements to the PDF processes described in this submission can be implemented without the need for any drafting changes to the Detailed PDF Processes in the SAU.

Accordingly, **nbn** considers that it is in the LTIE that the current Detailed PDF Processes (in conjunction with the Endorsed Network Change Provisions and Dispute Resolution Provisions) be extended until 30 June 2023. Further detail in relation to feedback on each of the Expired Provisions, and **nbn**'s response, is set out below.



2 Endorsed Network Change Provisions

As highlighted in **nbn**'s Original Supporting Submission, **nbn** has not used the Endorsed Network Change Provisions since the commencement of the SAU. This is because all capital expenditure in respect of network changes has been made in accordance with the Network Design Rules or a Permitted Variation to the Network Design Rules.

Nevertheless, **nbn** considers that the basis on which the ACCC accepted the Endorsed Network Change Provisions in its Final SAU Decision remains relevant. The operation of the Endorsed Network Change Provisions until the end of the Initial Regulatory Period would continue to encourage efficient investment in (and operation of) **nbn**'s network, which is one of the elements of the "reasonableness" test.

Efficient investment would continue to be supported by providing a mechanism through which access seekers and consumer advocacy groups can participate in determining whether network changes are efficient - where such network changes are not otherwise made in accordance with the Network Design Rules or a Permitted Variation to the Network Design Rules. In particular, the Endorsed Network Change Provisions ensure that the relevant network changes reflect the needs of access seekers and end-users, thereby ensuring the efficient operation of **nbn**'s network.

With the exception of ACCAN, feedback to the ACCC's request for submissions did not raise major concerns with the Endorsed Network Change Provisions. The concern raised by ACCAN was that it is difficult to validate the Endorsed Network Change Provisions as being in the LTIE given that they have not been used since the SAU was first approved. **nbn** appreciates that the efficacy of the processes is difficult to prove until such time as they are used. However, it is important that an avenue for access seekers to endorse those network changes outside of Permitted Variations remains in place. The existing Endorsed Network Change Provisions provide a clear and consistent process to achieve this and, until such time as the provisions are triggered and a deficiency identified, it would be inefficient and potentially lead to worse outcomes to seek changes to the existing construct, or the provisions are allowed to expire. We also note that the Endorsed Network Change Provisions provide a role for the ACCC if access seekers object to the network change option proposed by **nbn**.

3 Dispute Resolution Provisions

As noted in **nbn**'s Original Supporting Submission, the dispute resolution process set out in the SAU has not yet been used. While **nbn** has continued to comply with the Dispute Resolution Provisions regarding appointment of the Dispute Resolution Advisor and Pool Members (including since their expiry on 30 June 2019), no formal dispute has been triggered requiring resolution under these processes as incorporated in **nbn**'s Wholesale Broadband Agreement or other Standard Form of Access Agreement.

However, **nbn** considers that the Dispute Resolution Provisions continue to provide a useful framework for guaranteeing that any disputes that arise in future will be resolved in an impartial and unbiased manner (e.g. through an independent Dispute Resolution Advisor, Pool Members and Panel Members).

With the exception of ACCAN, feedback to the ACCC's request for submissions did not raise major concerns with the extension of the Dispute Resolution Provisions. The concern raised by ACCAN was that *'the provisions have failed to promote the long term interests of end-users as they have not supported resolution of conflicts between*



service providers and NBN Co, nor service improvements through better processes. nbn disagrees with this characterisation of the merits of the Dispute Resolution Provisions. The key reason that the provisions have not been seen to support the resolution of conflicts between service providers and nbn is because any disputes arising between the parties have been resolved without the need to trigger a formal dispute utilising these provisions. The resolution of conflicts without the need to trigger such formal processes, which would drive additional effort and expense into both access seeker and nbn organisations, is in the LTIE.

As with the Endorsed Network Change Provisions, it is in the LTIE that the SAU continues to capture detailed dispute resolution provisions. There is currently no clear basis on which to amend the existing Dispute Resolution Provisions and, until such time as the provisions are triggered and a deficiency identified, it would be inefficient and potentially lead to worse outcomes to seek changes to the existing construct, or allow it to expire.

4 Detailed PDF Processes

nbn's product development processes were the focus of feedback from ACCAN, Optus and Telstra to the ACCC. In response to this feedback, and nbn's existing review of the PDF, nbn initiated the PDF Improvements Consultation to better understand PDF Member concerns and seek to implement appropriate solutions.

The initial consultation paper was issued in March 2020 and submissions were received from several PDF Members. In addition to reviewing this formal feedback, nbn provided the opportunity for interested PDF Members to meet with nbn and discuss their concerns and nbn's position. Due to the impact of the COVID-19 pandemic, which necessarily shifted PDF Member and nbn priorities, the consultation process period needed to be longer than initially expected and concluded on 27 October with the issuing of the consultation closure paper.

