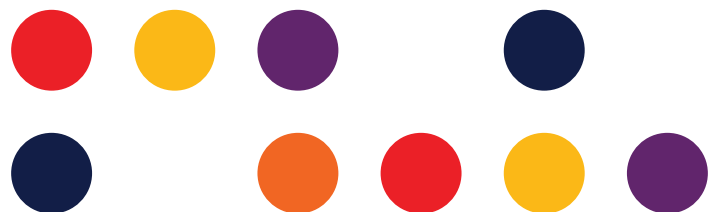


Proposed variation to the NBN Co Special Access Undertaking

TPG Telecom response to ACCC consultation paper

February 2023

Public version



Executive Summary

TPG Telecom welcomes the opportunity to respond to the ACCC's *Proposed variation to the NBN Co Special Access Undertaking Consultation Paper* (January 2023) (**Consultation Paper**).

The Consultation Paper relates to NBN Co's revised proposal to vary its Special Access Undertaking, published by the ACCC on 30 November 2022 (**SAU**). This followed the withdrawal of NBN Co's variation proposal which was published by the ACCC on 23 May 2022 (**May SAU**).

Following the withdrawal of the May SAU, on 12 August 2022, NBN Co published a discussion paper in relation to changes it was considering for a revised SAU variation proposal (**August Paper**). Despite TPG Telecom and other RSPs providing written feedback to the August Paper and in ACCC-led industry forums, it is disappointing the SAU proposal largely reflects the pricing proposal set out in the August Paper, without any meaningful improvements.

TPG Telecom has written to NBN Co on several occasions since the first ACCC industry forum on 18 June 2021. Over 18 months later, we are disappointed NBN Co has still failed to address our feedback and improve its pricing proposal to support more affordable broadband services, particularly users on lower speed tiers. It is incongruent for NBN Co to simultaneously claim it is not a monopoly while issuing take-it or leave-it proposals.

TPG Telecom has consistently advocated for reasonable and transparent wholesale pricing that enables RSPs to support end-consumers. NBN Co's proposal simply disallows this. Based on the ACCC's own analysis of NBN Co's proposal, wholesale prices will consistently increase across all product categories over time, and the more affordable entry level broadband products will likely be priced out of the market. The continuing margin squeeze on RSPs will likely lead to further industry consolidation and regular retail price increases for the foreseeable future.

Fundamentally, we believe the ACCC must approach the task at hand by assuming NBN Co is a commercial entity that owns monopoly assets. The ACCC must not allow itself to be lured by NBN Co's positions on price increases.

We believe it is not possible for the ACCC to conclude this situation would promote the long-term interests of end-users (**LTIE**) for any regulated monopoly asset. In a competitive market, when faced with competition, suppliers reduce prices, increase quality, or do both. NBN Co is proposing neither. It will not commit to quality increases, but it will gladly commit RSPs to annual cost increases to support its arbitrary financial objectives.

We support the ACCC approaching NBN Co's claims with scepticism and toughness, as it would for any other monopoly provider. The regulation of the NBN has been approached with uncharacteristic passivity for the past decade. It would be a gross injustice for the status quo to continue for the next two decades.

Changes required for acceptable SAU

Having regard to the LTIE test, we believe an SAU capable of acceptance must, at a minimum, include the following:

- NBN Co is not allowed the discretion to increase product prices on an annual basis for the duration of each regulatory cycle, i.e. it can only decrease prices at the product level and must set prices for at least three years in advance;
- an immediate shift to AVC-only pricing on all products;
- if NBN Co wishes to withdraw the NBN12 broadband service from the market, then it should offer NBN25 at the same effective price point as the current NBN12 service;
- an obligation for RSPs to pass on the cost-savings from the reduction in charges for voice-only services; and
- if the ACCC believes a dual-pricing model is in the LTIE, NBN Co cannot be allowed to decrease CVC inclusions, i.e. under the CVC adjustment mechanism, NBN Co can only change CVC inclusions to reflect growth in CVC.

