



**Submission in response to the  
Proposed variation to the NBN Co Special Access  
Undertaking**

22 July 2022

## 1 Introduction

- 1.1 Commpete—an industry alliance for greater competition in telecoms markets—welcomes the opportunity to contribute to the Australian Competition and Consumer Commission’s (ACCC) consideration of the proposed variation dated 29 March 2022 to the NBN Co’s special access undertaking (**the proposed SAU variation**).
- 1.2 Commpete represents non-dominant telecommunications providers of retail and wholesale digital communications. It is Commpete’s view that a successful telecommunications sector is one that supports the ability of all market participants to deliver value, flexibility and choice to consumers and businesses across Australia. We remain committed to working with the ACCC to ensure that NBN Co’s wholesale service offerings can support the customer experience outcomes that Commpete’s members aspire and need to deliver in order to attract and retain customers.
- 1.3 Commpete agrees with the ACCC’s analysis and preliminary views as expressed in the ACCC’s May 2022 consultation paper. We also affirm our support for the consensus outcomes of the ACCC’s working groups on the future regulatory framework for wholesale access to the NBN, namely that:
  - 1.3.1 NBN Co have the opportunity to earn the minimum revenues it needs to meet its legitimate financing objectives, including to transition to a stand-alone investment grade credit rating;
  - 1.3.2 NBN end-users be protected from price shocks and from prices that are higher than necessary in later years;
  - 1.3.3 the regulatory framework provide incentives for NBN Co to operate efficiently and promote use of the NBN;
  - 1.3.4 that retailers have greater certainty over the costs that they will face when using the NBN; and
  - 1.3.5 there is a clear and robust quality of service framework so retailers and end-users know what to expect from NBN services, including a review mechanism so that service standards remain fit for purpose.
- 1.4 Unfortunately, the proposed SAU variation does not stand up well when measured against those principles, except perhaps the first principle regarding NBN Co’s achievement of a minimum revenue target. However, on that point we reiterate that it should not be for retailers or end-users to guarantee that NBN Co is able to transition its business to achieve a standalone investment grade credit rating. At most, NBN Co is entitled to a credible pathway to achieve that outcome. All entities that invest in infrastructure need such an opportunity, but they are often in markets that are far more competitive than the wholesale broadband market and do not enjoy the same protections from competition afforded to NBN Co.
- 1.5 Our responses to some of the ACCC’s consultation questions are set out below but in short, Commpete believes the proposed SAU variation is an appalling response to the pressures and problems, needs and preferences that were identified through the ACCC’s working group process. It displays a monopolist’s mentality, fails to address the substance of retailers’ long-standing concerns, and fosters the illusion that NBN is subject to regulatory constraints when in practice they are wholly ineffective. It must be rejected. The time has come for the ACCC to intervene with an access determination.<sup>1</sup>

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<sup>1</sup> Commpete has consistently highlighted the need for an NBN access determination over many years, most recently in September 2020 in respect of wholesale service standards.

