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# TELSTRA CORPORATION LIMITED

## Response to the Proposed Variation to the NBN Co Special Access Undertaking

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## 1 EXECUTIVE SUMMARY

Since March 2021 RSPs have jointly requested and provided input and guidance on the development of a minimum acceptable regulatory framework, in anticipation of having to negotiate with nbn co on price and non-price terms that deliver the best outcomes for our customers. Without a regulatory framework in place, RSPs have little bargaining power and would not be able to secure even the minimum standards that our customers need and expect.

However, nbn co's SAU Variation largely ignores those discussions. There is little doubt nbn co's SAU Variation does not promote the long-term interests of end users, including of our customers or the community. In many areas, it does not meet the minimum acceptable standard for a regulatory framework.

**nbn co's prices would be unnecessarily high and increase every year until 2040.** The SAU locks in an upfront increase in wholesale prices for broadband (up to 20%), and increases those high prices year on year until 2040 (by as much as 10.8% pa). These unnecessary price increases would come at a critical phase in, and threatens to damage, the digital economy, when Australians face serious cost-of-living challenges. The SAU Variation would make Australian wholesale prices the highest in the world, when taxpayers' investment in the NBN is already inefficiently underutilised and adoption is low. The motivation behind the proposed prices increases appears to be to earn a return on the last decade of nbn co's inefficient costs.

**The proposed price and product constructs will harm customers.** Customers will be generally much worse off under the proposed ongoing price increases, with customers needing basic connectivity, vulnerable customers or those with low spend being at risk of most harm initially. The proposed overage charges are not in the LTIE, as the charge is well over nbn co's incremental cost of capacity, and CVC inclusions growing at 50% of demand growth is not sufficient to protect end RSPs from significant cost escalations or consumers from poor experience.

**Controls on prices and revenues are ineffective and inefficient.** The CPI linked price caps bear no relationship to changes in nbn's cost. The revenue cap provides no constraint or certainty for many years and, to the extent it does become binding, encourages inefficient outcomes. While the SAU Variation prevents the ACCC from intervening in the future, it does not contain even the minimum standard of community consultation on future nbn co decisions.

**The cost allocation approach enables anticompetitive and inefficient behaviour.** If nbn co continues to use taxpayer funds to undercut private firms in competitive markets, then it must allocate substantially more of its costs to its activities in competitive markets, and be subject to strict constraints in how it changes its cost allocations in future.

**The SAU Variation fails to address nbn co's poor service quality performance.** A key feature of the SAU Variation is nbn co would get to raise prices regardless of the service quality it provides in the future. This is not in the LTIE. Currently, many Telstra customers have been impacted by nbn co outages – Telstra receives less than 1 hours' notice for a significant proportion of nbn co's 'planned' outages. Under the current WBA, a customer can experience up to 10 drops a day in their NBN service before nbn co will classify it as a fault (rather than a performance incident) and be obliged to investigate and rectify the issue within agreed fault timeframes, and when nbn co cannot adequately resolve a speed fault, a customer may be subject to an 18-month remediation period.

**There are also numerous issues with the drafting of the SAU Variation.** For example, for plans nbn co intends to remove overage, it would be able to reintroduce those overage charges in future without ACCC oversight.

Given the situation and that the SAU Variation is clearly not in the LTIE, we submit that the ACCC should reject nbn co's proposed SAU Variation and establish an alternative regulatory regime through an



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Access Determination. While an Access Determination is in place, it would be open for nbn co to put forward an alternative SAU variation, without having to commercially negotiate with RSPs concurrently.

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## 2 Introduction

Since March 2021 RSPs have been jointly requesting the development of a regulatory framework, in anticipation of having to negotiate with nbn co on price and non-price terms that deliver the best outcomes for our customers. Without a regulatory framework in place, RSPs have little bargaining power and would not be able to secure even the minimum standards that our customers need and expect.

Over the last year, nbn co has had the opportunity to develop a regulatory framework through a variation to its SAU. Through a series of ACCC-led industry workshops, RSPs, ACCAN and the ACCC invested a substantial amount of resource, time and effort to provide nbn co with input and guidance on what would be a minimum acceptable regulatory framework that would provide better outcomes for end users.

However, nbn co's SAU Variation largely ignores those discussions. There is no doubt the SAU Variation does not promote the long-term interests of end users, including of our customers or the community. In many areas, it does not meet the minimum acceptable standard for a regulatory framework.

Disappointingly, nbn co's actions have delayed a resolution, yet at the same time they have been trying to accelerate forthcoming commercial negotiations. In markets where nbn co holds a substantial degree of power, it clearly has a strong incentive to set terms of access that free it from regulatory oversight and constraint.

For almost a month after the public consultation on the SAU Variation began, nbn co had not provided its BBM to interested parties. While the BBM was published on 22 June, it was password protected so we could not test or interrogate it. At the time of preparing this submission, we are still waiting for nbn co to provide access. This submission therefore is unable to address any matters relating to nbn co's BBM or matters that would normally rely on an understanding of nbn co's costs. On 13 July, a version of the BBM had been provided without password protection, but this version is not a complete functioning model (for example, a user cannot vary or test capex, cost allocation or asset life assumptions). We will provide a further submission dealing with issues associated with nbn co's BBM.

While this submission details a series of flaws with nbn co's proposed SAU Variation, the fundamental problem is that nbn co seeks a return on a decade of inefficient costs. No commercial organisation could expect to recover such costs. This will necessarily result in unreasonably high prices for end users and therefore the underutilisation of a national asset, to the social and economic detriment of all Australians.

Given this situation and for the reasons set out in this submission, we submit that the ACCC should reject nbn co's proposed SAU Variation and establish an alternative regulatory regime through an AD. While an AD is in place, nbn and RSPs could commercially negotiate the WBA, and it would be open for nbn co to put forward an alternative SAU variation later, without having to do so at the same time as commercial negotiations occur.

While this submission addresses the question in front of the ACCC – whether or not to accept nbn co's proposed SAU Variation – we also comment on what would constitute a minimum acceptable regulatory framework that works for customers, RSPs, nbn co and Government (as nbn co's sole shareholder). We appreciate the latter is not relevant to the acceptance or rejection of the SAU variation, but it is critically important to resolve immediately following a decision on the SAU Variation.

Separately, given the lateness of nbn co's release of its BBM and the password to review the BBM, we request that the ACCC give less weight to that evidence and related parts of nbn co's submissions. The documents provided by nbn were so deficient, in Telstra's view, that any decision to accept the SAU Variation made on the basis of these documents would risk failing to comply with the consultation procedures required by law to be followed when considering a variation to an SAU. Additionally, such a decision also risks failing to take into account relevant considerations (or taking into account irrelevant considerations) as affected stakeholders have not been able to make complete submissions, that they otherwise could have made if nbn had provided adequate documentation.



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## Acronyms and terms referred to in this submission

AD: Access Determination  
BBM: Building Block Model  
CCA: Competition and Consumer Act 2010  
ICRA: Initial Cost Recovery Account  
Legislative Criteria: Part XIC legislative criteria  
LTIE: Long Term Interests of End Users  
MNO: Mobile Network Operator  
NBN: National Broadband Network  
nbn co: nbn co ltd  
SAU Variation: nbn co's proposed SAU variation  
RAB: Regulatory Asset Base  
RSP: Retail Service Provider  
WACC: Weighted Average Cost of Capital  
WAPC: Weighted Average Price Cap

### 3 Wholesale prices would be unreasonably high and increase every year until 2040

#### *Key points:*

- The SAU locks in an upfront increase in wholesale prices for broadband (up to 20%), and increases those high prices year on year until 2040 (by as much as 10.8% pa).
- The proposal to raise wholesale prices comes:
  - at a critical phase in, and threatens to damage, the economy;
  - when Australians face a cost-of-living crisis.
- The SAU Variation would make Australian wholesale prices the highest in the world.
- Taxpayers' investment in the NBN is inefficiently underutilised and adoption is low.
- Low utilisation of NBN positions Australia poorly for adopting new technologies.
- The SAU Variation would put at risk the potential economic benefits of the NBN.
- The SAU Variation seeks a return on the last decade of inefficient costs.
- The SAU variation (and current wholesale pricing) means the NBN will be accessible for only the few who can afford it.

#### 3.1 Key price changes under the SAU Variation

**The SAU locks in an upfront increase in wholesale prices for broadband (up to 20%), and increases those high prices year on year until 2040 (by as much as 10.8% pa).** There would be a 20% upfront increase in the upfront bundle price for nbn co's most popular 50 Mbps speed tier at the outset of the SAU Variation. For the first two years of the SAU Variation, prices would increase by over CPI+3% for high-speed plans and by CPI+X%<sup>1</sup> for low-speed plans. For the years after and until 2040, prices would increase year on year. The proposed price increases for selected years are set out in the table below.

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<sup>1</sup> X is effectively the \$8 overage charge multiplied by 50% of customers' growth in peak usage. On the ACCC's analysis of proposed price changes, X would range from 2.7% for ELB[12/1] in 2025 to 4.3% for B50 in 2027. X would increase to a high of 8.3% in 2040.



**Table 1. Ongoing annual price increase for selected years under the SAU Variation**

Plans	2025	2030	2035	2040
ELB [12/1] voice	2.5%	2.5%	2.5%	2.5%
ELB [12/1]	5.2%	6.3%	7.5%	8.8%
B25 [25/5, 25/10]	6.2%	7.4%	8.7%	9.9%
B50 [50/20 & WP]	6.2%	7.8%	9.5%	10.8%
High Speed Plans [100/20+]	5.6%	3.0%	3.0%	3.0%

Source: ACCC model of NBN SAU projected access costs.

Generally, increasing wholesale prices in the way set out in the SAU Variation would not promote the LTIE and is not reasonable in the context of the legislative criteria to which the ACCC must have regard.

### 3.2 The proposal to raise wholesale prices comes at a critical phase in, and threatens to damage, the economy

**Australia has passed a turning point in the digital transformation of its economy.** The NBN build is complete and the roll out of 5G is well underway. As a result of the covid pandemic, businesses, government, and communities are embracing digital technologies and adapting to new ways of living, working and operating. Digitisation and access to the next generations of high-speed connectivity are more a part of our lives and work than ever before.

**This positions Australia well for a digital-led productivity resurgence through the current global economic headwinds.** High inflation and interest rates are contributing to cost of living and business cashflow pressures throughout the economy. Addressing the low adoption and under-utilisation of the NBN is key to enabling productivity growth in the economy. In this regard, it is critical that wholesale prices are set to promote competition, encourage efficient use of the NBN, and not to recover past inefficient costs.

**To encourage higher adoption and better utilisation of the NBN, the market needs a regulatory framework that meets the minimum standard.** That framework needs to deliver: (1) lower wholesale prices to encourage utilisation, (2) more certainty and predictability to support investment by nbn co and RSPs in downstream markets, and (3) address service quality issues that hamper customers' use of the NBN.

### 3.3 The proposal to raise wholesale prices comes when Australians face a cost-of-living crisis

**For the year ending March 2022, wages in Australia increased by 2.4% while headline inflation rose by 5.1%.** More Australians are facing cost of living pressures, with the worst affected having to forgo some of life's necessities. And this is expected to worsen. The RBA forecasts headline inflation to hit approximately 6% in the second half of the year, with continued strong rises in underlying inflation.

A recent study from NAB found that debt repayments, bills, and everyday spending has left one in three Australians with high financial stress.<sup>2</sup>

A large contributor to cost of living pressures is housing. Recent research by the Real Estate Institute of Australia puts the proportion of income required to meet home loan repayments in Australia at 37%.

<sup>2</sup> [Three quarters of Aussies keen to save but challenged with everyday expenses and activities - NAB News](#)

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People spending more than 30% of their income on housing (mortgage repayments or rent) are under "housing stress".<sup>3</sup> This is one of the key benchmarks the Government looks at when gauging housing affordability. The average loan amount rose to \$590,482 – an increase of 17.7% over the past 12 months and the largest annual increase recorded since 2002.<sup>4</sup>

**As Australians face a cost-of-living crisis, people would have to pay significantly higher prices** once the SAU comes into effect, increasing every year thereafter at rates likely to be higher than CPI. ACCAN estimates that already over 1 million households cannot afford to connect to the nbn.<sup>5</sup>

RSPs already face near non-existent margins (e.g. just 1% EBITDA for residential fixed services in H1 2022 for Telstra) and will have to pass on these cost increases. Faced with tough choices between heating and powering their homes and businesses, fuelling their cars or maintaining their broadband connection alongside their mobile phone, ordinary Australian families and businesses will have to look for cheaper alternatives. They will likely downgrade their NBN plans and they will move to mobile only alternatives. Many people could be left with nothing but public WiFi and payphones.

### 3.4 The SAU Variation would make Australian wholesale prices the highest in the world

**The SAU variation would result in nbn co's wholesale bitstream prices for 50, 100 and 1000 Mbps speed tiers being the highest in the world of comparable countries.** This is illustrated by LinkEconomics' research in Figure 1 below. Even compared to Canada, with a land mass and population distribution similar to Australia's, nbn co's wholesale price for a 50 Mbps service would be AU\$16 per month more expensive than Canada's AU\$36.

LinkEconomics' research also illustrates that in some countries, such as the UK, Denmark and Italy, RSPs are able to access the last mile at 1000 Mbps speeds for as little as AU\$24-40 on an unbundled basis. Those RSPs need to provide their own backhaul, but this comes at a substantially lower cost than the access provider's CVC component of pricing.

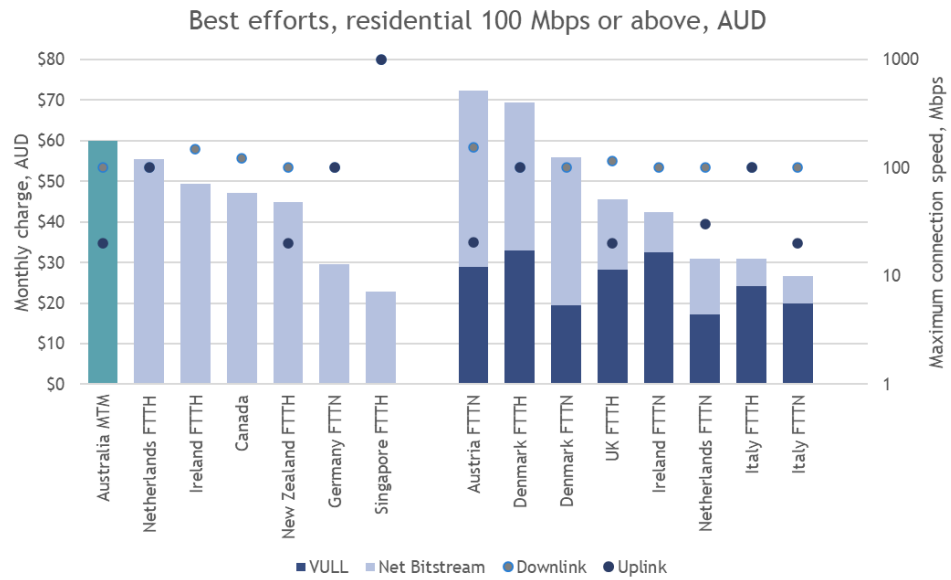
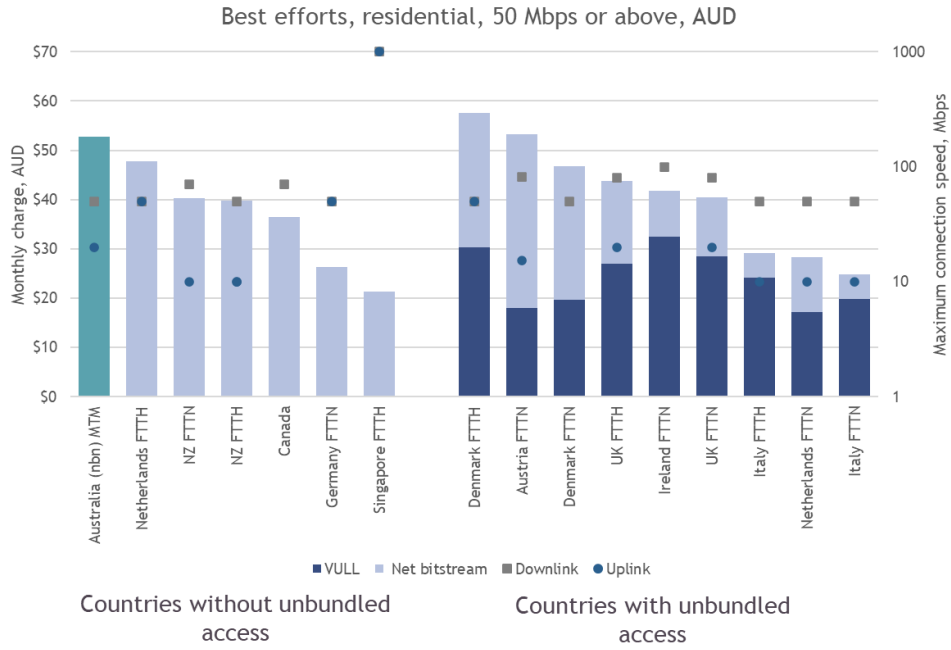
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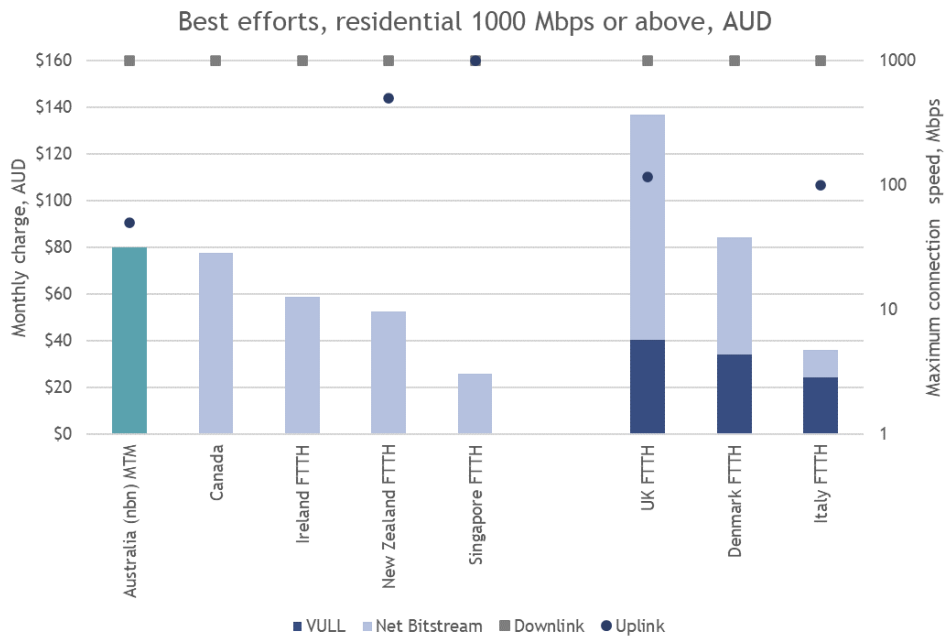
<sup>3</sup> [Cost of Living 2022: Everything you need to know about handling rising living costs \(mozo.com.au\)](https://www.mozo.com.au/cost-of-living-2022)

<sup>4</sup> [Aussies putting 37% of income towards mortgage repayments: REIA \(mozo.com.au\)](https://www.mozo.com.au/aussies-putting-37-of-income-towards-mortgage-repayments)

<sup>5</sup> [No Australian Left Offline \(accan.org.au\)](https://www.accan.org.au/no-australian-left-offline)

**Figure 1: International comparison of wholesale broadband prices**





Source: Link Economics, 2022.

Notes: On the left of each chart are wholesale prices for similar types of bitstream services to those provided by nbn co – that is, the AVC and CVC components are provided together as a bundle. On the right of each chart are wholesale prices for countries where unbundled access is provided. The lower part of each bar is the unbundled access (VULL) price akin to nbn’s AVC service. The upper part of each bar is the price the provider charges for the backhaul component – akin to nbn’s CVC service. In countries that offer unbundled access, retailers can (and typically do) use other options for backhaul, including using their own backhaul network. Because we use the AVC provider’s backhaul prices, the charts may overstate the total cost for countries where unbundling is available. The full bar provides a net bitstream price to compare to nbn’s bitstream price.

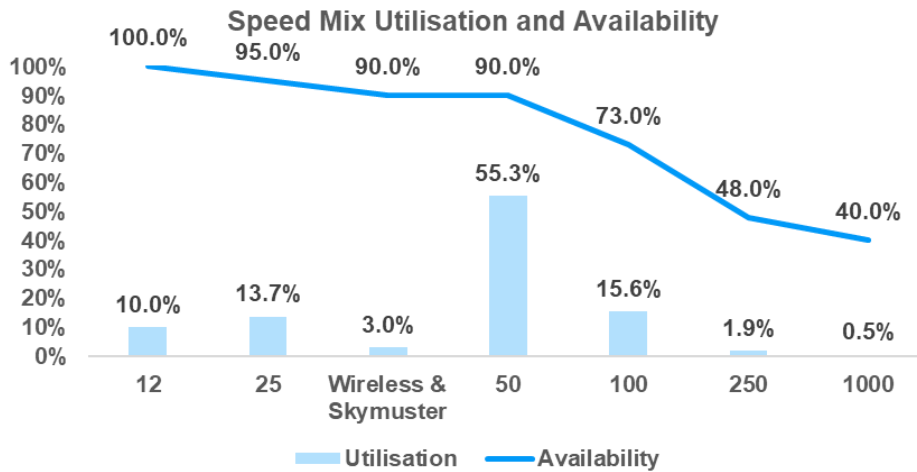
### 3.5 Taxpayers’ investment in the NBN is inefficiently underutilised and adoption is low

**nbn co’s wholesale pricing has led to heavy under-utilisation of the NBN – while 40% of fixed premises can attain 1 Gbps speed<sup>6</sup>, less than 1% of customers take up these speeds.<sup>7</sup> Further, 73% of nbn co’s fixed-line footprint can achieve over 100 Mbps speeds, while only 18% of customers take up plans with speeds of 100 Mbps or more.**

**Figure 2: NBN speed mix utilisation and availability**

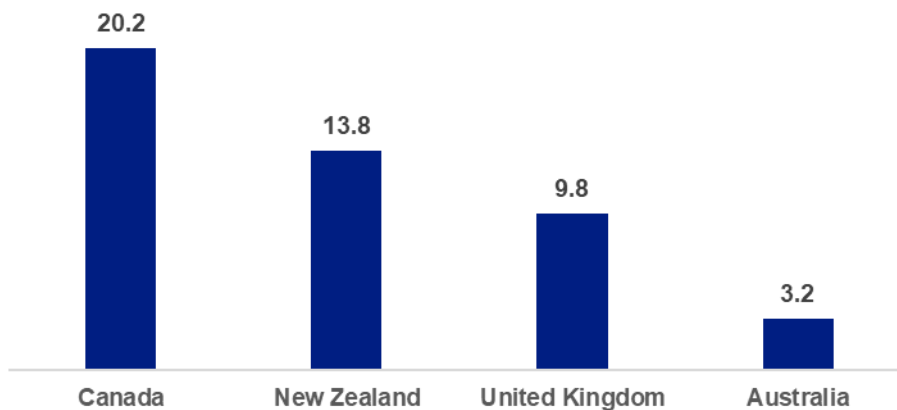
<sup>6</sup> nbn co, *Corporate Plan 2022*

<sup>7</sup> ACCC, *Measuring Broadband Australia Report*, 31 March 2022.



**Relative to international peers, Australia’s penetration of high-speed fixed broadband remains very low.** While OECD statistics are updated less frequently than ACCC statistics, Figure 3 illustrates that as of a year ago, the OECD reports that Australia’s penetration of high-speed broadband was just 3% while in Canada it was as high as 20%. GREX Consulting report that in New Zealand, a mere 7% of customers take up plans at the 50 Mbps level. The vast majority of New Zealanders take up high speed plans –18% of Chorus GPON customers take up 1 Gbps speeds and approximately 70% of Chorus connections are on 100 Mbps.<sup>8</sup>

**Figure 3: Fixed broadband subscriptions per 100 people, speed tiers 100 and above (June 2021)**



Source: OECD Broadband Statistics.

**nbn co’s pricing has also led to low adoption with 30% of premises passed by nbn co choosing not to buy any NBN plans.**<sup>9</sup> This is in an environment where customers were mandated to disconnect their copper services, and strongly encouraged by many RSPs and nbn co to migrate to an NBN plan.

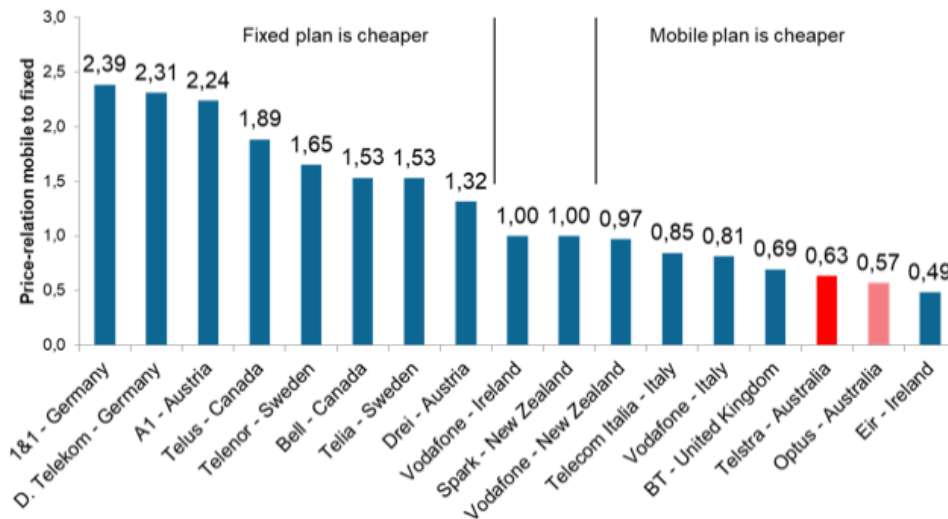
<sup>8</sup> GREX Consulting, *New Zealand Broadband Market & Regulatory Landscape Presentation*, 2021, p. 19.