Set out below are the key feedback themes raised by PDF Members to both the ACCC and nbn consultations, and corresponding improvements to the PDF process that nbn has implemented as a result.

Product Construct Papers and Industry Consultation Papers

When consulting on new products and product changes via the PDF, nbn has historically used two key templates: (1) Product Construct Papers (PCP); and (2) Industry Consultation Papers (ICP). The first of these is used when a new product or product change is technically captured by the SAU and therefore triggers the PCP process captured in Schedule 1I of the SAU. The second template has been used where nbn is consulting on a new product or product change for an access technology that is not covered by the SAU, or for consultation on other matters that are not technically a new product or product change.

Feedback from PDF Members indicates that members remain unclear on this SAU/non-SAU distinction for consultation papers or question the relevance to PDF Members. In order to address this concern, nbn has implemented the following changes to the consultation process:

- 1) **Use of a single PCP template for SAU and non-SAU product ideas:** Acknowledging the feedback from RSPs, nbn will use the PCP template for consulting on product ideas whether or not the relevant access technology is subject to the SAU. While the ICP template may still serve a purpose for PDF engagement that is not introducing or amending a new product (for example the PDF Improvements Consultation), this consistent use of PCPs for all product ideas should provide greater clarity for PDF Members.



- 2) **Consistent treatment of SAU and non-SAU product ideas:** nbn has updated its processes to ensure greater alignment in the treatment of product ideas and consultation processes irrespective of whether the idea relates to an access technology covered by the SAU or not. nbn has also amended its Product Idea publication process so that, if a submission would meet the criteria of a Product Idea if the relevant access technology was covered by the SAU, this submission will be published to the PDF and treated as if it were subject to the SAU PDF processes.

Product Idea review process

PDF Member feedback indicated a lack of clarity regarding what product ideas qualify for consideration under the PDF process. nbn considers that the process change that has been implemented to ensure consistent treatment of SAU and non-SAU access technologies should help address this concern.

Another matter raised in relation to Product Ideas was that the mechanism is rarely used by PDF Members. nbn considers that a key reason for the relatively low volume of formally submitted Product Ideas may be the ongoing engagement between nbn and PDF Members. While nbn ensures that new products or product changes are consulted on openly via the PDF, ideas published by nbn for consultation are often the result of either informal access seeker suggestions or ideas arising from discussions between nbn and one or more access seekers.¹ If RSP concerns / proposals are progressing into the PDF via this avenue, this would likely reduce the need for PDF Members to submit a formal Product Idea.

In line with this, one PDF Member has recommended that nbn's account teams are available for discussions with PDF Members to consider proposals before the PDF Member lodges a formal submission. nbn is very supportive of this and to the extent that PDF Members were not clear on the availability of account managers for these discussions nbn has reiterated this in both the PDF Improvements Consultation and the updated PDF Handbook provided to PDF Members.

If the low volume of ideas being submitted to the PDF is due to a lack of PDF Member confidence or clarity in the process nbn is keen to ensure that this is addressed. nbn anticipates that the updated processes described above should help increase PDF Member confidence in Product Idea submission but has also sought other suggestions from PDF Members that could further improve the value of the Product Idea submission process.

Consultation management

PDF Members raised several points in relation to Consultation Management, including:

- 1) **Managing overlapping consultations:** Some access seekers raised concerns with the volume of consultation materials issued through the PDF (particularly when combined with parallel WBA consultations). The consultation feedback indicated that access seekers were not necessarily requesting that nbn reduce the volume of consultation but that nbn:
 - a. seek to reduce overlap of consultations (whether the duplication is between PDF consultations or between a PDF and WBA consultation);
 - b. ensure nbn is consistent in its use of the PDF process; and
 - c. ensure that related initiatives are combined and consulted on as a single piece of work where appropriate.

¹ [Commercial-In-Confidence]



Based on the feedback and **nbn**'s internal considerations the following 3 improvements have been identified / implemented to address these concerns:

- a. *Enhanced co-ordination of RSP consultation materials:* **nbn** has put in place an internal co-ordination point to consider whether RSP consultations are overlapping and should be consolidated.
 - b. *Enhanced Roadmap:* **nbn** has undertaken a comprehensive review of the Integrated Product Roadmap and recently released the Enhanced Roadmap. Released monthly, the Enhanced Roadmap provides a more comprehensive and granular view of RSP-impacting initiatives and milestones leading up to launch, and a clearer link between PDF consultation and launch activities.
 - c. *Improved clarity in proposed outcome of PCPs:* **nbn** will give greater consideration to the purpose of each consultation and reflect this in future PCPs so that PDF Members can allocate time effectively.
- 2) **Scheduling of consultation releases:** Feedback regarding scheduling of consultations generally suggested that **nbn** should not seek to implement a strict schedule of when consultations can be released. By addressing issues of overlap, and improving the forward-looking view of consultations, it is anticipated that this should help address the core concerns regarding release volume and scheduling.
- 3) **Consultation period:** PDF Member feedback does not indicate any change is required to the timeframes that **nbn** currently employs for consultation. In line with current practice and PDF member feedback, **nbn** will continue to use a standard PCP consultation period of 6 weeks unless the particular consultation justifies a shorter or longer period.

