



Australian
Competition &
Consumer
Commission

Variation to NBN Co Special Access Undertaking

Consultation paper

July 2016

Contents

| | |
|--|----|
| List of abbreviations and acronyms | 2 |
| Glossary..... | 3 |
| Executive Summary | 6 |
| 1. Introduction | 8 |
| 1.1. Purpose | 8 |
| 1.2. SAU variation and supporting documents | 8 |
| 1.3. Consultation..... | 9 |
| 1.4. Structure of this paper..... | 10 |
| 2. Regulatory framework | 11 |
| 2.1. Overview of the telecommunications access regime | 11 |
| 2.2. Overview of the current SAU..... | 12 |
| 2.3. Criteria for accepting an SAU variation | 13 |
| 2.4. Scope of the SAU variation | 14 |
| 2.5. Timeframe for assessment..... | 15 |
| 3. Service description..... | 16 |
| 3.1. Current SAU provisions | 16 |
| 3.2. Proposed changes to the SAU..... | 17 |
| 3.3. Issues for consultation | 19 |
| 4. Co-existence and remediation..... | 22 |
| 4.1. NBN Co's proposed changes to the SAU..... | 22 |
| 4.2. Key issues | 23 |
| 5. Rollout information | 26 |
| 5.1. Current SAU provisions | 26 |
| 5.2. NBN Co proposed variation to rollout information | 26 |
| 5.3. Issues for discussion..... | 28 |
| 6. Other proposed changes to the SAU..... | 33 |
| 6.1. Appointment of dispute resolution advisor..... | 33 |
| 6.2. NBN Offers and Other Charges | 33 |
| 6.3. Change to the LTRCM formula | 34 |
| Appendix A: Consolidated list of questions for consultation..... | 36 |

List of abbreviations and acronyms

| | |
|--------|--|
| ACCC | Australian Competition and Consumer Commission |
| AVC | Access Virtual Circuit |
| CCA | Competition and Consumer Act 2010 (Cth) |
| FTTB | Fibre to the Basement |
| FTTdp | Fibre to the Distribution Point |
| FTTN | Fibre to the Node |
| FTTP | Fibre to the Premises |
| HFC | Hybrid Fibre Coaxial |
| LTIE | Long-term interests of end-users |
| LTRCM | Long Term Revenue Constraint Methodology |
| MDF | Main Distribution Frame |
| MDU | Multi-dwelling Unit |
| MRP | Maximum Regulated Prices |
| NBN | National Broadband Network |
| NBN Co | NBN Co Limited |
| NNI | Network to Network Interface |
| NTD | Network Termination Device |
| OSI | Open System Interconnection |
| PDF | Product Development Forum |
| PIR | Peak Information Rate |
| POI | Point of Interconnection |
| RFS | Ready for Service |
| RSP | Retail Service Provider |
| SAM | Service Area Module |
| SAOs | Standard Access Obligations |
| SAU | Special Access Undertaking |
| SFAA | Standard Form of Access Agreement |
| UNI | User Network Interface |
| WBA | Wholesale Broadband Agreement |

Glossary

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

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

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

Ancillary services – NBN Co defines this as the services supplied by NBN Co that facilitate the supply of the NBN access service, but excludes the facilities access service.

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

Binding rules of conduct – written rules made by the ACCC specifying any or all terms and conditions for compliance with SAOs or requiring compliance with any or all applicable SAOs in a manner specified in the rules. These rules are made when there is an urgent need to do so.

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

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

Content service - this is defined in section 15 of the *Telecommunications Act 1997* as a broadcasting or online service

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

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

Data transfer rate – the number of binary bits per second of data passing through an interface during a given time.

Eligible service – this is defined in section 152AL of the *Competition and Consumer Act 2010* as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons).

Facilities access service – described by NBN Co as a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a point of interconnect for the purpose of interconnecting its network with the NBN Co network.

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

Listed carriage service – a carriage service of the type listed in section 16 of the *Telecommunications Act 1997*, that is, a carriage service between two points where at least one point is in Australia.

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

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

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

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

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

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

Open System Interconnection (OSI) model – the open system interconnection model, which is the framework developed by the International Standards Organisation to provide worldwide standards for computer communications.

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

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

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

Product development forum (PDF) – NBN Co describes this as the primary forum through which customers may submit new product ideas, provide input on the development of new and existing products, and obtain information from NBN Co on its current and future product offerings.

PDF processes – the provisions of Annexure 1 to Schedule 11 of the SAU. These provisions describe how NBN Co will engage with customers via the product development forum on the development and withdrawal of products.

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

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

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

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

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

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

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

The SAU – the SAU given to the ACCC on 19 November 2013.

The SAU variation – NBN Co's proposed SAU variation, given to the ACCC on 27 May 2016.

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

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

Executive Summary

On 27 May 2016, NBN Co lodged a variation to its Special Access Undertaking (SAU) with the Australian Competition and Consumer Commission (ACCC). The ACCC must make a decision to either accept or reject NBN Co's proposed variation after assessing the SAU variation against the criteria outlined in section 152CBD(2) of the *Competition and Consumer Act 2010* (CCA). This consultation paper invites stakeholder views on the SAU variation to inform the ACCC's assessment.

NBN Co's current SAU was accepted by the ACCC in December 2013 and forms a key component of the regulatory framework for the National Broadband Network (NBN). The current SAU is in place until June 2040 and provides the framework for governing prices and other terms upon which NBN Co will supply services over the NBN. The main purpose of the SAU variation is to incorporate three new network architectures within the SAU to reflect the current NBN model. These technologies are fibre-to-the-node (FTTN), fibre-to-the-basement (FTTB) and hybrid fibre coaxial (HFC). NBN Co also proposes to make a number of other changes to the SAU through the SAU variation.

This consultation paper provides some background on the regulatory framework and the criteria for assessing the SAU. It also explains the main changes proposed in the SAU variation and poses a number of questions for stakeholder comment. The main changes relate to amendments to the service description, the introduction of 'co-existence' and 'remediation' provisions for FTTN and FTTB services, and changes to NBN Co's obligations to make rollout information available. Other proposed changes to the SAU include amendments to the provisions for the appointment of a dispute resolution advisor, inclusion of initial maximum regulated prices for FTTN, FTTB and HFC services, and a correction to a formula used for the calculation of NBN Co's revenue controls.

NBN Co has proposed several changes to the service description to incorporate the FTTN, FTTB and HFC network types. These changes are to the definitions of the NBN access service and user network interface (UNI), as well as changes to the SAU dictionary. The ACCC is seeking stakeholder views on these changes to determine whether the revised service definitions provide sufficient certainty around NBN Co's commitments and are consistent with accepted industry standards.

NBN Co has also introduced new co-existence and remediation provisions in the SAU variation. These provisions allow NBN Co to provide lower data transfer rates during co-existence and remediation periods than the peak information rates specified in the SAU. The co-existence period occurs when NBN Co and Telstra are simultaneously supplying services over copper lines in a particular area. The remediation period occurs when NBN Co needs to remediate copper lines where the line is not able to meet the peak information rate objective for various reasons. The ACCC is seeking information from stakeholders on the extent to which they have experienced issues with co-existence and remediation and whether stakeholders are sufficiently informed about NBN Co's arrangements.

NBN Co has proposed to vary the current SAU to include rollout information for the new technologies (FTTN, FTTB and HFC). For each of its rollout information commitments, NBN Co proposes to move from 'publishing' the information to 'making the information available'. NBN Co has also proposed changes to reporting timeframes, the geographic areas reported on and the details included. NBN Co also proposes to remove its commitment to provide its 1-year construction plan, which it considers redundant. The ACCC is seeking comment from stakeholders on the arrangements proposed by NBN Co and whether these meet service provider requirements.

The ACCC invites submissions from interested parties on these issues and any other aspects of the SAU variation until 26 August 2016.

1. Introduction

1.1. Purpose

On 27 May 2016, NBN Co submitted a proposed variation to its Special Access Undertaking (SAU) to the Australian Competition and Consumer Commission (ACCC).¹ NBN Co's current SAU was accepted by the ACCC in December 2013 following an extensive assessment and consultation process.

The SAU sets in place the principles for regulating access to the National Broadband Network (NBN) until June 2040. It provides the framework for governing prices and other terms upon which NBN Co will supply services over the NBN. The SAU is largely drafted in a technology neutral way. However, there are several provisions in the SAU which reflect the previous NBN model, which would be delivered using a combination of fibre-to-the-premises (FTTP), fixed wireless or satellite technology platforms.

The main purpose of the SAU variation is to incorporate three new network architectures within the SAU to reflect the current NBN model. These technologies are fibre-to-the-node (FTTN), fibre-to-the-basement (FTTB) and hybrid fibre coaxial (HFC). NBN Co also proposes to make a number of other changes to the SAU through the SAU variation, including:

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

The ACCC has released this consultation paper to seek views from interested stakeholders on the proposed changes to NBN Co's SAU. Although a number of specific questions have been included in this paper, stakeholders are invited to raise other matters related to the variation or varied provisions that have not been canvassed by the ACCC. Stakeholder submissions will inform the ACCC's assessment of whether to accept or reject the SAU variation.

1.2. SAU variation and supporting documents

NBN Co's SAU variation consists of an execution document and a marked up version of NBN Co's current SAU. The varied terms are denoted by underlined words for additions and struck-out words for deletions. The remainder of the SAU is unchanged.

