



Submission in response to ACCC

**Variation of NBN Co Special Access  
Undertaking**

PUBLIC VERSION

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## Section 1. Overview

- 1.1 The consultation processes on NBN Co's SAU have been running for almost two years with considerable input from the industry.
- 1.2 The length of this process largely reflects the nature of the SAU put forward by NBN Co, which has raised considerable concerns both from the ACCC and the industry. The original SAU tabled by NBN Co in December 2010 was subsequently withdrawn. Revised versions of the SAU were then lodged in September and December 2012, but in Optus' view there remains a need to improve the revised SAU if it is to provide sustainable access conditions that are capable of delivering market outcomes that enable the broader communications sector to meet international benchmarks.
- 1.3 The ACCC has issued a draft variation notice that outlines a considerable number of changes that will need to be made to the current SAU before it can be accepted. These changes seek to respond to the many material concerns raised by industry with the revised SAU.
- 1.4 In broad terms, Optus is supportive of the changes proposed by the ACCC. Importantly, these changes seek to restore the opportunity for independent ACCC oversight of the NBN Co's access terms and to provide a greater degree of balance in the interaction between access seekers and NBN Co than was envisaged in the SAU. Notwithstanding these changes, it is by no means certain that SAU represents the best way to regulate the NBN over the next 30 years.
- 1.5 Even with the amendments proposed by the ACCC, Optus considers that the net effect of the SAU is to circumscribe the powers and flexibility that the ACCC would otherwise have to regulate the terms of access to the NBN under the legislative provisions in Part XIC. It does this by specifying the processes, timeframes and considerations the ACCC must have regard to in assessing the reasonableness of access terms. In this respect, the SAU narrows the powers that Parliament has conferred on the ACCC under Part XIC. The SAU does this in order to provide a high degree of certainty to NBN Co in terms of how it will be regulated. Whilst this approach benefits NBN Co, it is by no means clear that it will always lead to outcomes that benefit consumers. As an example, the SAU provides NBN Co with a high degree of certainty that it can recover its costs plus a guaranteed return. A consequence of this approach is that wholesale (and by corollary retail) prices will rise in real terms over time – reversing the price trends of the past decade in the Australian telecommunications industry.
- 1.6 Further, Optus notes that the SAU remains a highly complex regulatory instrument with many inter-dependent components. This complexity raises the scope for confusion and future disagreements to arise in terms of how it will operate in practice. There is every prospect that the SAU will need to be revised in the future to address such concerns.
- 1.7 Whilst Optus supports the ACCC's proposed variations and strongly encourage NBN Co to adopt these, Optus nevertheless reserves judgement on the long-term utility and appropriateness of the SAU.
- 1.8 In this submission Optus has provided comments on the ACCC's proposed amendments to the SAU. In the majority of cases Optus supports the proposed variations. However, Optus has recommended some further changes to deal with concerns that have not been addressed appropriately or where we consider that the variation proposed by the ACCC may not have the impact it expects.

- 1.9 Optus makes the following recommendations in respect of the draft Variation Notice:
- (a) NBN Co should not be able to enforce provisions in an Access Agreement that are not agreed by both parties. The SAU should provide that specific terms in an Access Agreement which are not commercially agreed can be subject to regulatory determinations during the term of the Access Agreement;
  - (b) Provision should be made for earlier review of NBN Co's prices, in particular the pricing assumptions relating to the CVC – which are already likely to be out of date; and
  - (c) Further drafting changes designed to reinforce and clarify the ACCC's role in overseeing the operation of the LTRCM.

## Section 2. Flow through in access agreements

### Recommended variations to SAU

**Clause 6:** Amend to include commitment that:

- (a) NBN Co will allow an Access Seeker to sign an Access Agreement with reservation on specific clauses.
- (b) Any reserved clauses will not form part of the signed Access Agreement and may be subject to regulatory determinations.

- 2.1 Optus is concerned that the ACCC has failed to appreciate the details of industry's concerns about regulatory flow through to *existing* access agreements. Optus raised concerns in its previous submission on this. Optus' concerns have increased following its experience negotiating with NBN Co in relation to the latest version of the WBA, where NBN Co is exercising its market power to *impose* on Access Seekers a provision excluding rights under Part XIC of the CCA.
- 2.2 The legislative hierarchy is intended to allow commercial agreements to forego regulatory rights where *both* parties agree. However, it appears that NBN Co, and now the ACCC, are interpreting the hierarchy as allowing one party to exclude legislative rights unilaterally regardless of the view of the other party. Optus believes this interpretation is inconsistent with the intent of the hierarchy.

### **ACCC interpretation of the problem**

- 2.3 The Draft Decision identified a potential risk where Access Seekers *must* enter into an SFAA-based Access Agreement (AA) to obtain access on regulated terms. The ACCC has noted that this created uncertainty as to how NBN Co would comply with its obligations under the SAU and Part XIC of the Act.
- 2.4 The ACCC state that the SAU commitments could be interpreted as follows:
  - (a) NBN Co *must* comply with an Access Seeker's request to supply a service on regulated terms as set out in the SAU and regulatory determinations, so long as the terms are not inconsistent with an Access Agreement;
  - (b) Access Seekers do *not* have to enter into an Access Agreement to obtain access on regulated terms; and
  - (c) NBN Co, Access Seekers or the ACCC can enforce the terms in regulatory determinations.<sup>1</sup>
- 2.5 Optus and other interested parties considered that the SAU should contain an obligation for NBN Co to flow-through regulated terms into Access Agreements, during the lifetime of the

<sup>1</sup> ACCC, Response to Submissions, p.15.

Access Agreement.<sup>2</sup> That is, where a regulatory determination is made during the lifetime of an Access Agreement (i.e. during the two year period), the Agreement should be updated to reflect the new terms of service. Failure to do so may result in Access Seekers being denied regulatory recourse for a two-year period. The ACCC rejected such an approach, stating that it would be inconsistent with regulatory hierarchy in the Act:

*In relation to the arguments of interested parties that additional commitments should be included in the SAU to allow for flow-through of regulated terms into Access Agreements, the ACCC does not propose to allow for regulatory intervention on disputed terms in an executed Access Agreement. **This is because requiring regulated terms to be incorporated into Access Agreements would conflict with the primacy of commercial agreement that is established by Part XIC.***<sup>3</sup> [Emphasis added]

- 2.6 However, Optus submits that this interpretation misrepresents the position put forward in responses to the Discussion Paper. Optus agrees that the where two parties *voluntarily agree* to forego regulatory rights for compensation (i.e. lower access prices) than regulatory determinations should not be able to over-rule. Optus understands this to be the intention of the legislation hierarchy. Importantly, this is not the situation concerning NBN Co and negotiations for the WBA. There is no *voluntary agreement* between the parties; rather, NBN Co is using its market power to impose a condition within the WBA unilaterally that Optus, and many other Access Seekers, do not wish to be included<sup>4</sup>.
- 2.7 Optus' concerns are explained in detail below.

### **Optus' concerns explained further**

- 2.8 Optus submits that the analysis in the draft Variation Notice has not given due regard to two key issues:
- (a) In practice Access Seekers *cannot* obtain access on regulated terms without entering into an Access Agreement; and
  - (b) NBN Co's ability to *unilaterally* remove statutory rights which is of itself inconsistent with the legislative hierarchy of Part XIC of the Act.

### **NBN service can only be provided through Access Agreements**

- 2.9 Optus does not see how it is legally, or commercially, possible to provide service over the NBN without any form of signed agreement with NBN Co. A signed agreement is an Access Agreement.
- 2.10 Optus invites the ACCC to explain fully how it sees it possible for Access Seekers to be supplied a service from NBN Co without having to sign any form of commercial agreement. Especially in the context of the current SAU that does not cover non-price terms – such a liability, service quality, etc.
- 2.11 The ACCC previously commented that it may be possible for Access Seekers to 'sign with reservations' an Access Agreements. Consequently, the clauses over which there are reservations would not be subject to an existing Access Agreement, and therefore may be updated when regulatory determinations are made. It is not clear, however, whether such an

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<sup>2</sup> ACCC, Response to Submissions, p.17.

<sup>3</sup> ACCC, Response to Submissions, p.20.

<sup>4</sup> This condition is to exclude regulatory oversight during the term of the WBA.

approach is possible without agreement from both parties. The ability to sign an Access Agreement with reservations rests on the willingness of NBN Co to do so. To date it has not offered such an option.

- 2.12 Access Seekers appear to have a false choice: either sign an Access Agreement and remove all regulatory rights under Part XIC during its two-year term and participate in the fixed-line market; or refuse to sign an Access Agreement and not offer NBN services. Presented with this choice, Access Seekers would most likely sign an agreement, but the exercise of monopoly power to exclude statutory rights is not in the LTIE. Ultimately, this will lead to consumers being denied access to regulatory outcomes that promote the LTIE.

*Unilateral removal of statutory rights is not consistent with legislative hierarchy*

- 2.13 The combined effect of NBN Co's commercial behaviour and the ACCC's interpretation of the legislative hierarchy is that access to the NBN is only possible once Access Seekers forego all rights under Part XIC for fixed two-year periods.
- 2.14 It is only possible to receive an NBN service after signing an agreement with NBN Co. Once an agreement is signed, this becomes an Access Agreement. Under the Part XIC hierarchy, regulatory determinations have no effect where it is inconsistent with terms in a signed access agreement. The Explanatory Memorandum to the Bill that introduced the hierarchy states:

*Carriers/CSPs and Access Seekers are **free to negotiate on, and agree to, terms of access** to declared services. If a carriers/CSP and an access seeker settle on an agreed arrangement for access to declared services, that arrangement is called an access agreement.<sup>5</sup>*

- 2.15 Optus agrees with the principle behind the legislative hierarchy: where two parties have agreed freely to an agreement with excludes regulatory recourse, such an agreement should be respected. [CIC]. However, such provisions have been agreed *mutually* and both parties to such an agreement gain some form of consideration.
- 2.16 This is not the scenario faced by Access Seekers when negotiating with NBN Co. NBN Co's position is:
- (a) NBN services will be supplied as per the WBA;
  - (b) NBN Co has unilaterally decided to exclude all rights under Part XIC during the term of the agreement;
  - (c) NBN Co will not negotiate on the issue of regulatory recourse provisions; and
  - (d) Access seekers cannot receive any services unless they sign the WBA.
- 2.17 Requiring Access Seekers to sign an agreement excluding statutory rights in order to receive the NBN service is not an example of *free negotiation and agreement*. The intent of the legislative hierarchy is to ensure that regulatory determinations did not interfere with *freely negotiated* commercial agreements between Access Seekers. The Amending Bill did not anticipate the situation where a monopoly service provider forces Access Seekers to sign agreements that abdicate legislative rights with the threat of refusal to supply.

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<sup>5</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, Explanatory Memorandum, p.180.



