



Australian
Competition &
Consumer
Commission

**NBN Co Limited Special Access Undertaking
Supplementary Consultation Paper**

February 2012

© Commonwealth of Australia 2012

This work is copyright. Apart from any use permitted by the Copyright Act 1968, no part may be reproduced without prior written permission from the Commonwealth available through the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131, Canberra ACT 2601 or by email to publishing.unit@acc.gov.au.

www.accc.gov.au

Contents

1	Preface	1
1.1	Consultation process	1
1.2	Time limit for ACCC assessment of the SAU	2
1.3	Overview of the SAU and the supplementary consultation paper	3
2	Regulatory context	8
2.1	Establishing an effective regulatory framework	8
2.2	Approach to assessment of the SAU	11
3	Operation of the SAU	12
3.1	Regulatory recourse disputes	12
3.2	Term, variation, withdrawal and extension of the SAU	15
4	Common approaches adopted in the SAU	20
4.1	Common approaches to the operation of the SAU	20
4.2	Common approaches relating to obligations.....	23
5	Service description and products under the SAU	26
5.1	NBN Access Service	26
5.2	Product components	29
5.3	Ancillary services.....	30
5.4	Service levels	31
5.5	Product development and withdrawal.....	33
6	Price-related terms and conditions	39
6.1	Price structures	39
6.2	Initial prices.....	41
6.3	Price controls.....	44
6.4	Long-term revenue constraint	46
6.5	WACC.....	50
6.6	Prudency.....	52
7	Non-price terms and conditions	60
7.1	WBA development and Access Agreement change management	61
7.2	Dispute management	63
7.3	Default management	64
7.4	Risk management and liability.....	65
7.5	Confidential information.....	67
7.6	Billing, payment and credit management	68
7.7	Points of interconnect.....	70
7.8	Access to common property.....	72
7.9	Major NBN upgrades	72
7.10	Access to NBN Co platform	74

7.11	Rollout information.....	75
8	Enforcement of SAU commitments	77
8.1	Clarity of obligations	77
8.2	Monitoring and reporting	78

1 Preface

NBN Co Limited and NBN Tasmania Limited ('NBN Co') lodged a Special Access Undertaking ('the SAU') with the Australian Competition and Consumer Commission ('the ACCC') pursuant to section 152CBA in Division 5 of Part XIC of the *Competition and Consumer Act 2010* ('the CCA') on 5 December 2011. The SAU specifies some terms and conditions upon which NBN Co undertakes to supply what it terms the 'NBN Access Service'.

NBN Co has provided a submission and two consultancy reports in support of the SAU to the ACCC. These are available on the ACCC's website.

On 20 December 2011, the ACCC released an initial consultation paper (the 'December 2011 consultation paper'). The December 2011 consultation paper set out the legislative framework for the assessment of the SAU, provided an overview of the SAU, and sought stakeholders' preliminary views on the SAU. The ACCC received public submissions from Telstra, Optus, Vodafone-Hutchison Australia, Nextgen, Macquarie Telecom, Herbert Geer (on behalf of iiNet, Internode and TransACT) and the Competitive Carriers' Coalition.

The December 2011 consultation paper and the public submissions are available on the ACCC's website.

This supplementary consultation paper provides guidance on what the ACCC considers to be the key issues associated with the SAU and seeks to gain a more detailed understanding of stakeholders' views. The ACCC has had regard to the submissions received to the initial consultation paper in identifying the issues that the ACCC should focus on in this supplementary consultation paper.

1.1 Consultation process

Submissions must:

- be provided electronically (in MS Word or PDF format) that is text-searchable to allow a 'copy and paste' function;
- use a text font size no smaller than 12 pt, Times New Roman;
- be singled-spaced; and
- include a copy of any court decision, tribunal decision, consultant's report or other extraneous material that is relied upon in the submission, with the relevant referenced sections clearly marked.

Written submissions from interested parties should be lodged no later than **5.00pm 30 March 2012**.

All submissions should be forwarded by email to:

General Manager
NBN Engagement and Group Coordination Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001
Email: richard.home@acc.gov.au
Fax: 03 9663 3699

Please copy any email correspondence to: analena.gilhome@acc.gov.au.

Enquiries may be directed to Analena Gilhome, Director, NBN Co Access Coordination, on 03 9290 1872 or analena.gilhome@acc.gov.au

All submissions to this supplementary consultation paper will be considered as public submissions and will be posted on the ACCC's website. If parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and confidential version of their submission. The public version should clearly identify the confidential material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

Parties are encouraged to restrict confidentiality claims to a minimum and to establish appropriate confidentiality regimes for the disclosure of any information that is claimed to be confidential.

NBN Co has indicated that it will assess each request for access to its commercially confidential information on a case-by-case basis. Parties wishing to obtain the confidential versions of NBN Co's materials should contact:

Tony Neilson
Senior Regulatory Advisor
NBN Co Limited
+61 3 8662 8154
tonyneilson@nbnc.com.au

Following receipt of submissions, the ACCC intends to hold a multilateral industry forum to discuss key issues associated with the SAU, likely around mid-April 2012. Further details of this forum will be provided at a later date.

1.2 Time limit for ACCC assessment of the SAU

The ACCC must make a decision to accept or reject the SAU within six months of the lodgement of the SAU with the ACCC,¹ subject to the ACCC's ability to extend this period.² If the ACCC does not make a decision within this period, it is deemed to have accepted the SAU.³

¹ *Competition and Consumer Act 2010 (CCA)*, s. 152CBC(5).

² *CCA*, s. 152CBC(7).

³ *CCA*, s. 152CBC(5).

The ACCC may extend, or further extend, the decision-making period for making its decision by giving a written notice to NBN Co.⁴ Each extension must be for less than three months.⁵ The ACCC must explain in its notice why it was unable to make a decision on the SAU during the original decision-making period.⁶ The time limit is also extended by the duration of any periods during which the ACCC is waiting for NBN Co to respond to an ACCC information request,⁷ or a variation notice,⁸ or the period when the ACCC is undertaking public consultation on the SAU.⁹

Following the ACCC's analysis of the SAU and the submissions of interested parties, it intends to publish the findings of its initial analysis in a draft decision. The ACCC will invite further submissions on its draft decision. Taking into account the submissions, the ACCC will form a view on whether to accept or reject the SAU.¹⁰ The ACCC will publish the reasons for its decision.

Under these arrangements, it is not possible to give a definitive date by which the ACCC will make its final decision on the SAU. However, the ACCC intends to make its decision as soon as it is practicable to do so, taking into account the scale and complexity of the issues to be assessed, and the proposed duration for the operation of the SAU.

1.3 Overview of the SAU and the supplementary consultation paper

In designing the SAU, NBN Co states that it has had regard to the objectives of:

- providing an appropriate degree of regulatory certainty to access seekers, their end-users and NBN Co; and
- establishing a long-term framework reasonably necessary to achieve uniform national wholesale pricing.¹¹

In support of these objectives, NBN Co proposes that the commitments in the SAU shall apply for 30 years, with a mid-term review conducted by NBN Co that considers the operation of the SAU in relation to certain matters.¹² NBN Co submits that the SAU

⁴ CCA, s. 152CBC(7).

⁵ CCA, s. 152CBC(7)(a).

⁶ CCA, s. 152CBC(7)(b).

⁷ CCA, s. 152CBB(2).

⁸ CCA, s. 152CBDA(2).

⁹ CCA, s. 152CBC(6).

¹⁰ CCA, s. 152CBC(2).

¹¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 27.

¹² *Ibid.*

utilises a series of “largely self-executing rules”,¹³ with monitoring by the ACCC,¹⁴ and with certain discrete powers conferred on the ACCC.¹⁵

NBN Co submits that the SAU is comprised of three broad elements, which are:

- the service description;
- price-related terms and conditions; and
- non-price related terms and conditions.¹⁶

In respect of the service description, NBN Co states that the SAU provides broad coverage of NBN Co services, including all of NBN Co’s product components, product features and ancillary services.¹⁷ Key commitments in relation to services include:

- processes for the development by NBN Co and access seekers of additional product components and product features;¹⁸
- a commitment to not withdraw a set of basic product components during the term of the SAU;¹⁹ and
- processes that must be followed by NBN Co in order to withdraw other product components and product features.²⁰

In relation to the price-related terms and conditions, NBN Co submits that the SAU is intended to:

- provide NBN Co with the opportunity for the recovery of its costs over time;
- encourage the economically efficient take up and usage of NBN Co’s products; and
- strike a balance between providing pricing certainty for access seekers and pricing flexibility for NBN Co.²¹

To meet these objectives, the SAU contains commitments in relation to the pricing of products, and how prices of products will change over time. Key commitments in relation to price-related terms and conditions include:

¹³ Ibid, p. 28.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid, p. 27.

¹⁷ Ibid, p. 28.

¹⁸ Ibid, p. 78.

¹⁹ Ibid, p. 41.

²⁰ Ibid, p. 82.

²¹ Ibid, p. 47.

- initial pricing for a set of basic products, fixed for five years, that are set with reference to wholesale prices on legacy networks and are uniform across NBN Co's networks;²²
- a mechanism, locked-in for the term of the SAU, for classifying NBN Co's expenditure as prudent and efficient;²³
- a two-part pricing approach comprising an access component and a usage component;²⁴
- an annual price increase limit of CPI/2 that applies to the prices of all NBN Co's products and product components;²⁵
- a long-term revenue constraint methodology that allows NBN Co to incur losses in early periods as customers transition to the NBN, but limits NBN Co over time to recover its costs, inclusive of a regulatory cost of capital;²⁶ and
- a regulatory cost of capital of a risk-free rate plus a mark up of 350 basis points.²⁷

In respect of non-price terms and conditions, NBN Co submits that it has adopted a principles-based and non-exhaustive approach in the SAU.²⁸ NBN Co states that the SAU explicitly provides for "linkage" of the SAU to NBN Co's Wholesale Broadband Agreement ('WBA').²⁹ NBN Co also states that it provides for an ACCC role where agreement cannot be reached in respect of certain terms and conditions between NBN Co and an access seeker through a transparent and efficient mechanism in the SAU.³⁰

If the ACCC makes a decision to accept the SAU, the commitments made by NBN Co in the SAU will be enforceable by the ACCC, or by any person whose interests are affected by a contravention, through orders from the Federal Court.³¹

Submissions in response to the December 2011 consultation paper have assisted the ACCC in identifying a number of significant issues associated with NBN Co's SAU, and on which the ACCC is seeking further views in this supplementary consultation paper. These issues include:

- *The nature of the SAU review mechanisms* — the SAU provides for NBN Co to undertake reviews of the SAU on certain matters during the proposed 30 year term,

²² Ibid, p. 47.

²³ Ibid, p. 60.

²⁴ Ibid, p. 49.

²⁵ Ibid, p. 47.

²⁶ Ibid, p. 55.

²⁷ Ibid, p. 61.

²⁸ Ibid, p. 69.

²⁹ Ibid, p. 28. The WBA is a Standard Form of Access Agreement containing terms and conditions of access that is published by NBN Co, and NBN Co must enter into an Access Agreement that is the same as the WBA with an access seeker upon request in accordance with section 152CJA(2) of the CCA.

³⁰ Ibid, p. 69.

³¹ CCA, s. 152BB(1).

and following these reviews, to submit variations of the SAU to the ACCC. The review processes specified in the SAU will only result in a variation to the SAU if NBN Co elects to submit a variation. There is no scope for the ACCC or access seekers to propose or require a variation. The ACCC is seeking views on NBN Co's proposed review mechanisms.

- *The interaction between the SAU and the WBA* — NBN Co has used the SAU to specify high-level commitments (particularly in relation to non-price matters) with the detailed terms and conditions being specified in the WBA. The WBA is subject to change by NBN Co and is not assessed by the ACCC. The ACCC is seeking views on the interaction between the SAU and the WBA.
- *Service level commitments* — the SAU notes NBN Co's intention to introduce service level commitments. The SAU does not specify any service levels and does not make any commitments that NBN Co will comply with service levels set out in another document. The ACCC is seeking views on whether the proposed approach to service levels is reasonable and in the long-term interests of end-users.
- *The setting of initial prices* — the SAU specifies initial prices for a subset of product components (the 'price controlled offers'). The prices for other product components, product features and ancillary services that NBN Co will be providing at the commencement of the SAU are not specified in the SAU. The SAU also makes commitments around how initial prices for new products will be set. The ACCC is seeking views on whether these commitments will lead to prices that are reasonable and in the long-term interests of end-users.
- *The degree of ACCC oversight of key pricing matters* – the pricing methodology specified in the SAU does not provide for periodic review by the ACCC of key pricing matters, including NBN Co's expenditure and its annual revenue requirements. Under NBN Co's pricing methodology, NBN Co will determine key pricing elements by following 'self-executing' rules that are specified in the SAU. The ACCC is seeking views on whether this approach is reasonable and in the long-term interests of end-users, and particularly whether it promotes efficient investment in and use of the NBN.

The structure of the remainder of this supplementary consultation paper is as follows:

- Chapter 2 outlines the regulatory context under which the SAU operates.
- Chapter 3 discusses how the SAU will operate, including the term of the SAU, reviewing and varying the SAU and the regulatory recourse mechanism.
- Chapter 4 outlines common approaches adopted by NBN Co throughout the SAU.
- Chapter 5 discusses the service description adopted in the SAU and the products by which NBN Co will deliver this service (including the development and withdrawal of products).

- Chapter 6 discusses the commitments made by NBN Co regarding how it will set prices for its products and the expenditures it can recover under the SAU.
- Chapter 7 discusses the non-price commitments made by NBN Co.
- Chapter 8 discusses the enforcement of the terms and conditions in the SAU, including reporting and compliance commitments.

The ACCC seeks the views of interested parties on the questions identified throughout this supplementary consultation paper. Respondents should have regard to the statutory criteria in section 152CBD of the CCA, as outlined in chapter 3 of the December 2011 consultation paper, in formulating their submissions.

2 Regulatory context

The ACCC notes that the assessment of the SAU takes place as one component of the broader establishment of the National Broadband Network ('NBN') and the arrangements for access to its services. A wide range of complex issues may therefore arise during the SAU assessment process. Whilst the absence of NBN Co activity in retail markets for communications services may diminish the importance of some issues that have arisen in previous regulatory processes under Part XIC of the CCA, new and different issues are likely to arise. Given the circumstances that this SAU relates to, many of the issues are likely to be unique and may require novel approaches to issues that have arisen in other regulatory contexts.