NBN Co also lodged a number of supporting documents with the SAU variation. These consisted of a covering letter, supporting submission and three expert reports:

- The covering letter provides some context for the submission, including a description of each of the documents and the associated confidentiality status.
- NBN Co's supporting submission seeks to explain the rationale behind its proposed changes to the SAU. It provides some context for the variation to the SAU, an outline of the proposed changes to the SAU and a description of the statutory requirements. NBN Co then sets out its assessment of the variation as a whole against the statutory

¹ Submitted in accordance with section 152CBG(2) of the *Competition and Consumer Act 2010* (CCA).

requirements and an assessment of each category of changes proposed in the variation.

- The expert report by Janusz Ordover and Allan Shampine was commissioned by NBN Co to provide advice on whether or how the Government's transition from a predominantly FTTP model to a mixture of technologies would impact on the incentives and constraints applicable to NBN Co over the term of the SAU. The report argues that the incentives provided by the current SAU for NBN Co to act efficiently are not affected by the inclusion of the new technologies.
- The expert report by Analysys Mason was commissioned by NBN Co to review the prudence and efficiency of NBN Co's methodology and process for determining which type of network it will deploy in particular geographic areas and NBN Co's initial design of its FTTN, FTTB and HFC networks. NBN Co provided a confidential version and a public version of this report to the ACCC. Analysys Mason concluded that the methodology and processes used by NBN Co for determining which type of network it will deploy in a particular geographic area is prudent and efficient. Analysys Mason found that NBN Co's design of its FTTN/FTTB network reflects an efficient and prudent network design (notwithstanding the fact that certain components of the design and industry incentives to support the competitive deployment of these networks are still in a state of development). Analysys Mason also found that NBN Co's design of its HFC network reflects an efficient and prudent network design on the whole, although there are potential issues that NBN Co recognises and is addressing.
- The expert report by Dr Steven Bishop and Professor Bob Officer was commissioned by NBN Co to assess whether the rate of return approach and principles in the SAU are reasonable when applied to the FTTB, FTTN and HFC technologies. The report argues that the current method for calculating NBN Co's rate of return remains appropriate with the inclusion of the new technologies.

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

1.3. Consultation

The ACCC plans to consult with interested parties at a number of stages before making a decision to either accept or reject the SAU variation. The ACCC published the SAU variation and supporting material on the ACCC website on 31 May 2016 and invited submissions by 26 August 2016. The ACCC has released this consultation paper to assist interested parties in preparing their submissions.

The ACCC plans to release its draft decision on whether to accept or reject the variation in late 2016. Following its consideration of submissions to the draft decision the ACCC will then release its final decision. The ACCC's draft and final decision will be published on the ACCC's website.³

The ACCC encourages industry participants and other interested parties to make submissions to this consultation paper, including reasons to support their views.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit

² See: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation/sau-variation-documents>

³ See: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation>

commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The confidential version of the submission should clearly identify the commercial-in-confidence material by bookending the confidential material with an appropriate symbol of 'c-i-c'. The public version should ensure that all confidential material has been removed and replaced with 'c-i-c'. The ACCC has prepared guidelines for parties wishing to submit confidential information to communications inquiries.

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

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

Please email submissions by **5pm Friday 26 August 2016** to nbn@acc.gov.au and copy to:

Scott Harding

Acting Director

ACCC

Scott.Harding@acc.gov.au

Kim Hollis

Assistant Director

ACCC

Kimberley.Hollis@acc.gov.au

1.4. Structure of this paper

This consultation paper is structured as follows:

- Chapter 1 provides an introduction and overview of the SAU variation consultation process
- Chapter 2 describes the regulatory framework that applies to the NBN and the criteria for the ACCC's assessment of an SAU variation
- Chapters 3-6 set out the major changes proposed by NBN Co in the SAU variation and a number of questions for stakeholder comment
- Appendix A provides a consolidated list of questions for consultation.

2. Regulatory framework

2.1. Overview of the telecommunications access regime

Objectives of Part XIC

Part XIC of the *Competition and Consumer Act 2010* (CCA) establishes a telecommunications access regime. The object of the telecommunications access regime is to promote the long-term interests of end-users (LTIE) of carriage services and services provided by means of carriage services.⁴ In determining whether a particular thing promotes the LTIE, the ACCC is required to have regard to the objectives of:

- promoting competition in the markets for these services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- encouraging the economically efficient use of, and economically efficient investment in the infrastructure by which these services are supplied and any other infrastructure by which these services are, or are likely to become, capable of being supplied.⁵

The SAU variation will need to be assessed in accordance with the legislative criteria contained in Part XIC of the CCA, including consideration of whether the SAU variation will promote the LTIE.

Regulation of terms and conditions of access to NBN Co services

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

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

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

Once an NBN service is declared, NBN Co is required to comply with the category B Standard Access Obligations (SAOs) specified in the SAU.⁶ The category B SAOs include the obligations to supply the declared service if requested by a service provider and to permit interconnection of facilities.⁷ An SAU must state that NBN Co agrees to be bound by the category B SAOs and undertakes to comply with the terms and conditions specified in the undertaking in relation to category B SAOs.

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

⁴ CCA, s. 152AB(1).

⁵ CCA, s. 152AB(2).

⁶ Part XIC of the CCA also sets out category A SAOs but these do not apply to NBN Co.

⁷ CCA, s. 152AXB.

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

Part XIC of the CCA establishes a hierarchy between these instruments to allow parties to identify which terms and conditions are to apply, particularly in the event of inconsistency between the instruments.⁸ Part XIC also provides for NBN Co to formulate and publish open offers for access to its services, known as an SFAA.⁹ An SFAA itself is not an access agreement and does not form part of the Part XIC legislative hierarchy. Rather, access seekers can request NBN Co to enter into an access agreement on SFAA terms and these form access agreements for the purposes of the hierarchy.

Essentially, terms and conditions about a particular matter in an instrument that is higher in the above list will prevail over terms and conditions about the same matter specified in an instrument that is lower in the list. For instance, commercially negotiated and agreed terms and conditions (set out in an access agreement) between NBN Co and access seekers will prevail over regulated terms in a varied SAU, binding rules of conduct and access determinations that are made by the ACCC, to the extent of any inconsistency between these terms.¹⁰ In other words, a varied SAU, binding rule of conduct and an access determination would have no effect to the extent of any inconsistency with the access agreement.

The ACCC assessment of the SAU variation is important in the context of the legislative hierarchy. Further, once the ACCC accepts a variation from NBN Co, there is no provision under Part XIC of the CCA for the ACCC to vary or set aside the varied terms of the SAU.

2.2. Overview of the current SAU

The current SAU forms a key part of the framework that governs the price and other terms upon which NBN Co will supply NBN services to telecommunications companies, including wholesale and retail service providers. The SAU, which was approved by the ACCC in December 2013, sets in place principles for the regulation of access to the NBN until June 2040.

The SAU has a modular structure which ‘locks in’ matters for different periods of time. This structure balances regulatory certainty for NBN Co with flexibility to change certain elements or to determine certain matters at different points in time over the term of the SAU. The SAU contains three modules:

- **Module 0** applies for the term of the SAU and provides the overarching structure and context to the other parts of the SAU. It sets out the relevant background, including

⁸ CCA, s. 152AY(2).

⁹ CCA, ss. 152CJA(2)(b) and 152CJF.

¹⁰ CCA, ss. 152AY, 152BCC, 152BDB, 152BDE, 152CBIA, 152CBIB and 152CBIC.

the scope and term of the SAU, the structure of the SAU document, fixed principles terms and conditions and provisions for the variation, withdrawal and extension of the SAU. Module 0 also contains four attachments which provide the service descriptions, SAU dictionary of defined terms and the initial products list.

- **Module 1** covers the initial regulatory period from the commencement of the SAU until 30 June 2023. The module is intended to broadly align with the rollout phase of the NBN. It specifies how the NBN access service, ancillary services and the facilities access service will be implemented and includes price terms for NBN offers and other charges. It also includes provisions for the long term revenue constraint methodology, which is a mechanism to encourage efficient expenditure and allow NBN Co to recover its costs over time. In addition, module 1 sets out non-price terms and conditions relating to dispute resolution, provision of certain information and product development and withdrawal.
- **Module 2** covers the subsequent regulatory period and applies from 1 July 2023 to 30 June 2040. Some schedules in module 2 closely mirror the schedules in module 1, while others are unique to module 2. This module sets out the long-term arrangements for determining NBN Co's required revenue, price reviews and the development and withdrawal of NBN Co's products. This module will operate alongside additional 'replacement modules' which will contain forecasts of NBN Co's revenue and expenditure, as well as other detailed terms and conditions proposed by NBN Co.

While the SAU is largely drafted in a technology neutral way there are a number of existing provisions which reflect the previous Government's intention that the NBN be delivered using a combination of FTTP, fixed wireless or satellite technology platforms.

2.3. Criteria for accepting an SAU variation

The ACCC must assess the SAU variation against criteria outlined in section 152CBD(2) of the CCA. Based on this assessment, the ACCC must make a decision to either accept or reject the SAU variation. Broadly, section 152CBD(2) of the CCA sets out that the ACCC must not accept the variation unless:

- the terms and conditions specified in the variation in relation to compliance with the category B SAOs are consistent with those obligations and are reasonable¹¹
- any conduct that is specified in the variation in relation to access referred to in section 152CBA(3B) will promote the LTIE, and that the related terms and conditions are reasonable, and
- any conduct that is specified in the variation in relation to certain matters referred to in section 152CBA(3C) will promote the LTIE.¹²

Section 152AH of the CCA sets out the matters the ACCC must have regard to in determining whether particular terms and conditions are reasonable. These include whether they promote the LTIE, the legitimate business interests of the carrier or carriage service

¹¹ Category B SAOs require NBN Co to: supply a declared service upon request; provide interconnection to facilities upon request; and supply any service using conditional access customer equipment that is necessary in order for a service provider to provide carriage service and/or content service by means of the declared service, upon request.

