



# nbn guidance note on SAU and WBA interaction

18 December 2023

Following discussions with the ACCC and to assist the industry's understanding, this **nbn** guidance note provides clarifications and confirmations regarding the interaction between:

- **nbn**'s Special Access Undertaking (**SAU**) (a regulatory undertaking given to the ACCC in relation to the majority of **nbn** services); and
- **nbn**'s Wholesale Broadband Agreement (**WBA**) (a commercial supply agreement entered into with individual Retail Service Providers (**RSPs**) based on a Standard Form of Access Agreement (**SFAA**) published on **nbn**'s website).

Broadly, this note sets out that:

- under the SAU, **nbn** must publish an annual Tariff List, setting out maximum prices for NBN Offers and Other Charges, which **nbn** must not price above. In that context, if such a price in the Tariff List were to reduce during a financial year (in the circumstances contemplated by the SAU), **nbn** would be required to reduce the corresponding price in the WBA (and the WBA SFAA) so that it did not exceed the new price in the Tariff List;
- under the SAU, the ACCC can set Benchmark Service Standards for a Regulatory Cycle and an implementation date by which **nbn** must include an obligation in its WBA SFAA to meet or exceed service standards that are no less favourable to RSPs than those Benchmark Service Standards. The SAU also provides for those benchmarks to be updated mid-Regulatory Cycle, including in response to a 'Systemic Service Standard Event' or a 'Retail Service Standard Regulation';
- should the Benchmark Service Standards for the first Regulatory Cycle change during the cycle as a result of a Systemic Service Standard Event or a Retail Service Standard Regulation, **nbn** intends to flow through the resulting SFAA changes to its executed WBA5 Access Agreements in parallel to updating its WBA5 SFAA, subject to factors such as whether doing so is technically and operationally achievable;
- the SAU provides for the ACCC to set the Benchmark Service Standards for the *second* Regulatory Cycle by early June 2026 (although that timeframe can be extended), and will then require **nbn** to account for those benchmarks in its WBA SFAA by an implementation date set by the ACCC. **nbn** would support that implementation date being the start date of **nbn**'s next WBA (ie, WBA6, with an anticipated start date of 1 December 2026) – allowing time for **nbn** and RSPs time to negotiate, obtain internal approvals for and operationalise a new WBA which accounts for the updated benchmark. If instead the relevant implementation date is earlier, before the expiry of WBA5, the SAU will still require **nbn** to update its SFAA (then the WBA5 SFAA) to account for the new benchmarks from that date – and **nbn** will be incentivised to flow through such changes to its existing WBA5 Access Agreements to the extent possible for reasons of operational simplicity and efficiency; and
- one matter for future confirmation will be the term of WBA6 – which will be a matter for agreement between **nbn** and RSPs. In proposing an expiry date for WBA6, **nbn** will consider a range of factors including the value in that expiry date being shortly after the end of the second Regulatory Cycle.



## SAU Tariff List and the prices under the WBA

The SAU requires **nbn** to publish a Tariff List by 1 May each year, setting out prices for NBN Offers and Other Charges for the upcoming financial year,<sup>1</sup> where such prices are subject to particular controls under the SAU.

Upon publishing the annual Tariff List under the SAU, **nbn** will issue a notice to RSPs under the WBA of corresponding changes to prices under the WBA which will take effect from 1 July.<sup>2</sup>

A central aspect of the SAU pricing regulation framework is clause 2B.1.6 of the SAU, which provides as follows:

***2B.1.6 Prices for supply of NBN Offers and Other Charges must not be higher than Prices in Tariff List***

*(a) The Price for the supply of an NBN Offer at any point in time during a Financial Year must not be higher than the Price applicable to that NBN Offer in the Tariff List at that point in time.*

*(b) The Price of an Other Charge at any point in time during a Financial Year must not be higher than the Price applicable to that Other Charge in the Tariff List at that point in time.*

That clause establishes the prices for NBN Offers and Other Charges in the SAU Tariff List as maximum prices, which **nbn** must not price above. In that context, if such a price in the Tariff List were to reduce during a financial year (in the circumstances contemplated by the SAU),<sup>3</sup> **nbn** would be required to reduce the corresponding price in the WBA (and the WBA SFAA) so that it did not exceed the new price in the Tariff List, in order to comply with clause 2B.1.6 of the SAU. **nbn** can do so by issuing a notice to RSPs under the WBA.<sup>4</sup>

## The Benchmark Service Standards framework under the SAU

The SAU establishes a framework for setting Benchmark Service Standards for a Regulatory Cycle, where:

- as part of the periodic regulatory reset or ‘Replacement Module’ process, the ACCC will determine Benchmark Service Standards and an implementation date by which **nbn** must include an obligation in its WBA SFAA to meet or exceed service standards that are no less favourable to RSPs than the Benchmark Service Standards;<sup>5</sup> and
- **nbn** must then account for those Benchmark Service Standards in its WBA SFAA in that way by the implementation date determined by the ACCC.<sup>6</sup>

The SAU also provides for such Benchmark Service Standards to be updated mid-Regulatory Cycle, including in response to a ‘Systemic Service Standard Event’ or a ‘Retail Service Standard Regulation’ – where the ACCC may give **nbn** notice of such events and in turn, **nbn** must give the ACCC a ‘Service Standard Response’ with any proposed changes to the Benchmark Service Standards and a proposed date for making related changes to **nbn**’s SFAA. In such cases, if the ACCC:

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<sup>1</sup> See clause 2B.2.3 of the SAU. Transitional rules apply for FY24, under which **nbn** published the first Tariff List under the varied SAU on 1 November 2023 – see clause 2B.2.5(b) of the SAU.