- 2.18 It is not correct that requiring *both* parties to agree to exclude regulatory recourse would conflict with the primacy of commercial agreement that is established by Part XIC. As shown above, the intent of the legislative hierarchy is to allow *freely* entered into agreements not be overridden by regulatory determinations. It is not designed to protect the exploitation of monopoly power.
- 2.19 Optus submits that it is NBN Co's position that is in conflict with the legislative hierarchy since it purports to impose an Access Agreement on a party where no such agreement exists.
- 2.20 Optus recognises that this is a difficult issue to resolve. NBN Co is reluctant to sign an Access Agreement that provides scope for subsequent regulatory recourse whereas Access Seekers are reluctant to give up such rights. As a circuit breaker, Optus proposes that any such regulatory recourse be narrowed down to specific provisions that are not agreed. That is, the SAU be varied to make it a Standard Access Obligation for NBN Co to allow an Access Seeker to have the option of signing an agreement on the basis that certain specified clause are not agreed and can be amended by a subsequent ACCC access determination.
- 2.21 Optus proposes the following clause be added to clause 6 of the main body of the SAU:
- (a) NBN Co will allow an Access Seeker to sign an Access Agreement with reservation on specific clauses.
  - (b) Any reserved clauses will not form part of the signed Access Agreement and may be subject to regulatory determinations.

## Section 3. Pricing Concerns

### Recommended variations to SAU

**Clause 1C.4.3:** Amend to link specific CVC price declines to actual throughput levels. For example, state the CVC level at different levels of average traffic (150kbps, 300kbps, 500kbps, 750kbps, 1Mbps, etc.).

- 3.1 Optus identified several concerns regarding the initial prices put forward in the SAU. Concerns were raised about the:
  - (a) Failure of proposed prices to encourage new products and revenue streams; and
  - (b) Failure of proposed prices to ensure a smooth transition from legacy products, especially regarding business products and multiple phone connections.<sup>6</sup>
- 3.2 The draft Variation Notice proposed no change to the starting prices of NBN Co products, as the ACCC claimed it had no information before it contrary to the NBN Co position.<sup>7</sup> However, this is not accurate as many previous submissions provided this information. In fact, Access Seekers have raised the unsuitability of starting prices to both ACCC and NBN Co for numerous years in multiple fora. NBN Co has consistently refused to amend its prices.
- 3.3 Optus disagrees with the conclusion in the draft Variation Notice that NBN starting prices are suitable. Optus still has concerns over the appropriateness of the starting prices of many of the NBN product components; and the suitability of the components to be used by RSPs to supply a retail service replicating existing service levels at existing price points.
- 3.4 In respect of business services, the ACCC relies upon NBN Co's analysis of Optus' retail pricing construct as evidence that NBN Co pricing is reasonable. NBN Co claims that Optus should use other NBN Co product components to develop its retail services. In effect NBN Co is asserting that it is better placed to develop retail products than Optus. The ACCC fails to recognise that NBN Co does not sell products to end-users, and is therefore not in a position to dictate what end-users require and the price they are willing to pay for it.
- 3.5 It remains Optus' experience that the starting prices of some product components remain too high to enable replication of existing services at the same price level. The ACCC should place greater weight on the views of RSPs rather than the wholesale-only provider when assessing whether the current wholesale rates are likely to enable retail products to be priced at levels that promotes the LTIE.

### **CVC pricing will inhibit the market**

- 3.6 Optus has most concern over the level of the CVC pricing. The CVC construct is inconsistent with cost-based principles, and has the largest potential to cause ongoing consumer detriment. Moreover, the CVC is the product component that has the most direct impact on the consumer experience. The cost of CVC impacts on whether end-users purchasing speed

<sup>6</sup> Optus Submission to the ACCC Consultation Paper on NBN Co Limited 2012 Special Access Undertaking, January 2013, section 7.

<sup>7</sup> ACCC, Response to Submissions, pp. 64-6.

specific AVCs will experience the AVC speeds purchased. While dimensioning issues are not currently in end-users' mind due to the lack of subscribers on the NBN, over the period of Module 1, it is expected to become a significant issue.

- 3.7 The 'commitment' in clause 1C.4.3 for NBN Co to reduce CVC pricing over time is ambiguous, without consequence, and will most likely have no impact on CVC pricing. Of even greater concern is the apparent non-compliance with the clause. Optus questions the utility of a clause with purports to encourage CVC price declines as volumes increase when CVCs have remained stable at \$20/Mbps for the last three years while underlying traffic trends have materially changed.
- 3.8 The CVC starting price of \$20/Mbps price based on the assumption that the average usage per SIO is [CiC] GB, equating to throughput per SIO of [CiC] kbps. This was set several years ago and the CVC has not changed since it was set in 2010 notwithstanding significant growth in usage. If the 'commitment' in the SAU had an impact on CVC pricing, the rate would have declined over time as usage volumes increased.
- 3.9 [CiC]
- 3.10 Optus recognises NBN Co's 'commitment' to lower CVC prices over time as traffic increases; but questions its incentive and willingness to do so. Optus recommends that the 'commitment' in the SAU be amended to link specific CVC price declines to actual throughput levels. For example, specify the CVC for different average traffic levels, such as 150kbps, 300kbps, 500kbps, 750kbps, 1Mbps, etc. The prices can be set as per the assumptions in the latest NBN Co business plan.

## Section 4. Variations to the LTRCM

### Recommended variations to SAU

**Clause 1E.4.1:** Replace with: *“The following matters are relevant to whether capital expenditure forecasts reflect prudent and efficient costs:*

- (a) reasons for proposed changes to capital expenditure from one regulatory period to the next regulatory period;*
- (b) whether the access provider’s asset management and planning framework reflects best practice;*
- (c) any relevant regulatory obligations, or changes to such obligations, applicable to providing the relevant declared fixed line services; and*
- (d) any other matters relevant to whether forecast capital expenditures reflect prudent and efficient costs.”*

**Clause 1E.4.1(c):** remove references to consistency with capex incurred in prior years and replace with consistency with Corporate Plan forecasts and forecasts/commitments made to Parliament.

**Clause 1F.7.1(a):** Remove “+ 3.50%”.

**Clause 1F.8.2(c):** remove references to consistency with capex incurred in prior years and replace with consistency with Corporate Plan forecasts and forecasts/commitments made to Parliament.

**Clause 1E.4.1(c)(iv):** move to a new clause 1E.4.1(d).

**Clause 1F.8.3(c):** amend to include reference to industry and other relevant benchmarks.

**Clause 1F.8.2(c)(iv):** move to a new clause 1E.8.2(d).

**Clause 2D.4.3:** replace annual forecast revenue with annual nominal revenue.

**Clause 2D.4.4:** amend to allow ACCC review, as per powers under Module 1.

**Clause 2D.5:** amend to provide same powers of ACCC review as provided under Module 1. ACCC should half power to review and approve roll-forward values under cl.2D.5.2.

**Clause 2D.6.4(a):** references to ‘power pursuant to any power conferred to ACCC’ in previous regulatory cycle should be removed.

**Clause 2D.6.6:** should be removed.

- 4.1 In response to concerns of industry, the draft Variation Notice contains variations to the SAU relating to the:
- (a) Interaction between price controls and the LTRCM;
  - (b) Mechanisms of ACCC assessment of LTRCM components and transitional issues;
  - (c) Half-WACC adjustment;

- (d) Administration of LTRCM in Module 1, including assessment of its components; and
  - (e) Administration of LTRCM in Module 2.
- 4.2 Optus welcomes the proposed variations to the LTRCM dealing with capital expenditure, particularly the inclusion of ACCC oversight over inclusion of costs into the RAB, calculation of components of the LTRCM, and assessment of RAB rollover values.
- 4.3 While Optus welcomes the overall thrust of the proposed variations, Optus has ongoing concerns in relation to several of the specific changes. The concerns relate to:
- (a) Assessment of LTRCM components and transitional issues;
  - (b) Assessing prudence of capital expenditure;
  - (c) Assessment of operating costs during Module 1;
  - (d) LTRCM in Module 2;
  - (e) Roll-over of the RAB during Module 2; and
  - (f) Value of the WACC.

#### **ACCC assessment of LTRCM components and transitional issues**

- 4.4 The draft Variation Notice has identified further variations required due to the inclusion of ACCC oversight in determining the LTRCM components during Module 1. These issues relate to the transition between Module 1 and Module 2; and between regulatory periods under Module 2.<sup>8</sup> The ACCC is considering these issues and seeks views from stakeholders.
- 4.5 Optus submits that the approach adopted should ensure that the ACCC does not restrict its ability to adjust RAB/LTRCM values between periods unnecessarily, where such variation would promote the LTIE, consistent with the powers under Part XIC of the CCA.
- 4.6 Optus reiterates the views put forward in its previous submission that the ACCC should have the ability to use both *ex post* and *ex ante* review powers to ensure efficient expenditure, and be able to use all information before it to assess efficiency of capex/opex proposals – as per best practice as identified by the AEMC.
- 4.7 In 2012, the AEMC altered the gas and electricity rules to strengthen the ability of the regulator to review capex and opex on an *ex ante* basis and also undertake *ex post* reviews.<sup>9</sup> The AEMC provided guidance on the final rule that:
- (a) There is an obligation to accept reasonable proposal; and
  - (b) When assessing a substitute for a proposal, the regulator is not constrained by the capex and opex criteria from choosing the best substitute it can determine from all information before it.<sup>10</sup>
- 4.8 The rule changes make clear that the capex and opex proposal by the provider is the starting point of the analysis; it should be only one of a number of inputs. The regulator can have reference to other submissions, expert reports, and its own analysis when assessing what a

<sup>8</sup> ACCC, Response to Submissions, p.88.

<sup>9</sup> AEMC, 2012, Final Rule Determination, chapter 9.

<sup>10</sup> AEMC, 2012, Final Rule Determination, p.96.

reasonable forecast is. The assessment of reasonable allowances is not restricted by the initial proposal.<sup>11</sup>

- 4.9 The rule changes also dealt with enhancing the ability of the regulator to undertake *ex post* review of allowances. The new rules provide the regulator with a number of tools it can apply, including:
- (a) Capex sharing schemes to be designed by the regulator;
  - (b) Efficiency reviews of past capex, including the ability to preclude inefficient expenditure from going into the RAB up to an amount that is equal to the amount of expenditure above the allowance; and
  - (c) Deciding whether to depreciate the RAB using actual or forecast expenditure to establish a NSP's opening RAB.<sup>12</sup>
- 4.10 Of relevance for the assessment of the NBN Co SAU, the AEMC took the view that *ex post* review of efficiency addresses the information asymmetry inherent when making *ex ante* assessments; and provides firms with an incentive to incur only efficient expenditure if there is a risk of an inability to recover inefficient costs.<sup>13</sup>
- 4.11 It is clear from this brief outline of the changes to the NERs, that the regulatory response to the threat of excessive expenditure in the electricity industry is to enhance and clarify the role of the regulator to review allowances before and after a regulatory period, including the extent to which costs should be rolled over into the RAB.
- 4.12 Optus does not support the drafting contained in new clause 2D.6.4(a) that restricts the powers of the ACCC to those granted in the first regulatory cycle. The ACCC should be able to use all powers as allowed under Part XIC to determine the level of capex rolled-over into the RAB should be assessed.