Consultation feedback

PDF Members raised two key issues in relation to consultation feedback:

- 1) **Transparency of PDF Member feedback:** Some PDF Members have noted concerns with the transparency of the PDF. A challenge of the PDF to date has been ensuring that **nbn** respects PDF Member confidentiality while ensuring that PDF Members have an accurate view as to the feedback received by **nbn**. While it will remain necessary to not publish confidential submissions (or extracts from them), **nbn** will implement the following steps to ensure that confidence in the transparency of the PDF is enhanced:
 - a. *Enabling self-publication:* A key change in the updated PDF Portal will be a clearer process for PDF Members to identify that a submission is for publication to all PDF Members.² While the initial build will still require a manual step on **nbn**'s behalf (i.e. to transfer the submitted non-confidential response from a private PDF Member folder to the relevant public consultation folder) the updated process should remove any ambiguity as to whether a PDF Member intends for their submission to be private or shared with the PDF. **nbn** will target completion of the manual step within 1 business day and aims to automate this step at a later stage.
 - b. *Summary of response numbers:* In addition to the summary of feedback that **nbn** provides in updated or final consultation papers, **nbn** will also include a summary of the number of PDF responses received on each consultation (specifying confidential and non-confidential numbers). This should provide PDF Members with greater visibility of the actual volume of feedback and

² [Commercial-In-Confidence]



improve confidence that **nbn** is making all public feedback available.

- 2) **Responding to feedback and reason for nbn decisions:** Some PDF members have indicated that it is not always clear if **nbn** has taken on board feedback and requested that **nbn** provide more clarity on the reasoning of its decisions. Taking on board the concerns from PDF Members in relation to treatment of feedback, **nbn** will trial adding a more detailed feedback table to closure papers so that PDF Members have a clearer view of these issues and the reasoning behind **nbn**'s decision. While this will still focus on key themes and not necessarily be able to cover every item of PDF Member feedback, it should provide PDF Members with a clearer view of how **nbn** has considered core issues.

nbn continues to welcome follow up discussions with PDF Members to ensure that where an item is not specifically covered in a closure paper and a PDF Member would like to understand the reasons behind a decision on the product or how **nbn** considered the member's feedback.

In its submission to the ACCC consultation, ACCAN has also suggested that **nbn** provide more detail regarding its revenue requirements in specific consultations. **nbn**'s view is that **nbn** revenue requirements should not be a focus of the product development forum which is intended to identify RSP appetite for new or varied products and ensure all RSPs have the opportunity to input into the development of these products.

Constraints of confidential information

ACCAN's submission to the ACCC raised concerns regarding the confidential nature of the consultation process, which can inhibit ACCAN from engaging with member organisations on matters that directly impact their interests. **nbn** appreciates the concerns raised by ACCAN but must equally balance the need to maintain confidentiality of RSP and **nbn** information, as well as contain the development forum so that it does not become unmanageable. To manage these competing interests, the PDF is generally subject to strict confidentiality requirements but **nbn** has permitted the sharing of certain consultation papers with parties outside the PDF where there is a genuine need.³

ACCAN has also recommended that **nbn** consider an open and public consultation process. **nbn** has undertaken this approach for some select consultations in the past (e.g. Fibre TV). However, opening up all consultations to the public without regard to the specific product development could negatively impact the product development process in two ways. First, this could lead to an overly complex consultation process where it is not possible to effectively manage and respond to submissions – and unnecessarily delay product development. Second, creating this public forum for all consultations may counter the ability of PDF members to provide honest feedback that is essential to the process. As above, **nbn** will continue to consider appropriate requests where ACCAN or other PDF Members consider external stakeholders may have a real and genuine interest in a development, and where direct feedback from those stakeholders is critical to the consultation.

³ [Commercial-In-Confidence]



5 Summary

nbn has considered in detail the key concerns raised by access seekers in relation to the Expired Provisions. As noted above, the Endorsed Network Change Provisions have not been triggered since the approval of the SAU. Nor has there been a relevant dispute to trigger the Dispute Resolution Provisions in that time.

In relation to the Detailed PDF Processes, **nbn** has undertaken a detailed consultation with PDF Members regarding the operation of the PDF - with tangible outcomes designed to further improve the transparency and effectiveness of the forum. **nbn** considers that these improvements will further enhance the operation of, and PDF Member confidence in, the PDF. These changes (the majority of which have already been implemented or are in train) are possible without changes to the current Detailed PDF Processes set out in the SAU.

On this basis, **nbn** considers that it is in the LTIE that the Expired Provisions be extended until 30 June 2023.