<sup>2</sup> Pursuant to clause F4.9(c) of the WBA Head Terms.

<sup>3</sup> Note that once the Tariff List for a financial year has been published, there are only limited circumstances in which the prices in that Tariff List can be changed during the financial year – see clauses 2B.2.3(d) and (e) of the SAU.

<sup>4</sup> Pursuant to the same clause F4.9(c) of the WBA Head Terms referred to above.

<sup>5</sup> See clauses 5.2(e)(iv), 5.6 and 5.9(a)(ii) of the SAU.

<sup>6</sup> See clause 2I.2.1(a) of the SAU.



- accepts **nbn**'s Service Standard Response, the SAU requires **nbn** to amend its SFAA accordingly; or
- rejects **nbn**'s Service Standard Response and sets updated Benchmark Service Standards, the SAU requires **nbn** to amend its SFAA (by a date determined by the ACCC) to include an obligation to meet or exceed service standards which are no less favourable to RSPs than the updated Benchmark Service Standards.<sup>7</sup>

**nbn** looks forward to continuing to implement the Benchmark Service Standards framework in the SAU as it applies over time.

## Mid-cycle changes to the Benchmark Service Standards applying during the first Regulatory Cycle

**nbn** confirms that, should the Benchmark Service Standards for the first Regulatory Cycle change during the cycle as a result of a Systemic Service Standard Event or a Retail Service Standard Regulation, **nbn** intends to flow through the resulting SFAA changes to its executed WBA5 Access Agreements in parallel to updating its WBA5 SFAA.

Naturally this is subject to factors such as whether doing so is technically and operationally achievable and whether RSPs have requested additional related measures or implementation timeframes – noting that those factors may depend on the nature and complexity of the changes to the Benchmark Service Standards and the time allowed to update the SFAA (which are matters set by the ACCC and over which **nbn** has no control). That context underpins the Benchmark Service Standards framework in the SAU, which operates to set a regulatory benchmark, while the terms of **nbn**'s Access Agreements with RSPs are ultimately a matter for agreement with RSPs.

## Changes to the Benchmark Service Standards for the second Regulatory Cycle

The SAU provides for the ACCC to set the Benchmark Service Standards for the second Regulatory Cycle at least 20 business days before the end of the first Regulatory Cycle (ie, by early June 2026) – although that timeframe can be extended.

The SAU will then require **nbn** to account for those benchmarks in its WBA SFAA from an implementation date to be determined by the ACCC when setting those benchmarks. **nbn** would support that implementation date being the start date of its next WBA (ie, WBA6, with an anticipated start date of 1 December 2026). In that way, the SAU would allow for the ACCC to establish the regulatory benchmark for WBA6 in a manner which allows **nbn** and RSPs time to negotiate, obtain internal approvals for and operationalise a new WBA which accounts for that regulatory benchmark.<sup>8</sup>

If instead the relevant implementation date determined by the ACCC is earlier, before the expiry of WBA5, the SAU will still require **nbn** to update its SFAA (then the WBA5 SFAA) to account for the new Benchmark Service Standards from that date. In those circumstances, whether **nbn** will seek to update its executed WBA5 Access

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<sup>7</sup> See clause 21.2.2 of the SAU.

<sup>8</sup> Note that **nbn**'s SFAA for WBA5 (as published on **nbn**'s website) has a start date of 1 December 2023 and an expiry date of 30 November 2026, five months after the end of the first Regulatory Cycle, pursuant to the framework established under clauses 4A.2 and 21.3.1 of the SAU.



Agreements to account for the updated WBA5 SFAA, despite those Access Agreements being shortly due to expire, will depend on the circumstances and the types of factors referred to above. Nonetheless, **nbn** will be incentivised to flow through such changes to its existing WBA5 Access Agreements to the extent possible for reasons of operational simplicity and efficiency – given it is likely to be operationally complex and burdensome to include one set of service standards in **nbn**'s SFAA and a different set of service standards in **nbn**'s existing Access Agreements.

## Term of WBA6

One matter for future confirmation will be the term of WBA6 – which will be a matter for agreement between **nbn** and RSPs. In proposing an expiry date for WBA6, **nbn** will consider the value in that expiry date being shortly after the end of the second Regulatory Cycle – balancing factors such as that:

- the previous term of **nbn**'s WBA SFAAs (generally two years) has proven too short a period and Access Agreements have typically been extended past that point – for example, to allow for the resolution of parallel regulatory processes – and in circumstances where WBA negotiations typically last many months and traverse a range of commercial, technical and operational issues;
- there is value in an SFAA expiring after the expiry of the relevant Regulatory Cycle to give **nbn** and RSPs time to negotiate, obtain internal approvals for and operationalise new Access Agreements that account for the regulatory settings applying in the new Regulatory Cycle; and
- **nbn** and RSPs cannot know with certainty, years in advance, the timing of the ACCC determining the Benchmark Service Standards for the third Regulatory Cycle (where the SAU provides for that determination to occur shortly before the end of the second Regulatory Cycle, but also allows for that timeframe to be extended by six months).<sup>9</sup>

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<sup>9</sup> See clause 5.8(e) of the SAU.