¹² Specified conduct under section 152CBA(3C) includes developing a new eligible service, enhancing a declared service, extending or enhancing the capability of a facility or network for the supply of a declared service, activities that are preparatory to the supply of a declared service, activities that are ancillary or incidental to the supply of a declared service or giving information to service providers about any of these activities.

provider, the interests of persons who have rights to use the declared services, the direct costs of providing access to the declared service, operational and technical requirements necessary for the safe and reliable operation of the service and economic efficiency.

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

In addition to the criteria for accepting an SAU variation, the CCA sets out three reasons why the ACCC must not reject a variation. These reasons relate to price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services,¹³ certain authorised conduct¹⁴ and fixed principles provisions that are in effect.¹⁵

If the ACCC accepts the variation, the ACCC must give a written notice stating that the variation has been accepted, setting out the terms of the variation.¹⁶ If the ACCC rejects the variation, the ACCC must inform NBN Co that the variation has been rejected and provide reasons for the rejection. If the variation is rejected, the existing terms of the SAU continue to apply.

2.4. Scope of the SAU variation

This is the first time the ACCC has considered a variation to NBN Co's SAU. The ACCC has previously considered the framework for assessing future variations to the SAU as part of its decision to accept the SAU in December 2013. In the final decision to accept the SAU, the ACCC indicated the following:

*"In the context of assessing a proposed variation to the SAU, the ACCC is to make a decision to accept or reject the variation proposed by NBN Co, and not the existing terms and conditions in Modules 0 and 2 (unless NBN Co proposes to change these existing terms in its variation), although the ACCC may decide that the proposed variation does not meet the statutory criteria by virtue of its interaction with an existing term or condition in Module 0 or 2 (and therefore that the variation should be rejected)."*¹⁷

In accordance with this statement, the ACCC's assessment of the SAU variation will be an assessment of the varied terms, the effects of the varied terms, and the interaction of the varied terms with unchanged provisions in the SAU. In other words, the ACCC proposes to assess varied terms in the context of the whole SAU. However, the ACCC does not consider the assessment of the SAU variation to be a reassessment of each existing provision in the SAU.

In its supporting submission, NBN Co stated that the variation is denoted by underlined words, which are additions to the original wording in the SAU, and words that are struck out as deletions from the original wording in the SAU. NBN Co has acknowledged that the

¹³ Section 152CBD(5A)(a)-(c) of the CCA specifies that if the varied undertaking contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services, the ACCC must not reject the undertaking for a reason that concerns the price-related terms and conditions.

¹⁴ Section 152CBD(5C)(a) of the CCA provides that if certain conduct by NBN Co (relating to interconnection and bundling of access services) is authorised under Part XIB of the CCA, the ACCC must not reject the undertaking for a reason that concerns this conduct.

¹⁵ Section 152CBAA(5)(h) of the CCA states that if the ACCC has accepted an SAU given by a person that contains fixed principles terms or conditions that are in effect, the ACCC must not reject another undertaking for a reason relating to the corresponding fixed principles terms or conditions

¹⁶ CCA, ss. 152CBG(3)(5)(6).

¹⁷ ACCC, *NBN Co Special Access Undertaking (SAU) – Final decision*, December 2013, p. 109. <http://www.accc.gov.au/system/files/ACCC%20Final%20Decision%20on%20the%20Special%20Access%20Undertaking%20lodged%20by%20NBN%20Co%20on%2019%20November%202013.pdf>

ACCC's assessment will include an assessment of the interactions of the subject matter of the variation with the existing SAU provisions.¹⁸

It would be useful if stakeholders could clearly explain the link between the varied terms and unvaried terms if making submissions on terms that have not been marked up as varied terms.

2.5. Timeframe for assessment

The CCA specifies a time limit for the ACCC's assessment of a proposed variation to the NBN Co SAU. The ACCC must reach a decision to either accept or reject a proposed variation within six months after receiving the variation, subject to the ACCC's ability to extend this period. If the ACCC does not make a decision within the statutory time period, it is deemed to have accepted the variation.¹⁹

The ACCC may extend (or further extend) the decision-making period by giving written notice to NBN Co. Each extension may be for no more than three months. The ACCC must explain in its notice why it was unable to make a decision on the SAU during the original (or previously extended) decision-making period.²⁰

In addition to the ACCC's ability to extend the decision making period, the decision-making period is also extended by the following events.

- The decision-making period is extended for the period in which the ACCC is undertaking a public consultation in accordance with section 152CBD(2)(d). The extension period begins on the date the ACCC published the variation and invited submissions until the last day for submissions specified by the ACCC when it published the variation.²¹ Any further consultation on the proposed variation does not extend the decision-making period.
- The decision-making period is also extended by any period during which the ACCC has requested further information under section 152CBH from NBN Co and is waiting for NBN Co to respond. The extension period begins on the date the ACCC requests the information from NBN Co until the day NBN Co provides the information.²²

The ACCC published NBN Co's proposed variation and supporting material on the ACCC website on 31 May 2016 and invited submissions by 26 August 2016.²³ The ACCC has released this discussion paper to assist interested parties in preparing their submissions.

Following the current consultation, the ACCC expects to release a draft decision on whether to accept or reject NBN Co's proposed variation in Q4 2016. The ACCC will invite further submissions on its draft decision.

Under these arrangements, it is not possible to give a definitive date by which the ACCC will make its final decision on the SAU variation. However, the ACCC intends to make its decision as soon as it is practicable to do so, taking into account the scale and complexity of the issues to be assessed, and the proposed duration for the operation of the SAU.

¹⁸ NBN Co, *Supporting submission to the ACCC – Variation to the NBN Co SAU*, May 2016, p. 2

¹⁹ CCA. s. 152CBG(7).

²⁰ CCA. ss. 152CBG(9) and (10).

²¹ CCA. s. 152CBG(8)(a).

²² CCA. s. 152CBG(8)(b).

²³ Section 500(2) of the *Telecommunications Act 1997* specifies that the ACCC must allow at least 28 days for submissions.

3. Service description

For the purposes of this consultation paper, ‘service description’ refers to the following elements of the SAU:

- the definitions of the NBN access service and ancillary services in Attachment A
- the definitions of the user network interface (UNI) and network to network interface (NNI) in schedule 1A.3, and
- the associated definitions in the SAU dictionary (Attachment C).

The service description is a key component of the SAU. It defines the scope of NBN Co’s commitments under the SAU by specifying the services to which these commitments apply. Several components of the service description are contained in module 0 and apply for the full term of the SAU, while other elements of the service description are contained in modules 1 and 2.

This chapter seeks views on NBN Co’s proposed changes to the service description to incorporate the FTTN, FTTB and HFC network types within the SAU.

3.1. Current SAU provisions

The SAU defines the NBN access service as a Layer 2 service supplied on the NBN Co network between and including:

- the UNI on a network termination device (NTD), and
- the NNI associated with that NTD,

for the purpose of enabling an access seeker to supply carriage or content services.²⁴

The UNI is defined as a physical interface on the NTD.²⁵ The NTD is then defined as a network termination device that is owned, operated or controlled by NBN Co.²⁶ The NNI is defined as a physical interface between the NBN Co network and the access seeker’s network associated with a point of interconnection (POI).²⁷ The NBN Co network is defined as comprising the NBN Co fibre network, the NBN Co wireless network, and the NBN Co satellite network, as well as any equipment owned, operated or controlled by NBN Co.²⁸ Further definitions are provided in Attachment C (dictionary) to the SAU.

The SAU defines the ancillary services as the services supplied by NBN Co that facilitate the supply of the NBN access service.²⁹ Types of ancillary services are specified in Schedule 1A.6 and include the platform interfacing service (supports activation, assurance and billing transactions) and the sandpit service (provides testing and verification facilities).³⁰

In addition, the service description specifies the network boundary points of the NBN Co network as follows:

- At the premises, the network boundary is defined as the end-user side of the UNI.

²⁴ NBN Co, *Special Access Undertaking (SAU)*, November 2013, Attachment A, clause 2(a), p. 11.

²⁵ *ibid.*, Schedule 1A, clause 1A.3.3, p. 52.

²⁶ *ibid.*, Attachment C, p. 30.

²⁷ *ibid.*, Schedule 1A, clause 1A.3.4, p. 52.

²⁸ *ibid.*, Attachment C, pp. 26-27.

²⁹ *ibid.*, Attachment A, clause 3, p. 11.

³⁰ *ibid.*, Schedule 1A, clauses 1.A.6.1-2, pp. 54-56.

- At the POI, the network boundary point is defined as the access seeker side of the NNI.³¹

3.2. Proposed changes to the SAU

In lodging the SAU variation, NBN Co has proposed a number of changes to the service description to incorporate the FTTN, FTTB and HFC network types. These changes are to the definitions of the NBN access service and UNI and the relevant terms in the SAU dictionary. NBN Co has not proposed changes to the definition of the ancillary services.

The key changes NBN Co is proposing to make to the service description through the SAU variation are discussed below.

Broadened definition of NBN Co network in the SAU dictionary

NBN Co has proposed amending the definition of the NBN Co network (which currently comprises NBN Co's fibre, wireless and satellite networks) to include the following elements:

- the NBN Co FTTB network
- the NBN Co FTTN network
- the NBN Co HFC network, and
- any other telecommunications network or other network elements, platforms, systems and functions over which any product is supplied by NBN Co.³²

NBN Co submits that the current definition of the NBN Co network means that some aspects of the SAU (such as price controls) only apply to services provided over NBN Co's fibre, fixed wireless and satellite networks.³³ Expanding the definition of the NBN Co network to specifically reference FTTN, FTTB and HFC has the effect of extending NBN Co's existing commitments under the SAU to these technologies.