Nonetheless, the ACCC considers that its overarching objectives in assessing the SAU are fundamentally the same as those performed in other regulatory processes – promoting the long-term interests of end-users by fostering competitive markets and efficient operation, use, and investment in relation to infrastructure.

This chapter of the supplementary consultation paper provides interested parties with a broad overview of how the ACCC views the different components of the access arrangements for the NBN interacting with one another, and considers some of the choices made by NBN Co in the design of the SAU in this context. Some of the matters in this chapter may not be specifically relevant to an ACCC decision to accept or reject the SAU, but may assist interested parties in their understanding of what are complex commercial, regulatory and legislative arrangements.

In this respect, the ACCC considers that discussion of these matters may assist interested parties to focus on issues that are properly considered as part of the SAU assessment process, and those that may be more appropriately considered in other regulatory processes.

2.1 Establishing an effective regulatory framework

Subsection 152CJA(1) of the CCA states that NBN Co must not supply eligible services unless those services are 'declared', and hence subject to Category B Standard Access Obligations ('SAOs').³² Part XIC of the CCA allows for the terms and conditions on which NBN Co must comply with the Standard Access Obligations, and supply the declared service, to be set out in a number of different documents.

NBN Co may give the ACCC an SAU that sets out some or all of the terms and conditions relating to the supply of a service.³³ If the SAU is accepted by the ACCC,

³² Once a service becomes a 'declared service', an access provider must supply the service to an access seeker upon request. Standard Access Obligations apply to a service provider of a declared service, and require the provision of access to declared services in order for access seekers to provide carriage services or content services using declared services. For further information about declared services and Category B Standard Access Obligations, please see sections 3.2.1 and 3.2.2 respectively in the December 2011 consultation paper.

³³ CCA, ss.152CBA(1)(b) and (2).

the ACCC may still decide to supplement the SAU terms and conditions by setting out regulated terms and conditions in relation to the service in Access Determinations, or in Binding Rules of Conduct (if an urgent need arises). Alternatively, if an SAU is not accepted by the ACCC, the ACCC may set out all regulated terms and conditions of access to declared services in an Access Determination (or Binding Rules of Conduct, if an urgent need arises).

Part XIC also provides for terms and conditions to be established by mutual agreement between NBN Co and access seekers in Access Agreements.³⁴

A number of submissions to the December 2011 consultation paper expressed concerns about the ‘hierarchy’ of terms under Part XIC,³⁵ which provides for the terms and conditions contained in Access Agreements to prevail over inconsistent terms and conditions contained in Access Determinations or Binding Rules of Conduct made by the ACCC.³⁶

The ACCC is committed to ensuring that there is an effective regulatory framework in place as soon as is practicable, and ideally prior to access seekers executing long-term Access Agreements. In this respect, the ACCC notes that the SAU does not contain comprehensive terms and conditions of access to the NBN Access Service. Consequently, there may be other regulated terms and conditions that should be established prior to parties entering into long-term Access Agreements.

The ACCC supports and encourages continuing negotiations between NBN Co and access seekers with a view to establishing mutually agreeable commercial terms. At the time of publication, a number of access seekers have entered into Access Agreements with NBN Co that are based on a ‘short-term’ WBA (NBN Co’s main Standard Form of Access Agreement).³⁷ The ACCC understands that these establish a ‘Contract Development Process’ that is designed to assist all interested parties to develop terms and conditions for longer-term Access Agreements.

Regarding the relationship between the WBA and the SAU, NBN Co has chosen to structure the SAU so that it is closely linked to the WBA. This approach results in some complex interactions between the two documents, as discussed in chapter 4 of this supplementary consultation paper.

However, while the SAU is intended to underpin longer-term Access Agreements and refers to the WBA, the WBA does not form part of the SAU. The ACCC does not have a legislative role in assessing the reasonableness of a Standard Form of Access

³⁴ Chapter 3 of the December 2011 consultation paper contains further information about the telecommunications access regime in Part XIC of the CCA that applies to NBN Co.

³⁵ For example: Telstra, *NBN Co Special Access Undertaking – Telstra’s response to the ACCC’s first consultation paper*, January 2012; Herbert Geer, *Submission by Herbert Geer Lawyers on behalf of: iiNet, Internode, and TransAct Capital Communications*, 20 January 2012; Vodafone Hutchinson Australia, *Initial Submission to the Australian Competition and Consumer Commission*, January 2012.

³⁶ Chapter 3 of the December 2011 consultation paper contains further information about the telecommunications access regime in Part XIC of the CCA that applies to NBN Co.

³⁷ See section 3.4 of the December 2011 consultation paper for more information about NBN Co’s Standard Form of Access Agreement.

Agreement and is not assessing the specific terms and conditions that are contained in the WBA as part of the SAU assessment process (unless they are incorporated into the SAU).

The SAU is therefore somewhat unusual in comparison to some other undertakings accepted by the ACCC, as it does not include a set of indicative terms that may be negotiated with an access seeker. In further contrast to some other service providers regulated by the ACCC, NBN Co is required by law to comply with a request by an access seeker to enter into an Access Agreement on the same terms and conditions that are in a Standard Form of Access Agreement,³⁸ such as the WBA. This particular aspect of the broader telecommunications access regime may therefore address the ‘indicative terms’ aspect of access to services that otherwise may be expected to be addressed as part of an undertaking. Having said this, the ACCC would normally consider whether such ‘indicative terms’ provide a suitable set of terms and conditions to be offered by the service provider as part of an undertaking assessment process. As noted, the ACCC does not have a role under Part XIC in assessing the reasonableness of a Standard Form of Access Agreement.

The ACCC notes that a Standard Form of Access Agreement such as the WBA does not form part of the hierarchy of terms outlined above, unless executed as an Access Agreement between NBN Co and an access seeker. That is, terms and conditions contained in a Standard Form of Access Agreement do not prevail over inconsistent terms and conditions contained in an SAU, Access Determinations or Binding Rules of Conduct.

The ACCC also notes that its understanding is that NBN Co is not obliged to offer a subset of terms and conditions contained in a Standard Form of Access Agreement – that is, it is only obliged, upon request by an access seeker, to enter into an Access Agreement that is the same as any published Standard Form of Access Agreement. Therefore, should an access seeker wish to enter into an Access Agreement with NBN Co which adopts some terms and conditions contained in the WBA and some contained in another document (for example, an Access Determination), it would need to negotiate this outcome with NBN Co.

As NBN Co is not obliged to enter into Access Agreements based on a subset of the terms and conditions in a Standard Form of Access Agreement, it may be necessary that a comprehensive set of regulated terms and conditions is in place to provide access seekers with an alternative means of supply to executing the WBA. The ACCC will therefore need to give careful consideration to the scope of both the commitments made in the SAU and any future regulated terms and conditions contained in Access Determinations or Binding Rules of Conduct.

Are there terms and conditions that are not contained in the SAU which you consider should be established prior to parties entering into long-term Access Agreements?

³⁸ CCA, s. 152CJA(2).

2.2 Approach to assessment of the SAU

The ACCC is required to assess NBN Co's proposed SAU in accordance with the statutory criteria set out in section 152CBD of the CCA.

While the ACCC may provide some guidance to NBN Co about the changes that would allow the SAU to be accepted, it cannot unilaterally amend NBN Co's proposed SAU. That is, the terms and conditions that are set out in the SAU, as drafted by NBN Co, are the focus of the SAU assessment process. As a consequence of this, alternative approaches or commitments are generally not directly relevant to an assessment of whether the particular SAU that NBN Co has lodged should be accepted or rejected.

Having said this, section 152CBDA of the CCA provides for a person to make variations to an original undertaking in accordance with a notice given by the ACCC. If the person does so, the ACCC must consider the varied undertaking as if it had been given to the ACCC instead of the original undertaking. This streamlines the SAU assessment process by preventing NBN Co from having to submit a new SAU.

NBN Co has made a number of submissions in support of the SAU, or specific commitments in the SAU, by reference to the 'with and without' test and a 'counterfactual'.³⁹ In making a decision whether to accept or reject the SAU, the ACCC must be satisfied of a range of matters, including that certain aspects of the SAU promote the long-term interests of end-users. The ACCC proposes to, in general, not assess whether certain aspects of the SAU (or, indeed, acceptance of the SAU itself) would satisfy the statutory criteria by comparing a 'future with' the SAU to a 'future without' the SAU. This approach is consistent with previous ACCC practice, such as in the *FANOC Draft Decision*, where the ACCC stated that:

"...reasonableness is not determined by reference to what would exist if the SAU was not accepted. In this sense, as has been confirmed by the Tribunal, it is not always necessary to apply a 'with and without' test in assessing the reasonableness of the SAU. It may be useful to apply the 'with and without' test to individual criteria or in specific circumstances but, ultimately, the reasonableness test is applied as a standalone test."⁴⁰

The ACCC considers that it should maintain this approach to the use of the 'with and without' test when assessing the SAU given by NBN Co.

The ACCC recognises that the SAU contains a complex set of commitments, many of which are interrelated. Consequently, the ACCC considers that it should, where appropriate, consider the combined effects of different aspects of the SAU when assessing the SAU commitments against the statutory criteria.

For further information about the legislative criteria that the ACCC must apply, please refer to chapter 3 of the December 2011 consultation paper.

³⁹ See, for example, NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 109.

⁴⁰ ACCC, *Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service – Draft Decision*, December 2007, p. 31.

3 Operation of the SAU

This chapter seeks views on the following matters:

- the process that is established by the SAU, known as ‘Regulatory Recourse’, which provides for the ACCC to resolve certain types of disputes between NBN Co and access seekers about terms and conditions of access; and
- the proposed 30 year term of the SAU, the reviews of the SAU conducted by NBN Co and the recognition of NBN Co’s right under Part XIC of the CCA to withdraw the SAU, which together determine when the SAU operates, and how it may change or cease to operate over time.

3.1 Regulatory recourse disputes

NBN Co has included a mechanism in clause 6 of the preliminaries to the SAU for NBN Co and access seekers to seek resolution of specific disputes by the ACCC about the terms and conditions of access to a relevant service. The ‘Regulatory Recourse’ dispute process only applies before an Access Agreement has been entered into.⁴¹ The ACCC notes that it is also able to set terms and conditions of access to a declared service in an Access Determination (or if an urgent need arises, in Binding Rules of Conduct). Hence, the dispute resolution power conferred on the ACCC is in addition to existing ACCC regulatory powers under Part XIC of the CCA.

This dispute resolution power does not concern commercial disputes arising under executed Access Agreements, which are covered by the dispute management process set out in Schedule 12 (Dispute Management Rules) of the SAU. This process is discussed in section 7.2 of this supplementary consultation paper.

3.1.1 Disputes subject to notification

Clause 6 of the preliminaries to the SAU provides for either NBN Co or an access seeker to notify disputes to the ACCC in respect of:

- non-price terms and conditions that are not covered by the SAU;⁴² and
- price-related terms and conditions that had not been announced prior to the commencement of the SAU.⁴³

These disputes may only be notified before execution of an Access Agreement between NBN Co and the access seeker.⁴⁴

⁴¹ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 6.1(a)(i).

⁴² Ibid, preliminaries, clause 6.1(a)(ii).

⁴³ Ibid, preliminaries, clause 6.1(a)(iii).

⁴⁴ Ibid, preliminaries, clause 6.1(a)(i).

The aim of this process is to enable parties to seek an ACCC ruling in the event that they are unable to reach agreement on particular terms of access via their negotiations over Access Agreements.⁴⁵ However, the ACCC considers that it is unclear whether clause 6 applies in relation to the following disputes:

- Disputes that arise between NBN Co and an access seeker when renegotiating an expiring Access Agreement or replacement Access Agreement. This is because clause 6.1(a) specifies that clause 6 only applies ‘before execution of an Access Agreement with that Access Seeker’. Disputes arising from the renegotiation of an Access Agreement or a replacement Access Agreement may not fall within this category.
- Disputes regarding terms and conditions relating to a particular non-price term that is to some extent ‘covered by the SAU’. An example of this is where the SAU requires NBN Co to include terms or conditions relating to a subject matter in the WBA, but the SAU does not itself specify a particular term or condition.

3.1.2 Dispute resolution procedure

Clause 6.1 of the preliminaries to the SAU sets out the dispute notification and resolution procedure that must be followed by NBN Co, access seekers and the ACCC. The procedure includes timeframes to be followed by the parties to the dispute and the ACCC. The ACCC may vary the procedure for disputes relating to price-related terms and conditions in certain circumstances, provided both NBN Co and the access seeker agree.⁴⁶ Clause 6.1 also requires the documentation submitted to the ACCC to comply with certain requirements as to form.⁴⁷

NBN Co submits that, in formulating the dispute resolution provision, it “...has sought to provide for a transparent and efficient process that avoids (to the extent possible) the problems with the now removed ‘negotiate-arbitrate’ model.”⁴⁸

While some strict timeframes and form requirements may facilitate expeditious resolution of some disputes, these requirements could impede effective resolution of more complicated disputes by the ACCC. To the extent the SAU provides for some additional flexibility in the process to be followed when dealing with price-related disputes, this possibility may be somewhat lessened. For example, clause 6.1(j) of the SAU allows the ACCC to vary the process required in the SAU provided the consent of both NBN Co and the access seeker is obtained. However, in the ACCC’s experience, disputes about non-price terms and conditions may sometimes be as complicated as disputes relating to price-related terms and conditions, particularly where a dispute concerns a number of non-price terms and conditions. Accordingly, consideration could be given to providing procedural flexibility in regard to disputes regarding non-price, as well as price-related, matters.

⁴⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 77.

⁴⁶ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 6.1(j).

⁴⁷ *Ibid*, preliminaries, clauses 6.1(d), (e) and (f).

⁴⁸ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 77.

3.1.3 Dispute resolution decision and criteria to be applied

The SAU sets out the basis on which the ACCC must make its decision on a dispute, including the criteria that the ACCC must apply and restrictions on decisions by the ACCC.⁴⁹ The SAU does not state whether the concepts of reasonableness and promotion of long-term interests of end-users employed in this clause take the same meanings as in Part XIC of the CCA. However, it seems reasonable to interpret them in such a way given the SAU is proffered pursuant to Part XIC of the CCA.