<sup>9</sup> nbn co, *Weekly Progress Report (Build)*, 23 June 2022.

Despite that encouragement, we estimate 25% of premises that were disconnected from the copper network chose not to migrate to the NBN.<sup>10</sup> This is a missed opportunity for those users living and working in those premises and for nbn co, largely related to charging high wholesale prices.

Since customers need to have access to mobile phones for their work and lives, people facing affordability pressures will tend to choose not to purchase a fixed connection. This is exacerbated by nbn co's pricing – Australia has a very low ratio of mobile to fixed pricing (Figure 4), and a very high proportion of mobile only households (Figure 5).

**Figure 4: International comparison of fixed and mobile relative prices**

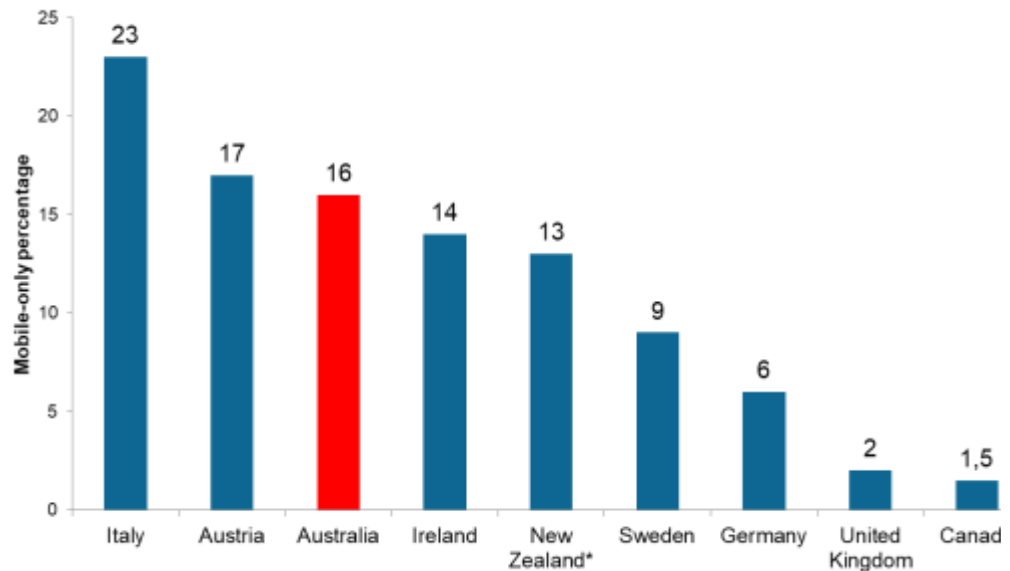


Source: WIK.

Notes: Price-relativities of a potential mobile-only plan to a 100mbps fixed broadband plan, September 2021.

<sup>10</sup> Telstra analysis, at the end of December 2021.

**Figure 5: International comparison of mobile only households**



Source: WIK.

Notes: Mobile-only users/households in %, 2020 for AU, CA, NZ; 2019 for European Countries<sup>11</sup>.

**NBN to mobile substitution is not efficient competition – it’s a limited and suboptimal response from customers and RSPs to nbn co’s inefficiently high wholesale prices.** This is not in the LTIE for reasons including the following:

- High NBN prices harm the service quality potential for mobile customers. MNOs have limited spectral capacity and share that capacity between fixed wireless and mobile customers. The more spectrum used by an MNO for fixed wireless or mobile to bypass the NBN, the poorer the service quality that MNO can deliver to their mobile customers.
- High NBN prices reduce the number of end users with access to the NBN and increase the number of mobile-only households. This harms competition in downstream data, calling and messaging markets. Competition in those downstream markets is promoted when customers have access to both NBN and mobile infrastructure and substitute between connections, application and services.
- Even families heavily reliant on mobile services benefit from also having a fixed connection in their home. Fixed connections act as a way of helping families manage high mobile device use (by connecting mobile phones to home wifi), and as a failsafe for mobile customers with homes that have inbuilding mobile coverage issues.<sup>12</sup> Fixed networks are also capable of connections

<sup>11</sup> Eurostat for EU countries, ACMA for Australia, Statistics Canada for Canada, Commerce Commission for New Zealand. Data for New Zealand is share of households with a FWA subscription, no separate mobile-only number available. ACMA (2020): Mobile-only Australia: living without a fixed line at home, available at [Mobile-only Australia: living without a fixed line at home | ACMA](#)

<sup>12</sup> Similarly, the mobile network acts as a failsafe for NBN outages if the customer has NBN modems with 4G backup.

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that are superior to mobile – e.g. where persistent high speeds are needed, or for large format video streaming and for use with older style desktop computers.

### 3.6 Low utilisation of NBN positions Australia poorly for adopting new technologies

**In other countries with large fibre networks, customers default onto much higher speeds, meaning they are ready for the next technology dependent on high speeds.** In Australia, for AU\$80 a retail customer will get a 25 Mbps plan, and for AU\$95 a 50 Mbps plan.<sup>13</sup> This does not compare well to Australia's peers:

- In the US, Verizon's lowest speed plan for its fibre customers is 300 Mbps (downstream – the plan is also 300 Mbps upstream).<sup>14</sup> It costs US\$49.99 (AU\$71.86).<sup>15</sup>
- In NZ, Spark offers fibre customers a 321 Mbps plan for NZ\$85 (AU\$77.14) and a 859 Mbps plan for NZ\$100 (AU\$90.76).<sup>16</sup>
- In the UK, BT offers 500 and 900 Mbps plans for GBP45.99 (AU\$80.83) and GBP55.99 (AU\$98.40), respectively.<sup>17</sup>

Australia's poor comparisons are a direct result of high NBN wholesale prices, leading to RSPs having to offer much lower speeds to customers at similar retail price points to what is charged overseas.

**This will reduce Australia's international competitiveness for creation and adoption of innovation in application and service technology.** Innovators are much better off developing their high-speed applications and services in and for countries with customers that are already making full use of what their infrastructure has to offer. When they come to release innovation in Australia, they will be met with the challenge of waiting for customers to migrate up speed tiers, and the real likelihood that if their innovation creates additional value, nbn co will capture that value by raising wholesale prices. This would be harmful to the LTIE.

### 3.7 The SAU Variation would put at risk the potential economic benefits of the NBN

**Digital and telecommunication technologies are key enablers to and have the potential to uplift productivity in various sectors of the economy.** Consumers and businesses will benefit from faster internet and the ability to access a greater range of digital goods and services. Digital and telecommunications technologies have the potential to reduce the digital divide between high and low income quintiles, enabling those in lower income quintiles to participate in the digital economy and enable firms to enhance productivity. Innovation and accessibility are key to the success of the digital technology adoption, with the OECD stating that<sup>18</sup>:

*“Digital innovation not only gives rise to new goods and services, but it also creates opportunities for new business models and markets, and it can drive efficiencies in the public sector and beyond. Digital technologies and data spur innovation in a wide range of sectors, including education, health, finance, insurance, transportation, energy, agriculture, fisheries and manufacturing, as well as the ICT sector itself.”*

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<sup>13</sup> <https://www.telstra.com.au/internet/nbn#plans>

<sup>14</sup> <https://www.verizon.com/home/fios-fastest-internet/>

<sup>15</sup> Using a conversion rate of USD1:AUD1.44.

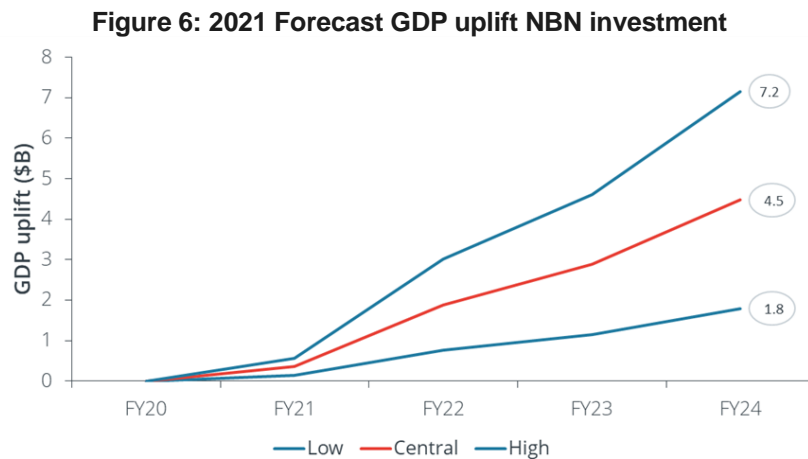
<sup>16</sup> <https://www.spark.co.nz/shop/internet/plans/>. Using a conversion rate of NZD1:AUD0.91.

<sup>17</sup> <https://broadbandinternetuk.com/blog/844/bt-infinity-broadband-coverage-map-launched>. Using a conversion rate of GBP1:AUD1.76.

<sup>18</sup> <https://www.oecd-ilibrary.org/sites/c5b3ea5d-en/index.html?itemId=/content/component/c5b3ea5d-en>



The scale of the economic opportunity presented by accelerated digitisation is significant. The NBN network investment plan will enable productivity gains across the economy and result in a \$6.4B incremental annual GDP uplift (uplift).<sup>19</sup> Frontier Economics in a separate forecast on the impact of the uplift from the NBN investment projected three potential scenarios ranging from \$1.8bn to \$7.2bn (refer figure below), with \$1.2bn uplift in Regional Australia (based on the midpoint forecast).<sup>20</sup>



Source: Frontier Economics

**The forecasts by Alpha Beta and Frontier Economics are dependent upon an above average usage of higher speed services by businesses and consumers, which won't be realised with high wholesale prices.** The ability of the economy to realise the benefits of digitalisation and productivity gains are dependent on demand for enabling communication infrastructure such as the NBN. The investment in NBN infrastructure is forecast to bring close-to-gigabit speeds to up to 75% of residential and businesses users in its fixed line network by 2023.<sup>21</sup> The modelling in the reports by Alpha Beta and Frontier Economics was conducted under the previous SAU and at a time when annualised inflation ranged from 0.9% to 1.8% and the cash rate was as low as 0.10%. The annualised inflation rate currently 5.1 per cent in the March quarter, will add to cost-of-living pressures on consumers and businesses, with both likely to reduce both discretionary and non-discretionary spend because of these pressures.<sup>22</sup>

A recent study on the demand for fixed line broadband in the United States, indicates that a 10% increase in prices results in a 5% fall in demand.<sup>23</sup> With higher prices in Australia than in the US (see section 3.6), demand for services on the NBN is likely to be more elastic than this.

**If the fall in demand resulted in a GDP uplift of only \$1.8bn, the lower boundary of the Frontier Economics forecast, the SAU Variation would result in the loss of between \$4.6 and \$5.4bn from the estimated uplift to the Australian economy.** Higher costs for households and businesses across

<sup>19</sup> <https://www.nbnco.com.au/content/dam/nbnco2/2020/documents/media-centre/corporate-plan-2021/impact-of-nbn-network-investment-alphabeta.pdf>

<sup>20</sup> <https://www.infrastructure.gov.au/sites/default/files/documents/the-economic-impact-of-new-nbn-investments-on-business-frontier-economics-13august2021.pdf>

<sup>21</sup> <https://www.nbnco.com.au/content/dam/nbnco2/2020/documents/media-centre/corporate-plan-2021/impact-of-nbn-network-investment-alphabeta.pdf>

<https://www.infrastructure.gov.au/sites/default/files/documents/the-economic-impact-of-new-nbn-investments-on-business-frontier-economics-13august2021.pdf>

<sup>22</sup> <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release>

<sup>23</sup> <https://www.phoenix-center.org/perspectives/Perspective21-04Final.pdf>

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the economy are forecast to negatively impact investment and consumption beyond 2022.<sup>24</sup> Similarly, higher broadband prices as proposed under the SAU Variation would potentially decrease demand for the provision of internet services by both households and businesses thereby reducing the forecast GDP uplift by both Alpha Beta and Frontier Economics from the resulting productivity gains associated with the NBN investment.

- *Costs to regional Australia* – Alpha Beta and Frontier forecast that the uplift will benefit Regional Australia bringing the fastest NBN plans to 950,000 regional families and 455,000 regional businesses.<sup>25</sup> The proposed price increases however, have the potential to minimise the forecast benefits to regional Australia if inflationary pressures continue beyond 2022 as forecast by the RBA.<sup>26</sup> Further to this a higher proportion of lower income households are in Regional Australia<sup>27</sup> and if cost of living demands impact both business investment and consumer confidence in Regional Australia, this will negate some of the forecast uplift.
- *Lower income groups most at risk* – despite increased access to the NBN, nearly 2.5 million Australians are without internet access.<sup>28</sup> These Australians are mostly found in lower income quintiles, which limits their ability to access the digital economy and the productivity enhancing benefits from the NBN identified by Alpha Beta and Frontier Economics. Further price increases in the NBN, will exacerbate the accessibility problem for those in the lower income quintiles, potentially reducing the projected impact of the uplift forecast by Alpha Beta and Frontier Economics.

**The proposed framework for NBN wholesale pricing does not facilitate a level of investment in productivity enhancing technology required for Australia to achieve its digital transformation ambitions.** To plan for investment, a pricing framework that provides long term certainty and lower prices to businesses and consumers is needed.

### 3.8 The SAU Variation seeks a return on nbn co's inefficient costs

The SAU Variation proposes to cap prices at a level high enough for nbn co to recover all its historical costs, including all inefficient costs and additional expenditures for which it is not in the LTIE to be recovered from prices. Inefficient costs accumulate in the ICRA, to the extent they are yet to be recovered. The ICRA also includes the compounding commercial return on inefficient historical costs. Inefficient costs also accumulate in the RAB, to the extent they are yet to be depreciated. There is no mechanism in the current SAU or the SAU Variation to exclude inefficient historic costs. Instead, it appears that all inefficient costs are convoluted with efficient costs in the \$44.6B "crystallisation" of ICRA and the RAB, and therefore support an unnecessarily high price and/or revenue cap. This is inconsistent with the legislative criteria.

#### 3.8.1 The economic basis for assessing historical costs under the Legislative Criteria

The ACCC must not accept the SAU Variation unless it satisfies the Legislative Criteria, including that it promotes the LTIE and is reasonable. The following aspects of the LTIE and reasonableness criteria are relevant to the consideration of the cost pool the SAU Variation seeks to recover through the setting of price and revenue caps.

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<sup>24</sup> <https://www.rba.gov.au/inflation/measures-cpi.html>

<sup>25</sup> <https://www.nbnco.com.au/content/dam/nbnco2/2020/documents/media-centre/corporate-plan-2021/impact-of-nbn-network-investment-alphabeta.pdf>

<sup>26</sup> <https://www.rba.gov.au/publications/smp/2022/may/economic-outlook.html>

<sup>27</sup> <https://grattan.edu.au/wp-content/uploads/2017/08/890-Regional-patterns.pdf>

<sup>28</sup> <https://apo.org.au/sites/default/files/resource-files/2020-10/apo-nid308474.pdf>. This is supported by the findings in the most recent Australian Digital Inclusion Index - [Key findings and next steps - Australian Digital Inclusion Index](#)

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- *Promotion of competition* – Wholesale prices that seek to recover inefficient costs, promote inefficient entry and over-investment by inefficient competitors in the wholesale market. Competition would be harmed if competitors with higher costs than nbn co attracted customers because they could set prices a little lower than nbn co's price that aimed to recover inefficient costs. Wholesale prices that seek to recover inefficient costs also discourage efficient competitors from entering downstream markets – including in retail broadband markets and application and service markets that depend on high-speed broadband further downstream.
  - *Efficient use of infrastructure* – Wholesale prices that seek to recover and provide a commercial return on inefficient costs would discourage use of the nbn network. Such prices are also allocatively inefficient, as resources used to pay for inefficient costs could be put to more productive use elsewhere.
  - *Efficient investment in infrastructure* – Wholesale prices that seek to recover and provide a commercial return on inefficient costs would encourage nbn co to add additional inefficient investment into the RAB and the ICRA. Such prices are productively inefficient, as they do not reflect the minimum cost of providing the service.
  - *Legitimate business interests of nbn co* – Firms in competitive markets do not expect to recover inefficient costs, and are regularly punished by competitors should they attempt to do so. Investments made with the best of intentions, but turn out to be inefficient, are also unrecoverable in a competitive market. In competitive markets, this is reflected in asset write downs and product exits that are regularly seen in commercial marketplaces. It is not a legitimate business interest of nbn co's to recover inefficient costs.

### 3.8.2 Historical incentives and processes that have encouraged cost inefficiency

Monopolies, particularly government-owned monopolies, face strong incentives to incur cost with little of the efficiency incentives and constraints that apply in competitive markets. In nbn co's case, the following features of the market have historically provided incentives for nbn co to incur costs regardless of their efficiency.

- **Inefficient spend delays when nbn co is bound by a revenue constraint.** nbn co's existing SAU allows for recovery of and a commercial return on inefficient costs. The existing SAU operates such that an additional \$1 of cost incurred by nbn co is likely to be added to the ICRA, compounded with a commercial return, and earmarked for future recovery. The higher the ICRA the longer it takes for the SAU's minimum allowable revenue constraint to come into effect. Therefore, NBN can delay the operation of the SAU's revenue cap by spending more money.
- **Being government-owned, nbn co has been subject to different policy objectives with successive governments that have led to inefficient spend.** For example, at its outset, nbn co was expected to roll out a Fibre To The Premises (FTTP) network, a Satellite network and a Fixed Wireless (FW) network.<sup>29</sup> The FTTP network was later changed to a mix of Fibre To The Node (FTTN), Fibre To The Curb (FTTC) and Hybrid Fixed Coaxial (HFC) networks.<sup>30</sup> Expectations are now that nbn co's FTTN network is converted to FTTC and FTTP, and FW is converted to FTTP.<sup>31</sup> In addition, nbn co faced political pressure to roll out its network inefficiently. Efficient network roll outs should target low cost and high profit

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<sup>29</sup> NBN Co Limited Statement of Expectations, 17 Dec 2010.

<sup>30</sup> NBN Co Limited Statement of Expectations, 24 Sep 2013.

<sup>31</sup> NBN Co, Corporate Plan 2022, from p. 13.

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areas first, to minimise any upfront losses. nbn co was required to roll out to high cost and low profit areas first.<sup>32</sup>

- **There are also poor capital governance incentives applied to nbn co.** Very early in its existence, nbn co was targeting a return well below its WACC.<sup>33</sup> As the peak of nbn co's capital expenditure – spending between \$5.8-\$6.7B per annum from FY17 to FY20<sup>34</sup> – nbn co's forward looking IRR was 3.2% to 3.7%<sup>35</sup> compared to its WACC of 4.9% to 6.2%.<sup>36</sup> By targeting a return lower than its cost of capital, nbn co is encouraged to inefficiently over-spend on capital. If nbn co had faced a floor return on capital investment equal to its WACC, nbn co would have been forced to invest more efficiently.
- **The Averch-Johnson and X-inefficiency effects play a large role in driving nbn co to spend inefficiently.** These effects occur because nbn co's existing SAU has included and allowed a return on all nbn co's expenditure regardless of its prudence and efficiency. Under this approach, nbn co has been able to invest in entirely inefficient projects, with the knowledge that the regulatory pricing model will allow nbn co's future prices to recover a healthy return on that inefficiency.<sup>37</sup> Indeed, under the existing SAU, nbn co could invest in digging and refilling holes in the ground, and that expenditure would feed into its allowable revenue.
- **The Vertigan recommendation to split nbn co for more efficient capital and competitive structure was not implemented.** The Vertigan Panel recommended that *“the basis for a competitive wholesale broadband market structure be created through the disaggregation of nbn co”*.<sup>38</sup> Part of their reasoning for encouraging the disaggregation of nbn co was that *“monolithic entities with a very high degree of market power, as nbn co would have under the current model, have poor histories of working efficiently and – given their de facto control of cost and demand information – are difficult to regulate effectively.”*<sup>39</sup>
- **nbn co has been and will continue to be encouraged to spend inefficiently.** Governments will cause nbn co to commit to inefficient spend whilst under government ownership. While this is a prerogative of governments, as it is for private owners to commit their wholly owned companies to spend inefficiently, it is not a factor that that ACCC may take into account when assessing the LTIE. The inefficient costs spent under the direction of government has one of two implications: they can be recovered from end users, which is not

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<sup>32</sup> For example, as at 30 June 2011, brownfield FTTP had been rolled out to over three times as many premises in regional areas than premises in metro areas – *Government Report to Joint Committee on the Broadband Network on NBN Co Limited*, 31 December 2011, p. 27.

<sup>33</sup> NBN Co shareholders stated...“NBN Co modified and simplified its originally proposed SAU approach, including to...simplify the approach to weighted average cost of capital (WACC), so that it allows NBN Co to achieve its Corporate Plan objectives and **deliver a return above the long term bond rate**...[emphasis added]”. Minister for Finance and Deregulation and Minister for Broadband, Communications and the Digital Economy, *Government Report to Joint Committee on the National Broadband Network on NBN Co Limited*, 31 December 2011, p. 17.

<sup>34</sup> NBN Co, *LTRCM Spreadsheet: 2020-21*, Nominal Capital Expenditure.

<sup>35</sup> NBN Co, *Corporate Plan 2017*, 2016, p.54.

<sup>36</sup> NBN Co, *LTRCM Spreadsheet: 2020-21*, Nominal Rate of Return.

<sup>37</sup> For a summary of some economic literature on the Averch-Johnson and X-inefficiency effects, see Biggar, Darryl, *The Fifty Most Important Papers in the Economics of Regulation*, Working Paper No. 3, May 2011, from p. 23.

<sup>38</sup> Vertigan Panel, *Independent Cost-Benefit Analysis of Broadband and Review of Regulation: Volume I – National Broadband Network Market and Regulatory Report*, August 2014, p. 76.

<sup>39</sup> Vertigan Panel, *Independent Cost-Benefit Analysis of Broadband and Review of Regulation: Volume I – National Broadband Network Market and Regulatory Report*, August 2014, p. 67.

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in the LTIE, or they can cause a reduction in the value of Government's equity in nbn co, which would be in the LTIE. A simple test of the reasonableness of this position could be undertaken by looking at the expected returns for government proposed projects – if nbn co expects a return of less than 6% from a government project, then it would be unreasonable for that spend to be allowed in the BBM and earn a return over 6%.

- **The ICRA accumulates the spend of many projects using nbn co's WACC that is significantly lower than nbn co's expected return.** The implication of this is that the ICRA includes nbn co's costs of capital compounded at nbn co's WACC, for spends related to projects that had an expected return less than nbn co's WACC.<sup>40</sup> This is akin to paying an interest rate of 3.5% for a business loan, and claiming the interest rate is 6.5% when recovering those costs from consumers. These amounts should be treated as inefficient, and it would not be in the LTIE to recover them from end users.

### 3.8.3 Measuring the inefficiency of nbn co's historic costs

To demonstrate the inefficiency of nbn co's costs we present below two comparative analyses. Both forms of analysis highlight significant inefficiency in nbn co's costs. It is nbn co's task to establish that the costs it is seeking to recover are efficient, but it hasn't provided any materials in its submissions that do so. For this reason, the SAU Variation is not in the LTIE. Further, when considering a future regulatory regime, it is important that nbn co's inefficient costs are not carried into prices.

#### 3.8.3.1 Comparison with NZ's Fibre Roll out

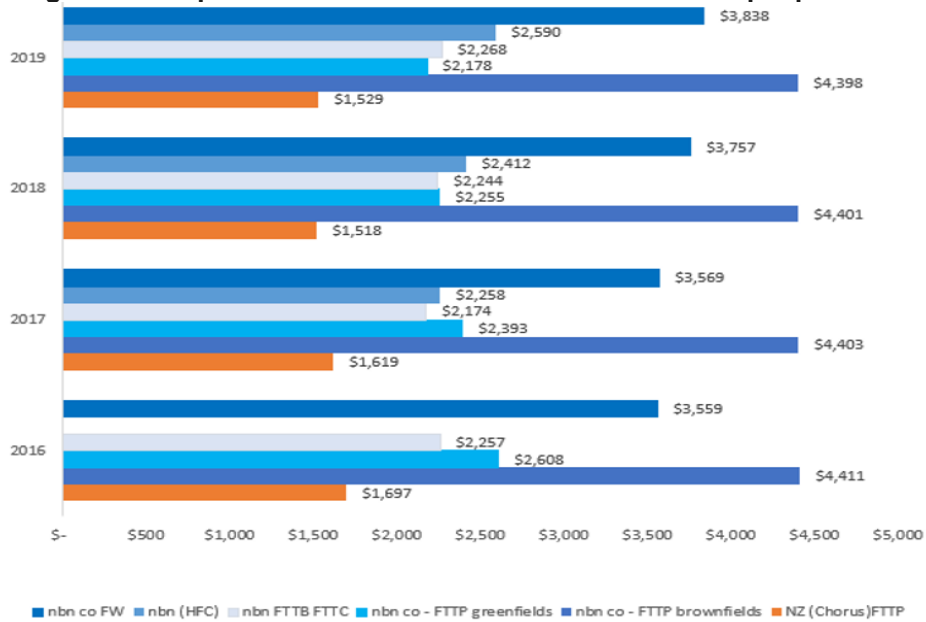
This analysis benchmarks nbn co's historical expenditure vs. Chorus UFB expenditure across key measures as a proxy for assessing efficiency of nbn co's historical expenditure. To assess the efficiency of nbn co's historical expenditure, we have compared nbn co's expenditure with Chorus UFB expenditure using public data.

Over the last four years, nbn co's FTTP (brownfields) cost per premise is almost 200% more than Chorus. Across the whole technology stack, Chorus has lower roll out costs per premise despite Chorus rolling out FTTP and nbn co deploying what are supposed to be less costly technologies. This is illustrated in Figure 7.