### **Assessment of capital costs during Module 1**

- 4.13 Optus agrees with the objective of the proposed variations. That is, that the ACCC be responsible for applying the LTRCM, and that determining prudent capex on the methodologies in the 18 December 2012 SAU does not promote the LTIE. Optus' concerns relate to:
- (a) Reference to consistency with previous years;
  - (b) Reliance on procurement rules in clause 1E.4.2; and
  - (c) Limited use of non-exhaustive lists.

### **Consistency with previous years**

- 4.14 The draft Variation Notice proposes to deem capex to satisfy the prudent cost condition if the ACCC is satisfied that the capex is consistent with capex included in the RAB in previous years (clause 1E.4.1(c)).

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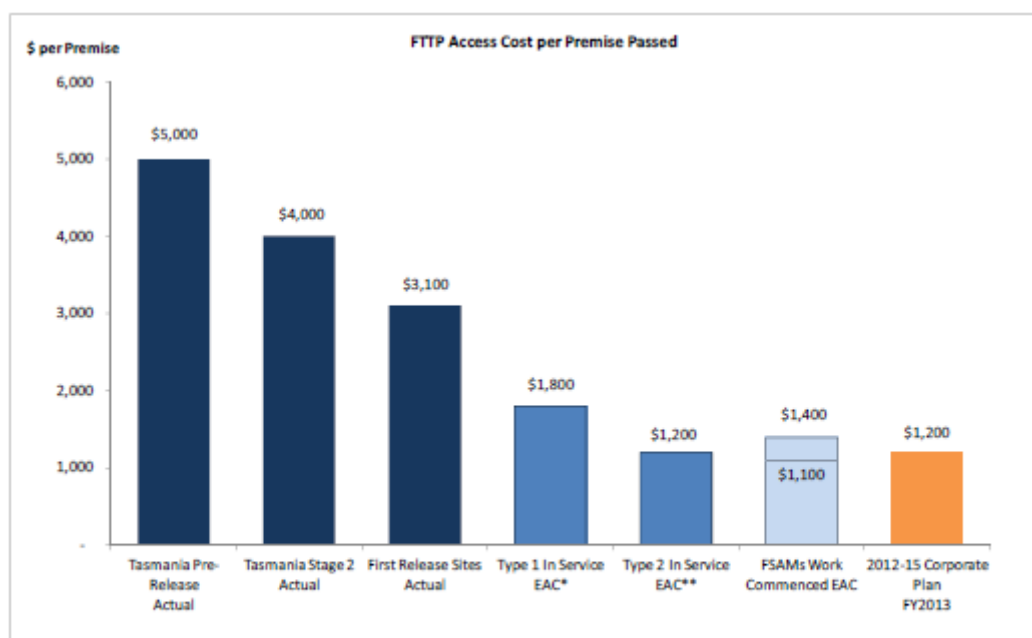
<sup>11</sup> AEMC, 2012, Final Rule Determination, section 8.5.

<sup>12</sup> AEMC, 2012, Final Rule Determination, p.166.

<sup>13</sup> AEMC, 2012, Final Rule Determination, section 9.

4.15 Optus disagrees that prudence should be assessed with reference to consistency to previous years. Depending on its implementation, this will enable NBN Co to entrench cost inefficiencies in an industry that exhibits declining capex cost trends. Optus notes that NBN Co have committed to declining capex unit costs over time. For example, NBN Co data shows that the FTTP capex per premise has declined significantly since the Tasmania pre-release sites and first release sites.

Figure 1 NBN FTTP Capex per premise passed



Source: NBN Co, 2012-15 Corporate Plan

Note: \* Fibre Serving Area Modules (FSAMs) in service: Estimate at Completion using Type 1 design.

\*\* FSAMs in service: Estimate at Completion using Type 2 design.

All Cost per Premise estimates are rounded to nearest \$100. Actual costs are based on information available at 31 March 2013.

Source: NBN Co, *Report to Parliamentary Joint Committee on the NBN: Financial and Rollout Data*, 19 April 2013, p.5.

- 4.16 Deeming capex prudent based on consistency with historical spend does not provide NBN Co with the efficiency incentives required to ensure ongoing improvements in the design and rollout. NBN Co could miss its self-imposed prudence targets, and yet still be assessed as prudent.
- 4.17 Optus recommends that the SAU be varied to state that prudence be assessed against NBN Co forecast statements and document, such as Corporate Plans and other public documents. Optus notes that NBN Co compares its actual capex against the forecasts in the Corporate Plan to demonstrate prudence before the Joint Parliamentary Committee on the NBN.<sup>14</sup> If it is appropriate for NBN Co to refer to meeting Corporate Plan targets as evidence of efficient capex, then it is equally valid to infer inefficient spend when NBN Co fails to meet the forecasts.
- 4.18 Optus submits that this could be addressed by removing references to ‘consistent with capex that has been included in the RAN in respect of a prior financial year’ and replace with ‘consistent with capex that has been included in Corporate Plan forecasts and other data provided to Parliament’.

<sup>14</sup> See, for example, extension arguments put forward in NBN Co, *Report to Parliamentary Joint Committee on the NBN: Financial and Rollout Data*, 19 April 2013.

## Procurement rule

- 4.19 Optus is concerned about the proposed reliance on compliance with Procurement Rules to assess prudence (clause 1E.4.2(a)). These concerns are magnified given that the Rules are not yet drafted. For example, NBN Co may include a catch-all condition in the Rules that permits the CEO to sign-off compliance. Such a catch-all provision would undermine the intent of the proposed variations.
- 4.20 Optus submits that the assessment of prudence be made against the powers under Part XIC of the CCA. This allows the ACCC to make a full assessment, and utilise its full expertise and experience, without unnecessary restrictions.
- 4.21 However, reliance on the procurement rules are just one of three factors that must be considered. The last factor allows the ACCC to rely upon other factors it considers relevant. It is important, therefore, that the ACCC be able to rely upon clause 1E.4.2(a)(iv) to disallow capital expenditure where it believes does not represent prudent expenditure, but where still consistent with clause 1E.4.2(a)(i).
- 4.22 As noted below, Optus believes that the ability of the ACCC to rely upon other factors in its assessment is a key power that assists the SAU being in an acceptable form.

## Non-exhaustive list

- 4.23 Optus reiterates its preference for consistent powers between *all* ACCC regulatory determinations/undertakings in the telecommunications markets. At a broad level this is best achieved through reliance on existing Part XIC powers rather than SAU-specific clauses. The SAU could be varied to include a provision similar to that in recent FADs, which enables the ACCC to assess the prudence of capex with regard to Telstra's fixed-line network. It would be a perverse outcome if the effect of the SAU were to provide the ACCC with *less* ability to review efficiency of the new fixed-line monopolist than was provided over the old fixed-line monopolist.
- 4.24 Optus identifies two approaches:
- (a) A new clause consistent with powers in FADs be inserted in a new clause 1E.4.1:
- "The following matters are relevant to whether capital expenditure forecasts reflect prudent and efficient costs:*
- (a) *reasons for proposed changes to capital expenditure from one regulatory period to the next regulatory period;*
- (b) *whether the access provider's asset management and planning framework reflects best practice;*
- (c) *any relevant regulatory obligations, or changes to such obligations, applicable to providing the relevant declared fixed line services; and*
- (d) *any other matters relevant to whether forecast capital expenditures reflect prudent and efficient costs."*
- (b) Clause 1E.4.1(c)(iv) should be moved to a new clause 1E.4.1(d), so that the ACCC can consider other material it considers relevant in the context of the total assessment of whether capex in a financial year satisfies the prudent cost condition. The ACCC should be able to assess capex as not being prudent where there is sufficient evidence supporting such a conclusion, notwithstanding compliance with the yet to be written Procurement Rules.



## Assessment of operating costs during Module 1

- 4.25 Optus reiterates its support for the ACCC's position as per the Draft Decision that:
- (a) The majority of, if not all, opex incurred during the network rollout would be likely to fall within the scope of the opex principles set out in Module 1; and
  - (b) If an independent body were to determine whether opex was consistent with the principles, this would enhance the prospect that only efficient opex would be included in the ABBRR.
- 4.26 The section looks at whether the proposed drafting in clause 1F.8.2 best promotes these objectives. Optus agrees with the proposed varied clause subject to the following changes.
- 4.27 First, conditions in clause 1F.8.2 and 1F.8.3 refer to third party opex. No reference is made to the internal opex of NBN Co (i.e. staff costs, building rent, etc.). Optus previously noted that such expenditure should be able to be benchmarked across the industry (e.g. staff costs) or market (e.g. rent costs).
- 4.28 While it is true that some aspects of NBN Co are unique and therefore difficult to benchmark, internal opex should be easily benchmarked. Any prudent business would continue to benchmark its internal opex and make continual adjustments where necessary. Optus does not see why the ACCC should not have the *opportunity* to engage in benchmarking of internal opex.
- 4.29 Second, Optus recommends that the SAU be varied to state that prudence be assessed against NBN Co forecast statements and document, such as Corporate Plans and other public documents. Optus notes that NBN Co compares its actual capex against the forecasts in the Corporate Plan to demonstrate prudence before the Joint Parliamentary Committee on the NBN.<sup>15</sup> If it is appropriate for NBN Co to refer to meeting Corporate Plan targets as evidence of efficient capex, then it is equally valid to infer inefficient spend when NBN Co fails to meet the forecasts.
- 4.30 Optus submits that this could be addressed by removing references in clause 1F.8.2(c) to 'consistent with capex that has been included in the RAB in respect of a prior financial year' and replace with 'consistent with capex that has been included in Corporate Plan forecasts and other data provided to Parliament'.
- 4.31 Third, clause 1F.8.2(c)(iv) should be moved to a new clause 1E.8.2(d), so that the ACCC can consider other material it considers relevant in the context of the total assessment of whether capex in a financial year satisfies the prudent cost condition. The ACCC should be able to assess capex as not being prudent where there is sufficient evidence supporting such a conclusion, notwithstanding compliance with the yet to be written Procurement Rules.

## LTRCM in Module 2

- 4.32 The draft Variation Notice notes Optus' comments relating to clauses 2D.4 and 2D.5. However, no further mention is made, and there appears no response by the ACCC. The NBN SAU, with changes accepted, does not contain any changes to these clauses.
- 4.33 Optus repeats its previous comments.

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<sup>15</sup> See, for example, extensive arguments put forward in NBN Co, *Report to Parliamentary Joint Committee on the NBN: Financial and Rollout Data*, 19 April 2013.