NBN Co submits that “in order to reduce the incentives for regulatory ‘gaming’, [the dispute resolution process provides] for the ACCC to select between the positions put forward by the Access Seeker and NBN Co.”⁵⁰ NBN Co also submits that “the regulatory recourse mechanism ... will operate in a manner that also ensures compliance with other legal requirements.”⁵¹

The ACCC will need to consider the incentives created by the requirement for the ACCC to select between the positions put forward by the access seeker and NBN Co without variation by the ACCC.

The ACCC will also need to consider whether the restrictions on ACCC decisions under this process are sufficiently clear. As an example, it is unclear whether the prohibition on ACCC decisions that would result in NBN Co engaging in conduct that breaches agreements is intended to differ from the restrictions on Access Determinations under Part XIC of the CCA (such as those in relation to protected contractual rights).⁵²

3.1.4 Dispute resolution outcome

Clause 6.1(h) of the preliminaries to the SAU states that the ACCC decision is final and binding on both parties to the dispute, and that the terms or conditions must be adopted in the parties’ Access Agreement.⁵³

If the ACCC makes a decision in relation to a dispute, clause 6.3 of the preliminaries to the SAU requires NBN Co to publish the terms or conditions of the decision on the NBN Co website.⁵⁴ If an access seeker or an existing customer (who were not party to the original dispute) elects to adopt the terms and conditions of the decision, then NBN Co undertakes to either (where applicable):

⁴⁹ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clauses 6.1(g) and 6.2(b)(iv).

⁵⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 77.

⁵¹ Ibid.

⁵² Under section 152BCB(5) of the CCA, an Access Determination has no effect to the extent that it would have the effect of depriving any person of a protected contractual right.

⁵³ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 6.3(i).

⁵⁴ Ibid, preliminaries, clause 6.3(a).

- incorporate the terms or conditions into the WBA, so they will be available for inclusion in a prospective Access Agreement,⁵⁵ or
- incorporate the terms or conditions into any existing Access Agreement,⁵⁶ provided the other party to an existing Access Agreement elects to adopt these terms or conditions within 10 business days of publication on the NBN Co website.⁵⁷

The ACCC will need to consider whether the manner in which the outcomes of the regulatory recourse process are implemented is sufficiently clear and appropriate. For example, it is unclear whether the practical outcome of the dispute resolution process is to give ACCC decisions contractual force between the parties.

Are the types of disputes that may be notified through the dispute resolution process sufficient to resolve disputes between NBN Co and access seekers about access to the relevant services? In providing your views, please consider that the ACCC has powers under Part XIC of the CCA for setting terms and conditions of access to declared services, such as making Access Determinations and Binding Rules of Conduct, and can issue Procedural Directions in relation to negotiations.

Is the dispute resolution procedure likely to result in the effective resolution of disputes? Are the dispute resolution timeframes, the permitted ACCC decisions, and the criteria to be applied by the ACCC when making a decision, likely to result in the effective resolution of disputes?

Is it appropriate that the ACCC only has a choice of adopting one set of terms and conditions proposed by the parties without amendments? For instance, there may be a scenario where the ACCC considers that neither set of terms and conditions promotes the long-term interests of end-users.

Is it clear that the ACCC decisions under the dispute resolution processes will be binding on all parties?

Overall, are the regulatory recourse dispute resolution provisions contained in NBN Co's proposed SAU consistent with the legislative criteria in section 152CBD of the CCA?

3.2 Term, variation, withdrawal and extension of the SAU

Both clause 7 of the preliminaries to the SAU and Schedule 9 (Review and Variation of Aspects of SAU) of the SAU relate to the term of the SAU, variation of the SAU, and withdrawal of the SAU. These aspects of the SAU are closely related, as they affect the period of time for which the proposed SAU commitments apply. In particular, they have implications for whether the SAU commitments will remain reasonable and in the

⁵⁵ Ibid, preliminaries, clause 6.3(b)(i).

⁵⁶ Ibid, preliminaries, clause 6.3(b)(ii).

⁵⁷ Ibid, preliminaries, clause 6.3(c).

long-term interests of end-users over time and in changing circumstances. Broadly, the combined effect of these aspects of the SAU, if accepted, is that:

- the commitments in the SAU would be in effect for 30 years unless NBN Co varies or withdraws any or all of these commitments;
- NBN Co would be required to conduct reviews of certain aspects of the SAU; and
- NBN Co would be required to formulate and give SAU variations to the ACCC to accept or reject.

For the reasons explained below, the ACCC does not intend to consider clauses of the SAU related to term and variation as stand-alone commitments made by NBN Co. These clauses will be more fully considered by the ACCC when assessing the extent to which other commitments in the SAU are likely to satisfy the legislative criteria.

3.2.1 Term

NBN Co has proposed that the SAU should operate for approximately 30 years. If the proposed SAU is accepted and not otherwise varied or withdrawn, NBN Co will be required to abide by the commitments contained in the SAU for that period. Any Access Determinations or Binding Rules of Conduct that may be made by the ACCC during this time will have no effect to the extent of inconsistency with these SAU commitments.⁵⁸

NBN Co submits a range of reasons in support of the proposed term of the SAU, including:

- an extended SAU provides regulatory certainty and stability;⁵⁹
- the term of 30 years is aligned with investment in NBN infrastructure;⁶⁰ and
- the review mechanisms in the SAU will ensure the ongoing relevance and reasonableness of the terms and conditions of the SAU over the 30 year term.⁶¹

As noted, the ACCC does not intend to consider the term of the SAU as a stand-alone commitment made by NBN Co. The assessment of the term against the legislative criteria on a stand-alone basis appears unlikely to assist the ACCC's decision as to whether to accept or reject the SAU. Rather, the proposed term is so closely related to the substantive commitments in the SAU that the term is more appropriately considered when assessing the other commitments made in the SAU against the legislative criteria.

⁵⁸ CCA, ss. 152AY, 152CBIA and 152CBIB. These provisions are discussed further in sections 3.2.3 and 3.3.3 of the December 2011 consultation paper.

⁵⁹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 70.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, p. 74.

Such an approach recognises that the interrelationships between different clauses of the SAU can significantly influence the substance of the commitments made by NBN Co.

Consequently, the ACCC seeks views from interested parties about the proposed term of the SAU as one aspect of views about other specific commitments contained in the SAU.

3.2.2 Review and variation

Clause 7 of the preliminaries to the SAU recognises that NBN Co may request a variation to the SAU at any time in accordance with section 152CBG of the CCA. Clause 7 also requires NBN Co to conduct reviews of certain aspects of the SAU in accordance with Schedule 9 (Review and Variation of Aspects of SAU). The SAU requires the following reviews to occur:

- periodic reviews of the customer engagement processes and Product Development Forum Processes, which are further discussed in section 5.5.1.4 of this supplementary consultation paper; and
- a review of ‘SAU Review Matters’ upon the happening of certain events (the ‘SAU review’).⁶²

The processes for NBN Co to review and vary these aspects of the SAU are set out in Schedule 9. Clause 1 of Schedule 9 also sets out an obligation for NBN Co to exercise its rights and perform its obligations under this Schedule in good faith.

NBN Co is required to conduct the SAU review, in the period between declaration by the Communications Minister that the NBN should be treated as built and fully operational and declaration by the Minister for Finance that conditions are suitable for the entering into and carrying out of an NBN Co sale scheme.⁶³ This review requires NBN Co to review certain matters relating to the prudence of expenditure, the inclusion of expenditure into annual revenue requirement calculations and the approach to WACC.⁶⁴ At its discretion, NBN Co may also review other pricing matters as part of the SAU review.⁶⁵

Before the end of the SAU review period, NBN Co is required to submit a SAU variation, known as a ‘Triggered SAU Variation’, to the ACCC.⁶⁶ The SAU variation must ‘address’ the matters identified during the SAU review, and be assessed by the ACCC in accordance with sections 152CBG and 152CBH of the CCA.⁶⁷ If the ACCC rejects this variation, NBN Co is required to submit a new proposed variation within 6 months of this rejection.⁶⁸

⁶² NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 7.3(b).

⁶³ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.2(a).

⁶⁴ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.3(a).

⁶⁵ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.3(b).

⁶⁶ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.1.

⁶⁷ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.4(a).

⁶⁸ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.6(a).

NBN Co submits that the SAU review mechanism is appropriate as “[t]he timing is intended to coincide either with the preliminary stages of the privatisation process or the middle of the SAU term.”⁶⁹

NBN Co further submits that “...a mid-term review may be a practical means of ensuring the continued workability of the SAU.”⁷⁰ NBN Co submits that “[s]ome aspects of the SAU may not be suitable if NBN Co is no longer fully government owned and some may, in any event become less suitable over time...”,⁷¹ and it “...has the option of including other matters in the SAU Review, but these are not mandatory because the SAU design, as it relates to those other matters, is not reliant on NBN Co’s ownership...”.⁷²

As with the term of the SAU, the ACCC will not consider clauses relating to reviews and variations as stand-alone commitments made by NBN Co. Clauses relating to review and variation will be more fully considered when assessing the extent to which other commitments in the SAU are likely to satisfy the legislative criteria. In this respect, review and variation clauses affect the period of time for which the proposed SAU commitments apply, and in particular, how the SAU ensures that these commitments will continue to be reasonable and in the long-term interests of end-users over the proposed 30 year term of the SAU. In determining whether the proposed review processes ensure this however, an assessment of their effectiveness will nonetheless be required.

The ACCC is mindful of the fact that if it were to accept the SAU, the commitments in the SAU would apply for 30 years unless NBN Co submits a variation that the ACCC accepts in accordance with section 152CBG of the CCA. The effectiveness and independence of any review and variation processes included in the SAU are therefore likely to be of critical importance to the assessment of all the commitments in the SAU. In this respect, the ACCC notes that:

- the SAU review and the periodic reviews of the customer engagement process and Product Development Forum Processes are conducted by NBN Co;
- the SAU does not state what the parameters or objectives of the SAU review are;
- it is not clear to what extent other interested parties will be involved in the review process; and
- while NBN Co cannot vary the commitments in the SAU without the consent of the ACCC, ultimately NBN Co may choose which aspects of the SAU it wishes to seek a variation for, and the manner in which it seeks to vary these aspects of the SAU.

⁶⁹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 93.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

3.2.3 Withdrawal and Extension

Clause 7.4 of the preliminaries to the SAU broadly acknowledges the rights NBN Co has under Part XIC of the CCA to withdraw the SAU,⁷³ while clause 7.5 utilises section 152CBA(9) and 152CBE of the CCA to permit NBN Co to extend the operation of the SAU in certain circumstances which are set out in the SAU.

Section 152CBE of the CCA requires the ACCC to approve an extension (or subsequent extension) of the operation of a special access undertaking if the ACCC is satisfied that the criteria it must apply, as set out in the undertaking, have been met. NBN Co has set out the criteria that the ACCC must apply when deciding whether to approve such an extension, which is that the ACCC must be satisfied that an extension (or further extension) satisfies the reasonableness criteria in section 152AH of the CCA.⁷⁴

Are the commitments in the SAU likely to satisfy the legislative criteria for the proposed term of the SAU? Please identify those commitments that do.

Are there commitments in the SAU that are unlikely to satisfy the legislative criteria for the proposed term of the SAU? Please identify these commitments.

Do the obligations in the SAU for NBN Co to review the SAU and give variations to the ACCC mean that the commitments in the SAU are likely to be reasonable and in the long-term interests of end-users for the proposed term?

Does the good faith review obligation in clause 1.2 of Schedule 9 (Review and Variation of Aspects of SAU) enhance the effectiveness or independence of the reviews that NBN Co is required to conduct under the SAU?

⁷³ See section 152CBG of the CCA for variation of the SAU, and section 152CBI for withdrawal of the SAU.

⁷⁴ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 7.5(b).

4 Common approaches adopted in the SAU

This chapter provides an overview of, and seeks views on, common approaches used by NBN Co throughout the SAU. There are two main categories: those relating to the operation of the SAU and those relating to obligations set out in the SAU. This chapter is structured as follows:

- Section 4.1 seeks views on common approaches relating to the operation of the SAU, including the interaction of the SAU with the Wholesale Broadband Agreement and other documents, references to the ‘Wholesale Broadband Agreement’ versus references to ‘Access Agreements’, and references to ‘Customers’ versus references to ‘Access Seekers’.
- Section 4.2 seeks views on common approaches relating to obligations, including NBN Co’s obligations to develop systems, documents or processes and to consult.

4.1 Common approaches to the operation of the SAU

4.1.1 Interaction with the Wholesale Broadband Agreement and other external documents

There are numerous references to the WBA throughout the SAU. In its submission, NBN Co states its intention “for terms of access to be governed by a SAU (if accepted) **and** a WBA or an Access Agreement”⁷⁵ (emphasis added). The references to the WBA fall into three categories:

- *References that specify terms to be included in the WBA.* Some references state that NBN Co will include specific content in the WBA.
- *References that specify subject matter to be dealt with in the WBA.* Some references provide that NBN Co will include provisions relating to a particular subject in the WBA, without imposing specific requirements for the content of those provisions.
- *References that make commitments that rely on or are subject to provisions of the WBA.* These references may have the effect of defining the commitments in the SAU only by reference to a document that is not subject to review by the ACCC. That is, the SAU may give NBN Co the discretion to vary the scope of those commitments during the term of the SAU without ACCC oversight.

The ACCC considers that the intended effect of these references is sometimes unclear. It is likely that the ACCC will need to seek clarification from NBN Co on the intended operation of these references to the WBA.

⁷⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 78.

The SAU also makes references to the *Credit Policy*, the *Network Design Rules* and the *Procurement Rules*. References to these documents may affect the scope of the commitments being made by NBN Co in the SAU and raise potential issues in a similar way to references to the WBA.

4.1.2 References to Wholesale Broadband Agreement versus Access Agreement

Throughout the SAU, there are various clauses that make reference to either ‘the WBA’ or ‘Access Agreements’. For example, in Schedule 11 (Non-price Terms and Conditions) of the SAU, clause 14.1 refers to ‘the WBA’ while clause 14.3 refers to ‘Access Agreements’.