SAU could lead to consumers paying more for their NBN service every year

If the SAU is accepted, the ACCC would be endorsing a regulatory regime that permits the monopoly wholesale provider to increase prices every year for the duration of the SAU. The consequence is RSPs will have no choice other than to look to increasing prices. Consumers should therefore expect retail pricing to increase every year. This will further compound cost of living concerns.

NBN Co's pricing proposal will also see customers on the lowest speed tier NBN12 broadband services being the most impacted. These are customers who have relatively low broadband requirements, but the pricing proposal will immediately impact their ability to afford basic connectivity services.

While NBN Co is seeking to immediately raise the price of the NBN12 broadband service by up to \$8/month/line, it is discounting the NBN12 voice-only service by \$10.50/month/line. Both the NBN12 broadband service and voice-only service are delivered on the same access service, yet the AVC charge for the broadband service is \$24.40/month and the AVC-charge for the voice service is \$12/month. It is plainly absurd that both price points can be the efficient cost of providing this single connectivity service.

SAU does not afford RSPs with sufficient certainty

As it stands, the SAU does not provide sufficient certainty for RSPs to make product decisions. The three-year Pricing Roadmap only provides indicative prices for the second and third years. A potentially very destructive outcome is an RSP could sell a lot of a particular product today, and find it is going to receive lower margins, or potentially negative margins,

the following year when NBN Co confirms its annual Tariff List. A two month notice period will make it difficult for RSPs to make product decisions. It also implies consumers should not expect retail price stability for broadband services. This is clearly not in the LTIE.

NBN Co has sought to address these concerns by introducing a 'price relativity' mechanism. We understand this is intended to restrict the extent to which NBN Co can change the indicative prices for the second year of the Pricing Roadmap when it confirms the annual Tariff List. However, the 'price relativity' mechanism simply adds complexity and increases the incentive (and provides permission) for NBN Co to make prices increase year on year.

Further, the Statement of Pricing Intent does not provide any greater certainty. It does not tell RSPs anymore than what is already known about NBN Co's pricing strategy. There are no basic safeguards around the information which must be included in the Statement of Pricing Intent and the scope of changes NBN Co can make, such as anticipated price changes, timing for withdrawal of products, new product roadmaps, and planned discounting activity. The Statement of Pricing Intent is nothing more than promotional material for NBN Co's price increases. This is not in the LTIE.

When the ACCC began this process over 18 months ago, one of the goals was to address the uncertainty caused by NBN Co's current pricing practices. The SAU proposal does not improve certainty. The release of an annual Tariff List on 1 May means there is a lack of immediate transparency over NBN Co's prices beyond 12 months. There is even less certainty for sub-NBN100 products, because NBN Co will change CVC inclusions every 6 months. While NBN Co says CVC inclusions will change in line with CVC growth, the method of calculating CVC means there is no guarantee this will occur. A shift to AVC-only pricing for all products would afford RSPs with greater certainty.

Ultimately, the SAU will see the retail fixed broadband market remain subservient to NBN Co's annual exercise of its pricing discretion. The lack of independent oversight on NBN Co's ability to change product level pricing every year will result in flow-on consequences for consumers. If the ACCC adopts the NBN Co proposal, it should not be surprised when retail prices increase in lockstep. In an extreme scenario, retail prices will have to increase at a faster pace to ensure the annual wholesale pricing risk is adequately reflected in retail prices.

A simpler and more transparent three-year Tariff List that is 'locked in' at the start of every regulatory cycle will afford RSPs and consumers significantly greater confidence about the cost of their broadband service. This would be an important step change to NBN Co's regulatory framework under the SAU variation, in turn providing greater confidence to RSPs and consumers as the fixed broadband market is reshaped after decades of industry uncertainty.