Additionally, NBN Co submits that the approach of widening the definition of the NBN Co network as proposed facilitates the incorporation of future network variants. Specifically, the definition includes reference to '*..any other telecommunications network*' used by NBN Co to supply services. NBN Co submits that this approach will allow it to adopt future technology, such as fibre to the distribution point (FTTdp), without having to vary the SAU.³⁴

Changes to the definition of the UNI

NBN Co has proposed expanding the definition of the UNI in clause 1A.3.1. In the SAU variation, the UNI is defined as the physical interface to which NBN Co supplies the NBN access services to an end-user's premises. It is then further specified by network type as follows:

- for fibre, wireless, satellite and HFC services, the UNI is a physical port on the NTD
- for FTTN services where the premises is not a multi-dwelling unit (MDU), the UNI is either the physical port on the telecommunications outlet or passive NTD, and

³¹ *ibid.*, Attachment A, clause 2(c), p.11.

³² NBN Co, *First variation to NBN Co SAU* (SAU variation), May 2016, Attachment C, p.35.

³³ NBN Co, *Supporting submission*, 2016, p. 18.

³⁴ *ibid.*, p. 19.

- for FTTB and FTTN services where the premises is an MDU, the UNI is the physical port on which the jumper cable terminates on the customer side main distribution frame (MDF).³⁵

In addition, new definitions have been added to the SAU dictionary for the various network elements that support the proposed UNI definition, including telecommunications outlet, passive NTD, jumper cable and customer side MDF.

NBN Co submits that the changes to the definition of the UNI are to account for the fact that the UNI will not be located on an NTD for all network types (as is currently the case). This is because NBN Co does not supply an NTD as part of services supplied over NBN Co's FTTN and FTTB networks.³⁶

To reflect that the UNI will not be located on an NTD for all services, NBN Co has proposed a number of changes to the definition of the NBN access service and associated definitions in the SAU dictionary.

The NBN access service is currently defined as a service between a UNI on an NTD and the NNI associated with the relevant NTD.³⁷ NBN Co has proposed amending the definition to specify a service between:

- a UNI used to service a premises, and
- the NNI used to serve that premises.³⁸

Additionally, NBN Co has proposed the following changes to the SAU dictionary:

- the definition of an NTD has been modified to specify an active or powered device and specifically exclude a passive NTD,³⁹ and
- the definition of a premises has been broadened to include common areas in an MDU.⁴⁰

NBN Co submits that these changes are consistent with the changes to the definition of the UNI and make the NBN access service more technology neutral.⁴¹

Clarification of Layer 2 description

The NBN access service is defined as a Layer 2 service in the service description. To the Layer 2 description, NBN Co has proposed adding the following statement in a footnote:

*"Where an active or powered NTD is not supplied by NBN Co as part of the NBN access service, an NBN Co compliant device will need to be connected to the NBN access service in respect of the relevant premises"*⁴²

NBN Co submits that this statement has been added for clarity and to highlight that an active or powered NTD will need to be connected where such a device is not supplied by NBN Co

³⁵ NBN Co, *SAU variation*, 2016, Schedule 1A, clause 1A.3.1, p. 69.

³⁶ NBN Co, *Supporting submission*, 2016, p. 19.

³⁷ NBN Co, *SAU*, 2013, Attachment A, clause 2(a), p. 11.

³⁸ NBN Co, *SAU variation*, 2016, Attachment A, clause 2(a), p. 11.

³⁹ *ibid.*, Attachment C, p. 38.

⁴⁰ *ibid.*, Attachment C, p. 45.

⁴¹ NBN Co, *Supporting submission*, 2016, p. 19.

⁴² NBN Co, *SAU variation*, 2016, Attachment A, p. 12.

as part of the NBN access service (as is the case with services supplied over the FTTN and FTTB networks).⁴³

Removed definition of the network boundary point

As noted above, the current SAU defines the network boundary points of the NBN Co network as the end-user side of the UNI and the access seeker side of the NNI. NBN Co has also proposed removing this definition.

NBN Co submits that the definition of the network boundary points essentially duplicates the amended service description. The changes to the definition of the UNI are, it contends, sufficiently certain about the delivery points of the NBN access service without the network boundary definition. In addition, NBN Co notes that the Wholesale Broadband Agreement (WBA) will specify the relevant network boundary points for each technology.⁴⁴

Other changes to the SAU dictionary

NBN Co has proposed a number of changes to the SAU dictionary to reflect the FTTN, FTTB and HFC network types. These changes include a range of new definitions related to the FTTN, FTTB and HFC networks and network elements. In addition, NBN Co has proposed amending a number of existing definitions to clarify how these definitions relate to the new technologies. Examples of the amended definitions include, but are not limited to, the following:

- explicitly excluding FTTN, FTTB and HFC from the definition of the NBN Co fibre network, and
- specifying the point in the network at which the maximum data transfer rate is supplied (currently an NTD) when no NTD is used to serve a premises.⁴⁵

NBN Co submits that the majority of the changes to the SAU dictionary mirror the respective definitions in the WBA dictionary. Where relevant, the WBA terminology has been modified to reflect the terminology of the SAU. Additionally, some of the proposed changes have been simplified compared to the relevant WBA definitions.⁴⁶

3.3. Issues for consultation

In assessing NBN Co's proposed changes to the service description, the ACCC will consider whether the amended service description (including the associated changes to the SAU dictionary) accurately reflects the new technologies with sufficient detail and clarity. The assessment will consider both the proposed changes and the service description as a whole. The ACCC has identified the following key issues.

Changes to the UNI definition

The SAU currently defines the UNI as a physical port on the NTD. NBN Co has proposed retaining this definition for fibre, wireless, satellite and HFC services. For FTTN and FTTB services, the SAU variation defines the UNI as a physical port on either the telecommunications outlet at an end user's premises or the customer side of the MDF in a MDU. Neither the telecommunications outlet nor the customer side MDF are active devices.

⁴³ NBN Co, *Supporting submission*, 2016, p. 19.

⁴⁴ *ibid.*, pp. 19-20.

⁴⁵ NBN Co, *SAU variation*, 2016, Attachment C, p.29, 32 and 43.

⁴⁶ NBN Co, *Supporting submission*, 2016, p. 73.

The ACCC understands that under commonly accepted technical standards, a UNI usually refers to a port on a modem (or other similar device) into which an end-user can connect a device (such as a landline phone, computer or Wi-Fi router).

The ACCC has previously taken the view that where possible, it is desirable to adopt commonly accepted definitions. For example, in the final decision on the 2013 NBN Co SAU, the ACCC noted that the use of well-accepted standards is likely to promote both any-to-any connectivity and the efficient investment in and use of infrastructure.⁴⁷ Although the need for consistency is likely to be greater for technical matters, the ACCC considers that the use of commonly accepted definitions is also important for regulatory and contractual purposes.

The SAU is a long term undertaking that is in effect until 2040. It is therefore important to ensure that the implications of any differences in terminology between the SAU and commonly accepted technical standards are understood and thoroughly considered. As such, the ACCC is seeking stakeholder views on NBN Co's proposed use of UNI in the SAU variation and any potential inconsistencies they may cause. In particular, the ACCC is seeking views on whether it is appropriate for the SAU to refer to the UNI as a point not located on a modem or other similar advice.

Layer 2 service

The SAU defines the NBN access service as a Layer 2 service between the UNI and NNI. Under the conceptual open system interconnection (OSI) model, Layer 2 is the data link layer and defined as a logical connection between two active devices at either end of the connection. Layer 2 is independent of the underlying physical layer (Layer 1) required to make the connection.⁴⁸

As a result of NBN Co's proposed changes to the UNI, the NBN access service will not be supplied to an active or powered device for FTTN and FTTB services. To clarify that NBN Co will supply FTTN and FTTB services to a UNI not located on a device, but that the end-to-end service will still be a layer 2 service, NBN Co has proposed a footnote to the service description to clarify that an active NTD will need to be connected for these services.

The ACCC has previously taken the view that adopting international standards, such as the OSI model, is likely to promote both any-to-any connectivity as well as efficient investment in and use of infrastructure.⁴⁹ Such standards help to ensure that access seekers have a wide range of technological choices available to them and reduce the risks of assets being stranded by only being able to connect through limited protocols.

The ACCC is seeking industry views on whether there are any potential inconsistencies between NBN Co supplying FTTN and FTTB services to a UNI not located on a device and describing the NBN access services as a layer 2 service, and if so, whether the proposed footnote sufficiently resolves any inconsistency.

Removal of the network boundary point

The service description currently defines the boundary points of the NBN Co network in relation to the NBN access service. NBN Co has proposed removing this definition and submits that the changes to the definition of the UNI are likely to provide sufficient clarity around the network boundary. NBN Co additionally notes that the WBA will specify the relevant network boundary points for each technology.

⁴⁷ ACCC, *NBN Co SAU – Final decision*, 2013, p. 71.

⁴⁸ The key terms of the OSI model are defined in the ITU-T recommendation X.200 while the Layer 2 Service is defined in detail in recommendation X.212.

⁴⁹ ACCC, *NBN Co SAU – Final decision*, 2013, p. 71.

The ACCC considers that the proposed removal of the network boundary definition does not appear to be related to the inclusion of the new technologies. That is, new definitions for the UNI for FTTN, FTTB and HFC could be included in the SAU variation without removing the network boundary point clauses.

Although the UNI does represent the point to which NBN Co will supply services, the ACCC considers that an explicit reference to the network boundary could provide clarity to access seekers around the boundary points of the NBN Co network. Such a definition is likely to facilitate a common understanding and could be effective in mitigating future disputes around matters such as maintenance responsibilities.

