



ACCC Industry Forum on NBN Co's Special Access Undertaking

Industry Forum Summary

18 -19 August 2022

Hilton Hotel, Sydney and online via Teams

Disclaimer

This document is not a verbatim record of the industry forum but a summary of the issues raised by forum participants. The forum was conducted under the Chatham House Rule and so comments have generally not been attributed to any group, firm or individual except with their prior consent. The views and opinions expressed are those of the participants and do not reflect the ACCC's views or position on the issues summarised here.

Welcome and introduction

ACCC Chair Gina Cass-Gottlieb and Commissioner Anna Brakey welcomed attendees, outlined the purpose of the industry forum and invited attendees to contribute to the discussion of topics of interest to them.

Ms Cass-Gottlieb encouraged all attendees to focus on achieving an outcome in the long-term interests of end-users. In achieving this outcome, Ms Cass-Gottlieb reiterated the underpinning principles for NBN regulation which were jointly developed in 2021, that:

- NBN Co has the opportunity to earn the minimum revenues it needs to meet its legitimate financing objectives, including to transition to a standalone investment grade credit rating
- NBN Co end users are protected from price shocks and from prices that are higher than necessary in later years
- the regulatory framework provides incentives for NBN Co to operate efficiently and promote the use of the NBN
- NBN access seekers have greater certainty over the costs that they will face when using the NBN; and
- there is a clear and robust quality of service framework so that access seekers and end users know what to expect from NBN services, including a review mechanism so that service standards remain fit for purpose.

Ms Cass-Gottlieb also noted the forum's role was for attendees to contribute their ideas while the SAU variation proposal is under development, provide an opportunity for attendees to identify the issues which are in the long-term interests of end-users and to consider the merits of other perspectives.

Representatives from the Department of Infrastructure, Transport, Regional Development and Communications and the Arts (the Department) also provided opening remarks:

- The Government noted the important role that the special access undertaking (SAU) plays in establishing the default access terms for the NBN.
- The Government supports the SAU being varied to expand its scope to all technologies and better achieve the following outcomes which it considers would be needed so that the NBN can deliver long-term benefits to Australian businesses and consumers:
 - there is equitable and affordable access to high quality and reliable broadband services.
 - NBN Co has the opportunity to earn revenues that would enable it to efficiently invest in its network.
 - NBN Co operates with additional financial discipline.
- The Department reiterated the Minister's observation that, in her experience, consumers are currently more concerned with the quality of their NBN services than they are over the prices they are being asked to pay.
- The Department noted that the quality of NBN services is a function of the actions of both NBN Co and retailers and there is a need for each to work together if quality is to improve.
- The Department acknowledged NBN Co's stated intention to make substantial improvements to the SAU variation that it had proposed in March 2022 via its pending proposal, while noting that these are yet to be considered by industry and the ACCC.
- The Department further noted that it is important to recognise that, while the Government will be retaining NBN Co in public hands for the foreseeable future, it will continue to be a Government Business Enterprise (GBE) that is subject to commercial disciplines and that it is expected to be sustainable, which includes NBN Co achieving an appropriate rate of return.

Presentations and discussion of SAU components

NBN Co provided an overview of the changes to the SAU that it is considering for inclusion in its pending variation proposal. These broadly covered the key areas of pricing, service standards, the form of economic control, recovery of past losses, oversight of its expenditure and the ACCC's functions and powers. In its opening, and subsequent, presentations throughout the forum, NBN Co presented on issues consistent with those in its latest SAU variation discussion paper.¹

Other stakeholders presented on their objectives and expectations in relation to the revision of the SAU. Key areas included pricing, service standards, regulatory controls, expenditure criteria and the ACCC's functions and powers.