Submission

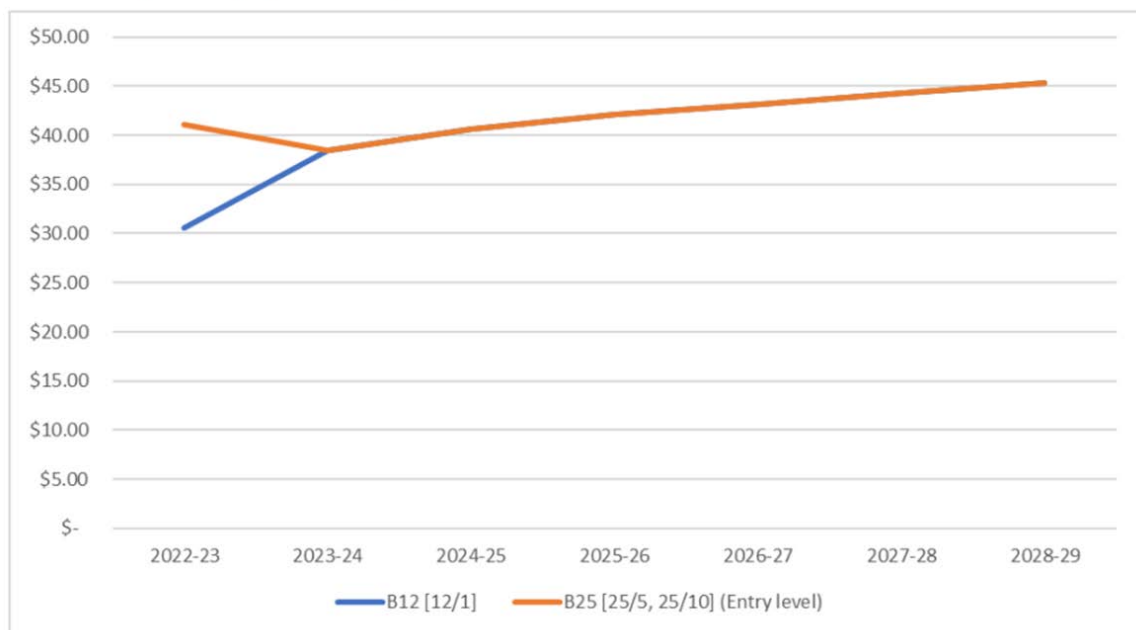
The LTIE is promoted when consumers obtain lower prices, increased quality of service and increased diversity and scope in product offerings. While NBN Co is aware of how the statutory criteria should be applied,¹ its SAU proposal has does not fulfil the requirements.

SAU does not deliver affordable services for NBN12 broadband consumers

The pricing proposal in the SAU does not promote the LTIE because consumers will not obtain lower prices and do not benefit from increased diversity and scope in product offerings. The greatest impact will be felt by NBN12 broadband consumers.

The Consultation Paper notes the cost of the NBN12 broadband service will increase by \$8/month/line:

Figure 2: Average access charges with utilisation growth and full advantage of individual price caps (\$ nominal)



A comparison of the status quo and the SAU shows the wholesale AVC price of an NBN12 broadband service will increase by 8.4% per service (from \$22.50/month to \$24.40/month). The CVC inclusions will also be removed and NBN Co has refused to commit to ever including CVC for NBN12 services, meaning the real price increase is even greater. This is before any overage costs from changes in consumer usage are factored in.

Consumers who are not able to afford these price increases for the most basic NBN service,

¹ NBN Co, *nbn Special Access Undertaking Variation 2022 – Supporting submission, Part G: Statutory Assessment* (November 2022), page 35.

or cannot afford to upgrade to an NBN25 plan, will be forced to either disconnect from the NBN or choose an alternative means to obtain connectivity.

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To put these figures into context of mobile networks (ie designed to provide mobility services, and not home wireless broadband services):

- the ACCC reported the average data downloaded over mobile broadband (data-only) services was 11.1 GB;² and

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The data shows an NBN12 broadband consumer does not necessarily have low usage needs. Given the high data usage, and due to bandwidth limitations, there is insufficient capacity for all NBN12 users to be serviced on mobile and fixed wireless networks. It is clear the NBN has a role to play in ensuring consumers on lower speed tiers can access broadband services that meet their needs. NBN Co's own consultant reports state the NBN is the preferred way to connect to the internet, as it is better for data intensive activities.³

The irony is NBN Co claims there is competition by pointing to alternative access networks, but at the same time it is doing everything it can to price marginal end-users off its network.