Although NBN Co submits that the definition of the UNI provides sufficient clarity, the ACCC considers that there are benefits to a standalone definition. Further, although the WBA does contain provisions relating to network boundary points, there could be merit in retaining the current definition in the SAU to provide long-term certainty.

The ACCC is seeking industry feedback on the proposed removal of the network boundary definition from the service description. The ACCC wishes to understand the extent to which the existing definition provides certainty to access seekers and whether the proposed definition of the UNI is sufficiently clear on the boundary of the NBN Co network. The ACCC also wishes to understand whether the definition of the network boundary in the WBA is likely to provide sufficient long-term certainty to access seekers in the absence of a stand-alone SAU definition

ACCC questions for comment

Changes to service description to incorporate new technologies

1. Do the proposed changes to the SAU service description accurately define the FTTN, FTTB and HFC network types with sufficient clarity and with regards to commonly accepted industry standards and practice?
2. Does the amended service description make sufficiently clear NBN Co's commitments under the SAU with regards to FTTN, FTTB and HFC?
3. Does NBN Co's proposed approach to extend the definition of the NBN Co network to include any other telecommunications network adequately facilitate the inclusion of future technologies such as FTTdp?

Changes to the UNI definition

4. Is the proposed definition of the UNI in clause 1A.3.1 consistent with commonly accepted technical standards? Is it appropriate for the SAU to refer to the UNI as a point not located on an NTD?

Layer 2 service

5. Is supplying the NBN access service to a UNI not located on an NTD for FTTN and FTTB services consistent with accepted definitions of Layer 2? If not, does NBN Co's proposed footnote on page 12 sufficiently resolve any inconsistency?

Removal of the network boundary point

6. To what extent does the definition of the network boundary point in the SAU provide certainty around matters such as maintenance responsibilities?
7. Does the proposed definition of the UNI and WBA definition of network boundary point provide sufficient certainty regarding the network boundary point if the reference is removed from the SAU?

4. Co-existence and remediation

NBN Co has proposed to include 'co-existence' and 'remediation' provisions into the SAU for FTTN and FTTB services. The proposed co-existence provisions would apply in areas where copper lines are being used simultaneously to provide FTTN and FTTB services and legacy fixed-line services. The proposed remediation provisions would allow NBN Co to rectify the copper lines over which the FTTN and FTTB services are provided when these copper lines are not capable of supporting the peak information rates (PIR) specified in the SAU. During the co-existence or remediation periods, the proposed provisions would allow NBN Co to provide downlink and uplink data transfer rates at lower rates than the PIR specified in the SAU.

4.1. NBN Co's proposed changes to the SAU

Co-existence

The co-existence period is the period after a FTTN or FTTB service has been declared 'ready for service' (RFS) but before the pre-existing copper services in the service area have been switched off.⁵⁰ That is, it is the period in which NBN Co and Telstra simultaneously supply services over the copper network in a particular area.

NBN Co has proposed a new clause which provides that during the co-existence period, the PIR (and the lower end of any PIR range) at the UNI for each Access Virtual Circuit (AVC) TC-4 bandwidth profile will be:

- For the FTTB Network a minimum of 25 Mbps PIR downlink and 5 Mbps PIR (TC-4) uplink, and
- For the FTTN Network, a minimum of 12 Mbps PIR downlink and 1 Mbps PIR (TC-4) uplink.

NBN Co has included co-existence clauses in both modules 1 and 2.⁵¹

The new clause would allow NBN Co to apply a 'power back-off' to its downstream services to accommodate the simultaneous supply of services during the co-existence period. This is likely to affect FTTN services more due to the distances between the node and the end-user premises (as compared to FTTB where the node is within the building). To take this difference into account, NBN Co is offering different speed tiers for FTTN services during the co-existence periods.

NBN Co submits that the inclusion of a co-existence clause is necessary to determine how the NBN access service, ancillary services and types of facilities access services will be supplied over time. NBN Co considers that the new clauses in the varied SAU are consistent with the relevant supply terms in the WBA which access seekers agreed on during the product development forum (PDF).⁵²

NBN Co estimates that the co-existence period may typically last for 18 months after the RFS date for each FTTN and FTTB area. However, this timeframe may be extended for up to three years in some cases until all special services are migrated to the NBN network.⁵³

⁵⁰ NBN Co, SAU variation, 2016, Schedule 1A, clause 1A.4.4 and Schedule 2A, clause 2A.4. pp. 71 and 231.

⁵¹ NBN Co, *Supporting submission*, 2016, p. 20.

⁵² *ibid.*, pp. 20-21.

⁵³ NBN Co, *Supporting submission*, 2016, p. 20.

Remediation

NBN Co has proposed a new clause that provides that NBN Co is able to conduct remediation to the acquired copper network if the line is not able to meet the PIR objective for various reasons. The new clause also provides that until remediation for the premises is completed, the downlink line rate and uplink line rate at the UNI used in the premises may be significantly less than the downlink PIR and uplink PIR of the bandwidth profile ordered by the Retail Service Providers (RSPs).⁵⁴ NBN Co has included remediation clauses in both modules 1 and 2.⁵⁵

NBN Co advises that remediation may occur over a more extended time period as a service must go through standard assurance, capacity planning and incident management processes prior to being placed into remediation.⁵⁶ NBN Co submits that in such cases, the inclusion of a remediation provision will acknowledge that there may be an ongoing and significant effect to the downlink and uplink line rate until remediation is completed. NBN Co advised that the potential need for remediation would not be limited to the initial deployment of NBN Co's FTTN and FTTB network and therefore has also included the remediation provision in module 2.⁵⁷

NBN Co further considers that the new clauses in the SAU variation are consistent with the relevant supply terms in the WBA which access seekers agreed on during the PDF.⁵⁸

4.2. Key issues

Co-existence

The ACCC recognises that NBN Co is required to provide FTTN and FTTB simultaneously over the copper network while legacy services are still being provided. It also understands that simultaneous supply of these services means that NBN Co will be unlikely to provide FTTN and FTTB services at the data rate it otherwise would be capable of if it was only providing FTTN or FTTB services.

The ACCC notes that NBN Co is proposing to make specific data transfer rate commitments during the co-existence period, instead of provisions allowing it to provide services at a lower but unspecified data transfer rate. The ACCC considers that this measure will provide a level of certainty to access seekers on service quality during the co-existence period.

The ACCC acknowledges that the duration of the co-existence period has a natural end date with the cessation of legacy services (after 18 months) which is also reflected in the WBA.⁵⁹ However, the ACCC notes that the co-existence period may extend beyond this timeframe due to continued provision of special services over copper lines. The ACCC considers this could create some uncertainty for access seekers about the duration of the co-existence period.

Further, the ACCC is concerned that there are no specific information commitments in the SAU for advising RSPs of when the co-existence period would likely occur. Nevertheless,

⁵⁴ NBN Co, *SAU variation*, 2016, Schedule 1A, clause 1A.4.5, p. 71.

⁵⁵ NBN Co, *Supporting submission*, 2016, p. 21.

⁵⁶ NBN Co, *Customer Discussion Paper – FTTN Offer – second release*, 2015, p. 6.

⁵⁷ NBN Co, *Supporting submission*, 2016, p. 21.

⁵⁸ *ibid.*, p. 21.

⁵⁹ NBN Co, *WBA – NBN Ethernet Bitstream Service*, pp. 29-30.

http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description_20160616.pdf

the ACCC considers that the majority of RSPs would have knowledge of areas where the NBN would be in operation and where Telstra services have not yet been switched off.

NBN Co has also proposed to include co-existence clauses in module 2. The ACCC considers that co-existence is transitory in nature and therefore, it is unclear why provisions of this kind are required for the duration of module 2. An alternative option would be to include co-existence clauses in the replacement modules (which are lodged with the ACCC every 3-5 years). The ACCC would then assess each replacement module as a variation to the SAU under Part XIC and make a decision to either accept or reject that application.⁶⁰

ACCC questions for comment

Co-existence

8. Have the WBA provisions regarding co-existence, on which the proposed SAU provisions are based, been effective?
9. Have you encountered any issues regarding co-existence matters with either NBN Co or end users? How was the matter resolved? Please provide details.
10. Are access seekers sufficiently informed about NBN Co's arrangements regarding co-existence?
11. To what extent does the proposed co-existence timeframe for special services create uncertainties for access seekers?
12. Is it appropriate for co-existence clauses to be included in module 2?

Remediation

The ACCC understands NBN Co's need to conduct remediation as part of utilising the copper lines for FTTN and FTTB services. However, the ACCC notes that the proposed provisions do not contain commitments from NBN Co to inform RSPs that a service will be placed into remediation. This could lead to a lack of adequate information from NBN Co regarding the speed level that can be expected by RSPs (and end-users) during the remediation period (as opposed to co-existence, where NBN Co has proposed specific data rate commitments). This may potentially lead to RSPs basing decisions on incomplete or inaccurate information about the expected performance of the service. As a result, RSPs may not fully understand the product they are selling and make representations at the point of sale to end-users, which are not accurate.

End-users may also be misinformed as there is no transparent way in which they could obtain an accurate and reliable indication of what speeds are likely to be obtained at their premises and in determining what speed tier is best suited to their needs. End-users are therefore reliant on RSPs informing them about the limitations of the service they are seeking to purchase and providing appropriate redress if the service is not achieving the expected quality and standard. The ACCC is concerned that if RSPs do not inform end-users of remediation in advance, end-users may not be able to obtain adequate redress, for example, obtaining a discount for a lower speed and poorer quality of service or being able to, quickly and at no extra cost, change their plan with a lower speed.