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<sup>40</sup> From FY15 to FY21, nbn co has forecast its IRR at 2.7% to 3.7% (nbn co, Corporate Plan 2016, 2015, p. 70; nbn co, Corporate Plan 2021, 2020, p. 54), and spent over \$32B capex (nbn co, LTRCM Spreadsheet: 2020-2021). Despite expecting a lower return, over that same period nbn co compounded that expenditure in the ICRA using a WACC ranging from 6.5% to 4.4%.

**Figure 7: Comparison of nbn co and Chorus roll out costs per premise**



Source: All costs in AUD. PPP adjusted (AUD/NZ). Chorus and nbn co Annual Reports 2016-2019

From 2016 to 2020, nbn co's opex per premise was 10% higher on average, relative to Chorus and nbn co's capex per premise was 23% higher. The annual difference in cost per premise are illustrated in Figure 8.

**Figure 8: Comparison of nbn co and Chorus opex per premise and capex per premise**

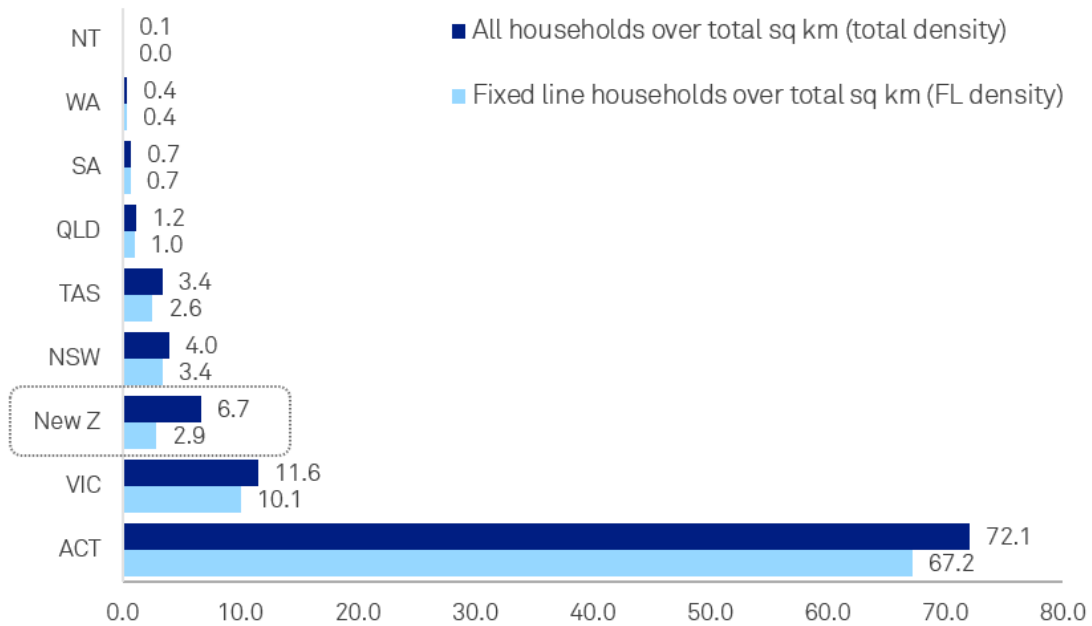


Source: Chorus Annual Report; nbn co LTRCM  
Notes: All costs in AUD, PPP adjusted.

Whilst there are differences between the New Zealand and Australian markets, these differences are not pronounced given the analysis compares the fixed networks of the two countries, and are otherwise controlled for.

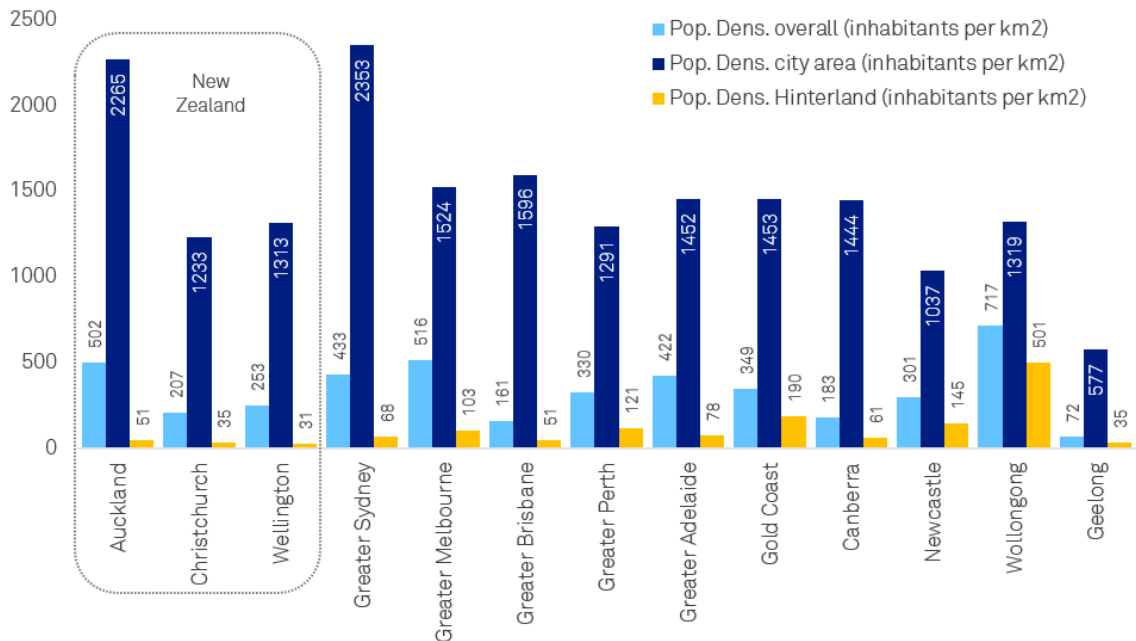
- There are differences in terms of number of premises. The UFB is rolled out to 1.76M premises while nbn co's fixed network is rolled out to 11.6M fixed premises. The figures above are in per unit amounts to control for this difference. Given nbn co's greater scale, it should be expected that nbn co's per unit costs are lower than Chorus'.
- The technology deployed for the UFB is FTTP whilst nbn has deployed an MTM model. It should be expected that MTM unit costs are lower than FTTP.
- The population and household density in New Zealand is very similar to the density in Australia where nbn co has rolled out its fixed network. New Zealand's total household density is comparable to Australian States and Territories. New Zealand's total household density falls between NSW and Victoria's. New Zealand metropolitan population densities are comparable to Australia's - Auckland's density measures are comparable to Greater Sydney; Christchurch and Wellington are comparable to the other metropolitan areas in Australia.

**Figure 9: Household density in Australia and New Zealand**



Source: Chorus Annual Reports, ABS Household projections

**Figure 10: Population density in Australia and New Zealand**



Source: OECD measures of population density in metropolitan areas, 2020

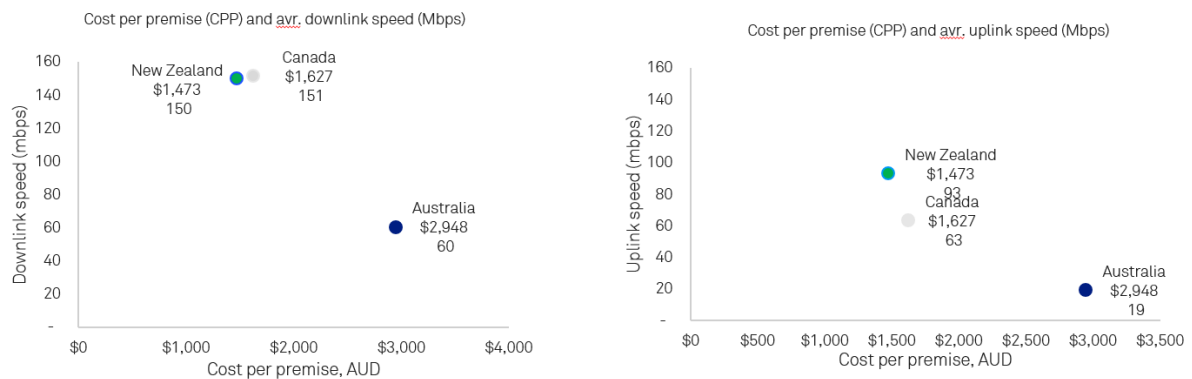


### 3.8.3.2 Cost v service quality

This analysis examines the cost of rolling out infrastructure and compares it to the service quality that customers receive using that infrastructure in terms of downlink and uplink speed.

nbn co's download and upload speeds lag behind other markets despite its cost per premise being considerably higher, demonstrating inefficiency in nbn co's costs. Specifically, nbn co's cost per premise is 81% higher than Canada, whilst the average downlink speed is 91 Mbps slower and average uplink speed is 44 Mbps slower. nbn co's cost per premise is almost 100% higher than New Zealand's while its average downlink speed is 90 Mbps slower and average uplink speed is 74 Mbps slower. This is illustrated in Figure 11.

**Figure 11: Comparison of nbn co and Chorus roll out costs per premise**



Source: Omdia, Fiber Development Index 2021, nbn's CCP: simple average of CCP across FTTP Brownfields, FTTP Greenfields and FTTN/B, for FY19. NZ CCP FY19. Canada CCP (cost per passing for FTTP- [https://www.tellusventure.com/downloads/santacruz/ctc\\_santa\\_cruz\\_ftth\\_estimate\\_may2015.pdf](https://www.tellusventure.com/downloads/santacruz/ctc_santa_cruz_ftth_estimate_may2015.pdf))

### 3.8.3.3 Inefficiency is exposed by retail offers for alternative networks

A comparison of Telstra, Optus and TPG fixed wireless and NBN plans which offer at least 50 Mbps of data finds that in almost all cases, the fixed wireless plans are cheaper or the same compared to their equivalent retail NBN plan. This is illustrated in Table 2.

These retail price differences illustrate that RSPs are able to offer fixed wireless services in the 50-100 Mbps speed range at a lower price than what they are able to offer on the NBN. One reason for this is because wholesale prices are too high, as nbn co seeks to use those wholesale prices to recover inefficient costs.

This substitution is not in the LTIE as fixed wireless and mobile users share their bandwidth within a cell, at least until 5G mm wave is used at scale. The more mobile-heavy/mobile-only users on mobile networks decreases the performance for all users unless further investments by MNOs take place. In turn, this will also decrease the usage of the NBN, leading to an economically inefficient outcome given the lower marginal cost of a connection on the already built NBN in comparison to the costs emerging from additional heavy users on one of the mobile networks.

**Table 2: Comparison of NBN and 5G home broadband plans**

Plan	Technology	Speed	Data Allowance	Price	5G discount relative to NBN plan
<b>TPG Home Broadband</b> <sup>41</sup>	5G	Up to 50 Mbps/20 Mbps	Unlimited Data	\$59.99	\$10
<b>TPG NBN 50 plan</b> <sup>42</sup>	nbn	50 Mbps (Typical Evening speed)	Unlimited data	\$69.99	
<b>TPG Home Broadband</b> <sup>43</sup>	5G	Up to 100 Mbps/20 Mbps	Unlimited Data	\$64.99	\$15
<b>TPG NBN 100 plan</b> <sup>44</sup>	nbn	NBN 100 (90 Mbps Typical Evening speed)	Unlimited data	\$79.99	
<b>Optus 5G Home Internet (Internet Everyday)</b> <sup>45</sup>	5G	Max 100 Mbps ; Typical 83 Mbps (busy period download speed between 7pm – 11pm)	Unlimited data	\$79	\$10
<b>Optus</b> <sup>46</sup>	nbn	Premium speed; 100 Mbps typical busy period download speed 7pm – 100 Mbps	Unlimited data	\$89	
<b>Telstra</b> <sup>47</sup>	5G	5G Home Internet average speeds – 378 Mbps download, 46 Mbps upload	1 TB	\$85	\$25
<b>Telstra</b> <sup>48</sup>	nbn	NBN™ 100, Typical evening speeds 7pm – 11pm 100 Mbps download, 17 Mbps upload	Unlimited data	\$110	

### 3.8.4 The special case of subscriber costs

Prior to its network build, nbn co negotiated contracts with Telstra and Optus that prevent them from competing against nbn co. Those contracts were agreed and granted competition authorisation by the ACCC (in respect of the Optus contracts) and s577BA of the Telecommunications Act (in respect of the Telstra contracts). nbn co paid Telstra per subscriber payments so that Telstra would not compete against nbn co and instead close down its HFC and copper networks. nbn co also paid Optus per subscriber payments to shut down Optus' HFC network so that it would not compete against nbn co.

The total value of the subscriber costs paid by nbn co is approximately \$9.6B. These costs, compounded with a commercial return since they were incurred, are currently reflected in the ICRA.

The SAU Variation seeks to recover these costs through wholesale prices. For the following reasons, doing so would harm the LTIE.

- In the case of Optus' HFC network, this was subsequently decommissioned and not used to deploy NBN services, so no or very little part of this expenditure contributes to nbn co's productive assets. These costs were incurred to shut down a potential competitor. Setting prices to recover such costs would not promote competition.

<sup>41</sup> TPG 5G Home Broadband Plus, [cis-5g-home-broadband.pdf \(tpg.com.au\)](https://www.tpg.com.au/cis-5g-home-broadband.pdf)

<sup>42</sup> [Our Best Ever NBN Plan Range - Internet Plans From TPG](#)

<sup>43</sup> TPG 5G Home Broadband Premium Plan, [cis-5g-home-broadband.pdf \(tpg.com.au\)](https://www.tpg.com.au/cis-5g-home-broadband.pdf)

<sup>44</sup> [Our Best Ever NBN Plan Range - Internet Plans From TPG](#)

<sup>45</sup> *Optus 5G Internet Everyday*, <https://www.optus.com.au/broadband-nbn/5g-home-broadband/5g-home-broadband-plan>

<sup>46</sup> *Internet Everyday Fast*, [nbn Plans from Optus](#)

<sup>47</sup> *5G Home Internet Plan* ([telstra.com.au](https://www.telstra.com.au))

<sup>48</sup> *Upfront Internet Plans* ([telstra.com.au](https://www.telstra.com.au))

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- In the case of payments to Telstra, these were (at least in part) made to provide a financial incentive for Telstra not to compete against NBN's FTTP network with an overlapping footprint – an incentive that is not required now that HFC and copper are the primary technologies used to provide NBN services in many areas.
  - The payments were agreed when nbn co intended to roll out FTTP to 92% of premises. At that time, potential competition from Telstra's and Optus' copper and HFC networks were considered likely to make nbn co's rollout of FTTP to 92% of premises potentially unsustainable.<sup>49</sup> However, nbn co subsequently changed its plans to use the upgraded copper and HFC networks that it acquired from Telstra to supply high speed broadband to a large proportion of the 92% premise footprint originally intended to be FTTP. In this context, end users do not get the benefit of FTTP to 92% of premises but, under the SAU variation, would have to pay nbn co for the costs it incurred to making that business case sustainable.

In relation to these payments, HoustonKemp states:

*“Each of these items represents costs that are not productively efficient because they were not required to provide the current NBN service and they do not contribute to better quality services for future customers. There is no economic basis to allow for these costs to be recovered from customers through inclusion in NBN Co's RAB. Recovery of productively inefficient costs does not contribute to the long term interest of end-users because such recovery:*

- *could not occur in an effectively competitive market, since a business that tried to recover productively inefficient costs would be undercut by an efficient competitor; and*
- *does not promote efficient use of the NBN service, since it places a price on access to the service that is above the efficient cost of its provision.*<sup>50</sup>

The recovery of nbn co's subscriber costs in wholesale prices does not promote competition, does not encourage efficient use of infrastructure, does not encourage efficient investment, and is not in the legitimate business interests of nbn co. They are also not direct costs for nbn co providing access, but rather costs incurred to shut down end users' access to competitors.

### **3.9 The SAU variation (and current wholesale pricing) will make the NBN inaccessible for many**

nbn co's current wholesale prices will mean the NBN will become the network for only those who can afford it. It will not be accessible for many Australians who need it, and for whom it provides the greatest chance to lift social opportunities and economic productivity.

Currently, despite an increasing dependence on internet usage with penetration coming close to 90%<sup>51</sup>, there has not been the willingness to pay for high-speed NBN plans at nbn co's wholesale prices.

Price sensitive customers choose not to pay high prices for low-speed NBN plans (50 Mbps and below) and instead take up mobile and FW for broadband when suitable. This will impact many customers for whom 50 Mbps and below plan speeds will suffice. At nbn co's current high wholesale prices, more and more Australians see mobile services as a viable alternative to fixed broadband, increasing from 40% in August 2020 to 49% in November 2021.<sup>52</sup> Relative to other countries, Australia's mobile network is one of the most price competitive to their fixed broadband plans (Figure 4) and Australia has a high mobile-only population (Figure 5).

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<sup>49</sup> ACCC, *Determination: NBN Co Limited – Authorisations – A91290-A91292*, 19 July 2012.

<sup>50</sup> HoustonKemp, *Economic concepts for the regulation of NBN services*, November 2021, p.12.

<sup>51</sup> Roy Morgan Market Database 2021

<sup>52</sup> Roy Morgan Market Database 2021

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Willingness to pay for high-speed NBN plans (100 Mbps and above) is insufficient to warrant nbn co's existing prices. Despite close to half of customers willing to pay something extra for higher speeds (Roy Morgan-2021 data)<sup>53</sup>, nbn co's current wholesale prices for their premium speeds cause a disparity between high-speed appetite and the affordability of these plans, indicated by low take-up on 100+ speed tier plans. While 5G and LEO satellite might pose an alternative for customers needing higher speed, those will be capacity constrained. There will only be a small proportion of nbn co's customer base that will be able to take advantage of 5G and LEO for high-speed fixed broadband, before network operators constrain usage to protect the service quality they are able to deliver to other mobile customers.

High wholesale prices have also resulted in RSPs "losing faith and trust" in the NBN as a solution for their customers. RSPs have actively sought out alternative infrastructures (such as FW) that are more affordable for end users and allow more opportunity for RSP investment and reward.

The SAU Variation will amplify this problem, as it attempts to make the 100 Mbps plan the minimum available, but at an even higher wholesale price. This has two material impacts. First, the wholesale pricing strategy is at odds with the Government's objectives for the NBN (i.e. to promote NBN take-up and use, per the current nbn co Statement of Expectations). Second, it will have a material negative impact on nbn co's future demand with consequences for the operation of the regulatory framework.

In relation to the second impact, nbn co's demand forecasts are both overstated for the prices proposed in the SAU Variation and understated relative to what they could be if wholesale prices were lower than current levels. The broad approach taken to regulation of NBN prices means that if demand is lower then prices need to be higher to recover average cost – yet as prices are high demand falls. There needs to be an intervention in this negative cycle, setting wholesale prices lower to encourage greater demand. This way the NBN will be accessible for all that need it, not just the few that can afford it.

Specifically, nbn co's demand forecasts suggest that there is significant opportunity for nbn co to demonstrate how it can:

- factor in additional sources of growth to what it has considered in its current forecasts, so as to make its demand forecasts more complete and reflective of current and future trends;
- consider how sensitive its demand forecasts are to price, and what impact a broad reduction in price would have on demand; and
- factor in the degree to which investments by nbn co and government to improve digital connectivity will translate into increased demand for TC-4 connections.

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<sup>53</sup> Roy Morgan Market Database 2021

## 4 The proposed price and product constructs will harm customers

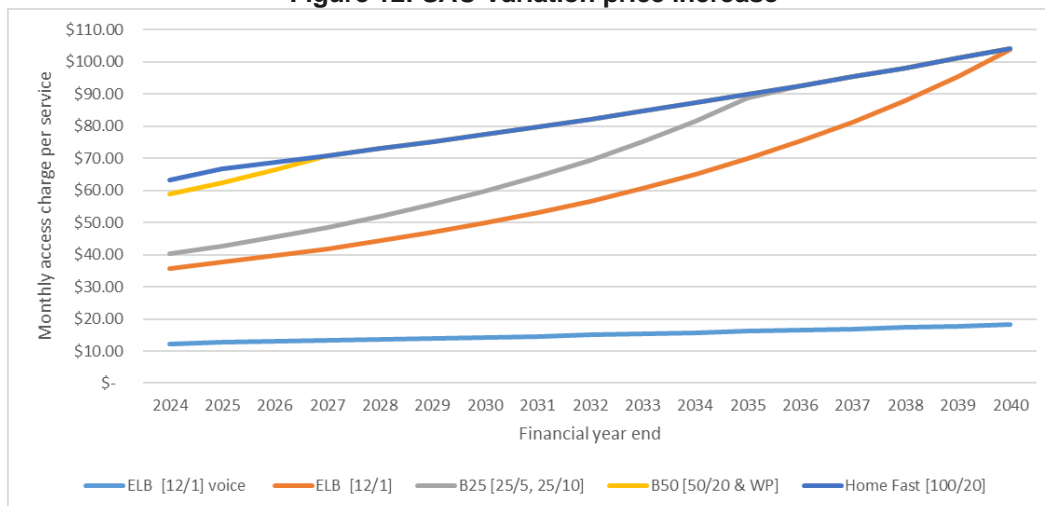
### Key points:

- Customers will be generally much worse off under the proposed ongoing price increases
- Customers needing basic connectivity will be harmed by the initial price changes
- Vulnerable and low spend customers will be harmed the most
- Charging overage on the 50 Mbps plan is not in the LTIE
- Pricing CVC overage above incremental cost does not promote the LTIE
- CVC inclusions growing at 50% of demand growth is not sufficient to protect end RSPs from significant cost escalations or consumers from poor experience
- CVC inclusions adjusted every 6 months is not dynamic enough
- The impact of changing to utilisation-based billing and overage measurement needs further consideration

### 4.1 Customers will be generally much worse off under the proposed ongoing price increases

Telstra broadly agrees with the ACCC's illustration of the effects of the SAU Variation on prices over time (Figure 12).

Figure 12: SAU Variation price increase



Source: ACCC

There are several reasons set on in the remainder of this section why the proposed price controls in the SAU Variation are not in the LTIE and not reasonable.

- Section 4.2 of this response explains why the SAU Variation is not in the LTIE for customers with low data use requirements. There is also a very significant portion of higher data use customers who are currently on unlimited data plans at slower speeds (50 Mbps and below)

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for affordability reasons. As explained in further detail in section 4.4 of this response, forcing these customers onto 100Mbps plans at much higher minimum prices is not in the LTIE of these end-users either.

- The proposed price increases are substantial and could be significantly worse under different CPI assumptions.
- The proposed price increases will reduce demand for the NBN, creating a market where the NBN is for only those that can afford it, whereas the NBN should be accessible to all.

#### **4.2 Customers needing basic connectivity may be harmed by the initial price changes**

There is a significant and diverse group of customers only needing basic connectivity. This ranges from consumers who just want limited internet access for email and basic web access to essential services or to make landline phone calls, to enterprise and government customers using legacy copper services for applications only needing low-rate data transfer such as EFTPOS, connection of ATMs or operation of traffic lights.

The initial price changes in the SAU Variation do not promote the LTIE for this category of end-users who don't want or need high speed plans, despite providing some relief to some categories of customers. To address these limitations, nbn should not set an arbitrary limitation on which customers can benefit from lower cost, low-usage service, and nbn should set a more reasonable throughput threshold of 0.15 Mbps, in line with the current nbn 12/1 product structure.

##### **4.2.1 Changes to the 12/1 wholesale plan would be in the LTIE**

nbn co's proposal to reduce the minimum cost of the 12/1 service for customers needing up to 0.1 Mbps from \$22.50 to \$12.00 would be in the LTIE, although the consumer benefit has been reduced by the years of delay in responding to industry and consumer calls for this. The current \$22.50 wholesale price makes retail services for these customers unprofitable for RSPs. After several years of making this clear to nbn co, RSPs have already begun initiatives to move these customers away from nbn co and many RSPs no longer offer these services on the NBN at all.

Reducing the wholesale cost of nbn co's 12/1 service is a very important initiative to ensure RSPs can retain an affordable retail offering to support the needs of those customers who rely only on the NBN to support a fixed-line voice service to keep in touch with others in their communities.

However, it is important that nbn does not arbitrarily limit the benefit of this cost reduction to only 'voice only' retail services. In the context of an IP-network, the concept of 'voice-only' is increasingly anachronistic. Today, RSPs are more likely to use TC-4 than TC-1 to support voice traffic over the nbn. Even where customers only use their nbn connection for phone calls, non-voice traffic such as device firmware updates and security patches will automatically be carried over the network. Further, basic connectivity extends beyond simple voice services – for example email, access to government services – and nbn should not arbitrarily discriminate against the use of the network to support these low-data services, where the end user has less than the throughput threshold in the peak hour.

##### **4.2.2 Some customers needing a small amount of data might be harmed by the SAU Variation**

Due to the unnecessarily low throughput threshold set by nbn (100kbps in the peak hour), many customers with 12/1 access speeds and who only need to access the NBN for basic connectivity may nevertheless end up incurring higher costs for RSPs than today. The minimum wholesale cost for customers needing a 12/1 plan using 0.1 Mbps of CVC would increase 15.5% from \$22.50 to \$26.00 + \$8/Mbps for CVC.

The proposed \$12 12/1 Mbps service should set a threshold sufficient to allow customers to do basic internet browsing and email correspondence as well as using voice services, thereby promoting digital inclusion and ensuring all Australians can afford access to the bare minimum of essential online

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services. The potential for the wholesale price of 12/1 plans to spike to \$26 (or more) where customers use more than 0.1 Mbps of CVC could undermine the ability of RSPs to achieve this outcome.

Telstra is investing in the promotion of digital inclusion amongst our typically older voice-only NBN base, by offering affordable internet starter plans including 25-50GB of data per month to enable customers to perform essential basic online activities like performing critical software and security updates, access government services and send emails and to provide an affordable progression path for non-digital customers to start to experiment with this technology.<sup>54</sup> The minimum wholesale cost of supplying these customers is likely to increase under the SAU Variation.