¹ NBN Co's consultation paper is available on its website at: <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-releases-revised-sau-variation-discussion-paper>

Price and associated controls

NBN Co outlined the key features of the new pricing and price control arrangements that it is considering. The main changes to the March 2022 SAU variation proposal that NBN Co highlighted were:

- A transition to AVC only pricing for the 50 Mbps and below speed tiers by no later than July 2026 facilitated by a progressive reduction in CVC charges and increase in AVC charges (in addition to the previously proposed immediate transition to AVC only pricing for the 100 Mbps and above speed tiers).
- Reductions in prices of 100 Mbps and above speed tiers relative to the AVC-only pricing proposed in the March 2022 variation proposal
- Reductions in the effective charges for 12, 25 and 50 speed tiers (as compared to the prices proposed in the March 2022 variation proposal but not necessarily from the current effective charges)
- A weighted average price cap with sub-caps on individual services, both of which are to apply to the combined (AVC plus CVC) effective prices
- Pricing principles in the SAU including a commitment to maintain a diversity of offers of different price and quality (speed tier), and to take into consideration the recommendations made by its proposed the low-income forum
- Additional measures to provide more guidance over its future pricing decisions, including an annual tariff filing statement, 3 year pricing roadmap and pricing intentions statement
- Rules to apply to discounting so that these practices did not again become a source of cost uncertainty for retailers and consumers.

NBN Co presented information indicating the direction and amount by which it expected its average revenue per user would change. NBN Co also presented similar information at an individual speed tier level. This information was based on actual July 2022 product mix and network (CVC) usage data and so did not appear to take into consideration changes in product mix and/or network usage that could occur due to the move to the new pricing arrangements or other factors.

NBN Co advised the forum that an overlay of the proposed SAU pricing on July 2022 actuals, including services and usage, would result in a \$0.30 cent per month increase in average TC-4 yield. Other notable changes were rises in the monthly yields of the 12 Mbps and 50 Mbps speed tiers of \$1.60 and \$1.80 respectively and a reduction in the 25 Mbps speed tier by \$2.60. NBN Co claimed that the latter reduction along with that of the for the Voice Only product would largely offset the yield rises for the 12 Mbps and 50 Mbps speed tiers.

Participants broadly acknowledged that NBN Co's proposals are an improvement on the March SAU variation proposal. However, participants expressed various concerns and suggestions for improvement on the pricing measures as outlined.

Participants generally welcomed the steps being taken towards the removal of CVC charges but some queried whether these charges could be phased out from the lower speed tiers sooner or with more significant reductions in CVC overage charges during the proposed transition period.

There was general support expressed for the objective of retaining a broad range of speed tiers so that end customers could choose the NBN plan inclusions that would meet their requirements, rather than having this decided by NBN Co.

There were concerns expressed about the rise in the minimum cost of the 50 Mbps bundle from \$45 to \$50 per month. It was pointed out that this did not consider changes in likely overage costs and that when these are considered the forecast increase could be less than the \$5 per month increase that focusing only on the minimum charge would suggest. Participants expressed interest in better understanding the assumptions that underpinned the projected reduction in overage charges that would act to moderate AVC price increases.

Some participants expressed the view that the effective charge for the 50 Mbps speed tier would potentially converge with that of the 100 Mbps speed tier in the near future, based on their expectations around CVC overage costs. One participant was concerned that this would reduce price and quality differentiation in the retail market, while another indicated that its view on this would depend on whether the 25 Mbps speed tier remains in market at a price level that makes it a viable alternative product for a significant number of its customers.

One participant questioned whether the underlying costs of supply would be roughly aligned with the average price level at the start of the regulatory period, in which case average price level increases would only be required to fund new investments or quality improvements, or for capital maintenance purposes. Participants raised some related concerns about the efficiency of the investments that would be made and how these would be selected and delivered. Participants expressed the view that the associated costs of investments would likely have a material effect on pricing and so it is important that these result in higher quality.

Some participants questioned whether reducing higher speed tier pricing was an appropriate pricing strategy where this necessitated an increase in the price of lower speed tiers. One participant pointed to the current product mix in market and expressed the view that this rebalancing of charges would likely lead to an increase in average access costs given most services are on the 50 Mbps speed tier, for which the effective cost will increase.

