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Commission

Variation to NBN Co Special Access Undertaking

Consultation paper

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
AVC	Access Virtual Circuit
CCA	Competition and Consumer Act 2010 (Cth)
CIR	Committed Information Rate
CVC	Connectivity Virtual Circuit
DBD	Dimension Based Discounting
FTTB	Fibre to the Building
FTTN	Fibre to the Node
FTTP	Fibre to the Premises
HFC	Hybrid Fibre Coaxial
LTIE	Long-term interests of end-users
LTRCM	Long Term Revenue Constraint Methodology
MRP	Maximum Regulated Price
MTM	Multi-Technology Mix
NBN	National Broadband Network
NBN Co	NBN Co Limited
NNI	Network to Network Interface
NTD	Network Termination Device
PIR	Peak Information Rate
POI	Point of Interconnection
RFS	Ready for Service
RSP	Retail Service Provider
SAOs	Standard Access Obligations
SAU	Special Access Undertaking
SFAA	Standard Form of Access Agreement
TC	Traffic Class
UNI	User Network Interface
WBA	Wholesale Broadband Agreement

Glossary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executive summary

NBN Co has submitted a revised variation to its Special Access Undertaking (the SAU). The main purpose of the revised SAU variation is to incorporate the three additional technologies under the multi-technology mix (MTM) model – fibre-to-the-node (FTTN), fibre-to-the-building (FTTB) and hybrid fibre coaxial (HFC) – into the SAU.

This SAU variation follows the previous SAU variation that NBN Co has lodged and which has now been withdrawn. The ACCC had made its draft decision to reject the previous SAU variation following consultation with interested parties.

In the draft decision, the ACCC proposed to reject the SAU variation because of concerns with proposed changes on three non-price matters. First, the ACCC was concerned that a proposed change to the definition of 'NBN Co Network' would result in key service description terms for new technologies being established outside the SAU and which would be subject to change over time without ACCC assessment or consultation. Second, the ACCC was concerned that the proposed removal of the network boundary point definition from the SAU would result in uncertainty for access seekers in respect of maintenance responsibilities. Third, the ACCC was concerned about the proposed co-existence and remediation provisions for FTTN and FTTB service operating for the remainder of the SAU term to 2040.

The ACCC also sought additional stakeholder comments on the application of SAU price terms to MTM services and on commitments to provide rollout information.

In the revised SAU variation, NBN Co has proposed to exclude reference to any other networks from the definition of NBN Co Network. NBN Co had previously proposed to include such a reference so that it could introduce a new network type, which would be covered by the SAU without the need for a further variation. NBN Co has also reinstated the definition of network boundary point into the SAU. In making these changes in the revised variation, NBN Co has reflected comments made by the ACCC in the draft decision.

NBN Co has also proposed to limit operation of the proposed co-existence and remediation provisions to module 1 of the SAU, which will operate until June 2023. In making this change, NBN Co has addressed a significant part of the ACCC concerns regarding the duration for which the proposed provisions would apply. Further, NBN Co has proposed further changes to the content of the proposed co-existence and remediation provisions. These further changes would limit the scope of the co-existence provisions to defined legacy technologies and provide scope for additional remediation and interference mitigation activities.

The ACCC seeks further feedback from interested stakeholders on the proposed co-existence and remediation provisions, particularly on their application until the end of module 1 and on the further changes to the content of the provisions.

NBN Co has made no further changes in the revised SAU variation compared to the previous SAU variation, but has made additional supporting submissions on the application of SAU price terms to MTM services.

The ACCC acknowledges the ongoing industry concerns about NBN Co's pricing, particularly the level of CVC prices. These concerns have been raised in submissions to the previous SAU variation and in the context of the ACCC's communications sector market study. The ACCC considers these concerns have the potential to impact competition in downstream markets and end-user experiences. Further, there is a risk that these concerns will continue and may even be magnified as the NBN rollout continues and usage increases.

The ACCC is aware that NBN Co is currently consulting with its customers about its pricing. The ACCC welcomes this development by NBN Co and considers any agreed outcome on pricing between NBN Co and its customers is likely to be preferable to any regulatory outcome. However, if a commercial outcome cannot be achieved, the ACCC will consider whether changes to NBN Co's pricing could be made that would promote more efficient outcomes for NBN Co, RSPs and for consumers.

The ACCC is continuing to consider submissions to the draft decision on the application of SAU price terms to MTM services and NBN Co's supporting submission to the revised SAU variation. However, the ACCC would welcome any further views on whether NBN Co's prices can be appropriately reconsidered with the SAU variation in place. The ACCC would also welcome other stakeholders' views on NBN Co's further submission.

Further, the ACCC would also welcome further views on whether the current pricing model is reasonable for MTM services given there is more variability and uncertainty about the speeds that can be achieved.

The ACCC is still considering submissions made to the draft decision on other aspects of the SAU variation. Although the ACCC is not specifically seeking comments on these other aspects, the ACCC would welcome any further comments stakeholders may have.

1 Introduction

1.1 Background to the SAU and the previous variation

NBN Co's Special Access Undertaking (SAU) sets out the principles for regulating access to the National Broadband Network (NBN) until June 2040. It provides a framework for governing price and non-price terms of access to services supplied by NBN Co over the NBN. The ACCC accepted the current SAU in December 2013 following an extensive consultation and assessment process.

The current SAU contains several provisions that reflect the previous NBN model, which was to be delivered using fibre-to-the-premises (FTTP), fixed wireless and satellite technologies. The current model for the NBN is a multi-technology mix (MTM) model that incorporates the additional technologies of fibre-to-the-node (FTTN), fibre-to-the-building (FTTB) and hybrid fibre coaxial (HFC).

On 27 May 2016, NBN Co submitted a proposed variation to the SAU to the Australian Competition and Consumer Commission (ACCC) (the previous variation). The main purpose of the previous variation was to incorporate the three network technologies into the SAU. NBN Co also proposed a number of other changes to the SAU, including:

- the introduction of 'co-existence' and 'remediation' provisions for FTTN and FTTB services
- changes to rollout information commitments, and
- a number of other amendments, including changes to the appointment of a dispute resolution advisor and to a formula used to make NBN Co's long term revenue constraint methodology (LTRCM) determination.

1.2 Consultation on the previous SAU variation

On 28 March 2017, the ACCC published a draft decision to reject NBN Co's previous variation due to concerns with a number of non-price terms and conditions. The ACCC's concerns related to three matters:

- changes to the service description that would allow future technologies introduced by NBN Co to be covered by the SAU without a further SAU variation
- removing the definition of the 'network boundary point' from the service description, and
- locking in 'co-existence' and 'remediation' provisions for FTTN and FTTB services for the remainder of the SAU term.

Additionally, the ACCC called for further stakeholder input on changes to rollout information commitments and the application of the SAU pricing provisions to services provided using MTM technologies.

The ACCC invited submissions on the draft decision on the previous variation until 28 April 2017. Six submissions were received from stakeholders.¹

¹ The ACCC received submissions from ACCAN, CCC, Kansoly, Optus, Telstra and NBN Co.