If these inflated NBN wholesale charges are unaffordable for low data users or fail to represent value for money, these customers will switch to available substitutes, such as mobile and fixed wireless services.<sup>55</sup> Under the SAU Variation, this is unlikely to harm nbn co, as there is a stronger incentive to raise revenue (by increasing prices) than there is to raise demand (as would be the case under a WAPC). However, end users would be harmed as they will be encouraged to move to networks that don't give them as high a quality or support the same range of devices as the NBN. Or they may miss out on the benefits of digital inclusion entirely, where suitable alternatives are not available.

To address these risks, Telstra recommends that at a minimum, the peak-hour throughput threshold for an end user service to qualify for the discounted \$12 12/1 product should be increased to 0.15 Mbps to bring the proposal more in line with the current 12/1 product construct (which includes 150kbps of CVC as part of the bundle offer).

Telstra supports nbn co's proposal to decrease the minimum wholesale cost of the 25/5 plan to \$26 from \$37. This is likely to support a wider range of retail offers on 25/5 than currently available to meet the needs of basic connectivity customers who need to use data up to the amount of CVC currently included in the 25/5 bundle (1.6 Mbps).

#### **4.3 Vulnerable and low spend customers will be harmed the most**

Through the ACCC's working groups and responses to nbn co's previous PDF pricing consultations, as well as several other nbn co stakeholder engagement exercises, over the last several years industry and ACCAN have provided extensive input to nbn co on the measures needed to ensure NBN broadband is affordable for all Australians and no-one is left offline.

The SAU Variation does nothing to respond to this extensive feedback. Instead, it simply proposes that yet another working group be convened to identify possible targeted initiatives to improve access to the NBN for low-income, vulnerable and unconnected consumers at some point before July 2024 and then once again before July 2025.

This is not in the LTIE. It does nothing to address the pressing current needs of vulnerable customers, and if this part of the SAU Variation prevents other initiatives (noting future regulation cannot be inconsistent with an accepted SAU) it would harm vulnerable customers.

##### **4.3.1 The needs of vulnerable customers**

The 2021 Australian Digital Inclusion Index (ADII) indicates 2.5 million Australians are currently digitally excluded: "*the number of highly excluded and excluded Australians is substantial, equalling 28% of the national population in 2021*". For Australians in the lowest income quintile, 67% would currently have to pay more than 10% of their household income to gain quality, reliable connectivity.<sup>56</sup>

Consumers who cannot afford to connect to the NBN and those who are currently hanging on to their NBN connection by a thread don't need more talking. They need nbn co to commit to lowering wholesale

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<sup>54</sup> See, for example: [starter-hbb-59.pdf \(telstra.com.au\)](#); [Starter-Internet-Plan.pdf \(telstra.com.au\)](#).

<sup>55</sup> See, for example: [The Best NBN Alternatives to Try if Your Connection Is Letting You Down \(lifehacker.com.au\)](#)

<sup>56</sup> [ADII 2021 Summary-report V1.pdf \(rocketcdn.me\)](#)

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prices to address the pressing issues of digital exclusion and disadvantage being faced in over a million Australian households today. In the words of Chris Dodd, Chair of Telstra's s Low Income Measures Advisory Committee (LIMAC):

*"Australia is in a process of rapid technological change in telecommunications as well as major structural change.... The most important measure to assist low-income customers is cheap reliable data and the key for this is obligations on NBN to make available a wholesale package which retailers can then implement with eligible customers..."<sup>57</sup>*

Almost exactly twenty years ago, the ACCC consented to Telstra rebalancing fixed line retail prices by increasing line rental charges. This was only permitted on condition Telstra accepted a new Carrier Licence Condition (**CLC**) formally imposing regulatory obligations to protect the interests of low-income consumers. As detailed in the relevant Regulation Impact Statement (**RIS**), these arrangements included the following initiatives:

- Telstra working collaboratively with welfare groups including ACOSS, the Salvation Army, the Smith Family, Jobs Australia and the Australian Federation of Homelessness Organisations to design and have endorsed our 'Access for Everyone' package';
- Tailored support provided by Telstra through the Access for Everyone package at an expected cost of about \$150 million per year, designed to not only to compensate existing low-income customers for any increase of the line rental on their standard telephone service, but also to meet the special needs of low-income consumers for an affordable basic service;
- A CLC requiring Telstra to, by 1 July 2002, offer, or have a plan for offering, a low-income package of products and arrangements that had been endorsed by low-income consumer advocacy groups and notified in writing to the Australian Communications Authority (ACA) and to then comply with that package, providing a revised version to the ACA in the event of any significant changes;
- A CLC requiring Telstra to have in place by 1 July 2002 a marketing plan for making low-income consumers aware of its low-income package, at an estimated annual cost to Telstra of \$1 million in the first year and variable ongoing marketing costs thereafter as needed; and
- A CLC requiring Telstra to maintain and adequately resource the LIMAC comprising representatives of organisations approved by the Minister, with LIMAC's role being to assess any proposed changes to the low-income package or to the marketing plan and to report annually to the Minister on the effectiveness of these measures. In contrast to nbn co's proposed requirement under the varied SAU for the new nbn low income working group to meet only annually, these arrangements envisaged LIMAC would meet at least four times per year in person, supplemented by additional virtual meetings.

The ACCC has found that nbn's proposed pricing "*is likely to force households and businesses to purchase high speed inclusions at a price that does not represent fair value to them*" and to lead to "*a narrowing of reasonably priced access products in the market*". These effects are due to factors including a proposed 15.5% increase in the minimum wholesale cost of NBN broadband, from \$22.50 to \$26.00. These proposals cannot be considered to serve the long-term interests of low-income and vulnerable end-users without meaningful additional regulatory protections first being put in place to protect these customers. The original 2002 carrier licence conditions Telstra was required to enter into before being permitted to increase our line rental charges provide both a precedent and a relevant template for how nbn co might be made subject to such obligations. In the context of migration of legacy

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<sup>57</sup> [csr-part-c-limac-chair.pdf \(infrastructure.gov.au\)](https://www.infraco.gov.au/csr-part-c-limac-chair.pdf)



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services to the NBN, it is also notable that the ACCC and Government have previously considered it appropriate to impose specific carrier licence conditions on nbn co.<sup>58</sup>

#### 4.4 Charging overage prices on the 50 Mbps plan is not in the LTIE

Whilst nbn co has proposed new flat rate pricing offers for residential grade plans 100 Mbps and higher, the bulk of NBN services (80%) will still be subject to CVC overage charges of \$8/Mbps for a proportion of customers' usage. We consider that retaining CVC overage charging for plans at 50Mbps is not in the LTIE for the following reasons, each of which is discussed in more detail below.

1. Creates long term price uncertainty for RSPs regarding their input costs;
2. Does not support the retail price structure set to meet consumer expectations;
3. Will negatively impact the customer experience for end customers;
4. Provides incentives for RSPs to develop broadband products over alternative platforms (i.e., mobile and fixed wireless) and will hasten the effects of fixed-mobile substitution;
5. Overage charges on 50 and 25 Mbps harm customers when their NBN line cannot meet plan speeds

Given the vast bulk of NBN customers are currently on the 50 Mbps plan, it is imperative that the price settings of this plan are in the LTIE and reasonable.

##### 4.4.1 Creates long term price uncertainty for RSPs regarding their input costs

Maintaining the existing two-part pricing tariff will continue to create significant uncertainty for RSPs in their input costs. Over time, the proportion of input costs related to CVC will account for an increased proportion of input costs for RSPs.

Between March 2019 and March 2022 acquired CVC capacity increased by 176%.<sup>59</sup> Whilst a significant proportion of this growth is attributable to COVID lockdowns and people working and schooling from home, the level of capacity acquired has not returned to pre-COVID levels. Whilst the acquired CVC capacity peaked in September 2021 and marginally fell in the quarter after, it has since continued to grow. In the March 2022 quarter alone, total CVC capacity acquired rose to 24.0 Tbps, up 2.4% from the previous quarter.<sup>60</sup> We expect CVC growth to continue as users continue to evolve their use of NBN services and more data intensive applications are commercialised.

Ongoing growth in CVC usage under the SAU Variation will lead to increasing wholesale prices and higher costs for RSPs – Net Payment Per User (**NPPU**). Using the ACCC's own modelling shows that as bandwidth grows (the ACCC assumes CVC will grow at 13% per annum), the NPPU outlook for RSPs supplying 50 Mbps is expected to worsen considerably, increasing total NPPU from \$51.00 per month to \$88 per month in FY30.<sup>61</sup> Accounting for growth in bandwidth only, excess CVC payments increase from \$6.00 to \$28.00 per month over a seven-year period.

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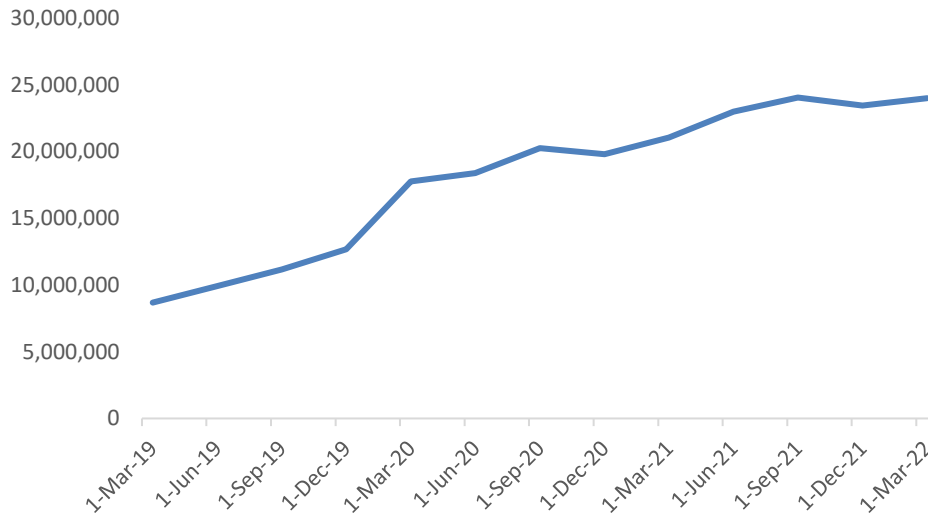
<sup>58</sup> Previously, the ACCC has contemplated imposing specific carrier licence conditions on nbn co in the context of the migration of legacy services from Telstra's network – see <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/information-disclosure-by-nbn-co>

<sup>59</sup> Increase between March 2019 to March 2022, calculated from ACCC wholesale markets indicators report. Reports available from <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/previous-reports>.

<sup>60</sup> ACCC, *NBN Wholesale Market Indicators Report*, March 2022, 19 May 2022

<sup>61</sup> This represents the total cost of supplying the 50 Mbps plan (AVC+CVC) using the approach outlined by nbn in the SAU.

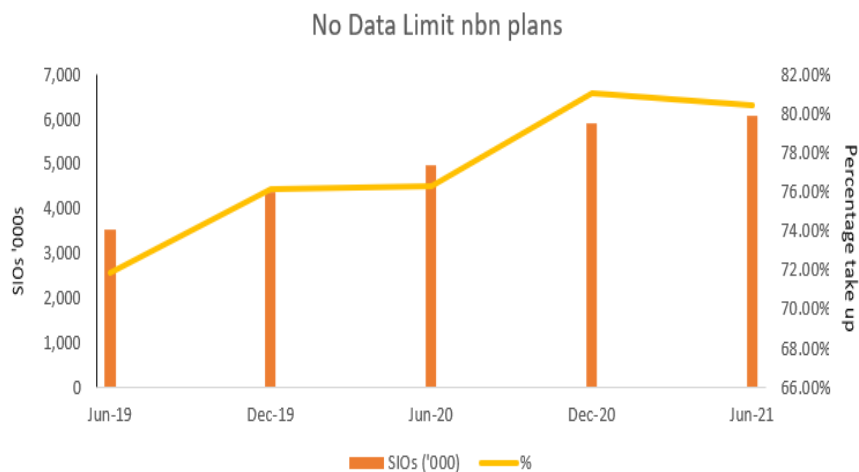
**Figure 13: Growth in demand for CVC capacity (TC-4) services<sup>62</sup>**



**4.4.2 Does not support the retail price structure set to meet consumer expectations**

The retail market for fixed broadband services has moved past data limits, with customers now expecting to receive an unlimited broadband experience, without excess usage fees. As illustrated in Figure 14, over 80% of customers now purchase NBN plans with no data limit, an increase of 10 percentage points from two years prior.

**Figure 14: No data limit take up of nbn plans over time**



Source: ACCC, *Internet Activity RKR*, 30 June 2021.

<sup>62</sup> ACCC, NBN Wholesale Market Indicators Report, Sum of contracted CVC capacity by State or Territory and by CVC traffic class, March 2019 – March 2022

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Customers expect to be able to use their broadband service at any time of the day, without monitoring the amount of data they use or modifying their behaviour – they expect their broadband service to operate at the speed they have purchased every day. RSPs have addressed this expectation by generally removing complexities such as shaping, hard data caps and excess charges. Retaining the CVC overage charging model on the most popular NBN plan is fundamentally misaligned to the retail market and customer expectations.

Attachment A showcases the key plans on offer by the major RSPs – Optus, Aussie Broadband, TPG and Telstra. The most popular plans advertised on the websites of all these RSPs are for no data limit plans, clearly highlighting the shift in the market. Such market dynamics are also heavily supported by Telstra's own customer research data which identified that data allowance was the second most important factor in influencing a customer's purchasing decision after minimum monthly spend.<sup>63</sup> The same research found that customers exhibit a high willingness to pay for no data limits, with the research highlighting that when comparing two plans, if all other attributes were equal, customers would be willing to pay a significant \$26 premium relative to 500 GB capped plan. Customers now have an expectation and willingness to pay for no data limits in relation to their plans and the RSPs have responded accordingly.

#### **4.4.3 Will negatively impact the customer experience for end customers on the 50 Mbps plan**

Continued adoption of the two-part tariff and overage on the 50 Mbps plan will have a negative impact on the customer experience. Demand shocks such as those observed during COVID lockdowns can and will occur in the network from time to time. When increases occur, RSPs costs will go up under the SAU Variation.

In response to increases in peak usage (and consequently overage charges) RSPs will be encouraged to cap usage and reduce the customer experience on the NBN, to minimise their exposure to increased costs. This creates the wrong incentives in the market when RSPs should be encouraging growth of peak usage on the NBN.

Abolishing overage for the 50 Mbps plan (nbn co's most popular plan) will allow RSPs long-term price certainty regarding their input costs and eliminate the inefficiencies and poor consumer outcomes that occur today.

#### **4.4.4 Creates incentives for RSPs to develop broadband products over alternative platforms**

The increased use of bandwidth-intensive applications such as video streaming, video conferencing, game downloads and cloud gaming will lead to increased usage of the NBN over time. When households and businesses use these applications in parallel at peak times, move CVC capacity is used.<sup>64</sup> A recent WIK study<sup>65</sup> showed that over the next decade, demand will be driven by the parallel usage of several applications. This is illustrated in Table 3. In comparison to today, future applications will be characterised by higher requirements for download, upload and quality parameters as the applications evolve. A recent WIK report estimates the downstream and upstream requirements in the next three years, estimates CAGR growth across all applications in the order of 15-30%.

Retaining overage for 50 Mbps plans will mean that as end users increase their demands on the network, RSPs could further develop and invest in alternative fixed wireless and mobile networks. This could mean customers are supplied using a more congestible network and nbn co's infrastructure

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<sup>63</sup> Sprout Research, 2020, Telstra Fixed Conjoint research, n= 350

<sup>64</sup> See Strube Martins, S.; Wernick, C. (2021): Regional differences in residential demand for very high bandwidth broadband internet in 2025, Telecommunications Policy, Volume 45, Issue 1, February 2021

<sup>65</sup> WIK Consult, *The impact of NBN wholesale pricing on the take-up of NBN services and economic benefits associated with the NBN*, November 2019, A Report for Telstra

becomes less and more inefficiently utilised. These outcomes are not in the LTIE and would not arise if overage charges were removed from the 50 Mbps plans.

**Table 3: Estimation of bandwidth and QoS requirements for individual applications in 2025<sup>66</sup>**

Application category	2015 Downstream bandwidth (Mbit/s)	Assumed CAGR in%	Downstream (Mbit/s) in 2025	Upstream (Mbit/s) in 2025	Packet loss	Latency
Basic Internet	2	25	≈20	≈16	o	o
Homeoffice/VPN	16	30	≈250	≈250	+	+
Cloud Computing	16	30	≈250	≈250	+	++
State of the Art Media and Entertainment (4k, 3D, UHD)...	14	20	≈90	≈20	++	+
Progressive Media and Entertainment (8k, Virtual Reality)	25	30	≈300	≈60	++	+
Communication	1.5	20	≈8	≈8	++	+
Videocommunication (HD)	8	15	≈25	≈25	++	++
Gaming	25	30	≈300	≈150	++	++
E-Health	2.5	30	≈50	≈50	++	+
E-Home/E-Facility	2.5	30	≈50	≈50	o	o
Mobile Offloading	2	30	≈15	≈12	o	o

#### 4.4.5 Overage charges on 50 and 25 Mbps harm customers when their NBN line cannot meet plan speeds

There are many circumstances where a customer may desire a 50 Mbps or 100 Mbps NBN plans and RSPs wish to put the customers on these plans, but RSPs cannot do so due to the poor condition of the NBN line. Indeed, for a long time, Telstra was not accepting any 100 Mbps order on FTTN/B/C at all to ensure our customers were able to get a good quality experience. Similarly, Telstra will not accept a 50 Mbps order when we know the customer's NBN line will not support that speed. Even when we accept an order for those speeds because the line supported them at the time of ordering, the customer may choose to downgrade their plan if they no longer get the full speed,<sup>67</sup> there are too many faults or outages on the line, or there is generally a poor customer experience at that speed tier. Figure 21 in Appendix D illustrates the proportion of FTTN/B/C lines that are not capable of achieving 100 Mbps to demonstrate how many lines are potentially affected by this.

Under the SAU Variation, nbn co will charge overage on 25 Mbps and 50 Mbps plans, and adjust their price points, so that over time the price differential between those speed tiers and the one above reduces, ultimately until they are the same. This penalises customers who must move from 100 Mbps to 50 Mbps plans, and customers that must move from 50 Mbps to 25 Mbps plans, because the NBN line condition does not support those speeds. During the term of the undertaking, there will be a point by which the wholesale price for the lower speed tiers converge to the 100 Mbps wholesale price point.

This would harm the LTIE. Customers get less relief from having to downgrade their plan speed due to the poor NBN line condition. Also, nbn co's incentive to improve the line condition reduces. Ultimately,

<sup>66</sup> WIK Consult, *The impact of NBN wholesale pricing on the take-up of NBN services and economic benefits associated with the NBN*, November 2019, A Report for Telstra

<sup>67</sup> TPG and Optus also have clauses for FTTB/N/C customers allowing them to move to lower speed tier plans without penalty or exiting plans in such circumstances.

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the SAU Variation would result in NBN prices that give no financial incentive to nbn co to improve line performance below 100 Mbps.

If all plans had overage removed, then these harms to the LTIE would not exist.

#### **4.5 Pricing CVC overage above incremental cost does not promote the LTIE**

##### **4.5.1 The proposed \$8/Mbps CVC overage charge is above nbn co's incremental cost**

The ACCC highlights that the proposed CVC overage charge of \$8/Mbps is above the long run marginal cost and that this is not indicative of an efficient pricing construct or price levels.

nbn co states that the role of the CVC overage charge is not solely to recover the incremental costs of augmenting capacity in the network. Rather, *“the usage charge provides a contribution to the fixed and variable costs of the network, in a way that incentivises higher-use customers to demand higher value speed tiers.”*<sup>68</sup> In essence, the SAU Variation allows non-linear recovery of common and sunk costs across different consumer cohorts, with higher use customers contributing mostly through fixed monthly charges, whilst lower use customers would largely contribute through usage charges.<sup>69</sup>

nbn co considers that this structure maximises the use of the network, whilst increasing overall affordability, and enables a more predictable price path than would be achieved if the CVC TC-4 Overage Charge was tied to long-run marginal cost.<sup>70</sup>

In some cases, it can be economically efficient for the usage component of a two-part tariff to be set higher than incremental cost, but these cases are unusual. For example, in electricity, water, gas, the usage component of pricing might be priced above marginal cost to discourage usage – particularly when electricity generation has environmental impacts or when water is scarce and usage needs to be minimised. However, in the case of the NBN, usage should be encouraged and expanded, and pricing the usage component of a two part tariff at or below marginal cost (or even at zero) is economically efficient.

##### **4.5.2 The NBN is not capacity constrained**

There is likely to be significant excess capacity in nbn co's CVC network. Telstra is not aware of any CVC order being turned down by nbn co due to capacity constraints. Further, at August 2021:

- 90% of fixed line premises can attain a speed of 50 Mbps but only 55% of customers take up these speeds. 73% of fixed line premises can attain a 100 Mbps speed but only 16% of customers take these speeds.
- 40% of fixed line premises can attain 1 Gbps speed but less than 1% of customers take up these speeds.<sup>71</sup>

This shows that the NBN is sufficiently underutilised to have excess capacity in the network.

##### **4.5.3 nbn co has routinely used discounts and promotions to shift demand indicating the excess capacity that exists in the network**

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<sup>68</sup> nbn co supporting submission, pg 96

<sup>69</sup> nbn co supporting submission, pg 96

<sup>70</sup> nbn co supporting submission, pg 97

<sup>71</sup> nbn co, *Corporate Plan 2022*,

<sup>71</sup> ACCC, *Measuring Broadband Australia Report*, 31 March 2022.

The use of discounts by nbn co to encourage shifts in demand have been extensively used over the last 5 years. During COVID, nbn co offered up to 40 per cent additional CVC capacity to RSPs at no additional charge. nbn co note that they managed the increase in capacity through a range of initiatives including capacity upgrades, architecture augmentation and increased reporting and monitoring.<sup>72</sup> Reflecting on the network performance during the peak COVID period in Australia, nbn co stated that “Despite additional customer demand, the nbn™ network performed well throughout the period. In August 2020, broadband monitoring company cable.co.uk released analysis based on over 364 million broadband speed tests that showed an average drop in speed of 6.38 per cent across 114 countries with social distancing and lockdown measures in place. Australia was shown as one of only a handful of countries that improved its internet speed, with a gain of 5.3 per cent.”<sup>73</sup>

#### 4.6 CVC inclusions growing at 50% of demand growth is not sufficient to protect end RSPs from significant cost escalations or consumers from poor experience

nbn co is proposing that CVC inclusion adjustments will be made biannually via a formula defined in the SAU. In particular, nbn co would adjust the level of inclusion in the bundles by 50% of usage change. This is just a way of increasing prices for low-speed NBN plans over time – so that there is a CPI+X price cap, where X relates to the \$8 overage charge multiplied by 50% of customers’ growth in peak usage.

We do not consider this to be appropriate risk and cost sharing between nbn co and RSPs. It continues to subject RSPs to significant cost burden as a result of their efficient usage of the NBN and allows nbn co to bank the windfall of increased demand and data growth.

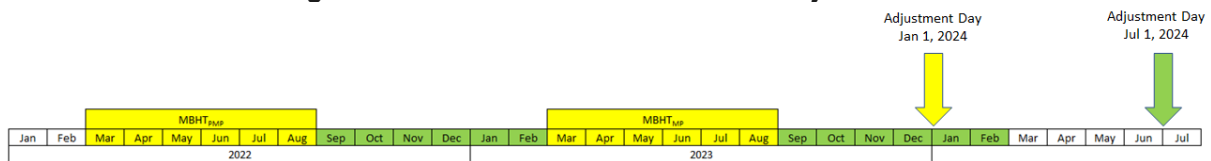
As discussed above, RSPs cannot easily pass these costs on to their end customers given that the majority of retail offers are based on unlimited data packages. Accordingly, growing CVC inclusions at a rate less than total demand growth will effectively bake-in to the SAU ongoing price increases and margin pressure for broadband providers.

At a minimum, we consider the CVC inclusions should grow at the same rate of growth as demand and be adjusted accordingly. This ensures that RSPs and users are not penalised by escalating costs and can continue to enjoy the benefits of the digital economy.

#### 4.7 The CVC adjustment mechanism is not dynamic enough

The CVC inclusion adjustment measurement timeframes proposed in the SAU are illustrated in Figure 15.

Figure 15: SAU Variation CVC inclusion adjustments



If overage charging is to be retained, we do not believe the 6-month adjustments to CVC inclusions in bundles are dynamic enough. The measurements for any one Adjustment Day begin 22 months prior and conclude 4 months prior, meaning the adjustment is too far divorced from when the usage growth occurred. For instance, relating to the timeframes above, if there has a large surge in usage in March 2022 and no significant growth thereafter, the CVC inclusion adjustment would provide relief to end

<sup>72</sup> [the-impacts-of-covid-19-response-measures-on-australian-broadband-traffic-on-the-nbn-network.pdf](https://www.nbnco.com.au/the-impacts-of-covid-19-response-measures-on-australian-broadband-traffic-on-the-nbn-network.pdf) (nbnco.com.au), pg. 19

<sup>73</sup> [the-impacts-of-covid-19-response-measures-on-australian-broadband-traffic-on-the-nbn-network.pdf](https://www.nbnco.com.au/the-impacts-of-covid-19-response-measures-on-australian-broadband-traffic-on-the-nbn-network.pdf) (nbnco.com.au), pg 21

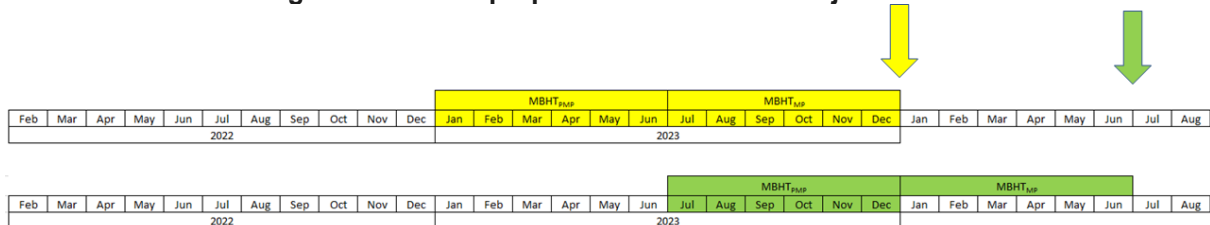
users up to 22 months later. Over those 22 months, nbn co would be earning revenue associated with overage. We do not believe there is any other justification for the delay. This is not in the LTIE.