In discussions with NBN Co, it has suggested the changes in wholesale charges will not be as drastic as suggested due to:

- the shift to utilisation-based charging for CVC overage; and
- RSPs having the opportunity to 'optimise' their consumer bases by shifting the heaviest of users onto higher speed tier services, e.g. NBN100 with a fixed wholesale cost of \$55 per service.

However, even when accounting for these factors and using NBN Co's own modelling assumptions (which we do not believe are robust),⁴ the wholesale cost increase for NBN12 is substantial and immediate.

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The SAU will not lead to lower prices for NBN12 consumers. NBN12 consumers represent around 9% of the NBN base. Despite their usage profiles, these consumers have decided not to upgrade to a higher speed service. NBN Co's mandate is to continue delivering

² ACCC, *Communications market report – 2021-22*, page 12.

³ Accenture, *Value of services over the nbn network* (released February 2023), commissioned by NBN Co.

⁴ [c-i-c]

improvements to the network while keeping prices affordable.⁵ However, the SAU variation does not deliver lower prices or affordability for the cohort of consumers who would be the most budget conscious. Given this, the SAU will not promote the LTIE.

SAU could result in yearly price increases across all NBN services

The pricing impacts are not only limited to NBN12 consumers. The SAU will lead to higher charges for the majority of existing NBN services. Further, cost reductions for higher speed NBN100+ services could be rolled back within 2-3 years under the proposed weighted average price cap (**WAPC**) mechanism. If the SAU is accepted, the majority of consumers should expect to immediately pay more for their NBN service, and all consumers should expect to pay more every year.

We have detailed the consequential result of the SAU pricing proposal in past consultation responses. In summary, using the latest ACCC data, the SAU will lead to:

- an immediate wholesale cost increase for up to 64% of all NBN services, reflecting the NBN12 and NBN50 speed tiers;
- a further 14%, being the NBN25 cohort, will not be materially worse off in the first year, but this could change from year 2 onwards when average costs increase due to usage growth (subject to NBN Co's reduction or increase in inclusions); and
- while NBN Co is proposing cost reductions for NBN100+ services in year 1, this only represents around 19% of all NBN services today. However, these 'discounts' may be rolled back within 2-3 years under NBN Co's proposed sub-cap mechanism, which allows it to increase prices on a product basis by up to 5% each year.

Consequently, consumers should expect:

- NBN services to become less affordable, as the NBN12 and NBN50 services face an immediate price rise;
- NBN50 consumers will need to make difficult decisions about whether to pay more to 'upgrade' to an NBN100 service or downgrade to a cheaper NBN25 service;
- rising NBN prices every year, with potential price shocks and no certainty on the cost of their NBN service beyond 12 months, regardless of whether they are an existing or new customer;
- decreased range of NBN speed tiers being offered by RSPs, as the NBN12 and NBN50 services will become uncommercial for many RSPs to supply; and

⁵ NBN Co Limited Statement of Expectations, issued by Minister for Finance and Minister for Communications (19 December 2022).

- if consumers can no longer afford their NBN service and decide to switch off, NBN could further raise the cost of all services to make up any revenue shortfall.

These outcomes would be explicitly endorsed by the ACCC if the SAU is accepted without variation to address the above concerns.

The ACCC is also aware that there are functional limitations with certain NBN technologies. NBN Co's proposal will lead to a cohort of consumers being materially worse off. Its own forecast is 29% of active premises will be on the FTTN/B network as at FY26, despite its plans to upgrade premises to FTTP.⁶

A segment of the NBN base will not be able to access higher speed tiers at all. Where these consumers need to be 'optimised' to NBN100, it is clearly unreasonable for either the RSP or the consumer to absorb the cost of NBN Co's price increases. It is not in the LTIE for consumers to pay more for the same service, or an inferior service, to underwrite NBN Co's upgrade plans for higher speeds, which they may never be able to access.

Given the above, we do not believe the SAU meets the statutory criteria. It is not in the LTIE for NBN Co to seek to take from the more price sensitive segments, to provide temporary relief to consumers who are already able to pay for higher prices for home broadband. This does not reflect an efficient investment in, and use of, infrastructure.