1.3 Lodgement of a revised variation

On 22 June 2017, NBN Co withdrew the previous variation and simultaneously submitted a revised SAU variation to the ACCC (the revised variation). The revised variation consists of an execution document and a marked up version of NBN Co's current SAU. The varied terms are denoted by underlined words for additions and struck-out words for deletions. The remainder of the SAU is unchanged. NBN Co also provided a comparison version of the revised variation against the previous variation which shows all changes in the revised variation as mark-up against the previous variation.

NBN Co also lodged a supporting submission focusing on the changes that NBN Co has included in its revised variation which were not included in the previous variation.

The revised variation and supporting documents (public versions) are available on the ACCC website.²

NBN Co submits that the revised variation is similar in most respects to the previous variation. However, NBN Co has made changes to the proposals in the revised variation that are responsive to the concerns the ACCC set out in the draft decision on the previous variation.

Similar to the previous variation, the purpose of the revised variation is to incorporate the MTM technologies into the SAU. The changes in the revised variation (relative to the previous variation) include:

- the reinstatement of definition of network boundary point in clause 2(c) of Attachment A (service description)
- the removal of previously proposed paragraph (g) from the definition of NBN Co Network in Attachment C (Dictionary), and
- refinement of the co-existence and remediation provisions and removal of these provisions from Module 2 of the SAU.

Other than the changes above, the terms of the revised variation are the same as those set out in the previous variation to the SAU.

1.4 Assessment approach

The ACCC must assess a variation to the SAU against the legislative criteria outlined in section 152CBD(2) of the *Competition and Consumer Act 2010* (CCA). Based on this assessment, the ACCC must decide to accept or reject the proposed variation.

Broadly, the ACCC must not accept the variation unless:

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

² See documents on the [ACCC website](#).

The ACCC has previously outlined the scope for assessment of an SAU variation in its consultation paper and draft decision on the previous variation. Consistent with its previous approach, the ACCC's assessment of the revised variation will be an assessment of the varied terms, the effects of the varied terms, and the interaction of the varied terms with unchanged provisions in the SAU. In other words, the ACCC proposes to assess varied terms in the context of the whole SAU. As previously stated, the ACCC does not consider the assessment of the SAU variation to be a reassessment of each existing provision in the SAU.

For more information on the ACCC's assessment approach, please see Appendix A.

1.5 Timeframe for assessment

Part XIC of the CCA specifies a time limit for the ACCC's assessment of a proposed variation to NBN Co's SAU. The ACCC must decide to either accept or reject a proposed variation within 6 months of receiving the variation, subject to the ability of the ACCC to extend this period by giving written notice to NBN Co.³ If the ACCC does not make a decision within the statutory time period, it is deemed to have accepted the variation.⁴

In addition the ACCC's decision-making period is also extended by the following events:

- the period in which the ACCC is undertaking a public consultation.⁵
- any period during which the ACCC has requested further information from NBN Co under section 152CBH and is waiting for NBN Co to respond.⁶

1.6 Consultation on the revised SAU variation

With the exception of the changes set out in 1.3 above, we note that the terms of NBN Co's revised variation are the same as those set out in its previous variation to the SAU. These matters have been the subject of the ACCC's previous consultation. We propose to consider the submissions made in response to the draft decision on the previous variation as part of our assessment to the revised variation.

We welcome any additional stakeholder comments on the revised variation, particularly the matters set out in 1.3 above. We ask that industry participants and other interested parties who wish to make submissions to this consultation paper, also include reasons to support their views.

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

³ Each extension may be for no more than three months. The ACCC must explain in its notice why it was unable to make a decision on the SAU during the original (or previously extended) decision-making period - CCA. ss. 152CBG(9) and (10).

⁴ CCA. s. 152CBG(7).

⁵ CCA, s 152CBD(2)(d).

⁶ CCA. s. 152CBG(8)(b).

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

The ACCC prefers to receive submissions in electronic form, in either PDF or Microsoft Word format which allows the submission text to be searched. Submitters should ensure that redacted information is not searchable or otherwise able to be disclosed.

Please email submissions by **5.00pm, Friday, 25 August 2017** to nbn@acc.gov.au and copy to:

Scott Harding

Director

ACCC

Scott.Harding@acc.gov.au

Nathan Sargent

Assistant Director

ACCC

Nathan.Sargent@acc.gov.au

2 Service description

Service description is a key component of the SAU as it defines the scope of NBN Co's commitments and the services to which those commitments apply. The service description defines the declared services that NBN Co will provide to retail service providers (RSPs) under the SAU.

Elements of the SAU that define the service description include:

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

2.1 Overview of revised SAU variation

The main purpose of the SAU variation is to incorporate the MTM technologies (FTTN, FTTB and HFC) into the SAU. NBN Co proposes to do this by:

- expanding the definition of NBN Co Network and including additional definitions of NBN Co FTTN Network, NBN Co FTTB Network and NBN Co HFC network, and
- amending the definitions for NBN Access Service, UNI and other related terms so they are consistent with the MTM technologies.

The ACCC's draft decision on the previous variation discussed these changes in detail.⁷ The differences between NBN Co's previous variation and its revised variation are discussed below.

2.2 Consideration of previous SAU variation and responses to draft decision

2.2.1 Changes to service to description to incorporate MTM technologies

In the draft decision the ACCC expressed its view that the proposed changes to service description terms aimed at incorporating the current MTM services into the SAU were reasonable.⁸

The application of the NBN access service over the MTM technologies will provide access seekers a wider range of technologies, which will allow access seekers to supply a variety of services to end-users in all geographic areas, hence reducing barriers to entry and promoting competition. The proposed changes, including to lock-in key elements, such as UNI and NBN Co Network for each technology type, are likely to promote efficient use of NBN Co's services and promote efficient investment. The ACCC also considered these changes to be consistent with NBN Co's legitimate business interests and the interests of access seekers and end-users.⁹

⁷ ACCC, *Variation to NBN Co SAU draft decision*, March 2017, p. 14.

⁸ ACCC *Draft decision on variation to NBN Co SAU*, March 2017, p. 22.

⁹ *Ibid*, p. 23.

However, the ACCC raised concerns with respect to the extent to which NBN Co proposed to broaden the definition of NBN Co Network and its proposal to remove the definition of the network boundary point from the NBN Access Service provisions.¹⁰

2.2.2 Broadened definition of NBN Co Network

In addition to its proposal to broaden the definition of NBN Co Network to the MTM technologies, NBN Co previously proposed to also extend this definition to include 'any other telecommunications network'. The effect of this clause would have been to incorporate future technologies not yet developed by NBN Co into the SAU without the need for a further SAU variation.¹¹

In the draft decision, the ACCC indicated that this would not provide sufficient certainty to access seekers about services to be provided over future technologies. In particular, key terms relating to the service description would not be specified in the SAU for new technologies. These key terms would be left to NBN Co's Wholesale Broadband Agreement (WBA), which may be varied by NBN Co, and would not be subject to ACCC assessment or consultation. The ACCC therefore considered that broadening the definition of NBN Co Network to future technologies would not promote efficient use of NBN services, provide for efficient investment or promote competition in downstream markets.¹²