There were concerns expressed about whether enough was being achieved in relation to affordability, including in keeping lower speed tiers affordable. There was broad support for the development of suitable wholesale pricing offers to address these concerns. Discussion on this point included the possibility of a capped data wholesale pricing offers to keep a variety of NBN retail offers in market at an affordable price point.

There was a request that NBN Co's proposed low-income forum be convened earlier so that it could contribute to the development of pricing proposals from the start of the first regulatory period, which NBN Co indicated it would consider doing.

The discussion on affordability brought forward a discussion about whether mobile/fixed wireless networks would be a viable substitute for consumers seeking a more affordable broadband service. The majority view expressed at the forum was that NBN services would continue to have an important part to play in supporting a significant number of the consumers that require affordable broadband solutions, including those who do not require high maximum speeds or unlimited data offers to meet their needs. In this regard, it was acknowledged that wireless access could still be preferred by certain household types.

Two participants suggested that the access product and pricing offers that are available over the New Zealand ultrafast networks would be a useful point of reference to assess NBN Co's proposed approach to pricing, noting that those price arrangements are relatively simple and do not include CVC charges.

One participant requested that NBN Co also reform its approach to charging for network to network interfaces (NNIs) as part of its pending SAU variation proposal. Its concern is that NBN Co's current approach to pricing this service results in significant scale economies that disadvantage smaller retailers that wish to interconnect directly with NBN Co.

Service standards and reporting

NBN Co presented on its proposed approach to investing in its networks and processes so that it can firstly maintain its current operating performance as additional businesses and consumers connect to its network and equipment reaches end of life. NBN Co then outlined the additional investment it is considering to enhance operational performance. This includes simplifying its systems, expanding the footprint of gigabit download services and higher upload speeds on its HFC network, as well as its FW and FTTP upgrade programs. NBN Co also spoke to its intentions to more clearly link its pricing decisions with the quality of its offers.

NBN Co confirmed for the forum that it would include in its next SAU variation proposal a baseline set of service levels and performance benchmarks to apply in the initial regulatory period and a mechanism by which these could be reviewed by the ACCC at each reset. Further, NBN Co would commit to negotiate improvements to these baseline measures and to offer the service levels in its standard form of access agreement. NBN Co would also identify the efficient costs associated with its proposed quality improvements when lodging its regulatory proposals so that the price impacts could be assessed.

The forum then discussed the related issues of how the initial baseline measures would be selected and the processes that would be followed in updating these periodically. On the first issue, NBN Co supports service levels and performance objectives being aligned with those in its current wholesale broadband agreement (WBA4) (which was issued in 2020) as the minimum baseline of service standards for the first regulatory period commencing in 2023.

Discussions then centred on whether this was reasonable with participants nominating service levels that they considered should be improved or expanded upon. These included the measures that apply to service outages (also termed drop-outs), under-performing copper lines with deteriorating speeds and network outage notifications. Some participants also queried whether the current performance benchmarks should be improved, noting these implicitly accepted that 1 in 10 consumer appointments may not be kept or faults not fixed within target timeframes.

In this regard, participants pointed to the increases in access costs that have occurred since 2020, and the further increase that would result from NBN Co's pricing proposal, and queried why the baseline service standards should not also increase.

In response, NBN Co advised the forum that it would further consider whether it could lift some of its service levels as part of its pending SAU variation proposal. NBN Co also noted that work is underway to improve the operational processes that it uses to provide network outage notifications which could enable stronger performance against this service level. Further NBN Co noted it is working to provide greater clarity over the service performance thresholds that it would use to determine whether it would accept a fault report, as well as the additional measures it will take so that its networks do not become congested. However, the timing of these improvements was unclear.