As noted, the WBA is a Standard Form of Access Agreement published by NBN Co on its website pursuant to section 152CJA of the CCA.⁷⁶ NBN Co must enter into an Access Agreement with any person who wishes to obtain access to declared services on the terms and conditions set out in a Standard Form of Access Agreement, subject to limited exceptions.⁷⁷ The WBA sits outside the legislative hierarchy made up of Access Agreements, Binding Rules of Conduct and Access Determinations. The WBA is not an executed contract between NBN Co and access seekers.

Access Agreements, however, create contractual rights between NBN Co and access seekers, and fall within the definition set out in section 152BE of the CCA. Access Agreements may be created in a number of ways. For example, an access seeker may request that NBN Co enter into an Access Agreement on the terms and conditions set out in the WBA.

However, Access Agreements need not contain all or any of the terms and conditions set out in the WBA.⁷⁸ That is, even if an Access Agreement is largely based on the WBA, NBN Co and an access seeker may negotiate different terms and conditions from those set out in the WBA.

Whether a reference in the SAU is to ‘the WBA’ or ‘Access Agreement’ may therefore have implications for whom and in what circumstances the SAU commitments apply. The ACCC will therefore need to consider whether the SAU refers to ‘WBA’ or ‘Access Agreement’ appropriately.

4.1.3 References to Customer versus Access Seeker

The SAU distinguishes between the concepts of ‘Access Seekers’ and ‘Customers’. An ‘Access Seeker’ is a service provider who is seeking access to a declared service as set out in section 152AG of the CCA.⁷⁹ On the other hand, a ‘Customer’ is an access

⁷⁶ ‘Wholesale Broadband Agreement’ is defined in Schedule 1 (Dictionary and Interpretation) of the SAU.

⁷⁷ CCA, s. 152CJA(2).

⁷⁸ CCA, s. 152CJA(3).

⁷⁹ ‘Access Seeker’ is defined in Schedule 1 (Dictionary and Interpretation) of the SAU.

seeker who has entered into, or is otherwise subject to, an Access Agreement.⁸⁰ The definition of ‘Access Seeker’ is therefore wider than the definition of ‘Customer’.

This distinction is relevant to the assessment of the SAU because it affects the persons entitled to benefit from the various commitments made by NBN Co in the SAU.

For example, NBN Co only undertakes to offer to supply the product components and associated product features to ‘Customers’ as a means of implementing its obligations under the SAU in respect of the NBN Access Service.⁸¹ Similarly, NBN Co only offers to supply the ‘Ancillary Services’ to ‘Customers’ under clause 2.4 of the preliminaries to the SAU. Therefore, the SAU does not appear to apply to the supply of these services to access seekers who have not entered into an Access Agreement.

On the other hand, NBN Co undertakes to consult more widely with ‘Access Seekers’ under clause 1 of Schedule 11 (Non-price Terms and Conditions) in relation to the future development of the WBA.

Clauses that refer only to ‘Customers’ may give rise to concerns that a commitment that should benefit all access seekers under the Category B SAOs is limited to those who have entered into Access Agreements with NBN Co. The ACCC will therefore need to consider whether the SAU refers to ‘Customers’ or ‘Access Seekers’ appropriately.

4.1.4 Recitals or assertions of fact

Setting aside the ‘Background’ section in the preliminaries to the SAU, there are a number of clauses in the SAU that are effectively recitals of NBN Co’s intentions or assertions of fact. For example, in clause 2 of Schedule 11 (Non-price Terms and Conditions) of the SAU, NBN Co states that it is committed to establishing and maintaining positive working relationships with customers.

These clauses do not set out substantive commitments, but may influence the proper interpretation of other parts of the SAU.

Are there any significant issues caused by references to ‘the WBA’ or other documents in the SAU?

Have references to ‘the WBA’ or ‘Access Agreements’ been used appropriately in the SAU?

Have the terms ‘Access Seeker’ and ‘Customer’ been used appropriately in the SAU?

Do the recitals or assertions of fact in the SAU assist in the interpretation of other parts of the SAU?

⁸⁰ ‘Customer’ is defined in Schedule 1 (Dictionary and Interpretation) of the SAU.

⁸¹ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 2.2.

4.2 Common approaches relating to obligations

4.2.1 Obligations to develop systems, documents or processes

The SAU requires NBN Co to develop various systems, documents and processes in the future. For example, in clause 7 of Schedule 11 (Non-price Terms and Conditions), NBN Co undertakes to develop operational and billing systems for the NBN, to be known collectively as the ‘NBN Co Platform’. In some cases, NBN Co undertakes that the resulting systems, documents or processes will have particular qualities or features. For example, clause 7.2 of Schedule 11 provides that the NBN Co platform must enable certain transactions to be carried out.

A failure by NBN Co to develop a system with these qualities or features would be a breach of NBN Co’s commitments in the SAU. However, the SAU does not provide a way for the ACCC to review the actual systems, documents or processes developed by NBN Co in the future.

Are there any other systems, documents and processes that should be included in the SAU?

Are the features or qualities that NBN Co has specified for these systems, documents and processes appropriate?

4.2.2 Obligations to consult

NBN Co has made a number of commitments to consult with access seekers, its customers and the ACCC in the SAU.

In some cases, NBN Co undertakes a broad and continuing obligation to consult. For example, clause 1 of Schedule 11 (Non-price Terms and Conditions) of the SAU states that NBN Co will:

- develop consultation processes in connection with the development of the WBA; and
- in good faith:
 - take into account the material provided by access seekers and the ACCC; and
 - seek to resolve the key issues raised during consultation.

Other obligations to consult are linked to particular reviews or events. For example, under clause 6 of Schedule 11, NBN Co undertakes to conduct public consultation during Point of Interconnection (‘POI’) reviews.

Other customer consultation processes will only apply if NBN Co chooses to use them. For example, clause 5.9(a) of Schedule 8 (Prudency) provides that NBN Co can either:

- seek endorsement from customers on the prudence of network changes through a consultation process; or
- seek regulatory endorsement from the ACCC.

The regulatory endorsement process specified would, however, permit the ACCC to undertake its own consultation with the general public or industry participants.⁸²

Other consultation obligations are limited to the particular customer. For example, clause 14.3(d) of Schedule 11 provides that if NBN Co proposes to vary a particular Access Agreement between NBN Co and a customer, it will consult the customer before doing so.

In general, the ACCC considers that where an action affects a particular party to the exclusion of others, consultation should be required with that party. Actions that have broader effect may require an appropriate period of consultation or negotiation with customers, access seekers or the general public.

The ACCC notes that the SAU provides for the review of the customer engagement and product development processes, commencing in the third year of the SAU and being repeated every five years.⁸³ NBN Co must provide any information reasonably required by the ACCC as part of this process, such as evidence of consultation.⁸⁴ However, this review and evidentiary requirement does not cover all NBN Co consultation processes. For example, it does not appear to cover the consultation processes in relation to the WBA, including the *NBN Co Operations Manual*, in clause 14.1(b) of Schedule 11.

Has NBN Co proposed to undertake consultation at appropriate times in the SAU?

Do the consultation processes cover the issues that are likely to require input from access seekers, the ACCC or the general public?

Are the consultation processes set out adequate? Do they give interested parties sufficient time to consider and comment on issues?

Do the consultation processes sufficiently set out the obligations of NBN Co to communicate/provide reasons for its decisions?

Is the extent to which the SAU requires NBN Co to take into account material provided through consultation processes sufficient?

Should there be greater ACCC oversight of consultation processes? Does the SAU provide sufficient opportunity for the ACCC to review consultation processes in order to assess whether they have been effective?

⁸² Ibid, Schedule 8 (Prudency), clause 7.

⁸³ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clauses 2.1-2.6.

⁸⁴ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 2.1.

4.2.3 Obligations to publish information

In the SAU, NBN Co has undertaken to publish or provide information in certain circumstances. For example, clauses 3 and 4 of Schedule 11 (Non-price Terms and Conditions) of the SAU require NBN Co to publish rollout plans, ready for service plans and a historical footprint list.

NBN Co submits that these publishing obligations will provide transparency and visibility for access seekers to develop products, marketing plans and strategies.⁸⁵

Do the publishing obligations in the SAU provide sufficient detail and types of information?

Is there other information that access seekers or other members of the public would require in relation to the supply of the NBN Access Service?

Is the proposed timing and location of publication appropriate?

4.2.4 Obligations regarding NBN Co's exercise of contractual rights

NBN Co has undertaken to constrain its exercise of contractual rights under Access Agreements in some provisions of the SAU.

For example, in clause 12 of Schedule 11 (Non-price Terms and Conditions) of the SAU, NBN Co undertakes that it will not impose contractual remedies under the WBA in respect of a customer unless it has notified that customer, and that it will cease to apply the contractual remedies as soon as reasonably practicable.

As a preliminary point, the ACCC notes that contractual remedies do not strictly arise under the WBA, but rather, under executed Access Agreements between the parties (including Access Agreements on the same terms as the WBA). If an Access Agreement differs from the terms and conditions in the WBA, it is uncertain as to whether this clause will apply.

The drafting of such constraints will also need to be carefully considered to assess whether they have the intended effect, given the legislative hierarchy set out in Part XIC of the CCA. Where there is inconsistency between the provisions of the Access Agreement and the SAU, the provisions in the Access Agreement will prevail. For example, the obligations to notify customers of changes to Access Agreements under clause 14.3 of Schedule 11 may not have any effect if the Access Agreement states that NBN Co is entitled to make the changes to the Access Agreement without notice.

Are the constraints on NBN Co contained in the SAU in relation to its exercise of contractual rights effective and reasonable?

⁸⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 86-7.

5 Service description and products under the SAU

This chapter seeks views on issues associated with the services and products covered by the SAU. In particular, the service description adopted in the SAU defines the scope of NBN Co's commitments in the SAU by specifying the service to which those commitments relate. It is therefore important that the service description is accurate and sufficiently complete.

This chapter is structured as follows:

- Section 5.1 seeks views on issues associated with the definition of the 'NBN Access Service';
- Section 5.2 seeks views on the definitions of the product components;
- Section 5.3 seeks views on issues associated with ancillary services;
- Section 5.4 seeks views on issues associated with service levels; and
- Section 5.5 seeks views on issues associated with product development and withdrawal. Section 5.5.1 seeks views on various aspects of the product development process and section 5.5.2 seeks views on issues associated with product withdrawal.

5.1 NBN Access Service

The SAU is given by NBN Co in relation to the 'NBN Access Service', a Layer 2 Ethernet service between the end-user premises and the relevant POI.⁸⁶ This will operate in the 'data link' layer of the open system interconnection ('OSI') model for communications. The NBN Access Service comprises services delivered over NBN Co's fibre, wireless and satellite networks.⁸⁷

NBN Co submits that the service has been developed to give effect to key directions from the government on the type of broadband technology to be used and the supply of open access wholesale-only services.⁸⁸ NBN Co further submits that the service has been described in a functional and technologically neutral way, consistent with previous ACCC views on service descriptions and the need for the service description to remain relevant over the 30 year term of the SAU.⁸⁹

⁸⁶ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, Recital F and clause 2.1; Schedule 2 (NBN Access Service).

⁸⁷ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 34.

⁸⁸ *Ibid*, p. 31.

⁸⁹ *Ibid*, pp. 33-4.

The ACCC has previously articulated the following principles for service descriptions:⁹⁰

- The service should be described in terms which are as functional as possible, to leave the access provider with flexibility to determine the most efficient way of supplying the service and access seekers with flexibility in the type of service that can be provided within the ambit of the declared service. Technical terms may, however, be appropriate where a functional description would provide scope for ambiguity.
- The eligible service should be described in a manner which provides sufficient clarity for application of the Category B SAOs.
- The service should be one for which it is technically feasible to supply and charge.

The ACCC has also set out its view that a bitstream access service should normally meet the following criteria:⁹¹

1. A Layer 2 bitstream access service, which may be offered at a variety of rates but should include a product that is not throttled as well as a product that is symmetric to the extent that technology permits. Products (both consumer and business grade) should be equally available to all access seekers on a non-discriminatory basis.
2. A service (whether the bitstream or another service) that allows access seekers to provide a voice service and that provides for standard E 164 numbering and addressing.
3. A wholesale service which offers:
 - a range of data packet priority options;
 - a range of quality of service options to allow retail service providers to offer commercially viable services;
 - interfaces that permit a retail service provider to control the network and service configuration (including fault status, if relevant) of its own customers;
4. POIs which are commercially feasible for service providers and support competition, including competition for backhaul services from the first point of aggregation.

⁹⁰ ACCC, *Telecommunications Services – Declaration provisions*, July 1999, pp. 27-28.

⁹¹ ACCC, *Submission to Department of Broadband, Communications and the Digital Economy “National Broadband Network: Regulatory Reform for 21st Century Broadband”*, June 2009, pp. 180-181.

5. Interconnection protocols based on well-accepted standards for broadband, voice and, if applicable, video, which are sufficiently well described to allow access seekers to design and build their own interconnecting facilities.
6. Arrangements for access to buildings, shelters and facilities for interconnection.
7. Equivalent treatment of access seekers in relation to all interfaces (including quality of service provision) required to provide a service.
8. An appropriate process for amending service specifications in later periods as needed or desirable, and adequate notice periods for any change.

NBN Co submits that the service description for the NBN Access Service meets these criteria, but that some of these criteria are not relevant to the NBN Access Service.⁹²

What services supplied by NBN Co fall outside the scope of this service description? Are there any services supplied by NBN Co for which this is unclear?

Does the SAU provide terms and conditions of access in relation to all the services which NBN Co supplies that downstream users require in order to supply carriage services or content services?

Does the service description in the SAU sufficiently describe the service that NBN Co purports to supply? Are there any missing essential elements in the service description?

Does the service description in the SAU accurately describe the service? Are there any elements of the service description that are unclear or ambiguous?

How does the service description for the NBN Access Service compare against the principles that the ACCC has previously specified for service descriptions?

Is the service description sufficiently technology neutral to remain applicable as technology changes in the future, particularly given the proposed term of the SAU?

Is an appropriate interconnection protocol specified in the service description?

How should appropriate mechanisms for handling congestion in shared network elements be specified? What are appropriate mechanisms?

Should a stand-alone low committed information rate product suitable for voice-only services be supplied?

⁹² NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, pp. 43-46.

5.2 Product components

The SAU states that the NBN Access Service will be delivered by means of the ‘Product Components’.⁹³ As a result, the scope of the service description for the NBN Access Service to which the SAU relates is narrowed. That is, the SAU does not broadly oblige NBN Co to offer all possible Layer 2 bitstream services between the specified end-points. The SAU only requires NBN Co to offer the specific Layer 2 bitstream service comprised of the product components.