Optus, ACCAN and Telstra supported the ACCC's draft decision and agreed that the proposal to broaden the definition of NBN Co Network to include 'any other telecommunications network' would not provide sufficient certainty to access seekers about services to be provided over future technologies.¹³ However, Telstra was of the view that omitting the provision completely would have the effect of limiting the definition of NBN Co Network to those specific networks currently being used to supply services as part of the NBN.¹⁴

Telstra submitted that the provision should be amended to include a reference to future network technologies but to limit its inclusion to those technology types used to provide the NBN Co Ethernet Bitstream Service (NEBS).¹⁵

Kansoly submitted that the consequence of not supporting NBN Co's broadened definition of NBN Co Network is that new technologies will take longer to be provided. Kansoly argued that it is in the LTIE that NBN Co can flexibly and rapidly deliver new technologies to maintain and enhance a telecommunications network.¹⁶

In its submission to the ACCC's draft decision, NBN Co disagreed with the ACCC's draft view that the proposed changes were not reasonable. It submitted that the broadened definition of NBN Co Network was intended to provide an efficient means of allowing new network technologies that satisfied the SAU's service description to be brought within the SAU framework in a more streamlined manner over time. Further, NBN Co contended that the ability for it to readily incorporate new technologies within the SAU framework provides

¹⁰ Ibid, p. 23.

¹¹ NBN Co, *Supporting Submission to the ACCC – Variation to the NBN Co Special Access Undertaking*, 27 May 2016, p. 8.

¹² ACCC, *Draft decision on variation to NBN Co SAU*, March 2017, p. 22-23.

¹³ Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, pp. 8-9; ACCAN, *Submission to ACCC draft decision on NBN Co SAU*, 28 April 2017, p.1 ; Telstra, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 6.

¹⁴ Telstra, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 6.

¹⁵ Ibid, p. 6.

¹⁶ Kansoly, *Submission to the ACCC on the draft paper on NBN Co 2016 Special Access Undertaking variation*, p. 1.

access seekers with certainty that new technologies will be brought within the regulatory framework as they are implemented.¹⁷

NBN Co states in its supporting submission to the revised variation, that it does not agree with the ACCC's reasoning in the draft decision or that the changes were not reasonable. However, NBN Co has responded to the ACCC's concerns by removing the reference to 'any other telecommunications network' from the definition of NBN Co Network.¹⁸

2.2.3 Network boundary point definition

NBN Co previously proposed to remove a provision within the NBN Access Service definition which specifies the network boundary point for all technology types. In the ACCC's draft decision it stated that the removal of the definition of the network boundary point was not reasonable and was likely to increase uncertainty for access seekers and introduce ambiguity around maintenance responsibilities. The ACCC considered that this uncertainty was not consistent with the interests of access seekers or end-users, and could reduce incentives for efficient investment in certain customer-end infrastructure.¹⁹

NBN Co reiterated its view that the definition of the NBN Access Service was clear and it was redundant to have a separate network boundary point definition in the SAU variation. However, it was receptive to the ACCC's suggestion to reinstate the provision noting that if it did reinstate it, it would only be set out in the SAU at a high level.²⁰

Telstra, Optus and ACCAN agreed with the ACCC that removing the network boundary point from the definition of NBN access service was not reasonable, and would introduce ambiguity around maintenance responsibilities.²¹

In its supporting submission to the revised variation, NBN Co submits that the reinstatement of the provision is workable on the understanding that the SAU provision is high level in nature and that the operational detail of the network boundary point applicable at each network type, is left to the WBA. NBN Co has therefore proposed to retain the network boundary point definition in its revised variation.²²

2.3 Matters for consultation

The ACCC is of the view that NBN Co has addressed the concerns of the ACCC and stakeholders on matters relating to service description by adopting the recommendations proposed by the ACCC in the draft decision. NBN Co has now reinstated the network boundary point definition and removed the reference to 'any other telecommunications network' from the definition of NBN Co Network. The ACCC considers the proposed changes in the revised variation on service description provides a high degree of certainty to access seekers about the services provided by NBN Co over the term of the SAU.

As NBN Co has accepted the further changes recommended in the draft decision to the previous variation, the ACCC is not seeking any particular feedback on matters related to

¹⁷ NBN Co, *Submission to ACCC draft decision – variation to the NBN Co SAU*, 28 April 2017, p. 2.

¹⁸ NBN Co, *Supporting Submission – Revised Variation to NBN Co SAU – 22 June 2017*, p. 3.

¹⁹ ACCC, *Draft decision on variation to NBN Co SAU*, March 2017, p. 22.

²⁰ NBN Co, *Submission to ACCC draft decision – variation to the NBN Co SAU*, 28 April 2017, p. 4.

²¹ Telstra, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 6; Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 9; ACCAN, *Submission to ACCC draft decision on NBN Co SAU*, 28 April 2017, p. 1.

²² NBN Co, *Supporting Submission – Revised Variation to NBN Co SAU – 22 June 2017*, p. 4.

service description as part of this consultation, but would welcome any further comments stakeholders may have.

3 Co-existence and remediation

NBN Co is proposing to include provisions on 'co-existence' and 'remediation' in the SAU as key supply terms.

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

Remediation occurs when NBN Co is required to undertake reasonable actions to ameliorate the line rate for services provided over NBN Co's FTTN or FTTB networks so that the line is capable of achieving the peak information rate (PIR) objective. The remediation provision would allow NBN Co to conduct remediation to the acquired copper network if the line is not able to meet the PIR objective. In both cases, NBN Co would be allowed to supply services at lower data rates than otherwise provided for by the SAU.

3.1 Overview of revised SAU variation

NBN Co has proposed two key changes in the revised variation in relation to co-existence and remediation, compared to the previous variation.

First, NBN Co proposes that the co-existence and remediation clauses will apply for the duration of module 1 until June 2023. This is in contrast to the previous variation, where it was proposed the provisions would operate for the duration of the SAU term until June 2040.²³

Second, NBN Co proposes further drafting amendments to the co-existence and remediation provisions to further clarify the scope of the provisions. NBN Co submits that the inclusion of co-existence provisions addresses the technical limitations of FTTB/FTTN services co-existing with legacy services during the transition period, while the remediation provisions provide the basis for NBN Co to address problems with copper lines. Further, NBN Co considers that the interference mitigation provisions allow NBN Co to respond to third party interference to its services while managing the interests of all affected users.²⁴

The key changes to the proposed provisions are as follows:

- a narrowing in the scope of services that can be covered by the co-existence provisions. NBN Co has proposed that the co-existence clauses only apply where the relevant NBN service co-exists with a pre-defined legacy service (i.e. ADSL, ADSL2, ADSL2+, SHDSL, ISDN and other services)
- the refinement of the remediation provisions to address interference management and the introduction of new definitions of Interference Event and Interference Mitigation
- the amendment of the remediation provisions to clarify that the effect of remediation or interference management is that speeds may be less than both the PIR Objective

²³ NBN Co, *Supporting Submission – Revised Variation to NBN Co SAU* – 22 June 2017, p 5.

²⁴ NBN Co, *Supporting Submission – Revised Variation to NBN Co SAU* – 22 June 2017, p 6.