The forum also discussed whether NBN Co's fibre-to-the-premise (FTTP) investment program was a suitable means to respond to the service outages and other reliability issues that participants had raised, noting that these have largely arisen on the copper-based networks which this program is looking to overbuild. Some participants queried whether this program alone would be an adequate response given the potential time involved in progressively delivering the fibre upgrade and then migrating affected services.

On the second issue, several participants spoke in some detail about the benefits from their perspective of robust consultation processes to be built into the next SAU variation proposal.

They considered that consulting retailers and the community would be a more effective means for NBN Co to better align its priorities with the improvements that consumers value.

It was noted that consulting retailers and the community would facilitate NBN prioritising investment to bring forward service improvements that have higher consumer benefits. Further, involving retailers in these discussions could facilitate a broader consideration of end-to-end costs and benefits associated with potential service level improvements, including the efficiency gains potentially available to retailers. These efficiency gains would include avoiding or simplifying a significant number of help desk inquiries, fault reports and complaints to RSPs for service issues.

The forum then discussed whether there should be regular public reporting on service quality and how this should best be established. In this regard, there was strong support for public transparency over service quality so improvements on known quality issues could be tracked and emerging issues more quickly identified. There was also broad support for public reporting arrangements to be established through a record keeping and reporting rule under Part XIB of the Competition and Consumer Act to complement the operational reporting contained in the SAU.

Form of Regulatory Control

NBN Co outlined its intention to adopt a weighted average price cap (WAPC) and associated side controls in its pending SAU variation proposal. NBN Co had proposed to be subject to a revenue cap in its March 2022 SAU variation proposal with potential to move to a WAPC at a future time. NBN Co noted that it is still working through the form that the WAPC should take but that there would be two distinct phases:

- until its forecast revenues align with its annual building block revenue requirement, i.e., the revenues that a benchmark network operator would require to meet its efficient capital and operating costs each year – the WAPC would permit annual average price increases in line with the CPI.
- following that time – the WAPC would permit annual average price changes of CPI minus “X”, with X calibrated to allow NBN Co to continue to meet its annual revenue requirement on a forward-looking basis having regard to forecast changes in efficient expenditure and product mix etc., plus an additional draw down amount from the Initial Capital Recovery Account (ICRA). The ICRA is discussed further below.

NBN Co indicated that the first phase would likely extend until around 2030-32.

In addition to the WAPC, individual products (speed tiers) would be subject to sub-caps

- For the 25 Mbps speed tier (or another speed tier that has been designated as the entry level product) – these would be limited to annual increases no greater than CPI.
- For other products – average prices would be capped at the higher of CPI or 5%.

A participant queried whether NBN Co’s costs are reducing (as suggested by its annual revenue building block requirement calculations), and if so whether the WAPC should be set to allow prices to continue to increase at CPI over an extended period. It was explained that this was essentially because NBN Co cost modelling indicated that its current revenues are significantly below the annual building block revenue that a benchmark network operator would require, and so a glide path could be required to increase revenues including via a nominal increase in the weighted average price of the basket of services.

In response to questions, NBN Co confirmed that its current thinking is that the X value in the CPI-X constraint could either be negative or positive, but that it would aim to ensure that there was a smoothing of prices to avoid price shock when ICRA drawdown was allowed. In this regard, a negative X value means that the weighted average price of the basket of

services would be increasing in real terms, i.e., more quickly than where only CPI increases were allowed. A positive X value on the other hand means the rate of growth in nominal prices would reduce below CPI.

A participant requested that NBN Co provide its expected average revenues per user for its “best efforts” traffic class, which are termed “TC-4”, under the contemplated arrangements – these make up almost all the services that would be covered by the weighted average price control under consideration. NBN Co took this question on notice.

A participant requested further clarity from NBN Co on its expected rate of growth in CVC usage noting that it had recently provided a range of estimates in its communications with retailers on this point. This was to more readily assess probable outcomes of the outlined price control arrangements while CVC was to be charged for. NBN took this question on notice.