While we believe CVCs should be abolished on all plans, if they are to feature on low-end plans, the Adjustment Day should be much closer to the end of the 6-month adjustment period. There may be reasons why an interval is required between the end of the measurement periods and the associated adjustment to bundle inclusions, but the interval should be a day rather than four months.

Also, the proposed mechanism has each 6-month measurement period leap-frogging the next 6-month period. This could have negative consequences if there is an event that only affects a single 6-month period, which isn't measured.

We propose an alternative mechanism where the 6-month measurement periods follow each other, and the Adjustment Date occurs almost immediately following the measurement period. This is illustrated in Figure 16. This would ensure growth in peak usage are flowed through quickly.

**Figure 16: Telstra proposed CVC inclusion adjustments**



Telstra also submits that nbn co should publish the usage and inclusion data (much like their current daily reports of capacity, inclusions and overage), so that inclusion changes come as no surprise to RSPs. In addition to an RSP-specific report, nbn should publish industry-wide daily usage data (on a daily basis) given the inclusion increase is based on the industry average.

#### 4.8 The impact of changing to utilisation-based billing and overage measurement needs further consideration

Telstra advocated for nbn co to remove CVC overage for all plans, or adopt utilisation-based billing. nbn co has chosen a hybrid approach. While generally Telstra agrees that utilisation-based billing is preferred to capacity-based billing, the SAU Variation raises some concerns and questions:

- For very low speed plans that have zero CVC inclusions (12/1 and 25/5 speed tiers), how can RSPs prevent utilisation-based billing causing price shock? For example, if a voice-only customer begins to use considerable data at peak times, what constraints can be put in place.
- Currently, RSPs use spare capacity from high-speed (e.g. 100 Mbps) plan inclusions to balance out the fact that low-speed (e.g. 50 Mbps) plan inclusions have been too low. The SAU Variation removes the ability for RSPs to do this, but the 50 Mbps CVC inclusion has not been lifted to compensate for this.
- It is not clear how overage will be calculated. RSPs will need specific calculations to be in a position to manage their traffic and expenses. For example, is peak usage calculated at the CSA level first (to account for time zone differences); is the hourly peak determined in discrete hours (e.g. 8pm to 9pm) or is it a sliding window to catch the absolute highest peak (e.g. 8:07pm to 9:07pm).

## 5 Controls on prices and revenues are ineffective and inefficient

### Key points:

- The CPI linked price caps bear no relationship to nbn's cost
- The revenue cap provides no constraint or certainty
- The revenue cap is not in the LTIE to the extent it becomes binding
- The 5% discount adjustment is not in LTIE
- There is no community consultation

### 5.1 The CPI linked price caps bear no relationship to nbn's cost

The SAU Variation proposes to increase the wholesale price caps for high-speed plans (100Mbps and over) by CPI+3% in each of FY24 and FY25, and by the lower of CPI and 3% for each year that follows. For low-speed plans (50Mbps and under), the SAU Variation would increase the price cap by CPI+X%, where X is related to the overage charge and usage growth. In comparison, nbn co's forecasts show that its opex will fall by 5% from FY23 to FY25 and its capex will fall by 42%.

Therefore, nbn co would be raising wholesale prices (and RSPs would likely be raising retail prices) over a period during which nbn co's costs are declining. For this reason, the escalation of the proposed price control would not promote competition, would not encourage efficient use of and investment in infrastructure, and would not be in the legitimate interests of nbn co.

While it is appreciated that nbn co's argument is that it needs to raise revenue in addition to its ongoing costs to recover its ICRA, recovery of the ICRA is not in the LTIE nor is it reasonable.

### 5.2 The revenue cap is not in the LTIE to the extent it becomes binding

Without having access to a functional BBM, the extent to which the revenue cap is likely to bind is not clear. We do assume that at some point over the term of the undertaking that it will bind.

It is on this assumption, that we submit that the revenue cap is not in the LTIE. The expert report of Prof. Sappington sets out the problems with revenue cap regulation:

- **Revenue caps encourage high prices and low output.** *"The incentives that revenue cap regulation can provide for elevated prices and diminished levels of output can be so strong as to induce a regulated enterprise to set higher prices than it would set if it operated as an unregulated, profit-maximizing monopoly."*<sup>74</sup>
- **Revenue cap regulation also can encourage a price structure that diverges fundamentally from the structure that maximizes consumer welfare.** *"...to ensure compliance with a binding cap on its revenue, a regulated enterprise can be motivated to set relatively low prices for services with relatively inelastic demand and relatively high prices for services with relatively elastic demand. Such a pricing structure entails a fundamental departure from the inverse elasticity principle, and so can generate substantial reductions in consumer welfare."*<sup>75</sup>

<sup>74</sup> Sappington, para. 30.

<sup>75</sup> Sappington, para. 33.



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- **Revenue caps can reduce service quality.** *“...when it operates under revenue cap regulation, an enterprise can increase its profit as it ensures compliance with the regulation it faces by reducing the quality of its services.”<sup>76</sup>*
  - **Revenue caps can discourage innovation by RSPs.** *“Innovation that enhances the demand for retail broadband services enhances the demand for the underlying wholesale broadband services. Such retail innovation can thereby generate wholesale revenue in excess of the authorized cap on revenue. Consequently, the regulated wholesale supplier must act to reduce revenue when it faces a binding cap on revenue.”<sup>77</sup>*
  - **Revenue caps can encourage large price variation.** *“Revenue cap regulation also can expose retail broadband suppliers to substantial and unpredictable variation in the prices of wholesale broadband services.”<sup>78</sup>*

In some industries revenue caps are used. They can have merit in settings where it is desirable to discourage consumption of the regulated firm’s service. Prof. Sappington comments:

*“To illustrate, environmental concerns might underlie a desire to reduce consumption of electricity produced by generators that employ fossil fuels. Because revenue cap regulation can encourage high prices (which discourage consumption) while ensuring the financial viability of the regulated firm, this form of regulation may merit some consideration in some electricity sectors.”<sup>79</sup>*

However, in relation to the SAU Variation, Prof. Sappington concludes:

*“However, expanded – not reduced – adoption of high-quality broadband services is desired in Australia. Consequently...such expanded adoption is better motivated through the ongoing implementation of price cap regulation than through an eventual switch to revenue cap regulation.”<sup>80</sup>*

### **5.3 The 5% discount adjustment is not in LTIE**

In the context of the rest of the SAU Variation, the process to embed discounts into the price control appears to be an adjustment mechanism that is intended to bring the price cap down when nbn co decides that the market cannot bear its high wholesale prices. There are several issues with this:

- Discounting should not be the mechanism to ensure price controls are set at an appropriate level. Price controls need to be set at a level that is suitable for the market at the outset – if there is a risk that the market cannot bear price controls, then those price controls cannot be in the LTIE.
- Discounting should be focussed on growing the market and delivering a positive return by growing the market. If discounting also ratchets down nbn co’s price controls, then the SAU Variation would act as a disincentive for nbn co to discount.
- The 5% discount adjustment will also act as a disincentive for nbn co to discount too much. nbn co should not be discouraged from discounting.

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<sup>76</sup> Sappington, para. 35.

<sup>77</sup> Sappington, para. 37.

<sup>78</sup> Sappington, para. 39.

<sup>79</sup> Sappington, para. 42.

<sup>80</sup> Sappington, para. 43.

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- The mechanism is unlikely to provide the certainty that RSPs and their customers need, given the discounts for some products could be quite large before it reaches the trigger set to 5% of nbn co's total revenue. Large discounts could also be withdrawn quickly before the 5% trigger is met, resulting in pricing uncertainty.
  - There are too many exclusions of discounts that would normally be used in the market, which limits the effect of the mechanism and makes operation challenging. For example, it's not clear how nbn co would judge whether a discount falls into one of the exceptions or not – could nbn co claim a substantial discount in the ordinary course of business is for the public benefit and therefore not trigger the mechanism?

For these reasons, the 5% discount adjustment in the SAU Variation is not in the LTIE.

#### 5.4 No community consultation

The primary objective of the SAU Variation must be to promote the LTIE. SAUs that intend to last for a considerable period cannot specify every clause in a way that allows flexibility to adapt to future circumstances where the LTIE might change. Indeed, the SAU Variation has a module replacement process that allows changes in each regulatory period, to that take into account future circumstances.

For that module replacement process to promote the LTIE on an ongoing basis, noting that what promotes the LTIE might change over the course of the SAU, there would need to be an obligation on nbn co to undertake community consultation, and take that community consultation into account, prior to finalising and putting forward the next module for ACCC assessment. In the same way that the AER's Better Resets Handbook recommends for energy networks, prior to each regulatory period, nbn co should be required to:

- engage in active community consultation regarding the outcomes end users need;
- transparently and clearly demonstrate how its capex, opex, service quality and prices will achieve the desired community outcomes;
- justify any deviations between nbn co's plans and the communities' objectives; and,
- explain the consumer benefits for any price increases.

As is the recommended approach for energy networks, nbn co's community engagement should precede the submission of nbn co's regulatory proposal to the ACCC. This will allow the ACCC to consider the effectiveness of the community engagement and the extent to which the proposal meets expressed consumer preferences when it considers whether the proposal promotes the LTIE.

The benefits of this approach are clear - it provides nbn co the opportunity to engage with the community to ascertain what are the most important focus areas for its expenditure in the next regulatory period, and allows the community a voice in providing input, without having to engage in a module replacement process that can be highly technical, require sophisticated engagement with the ACCC and nbn co, and with limited time and opportunity to influence the outcome.

Energy networks are encouraged to meaningfully and transparently engage with their customers to ensure that consumer preferences drive the development of their regulatory proposals. As set out in the AER's [Better Resets Handbook](#), the quality of this engagement plays a key role in the AER's assessment of whether the relevant cost recovery proposal advances the LTIE for network users.

By contrast, nbn co had put forward the SAU Variation for the ACCC's approval thereby proposing to allow nbn co to recover up to \$38 billion of ICRA (\$44.5 billion in nominal terms) to 2040, without having first even publicly shared a copy of its BBM. Without the incorporation of a stronger requirement to consult with and take into account community input, the SAU Variation does not promote the LTIE.



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Attachment B to this response:

- Shows, through some contrasting examples, how the SAU Variation fails to meet best practice for regulated infrastructure of public significance (compared to requirements in the energy, airport and mining sectors) because it does not oblige nbn co to engage in community consultation or to demonstrate how community feedback is reflected in proposals it submits to the ACCC; and
- Identifies aspects of the SAU Variation that should be subject to explicit community consultation obligations, so that nbn co's capex, opex and charges reflect, and are demonstrated to reflect, the LTIE prior to the reset for each regulatory period.

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## 6 Cost allocation enables anticompetitive and inefficient behaviour

### 6.1 Protecting against anti-competitive encroachment into competitive markets

Prof. Sappington identifies the high potential risks to the LTIE of a government business enterprise encroaching into competitive markets:

*“Although a government enterprise may value profit, its focus on profit enhancement may not be as intense as the corresponding focus of a private enterprise... One might think that a reduced focus on profit enhancement would reduce the likelihood that a government enterprise acts to harm competitors and impede competition. However, this is not necessarily the case. To illustrate, an increased focus on enterprise scale and scope can induce a government enterprise to be particularly aggressive in limiting the success of competitors, or even driving them from the market.”<sup>81</sup>*

Prof. Sappington identifies four forms that such aggression can take to the harm of competition:

- Impeding competitors' access to vital inputs;
- Adopting (inefficient) technologies that entail particularly low costs of supplying competitive services;
- Setting particularly low prices for competitive services and otherwise expanding its operations into markets that are well-served by private, competitive suppliers; and
- Allocating an unduly small share of common costs to the supply of competitive services or otherwise concealing under-performance or financial losses in competitive markets.<sup>82</sup>

While not all these forms of aggression can be prevented through the SAU Variation, they warrant particular focus on how nbn co proposes to allocate its costs and ICRA between its core services and other services provided by nbn co that encroach into already competitive markets.

### 6.2 Cost allocation under the SAU Variation

The SAU Variation seeks to establish separate cost bases for core regulated services and non-core competitive services. Core regulated services will be subject to SAU price controls and other provisions whereas non-core services would have their prices and other key terms determined outside the SAU Framework.

The ACCC's consultation paper has raised specific queries for feedback on the changes that NBN Co is proposing to introduce to SAU Framework in relation to cost allocation. Telstra has responded to each of these queries below.

Telstra has broad concerns as to whether the cost allocation framework as proposed by NBN Co, will appropriately allocate costs between core regulated services and non-core competitive services in a way that will ensure efficient outcomes. In turn, this also raises concerns as to whether the proposed cost allocation framework will ensure that NBN Co cannot obtain an unfair competitive advantage through its regulated services, and whether it will ultimately deliver against the LTIE objective, including lower prices for end-users. A number of Telstra's concerns set out below have been informed by observations the ACCC has included within its consultation paper.

#### 6.2.1 Will the cost allocation principles alone provide for the effective separation of the

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<sup>81</sup> Prof. Sappington, para. 57-58.

<sup>82</sup> Prof. Sappington, para. 58.

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## competitive services from the regulated services?

The ACCC observed that nbn co's proposed cost allocation principles "*differ from those used in regulatory frameworks in other sectors in some important ways, including the allocation of fixed and common costs*". Telstra has prima facie concerns as to why nbn co considers this to be a reasonable approach without establishing an appropriate justification for doing so. An additional observation raised by the ACCC regarding routine regulatory practice that Telstra supports, would be the imposition of "*ring fencing requirements and conditions around the maintenance of the Regulatory Asset Base (e.g. LTRCM) to account for the outcomes of applying the cost allocation principles*".

Telstra supports the principle that costs are allocated between regulated services and non-core services on the basis of their relative use. Although we have concerns with the methodology proposed by nbn co to achieve this.

nbn co's proposed cost allocation manual states that Opex is initially allocated between core regulated services and non-core services proportionally based on revenue.<sup>83</sup> nbn co justifies this methodology on the basis that "*revenue is considered the most accurate allocator available for this allocation because it best reflects the higher average value of Competitive Services (as premium business services)*". However, a revenue allocator would enable the types of harm to competition that Prof. Sappington has warned can arise per above. If nbn co aimed to undercut competitive services with a cross subsidy from core regulated services, it would aim to earn relatively less revenue from competitive services resulting in less cost being allocated to competitive services.

Another problem with revenue-based allocators arises where nbn co seeks to establish itself in a competitive market. For example, as nbn co discounts its 'business NBN Enterprise Ethernet' product or develops new products in competitive markets, it earns less revenue, resulting in more cost being allocated to core regulated services. In this way core regulated services are used to subsidise nbn co's discounting and expansion in competitive markets.

Telstra submits a more accurate methodology would be to initially allocate Opex on a directly attributable basis where possible and only utilise the revenue basis for costs that cannot be attributable on the basis of relative use. This must also be made transparent by nbn co at the individual plan and discounts level.

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

Telstra supports the ACCC's assessment that it should "*closely consider whether allocations appropriately reflect relevant cost drivers, the allocation of common costs, and how the ICRA balance is treated in the relevant allocations*".

Telstra has reviewed nbn co's proposed implementation of cost allocation principles based on our review of the nbn co forecast information document.<sup>84</sup> That document does not transparently demonstrate how capex and opex are being allocated between core regulated services and non-core services. But it is clear that almost all opex and capex is allocated to core regulated services:

- 99.64% (per FY 2021 Actual) to 98.53% (per FY 2025 Forecast) of total Opex
- 98.17% (per FY 2021 Actual) to 97.16% (per FY 2025 Forecast) of total Capex

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<sup>83</sup> nbn Cost Allocation Manual April 2022 document, page 13 [Cost Allocation Manual\\_0.pdf \(accc.gov.au\)](#)

<sup>84</sup> nbn Forecast Information: FY24 and FY25 document [NBN Co forecast financial information in support of Replacement Module Application\\_0.xlsx \(live.com\)](#)

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Further, it is unclear how nbn co's \$4.5 billion fibre upgrade plan has been allocated between core regulated services and non-core regulated services.<sup>85</sup> Telstra assumes based upon our calculations above, that the SAU Variation allocates almost all this investment to core regulated services. However, nbn co's stated target market of this investment is end-users of its three highest speed plans with peak download speeds of between 100 Mbps to 1 Gbps.<sup>86</sup> To benefit from the investment, customers on FTTC will need to order a plan with a speed of 250 Mbps or higher to qualify for an upgrade. Customers on FTTN will need to order a plan with a speed tier of 100 Mbps or higher.

Yet demand for core regulated services at these speed tiers will be low, particularly over the first regulatory period. The ACCC observed in March 2022 that only 18.0% of NBN connections are running at 100Mbps or above.<sup>87</sup> While on nbn co's forecasts demand for higher speed tiers increase, that is likely attributable to the pricing strategy in the SAU Variation rather than this investment. Notwithstanding, if four hundred thousand core regulated services are assumed to migrate to high-speed plans as a result of this investment, assuming a \$13/month increment in wholesale price, the payback period would amount to over 70 years.

It is more likely that enterprise customers will be the major beneficiary of this investment, and so a significant proportion of the \$4.5B should be allocated to non-core services.

Further, customers on speed tiers of 50 Mbps and lower will not benefit from the \$4.5B investment, and it would not be in the LTIE for those customers to have to pay for it. It is not clear from the SAU Variation whether nbn co intends to recover those costs from customers needing only lower speeds.

### **6.2.3 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?**

In its consultation paper, the ACCC observed there would be "*benefits in reviewing the categorisation of services and cost allocations on a periodic basis through the replacement module process*". Telstra supports this assessment and agrees with the ACCC's supporting assertion that a review process "*will assist in ensuring services are appropriately categorised according to competitive conditions that prevail at the time, and that subsequent cost allocations remain appropriate in the face of changing conditions*".

However, where nbn co is introducing discounts or promotional offers, that transparency should be made available as those offers are launched.

### **6.2.4 Does the proposed cost allocation framework achieve an appropriate balance between flexibility on implementation and ACCC oversight?**

Telstra supports the ACCC's view in relation to the categorisation of new services and relevant cost allocations, that it should "*closely consider whether this process unreasonably constrains the scope or timeframe within which the ACCC must perform this function*".

The ACCC specifically observed that nbn co's cost allocation manual "*appears to provide a degree of flexibility around implementation*". This is based upon nbn co only being required to notify the ACCC of any variations to the manual and not being allowed the power to approve or initiate changes to it. Further, it is proposed by nbn co, that the ACCC would then need to have regard to this cost allocation manual when seeking to "*determine cost allocations through a replacement module determination*". In this specific example, Telstra considers that the ACCC's role in providing reasonable oversight is unreasonably constrained.

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<sup>85</sup> nbn co, *Corporate Plan 2022*, p. 13.

<sup>86</sup> NBN Co Media Release 29 May 2020 [higher-speed-tiers-media-release.pdf \(nbnco.com.au\)](https://www.nbnco.com.au/higher-speed-tiers-media-release.pdf)

<sup>87</sup> ACCC Measuring Broadband Australia Report 31 March 22



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The ACCC must be satisfied that the SAU Variation is in the LTIE and reasonable. If the ACCC is constrained from changing cost allocations until 2040 and there is a risk that they harm the LTIE and become unreasonable, then the SAU Variation must be rejected.

## 7 General regulatory structure and replacement module assessment process

### *Key points:*

- Telstra would be comfortable with an initial 2-year regulatory period for an SAU that was capable of being accepted.
- The term of WBA/SFAA could be longer than 2 years, if there is a stable regulatory framework in place that support RSPs' businesses and outcomes for customers.
- Alignment of regulatory periods and the term of the WBA/SFAA, but with a sufficient lag to allow RSPs to accommodate any changes in their businesses, would be in the LTIE.

### 7.1 Initial regulatory period of 2 years

Telstra would be comfortable with an initial 2-year regulatory period for an SAU that was capable of being accepted.

Longer periods that provided the appropriate constraints on prices and service quality, and incentives on NBN Co to continue to invest and improve its service quality, would be preferable for subsequent regulatory periods. This would provide greater certainty for industry.

Telstra notes that the proposed 2-year replacement module is not compliant with the existing SAU, as replacement modules must have periods of 3, 4 or 5 years.

### 7.2 Alignment of the WBA term and regulatory period

#### 7.2.1 Longer WBA and SFAA periods

Telstra agrees with NBN Co that the term of WBA (and therefore SFAA) could be longer than 2 years. However, that would require having a stable regulatory framework in place that support RSPs' businesses and outcomes for customers.

Shorter periods would likely be needed if nbn co's proposed SAU were accepted, as there is little constraint on nbn co's prices, service quality and behaviours. nbn co would retain its substantial market power in negotiating commercial agreements, which in the past has led to terms and conditions that are unsatisfactory for RSPs and end users. Shorter periods would give an opportunity to more regularly assess how nbn co has behaved and press for improvements in outcomes for end users.

#### 7.2.2 Aligning the WBA/SFAA to the regulatory period

Telstra generally supports aligning the WBA/SFAA and regulatory periods. It also makes sense to have a lag after the commencement of a regulatory period, the negotiation of the next WBA/SFAA, and before the terms of the WBA/SFAA take effect. A lag should ensure the next replacement module is known before negotiations, any changes can be incorporated into the WBA, and any IT/operational changes necessary to take advantage of those changes can be implemented. Taking WBA4 as an example, nbn co had initially proposed allowing a 6-month transition period between the contract being finalised & it coming into effect (note: the WBA4 transition period evaporated due to delays).

nbn co does refer to giving RSPs 6 months' notice, but what is required is the full specification of any changes, so that RSPs are put in a position to determine their own IT specifications and implement changes at the RSP end.



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While alignment of periods makes sense, Telstra does not consider it would be in the best interests of end users to have a WBA lasting 5 years. Market conditions (product, technology, consumer preferences, etc) can change substantially over a 5-year period and it is unlikely that a contract will be able to accommodate those changes in way that promotes the long-run interests of end users. That said, it could be that the WBA/SFAA period lasts for 2.5 years and a corresponding SAU module lasts for 5 years.

### **7.2.3 Carrying current campaigns into the next regulatory period**

RSPs would benefit from clarity as to how nbn co intends to carry existing campaigns into the next SAU and WBA/SFAA cycle. For example, the Light Up Boost Rebate runs until Feb 2023, with rebates paid for 24 months following the connection of the AVC. If nbn co proposes any changes to this and other campaigns, will it withdraw the rebate, change the rebate amount or something else? The point is that if RSPs have been selling to customers on the basis of a campaign that is going to be changed, then nbn co needs to tell RSPs as soon as possible because they may not have the flexibility to change their retail terms.

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## 8 Service quality

### *Key points:*

- Current service quality does not meet the needs of end users
- The SAU Variation provides no regulatory framework for service quality
- Elements of the SAU Variation dealing with service quality are harmful to the LTIE

### 8.1 Current service quality does not meet the needs of end users

The terms of supply relating to the service quality provided by nbn co are set out in the WBA. nbn co's position is that the WBA is the most appropriate mechanism for determining detailed service levels and "*...that appropriate incentives and safeguards exist to ensure that end-users continue to receive the level of service that end-users should expect on the nbn network.*" This position does not, however, recognise that the service levels contained in the WBA are not delivering the level of services that customers expect, or that they are paying for.

There are clear gaps between the service quality provided by nbn co and what is needed for RSPs to deliver the quality of service expected by their customers. RSPs, like Telstra, are facing escalating complaints from customers, and nbn co is not delivering what RSPs are paying for. Telstra's experience is that customer complaints in relation to the NBN service are driven by an inability to connect due to outages or faults, ongoing service drops and slow speeds. The failure of current service quality in meeting the needs of consumers is illustrated by<sup>88</sup>:

- Between January and May this year, millions of Telstra customers have been impacted by planned outages, almost half of those planned outages did not meet the 10-day notification SLA. For many customers subject to a 'planned' outage, Telstra received less than 1 hours' notice. Further, most planned outages that did not meet the 10-day SLA occurred during core business hours (9am-5pm) meaning a direct and noticeable impact on NBN services.
- Under the current WBA, a customer can experience up to 10 drops in their NBN service a day before it can be classified as a fault (rather than a performance incident) and NBN Co obliged to investigate and rectify the issue within agreed fault timeframes which are shorter. The number of drops is reflected in modem back-up data. This occurs at a significant cost.
- Where a speed fault to an NBN service cannot be adequately resolved by NBN Co, a customer may be subject to an 18-month remediation period. During this time, they will have a degraded NBN service and may be reliant on an RSP-provided solution, such as 4G modem back-up.
- Since 2019, there has been a steady increase in the number of services that experience a fault in their NBN service within 30 days of activation. Further, an unacceptable number of services that experience a fault, experience a repeat within 30 days of the fault being addressed by NBN Co.

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<sup>88</sup> For more detail see Appendix D, Box 1

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- NBN Co consistently failing to meet its connection and assurance SLAs, alongside a significant number of missed appointments.
  - RSPs are not provided with all the near real-time data by NBN Co that would enable them to communicate efficiently with their customers about the status of their service, causing unnecessary delays and frustration as well as imposing additional costs on RSPs.

In an environment where Australians are increasingly working and learning from home, this is clearly unacceptable. NBN services need to be affordable. But they also need to be reliable. Critically NBN Co needs to be accountable for ensuring consumers receive the high-quality broadband service they expect and pay for.