## 2 Pricing and product constructs

Q. What are your views on the various elements of the pricing proposals put forward by NBN Co for the SAU variation?

- 2.1 Commpete understands the rationale that NBN Co has put forward for retention of a CVC component in its pricing, namely to encourage service take-up through the use of value components to justify a price premium for high users who value the service more, and thereby enable reduced prices for low usage and marginal users who might otherwise not subscribe or defer subscribing. Retail Service Providers who target high users see merit in the pricing for those speed tiers and do recognise NBN Co's work in that area.
- 2.2 However, usage reflects value and not cost. Now that the initial rollout and take-up of service is complete, price movements should reflect cost drivers and not value drivers. Value is a matter best left to the retail market to determine and to retail service providers (**RSPs**) to assess and reflect in their own competitive price structures.
- 2.3 If the rationale that is used by NBN Co to differentiate wholesale prices on the basis of value is to be partly withdrawn, it would seem to follow that it should be withdrawn for those prices that are directed to the retail market segments that value it least. NBN Co is doing the reverse. It is proposing to withdraw CVCs only for higher capacity services, of 100 Mbps and above, and to leave a CVC component in place for the 80% of residential grade services where usage is presumably lowest. This is perverse and will have unintended consequences, some of which the ACCC has alluded to in its consultation paper. One is that the wholesale price of the 50 Mbps service will catch up with the price of the 100 Mbps service in the relatively near term. To avoid continuing exposure to CVC charge increases, residential grade customers will be forced to shift to the 100 Mbps service, notwithstanding that they may not need the capacity that will then be provided to them. This is inconsistent with the efficient use of network resources.
- 2.4 In principle, to the extent CVC is retained, Commpete supports it being charged on the basis of the amount actually used rather than the amount provisioned as this would reduce the CVC management overhead for RSPs. Additionally, at times, it can take NBN Co several hours to provision additional CVC so this method should remove this lag and the associated customer impact. However, it remains essential that RSPs have the ability to control and limit the total CVC provisioned/charges in a simple and manageable way.
- 2.5 Nonetheless, Commpete can see no justification for the retention of the CVC pricing construct for any grade of service. The removal of CVC at the higher speed tiers is favourable for some Commpete members who target those customer segments. However there is also significant concern for providers with the changes proposed in both the voice only and lower 12/1 tiers. NBN Co's revenues must be a function of its efficiently incurred costs and not indexed to matters—such as capacity—that are not drivers of those costs. At the very least, the proposed SAU variation should commit NBN Co to a timetable for its progressive withdrawal in a manner that does not unduly require offsetting increases in the AVC price component in real terms.
- 2.6 CVC is not necessary to enable RSPs to differentiate, throttle or optimise their services. RSPs can do so without CVC should they wish to do so. Further, CVC does not encourage or allow service or product differentiation—indeed the experience to date proves the opposite as RSPs generally have tended to revert to re-selling NBN Co's bundles. Other retail broadband markets in other countries seem to manage to have a breadth of retail products in the absence of a volumetric charge and we expect Australia would be no different.

- 2.7 Commpete is also concerned that NBN Co's projection for annual peak data demand growth is 13%, nearly twice the rate allowed for in the data allowances proposed to be included, over time, under the proposed SAU variation. The result will be real price increases for many customers as RSPs will have little option but to pass on the increases wholesale charges.
- 2.8 Commpete sees no assurance in any of NBN Co's proposals that its investments and operation are efficient.

Q. Do you consider the proposals to be reasonable and likely to promote the LTIE, and if not, why not and what changes would be appropriate to achieve those outcomes?

- 2.9 No, Commpete does not consider the proposals to be reasonable in terms of efficient use of network capacity and resources. Nor does Commpete consider that NBN Co's proposals would be likely to promote the long-term interests of end-users (**LTIE**).
- 2.10 The proposed SAU variation will mitigate against the economically efficient use of existing NBN infrastructure and may lead to revenue decline with consequences for necessary future investment. The continuation of CVC price components for most residential end-users will cause them to consider, more than otherwise, whether they can continue to be exposed to usage components and may force them to increase the capacity of the service option they choose, well beyond their actual usage requirements, or to abandon fixed broadband via NBN altogether in favour of mobile broadband products. Increased mobile broadband substitution is a likely scenario and many households are operating on that basis already. The result will be a diminishing fixed broadband customer base for RSPs—and ultimately NBN Co—to serve, with resulting higher unit costs.
- 2.11 NBN Co's approach thus will not remove obstacles to end-users gaining access to broadband services and is more likely to obstruct achievement of that goal.
- 2.12 The proposed SAU variation does not promote the legitimate commercial interests of NBN Co as a continuing business. All industry stakeholders recognise that NBN Co is in a difficult position, in having to generate revenue sufficient to cover operational and capital charges whilst also recovering substantial past losses accumulated in the Initial Cost Recovery Account (**ICRA**). It is not consistent with the LTIE to do this when all commercial signposts and practice points to writing down or writing off these amounts. NBN Co's disinclination to do this does not change the fact that it is contrary to LTIE at this stage of the NBN life-cycle and also into the future.
- 2.13 The proposed SAU variation also fails to promote the legitimate commercial interests of RSPs in relation to their use of NBN access services. The continuing use of volumetric charging, which does not reflect cost causation at the wholesale level, distorts retail competition and potentially limits the diversity of offerings that a competitive retail market should offer. Most RSPs in the mass market for residential grade services are effectively resellers of the services defined by NBN Co in its price schedules. This also contributes to the uncertainty around NBN Co's future pricing, notwithstanding some limited efforts by NBN Co to reduce this.
- 2.14 Commpete also finds no assurance in NBN Co's pricing proposals that its investments and operation are efficient or will be subject to appropriate regulatory scrutiny of a kind that will ensure that they are efficient. As the ACCC points out, the ICRA will last for the whole of the SAU period to 2040 and possibly beyond that, and as long as the ICRA balance remains positive balance there will not be a direct linkage between the reasonable and efficient costs permitted in the building block model and NBN Co's prices.