(relevant to TC-4 AVCs) and the Committed Information Rate (CIR) objective (relevant to TC-2 AVCs) and

- the relocation of substantive definitions of terms used in clauses 1A.4.4 and 1A.4.5 from Attachment C (Dictionary) to those clauses respectively.²⁵

3.2 Consideration of previous variation and responses to draft decision

In its previous variation, NBN Co proposed to include co-existence and remediation provisions into the SAU as key supply terms to apply for the remainder of the SAU term.

In its draft decision, the ACCC agreed in principle with including specific provisions for co-existence and remediation in the SAU. However, the ACCC was concerned that the proposed provisions were likely to give NBN Co broad discretion over the circumstances in which an FTTN or FTTB node is placed into the co-existence period or when a line is placed into remediation and the period for which these provisions would apply. The ACCC was not satisfied that locking in these provisions for the remainder of the SAU term will ensure efficient and reasonable outcomes over that period. The ACCC did not specify a timeframe, but indicated this could be for duration of module 1 or for a defined period that ends before the end of module 1.²⁶

The ACCC also considered that the lack of information commitments to access seekers and end-users about services that are subject to co-existence or remediation could also lead to uncertainty for end-users and may result in them making decisions based on inadequate information about the data rates they can expect.²⁷

In response to the ACCC's draft decision on the previous variation, NBN Co submitted it would be reasonable for the provisions to apply for the duration of module 1 – that is, until 2023, given NBN Co's natural incentives to bring services out of co-existence and remediation to provide higher data rate services. NBN Co further indicated that it is highly unlikely that NBN Co's incentives in relation to the co-existence and remediation would change prior to the end of module 1. NBN Co submitted that any shorter period would create additional (and unnecessary) transaction costs and deprive NBN Co of regulatory certainty.²⁸

In its supporting submission to the revised variation, NBN Co submits that there are currently no cases of the co-existence period ending for an impacted FTTB or FTTN node as several interfering services types continue to exist on the Telstra network. A substantial proportion of node services contain special services. These special services prevent NBN Co from moving the relevant nodes out of co-existence until they are disconnected in 2019. Once these special services are disconnected in 2019, NBN Co indicates that this will improve the rate at which NBN Co can end the co-existence period in respect of the relevant nodes. NBN Co therefore submits that it is important to have co-existence provisions in the SAU.²⁹

In the case of remediation, NBN Co submits that it has not performed any instances of remediation, as so far, services are being investigated and restored by the initial workforce without the need for escalation for remediation to a more specialised team. However, remediation clauses will be required in the future to address copper degradation over time.

²⁵ See definition of co-existence in clause 1A.4.4(b) and remediation in clause 1A.4.5(a) of the varied SAU.

²⁶ ACCC, *Variation to NBN Co SAU draft decision*, March 2017, pp. 31-32.

²⁷ *Ibid*, pp. 32-33.

²⁸ NBN Co, *Submission to ACCC draft decision – variation to the NBN Co SAU*, 28 April 2017, p. 5.

²⁹ NBN Co, *Supporting Submission – Revised Variation to NBN Co's SAU* – 22 June 2017, p. 8.

NBN Co therefore submits that its ability to undertake remediation when and as required remains important to NBN Co.³⁰

In its response to the draft decision, Telstra submitted that it did not object to some co-existence and remediation provisions being included in the SAU. However, it considered that where service performance is degraded due to factors outside an RSP or end user's control, including performance issues related to co-existence and remediation, NBN Co should provide discounts to RSPs as compensation.³¹

Telstra also considered it would not be appropriate to incorporate NBN Co's proposed definitions of co-existence or remediation into the SAU given that its definition in the WBA is still the subject of ongoing negotiations. With respect to co-existence, Telstra agreed with the ACCC in that any co-existence provisions that are ultimately included should only be included in module 1 of the SAU and not in module 2.³²

In regards to remediation, Telstra supported (in principle) the inclusion of remediation provisions in module 2 as this approach will provide greater certainty to NBN Co and access seekers than the alternative of including the remediation provisions in replacement schedules.³³

In its response to the draft decision, Optus agreed with the ACCC's views that it is too early to lock in NBN Co's proposed co-existence and remediation provisions for the entire SAU term. Optus submitted that the current co-existence and remediation provisions have not been in place long enough for the ACCC to be satisfied that they are reasonable and will promote the LTIE.³⁴

ACCAN and Optus agreed that the information commitments from NBN Co should be strengthened to ensure that accurate and timely information in regards to the number of services affected by these provisions and the applicable duration is provided to access seekers.³⁵

3.3 Matters for consultation

In its revised variation, NBN Co has proposed to limit the operation of the proposed co-existence and remediation provisions to module 1. In removing the proposed provisions from module 2, NBN Co has addressed a key concern of the ACCC and stakeholders on the duration for which the provisions would be locked in. In the draft decision, the ACCC indicated that the provisions should apply for a limited time within module 1, but did not specify a specific end date for the clauses.

Considering that the disconnection of special services will not begin until 2019 and that the expected timeframe for final disconnection of special services is three years following this date, having the co-existence provisions apply for the duration of module 1, with the option of including co-existence provisions after this date through the replacement module process, could be appropriate. Further, the fact that no cases of remediation have been recorded could be evidence that the current arrangements are working effectively and issues with

³⁰ NBN Co, *Supporting Submission – Revised Variation to NBN Co's SAU* – 22 June 2017, p 8.

³¹ Telstra, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 8.

³² *Ibid*, pp. 7-8.

³³ *Ibid*, p. 8.

³⁴ Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 8.

³⁵ ACCAN, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 1; Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 9.

copper lines are being addressed at an earlier stage, which lends further support to having the provisions apply for the duration of module 1, as opposed to a shorter period.

The ACCC seeks stakeholder views on the duration for which the co-existence and remediation provisions should apply, and in particular, whether the module 1 timeframe is reasonable.

The ACCC also seeks stakeholder views on the proposed amendments to the co-existence and remediation provisions. The ACCC considers that the proposed changes represent an increased commitment compared to the previous variation. The scope of the co-existence and remediation provisions has been narrowed to specific legacy services. Further, the proposed remediation provisions provide for remediation to meet CIR objectives and to address issues of interference, whereas the proposed remediation provisions were limited to the PIR objective. The ACCC welcomes stakeholder views on these matters.

The other proposed refinements seem to broaden the operation of the provisions (e.g. introduction of the CIR Objective, and Interference Mitigation) and increase NBN Co's commitment to provide more information to its customers on when it will conduct remediation and how it will manage the remediation process. The ACCC considers that these provisions are likely to be appropriate but is interested in stakeholder views.

The ACCC welcomes any further comments by interested parties in relation to the refinement of the co-existence and remediation provisions and in particular the incorporation of new provisions dealing with 'interference management'.

The ACCC acknowledges ACCAN and Optus's submissions on whether NBN Co should provide further information regarding the number of services affected by the co-existence and remediation provisions. The ACCC seeks views whether there are other ways outside the SAU where access seekers can receive that information.

4 Application of SAU price terms to MTM services

The SAU sets out an overarching framework for setting prices for NBN services. This framework includes the following key elements, referred collectively as the SAU price terms:

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

4.1 Overview of the revised SAU variation

NBN Co's revised variation only includes a limited number of changes to the SAU price terms. These proposed changes are the same as those proposed in the previous variation.