SAU presents opportunity to deliver real and meaningful benefits to voice-only consumers

We recognise the introduction of a discounted voice-only product could provide benefits for consumers. NBN Co states the voice-only offer meets the statutory criteria because "*the introduction of a voice-only offer, at almost half the price of the existing entry level offer, will encourage greater take-up of services on the nbn network and promote retail competition for voice-only services*".⁷ This would only be the case if the SAU includes a mechanism which requires the savings in the voice-only service to be passed onto consumers.

NBN Co is proposing to discount the wholesale cost of the voice-only service from \$22.5/month to \$12/month, resulting in a potential cost saving of up to \$10.50/month for voice-only consumers.

Many RSPs, including TPG Telecom, offer voice services for zero charge with an NBN broadband service. There appears to be a meaningful cohort of consumers who acquire voice-only services (without an NBN broadband service). NBN Co's supporting materials note there are approximately 800,000 consumers on the NBN12 service, with approximately

⁶ NBN Co, *Forecasts in support of SAU variation – public version*.

⁷ NBN Co, *nbn Special Access Undertaking Variation 2022 – Supporting submission, Part G: Statutory Assessment* (November 2022), page 8.

half using a voice-only service.⁸ The absurd consequence of the SAU proposal is around 400,000 NBN12 services will receive a significant AVC price decrease, while the remaining half face steep AVC price increases.

Notwithstanding, the SAU provides an opportunity for voice-only consumers to benefit from NBN Co's price reductions. This can be achieved by including obligations on RSPs to pass through these savings to consumers. Based on our research, the retail price point for voice-only services is around \$55/month. Using this price point, the discounted voice only product could lead to approximately \$50 million per year in windfall gains.

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The ACCC recognises “NBN Co’s proposed pricing framework for the initial regulatory period could offer better (or similar) support for low-income and disadvantaged consumers that require voice connectivity”.⁹ However, the existing market dynamics suggests there is limited basis to assume this will occur. The SAU presents an opportunity for the ACCC to embed a pass-through mechanism to ensure these benefits are realised. This will in turn promote any-to-any connectivity and encourage or maintain the take-up of voice connectivity on the NBN.

Without this safeguard, the ACCC cannot be satisfied the reduction in the price of the voice-only offer will promote the LTIE.

Greater certainty required to promote LTIE in shift to WAPC mechanism

NBN Co claims its proposed sub-caps on individual services, together with the WAPC mechanism, minimises the risk of price shocks and will help deliver greater pricing certainty to RSPs. NBN Co suggests its proposal will also promote the efficient use of the NBN and investment in infrastructure. However, the SAU does not deliver these objectives.

Annual revision of Tariff List could lead to price shocks

The SAU does not provide adequate pricing certainty for RSPs beyond the first 12 months. For bundled AVC/CVC products, there is no certainty beyond 6 months, given NBN Co will adjust CVC inclusions every 6 months.

NBN Co proposes that on 1 May of each year, it will publish prices for the upcoming financial year (i.e. from 1 July) in an annual Tariff List. NBN Co will give RSPs 2 months’ notice of changes to CVC inclusions, the products subject to cost increases and the amount of cost increases. NBN Co will also advise RSPs of changes to CVC inclusions in October.

As discussed above, one potentially very destructive outcome of the annual revision of the

⁸ Frontier Economics, *Further assessment of NBN Co’s proposed SAU pricing arrangements* (7 December 2022), page 21: “With respect to the 12/1 product, NBN Co is proposing to reduce the charge for voice only customers (around half of the approximately 800,000 users) ...”

⁹ Consultation Paper, page 7.

Tariff List is an RSP could sell a lot of a particular product today, yet find it will receive lower margins, or potentially negative margins, the following year when NBN Co releases an updated Tariff List on 1 May.

More detrimentally, this proposal does not provide medium-term price certainty for consumers. For instance, if NBN Co’s revenue targets are not tracking to expectations, NBN Co will have significant incentives to simply increase prices at the product level to remediate any top line revenue shortfalls. It is not in the LTIE for NBN Co to have the incentive and ability to exercise this kind of pricing power.

To promote the LTIE and provide certainty for RSPs and consumers, NBN Co should be prevented from increasing product prices on an annual basis for the duration of each regulatory cycle. It should only be permitted to decrease prices at the product level.