- 4.34 Optus submits that the calculation of the ICRA during Module 2 should use actual expenditure rather than forecasts. The use of forecasts during the ICRA period creates an incentive for NBN Co to set forecasts to maximise the LTRC (i.e. minimise annual forecast revenue). This is a high risk given the above-cost WACC proposed (and remains unaddressed by the ACCC in the proposed variations – see Optus comments below).
- 4.35 Optus recommends that the reference to *annual forecast revenue* in the calculation of unrecovered cost in clause 2D.4.3 should be amended to *annual nominal revenue*.
- 4.36 Optus also submits that the roll-forward of the ICRA (clause 2D.4.4) allow for ACCC review and determination (if necessary) of rolled-forward value. Such an amendment ensures consistency with Module 1 powers.
- 4.37 Clause 2D.5 should also be amended to provide the ACCC with the same powers of review as it has under Module 1. Specifically, that:
- (a) the ACCC would be responsible for determining the final values of the RAB, annual revenue requirements and initial cost recovery account that applies to NBN Co; and
  - (b) in circumstances where the ACCC considered that NBN Co’s reported costs do not comply with the methodologies in the SAU *or do not reflect prudent expenditure*, the ACCC would consider rolling forward the RAB and ICRA, and determining the value of the annual revenue requirements, based on amended values as decided by the ACCC; and
  - (c) ACCC determine the amount to be carried forwards between regulatory cycles.
- 4.38 Finally, Optus submits that the ACCC ensure there are suitable powers afforded to the ACCC to review, both ex post and ex ante, where it is deemed necessary. This approach is consistent with the recommendations in relation to the electricity industry.

## **Roll-over of RAB in Module 2**

- 4.39 Optus recommended in its previous submission that Module 2 be drafted in a manner that provides the ACCC flexibility to approve, amend or disallow the value of the RAB/ICRA and ABBRR.
- 4.40 Optus supports the intent of the proposed new clause 2D.6.4. Namely, that capex that is consistent with previously approved forecasts under 2D.2.1 be rolled over; and where capex is greater than the approved forecast it can be reviewed by the ACCC.
- 4.41 However, Optus does not see the need for the restriction on the ability of ACCC to assess whether the capex above the approved forecast is consistent with Part XIC of the CCA. The ability of the ACCC to exercise its powers under Part XIC should not be restricted by conditions agreed in previous regulatory cycles (which could be a period up to five years earlier). Such restrictions do not enable the ACCC to ‘learn’ from past regulatory experience. This undermines the central benefit of the regulatory cycle approach – i.e. the regulator gains better information over time as to how best regulated NBN Co.
- 4.42 Optus does not see the need for clause 2D.6.6. This clause restricts the ability to ACCC in a manner similar to that above. Optus submits there should be no restriction on the ability to use information gained during the previous regulatory cycle to amend functions and powers granted to ACCC.

- 4.43 Overall, Optus strongly recommends that the SAU contain no additional obligations/restrictions on the ACCC above that imposed by Part XIC of the CCA. All assessments of the reasonableness of NBN Co proposals should be consistent with the CCA.

### Value of the WACC

- 4.44 The draft Variation Notice notes that the WACC should reflect the risk and the likely financing debt faced by NBN Co. The 3.5% mark-up over the long-term Government bond rate is considered reasonable.
- 4.45 Optus has previously raised concerns that this approach does not represent the actual cost of financing faced by NBN Co, and as such, risks over-compensating NBN Co.<sup>16</sup> In response to these comments, the draft Variation Notice states that:
- (a) Section 152AB(7) of the CCA requires ACCC to take into account the risks NBN Co face in its investment; and
  - (b) NBN Co is required to act commercially and consistent with the competitive neutrality principles, and therefore is required to make a commercial return.
- 4.46 Optus submits that the ACCC errs in its response, and as such has not justified that a mark-up above the risk free rate is reasonable:
- (a) First, the risk ACCC must take into account relates to the risk faced by the *provider of funding*;
  - (b) Second, NBN Co is not a commercial entity and is not required to make commercial returns; and
  - (c) Third, competitive neutrality policy does not apply to Government equity investments.
- 4.47 These errors would result in NBN Co having a significant incentive to over-invest. Clause 1F.7.1(a) should be amended to remove reference to the 3.5% mark-up above the risk-free rate.

### Providers of funding to NBN Co face no risk

- 4.48 The ACCC argues that under s.152AB(7) it must take into account the risks NBN Co face in its investment. The Act requires the ACCC to take into account the risk involved in making the investment when determining the incentives for investment in the infrastructure under s.152AB(6)(c).
- 4.49 When assessing this requirement, the ACCC needs to have regard to the circumstances of the NBN and NBN Co. Namely, that the NBN is a non-commercial investment and NBN Co was created because it was assessed that private equity would not undertake the investment.<sup>17</sup>
- 4.50 Optus submits that the question the ACCC should focus on is the *risk* incurred by the providers of capital, and the level of returns needed to compensate for that risk. However, when justifying why the 3.5% mark-up no reference is made to obligations place upon NBN

<sup>16</sup> Optus Submission to the ACCC Consultation Paper on NBN Co Limited 2012 Special Access Undertaking, January 2013, section 6, and Optus Submission to the ACCC in response to the Consultation paper on proposed variation of the NBN Co Special Access Undertaking, May 2013, section 5.

<sup>17</sup> Quoted by AGCNCO 2011, NBN Co, Investigation No. 14, Canberra, November.

Co to make a higher return to compensate for risk. In fact, there is no obligation on NBN Co to make a commercial return – Optus previously provided references to the level of returns expected by the provider of NBN Co’s finance – the Australian Government. The Government has accepted that a central reason for the existence of NBN Co is that the Government internalises the risk of the investment.<sup>18</sup>

- 4.51 The ACCC misapply the concept of risk in its justification for allowing higher returns for NBN Co. The concept of risk in the context of financing relates to the risk faced by the *provider of funding* that it will not receive its funds back. Consequently, for provider of funds to move from the risk-free option, the firm requiring funding needs to offer a higher rate of return. Optus does not see this concept as controversial.
- 4.52 The relevant question for the ACCC is therefore what this means in the unique circumstances of the funding of the NBN Co.
- (a) Does the Government require a return above what it required NBN Co to make in order to create incentives to invest? The answer is no.
- (b) Do buyers of Australian Government bonds require a return above the bond rate to continue to invest in Australian Government bonds? The answer is no.
- 4.53 It is clear that the providers of equity to NBN Co do not require higher returns than 7%; and it is clear that the providers of funding to the Australian Government do not require higher returns than the bond rate. Therefore, a higher rate of return is not needed to maintain the incentives for investment in the NBN during Module 1.
- 4.54 There appears no justification, either at a practical or theoretical level, why investors in Government bonds require a higher return when those funds are used to fund NBN Co rather than other Government-projects. The Government has not issued special ‘NBN-bonds’ which attract a return higher than normal Government bonds. The ultimate providers of capital (bond holders) are not expecting any higher return than that provided by Australian Government bonds.
- 4.55 Setting the regulated rate of return equal to the required rate of return will have no impact on the incentives for the Australian Government to continue its funding of NBN Co. Adopting the long term bond rate is therefore consistent with s. 152AB(7).

#### Competitive neutrality does not apply to equity

- 4.56 The ACCC state that allowing a 3.5% mark-up over the risk-free rate is consistent with competitive neutrality policy. However, such a statement does not accurately reflect the manner in which NBN Co is required to comply with the policy.
- 4.57 First, NBN Co and Government have both already acknowledged a 7% rate of return complies with the competitive neutrality policy. Optus refers the ACCC to the Australian Government Competitive Neutrality Complaints Office (AGCNCO) report on NBN Co, which concluded that the required rate of return for NBN Co represents a potential ex ante breach of competitive neutrality policy, in the absence of quantification of the social benefits of the NBN. Both the NBN Co and the DBCDE stated that the competitive neutrality obligations should not apply to NBN Co because of its social benefits.<sup>19</sup> The DBDCDE argued that the 7% rate of return

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<sup>18</sup> Quoted by AGCNCO 2011, NBN Co, Investigation No. 14, Canberra, November, p.32.

<sup>19</sup> AGCNCO 2011, NBN Co, Investigation No. 14, Canberra, November.

required by Government is consistent with competitive neutrality because it has internalised the cost of risks that a commercial entity would need to bear.<sup>20</sup>

- 4.58 Second competitive neutrality applies only to the cost of debt, not equity.<sup>21</sup> The AGCNCO therefore found that “*The Australian Government’s equity funding of NBN Co is not subject to the debt neutrality provisions of competitive neutrality policy*”.<sup>22</sup> In the absence of debt funding during Module 1 there are no competitive neutrality issues: and therefore, the rate of return does not need to be higher than the rate required by the equity funder.
- 4.59 Under these circumstances it is surprising that the ACCC relies upon competitive neutrality principles to justify a regulated rate of return greater than the commercial rate.

#### Mark-up above risk free rate does not promote LTIE

- 4.60 Optus reiterates the warning of the Productivity Commission (PC) that allowing a firm a regulated return above its actual cost of financing lowers welfare and creates inefficient incentives. The PC highlighted that a gap between the regulated WACC and the true cost of capital faced by the government-owned firm. The larger the gap, the weaker the penalty for excessive expenditure. A large gap may make it profitable to over-spend. Optus submits this is of particular concern for NBN Co as it is required to make an amount above the long term bond rate, whereas the proposed WACC provides for a 350 basis point mark-up over the bond rate.<sup>23</sup>
- 4.61 In conclusion, Optus finds that the ACCC’s treatment of the appropriate rate of return fails to take into account the unique circumstances of NBN Co. The ACCC is attempting to place ‘normal’ commercial return on a firm that is:
- (a) Fully funded by long-term Government debt;
  - (b) Justified on the basis that the NBN is not a commercially viable investment; and
  - (c) Not subject to competitive neutrality obligations, and has already been assessed by AGCNCO as breaching obligations if they were to apply.
- 4.62 Optus reiterates its concerns that the interest on debt (WACC) is substantially higher than the return made on investment, and as such there is a strong incentive for NBN Co to increase or maintain its debt in order for it to maximise returns. Such an outcome does not promote the LTIE.

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<sup>20</sup> AGCNCO, 2011, NBN Co, Investigation No. 14, Canberra, November, p.32.

<sup>21</sup> Competitive neutrality policy comprises of: taxation neutrality; debt neutrality; regulatory neutrality; rate of return neutrality. See Australian Government Competitive Neutrality Guidelines for Managers, February 2004.

<sup>22</sup> AGCNCO, 2011, NBN Co, Investigation No. 14, Canberra, November, Finding 3.8.

<sup>23</sup> PC, 2012, *Electricity Network Regulatory Frameworks*, p.195.

## Section 5. Integrated Price Review Mechanism

### Recommended variations to SAU

**Clause 1H.3.1(a):** Remove “Subject to clause 1H.3.1(c), no earlier than 1 July 2016,”.

**Clause 1H.3.1(c):** Remove clause.

**Clause 1H.3.2:** Replace 120 calendar days with 60 calendar days

Insert new **clause 1H.3.2(c)** to read “If NBN Co issues a written notice under clause 1H.3.1, NBN Co must also issue a Price Review Proposal at the same time.”