Specifically, NBN Co has proposed a number of changes to clause 1C.2 to specify NBN offers for services supplied over NBN Co's MTM networks. The price terms for these services are largely the same as the prices for equivalent services under the current SAU (except for the inclusion of a number of MTM-specific services).

4.2 ACCC Consideration of previous SAU variation

4.2.1 ACCC's draft decision

In the ACCC's draft decision on the previous variation, the ACCC considered that there were a number of arguments in favour of applying existing SAU price terms to the MTM services being reasonable.³⁶ These arguments were also considered when the ACCC accepted the SAU in 2013. These arguments include:

- NBN Co should have the opportunity (but not guarantee) to recover its costs over the long term³⁷,
- the SAU provides incentives for NBN Co to price services efficiently in order to increase traffic and uptake of higher value services³⁸,
- the SAU price terms include the ability for the ACCC to rebalance prices in a revenue neutral manner which would be retained and extended to the MTM services under the proposed variation³⁹,
- the SAU pricing model is based on the service an end-user receives, rather than the specific access technology⁴⁰, and
- pricing MTM services outside the SAU through another framework may lead to complexity and uncertainty.⁴¹

³⁶ ACCC, *Draft decision on variation to NBN Co SAU*, March 2017, p. 65.

³⁷ *Ibid.*, p. 60.

³⁸ *Ibid.*, p. 61.

³⁹ *Ibid.*, p.63.

⁴⁰ *Ibid.*, p. 64.

In general, the ACCC considered that NBN Co's proposed approach to incorporating the MTM services within the SAU framework was unlikely to materially change the assessment upon which the original SAU was accepted in 2013. In particular, the ACCC considered that NBN Co would continue to face incentives to only incur efficient expenditure and price services efficiently so as to increase traffic and uptake of higher value services.

In the draft decision, the ACCC also noted that accepting the proposed SAU variation, would extend the SAU's price review provisions to the MTM services. These provisions provide the ACCC with the ability to adjust the SAU prices, subject to the constraint that any adjustment must be revenue neutral across the life of the SAU.⁴²

NBN Co's proposed application of the existing SAU price terms to the MTM services is discussed in the submissions from NBN Co, Telstra, Optus, the CCC and ACCAN. These submissions are outlined below.

4.2.2 Submissions to the ACCC's draft decision

Application of price terms to MTM services

NBN Co's submission did not dispute that the application of the SAU price terms to the MTM technologies is within the scope of the ACCC's assessment of the SAU variation, but reiterated that any consideration of the price terms as they apply to existing services is beyond the scope of the ACCC's assessment.⁴³ In addition, NBN Co reiterated its argument that the SAU variation promotes the interests of access seekers by providing certainty about starting prices and price controls for MTM services.⁴⁴

Telstra did not object to NBN Co's proposed application of the SAU price terms to the MTM technologies. However, it restated its concerns that NBN Co had not sought to update the SAU to reflect pricing changes that have occurred since the SAU was accepted in 2013. It argued that this could cause confusion among access seekers.⁴⁵

Both Optus and the CCC disagreed with the ACCC's contention that there are arguments in favour of extending the application of the SAU pricing provisions to the MTM technologies. They both argued that the ACCC's assessment in the draft decision placed too much weight on cost recovery and the incentive structure of the SAU. They also argued that the ACCC's assessment did not adequately consider whether the proposed price terms promote the LTIE, the interest of access seekers, the impact on competition or the efficient use of the NBN.⁴⁶

ACCAN agreed in principle with the ACCC's assessment outlined in the draft decision. However, it submitted that take up of higher speed offerings on the NBN is not occurring, which suggests that the current pricing model is not conducive to increased uptake of services or increased traffic over the NBN.⁴⁷

⁴¹ Ibid, p.64.

⁴² Ibid, p. 65.

⁴³ NBN Co, *Submission to ACCC draft decision – variation to the NBN Co SAU*, 28 April 2017, p. 10.

⁴⁴ Ibid, p.10.

⁴⁵ Telstra, *Submission to ACCC draft decision on variation to NBN SAU*, 28 April 2017, p. 6.

⁴⁶ Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 5, and CCC, *Submission to ACCC Draft Decision on variation to NBN Co SAU*, 28 April 2017, p. 1.

⁴⁷ ACCAN, *Submission to ACCC draft decision on NBN Co SAU*, 28 April 2017, p. 4.

CVC pricing

The majority of the concerns raised by Optus, the CCC and Telstra around the proposed application of the existing SAU price terms to the MTM services relate specifically to CVC.

Optus submitted that market behaviour had changed significantly since the AVC/CVC construct was introduced. It suggests that much greater emphasis is placed on the CVC component now than originally envisioned. Optus argued that as a result, CVC pricing operates as an upstream bottleneck that limits the ability of RSPs to generate positive profits or provide sufficient service quality at prevailing retail prices. Optus also argued that NBN Co's dimension based discount (DBD) pricing scheme does not address the core problem with CVC pricing.⁴⁸

The CCC submitted that as CVC pricing is not cost-reflective and creates artificial scarcity, it has led to limited competition and product differentiation between RSPs. The CCC argued that NBN Co's introduction of the DBD pricing scheme recognises that the SAU prices are neither reasonable nor sustainable.⁴⁹ They further argued that the ACCC's assessment must only consider the prices set out in the SAU (that is, \$20 per Mbps for CVC) and must not take into account the discounted prices currently being offered by NBN Co under the DBD scheme.⁵⁰

Telstra raised concerns that the high cost of CVC has led to a number of small companies starting to provide high speed broadband services over alternative technologies, such as wireless. Telstra also argued that a pricing construct that seeks to differentiate RSPs (such as the DBD by RSP scheme) disadvantages low usage and voice only customers.

SAU price review provisions

Both Telstra and the CCC raised concerns around the mechanism to conduct a price review. Telstra submits that given the revenue neutral constraint in a price review, it is unlikely that a review would address concerns about the high cost of CVC or the pricing construct more generally.⁵¹ The CCC questioned the utility of a price rebalance if the CVC price of \$20 per Mbps was the starting point for a review and not the subsequent discounts, which are now being offered in the market by NBN Co.⁵²

4.3 Further submission from NBN Co

NBN Co made further submissions in support of its proposal to extend SAU pricing terms to MTM services in the revised variation. The key points made by NBN Co are as follows:

NBN Co's opportunity to recover its efficient costs and incentives to price services efficiently

NBN Co submits that a key aspect of the SAU is that it provides NBN Co with the opportunity (but not a guarantee) of recovering its prudent and efficient costs over the term of the SAU including an appropriate return on capital.⁵³

⁴⁸ Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 5.

⁴⁹ CCC, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 6.

⁵⁰ Telstra, *Submission to ACCC draft decision on variation to NBN SAU*, 28 April 2017, p.15.

⁵¹ *Ibid*, p. 14.

⁵² CCC, *Submission to ACCC draft decision on variation to NBN Co SAU*, 28 April 2017, p. 7.

⁵³ NBN Co, *Supporting Submission – Revised Variation to NBN Co's SAU*, 22 June 2017, p. 10.

