

Submission

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Re: NBN Special Access Undertaking (SAU) Draft Decision

The Australian Communications Consumer Action Network (**ACCAN**) thanks the ACCC for the opportunity to comment on the Variation to the NBN Co Special Access Undertaking Draft Decision consultation (**draft decision**).

ACCAN is the peak body that represents consumers on communications issues including telecommunications, broadband, and emerging new services. ACCAN provides a strong unified voice to industry and government as we work towards communications services that are trusted, inclusive and available for all.

ACCAN welcomes the draft decision of the ACCC to reject the proposed variation to the Special Access Undertaking (**SAU**) on the basis that it is not in the long-term interests of end-users (**LTIE**). While the proposed variation to the SAU represents a material step forward in addressing the concerns raised by ACCAN, further refinements are required to ensure that it aligns with the LTIE.

Noting our previous submission on the proposed SAU variation, we have limited our remarks to those matters raised in the draft decision that we consider merit further comment. The SAU proposal should be changed to:

- embed genuine consumer engagement on proposed expenditures, revenue, service standards and affordability by fully resourcing consumer engagement;
- remove deemed endorsement where Consumer Advocacy Groups are not able to participate in product development and network change consultations;
- remove or revise the credit rating objective;
- strengthen service quality provisions for the first regulatory cycle, noting existing standards are likely to be obsolete shortly after the acceptance of a revised SAU;
- remove restrictions on the ACCC's power to issue a replacement module determination within the initial regulatory period.

Consumer engagement is at the heart of the economic regulation of monopoly services. While no framework of engagement is perfect, the framework set out in the SAU does not provide an adequate basis for genuine engagement with consumers.

The NBN SAU provides the framework for the assessment and review of tens of billions of dollars of expenditure to 2040. These costs are ultimately recovered from consumers. However, the SAU provides no resourcing for consumer representatives to engage with NBN Co on the prudence, efficiency or prioritisation of this expenditure.

ACCAN is regularly called upon to comment on a variety of matters impacting on communications consumers ranging from infrastructure policy, consumer protection, digital inclusion and digital platforms. In contrast to other essential services sectors, ACCAN is often the primary and sole contributor on matters concerning the economic regulation of communications infrastructure due to a lack of broader resourcing of consumer representation.

NBN Co's current proposal provides no commitment to resourcing consumer engagement despite a clear expectation that consumers will engage on technical economic and regulatory matters. This includes a material uplift in expected engagement by consumers as part of the Replacement Module Application (**RMA**) process. The RMA process could commence in FY24 and there are very few representatives available to engage with the process.

Ensuring consumer engagement on these critical matters, and the billions of dollars in forecast expenditure requires immediate action to fund this uplift in capacity. While ACCAN's technical expertise is well established, it is finite. ACCAN cannot properly represent consumers on the economic regulation for both the proposed NBN SAU and broader communications policy matters without a material uplift in recurrent resourcing.

ACCAN will always prioritise those matters that have the most material impact on consumers. However, to engage adequately with the NBN Co's framework would potentially require us to relinquish substantive policy matters in our remit such as: consumer protections, the future of the universal service obligation, digital inclusion and infrastructure resilience. ACCAN's existing resourcing is limited relative to the range of issues in our broad remit, and it is foreseeable that even if we were to fully withdraw from our other policy work, there would still not be enough resources to allow for ACCAN to engage on the full range of matters that NBN Co proposes.

The significant expansion in ACCAN's remit envisioned by NBN Co would significantly monopolise our resources beyond their relative contribution to ACCAN funding via the Telecommunications Industry Levy (**TIL**). We consider that such an outcome is inconsistent with the intent of TIL funding arrangements which envisions that ACCAN is available to engage with a range of industry participants across a broad spectrum of issues.

Significant revisions are required to the SAU to amend the processes for consultation to embed additional resourcing to align with the LTIE. While we note that NBN Co may prefer committee based or ad hoc funding arrangements, such an approach would not allow for the development and retention of the capacity uplift envisioned by the SAU. Providing stable resourcing for consumer representation on key matters of economic regulation is the only feasible way to ensure the LTIE.

ACCAN provides further detailed comments on the proposed revision to the SAU in **Attachment A**.

We thank the ACCC for the opportunity to comment on the draft decision. Should you wish to discuss any of the issues raised in this submission further, please do not hesitate to contact me at gareth.downing@accan.org.au.