This structural constraint would ensure NBN Co is discouraged from simply raising prices at the product level to meet top line revenue shortfalls. This constraint will also stimulate innovation, as the only other opportunities available to NBN Co to increase revenue is by upselling to existing customers, on-boarding end-users who have chosen to not use the NBN, or by continuing to innovate on the product side.

For clarity, we believe NBN Co should have the freedom to decrease prices to stimulate demand, but it should not have the ability to increase prices unilaterally on an annual basis. This constraint needs to be in place until at least 2032, at which point in time the ACCC will undertake a review of the SAU.

Price relativity mechanism does not address pricing uncertainty concerns

We have previously raised concerns about pricing uncertainty with NBN Co in past consultation responses. Its response is to introduce a ‘price relativity’ mechanism, which it claims will afford RSPs with greater certainty over its prices. However, the price relativity mechanism does not appear to incentivise NBN Co to discount products in the roadmap by more than \$1, because doing so would place it in breach of this mechanism, unless it also discounts all other products.

In the following example, if NBN Co decides to decrease the price of TC4 Product A by \$2 from the price contained in the three-year Pricing Roadmap, and retain all other prices, then this would breach the price relativity mechanism. The only way NBN Co could comply with the mechanism is to also reduce the price of the TC4 Product B and TC4 Product C by at least \$1.

	p(t)	p(t+1) Roadmap	p(t+1) Tariff List	Delta	Note
TC4 Product A	\$34	\$35	\$33	-2	
TC4 Product B	\$50	\$51	\$51	0	
TC4 Product C	\$55	\$56	\$56	0	
Product D	\$100	\$102	\$102	N/A	Not TC4 product

			Min delta	-2	
			Max delta	0	
			Differential	-2	<i>Not compliant</i>

The reverse scenario is also true. NBN Co could seek to increase the price of one product from the price indicated in the three-year Pricing Roadmap. However, to comply with the price relativity mechanism, NBN Co would also need to raise the prices of other products at the same time.

	p(t)	p(t+1) Roadmap	p(t+1) Tariff List	Delta	
TC4 Product A	\$34	\$35	\$36	1	
TC4 Product B	\$50	\$51	\$53	2	
TC4 Product C	\$55	\$56	\$58	2	
Product D	\$100	\$102	\$102	N/A	Not TC4 product
			Min delta	1	
			Max delta	2	
			Differential	1	<i>Compliant</i>

Through these examples, it is unclear how the price relativity mechanism promotes end-user interests as it does not allow certain types of discounting and could improve incentives to increase wholesale prices.

The price relativity mechanism introduces unnecessary complexity to the SAU. For instance, it is unclear how the price relativity mechanism will interact with other aspects of NBN Co's pricing commitments. Specifically:

- *Discounting rules:* If NBN Co breaches the 5% discounting threshold, then it must reduce its Tariff List prices such that, had the reduced Tariff List prices applied in the previous financial year, the 5% threshold would not have been exceeded. If this occurs, NBN Co has the discretion to decide the products that would have reduced Tariff Rates, with no correlation between this and the discounted product which caused NBN Co to breach the rule.

With the price relativity mechanism, is the consequence NBN Co will need to discount multiple products to comply with the 5% threshold rule and the relativity mechanism?

- *CVC adjustments:* It is also unclear how the relativity mechanism will apply when NBN Co changes CVC inclusion in October for the next three years. If CVC usage is higher or lower than NBN Co forecasted, such that the effective price in the roadmap

for a bundled AVC/CVC product changes (say, by more than \$1), would NBN Co be required to change the prices of all other products in order to comply with the relativity mechanism?

The effect of 'optimising' the consumer base – that is, by acquiring NBN100 wholesale services for high usage retail consumers on NBN50 services and below – could lead to a decline in the measured CVC usage recorded by NBN50 wholesale consumers, as the high-usage consumers are shifted to the NBN100 wholesale service (despite acquiring an NBN50 retail plan). This could allow NBN Co to ratchet down CVC inclusions for NBN50 services every 6 months. It is unclear how this scenario would play out with the relativity mechanism.