The ACCC considers that remediation may involve significant infrastructure upgrades and could possibly involve, amongst other things, installing a node, replacing a distribution cable and the replacement of aged and degraded copper. However, there is no indication under

⁶⁰ NBN Co, SAU, 2013, Main Body, clause 4.4, p. 5.

the proposed provisions as to how long RSPs (and end-users) may need to wait before the service is rectified compared to the commitment NBN Co has given regarding co-existence. The lack of timeframes is also evident in the WBA, in which NBN Co states that it may temporarily interrupt the supply of services to investigate and/or repair service faults or perform remediation.⁶¹

While the ACCC understands NBN Co's need to conduct remediation, it is concerned about the potential of poor service performance, the absence of information commitments regarding remediation and the lack of timeframe commitment from NBN Co for completing the necessary remediation.

NBN Co has also proposed to include remediation clauses in module 2. Similar to the proposed co-existence clauses, the ACCC considers remediation to be a transitory matter and it is unclear whether the proposed provisions are required for the duration of module 2, or whether alternative arrangements (such as including remediation provisions in replacement modules if required) may be appropriate.

ACCC questions for comment

Remediation

13. Have the WBA provisions regarding remediation, on which the proposed SAU provisions are based, been effective? In particular, do they provide an appropriate level of certainty about data rates during remediation and the duration of remediation?
14. Have you encountered any issues regarding remediation matters with either or both NBN Co and end users? How was the matter resolved? Please provide details.
15. Are access seekers or RSPs sufficiently informed about NBN Co's arrangements regarding remediation?
16. Is it appropriate for remediation clauses to be included in module 2?

⁶¹ NBN Co, *WBA – Head Terms*, clause C15.2 (a), p. 26.
http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-head-terms_20160407.pdf

5. Rollout information

5.1. Current SAU provisions

Under the current SAU NBN Co commits to providing rollout progress information for the rollout out of its network until June 2023 (Module 1 of the SAU). NBN Co currently commits to publishing 3-year⁶² and 1-year⁶³ construction plans detailing:

- the areas where NBN Co plans to deploy its FTTP network
- the dates NBN Co expects to commence work in each area, and
- the estimated number of premises in each area.

NBN Co also commits to publishing monthly RFS plans detailing the geographic boundaries, the expected RFS date, the number of premises, and the footprint list of premises that are in the design and construction stage and expected to be RFS within the next 6 months.⁶⁴

In the final decision to accept NBN Co's SAU in December 2013 the ACCC noted that the provision of rollout information promotes the long-term interests of end-users in the following ways:

- promoting competition — rollout information can reduce barriers to entry into new markets by providing access seekers with information required for developing products, marketing and infrastructure. The provision of this information in a timely fashion enables access seekers to make services available more quickly to end-users.
- encouraging efficient use of and investment in infrastructure — giving access seekers clarity and certainty as to the progress of the rollout of the network will enable them to efficiently plan for operations and investment in downstream services, networks and facilities. This is likely to increase dynamic efficiency in the use of and investment in infrastructure.⁶⁵

5.2. NBN Co's proposed variation to rollout information

NBN Co has proposed to vary the current SAU to include rollout information for the new technologies (FTTN, FTTB and HFC). NBN Co proposes to broaden its rollout information commitments, in Schedule 1H.2, from NBN Co's fibre network to NBN Co's fixed line network to incorporate the new technologies. In addition to incorporating the new technologies, NBN Co proposes to make the following changes to each of its rollout information reports:

- Clause 1H.2.1 – 3 year construction rollout plan – NBN Co proposes to vary the SAU to allow it to report its 3-year construction rollout plan by quarter or half-year rather than precise dates. And, although it has not committed to do so in the SAU, it currently provides the expected technology mix in each area on its website.⁶⁶
- Clause 1H.2.3 – monthly RFS plan – NBN Co proposes to expand monthly RFS plans to include a list of all the geographic areas that are expected to be RFS in the

⁶² NBN Co, *SAU*, 2013, Schedule 1H, clause 1H.2.1, p. 151

⁶³ *ibid.*, Schedule 1H, clause 1H.2.2, p. 151.

⁶⁴ *ibid.*, Schedule 1H, clause 1H.2.3, pp. 151-152.

⁶⁵ ACCC, *NBN Co SAU – Final decision*, 2013, p. 105.

⁶⁶ See NBN Co's 3-year construction plan:
<http://www.nbnco.com.au/learn-about-the-nbn/three-year-construction-plan.html>

current and subsequent financial year. In addition, the proposed monthly RFS plan will list the expected RFS dates for all areas that are expected to be RFS in the next 12 months. However, NBN Co has reduced the obligation from providing information on all areas that have entered the design and construction phase to only planned RFS areas that have entered the construction phase. For the first 12 months of the RFS rollout plan NBN Co is planning to publish RFS timeframes no less specific than monthly and no less specific than quarterly for the remaining period. This is less precise than its current practice of providing specific RFS dates. In addition, NBN Co proposes to expand its proposed footprint list to include information for each premises that will be ready for service in the next 6 months and the technology for each premises.

- Clause 1H.2.2 – 1 year construction rollout plan – NBN Co plans to remove its commitment to provide its 1-year construction plan. NBN Co notes, in its supporting submission, that with the changes to the 3-year construction plan and the monthly RFS plan, the information in the 1-year construction plan will be redundant.⁶⁷
- Clause 1H.2.4 – historical footprint list and historical region list – NBN Co plans to expand its historical footprint and rollout region list to include estimates of the number of premises in each geographic area and the expected date for disconnection from the existing legacy network. This list will also include the technology to be used for each premises and the service class.

Further, for each of its rollout commitments NBN Co proposes to move from ‘publishing’ the information to ‘making the information available’.⁶⁸ NBN Co, in its supporting submission, notes that the amendment aims to clarify the intended meaning of ‘publish’.⁶⁹ NBN Co intends to continue its current practice of providing access to various rollout reports via an online portal, which is accessible only to NBN access seekers. For its monthly RFS plan, proposed footprint list and historical footprint list NBN Co will make the information available subject to the condition that it is ‘not restricted from doing so’.

NBN Co also proposes to include the ability for NBN Co to impose certain conditions on access seekers gaining access to the portal and obtaining rollout information. These conditions will be detailed in agreements that sit outside the SAU. In addition, NBN Co has expanded its commitment outside of the SAU to provide ‘certain’ information to ‘eligible parties’ who have not yet signed the WBA. NBN Co notes in its supporting submission that:

*Information contained in NBN Co’s rollout plans is commercially sensitive to NBN Co; therefore, there must be appropriate restrictions in relation to the entities to which the information is provided, and how it is used by those entities.*⁷⁰

However, NBN Co also considers it has:

*strong commercial incentives to provide information to access seekers which will allow them to effectively and efficiently migrate end-users onto the NBN network. These incentives are embedded in the SAU.*⁷¹

⁶⁷ NBN Co, *Supporting submission*, 2016, p. 27.

⁶⁸ NBN Co, *SAU*, 2013, Schedule 1H, clauses 1H.2.1-4 and 1H.3.1, pp. 150-152.

⁶⁹ NBN Co, *Supporting submission*, 2016, p. 27

⁷⁰ *ibid.*, p. 27.

⁷¹ *ibid.*, p. 27.

5.3. Issues for discussion

The ACCC has previously expressed concerns around the competition implications of an absence of accurate and timely rollout-related information to assist NBN access seekers in business planning and sales and marketing activities.

The ACCC considers that Telstra's role as a delivery partner and construction manager on the FTTN and HFC technologies compounds these concerns. While recognising that using Telstra's technical expertise will contribute to a quicker rollout of the NBN, the ACCC is particularly concerned about the clear potential for Telstra to gain significant competitive advantage due to access to better rollout information and/or access to that information materially ahead of other RSPs.⁷²

Under NBN Co's Definitive Agreements and the service delivery agreements it has now entered with Telstra, a significant amount of rollout information flows from NBN Co to Telstra, either directly or via NBN Co's other construction partners. Information is exchanged at many points throughout the rollout process, from the early planning and design stages through to the migration of particular premises to the NBN and the commencement of supply of services.

The information flow is in some cases necessary and warranted to allow Telstra to efficiently operate its networks as they are augmented ahead of handover to NBN Co. In other cases the information flow assists NBN Co in acquiring network planning and design services from Telstra that will facilitate NBN services becoming available sooner.

NBN Co also notifies Telstra of each service connected to its FTTN access network, including the identity of the NBN Co access seeker supplying a particular premises (that is, the retail service provider who is acquiring the service from NBN Co in respect of the copper path).