### 3 Controls on prices and revenues

Q. What are your views on the various elements of the price control proposals put forward by NBN Co for the SAU variation?

- 3.1 In other contexts, each of the individual elements in the price control proposals may have merit, at least theoretically. However, the problem with their inclusion in the proposed SAU variation is that these elements are combined and the basis for some of them is obscure and unexplained. Taking each in turn:
- 3.1.1 **CPI + 3% for the first regulatory period:** For the balance of the SAU period to 2040, NBN Co should be concentrating on improving the efficiency of its operations. As the network rollout period has ended, the reasonable expectation of RSPs and end-users is that they will benefit through an efficiency dividend in the form of reduced unit prices in real terms (that is,  $CPI - X\%$ ). Instead, NBN Co proposes real price increases at  $CPI + 3\%$ , ostensibly to claw back past losses. The reality is that this will make the NBN progressively less competitive vis-à-vis modal competition in the form of mobile and satellite services. Further, NBN Co's rationale and justification for a figure of 3% is absent.
  - 3.1.2 **The greater of CPI or 3% for subsequent regulatory periods:** This also fails to meet reasonable expectations, which, as noted above, is  $CPI - X\%$  where  $X$  is an efficiency dividend.
  - 3.1.3 **Bundled product offers:** As a statutory monopoly, NBN Co should be permitted to bundle provided the components of the bundle are available separately. However, the future of bundled offers is uncertain if, as we believe, there is no justification for retaining the CVC price construct. In any event, bundle pricing should reflect the  $CPI - X\%$  approach referred to above.
  - 3.1.4 **CVC overage charges:** Fixing the current the rate for the next 17 years for a charge that should be withdrawn (or at the very least, cost-justified) does not begin to address the problems with this charge, all of which have already been eloquently expressed by industry through the ACCC working group process.
  - 3.1.5 **Modification of the revenue cap to enable 50% of 'unders' and 'overs' to be carried forward:** In principle this level of flexibility is appropriate and, in the past, has been used to give some pricing flexibility to regulated entities. Without such a scheme there would be a significant incentive for a regulated entity to use up its full revenue cap rather than lose it, and that would not be promote the LTIE (nor those of RSPs). However, in the current context, this approach creates the potential for future price shocks to arise if the adjustments that might be carried forward happen to be significant.
  - 3.1.6 **Market offers as discounts:** There is some merit in the principle that if a threshold proportion of the revenue in any residential grade service category is from discounted services, then NBN Co should be obliged to make some of those discounts permanent. After all, if all discounts were incorporated into the mainstream pricing and charging arrangements there there is a distinct possibility that NBN Co will have no incentive to propose them in the first place, which may prevent the introduction of innovations in pricing that may or may not prove to be useful and worth continuing. However, NBN Co has not offered any justification or rationale for its proposed threshold figure of 5%.

- 3.1.7 **Hybrid price-revenue cap:** As the ACCC has pointed out in its consultation paper, the key issue for a hybrid cap is the price uncertainty that could result. Commpete believes that if there are multiple caps or constraints then it is necessary to establish a clear hierarchy or order of precedent for their application, so that all stakeholders, as well as NBN Co, have some level of certainty about implementation.

Q. Do you consider the proposals to be reasonable and likely to promote the LTIE, and if not, why not and what changes would be required to achieve those outcomes?