One participant suggested that New Zealand ultrafast network usage measures could give a guide as to potential changes in usage patterns that could be expected should NBN Co’s pricing approach be moving closer to what already applies on those networks.

A participant also expressed concern that the proposed WAPC framework would not prevent multi-year catch-ups in price in later years of a regulatory period.

A participant queried whether the sub-caps were too lax and potentially left open a range of pricing outcomes that could impact consumers or competition.

A participant nominated greater consultation and transparency requirements over future pricing decisions as a means to provide additional cost certainty to retailers.

Participants then discussed the mechanisms for setting the annual revenue amounts that NBN Co should have a reasonable opportunity to earn. This discussion included the implementation of the building block model (BBM) and the principles for setting an opening value for historical losses.

A number of participants considered that the basis of many of NBN Co’s forecasts that inform its projected annual revenue requirements has not yet been properly explained and tested. One attendee presented its analysis on NBN forecast costs which suggested that under some scenarios, NBN Co’s cash cost needs would likely be lower than the benchmark annual revenue allowances that its BBM generated. This led to questions around whether the BBM has been properly configured as well as whether the WAPC should transition to a CPI–X cap sooner.

One participant noted that NBN Co had historically not fully realised its demand and revenue forecasts and queried what the consequences would be were this trend to continue.

In response, it was noted that under-recovery of an annual building block revenue requirement would not typically allow credits to be carried forward where a WAPC was used as the principal regulatory control, and hence NBN Co would have stronger incentives to improve its forecasts and operate more efficiently. Further, the basis of NBN Co’s forecasts (including demand forecasts) would be provided to the ACCC for consideration at each reset.

In addition, it was suggested that NBN Co’s revenue could have departed from forecasts due to unforeseen market developments to which it had to respond quickly. An example is CVC overage waivers and other pricing relief provided during COVID.

There was also some discussion around the ICRA balance and its future drawdown. It was noted that the ICRA balance would be set equal to the minimum additional revenues that

NBN Co would require over and above the annual building block revenue requirement so it can pay down a sufficient portion of its accumulated debt to achieve an investment grade credit rating. In this regard, it was noted that NBN Co is yet to reach its forecast 'peak debt' level, and so it will need to continue to borrow to maintain its capital base and fund future investments.

One attendee agreed with the conceptual basis of setting the ICRA balance in this way, as enabling NBN to maintain an investment grade credit rating would facilitate NBN Co supplying services more efficiently (in particular when considering the debt cost). However, another participant queried whether this should be set on a stand-alone basis, since NBN Co appears to benefit from a very high credit rating and hence more favourable access to debt markets due to its implicit government backing. In its view it was not clear that allowing NBN Co to earn additional revenues in this circumstance would be consistent with the long-term interests of end-users.

It was also noted that under the outlined approach the ICRA would no longer accumulate, except via an annual CPI adjustment, notwithstanding that NBN Co would likely continue to under recover its annual building block revenue requirement for some time. It was suggested that this should be kept in mind when assessing NBN Co's proposal that it be permitted to over recover its annual building block revenue requirement in future years when it was in a position to earn such revenues. Additionally, any residual ICRA balance would not carry forward beyond the expiry of the SAU.

Some participants considered that the rules applying to how the ICRA amount could be drawn down required further consideration. It was noted that these rules are still being developed but that a key objective would be to implement a transparent mechanism, which seeks to minimise price shocks.

Some participants raised strong concerns about the potential for NBN Co to cross-subsidise its competitive services, i.e., those supplied in enterprise or business markets from revenues that it earns from regulated services. These attendees highlighted the importance of robust safeguards against this occurring such as the inclusion in the SAU of appropriate cost allocation rules and transparency measures.

Expenditure criteria and review

Participants in general welcomed NBN Co's intention to incorporate ex ante and ex post expenditure reviews in the revised SAU variation proposal. Such reviews were considered appropriate given the level of expenditures that would likely be incurred by NBN Co in the future.