NBN Co states in its submission that this component-based product construct is designed to give access seekers the flexibility to configure capacity and features on the NBN as if it were the access seeker’s own network.⁹⁴ In furtherance of this objective, NBN Co proposes to supply the product components at a variety of data rates, with additional features (adjustable uplink, traffic class) that can be configured according to the access seeker’s preferences.

The product components are defined in Schedule 1 (Dictionary and Interpretation) of the SAU as:

- the product components described in clause 1.1 of Schedule 3 (Product Components), being the access virtual circuit (‘AVC’), connectivity virtual circuit (‘CVC’), user-network interface (‘UNI’) and network-network interface (‘NNI’);
- the product components offered for supply by NBN Co as at the date on which NBN Co receives written notice of the acceptance of the SAU from the ACCC;
- the product components identified within the ‘Initial Product Roadmap’, which is defined in Schedule 1 (Dictionary and Interpretation); and
- any new and varied product components introduced by NBN Co pursuant to Schedule 6 (Product Development and Withdrawal).

However, clause 2.3(b) of the preliminaries to the SAU states *only* that NBN Co will supply the four components listed in clause 1.1 of Schedule 3: a UNI, an AVC, a CVC, and a NNI.⁹⁵ In contrast, NBN Co’s submission notes that the NBN Access Service will be supplied *initially* through these four components,⁹⁶ suggesting that the other components within the definition of ‘Product Components’ will be supplied at a later stage. The SAU does not appear to include a commitment to supply these additional components as they are introduced.

⁹³ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 2.3.

⁹⁴ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 40.

⁹⁵ These terms are discussed in more detail in section 4.2.2 of the December 2011 consultation paper.

⁹⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 32.

NBN Co's submission also notes that, for technical and operational reasons, an access seeker must purchase all four of the components in order to supply an end-to-end service to an end-user.⁹⁷

Is the 'Product Component' construct reasonable? What are the effects of the product component-based product construct on downstream markets in which carriage services or content services are supplied?

Is the definition of 'Product Component' to include product components other than the AVC, CVC, UNI and NNI appropriate? What is the effect of including product components identified within the Initial Product Roadmap or offered for supply by NBN Co at the date of acceptance of the SAU in the definition of 'Product Component'?

Does the limitation that the NBN Access Service is only to be supplied through the 'Product Components' adversely affect the supply of the NBN Access Service to access seekers?

Are the definitions of the AVC, CVC, UNI and NNI satisfactory and complete?

Are the clauses around product components likely to remain reasonable for the proposed term of the SAU?

5.3 Ancillary services

The SAU defines 'Ancillary Services' to include the 'Facilities Access Service' and the 'Systems Interfacing Service'.⁹⁸

The Facilities Access Service is defined as "a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a Point of Interconnect for the purposes of interconnecting their network with the NBN Co Network".⁹⁹

The Systems Interfacing Service is defined as "a service for the establishment, testing, operation and maintenance of a connection to the NBN Co Platform". (The NBN Co platform is discussed in section 7.10 of this supplementary consultation paper.)¹⁰⁰

Clause 2.4(b) of the preliminaries to the SAU states that ancillary services do not form part of the NBN Access Service. Therefore, it appears that NBN Co intends that the ancillary services will not become declared services if the SAU is accepted, so that NBN Co will not be subject to Category B SAOs in relation to the ancillary services (absent these services being declared by the ACCC or by NBN Co publishing a Standard Form of Access Agreement that relates to the services on its website).

⁹⁷ Ibid, pp. 41-42.

⁹⁸ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 1 (Dictionary and Interpretation), p. 13.

⁹⁹ Ibid, Schedule 1 (Dictionary and Interpretation), p. 17.

¹⁰⁰ Ibid, Schedule 1 (Dictionary and Interpretation), p. 31.

However, clause 2.4(a) of the preliminaries to the SAU states that NBN Co will offer to supply the ancillary services to customers. NBN Co's submission also notes that price and non-price commitments applying to ancillary services will be specified in the SAU.¹⁰¹ For example, clause 4.1 of the preliminaries to the SAU states that NBN Co will price ancillary services in a manner that is consistent with Schedule 7 (Long Term Revenue Constraint Methodology).

Are the definitions of the ancillary services accurate and complete? Are there ancillary services supplied by NBN Co which would fall outside the scope of the definition but which should be included?

What are the consequences of the exclusion of the ancillary services, for example, the Facilities Access Service, from the NBN Access Service?

Is it sufficiently clear which commitments in the SAU do and do not apply to ancillary services?

5.4 Service levels

Service levels specify the minimum quality of the service that is to be supplied by an access provider to an access seeker. For example, service levels may specify that a service will be available for use 99.95 per cent of the time, measured over a month, and that the service will provide a minimum data rate of 12 Mbps. The definition of service levels typically includes reference to a time period over which the service level will be measured, for example, a service level might specify 99.9% availability per day. Service levels would ordinarily be expected to form part of the description of a service.

The SAU does not specify any service levels. Neither does it make any commitments to comply with service levels set out in another document. However, clause 14.2 of Schedule 11 (Non-price Terms and Conditions) states that NBN Co intends to introduce service levels from time to time, and that NBN Co will consult with customers about the nature and extent of these future service levels.

In clause 14.2(a) of Schedule 11 (Non-price Terms and Conditions), NBN Co commits to introducing a service level regime for the fibre network by no later than 30 June 2012. The SAU states that the matters that this regime will deal with include: network performance, service delivery, communication with customers and planned and unplanned event management.¹⁰² It is not clear whether this service level regime is expected to apply only to NBN Co's existing products, although it could be inferred that this is the case because products introduced through the Product Development Forum will have service levels established as part of those processes. (Clause 3.7 of Schedule 6 (Product Development and Withdrawal) states that NBN Co will consult with customers in relation to service levels and associated remedies for new product

¹⁰¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, pp. 32-33.

¹⁰² NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 14.2(a).

components and associated product features prior to introducing those product components or product features.)

The SAU also states that NBN Co will maintain and update a service level regime for product components and associated product features for which it has introduced a service level.¹⁰³

Service level regimes perform a range of functions which go towards issues such as the promotion of efficient investment in and use of the network, and the interests of NBN Co and users of the network.

Typically, if an access provider fails to meet specified service levels, then it may be required to provide monetary credits or rebates to the access seeker. Service levels therefore provide incentives for the access provider to provide services of predictable quality. In the absence of competition, access providers may otherwise have an incentive to lower costs by decreasing expenditure on investment and maintenance, in turn degrading quality of services.

For access seekers, service levels are necessary in order to undertake network planning and product design for downstream markets. For example, it will be necessary for access seekers to select a sufficiently large capacity of CVC in order to provide a given quality of service to end-users. In this regard, the ACCC notes that the definition of ‘committed information rate’ may not reflect the presence of contention within the NBN itself. This means that access seekers may not be able to use the full capacity of their CVC during peak periods, contrary to the industry meaning of the words ‘committed information rate’.¹⁰⁴ In the absence of reliable service levels for the CVC, access seekers may be unable to design a network that fulfils their contractual obligations to end-users around service quality. If this were to be the case, it may reduce the scope of competitive behaviour that is possible in downstream markets, and result in reduced complementary investment to service these markets or, alternatively, inefficient investment to bypass the NBN.

Service levels are also relevant to the assessment of the price-related terms in the SAU because they provide minimum levels of quality in relation to the service being supplied for a given price. For example, it might be reasonable to charge \$X for a service that is available 7 days a week, 365 days a year, but unreasonable to charge \$X for a service with very low or unpredictable availability.

¹⁰³ Clause 14.2(b) of Schedule 11 (Non-price Terms and Conditions) refers to clause 3.7 of Schedule 6 (Product Development and Withdrawal) of the SAU.

¹⁰⁴ Committed information rate (CIR) is usually defined within the telecommunications industry as the maximum data rate that a network is committed to transfer under normal conditions. It is calculated as the average rate of data transferred over a specified time interval, for example, in bits per second (bps). Where a network does not meet its CIR (or other performance parameters), then it is deemed to be unavailable for the purpose of the relevant service level regime. See, for example, the definition in Harry Newton, *Newton’s Telecom Dictionary*, 22nd Ed (2007) at p. 244.

Are the commitments in the SAU with regard to service level regimes sufficient to ensure that the SAU promotes the long-term interests of end-users and is reasonable for the proposed term of the SAU?

Should service levels be specified in the SAU for the NBN Access Service?

Is the process described in the SAU appropriate for the development of a service level regime?

Are the quality criteria specified by NBN Co (network performance, service delivery, communication with customers and planned and unplanned event management) sufficient to define the service level regime for the fibre network? Are there additional criteria that should be specified?

Should the service level regime also apply to the wireless and satellite networks?

5.5 Product development and withdrawal

Schedule 6 (Product Development and Withdrawal) of the SAU sets out the processes by which NBN Co will introduce, vary and withdraw the product components and product features that it supplies.

Clause 1(b) of Schedule 6 excludes certain categories of product components and product features from being subject to the product development and withdrawal processes in the SAU, including (amongst others):

- product components and product features covered by, or contemplated within, the Initial Product Roadmap; and
- a minor variation or enhancement to a product component.

These exclusions may have the effect of exempting a broad range of NBN Co's products from the product development and withdrawal provisions in the SAU. In particular, it appears that the Initial Product Roadmap is sufficiently broad to cover, or contemplate, almost any new product component or product feature NBN Co may introduce. In addition, NBN Co appears to have discretion over whether a product variation or enhancement is minor.

The following sections of this paper seek views on the processes set out in the SAU for product development and withdrawal as follows:

- Section 5.5.1 seeks views on the Product Development Forum, including the rules around who can participate in the Product Development Forum and the processes for developing new product ideas.
- Section 5.5.2 seeks views on NBN Co's commitments around product withdrawal.

5.5.1 Product Development Forum

Under Schedule 6 (Product Development and Withdrawal) of the SAU, NBN Co will implement a Product Development Forum, which will be the primary forum through which customers may submit new product ideas, provide input on the development of new and existing products and obtain information from NBN Co on its current and future product offerings. The Product Development Forum Processes attached to Schedule 6 ('PDF Processes') set out the rules and processes that govern how NBN Co will engage with customers through the Product Development Forum.

In this regard, the Product Development Forum, and the rules around how it will operate, has implications for whether NBN Co has incentives to invest in products and services that access seekers desire, and in turn implications for efficient investment in and use of the NBN. The product development process is linked to the prudency provisions contained in the SAU (and discussed in section 6.6 of this supplementary consultation paper) in that, when a new product requires a change to NBN Co's *Network Design Rules*, NBN Co will follow the customer engagement process specified in Schedule 8 (Prudency) of the SAU (and outlined in section 6.6.1.1 of this supplementary consultation paper).

5.5.1.1 Participation in the Product Development Forum

The SAU states that NBN Co will make the Product Development Forum open to participation by all customers (as opposed to access seekers), subject to the terms of their respective Access Agreements.¹⁰⁵ Customers must also complete registration processes, including signature of a multiparty confidentiality agreement.¹⁰⁶ Interested parties who are not customers of NBN Co may contribute new product ideas and suggest product variations through the Public Ideas Forum.¹⁰⁷

5.5.1.2 Processes for developing new product ideas

The SAU sets out criteria to which NBN Co may have regard when determining whether to develop a product idea submitted by a customer.¹⁰⁸ NBN Co submits that the list of criteria for assessing customers' product ideas is "necessarily indicative, because NBN Co expects to receive a broad range of product ideas".¹⁰⁹

If NBN Co decides, at its discretion, to develop a product idea submitted by itself or a customer, it will publish a paper summarising the product idea, as well as a plan for customer consultation on development of the product idea.¹¹⁰ The Product

¹⁰⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 6 (Product Development and Withdrawal), clause 3.2.

¹⁰⁶ Ibid, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 3(b).

¹⁰⁷ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 6 (Product Development and Withdrawal), clause 3.3.

¹⁰⁸ Ibid, Schedule 6 (Product Development and Withdrawal), clause 3.4.

¹⁰⁹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 79.

¹¹⁰ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 6.4.

Development Processes set out the tools (including workshops and formal submissions) that NBN Co may use to consult with customers during the development of its own or customers' product ideas.

NBN Co submits that allowing it to have flexibility over the timeframes and means with which it consults with customers on product development will "allow for a variety of product ideas to be developed in the manner most effective and appropriate for each such product idea".¹¹¹ NBN Co further submits that its obligation to publish anticipated timeframes and project plans for the assessment, development and implementation of product ideas, will "give customers the means to hold NBN Co accountable...without requiring onerous procedures which stifle the rapid development of product ideas and variations which are capable of rapid development."¹¹²

The ACCC will need to consider whether the degree of discretion NBN Co has over how it assesses customers' product ideas and its consultation with customers creates incentives for NBN Co to efficiently invest in new products. Given the implications that the rules around product development have for efficient investment in and use of the NBN, it is important that product development processes provide a reasonable balance between the interests of NBN Co and its customers, and are clear and transparent while providing for an appropriate degree of flexibility such that they remain effective over the duration of the SAU.

The ACCC notes that the PDF Processes state that the dispute resolution provisions in the WBA do not apply to the Product Development Forum Processes.¹¹³ It is unclear what dispute resolution provisions, if any, will apply to disputes that arise between NBN Co and its customers under the Product Development Forum.

The ACCC further notes that the SAU states that NBN Co will consult with customers through the Product Development Forum on initial prices and service levels for new product components and product features.¹¹⁴ However, as noted above, it appears that a broad range of NBN Co's new product components or product features will not be subject to consultation via the Product Development Forum because they fall within the definition of the 'Initial Product Roadmap'.

5.5.1.3 Confidential information and intellectual property

The PDF Processes set out the confidentiality and intellectual property (IP) rights that will apply to parties during the development of product ideas.¹¹⁵ NBN Co submits that

¹¹¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 81.

¹¹² Ibid.

¹¹³ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 13.

¹¹⁴ Ibid, Schedule 6 (Product Development and Withdrawal), clauses 3.6 and 3.7.