- 3.2 No, for the reasons outlined earlier, Commpete does not consider the proposals to be reasonable or likely to promote the LTIE. Specifically, the proposals:
- 3.2.1 unreasonably seek to perpetuate arrangements in which NBN Co's prices reflect factors that are not drivers of NBN Co's costs;
  - 3.2.2 are uncertain in their application and leave substantial and inappropriate discretion to NBN Co;
  - 3.2.3 will continue the arrangement whereby regulated prices are not related to changes in efficient costs as reflected in the building block cost model;
  - 3.2.4 defeat the reasonable expectations of RSPs and of end-users that wholesale (and, consequently, retail) prices for broadband services will decrease in real terms over the near term and will continue on that trajectory for the duration of the period of the SAU; and
  - 3.2.5 will likely result in an increasing price spiral, as end-users opt out of using fixed broadband services via the NBN in favour of mobile and other alternatives, leaving a diminishing pool of subscribers to bear increasing unit costs. This runs contrary to the policy that supports the construction of public infrastructure and essential services with public funding and statutory protections to enable the lowest utility-level pricing from the outset.

Q. Are the access prices set at efficient levels, noting the elements of efficiency outlined in section 3.2 [of the consultation paper]?

- 3.3 No, they do not promote the optimum usage of the NBN, and nor are they demonstrably linked to the costs of efficient investments and operating processes. In fact, the price formulae and constructs proposed obscure any such connection.

Q. Are the proposed pricing measures likely to expand or reduce the diversity of retail offers and promote competition in dependent markets?

3.4 They will definitely reduce the diversity of retail offers and act as a disincentive for the development of new and innovative offers at retail level. This is because the proposed measures:

- 3.4.1 leave undue discretion in relation to ICRA recovery, treatment of unders and overs, continuing discounts, absorption of discounts into mainstream prices, etc with NBN Co, with little or no indication of how NBN Co will take decisions, provide notice, or subject its operations to orderly and transparent administration;
- 3.4.2 perpetuate the continued use of CVCs for the bulk of residential grade access services, thereby continuing the tendency of RSPs to be NBN Co resellers in that important segment; and
- 3.4.3 create an uncertain future in which price trends for high-speed access and lower speed access services will collide, without any opportunity for RSPs to anticipate market outcomes or to meaningfully prepare offerings that might be relevant in that situation.

Q. Do the proposed pricing measures provide retailers with sufficient certainty about access costs?

3.5 No, for the reasons mentioned above.

Q. Do the proposed pricing measures provide incentives for NBN Co to operate efficiently, allow for the recovery of efficient new investments, and promote the efficient use of the NBN?

3.6 It is unclear how the pricing measures will promote recovery of efficient new investments or enable any demonstration by NBN Co that new investment is efficient.

Q. Do the proposed pricing measures ensure that end-users are protected from price shocks and from prices that are higher than necessary in later years?

3.7 No, they do not. Further undertakings (work arounds upon work arounds) will be needed from NBN Co to clarify how the many price discretions reserved to NBN Co could be constrained to reduce the risks of price shocks. The ACCC has indicated its concern about the high chance of returns in the early years being below the levels predicted by NBN Co and the consequent need to recover those losses in later years to an extent beyond current expectations. The likely market response to a decade of continued high prices will be migration to other services and platforms leaving NBN Co in a parlous situation.

Q. Are the prices likely to represent value over time having regard to the permissible price increases without commensurate commitments to also improve service standards?

3.8 No, and the risk is that the market will recognise this and react in the manner set out above.

#### 4 Building block model – general approach

Q. The ACCC seeks stakeholder views on NBN Co's general approach to the building block model, which incorporates elements of the current SAU.

- 4.1 Commpete considers that the building block model is the appropriate approach for calculating costs of infrastructure and network projects, which, like the NBN, are long term and about which investors need to have assurance that a realistic opportunity to recover costs exists over that longer term.

Q. The ACCC seeks stakeholder views on NBN Co's proposed additional fixed principles [outlined by NBN Co at page 23 of NBN Co's supporting submission of 18 May 2022].

- 4.2 Commpete objects on principle to the 1 July 2020 ICRA value being hardwired into the SAU (in new clause 2C.4.4) by way of a fixed principle because we do not believe that the ICRA balance should be considered part of NBN Co's efficient costs. A substantial write-down (or write-off) of the balance of the ICRA is necessary and key to any meaningful reform of the regulatory regime that is to govern NBN Co for the next 17 years.
- 4.3 The precise impact intended by NBN Co is also unclear, as the ACCC appears also to have found. Commpete would be concerned if the additional fixed principles were to have the effect of unduly binding ACCC's decision making for the next 17 years. To avoid unpleasant surprises, NBN Co needs to set out clearly what inappropriate outcomes it believes would be avoided if each of the principles were included in the SAU.