Yours sincerely,

Dr Gareth Downing
Deputy Chief Executive Officer

Attachment A. Further comments on the proposed SAU variation

Consumer engagement is a presumption of the SAU

The proposed revision to the SAU is predicated on extensive, unfunded engagement with Consumer Advocacy Groups, of which ACCAN is expected to be a primary contributor. The presumption of ACCAN involvement is reflected in the text of the proposed revised SAU. In setting out the process for submitting a RMA, NBN Co is required to:

- Consult with Access Seekers and Consumer Advocacy Groups on the Relevant Expenditure NBN Co proposes to undertake in that Regulatory Cycle.¹
- Provide a summary of the consultation to the ACCC setting out the views of stakeholders including Consumer Advocacy Groups and how NBN Co has responded.²
- Propose expenditure forecasts that take into account the concerns of Consumer Advocacy Groups as identified by NBN Co in the course of its engagement with such persons.³

Consumer Advocacy Group is defined as ‘a body or association whose functions include representing the interests of consumers of telecommunications services in Australia’.⁴ While other organisations may be able to speak to specific issues or experiences, ACCAN is unaware of any other consumer organisation that has a national remit or the technical economic expertise to engage with the RMA process. In the absence of further resourcing, and ACCAN involvement in the RMA process, we query whether NBN Co can put forward a compliant expenditure forecast.

In addition to the engagement with the RMA, the SAU as currently drafted envisions Consumer Advocacy Groups participating in:

- The Multilateral Standard Form of Access Agreement (**SFAA**) Forum,⁵ which involves the setting of the standard terms of access, which is critical to facilitating retail competition;
- Review of Prudency Implementation Papers,⁶ which will set out proposed expenditure on preferred network change options;
- The Product Development Forum (**PDF**), which provides the primary mechanism for the development of new pricing constructs and products;⁷
- Product withdrawal consultations;⁸
- The Low-income Forum, the key forum for engagement on matters of affordability.⁹

¹ Clause 5.7(a).

² Clause 5.7(b).

³ Clause 2G.2.5(d).

⁴ Attachment C Dictionary, Clause 1.

⁵ Schedule 1B, Clause 1B.3.1.

⁶ Schedule 1D, Clause 1D.9.2.

⁷ Schedule 1I, Clause 1I.1.2 provides that Consumer Advocacy Group engagement is encouraged but provides no genuine commitment to resource engagement. Schedule 2H, Clause 2H.4.1 (a) provides that NBN Co will implement a product development process through which they will engage with Consumer Advocacy Groups in respect of Product development, a provision that conflicts Schedule 1I, Clause 1I.1.2. Schedule 1I, Clause 2H.4.1 (a) reads that NBN Co will consult with Consumer Advocacy Groups while Schedule 1I, Clause 1I.1.2 reads that engagement is voluntary and that they may consult. Schedule 2H, Clause 2.H.4.4 similarly establishes a positive obligation to consult Consumer Advocacy Groups on pricing matters, with Clause. 2.H.4.5 requiring consultation on technical attributes, Clause. 2H.4.6 requiring consultation on service levels.

⁸ Schedule 1I, Clause 1I.5.4; Schedule 2H, Clause 2H.2.

⁹ Schedule 2B, Clause 2B.7.

While participation in many of these forums is ostensibly voluntary,¹⁰ it is inconsistent with the LTIE that Consumer Advocacy Groups may be excluded from key forums due to resourcing constraints. This approach to engagement is fundamentally inconsistent with the LTIE, which is predicated on consumer preferences informing efficient and prudent investment.

We note that the ACCC is constrained from reviewing the existing provisions of the SAU as part of its assessment. However, we consider that the cumulative effect of expanding consultation obligations and expectations on Consumer Advocacy Groups' participation should be taken into consideration by the ACCC as a relevant matter when assessing the LTIE. We consider this approach is appropriate, noting that the provisions in their totality, including the RMA provisions, imply material increases in the demand's placed on ACCAN.

While ACCAN has great confidence in the expertise of the ACCC to scrutinise and assess the prudence and efficiency of NBN expenditures, the regulator is not placed to provide input on the relative merits of various economic trade-offs. This process is fundamentally reliant on extensive and in-depth engagement on consumer preferences; a role that can only be undertaken by a Consumer Advocacy Group.

Prudency Implementation Papers

ACCAN holds material reservations concerning the arrangements proposed for the review of Prudency Implementation Papers. As written, Clause 1D.11.1 could be interpreted as stating that Consumer Advocacy Groups have endorsed a Preferred Network Change Option where they have not been in a position to engage:¹¹

- (a) The Preferred Network Change Option will be considered to be endorsed by the Access Seekers and Consumer Advocacy Groups and/or the ACCC (as applicable) where:
 - i. a Network Change Dispute has arisen and the ACCC makes a decision accepting the Preferred Network Change Option in accordance with clause 1D.10.5; or
 - ii. no Access Seeker has satisfied the Network Change Dispute Conditions under clause 1D.10.2(b)(i) in respect of the Preferred Network Change Option,

As a matter of law, we note that NBN Co does not have the power to impose binding legal obligations on third parties in the absence of a power being established under NBN Co's legislative framework. For clarity, NBN Co cannot, through the terms of the SAU seek to unilaterally impose obligations on Consumer Advocacy Groups such as ACCAN.