NBN Co expects to face significant 'long term revenue sufficiency risk' well beyond the initial network rollout and migration due to significant up-front investment, the wholesale only business model and dependence on growth in take-up and usage over time.⁵⁴

Therefore, NBN Co states that it faces strong incentives to incur costs and invest efficiently, price efficiently to drive the uptake of higher value services, and increase the prospects of long term cost recovery.⁵⁵

NBN Co submits that these incentives remain in place and the extension of the SAU pricing construct to MTM services will not impact these incentives or NBN Co's 'long term revenue sufficiency risk'. Further, it argues that applying the price construct to MTM services will also extend various regulatory price protections under the SAU.⁵⁶ It considers that there is considerable evidence demonstrating the incentives, together with the constraints and protections under the SAU, are working effectively in practice and as intended.⁵⁷

The discounts to CVC pricing is, NBN Co suggests, one such example of incentives working in practice. The ability to discount prices such as through the DBD scheme helps drive up demand and achieve cost recovery over the longer term.⁵⁸

NBN Co notes that the ACCC only needs to be satisfied that the MRP for MTM services is reasonable in setting the upper bound on prices that may be set by NBN Co. (that is, through the WBA rather than the SAU).⁵⁹ The MRP for CVC capacity operates as a maximum regulated price, not as an actual price.

Pricing construct promotes economic efficiency

NBN Co disagrees with the assertion that its pricing construct is not cost reflective and does not promote economically efficient outcomes.

NBN Co submits the pricing structure incorporates the following elements:

- NBN Co's pricing is generally consistent across technologies, meaning prices are not reflective of the cost of the specific network over which access is provided.
- NBN Co uses a two-part pricing approach, which is expected to drive cost recovery as NBN Co achieves scale and usage of the NBN network increases as applications shift in favour of more bandwidth intensive usage.
- NBN Co has pricing flexibility (and natural incentives) to price efficiently to drive take up of services and respond to changes to evolving technology, applications and demand to maximise cost recovery, but remains price constrained through MRPs and other regulatory backstops within the SAU, and
- NBN Co is restricted from over-recovery through the LTRCM, which limits NBN Co to recovering its efficiently incurred costs (but no more) over the term of the SAU.⁶⁰

⁵⁴ Ibid.

⁵⁵ Ibid, p. 10.

⁵⁶ Ibid, p. 12.

⁵⁷ Ibid, p. 13.

⁵⁸ Ibid, p. 15.

⁵⁹ Ibid, p. 14.

⁶⁰ Ibid, p. 16.

Revenue neutral price re-balancing enhanced if MTM pricing included

NBN Co submits that the effect of including the MTM related price terms within the SAU is to extend the operation of the current revenue neutral price rebalancing regime to MTM services. The price rebalancing mechanism operates as a regulatory backstop if efficient outcomes do not eventuate through the broader incentives and revenue sufficiency risk. The regime also prevents a situation where NBN Co becomes unable to recover its efficiently incurred costs over the SAU term because of ACCC-determined changes to its pricing. The extension would also allow the ACCC to intervene in a more holistic way in relation to NBN Co's pricing arrangements.⁶¹

Pricing MTM services within the SAU framework

NBN Co agrees that a single regulatory instrument that applies to all NBN Co network types is likely to promote the interest of access seekers by providing long-term certainty around NBN Co's commitments and obligations.⁶²

NBN Co considers that the benefits of using a single regulatory instrument include:

- a consistent approach to regulation across technologies
- the ability to address both the cost recovery (LTRCM) and price control aspects of the NBN Co in an integrated manner within a single regulatory construct
- avoiding potentially inconsistent forms of regulatory treatment being applied across different NBN Co technologies and
- avoiding the regulatory cost and burden on all parties involved in administering more than one regulatory regime governing the same subject matter.⁶³

4.4 Matters for consultation

The ACCC acknowledges ongoing industry concerns about NBN Co's pricing construct, particularly in relation to the level of CVC prices. As indicated above, a key theme from industry submissions throughout the SAU variation process is that changes in the market since the SAU was accepted in 2013 require the ACCC to reconsider the pricing construct. Further, the ACCC has also received views about NBN pricing in other processes, most recently in the communications market study and industry forum.⁶⁴

Some of the specific concerns on the SAU pricing construct raised in these processes include the following:

- NBN Co's pricing construct has not resulted in the economically efficient use of NBN network infrastructure.⁶⁵
- The NBN pricing construct, and in particular the CVC charge, is constraining the uptake of higher value services and use of the NBN.⁶⁶
- In the context of increasing end-user demand for data, the current CVC price levels may make it uneconomic for some RSPs to supply adequate bandwidth for end-

⁶¹ Ibid, p. 19.

⁶² Ibid, p. 21.

⁶³ Ibid, p. 21.

⁶⁴ See [ACCC website](#).

⁶⁵ Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 5; CCC, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 3.

⁶⁶ ACCAN, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 4.

users at prevailing retail prices.⁶⁷ This has placed pressure on RSPs' margins and made it difficult for RSPs to maintain an acceptable end-user experience.⁶⁸

- Despite RSPs welcoming the recent DBD pricing scheme, it is not sufficient to fully address concerns about NBN Co's CVC charge.⁶⁹

Additionally, it has been suggested that the AVC/CVC price construct was developed in the context of the previous NBN model where FTTP was the predominant technology, and is less suited to services supplied over MTM services where there is more variability and uncertainty about the speeds that can be achieved.⁷⁰

The ACCC accepted a long-term SAU from NBN Co, which is intended to cover NBN Co as it transitions from building its network to operating its network. Given this, the ACCC focused on the means by which prices might evolve or change over time in response to industry conditions and market demand. A key aspect of this approach was to ensure pricing flexibility to allow NBN Co to respond to changes to industry conditions both during and after the NBN rollout.

However, the ACCC is also aware that incentives need to be in place for wholesale and retail service providers to provide services with data rates and levels of services that meet end-users' needs and willingness to pay.

The industry has raised concerns regarding the potential effect of NBN pricing on competition in downstream markets and on end-user experiences. Further, there is a risk that these effects will continue and may even be magnified as the NBN rollout continues and usage increases. The ACCC will continue to examine these concerns in its market study.

However, the ACCC is also considering NBN Co's proposal to extend the current pricing construct to MTM technologies as part of the revised variation. As noted in section 4.2, the ACCC received a range of views from stakeholders in response to its draft decision on the previous variation. It has also received an additional submission from NBN Co in support of the revised variation, which, among other things, points to evidence that the incentives in the SAU to price efficiently, together with the price constraints, are working effectively and as intended.

In its initial assessment of the SAU in 2013, the ACCC considered that the SAU pricing framework would allow prices to change in a range of ways in response to changing conditions over time. The ACCC considered the SAU price terms would provide flexibility to allow NBN Co to respond to demand and changing conditions both during and after the NBN rollout. The price controls would provide a degree of certainty to its RSP customers about future price changes and would alleviate price shocks for end-users in the transition to the NBN. The price controls would also place demand risk with NBN Co, thereby providing strong incentives to price efficiently to promote use of the NBN. Finally, the ability to rebalance prices would provide scope for intervention by the ACCC if prices do not lead to efficient outcomes for NBN Co, RSPs and end-users.