However, participants identified three areas where further improvements could be made:

- The need for structured consultation as part of expenditure reviews, to ensure that consultation is properly representative of community views.
- The drawing of clear links between increased expenditures and prices on the one hand and improvements in service outcomes on the other.
- The need for transparent treatment of government funding.

Further, participants considered that while prudence and efficiency tests should be applied to all expenditures, including the costs of maintaining existing service levels, more demanding investment tests should be applied to expenditures intended to improve service performance. Such tests should be broad enough to allow the ACCC to assess whether the relevant expenditures would be likely to promote the LTIE.

Participants also raised concerns about the price impacts on certain groups of end-users, particularly in cases where end-users would likely to be asked to pay higher prices for investments that do not benefit them. For example, whether end-users who cannot access very-high speed services, or who only require entry-level speeds, should contribute towards the cost of making them available to others.

A participant queried how ex post reviews would be conducted given the potential for new information to arise that called into question the efficiency of expenditures incurred at an earlier time. The ACCC clarified that in its opinion the relevant question would be whether the case for an investment was robust at the time the expenditure was made.

ACCC functions and powers

NBN Co provided an overview of the additional powers and functions it is intending to confer on the ACCC in its SAU variation proposal. This includes a broad power to review and reset the rules contained in the SAU that would be available to exercise from 2032. NBN Co noted that it intended to generally retain the propose respond model so that it would have an opportunity to develop regulatory proposals for each reset or to respond to issues that arose within a regulatory period.

Participants generally supported NBN Co's proposed approach, however some participants expressed concern that the powers and functions could be drafted in a way that unduly limited how they could be exercised.

Participants discussed the criteria to which the ACCC must have regard when exercising its functions and powers. Some participants indicated that the ACCC should be free to exercise the functions and powers in a way that would best promote the long-term interests of end-users (LTIE). On the other hand, NBN Co indicated that it believed some fixed principles would likely be needed for it to have regulatory certainty as in its view the LTIE principles are of quite broad scope.

Concerns were raised that the processes to be proposed in the SAU variation could be unduly complex and time consuming based on the processes that had been proposed in the March 2022 SAU variation. Participants suggested that processes should be kept as simple as practicable if the conferred powers and functions are to be effective and not impose unnecessary regulatory costs. NBN Co indicated that it would consider this in developing its SAU variation proposal.

Some participants requested further information on how the non-commercial expenditures such as investments that were mandated by government would be considered, as well as how the intended additional powers to revise the SAU rules from 2032 would be exercised.

Commercial bridging offer

NBN Co advised the forum that it intends to continue to apply the pricing roadmap that it has previously published under the wholesale broadband agreement (WBA4). This roadmap contains price-related terms for 2023 notwithstanding that WBA4 expires at the end of November 2022. Further, NBN Co would release a commercial 'bridging offer' by the end of August 2022 that would contain a relatively small number of updates to other commercial terms.

NBN Co noted that the bridging offer would be available to all retailers until it develops a new wholesale broadband agreement for execution by retailers regardless of whether they had agreed to extend WBA4 from its December 2022 expiry.

NBN Co also advised the forum that it intends to start negotiating shortly over the replacement wholesale broadband access agreement (WBA5) with a view to this new agreement commencing in 2023.

Next steps

NBN Co and the ACCC outlined an indicating timeframe for next steps in the SAU process and commercial bridging offer:

- Late August – NBN Co issues its bridging offer to retailers for their consideration
- Early September – Stakeholder responses due to NBN Co's SAU variation consultation paper
 - Stakeholders are requested to also provide these to the ACCC.
- October – NBN Co lodgement of its SAU variation proposal with the ACCC.
- Late October or early November – ACCC publishes NBN Co's SAU variation proposal and an ACCC consultation paper.
- December – submissions due to the ACCC on NBN Co's SAU variation proposal.