5.3.1. Carrier licence condition advice to the Department

In early 2015, the Department of Communications and the Arts (the Department) requested that the ACCC consult with industry to identify suitable information that NBN Co should be required to provide to retail service providers.⁷³ The Minister for Communications stated that Telstra's and NBN Co's handling of information is a critical issue in ensuring that the competition objectives of the Government's NBN reforms are realised.⁷⁴

The ACCC engaged with industry and presented its final advice on the proposed NBN Co carrier licence condition to the Department in June 2015. The final advice recommended that the carrier licence condition should include guiding principles. The ACCC considered that a fundamental principle for the proposed carrier licence condition is that Telstra should not

⁷² R Sims (ACCC Chairman), *ACCC continues to examine competition implications of NBN/ Telstra HFC delivery agreement*, media release, ACCC, 11 April 2016.
<https://www.accc.gov.au/media-release/accc-continues-to-examine-competition-implications-of-nbn-telstra-hfc-delivery-agreement>

⁷³ ACCC, *Report to Department of Communications: ACCC consultation on proposed information disclosure carrier licence condition*, May 2015
[https://www.accc.gov.au/system/files/ACCC%20Report%20-%20Proposed%20information%20disclosure%20CLC%20\(May%202015\)_0.pdf](https://www.accc.gov.au/system/files/ACCC%20Report%20-%20Proposed%20information%20disclosure%20CLC%20(May%202015)_0.pdf)

⁷⁴ M Turnbull (previous Minister for Communications), *Regulatory instruments for NBN Migration Plan finalised*, media release, Department of Communications and the Arts, 27 January 2015
http://www.minister.communications.gov.au/malcolm_turnbull/news/regulatory_instruments_for_nbn_migration_plan_finalised#.V33eKtR-Vh

obtain a competitive advantage due to its receipt of information from NBN Co.⁷⁵ The advice also recommended that the carrier licence condition should require NBN Co to:

- maintain a register of documents disclosed by NBN Co to Telstra, and to provide to access seekers, on request, copies of documents
- conduct ongoing consultation/engagement with interested parties in relation to the disclosure of information about the NBN, and
- prepare regular management-style reports disclosing specified information about the NBN, and to make these reports directly available to all service providers intending to supply over the NBN.⁷⁶

In May 2014, NBN Co published a 'communications pack' for access seekers setting out the scope and timing of reporting of the 'NBN Co Network Rollout Plan'. The ACCC's advice to the Department considered that the information NBN Co was already providing access seekers in its May 2014 communications pack provides a sound basis for the information to disclose.⁷⁷ However, the advice recommended that NBN Co should extend its commitments and provide the following additional information in its management style reports:

- A Separate Construction Rollout Plan, monthly RFS plan and Historical Rollout Region List For Each Technology (FTTN, FTTB and HFC).
- The status of each service area module (SAM) by way of milestone reached in the monthly RFS plan.
- A premises count by service class for each SAM in its monthly RFS plan, and the historical rollout region list.
- A column in the monthly RFS plan that indicates whether a specific exception event had occurred such that there was a material uncertainty as to whether the SAM's RFS date would be met.
- The forecast disconnection date for rollout regions in the historical rollout region list updated as necessary.
- The polygon boundary of each SAM in open source mapping software overlaid with existing exchange and DSL areas.
- Details of rack space available at POIs, including whether there are any impediments to service providers making use of a POI and information on remediation work at the POI in its points of interconnect report.
- Details of the planned RFS area in the monthly RFS plan when the SAM enters the Detailed Design Document process.⁷⁸

Further, the advice recommended that access to rollout reports should be directly available to all parties with a 'legitimate interest' in providing services over the NBN, without the need to sign a WBA.

In its supporting submission to the SAU, NBN Co notes that:

In formulating changes to clauses 1H.2 and 1H.3, NBN Co has had regard to industry submissions and the ACCC's recommendations on the potential carrier licence condition. The changes also reflect ongoing feedback from access seekers as to what information

⁷⁵ ACCC, *Report on proposed carrier licence condition*, 2015, p. 8.

⁷⁶ *ibid.*, p. 4

⁷⁷ *ibid.*, p.13

⁷⁸ *ibid.*, p.14

*they need to support their business planning, including via a recent consultation process conducted by NBN Co to improve the reporting metrics used in key rollout plans.*⁷⁹

5.3.2. Comparison between carrier licence condition recommendations and NBN Co proposed SAU commitments

The advice to the Department notes that NBN Co's commitments in its May 2014 communications pack provides a sound basis for the information to be disclosed in a carrier licence condition. In addition, the advice recommended further information to be disclosed. NBN Co has included some of the recommendations in its proposed variation of the SAU. Consistent with the advice, NBN Co proposes to vary the SAU to:

- include the number of premises that will be served by each technology in each planned RFS area in its monthly RFS plan. Also, the proposed footprint list and historical footprint list will include the expected technology for each premises.
- provide the boundaries of the planned RFS areas that have entered the construction phase in its monthly RFS plan. RSPs are able to then procure licensed ADSL exchange boundary information and overlay the two boundaries.
- provide the forecast disconnection date for each premises in its historical footprint list.

In addition, in its supporting submission, NBN Co proposes to make information available to certain parties who have not yet signed a WBA although it does not commit to do so in the SAU.⁸⁰

However, NBN Co's proposed variation to the SAU falls short of the recommendations in the advice to the Department in some areas. NBN Co has not proposed variations to address the following recommendations in our advice to the Department:

- NBN Co has not committed to providing the rollout status of each SAM in its proposed SAU variations.
- NBN Co has not committed to providing a premises count by service class for each SAM until after the RFS date in its proposed SAU variations.
- NBN Co has not committed to providing a column in the monthly RFS plan that indicates whether a specific exception event had occurred such that there was a material uncertainty as to whether the SAM's RFS date would be met.
- While NBN Co has committed to providing details of rack space available at POIs in its points of interconnect report it has not committed to providing information about remediation work to address capacity constraints at the POI.
- NBN Co has not committed to providing details of the planned RFS area when the area enters the Detailed Design Document phase in the monthly RFS plan. Rather, NBN Co has degraded its commitment and will not provide these details until after the area has entered the construction phase.
- NBN Co has not committed to granting RSPs access to a register of information disclosed by NBN Co to Telstra in its proposed SAU variations.

While it may do this in practice, NBN Co has not committed to conducting ongoing consultation/engagement with interested parties in relation to the disclosure of information about the NBN in its proposed SAU variations.

⁷⁹ NBN Co, *Supporting submission*, 2016, p. 25.

⁸⁰ *ibid.*, p. 28

5.3.3. Recent engagement with industry

Since the ACCC provided the above carrier licence condition advice to the Department, NBN Co has entered into a HFC Delivery Agreement with Telstra. Under this agreement, Telstra will plan, design, and build (or manage the contractors building) the NBN network within Telstra's HFC network footprint. The ACCC has raised concerns with NBN Co and Telstra, including that Telstra may receive a competitive advantage if it has access to better information than other service providers because of the HFC Delivery Agreement, and is assessing the parties' proposals to address these concerns.⁸¹ Relevant to the fundamental principle proposed in the carrier licence condition, any additional information Telstra receives under the HFC Delivery Agreement may inhibit RSPs ability to compete with Telstra on an equal footing.

In its supporting submission NBN Co stated that the SAU should be seen a "baseline set of commitments, which are then augmented by commercially rational provision of rollout information".⁸² NBN Co would provide additional rollout information that will be necessary for access seekers for planning and supplying services in addition to the SAU commitments on a voluntary basis to stakeholders who have signed the terms of access agreements. NBN Co argues that is so the provision of rollout information can continue to evolve over time to meet the needs of all parties.

The ACCC recently engaged in targeted consultation with RSPs on the adequacy of NBN Co's rollout information commitments in the context of NBN Co's proposals for the HFC Delivery Agreement. In the course of the inquiries, the ACCC contacted RSPs that use NBN products and use rollout information for planning or marketing purposes. The ACCC sought feedback from participants' in respect to:

- the materiality of the broad competition concerns that the asymmetry of information poses to their business
- SAU and voluntary rollout information to be provided by NBN Co, and
- reporting measures committed to by NBN Co and Telstra.

However, the ACCC undertook the targeted consultation process before NBN Co lodged its proposed variation to the SAU. As such, the ACCC was not in a position to seek views from stakeholders on the rollout information commitments NBN Co was seeking to make through the SAU variation.

The following questions seek to understanding what information access seekers currently use, what information access seekers require and when.

⁸¹ R Sims (ACCC Chairman), *ACCC continues to examine competition implications of NBN/ Telstra HFC delivery agreement*, media release, ACCC, 11 April 2016.

⁸² NBN Co, *Supporting submission*, 2016, p. 27.

ACCC questions for comment

Rollout information

17. Do the rollout information commitments contained in the SAU represent appropriate commitments (in terms of the nature and scope of information to be provided, the level of detail at which it will be provided, and its timing and frequency of information)?
18. Does the combination of SAU and voluntary rollout information commitments proposed by NBN Co ensure equal footing between Telstra and other RSPs?
19. Do the arrangements (SAU and voluntary) achieve the appropriate balance between flexibility to adapt to RSP information requirements and certainty around the commitment to provide timely and relevant rollout information?
20. Do you consider that the arrangements proposed by NBN Co outside the SAU provide assurance to RSPs that NBN Co will continue to provide the same quality of rollout information on a voluntary basis?
21. Do you consider the requirements set out in agreements that access seekers must agree to in order to gain access to rollout information reasonable?
22. Do you consider NBN Co's commitment of making the information available on the online platform to be a useful and appropriate way of receiving rollout information?
23. Do you consider NBN Co's proposed commitment to make information available 'where NBN Co is not restricted from doing so' in clauses 1H.2.2, and 1H.2.3 will provide sufficient certainty that NBN Co will provide necessary and timely rollout information?
24. Do you consider the broad timeframes expressed as quarter or half-year in the 3-year construction plan and month and quarter in the monthly RFS plan to be precise enough for RSPs marketing and planning purposes?
25. Would receiving information on rollout progress assist RSPs in competing in the supply of NBN services? What form would this information best take?

6. Other proposed changes to the SAU

NBN Co also proposes to make a number of other changes to the SAU through the SAU variation, including changes to dispute resolution, to NBN offers and other charges and to a formula relating to the long-term revenue constraint methodology (the LTRCM). The proposed changes are discussed below.

6.1. Appointment of dispute resolution advisor

Under clause 1H.5.1 of the SAU, NBN Co must state in its standard form access agreement (SFAA) that NBN Co and its customers agree to manage and resolve disputes that may arise in relation to the SFAA in accordance with the dispute management rules. Clause 1H.5.1(b) of the SAU states that the dispute management rules provide that certain functions and responsibilities are to be performed by an appointee to the role of 'resolution advisor' defined in Annexure 1 to Schedule 1H of the SAU.