The ACCC acknowledges that the pricing issues raised by stakeholders and the matters identified by NBN Co in its supporting submission to the revised variation are complex. The

⁶⁷ Optus, *Submission to ACCC issues paper on Competition in Evolving Communications Markets*, October 2016, p. 28.

⁶⁸ Optus, *Submission to ACCC issues paper on Competition in Evolving Communications Markets*, October 2016, p. 29; Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 7; CCC, *Submission to ACCC issues paper on Competition in Evolving Communications Markets*, October 2016, p. 4.

⁶⁹ Optus, *Submission to ACCC issues paper on Competition in Evolving Communications Markets*, October 2016, p. 29; Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 7.

⁷⁰ ACCC communications market study forum, 3-4 July 2017.

ACCC is aware that NBN Co is currently consulting with its customers about its pricing.⁷¹ This process is ongoing and independent of the SAU variation. The ACCC welcomes this development by NBN Co. It considers any agreed outcome on pricing between NBN Co and its customers is likely to be preferable to any regulatory outcome. However, if a commercial outcome cannot be achieved, the ACCC will consider whether changes to NBN Co's pricing could be made that would promote more efficient outcomes for NBN Co, RSPs and for consumers.

If the revised variation is accepted, the price controls and the AVC/CVC pricing construct, including the mechanism to conduct a price rebalance will apply to MTM services. Acceptance of the SAU variation would mean that prices for all of NBN Co's services can be reconsidered at the same time if a price rebalance was undertaken.

If the SAU variation is not accepted and MTM services are not priced under the SAU, then any rebalance would only apply to FTTP, fixed wireless and satellite services, which would limit any potential benefit of such a review. However, given the price rebalancing provisions are subject to a revenue neutrality constraint, it may not address all the concerns raised by industry stakeholders.

The ACCC is continuing to consider submissions to the draft decision on the application of SAU price terms to MTM services and NBN Co's supporting submission to the revised variation. However, the ACCC would welcome any further views on the proposal in light of the discussion above. In particular, the ACCC welcomes views on whether more certainty would be provided to industry in the future if the pricing construct applied to all technologies over which NBN services are delivered.

Further, the ACCC would also welcome views on whether the current pricing model is reasonable for MTM services given there is more variability and uncertainty about the speeds that can be achieved. Please provide reasons or evidence to support your views.

⁷¹ NBN Co, *Supporting Submission – Revised Variation to NBN Co's SAU*, 22 June 2017, p. 18; Commonwealth of Australia Senate, *Environment and Communications Legislation Committee Estimates*, 28 February 2017, p. 161; Communications Day, *Macquarie Telecom calls on NBN to dump CVC from business product pricing*, 7 July 2017, p. 3; M Smith and T Boyd, NBN to review pricing as part of image problem fix, *Australian Financial Review*, 25 July 2017.

5 Other proposed changes to the SAU

5.1 Overview of the revised SAU variation

In the previous variation, NBN Co proposed to make a number of other changes to the SAU. These proposed changes which remain in the revised variation are as follows:

- *Rollout information provisions* – NBN Co adopts the same changes it proposed in the previous variation. Specifically, NBN Co proposes to change its SAU rollout information commitments to extend their coverage to FTTN, FTTB and HFC technologies. It also proposes a number of further changes to expand and clarify its information commitments.⁷²
- *NBN offers and charges* – Consistent with its previous variation, NBN Co proposes to update the NBN Offers and Charges in Schedule 1C to incorporate the initial Maximum Regulated Prices (MRPs) for FTTN, FTTB and HFC.⁷³
- *Appointment of dispute resolution advisor* – NBN Co proposes changes to enable NBN Co to appoint an additional resolution advisor during the term of the existing resolution advisor if additional support is required and additional pool members once the initial pool has been established. Changes are also proposed to clarify that a body corporate may also be a resolution advisor.⁷⁴
- *Change to the LTRCM formula* – NBN Co proposes to amend the LTRCM clause 1E.9.4(c) in module 1 and clause 2C.1.4(b) in module 2 to correct an error in the formula that it has identified.⁷⁵ NBN Co also proposes to insert a clause in module 1 to clarify that the ACCC will account for the corrected formula in the next LTRCM determination.⁷⁶
- *HFC standard installation* – NBN Co proposes new provisions to define a standard installation for FTTB, FTTN and HFC. For HFC services, a standard installation involves NBN Co mailing the HFC NTD and HFC fly lead to the end-user for self-installation. In addition to a standard HFC installation, NBN Co also proposes introducing a professional HFC-NTD installation under which NBN Co installs all HFC related equipment at the end-user premises. A professional HFC-NTD installation attracts a fee equal to the hourly labour rate for a minimum of two hours (\$150).

5.2 Consideration of previous variation and responses to draft decision

Rollout information

In its draft decision, the ACCC was of the view that NBN Co's proposed changes to extend the rollout information provisions would ensure information is available to access seekers to

⁷² NBN Co, *Supporting submissions to the ACCC – variation to the NBN Co SAU*, May 2016, p. 25.

⁷³ *Ibid.*, p. 23.

⁷⁴ *Ibid.*, p. 60.

⁷⁵ NBN Co, SAU variation, Schedule 1E, clause 1E.9.4(c) and Schedule 2C, clause 2C.1.4(b), pp. 168 and 240.

⁷⁶ NBN Co, *Supporting submissions to the ACCC – variation to the NBN Co SAU*, May 2016, pp. 24-25.

plan for and market NBN services. The ACCC was satisfied that NBN Co would continue to make relevant public information available on its website which would promote the LTIE.⁷⁷

Telstra submitted that the proposed changes failed to strike the right balance between accuracy and providing timely rollout information to stakeholders.⁷⁸

Optus was also concerned that NBN Co's data inaccuracies and use of forecasts that are subject to frequent change has implications for RSP's ability to effectively plan and market NBN services.⁷⁹

ACCAN submitted NBN Co should be required to publicly release its 3-year construction plan on its website.⁸⁰

NBN offers and charges

In its draft decision the ACCC found the proposed charges were consistent with existing market prices, are likely to be cost reflective and allow NBN Co to recover its prudent costs in providing services. The ACCC took the draft view that the proposed charges would promote the efficient use of services.⁸¹

The ACCC acknowledges Optus and Telstra's concerns that the proposed changes would result in different charges for different network types in respect of service installation, service modification and service management charges. The ACCC also acknowledges Optus and ACCAN's submission that some charges are too high.⁸²

ACCAN was also of the view that the charges proposed should only be allowed if there is evidence demonstrating that the reason for the fees are occurring on such a scale that they are causing a significant detriment to the NBN business.⁸³

Appointment of dispute resolution advisor and change to the LTRCM formula

In the draft decision, the ACCC considered it appropriate for NBN Co to seek the proposed amendments to the dispute resolution advisor clauses to ensure clarity, efficient and timely resolution of disputes between NBN Co and its customers. The ACCC also considered NBN Co's proposed amendment to the LTRCM's formula in clause as necessary and reasonable.⁸⁴

HFC standard installation

Optus submitted that the definition of standard installation differs across the access technologies which results in an end-user potentially being charged significant installation costs depending upon the NBN access technology by which they will be served.⁸⁵

⁷⁷ ACCC *Draft decision on variation to NBN Co SAU*, March 2017, p. 40.