¹¹⁵ Ibid, Schedule 6 (Product Development and Withdrawal), PDF Processes, clauses 5.4-5.6.

these provisions ensure that “product development priorities and justifications are made to customers in a non-discriminatory manner”.¹¹⁶

The SAU provides for the terms of the WBA to apply in relation to IP rights in product ideas.¹¹⁷ In addition, it provides that a customer who submits a product idea to NBN Co must provide warranties to NBN Co relating to any moral rights that may attach to the IP in the product idea.¹¹⁸

The PDF Processes also require customers to disclose any third party IP rights.¹¹⁹ Customers must pay on demand to NBN Co any losses arising from a failure to comply with this requirement.¹²⁰

In relation to confidentiality, clause 3(b) of the PDF Processes provides for all customers to enter into a multiparty confidentiality agreement. However, clause 5.6 requires customers to grant NBN Co additional rights to use and disclose information in relation to a submitted idea and waive any restrictions in the confidentiality agreement.

It is important that the product development processes contain clear provisions in relation to confidentiality and intellectual property, in order to encourage customers and NBN Co to create innovative new products. However, it is also important that the arrangements do not constitute a barrier to customers’ participation. Provisions in the SAU which require customers to provide warranties, grant NBN Co rights, give NBN Co waivers of rights, provide notice to NBN Co, and indemnify NBN Co against liability may be significant requirements for customers.

5.5.1.4 Review and variation of Product Development Forum Processes and customer engagement processes

The SAU states that NBN Co will not vary the PDF Processes or customer engagement processes in the SAU, except in accordance with the review and variation processes set out in Schedule 9 (Review and Variation of Aspects of SAU) of the SAU. Under these processes, NBN Co would be required to submit certain information to the ACCC every five years and may, as part of its submission, propose a variation to its PDF Processes and customer engagement processes.¹²¹ The SAU sets out the process by which the ACCC must make its decision on the variation, including that NBN Co cannot utilise the customer engagement process or PDF Processes until the ACCC approves a variation or determines that no variation is required.¹²²

NBN Co submits that:

¹¹⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, pp. 81-2.

¹¹⁷ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 5.4(a).

¹¹⁸ Ibid, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 5.4(b).

¹¹⁹ Ibid, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 5.5(a).

¹²⁰ Ibid, Schedule 6 (Product Development and Withdrawal), PDF Processes, clause 5.5(d).

¹²¹ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 2.1(a)(v).

¹²² Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 2.5.

review scope, process and frequency are appropriate and should ensure that, through timely and well considered variations, effective engagement between NBN Co and its Customers is achieved over the term of the SAU.¹²³

Of note, the ACCC is not able to propose a variation to the PDF Processes or customer engagement processes, unless NBN Co submits a variation proposal.

Amongst other things, the ACCC will need to consider whether the proposed review process specifies suitable timeframes. It will also need to consider the incentives created for NBN Co by the proposal to suspend all operation of Product Development Forum and customer engagement processes until the ACCC approves a variation.

5.5.2 Product withdrawal

The SAU contains commitments around NBN Co's withdrawal of products from supply, including:

- that NBN Co will provide its customers with no less than 12 months notice;
- that NBN Co will discuss, and consider in good faith, any feedback received from its customers through the Product Development Forum prior to withdrawing a product; and
- the criteria to which NBN Co will have regard when considering whether to withdraw a product.¹²⁴

NBN Co submits that the commitments in the SAU around product withdrawal will provide customers with "long lead times to prepare for any product withdrawal and with a high degree of input into proposals regarding such withdrawals".¹²⁵

As noted above, it appears that a broad range of NBN Co's products will be exempt from the product withdrawal provisions in the SAU. In particular, any product components and product features covered by, or contemplated within, the Initial Product Roadmap will not be subject to the product withdrawal provisions in the SAU.

The ACCC notes that the consultation processes around product withdrawal are not specified in any detail in the SAU and the ACCC does not have a role in assessing matters relating to product withdrawal. The ACCC will need to consider whether the degree of discretion NBN Co has to withdraw product components and product features is appropriate.

Is the approach to product development likely to promote efficient investment in network capacity and network upgrades?

¹²³ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 92.

¹²⁴ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 6 (Product Development and Withdrawal), clauses 5.1-5.4.

¹²⁵ *Ibid*, p. 82.

Do the product development, variation and withdrawal processes apply to a sufficiently broad range of NBN Co's products?

Is it in the long-term interests of end-users for the Product Development Forum to be open to participation by NBN Co's customers only (as opposed to access seekers)?

Are the criteria for determining whether a product variation or enhancement is minor appropriate?

Are the criteria to which NBN Co may have regard when determining whether to develop a product idea submitted by a customer appropriate and in the long-term interests of end-users?

Do the processes by which NBN Co will determine whether to develop, and consult with customers on, product ideas provide an appropriate balance between the interests of NBN Co and its customers?

Are the PDF Processes likely to provide for effective and transparent engagement between NBN Co and its customers regarding product development?

Are there appropriate processes for resolving disputes between NBN Co and its customers that arise under the Product Development Forum Processes?

Are the confidentiality and intellectual property terms in the PDF Processes appropriate? Do they discourage or prevent customers from participating in the Product Development Forum?

Do you consider that the review process for the customer engagement and Product Development Forum Processes is appropriate and in the long-term interests of end-users? Is there sufficient involvement of other interested parties in the review process?

Do the product withdrawal processes in the SAU provide an appropriate balance between the interests of NBN Co and its customers? Should the SAU provide greater detail about how NBN Co will consult with customers?

Should product withdrawal be subject to dispute resolution procedures?

Are the commitments around product development, variation and withdrawal likely to be appropriate and in the long-term interests of end-users for the proposed term of the SAU?

6 Price-related terms and conditions

This chapter seeks views on the commitments by NBN Co in the SAU regarding how it will set initial prices for its products and how these prices will vary over the term of the SAU. NBN Co proposes that initial prices will be constrained by a long-term revenue constraint and a set of maximum prices specified in the SAU. NBN Co may increase these prices over time subject to price control mechanisms and the long-term revenue constraint set out in the SAU. NBN Co submits that its long-term revenue constraint proposal aims to ensure that it will earn revenues that result in a net present value of zero for all cash flows over the term of the SAU.¹²⁶

This chapter is structured as follows:

- Section 6.1 discusses NBN Co's proposals for how its prices will be structured, in particular in relation to its AVC and CVC prices;
- Section 6.2 discusses the scope of the initial prices set out in the SAU;
- Section 6.3 discusses the price control mechanisms that limit prices increases for individual product components;
- Section 6.4 discusses NBN Co's long-term revenue constraint methodology;
- Section 6.5 discusses NBN Co's approach to the weighted average cost of capital; and
- Section 6.6 discusses NBN Co's proposed mechanisms for ensuring the prudence of expenditure.

6.1 Price structures

As discussed in section 5.2 of this supplementary consultation paper, NBN Co proposes to provide the NBN Access Service through four main product components: the UNI, AVC, CVC and NNI. The initial prices for NBN Co's price controlled offers, which are a subset of these product components, are set out in the SAU (the initial prices of these product components are discussed in section 6.2 of this supplementary consultation paper).

NBN Co will also supply and charge for a range of other services, including the ancillary services outlined in section 5.3 of this supplementary consultation paper.

In its supporting submission, NBN Co explains how it will structure prices across the product components, in particular the AVC and CVC.¹²⁷ NBN Co states that the key element of its overarching pricing strategy is a two-part pricing approach comprising an

¹²⁶ Ibid, p. 57.

¹²⁷ Ibid, p. 49.

access component (the AVC charge) and a usage component (the CVC charge).¹²⁸
NBN Co submits that:

this pricing strategy should allow NBN Co to balance, over time, the competing needs of maintaining high rates of take-up of the NBN (through affordable AVC prices) with high rates of usage of the NBN (through affordable CVC prices). Striking an effective balance, and having the flexibility to adjust it dynamically is very important for NBN Co, access seekers and their end users given the extent of the economies of scale and scope associated with the NBN and also the need to account for evolving technology, applications and demand over the 30 year term of the SAU.¹²⁹

One of the key objectives in setting regulated prices is to ensure that a regulated business can be expected to recover its long-term efficient costs over time. However, the prices for the individual services provided by a regulated business can be structured in a variety of ways, and can be designed to address a number of objectives. For example, if the supply of a particular service involves a material variable cost component, setting the variable charge equal to the marginal cost of supply will promote the efficient use of and efficient investment in infrastructure. In situations where the regulated business supplies a scarce resource, or provides a service by means of a network with scarce capacity, prices can also be used as a mechanism to allocate these scarce resources or to manage capacity.

Different price structures can therefore have different impacts on downstream markets. For example, a regulated business may use a two-part tariff comprising of a fixed component (which does not vary between access seekers) and a variable component (which does vary between access seekers, depending on factors such as the size of the customer or usage). A two-part tariff that contains a significant fixed component (and a small variable component) may advantage larger access seekers if they can spread this cost out over their customer base. Similarly, a two-part tariff with a significant fixed component may provide a barrier for smaller access seekers if they are unable to spread these costs.

However, the extent to which the pricing structure affects downstream markets is also likely to be affected by other factors, including the other costs faced by access seekers. If the prices charged by the regulated business comprise only a small part of access seekers' cost bases, the impact of the regulated business's price structure on downstream competition is likely to be lower.

In assessing NBN Co's proposed price structures (the AVC and CVC price structure, as well as any other relevant price structures, such as for ancillary services), the ACCC will need to be satisfied that they are consistent with the long-term interests of end-users, in particular whether they promote competition and encourage efficient use of and investment in infrastructure. The ACCC will also need to have regard to whether the price structures achieve an appropriate balance between the legitimate businesses interests of NBN Co and the interests of access seekers.

¹²⁸ Ibid.

¹²⁹ Ibid.

What are the potential impacts of NBN Co's proposed price structures on downstream markets?

Will NBN Co's proposed price structures promote the efficient use of and investment in infrastructure?

Are the proposed price structures reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Are the proposed price structures reasonably necessary to achieve uniform national wholesale pricing?

6.2 Initial prices

The extent to which the SAU specifies initial prices for products supplied from the commencement of the SAU period, and processes for determining the initial prices for products introduced during the SAU term, is an important issue.

The larger the range of services for which the SAU specifies initial prices, the more certainty access seekers will have around price levels at the commencement of the SAU. Greater certainty around these prices is likely to promote efficient investments by access seekers and a smoother migration of end-users to the NBN. While recognising that greater certainty may be desirable for access seekers, it also needs to be weighed against any benefits that NBN Co may have if it retains some flexibility around the setting of initial prices.

In regard to new services, a degree of flexibility in the setting of new prices may be appropriate to ensure that the prices for new services will be reasonable, taking into account any relevant factors that exist at the time a new service is introduced. However, appropriate processes and constraints should be established to ensure that this flexibility is not used to set prices in a way that is not reasonable.

This section seeks views on the manner in which initial prices will be set for:

- the price controlled offers;
- non-price controlled offers; and
- new products.

6.2.1 Initial prices for price controlled offers

The SAU sets out the 'maximum regulated price' NBN Co is permitted to charge for the 'price controlled offers' for the initial five years of the SAU term, as follows:¹³⁰

¹³⁰ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 5 (Price Controls), clause 2.

- Basic Access Offers - \$24.00 per month (includes the 12/1 Mbps AVC and UNI products)
- Connectivity Virtual Circuit Offer - \$20.00 per Mbps per month
- Network-Network Interface Offer:
 - 1Gbps interface capacity - \$200 per month
 - 10Gbps interface capacity - \$400 per month

(As noted, the price controlled offers are a subset of NBN Co’s four main product components.)

NBN Co submits that the scope of the price controlled offers is designed to provide price certainty to access seekers as they migrate customers to the NBN and to ‘anchor’ the prices of other product components and product features.¹³¹ NBN Co submits that by providing access seekers and NBN Co with regulatory certainty, the price controlled offers will “promote competition in a range of retail and wholesale markets (such as those for the supply of voice, broadband and bundled services)”.¹³²

6.2.2 Initial prices for non-price controlled offers

The SAU does not include initial prices for any of NBN Co’s other product components, product features or ancillary services and does not set out any requirements for NBN Co in relation to publishing these prices.¹³³ However, clause 2.6 of the preliminaries to the SAU states that to the extent that an aspect of the supply of product components, product features or ancillary services (which would presumably include their price) is not covered directly by the SAU, it will be set out in the WBA.

NBN Co’s discretion over the level of initial prices for products not captured by the price controlled offers is proposed to be constrained as follows:

- The SAU states that NBN Co may set initial prices for product components, product features and ancillary services subject to the long-term revenue constraint methodology.¹³⁴
- NBN Co submits that its ability to set initial prices will be limited by the ‘anchor’ effect of the price controlled offers and other products that were released in July 2011 and are currently being supplied to access seekers.¹³⁵

¹³¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, pp. 50-1.

¹³² Ibid, pp. 50-1, 97.

¹³³ NBN Co has included prices for some of its other product components in the *WBA Product Catalogue*, which forms part of the Wholesale Broadband Agreement. The *WBA Product Catalogue* is available on NBN Co’s website: http://www.nbnco.com.au/getting-connected/service-providers/wba.html?utm_source=nbncohp&utm_medium=tile&utm_campaign=wba

¹³⁴ NBN Co, *Special Access Undertaking*, 5 December 2011, preliminaries, clause 3.4(a).

6.2.3 Initial prices for new products

NBN Co submits that its ability to set initial prices for new product components and product features will be limited by: the government's direction in relation to uniform national wholesale pricing, potential competition for some services from other networks, the operation of customer engagement processes, the long-term revenue constraint methodology, and the regulatory recourse mechanism specified in clause 6 of the preliminaries to the SAU.¹³⁶ In addition:

- NBN Co argues that, provided there is sufficient substitutability between new products and any existing products, the price of existing products will constrain the price NBN Co can charge for new products.¹³⁷
- The SAU states that NBN Co will consult with customers through the Product Development Forum on prices for new product components and associated product features (outlined in section 5.5.1 of this supplementary consultation paper).
- Clause 6 of the preliminaries to the SAU confers dispute resolution powers and functions on the ACCC for circumstances where NBN Co and access seekers are unable to reach agreement on price-related terms and conditions that have not been announced by NBN Co prior to the SAU commencement date.¹³⁸

Is the scope of the initial prices included in the SAU likely to provide sufficient certainty to access seekers to make efficient investments? Should the SAU specify initial prices for a broader range of NBN Co's products?