Insert new **clause 1H.3.2(d)** to read “Clause 1H.3.1(a) has no effect if NBN Co issues a written notice under clause 1H.3.1.”

**Clause 1H.3.7(a)(i)(A):** Remove.

- 5.1 Optus repeats its support for the SAU to allow the ACCC to undertake periodic reviews, where necessary, to:
- (a) Allow for prices to be rebalanced where re-balancing is required to promote efficiency;
  - (b) Rebalance prices in a revenue neutral manner; and
  - (c) Ensure that the CPI-1.5% price control continued to create incentives for NBN Co to operate efficiently.
- 5.2 While Optus is generally supportive of the proposed variations put forward, it has concerns regarding the timing of the review, and the restriction to just one review during the first 10 years. These restrictions were not part of the ACCC proposed variation in the Discussion Paper, and were not part of the proposal that garnered broad industry support.
- 5.3 Where NBN prices can be adjusted in a manner that promotes the LTIE in a revenue neutral manner, then the adjustment should be made. There appears no benefit accruing from the additional restrictions proposed in the draft Variation Notice. Restricting the number and timing of reviews does not promote the legitimate commercial interests of NBN Co above the revenue neutral obligations. The only impact of the proposed restrictions is to limit the ability of ACCC to implement a rebalance that promotes the interest of consumers. Optus does not see that the proposed limitations are justified, nor will it promote the LTIE.

### Timing of the price reviews

- 5.4 There was broad industry agreement for the ACCC to adjust prices to promote the objectives of Part XIC in a revenue neutral manner. Such power clearly promotes the LTIE as it allows beneficial price rebalancing while ensuring that there is no commercial detriment to NBN Co.

- 5.5 However, the draft Variation Notice proposes limitations on the ability of ACCC to undertake a price review:
- (a) Clause 1H.3.1 states that the ACCC or NBN Co cannot issue a written notice to commence a price review earlier than 1 July 2016; and
  - (b) Clause 1H.3.7(a)(i) states that no price review arrangement can be in place before 1 July 2018.
- 5.6 Optus notes that the ACCC does not appear to address these criteria when outlining its reasons for the proposed variation.<sup>24</sup> It is therefore, unclear how the inclusion of these clauses promotes the LTIE. Promotion of the LTIE balances two potentially conflicting objectives: promoting interests of consumers and Access Seekers; and promoting legitimate commercial interests of NBN Co. The balance is achieved in the Price Review Criteria (clause 1H.3.8). The criteria allow a rebalance if it is reasonable under s.152AH of the CCA; and that is revenue neutral to NBN Co. That is, there can be *no detrimental* impact to NBN Co following the Price Review Criteria.
- 5.7 Optus submits that if the Price Review Criteria is met at *any* time during the SAU, then a price rebalancing promotes the LTIE and should be permitted. The Price Review Criteria ensures that NBN Co does not face any adverse financial impact of a price review. As such, Optus fails to see any additional benefits of the new proposed clauses that accrue to Access Seekers, consumers or NBN Co, other than to restrict the ability of the ACCC to exercise its statutory functions.
- 5.8 Such a restriction was not the intention of the ACCC's proposals in the Discussion Paper. Optus notes there is broad industry support for the ability of the ACCC to rebalance prices, in a revenue neutral manner, to better promote the LTIE.
- 5.9 Optus recommends to:
- (a) Remove clause 1H.3.7(a)(i)(A); and
  - (b) Amend clause 1H.3.1(a) to remove "Subject to clause 1H.3.1(c), no earlier than 1 July 2016,".

### **Number of price reviews allowed**

- 5.10 Optus also has concerns over clause 1H.3.1(c), which appears to have the effect of allowing only *one* price review during the initial regulatory period, that is, the first 10 years of the SAU. While Optus supports the fact that more than one price can be reviewed during a Price Review, and that there should only be one review at one time. Optus does not support the variation proposing only one price review can occur during the first 10 years of the SAU.
- 5.11 Optus repeats that the Price Review Criteria ensure there can be no review that leaves NBN Co with a detrimental NPV than before the review. Therefore, there can be no review consistent with the Price Review Criteria that has a detrimental impact on NBN Co. Restricting the number of reviews can only, therefore, limit the ability of the ACCC to review prices to benefit end-users. Such a restriction does not promote the LTIE.
- 5.12 Optus recommends to:
- (a) Remove clause 1H.3.1(c).

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<sup>24</sup> ACCC, Response to Submissions, pp.80-82.

## Timeframe of price reviews

- 5.13 Under proposed clause 1.H.3.2, NBN Co has a four month period to develop new pricing plans in response to a Price Review Notice. Optus submits this is an unnecessarily long timeframe for NBN Co to respond to a review notice. The effect of which would be to limit the amount of industry consultation.
- 5.14 Part XIC requires the ACCC to make a decision about Access Determinations or SAUs within six months of the process starting. The six month period allows for consultation with industry and consideration of draft positions.
- 5.15 Optus sees no reasons why the timeframe for price reviews in the revised NBN Co SAU should vary from the general timeframes for processes under Part XIC. Optus prefers a process that distinguishes between ACCC initiated and NBN Co initiated price reviews, in the following way:
- (a) NBN Co initiated reviews should not provide any additional timeframe for NBN Co to develop a response to a Price Review Notice. It is reasonable that NBN Co would have a prepared proposal before starting a review. The timeframe to make a decision, therefore, should be a maximum of 6 months.
  - (b) ACCC initiated review should allow time for NBN Co prepare a response. However, a four month period would result in the overall review process lasting for 10 months. This is not beneficial to Access Seekers or NBN Co. Optus suggests that NBN Co be given a two month period to prepare a response. As a result, the price review period would last for 8 months in total.
- 5.16 These change could be implemented through the following amendments:
- (a) Amend clause 1H.3.2 to replace 120 calendar days with 60 calendar days.
  - (b) Insert new clause 1H.3.2(c) to read, "If NBN Co issues a written notice under clause 1H.3.1, NBN Co must also issue a Price Review Proposal at the same time."
  - (c) Insert new clause 1H.3.2(d) to read "Clause 1H.3.1(a) has no effect if NBN Co issues a written notice under clause 1H.3.1."



## Section 6. Replacement module processes

- 6.1 Optus has previously supported the ACCC's proposal for the removal of the replacement module process from the SAU. The draft Variation Notice proposes to include a varied version of the replacement module process. The draft Variation Notice states, "*the ACCC now considers that a replacement module process may be retained in the SAU, based on NBN Co's revised proposal.*"<sup>25</sup> However, the ACCC's proposed variation is subject to amendments to NBN Co's revised proposal<sup>26</sup> with respect to the changes set out below.
- 6.2 This section sets out Optus' views on the revised proposal for the inclusion of the replacement module process in the SAU.

### Length of the regulatory cycle

- 6.3 Optus supports the view that the determination of the length of the regulatory cycle should be determined as follows:
- (a) Firstly, by NBN Co in its replacement module application; and
  - (b) Second, by the ACCC in its replacement module determination – if and only if the replacement module application is not accepted.
- 6.4 As noted in the Draft Decision:
- Given its implications for NBN Co's incentives to invest and operate efficiently, the length of the regulatory cycle should not be determined unilaterally by NBN Co, but rather, should be subject to consultation and independent decision making, in order to ensure that NBN Co is subject to the appropriate degree of strength of incentive mechanism.*<sup>27</sup>
- 6.5 Given the replacement module application is to be lodged by NBN Co, it would be in their best interests to propose the relevant length of the regulatory cycle to meet the required content of their replacement module application (i.e. their associated Reference Offer, LTRCM and RAB roll-forward proposals). This would ensure that NBN Co's intended efficiency and investment incentives remain intact, and can therefore be assessed accordingly.
- 6.6 Optus therefore considers that it is reasonable for the ACCC to maintain the discretion to determine the length of the regulatory cycle only after considering the information submitted by NBN Co and any submissions in response to the replacement module application during public consultation. To facilitate this information transparency, Optus also strongly supports the ACCC's proposal to include a requirement "*for NBN Co to submit five-year forecasts with its replacement module application, even if it proposes a shorter replacement module period.*"<sup>28</sup>

<sup>25</sup> ACCC, Response to Submissions, p.26.

<sup>26</sup> NBN Co, *NBN Co submission to ACCC consultation paper on variation of NBN Co SAU*, May 2013, pp.15-17.

<sup>27</sup> ACCC, *ACCC Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012*, April 2013, p.167.

<sup>28</sup> ACCC, Response to Submissions, p.27.

## Content of the replacement module application

- 6.7 Optus broadly supports the ACCC's proposed content required to be lodged as part of the replacement module application. These include, for each financial period, for the next five financial periods following the commencement of the regulatory cycle:
- (a) Reference Offer Proposal;
  - (b) LTRCM Proposal (including proposal of how a change in tax will be addressed); and
  - (c) RAB Roll Forward Proposal.
- 6.8 In line with the ACCC's proposed drafting, this should capture the required information for the ACCC to make a reasonable assessment of NBN Co's replacement module application.

## Criteria for making the replacement module determination

- 6.9 Optus supports the inclusion of a conferral of power to the ACCC to make a replacement module determination in the event that it does not accept NBN Co's replacement module application. Furthermore, there should be no explicit constraints imposed on the ACCC in relation to the criteria that it must consider in making the replacement module determination.
- 6.10 In particular, Optus supports the ACCC's proposed variation with respect to *"the practical implication of the approach being that the ACCC would need to concurrently consider a replacement module determination whilst making a decision on the replacement module application."*<sup>29</sup>

## Summary of proposed changes to the Replacement Module process

- 6.11 The draft Variation Notice proposes to make the following amendment in relation to the replacement modules:
- (a) *The inclusion of a replacement module process that includes a commitment by NBN Co to make a replacement module application and an obligation for the ACCC to make a replacement module determination if it does not accept the application;*
  - (b) *The inclusion of NBN Co's drafting for the matters that must be addressed via the replacement module process, but with some variations as outlined above; and*
  - (c) *The inclusion of NBN Co's proposed drafting in relation to the criteria that the ACCC will have regard to when exercising its replacement module determination power, but with the some amendments to be consistent with the legislative criteria for the making of an Access Determination.*<sup>30</sup>

Optus therefore submits that while it still supports the ACCC's original proposal for the removal of the replacement module clauses (i.e. clauses 4.5 to 4.11 of the Main Body); it considers that the ACCC's current proposal and drafting for the replacement module process to be a

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<sup>29</sup> ACCC, Response to Submissions, p.29.

<sup>30</sup> ACCC, Response to Submissions, p.29.

suitable comprise. Notwithstanding this view, Optus also considers that the previous comments made by other Access Seekers<sup>31</sup> on this issue remain relevant.

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<sup>31</sup> See ACCC, Response to Submissions, p.17.