## **8.2 The SAU Variation provides no regulatory framework for service quality**

### **8.2.1 Implications of having no framework in the SAU Variation**

The SAU Variation does not provide the minimum acceptable regulatory framework for service quality.

Instead of including commitments in the SAU Variation to maintain or improve service standards or its performance against them:

- NBN Co continues to maintain a position of relying on its WBA to set non-price terms and conditions.
- The SAU Variation allows NBN Co to increase prices to allow for changes to service quality but includes no mechanism for assessing the efficiency of any service-related expenditure.
- The absence of a clear link between price and service quality in the SAU Variation means there is no incentive for NBN Co to improve - or even maintain - service quality.

While progress has been made, commercial negotiations have not delivered the customer experience that RSPs and consumers expect and consultation with RSPs is often far from ideal. Most recently, nbn co has been considering implementing changes to the way that certain outages are managed and communicated to RSPs, who will then need to communicate with their customers. However, it is not clear to Telstra that nbn co has addressed our feedback in a meaningful way throughout the process and instead, we are likely to have to implement a solution that is less than ideal for us and our customers, with little clarity on when outages will occur and how long they will last.

At a minimum, a baseline service quality should be determined as part of the regulatory framework that applies to NBN Co and clearly linked to the SAU. Contrary to NBN Co's position, this would not preclude future commercial negotiations but rather ensure NBN Co has the right incentives to deliver the service that consumers expect and are paying for.

This is not a reason to reject the SAU Variation, as an SAU does not need to cover all terms and conditions of providing a service or methods of ascertaining those terms and conditions, as long as the SAU Variation does not prevent other avenues to establish such a framework.

In this case, taking into account the comments in the sections that follow, it is possible for the ACCC to issue Access Determinations, RKR's and for the Minister to issue SIP standards that bring about the minimum acceptable regulatory framework.

In the section that follows we set out what that framework needs to include to support the supply of services to end users and how that can be supported with the various instruments available. While not pertinent to the ACCC's decision whether or not to reject the SAU, except to the extent the ACCC is minded to commence an access determination process, neither should that decision delay the introduction of the minimum acceptable regulatory framework.

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## 8.2.2 Features of the minimum acceptable regulatory framework for service quality

Prof. Sappington also considered the service quality components of the SAU Variation and concluded:

*“NBN Co’s proposal for ensuring high quality wholesale broadband service is deficient in at least three important respects. First, NBN Co proposes that base levels of service quality be negotiated with retail broadband suppliers, with no direct ACCC oversight. Second, NBN Co does not explain in detail how future levels of service quality will be determined when demand and costs are forecast for upcoming regulatory periods. Third, NBN Co does not propose a comprehensive set of penalties that NBN Co will incur if it fails to deliver all promised levels of service quality.”<sup>89</sup>*

Considering this expert opinion and the reasons for it, Telstra submits that there needs to be three components to a regulatory framework for service quality.

### 8.2.2.1 Minimum service standards for consumer protection

The minimum service standards that customers will tolerate need to be established, along with penalties and incentives for nbn co to stay above that floor. These should not become the expected performance, but rather the floor, below which customers or RSPs are harmed. That floor should also reflect, and be updated regularly to reflect any changes in retail service quality regulation whereby RSPs are dependent on nbn co for compliance.

Currently, the WBA4 sets out some components of that floor, but there are gaps. The WBA4 minimum service standards were not commercially negotiated, they were incorporated by nbn co only after it became obvious that the ACCC would otherwise regulate those terms.

Those minimum service standards also need to adapt over time. Prof. Sappington comments:

*“The levels of service quality that best promote both the LTIE and the efficient use of the infrastructure are likely to change over time as industry demand and cost conditions change. Such changes often are difficult to predict accurately. Consequently, the LTIE is promoted by ensuring the ACCC can modify prevailing service quality standards (and associated compensation for NBN Co) as industry conditions change.”<sup>90</sup>*

Since the minimum service standards are not specified in the SAU Variation, there are other options. The ACCC could establish them in an Access Determination, or the Minister could specify them in as SIP Standards. Absent SIP Standards, we encourage the ACCC to establish minimum service standards in an Access Determination.

### 8.2.2.2 Forecast service quality for the next regulatory period

The SAU Variation proposes a process whereby nbn co provides forecasts of opex, capex, demand, price, and other things relevant to the regime. These forecasts provide RSPs, customers and the market more generally important information by which to plan for that regulatory period.

The vital input missing from this set of information, is nbn co’s forecast of the service quality that it plans to provide to RSPs and end users over the regulatory period. That forecast service quality is a key input for the regulatory period, as it justifies (or not) the opex and capex forecasts, and it justifies (or not) the proposed prices.

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<sup>89</sup> Sappington, para. 44.

<sup>90</sup> Sappington, para. 48.

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We note that nbn co splits its capex forecasts into components that separate out maintenance of existing service provision and improving service quality. Of its total forecast capex of \$2.9B in FY22, 54% is expected to be on improving service quality through expansion and capability improvements.

It is important for RSPs (and other stakeholders) to understand how this expenditure is intended to improve service quality and by how much, to help those reliant on the NBN to plan their own business activities.

It is important for the regulatory process, for nbn co to be measured at the end of the regulatory period whether it has delivered those expected service quality improvements, given the cost involved and the impact those costs will have on prices in the next and future regulatory periods. At the end of a regulatory period, if nbn co does not meet its service quality improvement expectations, then it should not be permitted to recover the costs and raise prices as if it had. If expected service quality is not specified, then during a regulatory period, nbn co will face an incentive to reduce service quality to meet other objectives (for example, if it expects to overrun on opex forecasts for some other reason, nbn co could reduce service quality to bring opex in line with forecast). This would not be in the LTIE.

It is also important to understand how future opex and capex allowances feed into prices for different services. For instance, if allowable capex and opex is dedicated to improving speeds from 100 Mbps to 1000 Gbps, then it must be clear that these costs do not feed into prices for 50 Mbps plans.

While this component is best dealt with in an SAU, it is not included in the SAU Variation. That is not a reason to reject the SAU Variation, however, it remains important to use a different instrument to establish this component. The ACCC has powers under the s151BU or s155 of the CCA, to require nbn co to provide a forecast service quality over a future regulatory period.

#### 8.2.2.3 Accurate reporting of service quality performance

It is critical for the ongoing operation of a minimum acceptable regulatory framework for service quality to have accurate reporting of the service quality metrics that are important to end users. This reporting will be helpful for the community and market to understand where the future focus areas to improve service quality are. It will also help nbn co justify opex and capex forecasts linked to service quality improvements for future regulatory periods. Prof. Sappington concludes:

*“To ensure that specified penalties for sub-standard levels of service quality are imposed appropriately, realized levels of service quality should be monitored and reported regularly. Public reports of realized service quality performance can further enhance NBN Co’s incentive to meet established service quality standards.”<sup>91</sup>*

The reporting needs to be well specified, comprehensive and flexible to changing circumstances in the market. Therefore, the SAU is not the best place to establish this reporting, as the SAU is very inflexible to change. We would instead encourage the ACCC to use s151BU record keeping rules (RKR) to enable nbn co to publicly report service quality performance in a way that helps customers and the market.

### 8.3 Elements of the SAU Variation dealing with service quality are harmful to the LTIE

While the SAU Variation does not have to establish the minimum acceptable regulatory framework for service quality to be acceptable, there are several aspects of the SAU Variation that are harmful to the LTIE and are unreasonable

#### 8.3.1 Pay for what you get

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<sup>91</sup> Prof. Sappington, para. 53.

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A key feature of the SAU Variation is that nbn co sets the wholesale prices regardless of the service quality that it delivers. It is not in the LTIE for the SAU Variation to enable nbn co to charge end users the full price for a service that nbn co does not deliver.

There are aspects in the WBA4 where nbn co is penalised for poor service quality, and the case to maintain those aspects of WBA4 do not need to be repeated for this decision of the ACCC.

However, one aspect of service quality that is not dealt with in the WBA4 is that nbn co often fails to deliver the line speed expected of customers, for the prices they are paying. This has caused immense complexity and hardship for RSPs and customers to manage. The ACCC and ACMA have taken enforcement action against RSPs and RSPs have each had to establish complex processes to accommodate nbn co's poor speeds on some lines.

While nbn co has invested to reduce the number of lines with poor line speeds, there are other areas where nbn co is intending to enforce fair use policies rather than invest to maintain service quality.

Without a mechanism that prevents nbn co from charging the full price for a wholesale plan with a stated line speed, the SAU is not in the LTIE and should be rejected.

In considering a future regulatory framework, such a mechanism would promote the LTIE if it provided a financial incentive for nbn co to improve service quality. For example, if nbn co can reliably deliver only 50 Mbps download speed on a line, nbn co should not be permitted to sell a 100 Mbps plan. However, nbn co should earn the financial reward of being able to sell the higher speed plan, if it improves the capability of the line.

### 8.3.2 Utilisation management

Under the SAU Variation, nbn co's congestion commitments would apply when shared network resources in the transit backhaul network exceed a utilisation threshold of **95% utilisation for 15 minutes or more on 3 separate days in a 30-day period**. Once applied, within 15 Business Days nbn co must take such measures as it considers appropriate to return the shared network resource to below the utilisation threshold. Nbn co must also report on shared network resources exceeding 95% as well providing details about the planned augmentation.

- Defining peak utilisation in relation to 3 separate days in a 30-day period can still result in congestion, particularly as a result of software updates.
- The utilisation threshold should not be limited to transit links. There are other parts of nbn co's network that could contribute to CVC congestion. The utilisation threshold should apply to all components needed to maintain CVC capacity so that RSPs receive traffic levels that approach the NNI capacity they purchase.
- The 95% utilisation threshold is not adequate for CVCs that are predominately used for high-speed plans. At 95% utilisation, RSPs could expect speed reductions of approximately 14% for Ultrafast services and 6% for Superfast services. The reason for this is that CVC's carrying higher speed plans need more headroom.

For these reasons, Telstra submits that the utilisation management approach in the SAU Variation is not in the LTIE. We note nbn co currently has a 70% utilisation threshold. We expect the above issues would be resolved if the utilisation threshold was in the 70-80% range.

### 8.3.3 Overbooking of NNI

Telstra has previously advocated for NNI overbooking under the current pricing construct to accommodate certain circumstances (e.g. when creating a new CVC and pulling down an existing CVC). However, under the construct proposed in the SAU Variation, NNI overbooking would no longer be needed.



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Telstra accepts that allowing RSPs to overbook NNI, means that nbn co cannot supply CVC on a committed information rate basis. Instead nbn co proposes supplying CVC on a peak information rate basis. While there is a certain logic to this, RSPs would not want the move to a peak information rate basis allow nbn co to congest the CVC network. There needs to be assurance that any reduction of the CVC rate below the peak rate, is caused by the RSP overbooking NNI and not because of congestion in downstream transit and access links.



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## 9 Issues with the SAU Variation drafting

There are a number of additional issues in the SAU Variation drafting that are likely to give rise to harm to the LTIE or are unreasonable.

Telstra has undertaken a preliminary review of the drafting in the SAU Variation, and has identified a number of areas where the drafting:

- does not align with the supporting submission put forward by nbn co; or
- raises issues that are not identified or acknowledged in nbn co's supporting submission.

These issues are detailed in the table set out in Attachment C. This table is not comprehensive, as Telstra is still conducting its review of the Varied SAU and may identify further potential misalignments. However, this table represents Telstra's preliminary view of potentially problematic drafting, which could give rise to harm to the LTIE.



## ATTACHMENT A: RSPs' most popular retail NBN plans

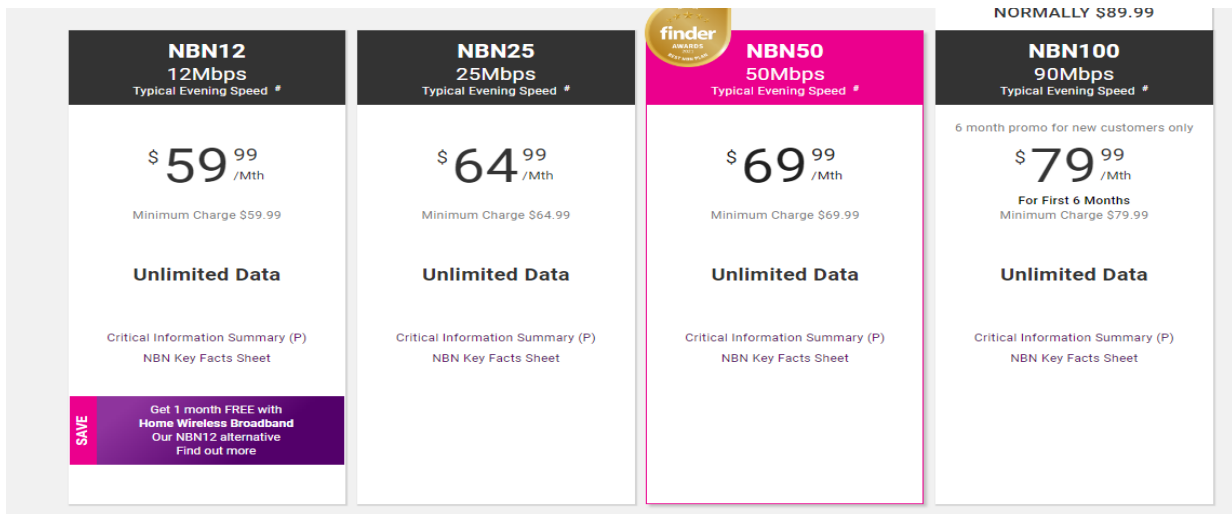


Figure 17: TPG Popular nbn plans <sup>92</sup>

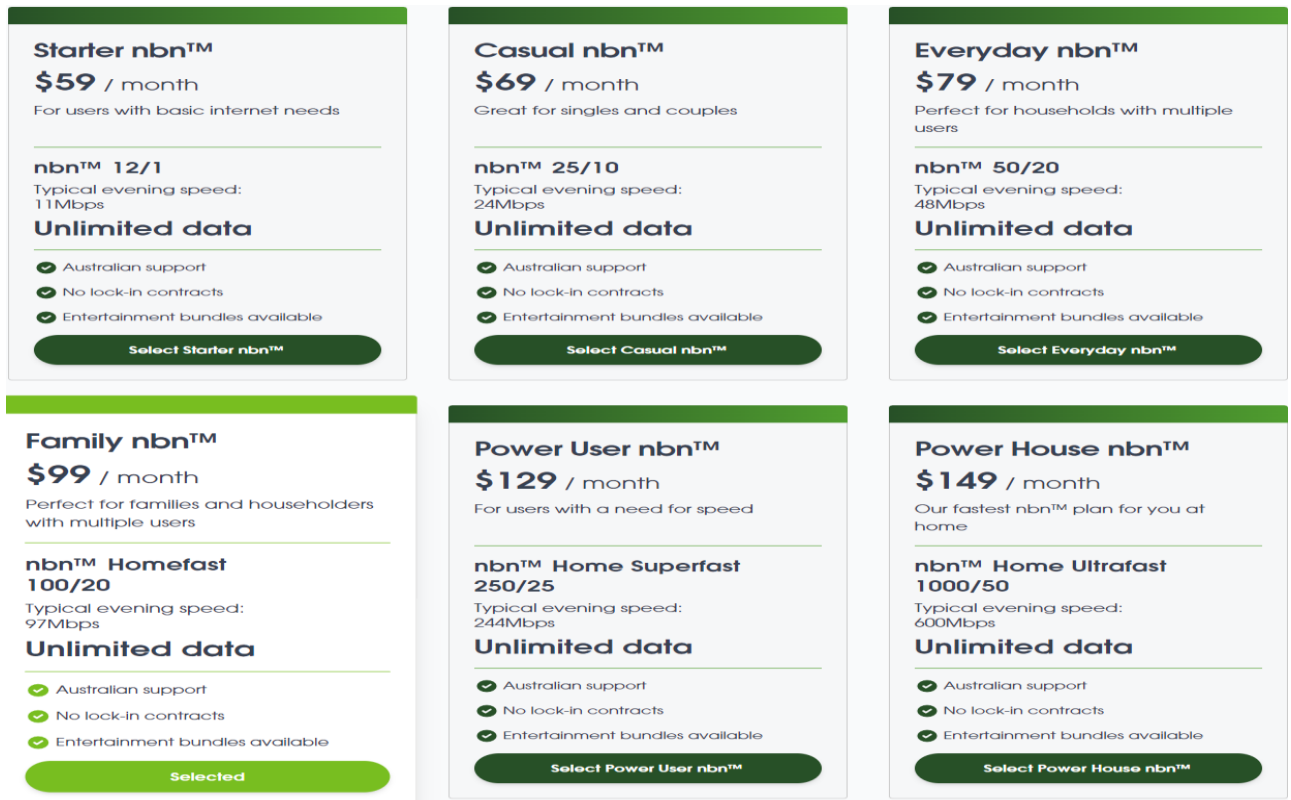


Figure 18: Aussie Broadband nbn plans <sup>93</sup>

<sup>92</sup> TPG, [Our Best Ever NBN Plan Range - Internet Plans From TPG](#), Accessed (4/7/2022)

<sup>93</sup> Aussie Broadband, [Unlimited nbn™ plans from \\$59/month | Aussie Broadband](#), Accessed (4/7/2022)

<b>Unlimited Data</b>	<b>Unlimited Data</b>
<b>Month-to-month plan</b>  <h2 style="color: #003366;">\$79.00</h2> <p>Per month for the first 6 months, normally \$99 (Intro + EOFY offers, T&amp;Cs)</p> <p><a href="#">▶Min. cost is \$331</a></p> <div style="background-color: #003366; color: white; padding: 5px; display: inline-block; margin-top: 10px;"><b>\$0 Startup fee</b></div>	<b>Month-to-month plan</b>  <h2 style="color: #003366;">\$109.00</h2> <p>Per month for the first 6 months, normally \$119 (Intro offer, T&amp;Cs)</p> <p><a href="#">▶Min. cost is \$577</a></p> <div style="background-color: #003366; color: white; padding: 5px; display: inline-block; margin-top: 10px;"><b>\$0 Startup fee</b></div>
<b>Premium speed</b> <b>100Mbps</b> typical busy period download speed 7pm – 11pm.	<b>Premium speed</b> <b>100Mbps</b> typical busy period download speed 7pm-11pm.
<b>Entertainment</b>	<b>Entertainment</b>

Fig 19: Optus Popular nbn plans<sup>94</sup>

GET \$15 OFF	GET \$15 OFF	GET \$15 OFF	GET \$15 OFF																
<a href="#">Check address →</a> NBN™ 25 <h3>Basic</h3> <p>25Mbps typical download speeds 7pm-11pm</p> <p>month-to-month</p> <h2 style="color: #003366;">\$80 per month</h2>	<a href="#">Check address →</a> NBN™ 50 <h3>Essential</h3> <p>50Mbps typical download speeds 7pm-11pm</p> <p>month-to-month</p> <h2 style="color: #003366;">\$80/mth for 6 months</h2> <p>Then \$95 per month</p>	<a href="#">Check address →</a> NBN™ 100 <h3>Premium</h3> <p>100Mbps typical download speeds 7pm-11pm</p> <p>month-to-month</p> <h2 style="color: #003366;">\$95/mth for 6 months</h2> <p>Then \$110 per month</p>	<a href="#">Check address →</a> NBN™ 250 <h3>Ultimate</h3> <p>250Mbps typical download speeds 7pm-11pm</p> <p>month-to-month</p> <h2 style="color: #003366;">\$125/mth for 6 months</h2> <p>Then \$140 per month</p>																
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Typical evening speed 7pm-11pm:																			
250 Mbps <small>Download</small>	22 Mbps <small>Upload</small>																		

Fig 20: Telstra nbn plans<sup>95</sup>

<sup>94</sup> Optus, [nbn Plans from Optus](#), Accessed (4/7/2022)

<sup>95</sup> Telstra, [nbn Plans - Unlimited Data with Telstra](#), Accessed (4/7/2022)

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## ATTACHMENT B: Best practice for community consultation

### B.1 nbn co SAU fails to meet best practice for community consultation

To illustrate how the SAU Variation falls short by comparison to other regimes for community consultation, we have summarised the community consultation guidelines that apply in the energy market, the airport development space and the NSW mining industry. While we acknowledge that community consultation obligations will necessarily differ between industries, there are some common themes amongst these examples which we view as best practice for community consultation requirements for regulated infrastructure – all of which are missing from the SAU Variation. Those key themes are:

- there is an expectation of engagement in sincere, meaningful and ongoing consultation with the community – the guidelines set a standard for this consultation;
- regulatory proposals should not be developed in a vacuum – a high quality regulatory proposal will be underpinned by quality consumer engagement;
- the community needs to properly understand any proposals and activities to be carried out by relevant entities and dissemination of quality information to allow consideration of proposals is key; and
- it is not enough to seek community consultation - relevant entities must demonstrate how they have taken community feedback into account when developing their plans and proposals.

These themes recognise that, with the privilege of operating/being granted rights to exploit important public infrastructure or assets, comes the responsibility of ensuring that the people and communities the infrastructure serves have an adequate “voice”. That voice needs to be heard when decisions are being made on how that infrastructure should be developed, what services it should be used to provide and what service levels will be available. In other words, community consultation needs to ensure relevant entities understand and act on what is actually important to the people who use the services or are impacted by them. The SAU Variation is conspicuous in its silence on these matters.

### B.2 Community Consultation for energy providers

The Australian Energy Regulator (**AER**) has published its community consultation expectations for energy providers in the [AER Better Resets Handbook](#). These expectations are principles-based and are applied across all network types. The AER expects energy providers to:

- sincerely partner and engage with consumers in developing regulatory proposals;
- transparently set out their engagement plans; and
- show clear evidence of how a proposal represents consumer views.

The AER has set out its expectations for network providers to engage in extensive community consultation in relation to their capex and opex. This involves informing consumer groups of historic capex and opex performance in achieving service levels, and how future capex and opex objectives will affect stakeholders. This includes for example, how capex will affect long term prices for customers and what other options might be available to satisfy a particular need (e.g. to meet certain service levels). Network providers must consider (and demonstrate consideration of) consumer views and objectives when developing their capex and opex proposals. The SAU Variation does not contain any similar obligations to consider community views and impacts in relation to capex or opex forecasts.

### B.3 Community consultation for airport developments

The Commonwealth Government released the [Airport Development Consultation Guidelines](#) in 2012 to help regulate Airport Lessee Companies (**ALCs**). Under these guidelines, ALCs must engage in

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continuous consultation with consumers and airport consultation groups in relation to land use, planning and developments at leased federal airport sites. There is a strong focus on transparency and building relationships with the community. The guidelines emphasise the importance of ALCs initiating discussions with various stakeholders (to receive diverse feedback) well before triggering formal public consultation requirements and before submitting formal planning proposals.

The Guidelines provide examples of what forms of community engagement would be appropriate, such as:

- public meetings with large audiences;
- stakeholder meetings with groups/individuals;
- focus group meetings;
- on-site meetings;
- permanent or ad hoc consultative committees;
- written submissions; and
- individual discussions for quick feedback.

#### **B.4 Community consultation for holders of mining exploration licences in NSW**

The NSW Government released a [code of practice](#) in 2016 which contains extensive community consultation obligations for exploration title holders.

It is a mandatory requirement for title holders to prepare a community consultation strategy before commencing any strategy. The community consultation strategy must:

- establish its objectives;
- describe and analyse potential community stakeholders, including the likely impact of each exploration activity and the potential areas of concern of each potential stakeholder group;
- outline how community consultation will be undertaken to ensure that the following objectives can be met:
  - the community is provided with reasonable information to understand proposals;
  - title holders can address community concerns early;
  - the community is informed of the proposed schedule; and
  - community consultation feedback is monitored and responded to,
- set out mechanisms for revising the community consultation strategy.

Title holders must provide clear evidence of their compliance with the code of conduct (i.e. show how community feedback was considered and implemented and how the community consultation strategy was executed).

The code of conduct also details the minimum requirements for the community consultation strategy and how title holders are to allocate risk and impact, and what community actions are required for each level of impact. For example, for low impact proposals, title holders need only respond to correspondence and hold meetings with key individuals or groups. However, for high impact proposals, title holders must engage in greater consultation activity such as holding meetings with a larger variety of stakeholders and setting up a dedicated project email address/phone number.

#### **B.5 Enhancements to nbn SAU required to align with best practice on community consultation**

nbn co occupies a privileged position within the Australian telecommunications sector, with the ability to affect the lives of millions of Australians. If accepted, the Varied SAU will endure until 2040. During this term, the interests of these Australians should be protected through formal obligations in the SAU obliging nbn co to properly engage with the community and stakeholders where nbn's actions under the terms of the SAU could result in significant impact on the users of nbn services.

There are various proposals, applications and submission made by nbn co to the ACCC pursuant to the terms of the Varied SAU that are likely to impact stakeholders (including end user customers and RSPs) where those stakeholders should reasonably expect to be consulted and their feedback taken into



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account in any subsequent proposal. In those cases, nbn co should be required to engage in community consultation and show how it has taken that community feedback into account.

As a minimum, the following aspects of the VSAU should be subject to explicit community consultation obligations:

- A requirement for the forecasts of Capital Expenses and Operating Expenses (for forecast ABBRR requirements) under clause 2C.2.5 should be the demonstration by nbn co of community expectations that were discerned from community consultation, and how the forecast capex and opex will meet those community expectations (for example in relation to availability of certain services or applicable service levels).
- An application by nbn co for a Cost Pass-Through Event based on a Service Standard Improvement should include a requirement under clause 2C.14 for nbn co to demonstrate that it has undertaken community consultation in relation to the particular Service Standard Improvement, and how the improvement proposed by nbn co aligns with the outcomes of that consultation and will deliver the community-desired results.
- Any Replacement Module Application by nbn co should be subject to nbn co having undertaken community consultation on relevant aspects of that Module and the Application should demonstrate how the changes made by that Replacement Module represent community views. Further, clause 3C.4.2 contemplates that nbn co must report to the ACCC for on the comparison between the information nbn co used in support of a Replacement Module, and nbn co's Capital Expenditure and Operating Expenditure for the relevant Financial Year. That comparison should include to what extent the community expectations that were to be delivered via the Replacement Module have actually been delivered via the Capital or Operational Expenditure.
- nbn co should not be able to trigger a Maximum Regulated Price Review pursuant to clause 2E.2 without having first completed community consultation in relation to the review. nbn co's Price Review Proposal should be required to include a description of how the proposal relates to, and to what extent it is necessary to deliver on, the result of that consultation.