Q. The ACCC seeks stakeholder views on the operation of the proposed financeability test.

- 4.4 The financeability test seems designed to give the ACCC responsibility for making adjustments should any ACCC action lead to a material risk that NBN Co's credit rating will not fall below a benchmark level of Baa2. This procedure is inappropriate. Commpete does not see it as the ACCC's role to ensure that its decisions do not negatively impact the credit rating of a regulated entity and we advise against the ACCC taking on such a responsibility via acceptance of the proposed SAU variation. If the ACCC were to take on that role, it would in effect be transferring the same obligation onto the industry through the restraint or adjustments that the obligation would entail.
- 4.5 It is the role of management to operate a business to achieve the outcomes that its owners require, including maintenance of a credit rating at a certain level. If the ACCC were inclined to make decisions in fulfilment of the criteria laid down in legislation or in instruments such as the SAU, and those decisions negatively impacted NBN Co's business and credit ratings, then it would be a matter for the Board and management of NBN Co to take further action to address the consequences. It should not be for the ACCC to take action to adjust for its own decisions.
- 4.6 In principle the proposed financeability test is inappropriate and should not be included in the SAU.

## 5 Recovery of accumulated losses

Q. The ACCC seeks comments from stakeholders on whether NBN Co's proposed treatment of accumulated losses is reasonable and in the LTIE.

- 5.1 Commpete considers that the proposed treatment by NBN Co of accumulated losses is unrealistic and that it is neither reasonable in all the circumstances in which NBN Co is operating nor in the LTIE.



- 5.2 NBN Co has been set up to operate on a commercial basis and in many respects has adopted all of the trappings and accoutrements of a commercial undertaking. It has been given statutory protection because it needs to be able to operate in the longer term with investment incentives allowing for a reasonable opportunity to recover costs over a longer period than might otherwise be available. However, nothing in this framework changes the commercial considerations that drive the behaviour of other stakeholders in the market—including infrastructure competitors, RSP and end-users. They will not willingly support excessive prices caused by NBN Co’s attempt to recover past losses in the longer term if other options are, or become, available.
- 5.3 The NBN may be a significant and long-term investment but it is in a highly dynamic, high-tech sector, and so NBN Co cannot realistically expect that the terms it seeks to lay down for the next 17 years are going to override the characteristics of the market.
- 5.4 NBN Co’s original expectation was that it would recover its initial losses in the decade from 1 July 2013 to 30 June 2023. The reverse has happened, and by 30 June 2023 NBN Co estimates the accumulated losses will be \$38 billion. There is no prospect that this amount will be recovered even by 2040. The forecast referred to by the ACCC in its consultation paper is that around 60% of the Core Services ICRA will still be outstanding at that time, even with the measures proposed by NBN Co in the proposed SAU variation.
- 5.5 The prices that NBN Co charges in the meantime will necessarily be inflated above the costs that are being incurred in current operations, and the impact of the inflation will be uncertain from year to year. Compete believes that this approach will almost certainly deter usage of the NBN and encourage customers to explore alternative sources of broadband services, certainly in greater numbers than might otherwise have been the case. The result will be that the costs that NBN Co seeks to recover, plus recovery of historical accumulated losses, will be borne by fewer end-users, with further upward pressure on prices and further contribution to “unders” that will be carried forward.
- 5.6 Commercially-oriented enterprises would recognise that in these circumstances the answer is not to crystallise losses, but to write them down substantially or to write them off entirely.

Q. The ACCC seeks stakeholder views on the extent to which NBN Co’s proposed revenue cap provides clarity about the recovery of accumulated losses and promotes certainty about future price levels.

- 5.7 Clarity is lost in the complexity. In particular, the arrangements to carry unders and overs forward are entirely dependent on year-to-year revenue performance and they provide for very short term (next year only) certainty at best.

Q. The ACCC seeks stakeholder views on the likely price and associated impacts of NBN Co’s proposals on retailers and end-users over the long term.