⁷⁸ Telstra, *Submission to ACCC draft decision on variation to NBN SAU*, 28 April 2017, p. 9

⁷⁹ Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p. 10

⁸⁰ ACCAN, *Submission to ACCC draft decision on NBN Co SAU*, 28 April 2017, p. 2.

⁸¹ ACCC, *Draft decision on variation to NBN Co SAU*, March 2017 pp. 54-55

⁸² ACCAN, *Submission to ACCC draft decision on NBN Co SAU*, 28 April 2017 pp. 2-3; Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, pp. 11-12.

⁸³ *Ibid*, pp. 2-3

⁸⁴ ACCC, *Draft decision on variation to NBN Co SAU*, March 2017, p. 54.

⁸⁵ Optus *Submission in Response to ACCC Draft Decision to NBN Co Special Access Undertaking (Public Version)*, April 2017, p. 12.

ACCAN submitted that an option other than self-install should be offered for free in HFC areas. ACCAN expressed concerns that professional installation would be required by vulnerable consumers who are unable to complete a self-installation.⁸⁶

Other matters

Telstra submitted that the variation provides an opportunity to clarify how receipts from the Regional Broadband Scheme (RBS) arrangement will be treated under the SAU. Telstra states that the arrangement was never contemplated by the SAU and submits that as the RBS is meant to create transparent and sustainable funding for NBN Co's non-commercial fixed wireless and satellite service, these assets should be separated from NBN Co's other assets for regulatory oversight and reporting purposes. This would ensure avoidance of incidence of inappropriate cost allocation or the inclusion of non-prudent costs in the asset base.⁸⁷

ACCAN also commented on the importance of performance incentives and service level agreements whilst not referred to in the draft decision. ACCAN is of the view that performance and reliability of service are of fundamental importance, and the current arrangement is not sufficiently working for the benefit of end-users. ACCAN considers that strong performance incentives, reporting of performance metrics and incentivised performance scheme should be further explored.⁸⁸

5.3 Matters for consultation

The ACCC is considering submissions made to the draft decision on these other matters. While the ACCC is not seeking specific feedback on any of these other matters, the ACCC welcomes any comments stakeholders may have.

⁸⁶ ACCAN *Submission to the ACCC Draft Decision*, 1 May 2017, p.3.

⁸⁷ Telstra, *Submission to ACCC draft decision on variation to NBN SAU*, 28 April 2017, p. 4.

⁸⁸ ACCAN, *Submission to ACCC draft decision on NBN Co SAU*, 28 April 2017, pp. 2-3; Optus, *Submission to ACCC draft decision on variation to NBN Co SAU*, April 2017, p.5.

Annexure A - ACCC's Assessment approach

1. Regulatory framework

Regulation of terms and conditions of access to NBN Co services

Part XIC of the *Competition and Consumer Act 2010* (CCA) sets out the telecommunications access regime.

NBN Co must only supply services that are declared services. Part XIC of the CCA sets out three means by which services that are supplied by NBN Co, or are capable of being supplied by NBN Co, may become declared services:

- NBN Co can provide the ACCC with an SAU
- NBN Co can publish a standard form of access agreement (SFAA), or
- the ACCC can declare an NBN service following a public inquiry.

The NBN access service was declared when the current SAU was accepted by the ACCC in December 2013.

Once an NBN service is declared, NBN Co must comply with the category B Standard Access Obligations (SAOs). The category B SAOs include the obligations to supply the declared service if requested by a service provider and to permit interconnection of facilities.⁸⁹ NBN Co's SAU must state that NBN Co agrees to be bound by the category B SAOs and undertakes to comply with the terms and conditions specified in the SAU in relation to category B SAOs.

Regulatory hierarchy

While the SAU forms an important part of the regulatory framework for the NBN, the terms and conditions by which NBN Co is required to comply with the category B SAOs may be specified in one or a combination of different instruments. These include:

- access agreements – commercial contracts between the access provider and an access seeker which set out negotiated terms and conditions of supply
- special access undertakings given by the access provider and accepted by the ACCC – documents given by the access provider proposing the terms and conditions on which it will offer access to its services
- binding rules of conduct – written rules made by the ACCC where there is an urgent need to make such rules, specifying any or all of the terms and conditions for compliance with any or all of the SAOs, or requiring compliance with any or all of the SAOs as specified in the rules, and
- access determinations – written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry, specifying any or all of the terms and conditions for compliance with any or all of the SAOs.

Part XIC of the CCA establishes a hierarchy between these instruments to allow parties to identify which terms and conditions are to apply, particularly in the event of inconsistency

⁸⁹ CCA, s. 152AXB.

between the instruments.⁹⁰ Essentially, terms and conditions about a particular matter in an instrument that is higher in the above list will prevail over terms and conditions about the same matter specified in an instrument that is lower in the list.

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

NBN Co's Wholesale Broadband Agreement (WBA) forms part of this regulatory framework. The WBA is a contractual arrangement between NBN Co and its wholesale customers. It is a SFAA, as allowed for by Part XIC. The WBA sets out comprehensive price and non-price terms relating to the supply of NBN services by NBN Co. It also sets out the processes for providing NBN Co's customers with operational and technical information in relation to those services.

2. Assessing the SAU variation

The ACCC must assess a variation to the SAU against the legislative criteria outlined in section 152CBD(2) of the CCA. Based on this assessment, the ACCC must decide to accept or reject the proposed variation.

Broadly, the ACCC must not accept the variation unless:

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

Promoting the LTIE

To determine whether a particular thing promotes the LTIE, the ACCC must have regard to the objectives of:

- promoting competition in the markets for these services
- achieving any-to connectivity in relation to carriage services that involve communication between end-users, and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which these services are supplied and any other infrastructure by which these services are, or are likely to become, capable of being supplied.⁹¹

Reasonableness

To determine whether a particular thing is reasonable, the ACCC must have regard to:

- whether it promotes the LTIE
- the legitimate business interests of the carrier or carriage service provider
- the interests of persons who have rights to use the declared services

⁹⁰ CCA, s. 152AY(2).

⁹¹ CCA, s. 152AB(2).

- the direct costs of providing access to the declared service
- operational and technical requirements necessary for the safe and reliable operation of the service, and
- economic efficiency.⁹²

Other considerations

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

The CCA specifies three reasons why the ACCC must not reject a proposed SAU variation. These reasons relate to price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services, certain authorised conduct and fixed principles provisions that are in effect.⁹³

If the ACCC accepts the variation, the ACCC must give a written notice stating that the variation has been accepted, setting out the terms of the variation.⁹⁴ If the ACCC rejects the variation, the ACCC must inform NBN Co that the variation has been rejected and provide reasons for the rejection. In this case, the existing terms of the SAU continue to apply.

⁹² CCA, s. 152AH.

⁹³ CCA, ss. 152CBD(5A)(a)-(c), 152CBD(5C)(a), 152CBAA(5)(h).

⁹⁴ CCA, ss. 152CBG(3)(5)(6).