Again, we have raised these concerns with NBN Co in previous consultation responses. NBN Co's solution appears to be the introduction of the concept of 'Bundled TC-4 Offer Groups'. This addresses part of the problem with respect to lower speed tiers, however does not address the core issue arising from the convergence of NBN50 and NBN100 services expected under the SAU.

Given the NBN50 service represents over half of wholesale consumers, it would be inconsistent with the LTIE for NBN Co to fail to recognise the detrimental and distortionary impact of encouraging RSPs to migrate consumers onto NBN100 wholesale services.

Statement of Pricing Intent does not deliver improved RSP certainty

The draft Statement of Pricing Intent does not tell RSPs more than what is already known about NBN Co's pricing strategy. The Statement of Pricing Intent also contains several shortcomings, specifically:

- the Statement has references to businesses and business products, when this should be separated from NBN Co's pricing of core residential services;
- the Statement is silent as to the specifics of NBN Co's future discounting activities;
- the Statement can be changed by NBN Co after consultation with RSPs (or with ACCC approval). If NBN Co undertakes a consultation process, it is open to it to reject feedback entirely. All NBN Co must do is provide "*an explanation of any changes NBN Co has made to its original proposal having considered such submissions*"; and
- the Statement enables NBN Co to present a view on matters such as operating environments and bandwidth requirements as fact, where RSPs could fundamentally disagree.

Retaining CVC construct not in the LTIE

It is clear the pricing commitments and price controls in the SAU introduce a significant

degree of uncertainty and complexity. For example, it is unclear what price levels will be from 1 July 2026 after NBN Co removes CVC pricing from sub-NBN100 products. We assume NBN Co will impose a price increase on the effective charge for the bundled product in the previous year, rather than zero-out CVC costs. Otherwise, we would expect to see a fall in NBN Co's projected revenue, which is not the case in the building block model presented by NBN Co.

It is unclear what transition path to AVC-only pricing is anticipated by NBN Co. This adds further uncertainty, and it is unknown whether RSPs and consumers will face price shocks from 1 July 2026.

A simple means to achieve the LTIE is to move to AVC-only charging for all services immediately.

We have explained how the CVC construct is incompatible with the LTIE in numerous past consultation responses to both the ACCC and NBN Co. NBN Co claims it faces competition from other providers and hence needs to retain the CVC construct to provide it with pricing flexibility. However, the practical effect of retaining CVC is consumers on NBN12 and NBN50 services (representing the majority of NBN consumers) will face higher charges. NBN Co continues to fail to provide any sensible reason why retaining CVC is in the LTIE.

This reflects more broadly on NBN Co's ability to exercise market power. NBN Co refuses to remove CVC despite a decade of calls from industry to do so. Virtually every RSP agrees CVC pricing should be abandoned, but NBN Co has so far refused to do this. We are now at a point where RSPs have made the same arguments over and over, such that it now feels redundant to continue repeating the same facts.

In this respect, where the SAU confers an obligation on NBN Co to consult with stakeholders, we seriously question whether NBN Co will act in accordance with the feedback or ignore it and continue as it desires, as part of its pursuit of arbitrary financial objectives.

Review in 2032 must not be subject to NBN Co's financial objectives

NBN Co states it is giving the ACCC the power to review the SAU in 2032, but subject to certain constraints. This includes "*NBN Co's prices (whether set by the ACCC or NBN) will allow NBN a reasonable opportunity to achieve and maintain a standalone investment grade credit rating with a stable outlook*". The ACCC must not give primacy to what NBN Co wants to achieve over the LTIE.

Under NBN Co's proposal, current end-users will underwrite NBN Co's current upgrade plans but cannot expect anything in return, except for higher costs. This outcome does not encourage the economically efficient use of, and economically efficient investment in, telecommunications infrastructure. Rather, this encourages NBN Co to operate inefficiently, because the Australian taxpayer and the end-user provides an explicit backstop.