While we acknowledge the VSAU does have some consultation requirements for SFAA changes and Network Changes, we do not think these go far enough in imposing the discipline of showing how community views and interests are taken into account in the resulting proposals.



## ATTACHMENT C: Concerns with the drafting of the SAU Variation

Issue	Position in nbn co supporting submission	VSAU clause(s)	Potential areas of misalignment between VSAU drafting and nbn co supporting submission
<b>Pricing considerations</b>			
<p>Price certainty of nbn co's zero rating of CVC charges under its new Flat Rate Offers</p>	<p>nbn co states it has addressed RSP needs for greater certainty in nbn co's wholesale pricing through the introduction of TC-4 AVC-only Offers which will be implemented by zero-rating CVC TC-4 on the relevant speed tiers. (Page 106, 180)</p>	<p>Schedule 1C (NBN Offers and Other Charges) 1C.4.1(c), 1C.5</p> <p>Schedule 1G (Maximum Regulated Price Review Mechanisms) 1G.2</p>	<p>In line with its supporting submission, the SAU Variation (<b>VSAU</b>) sets a price of \$0 for CVC charges in relation to higher speed tiers.</p> <p><i>However</i>, this proposed pricing remains subject to clauses 1C.5 and 1G.2 of the VSAU. These clauses give nbn co the right to change the pricing of CVC charges in certain circumstances, <i>including if nbn co provides adequate notice of its intention that the relevant offer cease to be zero-priced</i>. There is no ability for the ACCC or Access Seekers to reject such proposed changes. nbn co retains unilateral rights to start charging for CVC on the so-called AVC-only speed tiers provided that nbn co:</p> <ul style="list-style-type: none"> <li>• has "consulted" with Access Seekers;</li> <li>• provided Access Seekers and the ACCC at least 6 months' advance notice;</li> <li>• included reasons as to why the charge should cease to be zero-priced;</li> <li>• specified the new proposed price for the charge; and</li> <li>• specified the expiry date of the notice.</li> </ul> <p>These rights fundamentally undermine the claimed price certainty provided to industry and consumers by the introduction of the "AVC only" speed tiers.</p> <ul style="list-style-type: none"> <li>• While nbn co's potential to increase the price for CVC inclusions for higher speed services will be subject to any "Resetting Regulatory Determination" (effectively a FAD or a BROCC) made by the ACCC within the Relevant Financial Year, this would require future regulatory intervention in the event that nbn co significantly changes its prices, as opposed to including an absolute and binding commitment in the VSAU that CVC charges will not be reintroduced for higher speed services in the future.</li> </ul>



Issue	Position in nbn co supporting submission	VSAU clause(s)	Potential areas of misalignment between VSAU drafting and nbn co supporting submission
Adjustments to CVC inclusion in bundles	RSPs will benefit from greater long-term predictability of wholesale pricing because CVC inclusion adjustments will be made biannually to adjust the level of inclusion in the bundles by 50% of usage (meaning, in the case of usage growth, increased inclusions at no additional charge). The committed six-month update to CVC inclusions removes nbn co discretion in setting bundled inclusions, should provide RSPs with greater predictability regarding charges and remove the need for the existing bundle roadmap consultation process. With CVC inclusions adjusting automatically every six months, CVC inclusions will keep in closer alignment with customer usage. nbn co's commitment to provide 50% of any usage growth back as a bundle inclusion at no additional charge to RSPs means that nbn co is only monetising half of the potential overage growth (page 62, page 86, page 108).	Schedule 2B (Pricing Commitments, clause 2B.2.4, 2B.1.4(b) and (c))	<ul style="list-style-type: none"> <li>• The timing for nbn co making the first adjustments to CVC inclusions in the TC-4 bundles will depend on when the ACCC accepts nbn co's SAU variation and when the next Adjustment Date (of 1 January and 1 July) occurs following 1 July 2023. If the ACCC only makes a decision on the VSAU after 1 January 2023, the first adjustment could only occur on <u>1 January 2024</u> (assuming nbn co takes the full 6 months to introduce the bundles).</li> <li>• nbn co's current bundles roadmap only includes bundle inclusions based on forecast RSP CVC usage to 30 April 2023. nbn co's proposal for RSPs to bear the full CVC cost implications of increased usage between 1 May 2023 and 1 January 2024 is in direct contradiction to nbn co's claim that the VSAU will result in nbn co only monetising half of any potential overage growth.</li> <li>• Should the VSAU be accepted, this approach will also require nbn co to use historical data (from the period prior to the VSAU being accepted) in order to calculate the increase/decrease of CVC inclusions for the Bundled Offer Group in the next January or July.</li> <li>• nbn co seems to clearly propose calculating from the first Adjustment Date after the VSAU is accepted and using historical data. nbn co's supporting submission (see page 109) includes a worked example for an Adjustment Date of 1 January 2024 (using calculations subtracting data from 1 March 2022 to 31 August 2022 from data from 1 March 2023 to 31 August 2023). However, it is not clear in the VSAU how nbn co will measure this historical usage data so that it forms a meaningful baseline for assessing usage growth.</li> <li>• As a practical matter, it is unclear from the VSAU drafting how the adjustments to the CVC inclusions will be calculated for the first few Adjustment Dates where the baseline will need to be drawn from historic usage taking place prior to acceptance of the VSAU given that: <ul style="list-style-type: none"> <li>• There is presently no transparency and no binding commitments from nbn co regarding how nbn co measures usage;</li> </ul> </li> </ul>



Issue	Position in nbn co supporting submission	VSAU clause(s)	Potential areas of misalignment between VSAU drafting and nbn co supporting submission
			<ul style="list-style-type: none"> <li>• industry usage today is based on the current CVC provisioning-based charging model not the proposed usage-based charging model; and</li> <li>• currently RSPs have the benefit of offsetting usage on the 12, 25 and 50 Mbps speed tiers with high bundle inclusions on the 100 Mbps and higher speed tiers which will not continue to be the case when those speed tiers move to flat rate pricing.</li> <li>• Telstra considers that nbn co needs to clarify to industry and the ACCC how it plans to measure traffic and use historical data given the proposed changes to the CVC usage-based model and the fact that RSPs previously were able to offset usage on lower speed tiers with high bundle inclusions on higher speed tiers.</li> <li>• We are also concerned that the mechanism proposed in the VSAU for measuring CVC increases over time may not in fact result in CVC inclusions keeping in closer alignment with customer usage, due to the large elapse in time between the measurement period and the adjustment coming into effect. Telstra considers that the calculation mechanism for adjusting the CVC inclusions in the VSAU needs to be amended so that: <ul style="list-style-type: none"> <li>• the 6-month periods used in the calculation (1 March to 31 August or 1 September to last day of February) are <u>consecutive</u> (i.e. it should be the previous 12 calendar months that form the two 6 month measurement periods rather than comparing 6 months with the same calendar months in the previous calendar year). A side benefit of this approach is that it may reduce the need to rely on historic data from prior to acceptance of the VSAU – presently the VSAU anticipates an initial adjustment on 01/01/24, which means the measurement period for this is in-train right now. But if the measurements were consecutive as we propose, then the first measurement period could start as late as 1 January 2023; and</li> <li>• the measurement periods are much closer to the Adjustment Date to allow for a more relevant adjustment (i.e. not the previous 1 March to 31 August for a 1 January Adjustment Date and not the previous September to last day of February for an Adjustment Date of 1 July).</li> </ul> </li> </ul>





Issue	Position in nbn co supporting submission	VSAU clause(s)	Potential areas of misalignment between VSAU drafting and nbn co supporting submission
			<p>While Telstra acknowledges there may be reasons why a short interval of a day or so is required between the end of the measurement periods and the associated Adjustment Date, Telstra does not see any reason for a lag of 4 months provided nbn co continuously publishes the usage and inclusion data (as proposed below); and</p> <ul style="list-style-type: none"> <li>the VSAU requires nbn co to commence publishing daily reports of RSP-specific and industry-wide usage (given the inclusion increase is based on the industry average).</li> </ul>
<p>Cost pass-through mechanisms</p>	<p>nbn co proposes that it should benefit from a cost pass-through mechanism that has the following key elements:</p> <ul style="list-style-type: none"> <li>clearly-defined events that trigger nbn co's right to pass through material changes in costs of supply, in addition to Tax Change Events;</li> <li>mandatory, time-bound obligations on nbn co to pass through material decreases in costs of supply which result from certain events; and</li> <li>a supervisory role for the ACCC (page 142-3).</li> </ul> <p>nbn co claims this benefit is consistent with the views of other regulators, such as the Essential Services Commission of South Australia (page 144).</p>	<p>Attachment C (Dictionary) Definitions - 'Regulatory Change Event' and 'Regulatory Requirement'</p>	<p>The VSAU drafting will give nbn co significant discretion to pass through costs they would not otherwise have been able to pass through under the SAU. Telstra does not believe this material change in position from the original risk profile under the current SAU has been established to be in the long-term interests of end-users (<b>LTIE</b>).</p> <p>Further, on the current drafting of the VSAU, the new cost pass-through mechanism allows nbn co to pass-through changes to its cost base mid-cycle in a way that is unreasonable, unbalanced and does not reflect the approach taken by other regulated utilities.</p> <p>For example, the VSAU allows nbn co to make adjustments <i>at any time</i> during the regulatory cycle where it incurs, <i>or expects to incur</i>, changes in its costs.</p> <p>While there are similarities between the approach in the VSAU and those in regulated energy markets, there are some key areas where the VSAU gives less protection for RSPs compared to energy access seekers. These include:</p> <ul style="list-style-type: none"> <li>allowing cost pass-through for changed regulatory requirements which are yet to take effect with no apparent consequences if the change does not take effect; and</li> <li>strictly limiting the ACCC's assessment of the Attributable Amount to the existing circumstances and information available to nbn co at the time of its application when the regulator should be able to take into account all information available to it at the time it makes its decision.</li> </ul>



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			<p>Leaving aside the question of whether these new rights should be included in the VSAU at all, additional requirements needed to limit nbn co's pass-through rights to those applicable under the NER include:</p> <ul style="list-style-type: none"> <li>the event must substantially <i>affect the manner in which the services are provided</i> and materially increase or decrease the costs of providing <i>those services</i>;</li> <li>containing explicit references in the definitions of 'Regulatory Change Event' and 'Regulatory Requirement' to a change in costs being the trigger;</li> <li>making nbn co's ability to pass through increases in costs <i>time bound</i>;</li> <li>requiring nbn co to <i>provide evidence</i> of the actual and likely increase in costs (or cost savings) and for Positive Change Events evidence that such costs <i>occur solely</i> because of the Positive Change Event;</li> <li>having a more narrowly defined, more certain and less discretionary trigger (a 'regulatory obligation or requirement') than the Regulatory 'Regulatory Requirement' definition nbn co is proposing; and</li> <li>broadening the scope of the ACCC's consultation rights.</li> </ul>
<p>ACCC ability to conduct a public inquiry into a potential transition to a Weighted Average Price Cap (<b>WAPC</b>)</p>	<p>nbn co considers that while demand remains uncertain, a revenue cap meets the reasonableness requirements and remains an appropriate form of economic control on nbn co. A revenue cap is stable under the dynamic demand conditions faced by nbn co and individual price controls will provide certainty to all RSPs that they will not face price shocks irrespective of the speed tiers they acquire from nbn co and market to end-users. This contrasts markedly with a WAPC</p>	<p>4.13</p>	<ul style="list-style-type: none"> <li>Telstra considers that the ACCC has already conducted a public review process as part of the ACCC's industry working groups. The outcomes of that process were that the ACCC formed the view that a WAPC was preferable to a revenue cap '<i>because it provides stronger incentives on NBN Co to meet or outperform its demand forecasts and thereby promote the use of the NBN</i>'.<sup>96</sup> The ACCC also considered a WAPC '<i>provides for more flexibility to adjust prices to achieve efficient pricing outcomes than is likely to be available under individual product price caps</i>'. This approach also received broad support among RSPs. However, nbn co prefers a revenue cap and has taken that approach in the VSAU.</li> </ul>

<sup>96</sup> ACCC, *NBN Co Special Access Undertaking – Summary of industry working group outcomes*, page 13.



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	<p>where an allowable price increase (or decrease) under a WAPC could result in a RSP being afforded more or less protection than average, depending on whether its product weighting relative to the industry average means it is more or less affected by the particular range of price changes.</p> <p>The ACCC may initiate a public inquiry into whether it is appropriate for nbn co to be subject to a WAPC rather than a revenue control and individual price caps under the SAU. The ACCC may, following such an inquiry, direct nbn co to submit an SAU variation application setting out a WAPC applicable to Core Regulated Services.</p>		<ul style="list-style-type: none"> <li>• It is unclear what benefit is served by the VSAU requiring the ACCC to conduct a further full public review on this issue and the resulting costs to industry of participating in a further process prior to transitioning to a WAPC.</li> <li>• Even if the VSAU were to include a process for a transition from revenue caps to a WAPC as opposed to the preferred approach of incorporating a WAPC effective from acceptance of the VSAU, Telstra has fundamental concerns with the proposed transition process. In particular, the lengthy timeframe in which nbn co must submit the variation following a direction from the ACCC before any WAPC will take effect.</li> <li>• Prior to issuing any direction to nbn co requiring it to submit an SAU variation application setting out a WAPC for Core Regulated Services, the ACCC would first need to initiate a public inquiry into whether it is appropriate for nbn co to be subject to a WAPC rather than a revenue control and individual price caps under the SAU.</li> <li>• The process prescribed in the VSAU means that even if the ACCC directs nbn co to submit a SAU variation as soon as it can (i.e. on 1 July 2023), the soonest the WAPC could take effect is <u>5 years later</u>.</li> </ul> <p>It is unclear why:</p> <ul style="list-style-type: none"> <li>• nbn co requires the full term of the then current Regulatory Cycle (1 July 2023 to 30 June 2025) plus a further 12 month period of the next Regulatory Cycle (i.e. at total of 3 years at earliest, but potentially 4 to 6 years for a subsequent Regulatory Cycle) to lodge its variation; and</li> <li>• the commencement of the WAPC needs to be further delayed so it only commences at the start of the next Regulatory Cycle (which, on the earliest possible timing, would be 1 July 2028), a full 5 years after the ACCC issued its direction.</li> </ul>
Changes between NBN Offer types	nbn co may replace an nbn offer pricing construct with an alternative price construct (e.g., replacing a TC-4 Bundled Offer with AVC-only pricing) subject to giving RSPs at	2B.4	<ul style="list-style-type: none"> <li>• The VSAU will permit nbn co to change pricing constructs on RSPs and, in turn, consumers, on reduced notice. This change undermines price certainty</li> </ul>



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	<p>least six months' notification, consulting with RSPs, and provided that the ACCC does not object to the proposed change.</p> <p>nbn co claim these changes to nbn's pricing constructs provide RSPs with several layers of protection that promote the LTIE, namely:</p> <ul style="list-style-type: none"> <li>• changes cannot be made to pricing constructs without giving RSPs an opportunity to input into the proposed changes;</li> <li>• The amendments create a mechanism by which RSPs can provide nbn co with feedback and raise concerns with nbn co about any proposed price changes.</li> <li>• the amendments provide sufficient time for RSPs to make any adjustments to their retail product offerings.</li> <li>• the ACCC has the ability to object to the proposed change</li> </ul> <p>(Page 64)</p>		<p>for RSPs and consumers and fails to promote the LTIE (which nbn co claims the proposal does).</p> <ul style="list-style-type: none"> <li>• Today, the SAU does not allow nbn co to change nbn offer pricing structures without withdrawing the product (which requires <u>12-24 months'</u> notice).</li> <li>• Under the VSAU drafting, nbn co can replace an nbn offer pricing construct with an alternative price construct (e.g. replace AVC-only pricing with a TC-4 Bundled Offer) by giving RSPs only 6 months' notice, after having consulted with RSPs and provided the ACCC does not object to the proposed change.</li> </ul> <p>Telstra's concerns with this proposal include the following:</p> <ul style="list-style-type: none"> <li>• nbn co's consultation process with RSPs may remain private, with no visibility of submissions and nbn co replies given to the ACCC or other interested stakeholders such as consumer bodies. ACCC oversight of any such consultation process would assist the ACCC in informing whether it wishes to exercise its objection rights; and</li> <li>• the timing of the consultation process creates the potential that nbn co will not have concluded consulting with Access Seekers before the ACCC is required to make an objection (noting the ACCC can extend for a further 20 Business Days). Under the VSAU, the ACCC must give an objection within 40 Business Days from the date nbn co notifies the ACCC of the proposal but nbn co is only required to commence consultation with Access Seekers no more than one month after the proposal is released.</li> </ul>
<p>Broadened scope of Tax Change Events which may result in an increase to the MRPs</p>	<p>Nbn co's Supporting Submission refers to the current SAU including a mechanism in relation to Tax Change Events which applies in the Initial Regulatory Period but offers no justification for expanding the scope of Tax Change Events, particularly in circumstances where nbn co has included the ability to</p>	<p>Attachment C (Dictionary) definitions of 'Negative Tax Change Event' and 'Positive Tax Change Event'</p>	<p>Nbn co's supporting submission does not explain the rationale for broadening the scope of Tax Change Events which can result in changes to the Maximum Regulated Prices (<b>MRPs</b>).</p> <p>For both kinds of Tax Change Events, there are changes that mean:</p> <ul style="list-style-type: none"> <li>• a Tax Change Event can occur in Subsequent Regulatory Periods (not just the Initial Regulatory Period); and</li> </ul>



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	make broader cost pass-through applications to the ACCC.		<ul style="list-style-type: none"> <li>the scope of when a Tax Change Event (either positive or negative) will occur has been broadened (i.e. it was previously quite limited to the costs of supplying NBN Offers and Other Charges, it can now be the costs of supplying any product and service, arguably anything supplied by nbn co). This could arguably mean that a Tax Change Event could be triggered because of a change in a Relevant Tax that only impacts Competitive Services.</li> <li>This has the effect of widening the scope of circumstances in which a Tax Change Event occurs (and Maximum Regulated Prices may be changed).</li> </ul>
Discounting rules	<p>nbn co must reduce MRPs if its TC-4 revenue in a Financial Year is more than 5% less than the undiscounted TC-4 revenue nbn co would have earned on list prices.</p> <p>This means the MRPs will track effective market prices over time, end-users and RSPs will be protected from price shocks and RSPs will have greater cost certainty. (Page 19, 46)</p>	Schedule 2B (Pricing Commitments) clause 2B.2.9	<ul style="list-style-type: none"> <li>The potential for the proposal to result in MRPs tracking market pricing or in enhanced price certainty for RSPs is undermined by the drafting. This provides nbn co with complete discretion over which TC-4 MRPs to reduce and by how much provided the combined reductions have the effect that if they had been in place the Discounting Threshold would not have been exceeded.</li> <li>The scope of excluded discounts is also very wide. These include amounts paid in connection with service standard commitments, amounts paid to resolve disputes or refund miscalculated or overpaid accounts and amounts nbn co is require to rebate or credit to the customer as a result of nbn co's delay in making adjustments to the MRPs. If, for example, nbn co routinely rebates amounts to RSPs due to a failure to meet its service standards commitments, there is an argument that these amounts should be viewed as a discount and the MRP for the following year reduced accordingly.</li> </ul>
<b>Issues with proposed additional fixed principles</b>			
The need for the VSAU to give flexibility to adjust the ICRA in future.	In the same manner as the rolling forward of the ICRA, specified in existing fixed principles clause 2C.5.4(a) (clause 2C.4.2(a) in the VSAU), is essential to nbn co's regulatory certainty, nbn co believes specifying how the value of the Real Core	Schedule 2C (Long Term Revenue Constraint Methodology and	<ul style="list-style-type: none"> <li>This proposed new fixed principle specifies how the value of the Real Core Services ICRA as at 1 July 2023 will be calculated for the purposes of calculating the revenue cap for Regulated Core Services for all Regulatory Cycles other than the First Regulatory Cycle.</li> </ul>



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	<p>Services ICRA as at 1 July 2023 will be calculated, for the purposes of calculating the Forecast Core Services Revenue Cap in all Regulatory Cycles after the First Regulatory Cycle, specified in clause 2C.4.4, is also essential for regulatory certainty and the promotion of long-term cost recovery.</p> <p>The value of the Real Core Services ICRA as at 1 July 2023 will be calculated by relying on processes set out in Module 1 of the current SAU (i.e., applying a cost allocation methodology to the values determined in the LTRCM Determinations issued by the ACCC to determine an amount of unrecovered costs attributable to Core Regulated Services in Financial Years 2020/21, 2021/22 and 2022/23) and by anchoring the value of the Nominal Core Services ICRA at 1 July 2023 to the 1 July 2020 Nominal Core Services ICRA, which is specified in dollar terms in the Variation. (Page 220)</p>	<p>Regulatory Asset Base) clause 2C.4.4</p>	<ul style="list-style-type: none"> <li>• The effect of crystallising the ICRA and making the way the Real Core Services ICRA is calculated a fixed principle is that the ACCC cannot reject a subsequent variation (e.g. a Replacement Module Application) for a reason that relates to the value of the Real Core Services ICRA, i.e. that it is set at too high a level to result in any meaningful binding revenue cap on nbn co over the remainder of the SAU term.</li> <li>• While nbn co claims this new fixed principle relating to the opening value of the Real Core Services ICRA is essential to nbn co's regulatory certainty, Telstra considers that it is not in the LTIE to fix the ICRA on a forward-looking basis. Instead, the ACCC and industry (and indeed nbn co) may require some flexibility to vary the ICRA over the SAU term and it is inappropriate and not in the LTIE for the method of its calculation to be locked in until 2040.</li> <li>• The effect of having the relevant existing provisions in the current SAU as fixed principles has effectively meant that there has been no binding regulatory cap on nbn co to date. It is inappropriate to lock in now an untried and untested mechanism for draw down and recovery of part of the ICRA balance in circumstances where it is unclear if the fixed principle will have the effect nbn co claims of resulting '<i>in price certainty for RSPs and end-users, as well as confidence that nbn's prices are set at efficient levels</i>'. (Page 70)</li> <li>• Telstra considers that flexibility needs to be built in to allow the ICRA to be adjusted in the future. This could be achieved by including a new concept in clause 2C.4.2(b) (Initial Cost Recovery Account) and/or 2C.4.4 (Value of the Real Core Services ICRA for later Regulatory Cycles) to reduce the overall ICRA balance by the value of any decrease to the ICRA. This would preserve the new revenue cap mechanism proposed by nbn co (ABBRR + annual drawdown). Clearly, this would also need to be accompanied by an additional clause setting out the mechanics of how the ICRA could be varied (i.e. by who, under what conditions and setting out the relevant process).</li> </ul>
<p>What happens to the ICRA balance at the</p>	<p>nbn co recognises that it is unlikely to be able to recover all of the ICRA by 2040 and has proposed in the VSAU that it will only have the opportunity to recover a clearly</p>		<ul style="list-style-type: none"> <li>• The ongoing lack of clarity about what will happen with the recovery of the ICRA post 2040 creates long term regulatory uncertainty for RSPs and ultimately end users about potential long term price increases after the end of the SAU term. This is because while nbn co's submission is silent on what it</li> </ul>



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end of the SAU term?	<p>defined and constrained lesser amount over the remaining term of the SAU. (Page 54)</p> <p>nbn co will not have the opportunity to recover the entirety of the Core Services ICRA <i>until beyond the term of the SAU</i>. (Page 122)</p> <p>nbn co has indicated that it is willing to take a pragmatic approach to the ICRA, proposing to constrain recovery of the ICRA during the term of the SAU. While nbn co is willing to provide greater certainty and transparency about the rate at which it will recover the ICRA, and do so over a longer period of time than provided for in the current SAU, <i>it would be inappropriate for nbn to agree to any write down of either the ICRA or the RAB</i>. (Page 35)</p>		<p>proposes will happen to the ICRA balance upon expiry of the VSAU, the constraints on ICRA recovery are clearly framed to only apply for the remaining SAU term and nbn co expressly does not agree to any write down in the value of the ICRA.</p>
Additional fixed principle - Forecast Nominal Core Services ABBRR Requirements	<p>The Forecast Nominal Core Service ABBRR will be included in each Replacement Module and just as the Forecast Nominal ABBRR calculation is important for nbn's long-term certainty, the Forecast Nominal Core Services ABBRR calculation is similarly important.</p> <p>The Forecast Nominal Core Services ABBRR is calculated in clause 2C.2.2 the same way (i.e., at a minimum, taking into account specified elements) as the Forecast Nominal ABBRR is calculated in existing fixed principles clause 2C.2.1(a), albeit in the narrower context of determining nbn's</p>	<p>Schedule 2C (Long Term Revenue Constraint Methodology and Regulatory Asset Base)</p> <p>2C.2.2 - Forecast Nominal Core Services ABBRR Requirements</p>	<ul style="list-style-type: none"> <li>• These appear to operate in the same way as the existing Forecast ABBRR Requirements but apply in relation to Core Regulated Services (i.e., how the ABBRR for core services is determined).</li> <li>• The effect of this fixed principle is to lock in historical asset allocations between core regulated services and competitive services, despite changes in demand over time. This is not in the LTIE as cost allocations need to change as utilisation of assets change. For instance, shared infrastructure predominately used for residential TC4 services one year, might be used predominately for Enterprise Ethernet another year.</li> <li>• Further work is required to provide sufficient certainty for industry on which services are Core Regulated Services and which are Competitive Services (see entry on 'Competitive Services and Core Regulated Services', below).</li> </ul>