## Section 7. Product development

### Recommended variations to SAU

**Schedule 1I Annexure 1:** Remove reference to consumer advocacy groups.

**Clause 1J.3.2:** insert new provision stating that nothing in the IPR clauses has the effect of preventing parties or multiple parties requesting additional non-disclosure agreements to be signed to gain access to particular proposals that have IP attached.

**Clause 1J.1.3(b)(i):** Remove “The introduction of”. Replace “that is an initial product” with “that is supplied by NBN Co to at least one Access Seeker before or at the date of execution of this SAU.”

**Initial Product:** Remove the concept of Initial Product and remove all reference in SAU to Initial Product.

**Clause 1J.1.3(b)(ii):** Remove.

**Clause 1J.1.3(b)(iii):** Remove.

- 7.1 A key feature of NBN Co’s product development framework is the establishment and operation of the Product Development Forum (PDF). In particular, the SAU currently sets out a number of provisions in relation to how the PDF and PDF Processes will operate.
- 7.2 The ACCC identified a number of concerns with the product development and variation provisions in the Draft Decision, and consequently proposed a number of variations. With the exception for the inclusion of consumer advocacy groups and their participation in the PDF, Optus was otherwise generally in agreement with the ACCC’s proposed changes in relation to product development and variation.
- 7.3 These issues were again raised in the draft Variation Notice, with a number of additional amendments. The remainder of this section sets out Optus’ views on these issues.

### **Term and operation of the PDF Processes**

- 7.4 Optus supports the ACCC’s position that the term of the PDF Process continue to be limited to the first five years of Module 1 and accepts the ACCC’s reasoning that:

*In the event that, in five years’ time, NBN Co demonstrates that the processes lead to the outcomes that promote the long term interest of end-users, the ACCC would be able to accept their continued operation were NBN Co to seek to extend their operation via a SAU variation.<sup>32</sup>*

### **Commitments by NBN Co to share information and consult**

- 7.5 The industry has mixed views on the ACCC’s proposed commitment by NBN Co to consult with consumer advocacy groups. While a number of submissions supported the ACCC’s

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<sup>32</sup> ACCC, Response to Submissions, p.43.

proposal in principle, they also highlighted a number of caveats and circumstances where this commitment may not be appropriate. For example,

- (a) NBN Co considered that *“there should be an approval process around which group is nominated to become a member of the PDF, rather than a default position that would allow any group, or potentially any individual, to seek access to the PDF.”*<sup>33</sup>
- (b) Telstra proposed that NBN Co should establish and maintain a register of consumer advocacy groups that can participate in the PDF. It would be intended that organisations may apply to NBN Co to join the PDF, and subject to meeting a number of eligibility criteria, *“if an organisation is included on the register it will be treated as a ‘consumer advocacy group’.”*<sup>34</sup>
- (c) AAPT partially agreed, but noted that *“there may be circumstances in where end-user input may not be appropriate or relevant in the context of negotiations between supplier and customer.”*<sup>35</sup>

7.6 NBN Co also commented that since its product development would *“be at least one layer below those ultimately offered by RSPs. It has always been assumed by NBN Co that RSPs will be representing the needs of their consumers and potential customers in the PDF, to ensure that products are developed that end-users want to purchase.”*<sup>36</sup> This was a view similarly expressed in submissions, by Optus and VHA, which questioned the ACCC’s proposal.

7.7 The ACCC acknowledges that while it *“does not necessarily consider that membership should be open to any individual or group, or that participation should be unconstrained,”* the proposed variations will mean *“The PDF Processes themselves would then determine the circumstances in which NBN Co would be required to consult with these groups and consider their feedback.”*<sup>37</sup> As such, the ACCC does not intend to deviate from its original proposal.

7.8 Optus reiterates that it is not clear what benefits arise from having a formal role for consumer advocacy groups in the PDF, particularly in the context of wholesale decision-making. This position is similar to the view expressed by the DBCDE.

*Retail service providers must necessarily engage with end-users and it would seem more appropriate to encourage effective engagement at this level.*<sup>38</sup>

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

7.9 The ACCC’s preliminary view, supported industry views, that *“the effect of the confidential and intellectual property rights could be that customers are discouraged from participating in the Product Development Forum.”*<sup>39</sup> As such, the ACCC proposed the removal of clauses 5 and 6 of the PDF Processes.

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<sup>33</sup> NBN Co submission, p.42.

<sup>34</sup> Telstra, *Telstra’s response to the ACCC consultation paper – variation of NBN Co Special Access Undertaking*, May 2013, p.26.

<sup>35</sup> AAPT, *Submission by AAPT Limited on ACCC consultation paper – variation of NBN Co Special Access Undertaking and related Draft Decision*, May 2013, p.7.

<sup>36</sup> NBN Co submission, p.42.

<sup>37</sup> ACCC, *Response to Submissions*, p.47.

<sup>38</sup> DBCDE, *ACCC’s Draft Decision on NBN Co Limited’s Special Access Undertaking*, Letter to ACCC, 6 May 2013, p.3.

<sup>39</sup> ACCC, *Consultation Paper – variation of NBN Co Special Access Undertaking*, April 2013, p.83.

- 7.10 There was general agreement with the ACCC's proposal; however, a number of submissions also highlighted the continued need to have some high-level commitments in relation to confidentiality and IPR within the PDF Processes.
- 7.11 Optus additionally supports the ACCC's proposal to include a new clause in Schedule 1J and 2E, in relation to the 'Processes relating to the Product Development Forum'. Namely, the ACCC's proposed amendment for the:
- Addition of a power conferred on the ACCC in Module 1 and Module 2 to determine the terms and conditions of these confidentiality and intellectual property rights agreements, in the event of disagreement between the parties.*
- 7.12 Optus notes that while the practical implementation is yet to be seen, the proposed drafting set out in the new sub-clauses 1J.3.2(b)-(g) are broader in nature than the previous confidentiality and IPR clauses – i.e. it provides relevant parties with the discretion to reach an agreement on the terms and conditions in relation to confidentiality and IPR to be applied in the PDF. Importantly, failing agreement, it provides ACCC oversight to determine the relevant confidentiality and IPR terms and conditions pursuant to clauses 1J.3.2(e)-(f).
- 7.13 Optus recommends that an additional clause be included in 1J.3.2 stating that nothing in the IPR clauses has the effect of preventing parties or multiple parties requesting additional non-disclosure agreements to be signed to gain access to particular proposals that have IP attached.

#### **Provisions which allow for consultation to not be undertaken in particular circumstances**

- 7.14 The ACCC's preliminary view was that provisions such as these limit the extent that product development promotes competition. Consequently, the Draft Decision proposal included:
- (a) Removal of the Initial Product Roadmap exemptions;
  - (b) Removal of the Minor Product Variation exemptions;
  - (c) Removal of the exemptions for products that NBN Co is obliged to offer as a result of a licence condition; and
  - (d) Amendments to make clear that the product development, variation and withdrawal provisions apply to all Ancillary Services and to NBN Co-initiated product ideas.
- 7.15 As noted in a number of submissions, there was general agreement with the ACCC's proposal shared by AAPT, iiNet, Macquarie Telecom, Optus, Telstra and VHA. Optus submits that the ACCC's original proposal should remain the general approach adopted the SAU, as this would ensure that the PDF and PDF Processes continue to operate in the way it is intended. The inclusion of any exemptions from such commitments adds an additional layer of complexity and increases the potential for the development or variation of a product to result with unintended consequences.
- 7.16 In contrast, NBN Co was generally defensive against each of the ACCC's proposed changes and proposed a number of amendments. To address these concerns, the ACCC has proposed several amendments, discussed below.

#### **Exclusion of products covered by the Initial Product Roadmap**

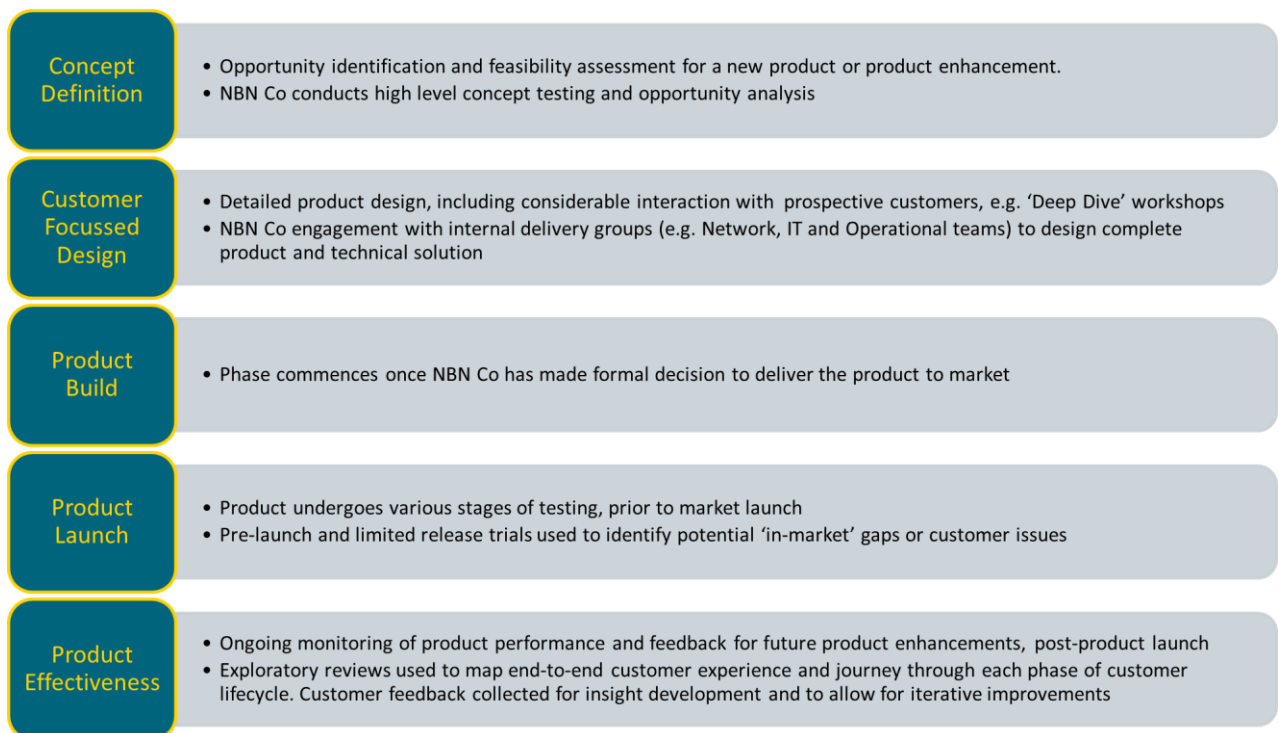
- 7.17 The ACCC's proposal for the removal of the Initial Product Roadmap exemptions was in response to the acknowledgement that *"the current scope of the Initial Product Roadmap*

*exclusion is too broad.*<sup>40</sup> Despite the general consensus shared by Access Seekers, NBN Co did not agree with the ACCC’s proposal and instead proposed the following:

*NBN Co proposes removing the references to ‘Initial Product Roadmap’, and replacing it with a shorter list of products that have already been through significant levels of customer engagement and development. These Initial Products will be included as an Annexure to Schedule 11.*<sup>41</sup>

7.18 To support the designation of Initial Products to be or not be subject to the PDF, NBN Co summarised its product development process into five main phases, illustrated in the figure below.<sup>42</sup>

Figure 2 NBN Co’s product development process – 5 key phases



Adapted from: NBN Co Limited

7.19 NBN Co also noted that:

*It would be inefficient and costly to require products that are already in the build phase of the product development process to be subject to an additional round of consultations through the PDF. While not every product that is on the Initial Product Roadmap is in the build phase as yet, the majority of them are, and have already been the subject of considerable industry engagement and consultation.*<sup>43</sup>

7.20 As such, NBN Co proposed that a subset of those products from the Initial Product Roadmap be exempt from the operation of the PDF. These exempted products include those that have been developed to at least the ‘Product Build’ phase as described by NBN Co.