ACCAN's silence on any matter relating to NBN Co expenditure should not and cannot be treated as an endorsement of the proposed expenditure.¹² To characterise lack of engagement as endorsement is inconsistent with best practice engagement and risks misrepresenting ACCAN's views on proposed expenditure.

The lack of appropriate arrangements for consumer engagement in the SAU risks undermining consumer confidence in the legitimacy of the SAU and the RMA process in the long term. Recent Roy

¹⁰ Schedule, 1B, Clause 1B.3.1.

¹¹ Schedule 1D, Clause 1D.11.1(a).

¹² Schedule 1D, Clause 1D.11.1.

Morgan research found that the telecommunications sector is the most distrusted industry in the Australian economy.¹³ Inadequate consumer input on proposed expenditures may diminish consumer confidence and trust in the legitimacy of regulatory settings for NBN Co.

The SAU restricts subsequent engagement

We note that similar provisions exist with respect to the PDF, with Access Seekers and Consumer Advocacy Groups being asked to participate in workshops on product constructs. However, we are concerned that, according to our reading of Schedule 1I: Annexure 1, Clause 6.3 *Participation in Workshops*, if a consumer group fails to participate or attend a particular workshop, Clause 6.3(a) could subsequently limit the ability of consumer advocacy group to query or amend the outcomes of the workshop. As the proposal states:

- (a) If an Access Seeker or Consumer Advocacy Group declines or fails to participate in a Workshop at any time, the Access Seeker or Consumer Advocacy Group may not subsequently amend or query the results or contributions achieved by that Workshop during the period in which the Access Seeker or Consumer Advocacy Group did not participate in the Workshop.

In short, the expectation is that consumer organisations will attend or have their ability to express a view on a product construct curtailed.¹⁴ We are also concerned that Clause 6.3(b) could be read as requiring Consumer Advocacy Groups to supply technical expertise without additional resourcing. Clause 6.3(b) reads:

- (b) If an Access Seeker or Consumer Advocacy Group representative to a Workshop does not have sufficient authority, knowledge, experience or expertise to participate fully in a Workshop, NBN Co may raise the issue with that entity's PDF Representative or other appropriate relationship manager.

We would like further clarification as to what 'raising the issue' might entail. Given the lack of resourcing for consumer engagement in the SAU it is possible that some Consumer Advocacy Groups engaging with the Workshops may not meet every criteria.

Introducing minimum guaranteed consultation periods is necessary to safeguard consumer engagement

Minimum guaranteed periods for consultation and engagement with consumer representatives are critical to offering consumers reasonable opportunity to engage on matters that materially impact upon them. In the absence of minimum periods of consultation being included in the SAU, ACCAN considers that it is possible that we would not always be able to engage on matters critical to the RMA in the required time.

¹³ Roy Morgan, 2023. 'Telecommunications industry overtakes Social Media as the most distrusted industry'. Available at: <https://www.roymorgan.com/findings/9193-risk-monitor-telco-most-distrusted-industry-2023>

¹⁴ Schedule 1I, Annexure 1, PDF Processes, Clause 6.3.

Credit rating objective

ACCAN agrees with the ACCC that the proposed credit rating objective principle is not consistent with the LTIE. We consider that achievement of a standalone investment grade credit rating has merit as a policy objective, but any such objective must be subsidiary to and consistent with prudent and efficient investment.

ACCAN notes the supplementary submission by NBN Co set out further potential revisions to the SAU to address the concerns raised by the ACCC with respect to the credit rating objective. Notwithstanding the potential further revisions to the SAU, ACCAN maintains its view that the credit rating objective should be removed, or at a minimum revised, to expressly indicate that it is subsidiary to the prudence and efficiency requirement.

Service quality

ACCAN welcomes the comments of the ACCC with respect to benchmark wholesale service standards and concur that the proposed arrangements are not consistent with the LTIE. As noted, by the ACCC the wholesale service standards were not developed in consultation with stakeholders and are likely to become obsolete shortly after the acceptance of the SAU.

While ACCAN welcomes the commitment of NBN Co to further engagement on the service quality through the Wholesale Broadband Agreement 5 process, we note that ACCAN's ability to engage with service standards via the SFAA is limited. Service quality is a key issue for consumers and as proposed the SAU provides a limited basis for engagement with consumers on critical issues of service performance.

The proposed SAU variation must embed processes that reflect consumer preferences and values. The SAU's processes should prioritise investment and expenditure to address those dimensions of service delivery that are most important to consumers. The proposed SAU variation as drafted provides a limited, optional approach to engagement on key matters relating to service quality. It does not reflect consumer preferences and accordingly cannot be in the LTIE.