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	<p>revenue allowance from Core Regulated Services.</p> <p>That is, the formula used to calculate the Forecast Nominal Core Services ABBRR is specified in the Variation with the same level of specificity, detail and certainty as the existing fixed principles formula for the Forecast Nominal ABBRR.</p>		
<b>Matters that interfere with the ACCC's decision-making ability</b>			
Replacement Module Assessment Process	<p>nbn co has developed a Cost Allocation Manual (<b>CAM</b>) which details how costs have been attributed and allocated between Core Regulated Services and Competitive Services. The ACCC must have regard to the CAM when making cost allocation decisions. (page 142)</p> <p>nbn co's costs will be deemed prudent if they are incurred on Government-directed projects (i.e. projects subject to a notice from the Communications Minister stating that the project is required to achieve Government policy (<b>Government Policy Project Notice</b>)). These costs will therefore be included in the ABBRR and nbn co will be permitted to recover such costs under the revenue cap. The ACCC may cap the amount of expenditure included in the ABBRR at the amount of any cap specified in the Government Policy Project Notice. (page 71)</p>	<p>Schedule 2C (Long Term Revenue Constraint Methodology and Regulatory Asset Base)</p> <p>clauses 2C.10.2, 2C.10.4(c), 2C.10.4(e), 2C.10.5(b), 2C.10.5(d)(ii),</p> <p>4.14, 2C.2.5, 2C.9.7, 2C.13.5</p>	<p>The key issues arising from nbn co's proposed amendments to the ACCC's Replacement Module Determination are as follows:</p> <ul style="list-style-type: none"> <li>• <b>The ACCC's decision-making process is hampered by nbn co's Cost Allocation Manual:</b> If the ACCC determines cost allocations via the Replacement Module Determination process, the ACCC is required to have regard to nbn co's Cost Allocation Manual (<b>CAM</b>). The ACCC is also required to have regard to the CAM in proposing the allocation of building block costs arising from the categorising or recategorising products as either Core Regulated Services or Competitive Services. This appears to afford nbn co considerable flexibility and curtail the ACCC's discretion in making an appropriate Replacement Module Determination, especially since the ACCC has no approval role or ability to initiate changes in relation to the CAM. In fact, nbn co is only required to provide the ACCC with an updated copy of the CAM 30 days after making 'material changes'. This provides nbn co with considerable commercial flexibility at the expense of providing any regulatory certainty as to the regulatory framework nbn co will apply and the ACCC is required to apply regarding cost allocation to either the ACCC or industry.</li> <li>• <b>Issues relating to scrutiny of nbn co's expenditure on Government-directed projects:</b> It is inappropriate for nbn co's expenditure relating to Government-directed projects to be deemed prudent. This allows the Government and nbn co great flexibility in deciding what costs to incur. Given that nbn co is wholly owned by the Australian Government, it is entirely</li> </ul>





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	<p>If the ACCC fails to make an ACCC Replacement Module Determination within 20 Business Days prior to the last day of a Regulatory Cycle, and the ACCC has not accepted nbn co's Replacement Module Application (<b>RMA</b>) for the upcoming Regulatory Cycle, the ACCC will be deemed to have made a Replacement Module Determination for that upcoming Regulatory Cycle consistent with nbn co's RMA. (page 160)</p>	4.10(j)	<p>possibly that a Government direction could require nbn co to act imprudently in the pursuit of a particular policy objective. However, in order for nbn co's expenditure to be in the LTIE its prices need to be set efficiently and not reflect the recovery of imprudently incurred expenditure. As a result, the ACCC's ability in making an appropriate Replacement Module is hindered given they cannot assess for prudent expenditure when it is incurred in connection with Government-directed projects (as such expenditure is deemed to be prudent, regardless of whether that is in fact the case).</p> <ul style="list-style-type: none"> <li>• <b>The ACCC's ability to cap expenditure recovery should not be constrained:</b> It is also inappropriate to restrict the ACCC's ability in capping expenditure recovery. The ACCC may only cap nbn co's recoverable costs to a maximum amount specified in the relevant Government Policy Project Notice (which is determined at the Communication Minister's sole discretion). This means the Government can ultimately dictate the amount of expenditure recoverable by nbn co since the ACCC may only cap the maximum amount as pre-determined by the Government. The ACCC is therefore significantly limited in its ability to consider prudent expenditure under a Replacement Module Determination and regulate the maximum amount recoverable for Government-directed projects.</li> <li>• <b>It is inappropriate for the ACCC to be deemed to have made a RMA in accordance with nbn co's RMA:</b> It is inappropriate for the ACCC to be deemed to have made a Determination in accordance with nbn co's Replacement Module Application if it fails to make a Determination within 20 days prior to the last day of the Initial Regulatory Period/Cycle is appropriate (clause 4.10(j)). While Telstra appreciates the need for nbn co to have regulatory certainty, it seems preferable and more consistent with standard practice for the existing SAU module to be rolled over rather than the ACCC having been deemed to have made a new ACCC Replacement Module Determination on the same terms as nbn co's Replacement Module Application.</li> </ul>
Classification of services as Core	Transparency commitments will provide comfort to the ACCC and industry that nbn co is not cross subsidising the costs of	Attachment C (Dictionary) definition of	The proposed categorisation process in the VSAU does not strike the claimed balance between providing nbn co with commercial flexibility regarding product development and appropriate regulatory oversight. Rather, this process leans too far towards giving



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Regulated Services or Competitive Services.	supplying its business grade services from revenues earned from the supply of residential grade services. Working in tandem with the proposed new price controls, it will also ensure that the prices for nbn co's Core Regulated Services accurately reflect the cost of providing those services and will promote the efficient use of the network used to supply those services (page 47)These functions and powers strike a balance between providing nbn co with a level of commercial flexibility to develop new products and prices commercially but subject to regulatory oversight, and the possibility of regulatory intervention by the ACCC. (page 20)	'Competitive Services'  Schedule 2C (Long Term Revenue Constraint Methodology and Regulatory Asset Base)  2C.10.4 and 2C.10.5  4.5, 4.6, 4.10	<p>nbn co commercial flexibility and only provides an inflexible process by which the ACCC can disallow nbn co's categorisation. Accordingly, Telstra considers the following changes to the categorisation process in the VSAU are required:</p> <ul style="list-style-type: none"> <li>the introduction of a new product or service or variation to an existing product or service should not be deemed by nbn co to fall within the scope of an existing Core Regulated Service or Competitive Service (clause 2C.10.4(a)) but should be subject to the categorisation process in clauses 2C.10.4(b) to 2C.10.4(e).</li> <li>While the ACCC can disallow nbn co's proposed categorisation of new products or services under clauses 2C.10.4 or 2C.10.5, the proposed process for the ACCC assessing changes to the classification of the NBN Co Enterprise Ethernet, NBN Co Satellite Mobility for Large Commercial Passenger Aircrafts and NBN Co Business Satellite services (<b>initial Competitive Services</b>) as part of a Replacement Module Application is inflexible.</li> </ul> <p>The ACCC has no ability to require nbn co to change its proposed variation to differently categorise the services and would be required instead to reject the RMA and potentially issue an ACCC Replacement Module Determination to have the categorisation of services changed. It is unclear why nbn co requires the ability to propose the recategorization of these services in a Replacement Module Application.</p>
Qualifying circumstances are no longer in the LTIE	The qualifying circumstances and the notional fixed period applicable to the new fixed principles have the same effect as those applicable to the existing fixed principles terms and conditions under the SAU. (Page 218)	Clause 5.4	<ul style="list-style-type: none"> <li>nbn co is not proposing to change the existing qualifying circumstances from those set out in the current SAU (clause 5.4).</li> <li>The qualifying circumstances have the effect that if nbn co gives the ACCC a SAU variation, the ACCC cannot reject it if contains a fixed principle term or condition that is identical to one in the original SAU in all respects, provided the variation was given during the notional fixed period if none of the qualifying circumstances exist.</li> <li>The ACCC must refuse to accept a SAU variation if it includes a fixed principle term or condition and the ACCC considers it should not be a fixed principle term or condition, or the notional fixed period or qualifying</li> </ul>



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			<p>circumstances for the fixed principle should not be the notional fixed period or qualifying circumstances.</p> <ul style="list-style-type: none"> <li>The current qualifying circumstances are limited and require the ACCC to be satisfied that either there is a manifest and material error in the fixed principles or any information on which the fixed principle was based was false or misleading in a material respect.</li> </ul> <p>Telstra considers it would be appropriate to include some further qualifying circumstances such as where the ACCC considers that a fixed principle is no longer in the LTIE or the Productivity Commission review finds the fixed principles are inappropriate in its pre-privatisation review.</p>
Breadth of scope and conflicting nature of Expenditure Objectives and Expenditure Factors	Not addressed.	4.5(d)	<ul style="list-style-type: none"> <li>As part of the ACCC's assessment of whether to accept or reject a Replacement Module Application (which is an nbn co proposed SAU variation) and whether the proposed terms and conditions are reasonable, nbn co requires the ACCC in the VSAU to have regard to the Expenditure Objectives and Expenditure Factors.</li> <li>Telstra has concerns that this seeks to fetter the ACCC's ability to exercise its full statutory powers to determine what is reasonable.</li> <li>As the ACCC has noted in its consultation paper, the list of Expenditure Factors and Expenditure Objectives is extremely broad. In some instances, these factors and objectives appear to potentially conflict with each other or the statutory matters to which the ACCC is already required to have regard when assessing the reasonableness of proposed terms of a variation under s 152AH of the CCA.</li> </ul> <p>As illustrations:</p> <ul style="list-style-type: none"> <li>The proposed new Expenditure Objective of implementing a project or program which is the subject of a Government Policy Project Notice (2C.2.5(iii)(C)) may well conflict with statutory criteria the ACCC is required to consider regarding the economically efficient operation of a carriage service, a telecommunications network or a facility (s 152AH(1)(f)).</li> </ul>



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			<ul style="list-style-type: none"> <li>There may well also be inherent contradictions between the proposed new Expenditure Factors – for example, the ACCC considering the historical trends in respect of Relevant Expenditure (2C.2.5(c)(i)) and nbn co's levels of Operating Expenditure (2C.2.5(c)(x)(A)) and Capital Expenditure (2C.2.5(c)(xi)(A)) in the previous Regulatory Cycle whilst having regard to the promotion of competition in telecommunications markets (2C.2.5(c)(v)).</li> </ul>
<p>Required use of the CAM by the ACCC is inappropriate</p>	<p>nbn co has developed a CAM that provides further detail on how it has attributed and allocated costs between Core Regulated Services and Competitive Services. This manual describes the detailed methodology which nbn co uses to allocate costs in accordance with the SAU's Cost Allocation Principles. A copy of the CAM will be provided to the ACCC around the time the VSAU is lodged with the ACCC, and nbn co is required to provide an updated copy of the CAM to the ACCC within 30 days after making any material changes to it.</p> <p>The Variation provides that the ACCC must have regard to the CAM when making cost allocation decisions under the SAU. (Page 142)</p>	<p>Clauses 2C.10.2(a), 2C.10.2(c) to (e) 2C.10.5(b), 2.10.5(d)(ii), 2C.10.4(c), 2C.10.4(e)</p>	<p>nbn co's supporting submission does not offer any explanation on why it is appropriate for the ACCC's decision-making on cost allocation to be curtailed by requiring it to have regard to the CAM, especially in circumstances where nbn co is unconstrained in its ability to change the CAM at any time. This undermines regulatory certainty, as the factors the ACCC is required to have regard to may be changed by nbn co at any time without any consultation or regulatory oversight.</p> <p>The ACCC is required to have regard to the CAM when it makes decisions allocating costs to Competitive or Core Regulated Services. Specifically, the ACCC is required to have regard to the CAM when it categorises services and/or determines the appropriate allocation of building block costs:</p> <ul style="list-style-type: none"> <li>for a new Competitive Service if it disallows nbn co's categorisation of new services and/or the allocation of building block costs to new Competitive Services (2.10.4(c));</li> <li>if it disallows nbn co's categorisation of new service as a Core Regulated Service and categorises the service as a Competitive Service or disallows the allocation of building block costs to new Competitive Services (2.10.4(e)); and</li> <li>if the ACCC does not accept a RMA where nbn co has proposed the categorisation of a product or service in that RMA and the ACCC makes an ACCC Replacement Module Determination (2C.10.5(d)).</li> </ul> <p>This significantly impedes the ACCC from exercising an appropriate degree of discretion (and considering the required statutory factors in respect of a SAU variation). Telstra considers it is particularly inappropriate for the ACCC's decision-making to be constrained in this manner given:</p>



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			<ul style="list-style-type: none"> <li>• nbn co's complete discretion to make changes to the CAM without requiring any consultation with either the ACCC or industry;</li> <li>• the lack of any requirement for nbn co's changes to the CAM to be approved by the ACCC – indeed, the ACCC may only receive a changed CAM from nbn co 30 days after material changes are made; and</li> <li>• there is no requirement for nbn co to update the CAM to reflect changes the ACCC has made in the categorisation or recategorization of services and the allocation of building block costs associated with such allocation.</li> </ul>
<b>Structural and process problems with the VSAU</b>			
Schedules that take effect even if Replacement Module or ACCC Replacement Module is in effect	Not addressed.	Schedule 2A – Implementation Schedule 2B – Pricing Commitments Schedule 2C – Long Term Revenue Constraint Methodology and Regulatory Asset Base Schedule 2D – Product Development and Withdrawal	<ul style="list-style-type: none"> <li>• Some of the Schedules in the VSAU take effect irrespective of whether a Replacement Module/ACCC Replacement Module Determination is in effect. This means that the contents of the Schedule will still apply regardless of whether or not there is a Replacement Module in place (referred to herein as <b>Enduring Schedules</b>).</li> <li>• Most of the Schedules in Module 2 of the VSAU are Enduring Schedules.</li> <li>• However, Schedules 2F – Term of any SFAA and Schedule 2G – Non-price terms and conditions have not been made Enduring Schedules. This means that they will not apply if there is a Replacement Module in place. Telstra considers that Schedule 2G should continue to apply even if there is a Replacement Module in place.</li> <li>• It is also unclear in the VSAU how any inconsistencies between the Enduring Schedules and the Replacement Modules should be resolved, other than in the case where there is a new obligation in a Replacement Module that is clearly intended to displace a Schedule 2 existing obligation. However, while this may work for the First Regulatory Period, it is harder to anticipate the content of future Replacement Modules. To address the risk of confusion as to nbn co's rights and obligations under the VSAU, the VSAU should include a general order of precedence clause that properly addresses the potential</li> </ul>



Issue	Position in nbn co supporting submission	VSAU clause(s)	Potential areas of misalignment between VSAU drafting and nbn co supporting submission
		Schedule 2E – Maximum Regulated Price Review Mechanisms.	for inconsistencies between the Enduring Schedules and any Replacement Modules.
low-income and vulnerable customers	The VSAU commits nbn co to work with the industry, Government and consumer advocacy groups on an ongoing basis to address the needs of low-income, vulnerable and unconnected end-users. These commitments promote both economic efficiency and social equity and, in turn, are reasonable and promote the LTIE (pages 12, 19)	Schedule 3E (PDF and other processes) Clause 3E.2	<p>The VSAU does not require nbn co to take any action to address any concerns or proposals raised by the Low-Income Forum. nbn co is solely required to provide Low-Income Forum members with a report on the progress of its initiatives and to provide a website update.</p> <p>nbn co has not imposed any meaningful obligations on itself in relation to improving NBN access for low-income consumers via the low-income forum. As such, the ACCC should have the ability to impose greater obligations to ensure nbn co implements appropriate initiatives to improve NBN access for low-income and vulnerable consumers. We recommend a similar approach be taken here as is the case for service standards (see clause 1C.1.8 and 2B.1.7) to preserve flexibility, so it is clear nbn co's obligations in relation to the low-income forum are not taken to prevent the ACCC requiring further commitments to be implemented that improve NBN access for these customers through the ACCC taking regulatory action (or as a result of commercial agreement between nbn co and RSPs).</p>
No revocation of nbn co's Replacement Modules for wrong information or error	Not addressed.	No provision in the VSAU	<p>While the VSAU provides that the ACCC may revoke an ACCC Replacement Module Determination within 12 months of it being made if the ACCC considers there is a material error or deficiency in it (see clause 4.11), there is no corresponding ability for nbn co to revoke (or be required to revoke) its Replacement Modules.</p> <p>It is unclear why this change would be in the LTIE when it does not equally apply to wrong information or error in one of nbn co's Replacement Modules, without requiring nbn co to go through the process of seeking to vary the SAU to remove the error.</p> <p>It is also unclear to Telstra why a Replacement Module proposed by nbn co ought to be less susceptible to error. Accordingly, given Replacement Modules can be in place for a long time (3 to 5 years), Telstra considers it would be in the interests of LTIE for the VSAU to include a method for nbn co to revoke or amend a RMA or Replacement Module in a timely manner without having to go through a full SAU variation process.</p>



Issue	Position in nbn co supporting submission	VSAU clause(s)	Potential areas of misalignment between VSAU drafting and nbn co supporting submission
<b>Service and service quality issues</b>			
Utilisation management	<p>The commitment to ensure shared network resources operate below 95% utilisation provides RSPs, and by extension end-users, confidence that nbn co will continue to ensure the network has sufficient capacity to support end-users' services (page 77, 180).</p> <p>While the WBA utilisation threshold is lower at 70%, implementing this utilisation threshold under the SAU would embed a threshold that would lock in long-term unnecessary network augmentation and cost (page 186-187)</p>	<p>Schedule 3D (Non-price terms and conditions), clause 3D.1</p> <p>Schedule 1H (Non-price terms and conditions), clause 1H.5</p>	<ul style="list-style-type: none"> <li>The drafting in the VSAU fails to impose any "real" commitments on nbn co regarding utilisation management, due to the extent of its discretion: <ul style="list-style-type: none"> <li>in taking '<i>such measures as it considers appropriate</i>' to return the Shared Network Resource below the Utilisation Threshold.</li> <li>in determining if the Utilisation Threshold has been exceeded: where <i>nbn co determines</i> that <i>more than 95%</i> of the Shared Network Resource has been utilised for a continuous period of 15 mins or more on at least 3 days in a 30 day period.</li> <li>to determine the commitment does not apply because compliance has been adversely affected by (i) use of the network in a manner inconsistent with that contemplated in the WBA or (ii) an anomalous or exceptional event, an event that is unlikely to recur or not within nbn co's control.</li> </ul> </li> <li>There is no ongoing commitment requiring nbn co to include this protection in Replacement Modules after 30 June 2025.</li> <li>The inclusion of 'on at least three separate days' in the utilisation threshold means that utilisation could exceed 95% for long periods on a single day but nbn co are not obliged to do anything if it only happens twice a month.</li> <li>Even if it was binding, the Utilisation Threshold of more than 95% is too high to provide the claimed confidence that the network has sufficient capacity to support end-users' services. Telstra considers that nbn co needs to commit to lower utilisation limits closer to the current 70% limits (not 95% as they propose) and that the utilisation commitments and reporting should apply not just for the transit links but on the other parts of their network that could impact an RSPs ability to maintain market claims (as highlighted in Telstra's WBA4 response).</li> </ul> <p>Many of these links are likely less than 10 Gbps. While it is the case that larger link sizes can be more heavily utilised for the same performance, their</p>



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			links are now carrying much larger AVC speeds. Allowing 95% utilisation of 10 Gbps links (500 Mbps of headroom) when those links are carrying 1 Gbps plans would result in a substantial reduction of average throughput for such plans in peak times, potentially impacting Telstra's ability to maintain market claims.
nbn serviceability	Not addressed	Attachment C (Dictionary) Definition of 'NBN Serviceable'	<ul style="list-style-type: none"> <li>This change has removed some certainty for RSPs as nbn co has removed how premises are determined to be non-serviceable (i.e. using the service qualification system).</li> </ul>
100G NNI offers	Not addressed	Attachment D (Initial Products), section 1 'Initial Product Components and Product Features'  Schedule 1C (NBN Offers and Other Charges) clause 1C.4.2 and 1C.3(f)	<ul style="list-style-type: none"> <li>Telstra previously queried as part of nbn co's consultation on the MTM drafting why nbn co had not included its 100G NNI offers. nbn co's response was effectively that 100G NNIs were introduced under the SAU's PDF processes and are accordingly already covered by the SAU, even where not expressly included in the SAU text.  However, the approach to inclusion of the 100G NNIs in the VSAU appears inconsistent:             <ul style="list-style-type: none"> <li>nbn co has included the 100G NNIs in the table in Attachment D – Initial Products, section 1 'Initial Product Components and Product Features' as a product feature (see page 86 of marked up VSAU) and their set up and activation costs are also included in a table in Schedule 1C (NBN Offers and Other Charges) in section 1C.4.2 (see page 129 of marked up VSAU).</li> <li>However, the monthly recurring charges have not been included in the table in Schedule 1C (NBN Offers and Other Charges) in clause 1C.3(f) (see page 123 of marked up VSAU).</li> <li>Telstra considers for consistency nbn co should either include all or none of the detail of the charges for nbn co's 100G NNI offers in the VSAU.</li> </ul> </li> </ul>





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FTTB/C/N Subsequent Installation	Not addressed	Attachment C (Dictionary) and WBA Dictionary definitions of 'FTTB/FTTN Subsequent Installation' and 'FTTC Subsequent Installation'	<ul style="list-style-type: none"> <li>Telstra considers that the definition of Subsequent Installation for FTTB/C/N needs to be amended as it appears to give nbn co the right to charge to reactivate an inactive copper pair (see paragraph (c) of the definition which refers to at a Premises where 'an Ordered Product is currently being, or has previously been, supplied') and does not align with the WBA definitions. Telstra's concern is with the italicised words.</li> <li>The corresponding WBA definitions are more specific around service classes, so Telstra suspects the problem has arisen from trying to simplify the drafting for the VSAU (since service classes are not a concept used in the SAU).</li> </ul>
Remediation of service faults	Not addressed	Attachment C (Dictionary), definitions of Network Activity' and 'Service Fault'	<p>The VSAU does not address the concerns raised by Telstra regarding the definitions of 'Network Activity' and 'Service Fault' in response to nbn co's MTM variation consultation process. We continue to have the following concerns with these proposed definitions:</p> <ul style="list-style-type: none"> <li>Definition of Network Activity: it is confusing for the SAU definition to be narrower than that in the WBA. In the WBA, 'Network Activity' can be undertaken to rectify 'Performance Incidents' – which are issues impacting the performance of an nbn co Product, most notably speed or unexpected dropouts. The VSAU definition contains no reference to actions to rectify Performance Incidents.</li> <li>Definition of Service Fault: As with Network Activity above, the proposed definition in the VSAU does not align with that in the WBA. In particular, it does not refer to 'Performance Incidents'. Telstra believes this definition should be aligned with that used in the WBA.</li> </ul>
<b>Other definitional issues</b>			



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Definition of 'Personnel'	Not addressed.	Attachment C (Dictionary) definition of 'Personnel'	<ul style="list-style-type: none"> <li>• nbn co has excluded people acting as its contractors, who are also Access Seekers, as personnel. It will mean any Access Seeker who is also a contractor to nbn co will not be "Personnel" which will affect various entitlements of all RSPs under the VSAU not just entitlements of the RSP who is the contractor. It is unclear why nbn co should be able to avoid responsibility for certain of its obligations under the VSAU simply because those obligations happen to be undertaken by a contractor who is also an Access Seeker.</li> </ul> <p>The impacts mean that:</p> <ul style="list-style-type: none"> <li>• a Force Majeure Event can now occur (and nbn co is excused from performance) where a circumstance is in the reasonable control of an Access Seeker, also acting as nbn co's contractor, etc (which could result in nbn co claiming a Cost Pass-Through Event or Operational Expenditure incurred in connection with a Force Majeure Event being included in the ABBRR which would affect all Access Seekers, not just the contractor RSP who may have some responsibility for the circumstance);</li> <li>• nbn co's utilisation management commitment does not apply if compliance with the Utilisation Threshold is adversely affected by an event which is within the reasonable control of one of nbn co's Access Seeker contractors;</li> <li>• there are certain reporting implications, e.g. nbn co will avoid a fault or failure in a Central Splitter arising from a failure by an Access Seeker contractor to exercise due care and skill in installation of the Central Splitter constituting a Service Fault (with the consequence that it would be excluded from being an End User Fault or Network Fault nbn co is required to report on in clause 3D.2.5);</li> <li>• attendance of Access Seeker contractors at a Premises will not be included as an Incorrect Callout, Late Cancellation (Site Visit Required), Missed Appointments, No Fault Found (Truck Roll Required), On Site Maintenance Call Outs, Professional Wiring Services, Set-up Cross Connect, Set-up NBN Co Co-location (Lockable Full Equipment Rack), Set-up NBN Co Co-location (Lockable Half Equipment Rack), Set-up NBN Co ODF Termination Point.</li> </ul>



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			This appears to result in the charges associated with Incorrect Callout etc not being subject to the MRPs in clause 1C.4.2 if these services are provided by an Access Seeker as contractor etc to nbn co.
Definition of Telstra Migration Plan	Not addressed.	Attachment C (Dictionary) definition of 'Telstra Migration Plan'	<ul style="list-style-type: none"><li>• Definition is new and fixed in time to the MP in existence as at Second SAU Variation Date.</li><li>• It is unclear why nbn co has considered it necessary to fix the Migration Plan in time to the version of the Migration Plan in existence at the Second SAU Variation Date given these references relate to the way in which Special Services and particular types of Special Services are defined in the Migration Plan. Telstra considers this should more appropriately refer to the Migration Plan as amended from time to time.</li></ul>



## ATTACHMENT D: CONFIDENTIAL INFORMATION