7.21 In light of these views, the draft Variation Notice proposes to make:

<sup>40</sup> ACCC Draft Decision, p.85.

<sup>41</sup> NBN Co submission, p.45.

<sup>42</sup> NBN Co submission, p.46.

<sup>43</sup> NBN Co submission, p.48.

- (a) Amendments to the provision that exclude products covered by, or contemplated within, the Initial Product Roadmap – the SAU will now exclude ‘Initial Products’ that are specified in the SAU.<sup>44</sup>
  - (b) This is supported by a proposed list of Initial Products as set out in Attachment D to the Main Body.<sup>45</sup>
- 7.22 There is a concern that that inclusion of the ‘Initial Product’ concept may still in effect be indirectly accepting the principle of the ‘Initial Product Roadmap’. For instance, in many cases, prices have been set irrespective of any firm details being set in relation to the technical specifications, yet the Initial Roadmap indicates that consultation and documentation on those product attributes have been completed. Optus therefore considers that the removal of the Initial Product Roadmap exemptions altogether would still be the preferred approach.
- 7.23 The proposed list of Initial Products has been narrowed to comprise a defined list of Product Components and its relevant Product Features. Optus considers this approach to be a significant improvement from the ‘Product Release’ categorisations proposed by NBN Co, however notes that the ACCC’s list should also be refined to take into account only the Products that have already been delivered to market. In addition, these Products should not be viewed from a static perspective, given the dynamic state of the service being provided.
- 7.24 Absent this refinement, or even in addition to this, the ACCC should still be granted a conferral of power to allow the operation of the PDF to include any discussion on products listed within the suite of Initial Products (similar to the ACCC ‘disallowance’ power proposed for product withdrawal matters).
- 7.25 For example, exclusion from the list of ‘Initial Products’ could be warranted if the Product Feature meets one or more of the following criteria:
- (a) The Product Feature is still subject to significant industry contention (e.g. the UNI Battery Backup capability and Optional Battery Backup Product Features);
  - (b) The Product Feature contains technical specifications that has not been finalised
  - (c) The Product Feature relates to a commitment or guarantee for a feature that is yet to be finalised (e.g. the AVC Enhanced Service Level guarantee commitments);
  - (d) The Product Feature relates to reporting requirements (e.g. the Other Service Enhancements Reporting Phase 1 and Phase 2 requirements).
- 7.26 Optus notes that while the inclusion of a specified list of ‘Initial Products’ may be reasonable, the nature of this list should only include those Product, Product Component or Product Features that have already been developed *and* delivered to market. Any product that has not been developed to fruition at SAU Commencement should continue to be subject to all other product development commitments, including regulatory oversight over all price and non-price provisions before introduction to market. Optus also considers that the inclusion of a separate ‘Initial Products’ list may already be redundant, given that the same or similar set of products will already be included elsewhere in the SAU, e.g. within the price list included in the Reference Offer and Non-Reference Offer schedules in Module 1.

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<sup>44</sup> ACCC Response to Submissions, p.51.

<sup>45</sup> ACCC Response to Submissions, pp.51, 138-40.



- 7.27 Optus further considers that while such a list may apply to product development commitments, it should not be used as an instrument to avoid consultation with respect to variations to such products.
- 7.28 Optus recommends that a simple amendment could be to remove the concept of initial products and state that products that have been developed and implemented prior to the execution of the SAU be excluded from PDF, but all new products or product variation after the start of the SAU be subject to the PDF.

#### Exclusion of products obliged to be offered as a result of a licence condition

- 7.29 The ACCC's proposal for the removal of these exemptions was to address the lack of certainty surrounding NBN Co's commitment to consult on the prices and services levels of those products.<sup>46</sup>
- 7.30 Despite the consensus shared by Access Seekers for the removal of the exemption altogether, NBN Co did not agree with the ACCC's proposal and instead proposed the following amendments:

*NBN Co proposes that this clause is modified to ensure that those aspects of the new product not specified by the licence condition would be subject to the product development process.<sup>47</sup>*

- 7.31 The ACCC has proposed to adopt NBN Co's suggested drafting for these provisions at clause 1.3(b)(iii) which clarifies that it only applies "to the extent that the specification of that Product, Product Component, Product Feature, Ancillary Service or type of Facilities Access Service is prescribed by that licence condition." Optus notes that while this appears to have further narrowed the scope of the exemption, it questions the applicability of the exemption given that where a licence condition required NBN to provide or vary a product it would therefore remain in the LTIE to consult with Access Seekers within the PDF on the development of this change.

#### Exclusion of minor product variations

- 7.32 The ACCC's proposal for the removal of these exemptions was to ensure that "all variations to existing products (whether NBN Co considers that the variation is minor or otherwise) are able to be consulted on via the Product Development Forum and PDF Processes."<sup>48</sup>
- 7.33 Despite the general consensus shared by Access Seekers, NBN Co did not agree with the ACCC's proposal and instead proposed that the existing clause be retained.
- 7.34 In light of these views, the ACCC is proposing to retain the minor product variation exemptions with an additional amendment to clarify that NBN Co does not have the discretion to determine whether the minor variation will have no material impact on customers. Optus considers that the ACCC instead proceed with its original proposal, given that the impact of any variation (minor or otherwise) has the potential to result in unintended consequences.

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<sup>46</sup> ACCC Consultation Paper, p.24.

<sup>47</sup> NBN Co submission, p.51.

<sup>48</sup> ACCC Consultation Paper, p.24.

## Additional variations proposed by Telstra

7.35 In its response to the ACCC's proposed variations to the Product Development and Withdrawal schedules in Module 1 and Module 2 of the SAU, Telstra proposed a number of additional variations intended "to build on, rather than replace, the consultation commitments in the NBN Co SAU."<sup>49</sup>

7.36 The ACCC, meanwhile, has considered a number of these proposed variations to have merit but has yet to propose any amendments to this effect.

*The ACCC considers that the proposed variations relating to additions to the product ideas register, the Integrated Roadmap, and the PASS test appear to have the potential to increase the extent to which the product development and variation provisions reduce information asymmetries between NBN Co, Access Seekers and end-users in the development and variation of products. In addition, the requirement to consult on NBN Co's initial assessment of proposed products, the inclusion of price-related terms in a Product Construct Paper and the inclusion of over-riding principles for the consultation process in an Idea Development Plan may facilitate a higher and/or more effective degree of consultation between NBN Co and participants in the PDF.<sup>50</sup>*

7.37 Optus submits that Telstra's proposal would add additional clarity and structure around a process that would otherwise remain completely behind 'closed doors'. In particular, there is currently no active role for the ACCC in the PDF, and while Optus accepts that the PDF can provide a suitable forum for commercial negotiation to facilitate discussion on the development of new products, and variations to existing products (including pricing and other critical aspects of supply), it considers that Telstra's proposals could add further transparency and legitimacy to the process without necessarily comprising the rights of NBN Co or RSPs from entering into commercial negotiation on such product development and variation commitments.

7.38 While it remains unclear how Telstra's proposal would take effect within the SAU, Optus supports the inclusion of the general principles in relation to the product development commitments proposed by Telstra in its previous submissions.

For example, it would remain in the interests of transparency for both the ACCC and Access Seekers to be able to access an updated register of Product Ideas and that mandatory consultation should occur during the development phase of each Product Idea. The benefits of these amendments would be two-fold. Firstly, for Access Seekers it would provide clarity and transparency surrounding the progress of a Product Idea – this would ideally add a level of certainty regarding the level of engagement and timeframes required by participating Access Seekers in the PDF, while the requirement for mandatory participation would ensure that all Access Seekers in the PDF would be aware that a consultation is currently underway (or an outcome has been reached) and it remains in their discretion whether or not they choose to participate. Second, in relation to the requirement to maintain an updated Product Ideas Register, accessibility to this register (in particular the timing information related to the Product Idea, including when was lodged, its progress, and its final outcome) could be invaluable to the ACCC in terms of monitoring from an external perspective, the level of engagement that has been exercised in the PDF. This level of oversight would also assist in the context that failing commercial negotiation, the ACCC will be able to declare services under Part XIC.

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<sup>49</sup> Telstra submission, p.18.

<sup>50</sup> ACCC Response to Submissions, pp.51-52.

## Section 8. Product withdrawal and reference offers

- 8.1 The SAU establishes that any service that is defined as a reference offer cannot be withdrawn during their relevant term. Under the product withdrawal commitments, NBN Co has the discretion to withdraw any non-reference offer provided that:
- (a) No less than 24 months written notice is given to customers of its intention to withdraw a Product, Product Component, Ancillary Service or type of Facilities Access Service; and no less than 12 months written notice for a Product Feature. This would also include notice of any arrangements to migrate customers to alternate services;
  - (b) When considering whether to withdraw a Product, Product Component, Ancillary Service or type of Facilities Access Service, have regard to a number of factors such as the level of existing demand, cost of maintaining and supplying the service and the feasibility, commercial viability and price of alternatives; and
  - (c) Discuss and consider in good faith any feedback received from its customers, and Access Seekers in some circumstances, in relation to the withdrawal.
- 8.2 The ACCC identified a number of concerns with the product withdrawal provisions in its Draft Decision, particularly in relation to NBN Co's discretion to withdraw non-reference offers, and consequently proposed a number of variations in its Consultation Paper.
- 8.3 There was general agreement by all parties with the ACCC's proposal to provide the same level of notice in relation to any withdrawal. In contrast, the proposal for a conferral of power for the ACCC to disallow the withdrawal of a currently supplied offer was mixed.
- 8.4 These issues were again raised in the draft Variation Notice of NBN Co's SAU response, and a number of additional amendments have been proposed. The remainder of this section sets out Optus' views on these issues.