NBN Co proposes to amend clause 5.3 in Annexure 1 to Schedule 1H to enable NBN Co to appoint an additional resolution advisor. In its supporting submission NBN Co notes that the appointment of an additional resolution advisor would provide for appropriate transitional arrangements if the term of one resolution advisor is coming to an end and is not renewed or if additional support is required.⁸³ NBN Co further notes that clause 6(a)(iii) of Annexure 1 to Schedule 1H already contemplates multiple resolution advisors.

NBN Co has also proposed changes to clause 1(f) of Annexure 1 to Schedule 1H. The proposed changes clarify that a resolution advisor may also be a body corporate with at least one 'nominated person' who remains responsible for overall compliance and decision-making functions of the resolution advisor.

Section 2 of Annexure 1 to Schedule 1H sets out a process for the selection and approval of pool members from which the resolution advisor may select panel members. NBN Co submits that under the current SAU, there is no process for adding new pool members once the initial pool has been established. NBN Co has therefore amended the section to enable the appointment of new pool members over time (i.e. after the establishment of the initial pool).

NBN Co submits that:

...this change will ensure that the pool can be maintained over time to achieve a beneficial balance of skills, experience and expertise, particularly in light of any resignations from the pool during the term of appointment.⁸⁴

The ACCC considers that it is appropriate for NBN Co to seek the above amendments to the dispute resolution advisor clauses. In addition, the ACCC's view is the proposed additions to Section 2 of Annexure 1 to Schedule 1H will facilitate the pool selection process and give NBN Co more flexibility in choosing its pool members.

6.2. NBN offers and other charges

NBN Co has updated NBN offers and other charges in Schedule 1C to incorporate initial maximum regulated prices (MRPs) for FTTN, FTTB and HFC. NBN Co notes that these changes are necessary to incorporate the additional technologies or to differentiate the

⁸³ NBN Co, *Supporting submission*, 2016, p. 60.

⁸⁴ *ibid.*, p. 61

additional technologies from the existing technologies covered by the SAU.⁸⁵ NBN Co submits that the initial MRPs are aligned with current and proposed WBA supply terms and consistent with the initial MRPs already in the SAU for the new services.⁸⁶

Specifically, NBN Co proposes to expand clause 1C.1 of the SAU to incorporate FTTN, FTTB and HFC technologies. NBN Co proposes to establish a PIR range for FTTN and FTTB technologies for AVC in clause 1C.2.2 with the corresponding MRPs proposed in clause 1C.4.1. NBN Co proposes to expand its other charges in clause 1C.4.2 to include new charges and activities for FTTN, FTTB and HFC. In some cases, Schedule 1C applies different charges for different network types for a number of service installation, service modification and service management charges. For example, there is a three-hour minimum charge for labour for equipment modifications on FTTN, FTTB and HFC networks but no such minimum for FTTP equipment modifications.

Further, NBN Co proposes to include additional annexures to define standard installations for FTTN, FTTB and HFC services.⁸⁷ NBN Co has indicated that the new definitions reflect those set out in the WBA.⁸⁸

NBN Co has not changed Schedule 1C to reflect the changes to prices or the introduction of new NBN offers or other charges that had already occurred under the SAU (e.g. the introduction of additional CVC TC-4 on the NBN Co fibre network). These prices became subject to the operation of the SAU through the mechanism of clause 1C.5.1, which allows for NBN Co to set prices for new products.⁸⁹

The ACCC is broadly satisfied with the approach NBN Co has adopted in the proposed changes to Schedule 1C, but will consider views from stakeholders on the approach and the details of the proposed changes.

6.3. Change to the LTRCM formula

In the course of applying the LTRCM provisions under Schedule 1E of the SAU, NBN Co identified an error in the formula used to calculate the cumulative inflation factor in respect of financial years prior to the first financial year (2013-14). NBN Co has updated the LTRCM clause 1E.9.4(c) in module 1 and clause 2C.1.4(b) in module 2 (to correct the formula error).⁹⁰ NBN Co also proposes to insert a clause in module 1 (clause 1E.1.2(c)) to clarify that the ACCC will account for the corrected formula in the next LTRCM determination. NBN Co estimates that the net present value of the adjustment is around \$10 million.⁹¹

The ACCC considers that NBN Co's proposed amendment to the LTRCM's formula in clause 1E.9.4(c) and clause 2C.1.4(b) is necessary and reasonable.

⁸⁵ NBN Co, *Supporting submission*, 2016, p. 23.

⁸⁶ *ibid.*, p. 23.

⁸⁷ NBN Co, SAU variation, Schedule 1C: Annexures 3-5.

⁸⁸ NBN Co, *Supporting submission*, 2016, p. 24.

⁸⁹ Under clause 1C.5(d) and (e) of the SAU, prices for new products may be set by NBN Co. The ACCC may undertake a price review of a new product within 24 months of a price being introduced for these types of products.

⁹⁰ NBN Co, SAU variation, Schedule 1E, clause 1E.9.4(c) and Schedule 2C, clause 2C.1.4(b), pp. 168 and 240.

⁹¹ NBN Co, *Supporting submission*, 2016, pp. 24-25.

ACCC questions for comment

26. What are stakeholder's views on the appointment of an additional resolution advisor?
27. What are stakeholder's views that a resolution advisor may also be a body corporate with at least one 'nominated person'?
28. Is the approach adopted by NBN Co in its proposed changes to Schedule 1C reasonable? Are the proposed changes on specific matters, such as specification of prices and other charges for FTTN, FTTB and HFC services and standard installation provisions, appropriate?
29. Are there any other issues you would like to raise regarding the SAU variation?

Appendix A: Consolidated list of questions for consultation

Changes to service description to incorporate new technologies

1. Do the proposed changes to the SAU service description accurately define the FTTN, FTTB and HFC network types with sufficient clarity and with regards to commonly accepted industry standards and practice?
2. Does the amended service description make sufficiently clear NBN Co's commitments under the SAU with regards to FTTN, FTTB and HFC?
3. Does NBN Co's proposed approach to extend the definition of the NBN Co network to include any other telecommunications network adequately facilitate the inclusion of future technologies such as FTTdp?

Changes to the UNI definition

4. Is the proposed definition of the UNI in clause 1A.3.1 consistent with commonly accepted technical standards? Is it appropriate for the SAU to refer to the UNI as a point not located on an NTD?

Layer 2 service

5. Is supplying the NBN access service to a UNI not located on an NTD for FTTN and FTTB services consistent with accepted definitions of Layer 2? If not, does NBN Co's proposed footnote on page 12 sufficiently resolve any inconsistency?

Removal of the network boundary point

6. To what extent does the definition of the network boundary point in the SAU provide certainty around matters such as maintenance responsibilities?
7. Does the proposed definition of the UNI and WBA definition of network boundary point provide sufficient certainty regarding the network boundary point if the reference is removed from the SAU?

Co-existence

8. Have the WBA provisions regarding co-existence, on which the proposed SAU provisions are based, been effective?
9. Have you encountered any issues regarding co-existence matters with either NBN Co or end users? How was the matter resolved? Please provide details.
10. Are access seekers sufficiently informed about NBN Co's arrangements regarding co-existence?
11. To what extent does the proposed co-existence timeframe for special services create uncertainties for access seekers?
12. Is it appropriate for co-existence clauses to be included in module 2?

Remediation

13. Have the WBA provisions regarding remediation, on which the proposed SAU provisions are based, been effective? In particular, do they provide an appropriate level of certainty about data rates during remediation and the duration of remediation?

14. Have you encountered any issues regarding remediation matters with either or both NBN Co and end users? How was the matter resolved? Please provide details.
15. Are access seekers or RSPs sufficiently informed about NBN Co's arrangements regarding remediation?
16. Is it appropriate for remediation clauses to be included in module 2?

Rollout information

17. Do the rollout information commitments contained in the SAU represent appropriate commitments (in terms of the nature and scope of information to be provided, the level of detail at which it will be provided, and its timing and frequency of information)?
18. Does the combination of SAU and voluntary rollout information commitments proposed by NBN Co ensure equal footing between Telstra and other RSPs?
19. Do the arrangements (SAU and voluntary) achieve the appropriate balance between flexibility to adapt to RSP information requirements and certainty around the commitment to provide timely and relevant rollout information?
20. Do you consider that the arrangements proposed by NBN Co outside the SAU provide assurance to RSPs that NBN Co will continue to provide the same quality of rollout information on a voluntary basis?
21. Do you consider the requirements set out in agreements that access seekers must agree to in order to gain access to rollout information reasonable?
22. Do you consider NBN Co's commitment of making the information available on the online platform to be a useful and appropriate way of receiving rollout information?
23. Do you consider NBN Co's proposed commitment to make information available 'where NBN Co is not restricted from doing so' in clauses 1H.2.2, and 1H2.3 will provide sufficient certainty that NBN Co will provide necessary and timely rollout information?
24. Do you consider the broad timeframes expressed as quarter or half-year in the 3-year construction plan and month and quarter in the monthly RFS plan to be precise enough for RSPs marketing and planning purposes?
25. Would receiving information on rollout progress assist RSPs in competing in the supply of NBN services? What form would this information best take?

Other changes

26. What are stakeholder's views on the appointment of an additional resolution advisor?
27. What are stakeholder's views that a resolution advisor may also be a body corporate with at least one 'nominated person'?
28. Is the approach adopted by NBN Co in its proposed changes to Schedule 1C reasonable? Are the proposed changes on specific matters, such as specification of prices and other charges for FTTN, FTTB and HFC services and standard installation provisions, appropriate?
29. Are there any other issues you would like to raise regarding the SAU variation?