Furthermore, the current Minister for Communications has publicly announced NBN Co will

remain in public ownership in the foreseeable future, in which case NBN Co receives a credit rating much higher than its BBB aim. It is unclear why NBN Co aims for a BBB credit rating, when it has already significantly overshot this goal. Indeed, we do not expect credit rating agencies to *reduce* NBN Co's credit rating if it were to significantly increase prices and capture a larger share of industry margins. We believe NBN Co's stated objective should be disregarded and has no direct application to the LTIE test.

Expiry of SAU upon privatisation

NBN Co is proposing the SAU expires when it is 50% or more privately owned. NBN Co has not explained why this is the appropriate control threshold. The difficulty is we cannot predict how NBN Co will be privatised in the future. For example, the Government could decide to privatise in tranches. The risk in this scenario is a minority share of NBN is privatised, while there remains a regulatory framework which may or may not be fit for purpose. The bias should be in favour of reviewing the regulatory framework even where there is minority private ownership, as a bare minimum.

We also do not understand the justification for allowing the SAU to expire 20 business days after the Commonwealth publishes a change of control notice stating it intends to take steps to relinquish control over NBN Co. We assume this would occur early in the privatisation process, prior to a Productivity Commission inquiry, as required before privatisation under the *National Broadband Network Companies Act 2011*.

The expiry of the SAU 20 business days after this notice appears to provide inadequate time for a substitute access determination or other regulatory instrument to be imposed. In a worst-case scenario, this could lead to in a situation where the monopoly wholesale provider is effectively subject to no regulation. This outcome is not in the LTIE.

Allocation of enterprise services requires greater scrutiny

It is very difficult to understand what NBN Co considers its 'non-core' business and there is currently limited information regarding the amount NBN Co has spent to expand its enterprise business.

For instance, NBN Co reported on 9 August 2022 'business segment' revenue of \$1B, which is up 20% year on year. On 15 February 2023, it reported revenue from 'business customers' increased to \$549 million in HY23, up 11 per cent from \$493 in HY22. It has predicted take-up of enterprise ethernet services will grow "*rapidly*".¹⁰ However, it is not possible to know how much of this 'business segment' or 'business customer' revenue is profit and to what extent NBN Co has used expenditure from the build out of its monopoly residential service to cross-subsidise its expansion into competitive 'non-core' services.

The SAU also appears to be silent as to the criteria to be adopted to determine whether a

¹⁰ NBN Co, *nbn Special Access Undertaking Variation 2022 – Supporting submission: Public version* (March 2022), page 273.

product should fall within the scope of 'core' or 'competitive services'. For example, NBN Co is proposing to classify its 'Smart Places' products as 'core services'. The Smart Places service enables the extension of NBN to eligible non-premises locations such as traffic lights, digital billboards and public Wi-Fi. Some RSPs offer competing services in the enterprise arm of their business. These are clearly not residential services and should be classified as 'competitive services'.

Further, supplying a service over TC-4 should not mean it is classified as 'core services' by default, which appears to be the approach NBN is adopting. For instance, NBN Co supplies Business Bundles using TC-4, and it is apparent these should fall within the scope of 'competitive services'.

Where NBN Co is seeking to compete in the enterprise and IoT sectors, the associated products should be considered 'competitive services'. Without appropriate cost and revenue allocations, there is a real risk NBN Co can take advantage of its Government backed monopoly position to obtain an unfair advantage over competitors.

Clarification of discounting rules

We believe further clarification of how the discounting rule will work in practice is required. Much of NBN Co's current discounting activity is targeted at attracting consumers who are not using the NBN, or have recently disconnected, to sign-up to an NBN service. For the purposes of the discounting rule, the SAU defines Notional Undiscounted TC-4 Revenue as the *"amount of revenue that would have been earned by NBN Co in a Financial Year from all TC-4 Related Charges, had no Discounts applied to any TC-4 Related Charge."*

One potential interpretation is if NBN Co did not provide a discount, then it would not have earned the revenue in any event. The consequence is discounting activity undertaken by NBN Co to attract new consumers would fall outside the scope of the proposed discounting rules. If this is the case, we would strongly query whether the discounting rules address the commercial uncertainty caused by NBN Co's short term discounting practices or provide a means for NBN Co to circumvent the intent of the rules.