### Reference and Non-Reference Offers

- 8.5 The Reference Offer and Non-Reference Offer construct applies in both Module 1 and Module 2 of the SAU. The broad elements of these offers can be described as follows:
- (a) Reference Offers must be defined for a relevant term, in accordance with a set of criteria (i.e. required to cover all of the elements required to provide an end-to-end service). For example, this would include the Basic Access Offers (BAO); the Enhanced Access Offer (EAO); the Standard Business Offer (SBO).
  - (b) Non-Reference Offers cover all services that are not Reference Offers or Other Charges associated with the supply of Reference and Non-Reference Offers.<sup>51</sup>
- 8.6 Additionally, while *"The ACCC did not propose any variations in relation to the composition of the initial Reference Offers. It did however propose that the replacement module process (and in turn the process for changing the composition of Reference Offers over the course of Module 2) be removed from the SAU."*<sup>52</sup>

<sup>51</sup> NBN Co, *Supporting Submission to NBN Co SAU*, 28 September 2012, p.101.

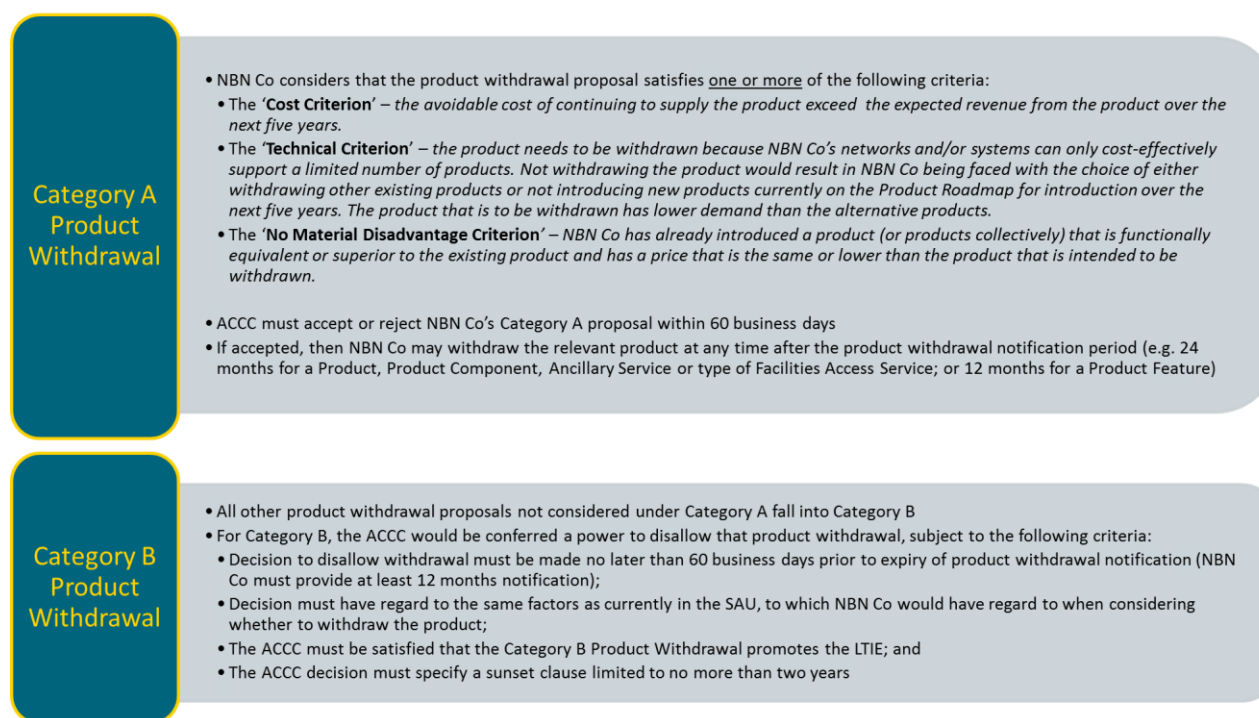
<sup>52</sup> ACCC Response to Submissions, p.54.

- 8.7 The SAU establishes that during Module 1, the composition of Reference Offers cannot be changed for the duration of the initial regulatory period. In contrast, during Module 2, NBN Co may seek to retain and/or vary its suite of Reference Offers as part of each replacement module application.
- 8.8 The ACCC would then assess this application under the replacement module process (or issue its own replacement module determination as per ACCC's current proposal), and when accepted, the composition of the Reference Offers would change in accordance with the proposal for the next regulatory cycle.
- 8.9 It is therefore important that the composition of the Reference Offers in Module 1 (and any subsequent replacement modules) be designed to represent the products required by Access Seekers to provide entry-level residential and business grade services to end-users.

### Product withdrawal notification and disallowance

- 8.10 In its response to the Discussion Paper, NBN Co proposed a product disallowance framework in relation to the conferral of power to be provided to the ACCC. NBN Co's proposed approach essentially categorises product withdrawal proposals into either Category A or Category B Product Withdrawals, summarised in the figure below.<sup>53</sup>

Figure 3 NBN Co's proposed product withdrawal disallowance power



Adapted from: NBN Co Limited

- 8.11 Where one or more criteria is met to warrant a Category A designation and the ACCC approves the proposal submitted, then the product withdrawal will be allowed to proceed. This therefore limits the proposed conferral of power to be provided to the ACCC to Category B Product Withdrawals, which also includes a number of decision making criteria and a condition that any ACCC decision be limited to a maximum of two years.

<sup>53</sup> NBN Co submission, pp.56-58.

8.12 The ACCC has considered this proposal but noted:

*... the requirement to categorise a product under **NBN Co's proposed approach appears to potentially add an additional, unnecessary layer of process to the ACCC's decision making about whether to disallow the withdrawal of a product** – the ACCC is required to make two decisions if it considers that a product withdrawal should be disallowed (first the categorisation, and second the disallowance decision).<sup>54</sup> [emphasis added]*

8.13 Consequently, the ACCC is proposing only partial adoption of NBN Co's proposed approach, which it considers broadly equivalent to NBN Co's proposed process for disallowing a Category B product withdrawal. The key differences include:

- (a) Extension of the 'sunset period' from a maximum of two years to five years;
- (b) Inclusion of ACCC discretion to extend its time period in which it can make a decision to disallow the product withdrawal by an additional 40 business days; and
- (c) Removal of the requirement on the ACCC to categorise the products NBN Co wants to withdraw as either Category A or Category B.<sup>55</sup>

8.14 Optus supports in principle the inclusion of a conferral of power on the ACCC to disallow the withdrawal of a product. However, Optus remains sceptical on the practical implications, given that access seeker's concerns on the proposed notification periods (and its applicability to Non-Reference Offers) for product withdrawal have not changed.

### **Interaction between product disallowance power and Reference Offer / Non-Reference Offer distinction**

8.15 The draft Variation Notice notes that the Reference Offer and Non-Reference Offer concepts; and operation of the product disallowance power are clearly related.<sup>56</sup>

8.16 While there were several concerns raised in relation to the product withdrawal process in access seeker responses to the Consultation Paper, Optus considers that this has been addressed to some extent with the conferral of power on the ACCC to disallow a product withdrawal, provided that this power remains unconstrained – the ACCC should not be restricted in its decision-making capacity and should be given the flexibility to make a decision in which it balances a range of factors.

8.17 Optus is not opposed to the requirement for NBN Co to specify a suite of Reference Offers, in order to set suitable price 'anchors' for the introduction of future prices, however remains acutely aware of the implications that while not specifically defined there is the risk that a Non-Reference Offer (which may be related to a Reference Offer, but not specifically defined within its composition) may be subject to product withdrawal during the relevant regulatory term.

### **Product withdrawal required by law or Shareholder Minister**

8.18 Under the SAU, NBN Co currently has the discretion to be exempt from the full operation of the product withdrawal commitments where a product withdrawal is required by law.

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<sup>54</sup> ACCC Response to Submissions, p.56.

<sup>55</sup> ACCC Response to Submissions, p.57.

<sup>56</sup> ACCC Response to Submissions, p.57.

- 8.19 In response to concerns raised by Access Seekers, NBN Co proposed “*variations be made to the SAU to provide additional commitments by NBN Co in relation to the notifications to customers of product withdrawals required by law and so provide them with enhanced ability to plan to make changes to their business models.*”<sup>57</sup>
- 8.20 This proposal is similarly adopted in the ACCC’s proposal, and is included in the form of a new sub-clause 5.4(b) in Schedule 1J which requires NBN Co to:
- (a) Provide written notification of the withdrawal within 20 business days of NBN Co being made aware of the requirement to withdraw a product; and
  - (b) Consult with and consider any feedback received from its Customers in relation to the impending withdrawal and related issues, such as migration.<sup>58</sup>
- 8.21 Optus considers the proposed changes only partially addresses the concerns raised, and Telstra’s request that such exemptions from the full operation of the product withdrawal commitments be limited so that it only applies to the extent that NBN Co is prevented by law from complying with product withdrawal commitments is adopted.

### **Additional variations proposed by Telstra**

- 8.22 In its response to the ACCC’s proposed variations to the Product Development and Withdrawal schedules, Telstra also proposed a number of additional variations to the product withdrawal provisions about transitional arrangements and non-circumvention.<sup>59</sup>
- 8.23 On the transitional arrangements, Telstra proposes that NBN Co should be required to provide the following information, at a minimum:
- (a) NBN Co’s assessment of each of the matters it has relied on to warrant the withdrawal of a product;
  - (b) NBN Co’s proposed transitional arrangements for migration to an alternative product, including:
    - (i) NBN Co’s proposed ‘go to’ product;
    - (ii) NBN Co’s proposed timeframes for transition to the ‘go to’ product;
    - (iii) Details of testing of the ‘go to’ product; and
    - (iv) Details about trials and phasing-in processes for transition to the ‘go to’ product; and
  - (c) NBN Co’s proposal to consult with RSPs and consumer advocacy groups in respect of these matters and reasons why NBN Co considers this proposal appropriate in the circumstances.<sup>60</sup>
- 8.24 The ACCC, meanwhile, has considered the proposed variations in relation to the transitional arrangements has merit but has yet to propose any amendments to this effect.

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<sup>57</sup> NBN Co submission, p.59.

<sup>58</sup> NBN Co submission, p.59.

<sup>59</sup> Telstra submission, pp.23-5.

<sup>60</sup> Telstra submission, pp.23-4.

*The ACCC considers that these variations appear to have the potential to increase the extent to which Access Seekers can plan for making changes to their business models and other downstream investments as a result of NBN Co's decision to withdraw a product. This would increase the extent to which the product withdrawal provisions encourage efficient investment in, and use of, the NBN.<sup>61</sup>*

- 8.25 Optus submits that Telstra's proposal, to some extent, should be adopted. Under the current product withdrawal commitments, the SAU appears to remain silent on the level of information (concerning transitional arrangements, if any) NBN Co is required to provide in any product withdrawal notification. This is despite the stated commitment for NBN Co to have regard to any 'alternative' products when it considers whether to withdraw a product.

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<sup>61</sup> ACCC Response to Submissions, p.60.