- 5.8 The assurance that price levels are not related to the current costs of the business, and that they incorporate recovery of historical accumulated debt, is a major source of uncertainty. That uncertainty will cause RSPs and end-users to underutilise the NBN and seek better terms elsewhere, particular from infrastructure competitors providing mobile, satellite and other broadband services.

Q. The ACCC seeks stakeholder views on the likely implications for NBN Co's incentives under its proposal.

- 5.9 Commpete would expect that in order to contain the commercial damage of operating as it has done and proposes to do, NBN Co would seek to cut costs and to underinvest in new network equipment.

## 6 Cost allocation

Q. Will the cost allocation principles alone provide for the effective separation of the competitive services from the regulated services?

Q. Are the proposed cost allocation principles and detailed implementation likely to reflect relevant cost drivers and appropriately allocate common costs and historical losses?

Q. Are the processes for periodically reviewing cost allocations through the replacement module process, and processes for considering cost allocations for new services, appropriate and accommodating of changing conditions?

Q. Does the proposed cost allocation framework achieve an appropriate balance between flexibility on implementation and ACCC oversight?

- 6.1 An appropriate allocation of costs between NBN Co's core and non-core services—and the perception of effective separation and of fair competition for non-core services—requires greater “hands-on” regulatory oversight than the mere adoption of cost allocation principles.
- 6.2 Commpete also believes that it is important should have some ability to make changes, or require NBN Co to make changes, to the NBN Co's proposed cost allocation manual. The proposed SAU variation seeks to bind the ACCC to have regard to the manual (in the event the ACCC determines cost allocations through a replacement module determination anytime in the next 17 years) despite the ACCC having no sway over its content.

## 7 Expenditure criteria

Q. Do you consider the Expenditure Objectives and/or Expenditure Factors proposed in the SAU variation raise the prospect that NBN Co may be required to make complex and/or subjective trade-offs and if so, why?

- 7.1 Yes, there will have to be trade-offs, but that should come as no surprise since it is in the nature of resource-constrained commercial decision-making to make choices and trade-offs.
- 7.2 As the ACCC would appreciate, lists of factors—many of which may be offsetting to others—appear regularly in legislation and regulation and are almost always non-exhaustive and without weightings or internal rankings or priorities. It therefore is not surprising that the Expenditure Factors have been set out in that format as well.
- 7.3 Commpete does not interpret the inclusion of the proposed Expenditure Factors in the proposed SAU variation as a measure to constrain the ACCC's review of expenditure in terms of prudence and efficiency, but, rather, to set out some of the key relevant considerations. There is a requirement that each of the listed Expenditure Factors should be considered by the ACCC to determine if they are relevant in a particular case, and, if relevant, how they should be applied. We note that Expenditure Factor (xiii) is “any other relevant matter”, which would appear to provide the ACCC with scope to make sure that reviews are complete and cogent.

Q. Do you think that the Expenditure Objectives and/or Expenditure Factors will lead to only prudent and efficient expenditure being allowed?

- 7.4 If the review is thorough there is every prospect that the Expenditure Factors will lead only to prudent and efficient expenditure being allowed. As already noted, Expenditure Factor (xiii) is “any other relevant matter”, so the ACCC has scope to make sure that reviews are complete and cogent.

Q. Do you consider the proposed triggers for cost pass-through applications as drafted may allow NBN Co to recover from users increases in costs that could be greater than those necessary to promote the LTIE? If so, please explain how this could occur and any changes to the proposed triggers that would be required in order for them to promote the LTIE?

- 7.5 NBN Co proposes that cost pass-throughs should apply in the case of the following:
- any legal, regulatory or administrative obligations or requirements;
  - any policy or direction to NBN Co issued or maintained by any government agency (including any Statement of Expectations); or
  - a Government Policy Project Notice.
- 7.6 NBN Co may well not be able to avoid the expenditure implications of these events but it would often have options about how best to implement them.
- 7.7 In Commpete’s view, these events might be candidates for pass-through but the application from NBN Co to the ACCC to approve pass-through should be required to demonstrate to the ACCC’s satisfaction that the response from NBN Co and the expenditure that it proposed to incur was both prudent and efficient.
- 7.8 To take the current Statement of Expectations as an example. The expectations listed in the Statement are couched in the broadest language in most cases, and are often stated without qualification in terms of timing, resources or targets. Indeed, this has been a source of criticism of the Statement. In any case, NBN Co has substantial discretion about the manner in which it will comply with the Statement, and, consequently, about the expenditures that it will incur and the time periods in which it will do so. It is those subsidiary decisions that should be subject to the prudence and efficiency assessments conducted by the ACCC.
- 7.9 Without that, there would be a major risk that LTIE would not be met, in that excessive and unjustified costs would be automatically accepted for recovery simply because they are the subject of a Government Policy Project Notice or included in other government policy directives.