Are the maximum regulated prices for NBN Co's price controlled offers likely to be reasonable? In particular, do these prices decrease the possibility of price shocks for access seekers and end-users in migrating to the NBN?

Is the 'anchor' effect of the price controlled offers likely to provide reasonable certainty to access seekers over prices for other products NBN Co intends to offer at the commencement of the SAU?

Does the setting of prices for new product components and product features provide a reasonable balance between the interests of NBN Co and its customers? Should the SAU set out principles and/or a more detailed process by which NBN Co will set prices for new products? Should the ACCC have a role in relation to setting initial prices for new products?

Is the 'anchor' effect of currently supplied products likely to provide reasonable certainty to access seekers over the initial prices for new products introduced throughout the proposed term of the SAU?

¹³⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 54.

¹³⁶ Ibid, pp. 54-5.

¹³⁷ Ibid.

¹³⁸ A more detailed discussion of this dispute resolution process is provided in section 3.1 of this supplementary consultation paper.

Will the processes by which NBN Co will consult with customers on prices for new products ensure that prices are set reasonably over the proposed term of the SAU?

Are the dispute resolution processes in relation to prices for new products likely to ensure prices are set reasonably over the proposed term of the SAU?

6.3 Price controls

This section seeks views on the manner in which NBN Co will be able to change price levels over time. Price controls provide a degree of price certainty over the SAU term. The greater the degree of certainty in future prices, the more likely this will promote competition in related markets and efficient investment in infrastructure by access seekers. However, it is also desirable for price controls to have some degree of flexibility to ensure that prices remain cost reflective (over the longer term) if costs change over time. It is important that price control mechanisms appropriately balance these considerations.

6.3.1 Specified price controls

The SAU states that NBN Co will not charge more than the maximum regulated price for each of the price controlled offers for the first five years of the SAU term (as discussed in section 6.2.1 of this supplementary consultation paper).

In addition, the SAU states that NBN Co will not increase the price of any product component, product feature or ancillary service by more than half the consumer price index ('CPI') in any financial year, as determined in accordance with the 'individual price increase limit'.¹³⁹ This price control also applies to price controlled offers after 30 June 2017.¹⁴⁰

The SAU includes an anti-avoidance provision that prevents NBN Co from circumventing the price controls through the application and removal of discounts, allowances and rebates.¹⁴¹ The SAU also specifies that the price control mechanisms also apply to bundles of products.¹⁴²

NBN Co submits that the price controls in the SAU, together with the long-term revenue constraint methodology, will provide a "level of certainty to access seekers that should enable them to develop and implement medium to long term business models that are predicated on NBN based supply".¹⁴³

¹³⁹ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 5 (Price Controls), clause 3.

¹⁴⁰ Ibid, Schedule 5 (Price Controls), clause 2.3.

¹⁴¹ Ibid, Schedule 5 (Price Controls), clause 3.3.

¹⁴² Ibid, Schedule 5 (Price Controls), clause 3.4.

¹⁴³ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 100.

6.3.2 Price control review processes

The SAU sets out a process by which NBN Co may request ACCC approval to increase prices by an amount greater than is permitted by the price controls, including the basis on which the ACCC must make its decision on NBN Co's pricing proposal (outlined in more detail in section 4.4.1.2 of the December 2011 consultation paper).

NBN Co submits that its ability to request approval to increase prices by an amount greater than permitted by the price controls will allow it to adjust prices "to maximise the benefits to end-users", for example by rebalancing prices in response to changing usage patterns.¹⁴⁴

The ACCC notes that this review process could decrease the degree of certainty over future price levels proposed to be created by the price controls. However, the inclusion of a role for the ACCC to assess NBN Co's pricing proposal, as well as the criteria to which the ACCC must have regard in its assessment, may provide assurance to access seekers that NBN Co's prices will remain reasonable over time.

Separately, NBN Co may, at its discretion, review the nature of any price control arrangements at the SAU review period (described in section 3.2.2 of this supplementary consultation paper). This review is undertaken by NBN Co (as opposed to the ACCC or in consultation with industry) and whether it results in a proposed variation to the price control arrangements is at NBN Co's discretion. The ACCC does not have the ability to initiate a review of the price control arrangements at the SAU review period, or at any other time.

Are the price controls in the SAU likely to ensure that NBN Co's prices are reasonable, and are likely to remain reasonable over the proposed term of the SAU? Are they likely to provide sufficient certainty to access seekers to make efficient investments?

Is the process by which NBN Co can request ACCC approval to increase prices by an amount greater than permitted by the price controls reasonable? Should the ACCC's decision on NBN Co's pricing proposal be limited to either accepting or rejecting the proposal? Is the timeframe for the ACCC to make a decision on NBN Co's pricing proposal reasonable?

Is the process for NBN Co to review the price controls at the SAU review period reasonable? Should the ACCC have the ability to initiate a review of the price controls?

Are there sufficient provisions to prevent NBN Co from avoiding or circumventing the price controls by withdrawing/introducing new product components or features, or by removing discounts, rebates and allowances?

Is the anti-avoidance provision likely to prevent NBN Co from avoiding the price controls by introducing new charges for product components or product features for which customers were not previously charged?

¹⁴⁴ Ibid, p. 54.

Is the process for applying the price control to bundles of products likely to be reasonable?

6.4 Long-term revenue constraint

This section seeks views on the methodology that NBN Co will follow to calculate the amount of revenue it will be able to recover through access prices over the term of the SAU, as contained in Schedule 7 (Long Term Revenue Constraint Methodology) of the SAU. This Schedule specifies that NBN Co's annual revenue requirements will be based on a building block model and a regulatory asset base ('RAB'). The building block model is comprised of five cost components: operating expenditure, a return on assets ('WACC'), regulatory depreciation, a net tax allowance and an annual construction-in-progress allowance.

The costs that NBN Co can include in its revenue methodology encompass all expenditure and all assets owned or operated by NBN Co that have been prudently incurred and procured in accordance with Schedule 8 (Prudency) of the SAU.¹⁴⁵ The sources of revenues relevant for the recovery of these costs are all revenues earned from NBN Co's product components, product features and ancillary services.¹⁴⁶

Under the SAU, NBN Co will be responsible for calculating the annual revenue requirements in accordance with Schedule 7. The SAU states that NBN Co will price the product components, associated product features and ancillary services in a manner that is consistent with the long-term revenue constraint methodology in Schedule 7.¹⁴⁷ Under Schedule 10 (Reporting), NBN Co will report annually to the ACCC on the calculated components of the annual revenue requirement, the RAB and the initial loss recovery account, as well as the actual revenues received by NBN Co, to demonstrate its compliance with Schedule 7 of the SAU.

This aspect of the proposed approach is particularly novel. It differs substantially from other common regulatory frameworks where the regulated businesses make periodic pricing submissions to the regulator that contain proposed annual revenue requirements (together with the revenue components and, in some cases, prices) for regulatory approval. In assessing the SAU, the ACCC will need to consider whether the proposed processes that NBN Co will follow under its long-term revenue constraint methodology are an effective substitute for periodic regulatory review of key pricing matters, including the annual revenue requirement.

The ACCC notes that NBN Co has not provided the ACCC with any modelling of its long-term revenue methodology in support of its SAU.

The following sections discuss in more detail particular elements of NBN Co's long-term revenue constraint methodology, as follows:

¹⁴⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 7 (Long Term Revenue Constraint Methodology), clauses 3 and 4.

¹⁴⁶ *Ibid*, Schedule 7 (Long Term Revenue Constraint Methodology), clauses 5 and 6.

¹⁴⁷ *Ibid*, preliminaries, clause 4.1.

- Section 6.4.1 discusses NBN Co’s proposed initial cost recovery account;
- Section 6.4.2 discusses the methodology for calculating NBN Co’s RAB; and
- Section 6.4.3 discusses the methodology for calculating the components of NBN Co’s annual revenue requirements.

6.4.1 Initial cost recovery account

NBN Co’s revenue methodology includes a loss recovery mechanism during the initial years of the SAU. This model allows NBN Co to earn revenues at a lower level than is required to recover the annual revenue requirement determined by its building block model. These revenue shortfalls are included in what NBN Co terms the ‘initial cost recovery account’ for recovery later in the SAU period.¹⁴⁸

The ACCC notes that the proposed initial cost recovery methodology is not a standard feature of most other regulatory frameworks. The initial cost recovery methodology proposed by NBN Co is a formal mechanism for deferring cost recovery of expenditure from one period to another. If NBN Co sets its initial prices with reference to the prices of legacy services, to the extent that this leads to lower revenues in the initial years of the SAU, this will have implications for NBN Co’s ability to recover its costs. Conversely, if NBN Co sets prices to recover its costs from the commencement of the SAU, these prices may be higher (potentially significantly higher) than the prices of legacy services. This may discourage take-up of NBN services during the network rollout, which may also have implications for NBN Co’s ability to recover its costs. Given this, the initial cost recovery approach may in principle be appropriate if it appropriately balances promoting stable prices over the SAU period and reducing the potential for price shocks in migrating to the NBN, with allowing NBN Co to recover its costs.

6.4.2 Regulatory Asset Base

The revenue methodology set out in Schedule 7 (Long Term Revenue Constraint Methodology) of the SAU adopts a single RAB that covers all of NBN Co’s assets. This RAB will be updated over time by following a RAB roll-forward methodology.¹⁴⁹

Under this approach, NBN Co’s assets will be valued at depreciated purchase cost. This contrasts with alternative asset valuation approaches such as replacement cost and optimised asset valuation. NBN Co is able to review the valuation of the RAB and the initial loss recovery account under the review mechanism in Schedule 9 (Review and Variation of Aspects of SAU) of the SAU (as discussed in section 3.2.2 of this supplementary consultation paper).

In its submission, NBN Co states that a single RAB is appropriate as NBN Co is offering uniform national wholesale pricing and there would be little utility in

¹⁴⁸ Ibid, Schedule 7 (Long Term Revenue Constraint Methodology), clause 5.

¹⁴⁹ Ibid, Schedule 7 (Long Term Revenue Constraint Methodology), clause 3.

maintaining a separate RAB for each access network.¹⁵⁰ It argues that specifying a single revenue cap that applies across all of NBN Co's networks and all locations is a price-related term or condition that is reasonably necessary to achieve uniform national wholesale pricing.¹⁵¹ NBN Co also provided the ACCC with a report prepared by Synergies Economic Consulting.¹⁵² The Synergies report provides arguments in support of the roll-forward of the RAB and the use of a single RAB to cover all of NBN Co's capital expenditure.¹⁵³

In addition to adopting a single RAB, NBN Co's long-term revenue methodology does not contain any allocation of costs and revenues to particular network expenditures more generally. Rather, the long-term revenue methodology determines a single revenue requirement that reflects the total costs incurred by NBN Co. NBN Co will then set access prices in a manner that is consistent with these revenue requirements.

The ACCC notes that NBN Co may supply services in markets that are characterised by varying degrees of competitive tension, and that the degree of competitive tension in those markets may change over time. For example, NBN Co may supply wholesale business or commercial grade services in markets that are supplied by existing network providers but may be the sole supplier of fixed-line wholesale residential services. The use of a single RAB methodology with no revenue and cost allocation may allow NBN Co to cross-subsidise the prices of services it provides in competitive markets with revenues earned from services supplied in markets that are not competitive. It is common for regulated businesses that supply both competitive and non-competitive services to be subject to a ring-fencing regime.¹⁵⁴

6.4.3 Annual revenue requirement components

The SAU outlines the methodology for calculating the components of the annual revenue requirements (operating expenditure, WACC, regulatory depreciation, net tax allowance and an annual construction-in-progress allowance) over the term of the SAU.¹⁵⁵

NBN Co will include actual capital and operating expenditures into the long-term revenue constraint methodology if it is classified as prudent under Schedule 8 (Prudency) of the SAU.¹⁵⁶ NBN Co will include prudent capital expenditure into its

¹⁵⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 60.

¹⁵¹ *Ibid*, p. 68.

¹⁵² Synergies Economic Consulting, *Advice on NBN Co Ltd's Special Access Undertaking*, January 2012. This report is available on the ACCC website at:
<http://www.accc.gov.au/content/index.phtml?itemId=1020185>

¹⁵³ *Ibid*, pp. 8-9.

¹⁵⁴ For example, Australia Post is subject to a ring-fencing regime to prevent the prices of its competitive services from being cross-subsidised with revenue from its statutory monopoly services (such as the carriage and delivery of letters and the issuance of postage stamps). For more information, see: <http://www.accc.gov.au/content/index.phtml/tag/cross-subsidy/>
¹⁵⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 7 (Long Term Revenue Constraint Methodology), clause 5.

¹⁵⁶ Section 6.6 of this supplementary consultation paper discusses in detail the basis on which NBN Co will classify expenditure as prudent.

RAB at the time at which the expenditure is recognised as ‘Placed in Service’.¹⁵⁷ This occurs when the associated asset has reached practical completion and is ready for commercial operation.

The calculation of the return on assets (WACC) component is discussed in section 6.5 of this supplementary consultation paper.

The revenue methodology also allows NBN Co to recover an annual construction-in-progress allowance. In its submission, NBN Co states that this allowance accounts for the financing costs associated with capital expenditure that has not yet been ‘Placed in Service’.¹⁵⁸ It argues that these costs need to be separately accounted for because the RAB does not include any allowance for interest during construction.¹⁵⁹

The ACCC notes that an allowance for construction-in-progress is generally required if capital expenditure is recognised in the RAB when the relevant asset comes into service. In this case, the allowance would be used to reflect the financing costs between the start of construction and when the asset comes into service.

The effect of NBN Co’s proposed approach appears to be that the allowance will be included as a lump sum in NBN Co’s annual revenue requirement. The ACCC notes that an alternative to this approach is to include this allowance as part of capital expenditure to allow it to be recovered over the life of the asset.¹⁶⁰ Another approach to this matter is to recognise capital expenditure when it is incurred, rather than when the asset comes into service.¹⁶¹ This approach eliminates the need to calculate an allowance for construction-in-progress.