Q. What are your views on the SAU variation’s proposal that less stringent criteria would apply to the ACCC’s determination of forecast expenditures on Government-directed projects relative to other forms of its expenditure for the purpose of making its replacement module determinations? Do you consider this proposal is reasonable and promotes the LTIE and, if not, why not?

- 7.10 Government-directed projects should be subject to the same assessment criteria in relation to prudence and efficiency as any other. The Variation suggests that the issue of prudence is off the table with these projects because the Government has already indicated that they will be carried out. Unless drafted by NBN Co, it is unusual for the Government to specify the technical and management details in such approvals. It follows that there is a subsidiary level to which the ACCC may apply the prudence criterion.
- 7.11 It is hard to imagine that those that make Government decisions on projects that NBN Co will be directed to undertake would be comfortable with the thought that they have also made subsidiary decisions on prudent and efficient means of implementing the direction.

## 8 WACC

The ACCC welcomes stakeholders' feedback in relation to the matters set out below:

- NBN Co's proposal to lock in a detailed WACC methodology in the SAU, without any scope for a review of the methodology, until the end of SAU period of 2040.
- NBN Co's proposed WACC for SAU Module 2 with respect to the methodology and parameters.
- NBN Co's proposed WACC for the first regulatory cycle with respect to the methodology and parameters.

- 8.1 Commpete considers it unreasonable and unacceptable to lock-in a detailed WACC methodology for the next 17 years without any prospect or scope for review. NBN Co does not need and should not receive this level of certainty, and it may well be that its own interests are not served by it. Clearly the interests of the industry and end-users will not be best served by arrangements that are protected from review over the long term.

## 9 General regulatory structure and replacement module assessment process

Q. We are also interested in stakeholder views on NBN Co's proposal to align the maximum term of commercial agreements with the replacement module process. We note that a commercial agreement with a term of 5 years would be significantly longer than the current arrangements. We seek views on whether the proposed period would facilitate timely negotiation and resolution of issues

- 9.1 Commpete has no objection to the maximum period of commercial agreements being extended to 5 years provided that lesser periods will also be offered, and that the decision on the period is one that is entirely with the RSP. The problem with maximum terms in the hands of powerful suppliers (such as NBN Co) is that they also become the minimum or only terms on offer. If there is advantage for NBN Co in having 5-year agreements, then they can offer such agreements as an option, including discounts or other price benefits to induce take-up (e.g. they might reflect a share of the cost savings from not having to administer shorter term contracts and negotiate renewals or continuation on a shorter cycle).

## 10 Service quality

Q. The ACCC also seeks comments on whether NBN Co's proposed approach to service quality, which does not contain any commitments to update wholesale service standards, would allow retailers to efficiently meet any new retail service quality determinations that may be made.

- 10.1 The SAU must include a baseline set of service standards or performance benchmarks for each service. These are the inevitable requirements needed to ensure that regulated prices are not undermined in practice. Prices must be the price of something very specific, and the specification must include service quality and performance standards. Without that, retail service providers and end-users are being asked to buy a service label, not enforceable service substance. Certainty on service quality is the flip-side of certainty on service price.

## 11 Service description

Q. The ACCC seeks stakeholder views on whether incorporating the MTM technologies into the SAU is in the LTIE.

- 11.1 It is important that the MTM technologies are incorporated into the SAU. To do otherwise is to leave important technologies, such as FTTB, FTTN, HFC and FTTC, outside the regulatory framework that is, or should be, comprehensive and all-inclusive. These technologies will be in operation for some time into the future, so the problems posed by non-incorporation will not disappear anytime soon. However, whether or not the inclusion of the MTM technologies is in the LTIE will depend on the associated terms and conditions, which in this case, and for the reasons described above, cannot reasonably be found to have met that standard.

## 12 ACCC functions and powers

Q. Our proposed approach to assessing the sufficiency and effectiveness of the proposed functions and powers that are to be conferred on the ACCC. Are there any other checks that we should be doing on the powers and functions that have been proposed to be conferred?

- 12.1 The ACCC is in a better position than Commpete to determine the powers that it requires to ensure that the SAU is working, and continues to work over the remaining 17 years of its life, to promote the LTIE. What might constitute the LTIE itself may even change over such a long period and in ways that cannot be envisaged now.
- 12.2 It would be totally unacceptable for the ACCC to have to say in 5-, 10- or 15-years' time that it cannot effectively address issues that arise within the SAU framework because the ACCC and the industry were unable to anticipate the issue in 2022 and therefore omitted to suggest the powers that the ACCC would need to have and apply. This would become even more unacceptable—if that is possible—if the ACCC actually would have had the powers to address an issue under the *Competition and Consumer Act 2010 (CCA)* but gave them up under an SAU.
- 12.3 In the ACCC's consultation paper (at paragraph 5.12.2), the ACCC raises the idea of including a 'power to review the effectiveness of the existing regulatory controls, and to require changes where these have been found to be ineffective in bringing about the intended outcome'. This is an example of the type of function or power that, if included in the SAU, might address Commpete's concern and we would therefore give in principle support to the creation/inclusion of such a power.

Q. Whether there are any further functions and powers that should be conferred so that the proposed regulatory controls will be effective, and to ensure the SAU variation promotes the LTIE, and its terms and conditions are reasonable over time? Is ACCC oversight of the cost allocation manual required for this purpose?

- 12.4 Commpete is not aware of further functions or powers that should be conferred on the ACCC under the SAU. Clearly the ACCC should have no limitations in being able to oversee and review the cost allocation manual if it ceases to be appropriately expressed or applied in the LTIE. A more general power might be more appropriate, perhaps of the kind discussed in paragraph 12.3 above. NBN Co is undoubtedly seeking certainty for its operations, investments and cost recovery, but it cannot have that certainty for 17 years at the risk of serious impairment of the LTIE.

Q. Whether the limits that apply to the exercise by the ACCC of the functions and powers conferred on it by the varied SAU are certain and readily ascertainable.

12.5 For the reasons mentioned above, no, the proposed SAU powers are not certain or readily ascertainable, and nor can they be when all of the detailed issues that might arise during the remaining 17 years of the SAU cannot be anticipated.

Q. Whether any of the limits on the ACCC's functions and powers will preclude the SAU variation from satisfying the statutory criteria for acceptance of the varied SAU, and the consistency of those limits with the legislative framework established by Part XIC of the CCA, including for example:

- The appropriateness, and consistency with the ACCC's existing powers and the statutory criteria under the legislative framework established by Part XIC, of the limits on the ACCC's powers to accept or reject NBN Co's replacement module applications and make a replacement module determination imposed by the SAU variation in respect of expenditure forecasts and by reference to clause 2C.2.5 of Schedule 2C of the SAU variation.
- The adequacy of the timeframes specified for regulatory decision-making by the ACCC under the varied SAU and at the expiration of which the ACCC ceases to have regulatory oversight.

12.6 As the ACCC's consultation paper notes, 'sub-section 152CBA(10A) of the CCA permits a special access undertaking to confer functions and powers on the ACCC, in which case the ACCC may exercise or perform them in accordance with the undertaking.' We note that this relates to *additional* powers and functions. It is a legal question, beyond the scope of Commpete's response, whether and to what extent the ACCC may accept constraints in an SAU which are, or could be, inconsistent with the legislative framework established by Part XIC of the CCA. In principle, however, and in the absence of very clear language in the CCA itself, Commpete believes that it would not be open to the ACCC to agree not to exercise powers and functions that have been given to it by statute. To make the matter as clear as possible in the SAU, perhaps there needs to be an explicit recognition that nothing in the SAU shall be considered to preclude exercise of the ACCC's powers under the Act and under Part IX in particular.

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