The calculation of the regulatory depreciation allowance and the tax allowance is based on a number of rules set out in Schedule 7 (Long Term Revenue Constraint Methodology) of the SAU. NBN Co will be responsible for calculating the depreciation and tax allowances in accordance with these rules. These rules will apply for the term of the SAU, except if they are amended under the review mechanism in Schedule 9 (Review and Variation of Aspects of SAU) of the SAU. (As discussed in section 3.2.2 of this supplementary consultation paper, this review is both initiated and undertaken by NBN Co and may not necessarily result in a proposed variation to the depreciation or tax calculations.) An alternative process commonly adopted in other regulatory frameworks is for the regulated business to submit depreciation and tax allowances as part of periodic regulatory proposals (which may or may not be based on the existing methodologies) for regulatory approval.

The proposed methodologies for calculating depreciation and tax are similar to those commonly adopted in other regulatory frameworks.

¹⁵⁷ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 7 (Long Term Revenue Constraint Methodology), clause 3.2.

¹⁵⁸ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 64.

¹⁵⁹ Ibid.

¹⁶⁰ Australian Energy Regulator, *Powerlink Queensland transmission network revenue cap 2007-08 to 2011-12 – Draft Decision*, 8 December 2006, pp. 23-25.

¹⁶¹ Ibid, p. 18.

As noted previously, NBN Co has not submitted modelling of its long-term revenue methodology to the ACCC in support of its SAU. It has also not provided any information relating to forecast expenditure, demand or expected future prices.

The ACCC recognises that detailed models form a key part of other regulatory decisions, in particular where the regulator is required to determine a set of prices for a defined period. Instead of specifying a set of prices, the SAU specifies a process for determining prices. As such, modelling information may be less important in this SAU assessment than in other regulatory decisions.

Notwithstanding this difference the ACCC will consider whether it will require further information of this kind in order to assess whether the SAU is reasonable.

Is NBN Co's proposed long-term revenue constraint methodology reasonable? If so, is it likely to remain reasonable over the proposed term of the SAU?

Does the long-term revenue constraint methodology encompass all relevant costs and revenues?

Is the approach to deferring cost recovery through the proposed initial cost recovery mechanism reasonable? What are the implications for NBN Co's prices over the initial loss recovery period and for the later years of the SAU period?

Should NBN Co be required to allocate costs between services supplied in competitive and non-competitive markets? If so, how might these costs be allocated? How might this requirement change over the proposed term of the SAU?

Is NBN Co's approach to determining the allowance for construction-in-progress reasonable? Is this approach likely to remain reasonable over the proposed term of the SAU?

Are the methodologies for determining depreciation and tax allowances reasonable? Is it likely that these methodologies will remain reasonable over the proposed term of the SAU? Are the asset lives used in the calculation of depreciation and tax reasonable?

What, if any, further economic modelling is required from NBN Co to assess whether the SAU is reasonable?

Does NBN Co commit to supplying the ACCC with sufficient information to enable it to assess whether NBN Co is complying with the commitments made in Schedule 7 (Long Term Revenue Constraint Methodology)?

What aspects, if any, of the long-term revenue constraint methodology are reasonably necessary to achieve uniform national wholesale pricing?

6.5 WACC

This section seeks views on the approach to the cost of capital set out in the SAU. NBN Co's return on capital will be determined using the WACC. The nominal WACC will

be calculated by applying a 350 basis point premium to the risk free rate.¹⁶² The risk free rate used to determine the WACC each financial year will be the mean yield on 10-year Commonwealth Government Securities, averaged over the final 20 business days of the preceding financial year.¹⁶³

The SAU states that NBN Co must review the approach to the WACC at the SAU review period¹⁶⁴ (outlined in section 3.2.2 of this supplementary consultation paper). As noted earlier, this review is undertaken by NBN Co (as opposed to the ACCC or in consultation with industry) and whether it results in a proposed variation to the SAU is at NBN Co's discretion. Further, it appears that if NBN Co makes a variation to the SAU (which is subject to review by the ACCC), this decision will not immediately lead to a change in the value of the WACC. Rather, it will lead to a change in the approach used to determine NBN Co's WACC, as defined in the SAU.¹⁶⁵

NBN Co provided the ACCC with a consultancy report, prepared by Officer and Bishop, in support of the WACC component of the SAU.¹⁶⁶ Key conclusions from the report include:

- It is reasonable to set NBN Co's WACC with reference to the risk free rate plus a set 'risk margin', although there may be disadvantages to adopting this approach if NBN Co's systematic risk varies over time.
- A 'risk margin' of 350 basis points is likely to be within a reasonable range for NBN Co.
- A review of other regulated industries indicates that the appropriate 'risk margin' is likely to vary over time.
- A mandatory WACC review prior to sale of the NBN is likely to lead to a WACC that is reflective of conditions at the time.¹⁶⁷

The ACCC notes that in assessing the cost of capital in other regulated industries the ACCC generally:

- adopts an approach based on the weighted average of the cost of debt and the cost of equity — NBN Co's proposed WACC approach does not separate out the cost of debt and cost of equity;

¹⁶² NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 7 (Long Term Revenue Constraint Methodology), clause 7.2.

¹⁶³ Ibid, Schedule 7 (Long Term Revenue Constraint Methodology), clause 7.2(b).

¹⁶⁴ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.3(a)(iii).

¹⁶⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.3(a)(iii).

¹⁶⁶ Officer and Bishop, *Report on WACC component of NBN Co's SAU*, December 2011. This report is available on the ACCC website at:

<http://www.accc.gov.au/content/index.phtml?itemId=1020185>

¹⁶⁷ Ibid, pp. 1-3.

- uses relevant industry benchmarks to determine the cost of debt and cost of equity — the report by Officer and Bishop refer to other utilities and regulatory decisions in support of NBN Co’s proposed WACC;
- determines the WACC with reference to the systematic risk of the regulated business — the ACCC will need to be satisfied that NBN Co’s WACC is commensurate with the risks faced by NBN Co, including how other components of the SAU are likely to affect NBN Co’s systematic risk, over the term of the SAU; and
- has a role in periodically reviewing and updating the WACC over time — while NBN Co’s WACC will be subject to review by NBN Co at the SAU review period, the SAU does not set out a process for periodic review of the WACC throughout the SAU term.

Is NBN Co’s approach to the WACC reasonable? Is it likely to encourage efficient investment in and use of infrastructure?

Is a risk margin of 350 basis points likely to reasonably reflect NBN Co’s systematic risk over the proposed term of the SAU? Is the appropriate risk margin likely to vary over the proposed term of the SAU?

Should the ACCC assess NBN Co’s WACC against a return on capital calculated using the weighted average of the cost of debt and the cost of equity?

Is it reasonable to use a benchmarking approach to assess NBN Co’s WACC? Which industries are likely to provide appropriate benchmarks for assessing NBN Co’s WACC?

Is it reasonable that the SAU does not set out a process for periodically reviewing the WACC approach within the SAU period?

Is the process for NBN Co to review the WACC approach at the SAU review period likely to ensure NBN Co’s WACC remains reasonable over time?

6.6 Prudency

This section seeks views on the mechanisms proposed in the SAU to encourage efficient (or ‘prudent’) expenditure and investment in infrastructure by NBN Co, including the role of customer engagement within the proposed prudency mechanisms. The ACCC notes that the customer engagement process for prudency of expenditure is in addition to the Product Development Forum processes discussed in section 5.5.1 of this supplementary consultation paper.

Schedule 8 (Prudency) of the SAU sets out the basis on which NBN Co will classify capital expenditure and operating expenditure as prudent. NBN Co will be able to recover all prudently incurred expenditure through access prices. All expenditure will be considered prudent if it satisfies a number of principles that are outlined in Schedule 8.

Under Schedule 10 (Reporting) of the SAU, NBN Co is required to provide annual reports to the ACCC which certify that NBN Co complied with the prudency arrangements in Schedule 8 in the preceding financial year. NBN Co is also required to report to the ACCC on the levels of capital and operating expenditures it has incurred. If the ACCC determines that NBN Co has not complied with Schedule 8 of the SAU, it will be able to seek Federal Court action for a breach of the SAU (see chapter 8 of this supplementary consultation paper for more discussion on the enforcement of the SAU).

During the term of the SAU, NBN Co must conduct a review of its proposed customer engagement model (outlined in section 6.6.1.1 below). NBN Co must also conduct a review of the approach to prudency of capital and operating expenditure under the SAU review processes in Schedule 9 (Review and Variation of Aspects of SAU) of the SAU.¹⁶⁸ As discussed in section 3.2.2 of this supplementary consultation paper, this review is undertaken by NBN Co and whether or not it results in a proposed variation to the prudency arrangements is at NBN Co's discretion.

The remainder of this section discusses the specific approaches to capital expenditure, operating expenditure and 'deemed prudent' expenditures.

6.6.1 Capital expenditure

Under the SAU, NBN Co will be permitted to recover all capital expenditure that satisfies both of the following conditions:

- 'Prudent Design Condition'; and
- 'Prudent Cost Condition'.¹⁶⁹

These conditions are described in further detail in section 4.4.4.1 of the December 2011 consultation paper.

In its submission, NBN Co states that the prudency commitments in the SAU are in addition to the cost control and transparency measures which apply to NBN Co as a government business enterprise, as well as other accountability requirements placed specifically on NBN Co by the government and the Parliament, as follows:

- 'Commonwealth GBE – Governance and Oversight Guidelines';
- reporting requirements;
- *Corporations Act 2001* (Cth) and ASX recommendations;
- performance audits conducted by the Auditor-General;

¹⁶⁸ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 9 (Review and Variation of Aspects of SAU), clause 3.3.

¹⁶⁹ *Ibid*, Schedule 8 (Prudency), clause 1.2. The ACCC notes that NBN Co has not yet submitted its *Procurement Rules* to the ACCC.

- parliamentary committee oversight; and
- *Freedom of Information Act 1982 (Cth)*.¹⁷⁰

In its submission, NBN Co argues that, in conjunction with the commitments made in the SAU, these arrangements mean that its ability to inefficiently incur costs is significantly curtailed.¹⁷¹

NBN Co also notes that its approach to prudence does not rely on ex ante regulatory approval of capital expenditure forecasts or any ex post review of NBN Co's actual capital expenditure.¹⁷² NBN Co instead argues that compliance with the prudent design and prudent cost conditions (as outlined above) places appropriate controls on NBN Co's actual capital expenditure.¹⁷³

The Synergies report provides further arguments in support of the approach to prudence adopted in the SAU.¹⁷⁴

Mechanisms to ensure that costs are incurred in a prudent and efficient manner are key features of effective price regulation. Any prudence mechanism should:

- provide incentives on the regulated business to invest efficiently and seek cost-minimisation and productivity improvements;
- contain an appropriate balance between providing certainty to the regulated businesses that it can recover the expenditures it incurs, whilst also providing incentives to only incur these expenditures efficiently and as necessary; and
- promote investments that customers desire and are willing to pay for, such as new services and increased network capacity.

The ACCC notes that under the prudence mechanisms in the SAU, NBN Co will be responsible for determining whether the actual capital expenditure it incurs satisfies the prudent design and prudent cost conditions. The ACCC will only have a limited role under the SAU in relation to prudence of expenditure. It will have no ongoing role in approving or overseeing NBN Co's expenditure.

This approach differs from other common regulatory frameworks which generally provide periodic regulatory oversight of the quantum of expenditures that can be recovered through regulated access prices. For example, in other industries regulated by the ACCC and the Australian Energy Regulator ('the AER') (such as electricity, gas and Telstra's fixed-line services), the ACCC/AER is given a role in determining the forward-looking estimates of expenditure at regulatory review periods. These forecasts

¹⁷⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, pp. 127-139.

¹⁷¹ Ibid, p. 139.

¹⁷² Ibid, p. 114.

¹⁷³ Ibid, pp. 113-114.

¹⁷⁴ Synergies Economic Consulting, *Advice on NBN Co Ltd's Special Access Undertaking*, January 2012, p. 4.

typically then form the basis of access prices and can be used to create effective incentive mechanisms for the regulated businesses.

The only recurring involvement of the ACCC in the prudency of NBN Co's expenditure is through annual compliance reporting whereby NBN Co is required to submit annual compliance reports to the ACCC which certify that it has complied with the prudency arrangements in the SAU.¹⁷⁵ However, under the annual compliance process, the ACCC is not given a formal approval role to determine whether NBN Co's expenditure has been incurred prudently.

Further, the ACCC notes that the inclusion of NBN Co's actual expenditure in the long-term revenue calculations may have implications for NBN Co's incentives to invest and operate efficiently. For example, if NBN Co incurs higher expenditure than it had forecast in any given period, it will be able to recover the additional expenditure from customers. Conversely, if NBN Co incurs lower expenditure than it had forecast, these savings are passed through to customers rather than being retained by NBN Co. This may not promote strong financial incentives on NBN Co to seek cost savings, or to invest efficiently, as it is not being financially rewarded for doing so.

6.6.1.1 Proposed customer engagement model

In its submission, NBN Co states that a central aspect of its prudency model is customer engagement.¹⁷⁶

NBN Co must seek the endorsement of capital expenditure it is proposing in connection with a change to the *Network Design Rules* through the Product Development Forum. The ACCC notes that, although parties to the Product Development Forum are the same as those consulted with for changes to the *Network Design Rules*, the Product Development Forum Rules (discussed in section 5.5.1 of this supplementary consultation paper) do not apply to this particular endorsement process. Instead, the customer engagement process, which allows proposed changes to the *Network Design Rules* to be considered by the Product Development Forum, are specified in Schedule 8 (Prudency) of the SAU.

NBN Co notes that customer engagement models are being used increasingly in regulated sectors as an effective mechanism to seek approval of capital expenditure by infrastructure owners for new capital investments.¹⁷⁷ The Synergies report argues that the characteristics of NBN Co's customers¹⁷⁸ are such that the inclusion of a customer

¹⁷⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 10 (Reporting), clause 3.

¹⁷⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 140.

¹⁷⁷ Ibid, p. 121.

¹⁷⁸ Synergies Economic Consulting, *Advice on NBN Co Ltd's Special Access Undertaking*, January 2012, p. 41. Synergies states that NBN Co's customer base will consist of telecommunications services providers that are large and well established in the industry and possess a high level of knowledge in telecommunications network services and network capacity.

engagement and endorsement process in relation to the scope of network capacity expansions can reasonably be expected to prevent inefficient investment.¹⁷⁹

The ACCC notes that under NBN Co's proposed customer engagement model, it appears that NBN Co is only required to seek customer endorsement of capital expenditure when the expenditure requires a change to the *Network Design Rules* and is not associated with a 'deemed prudent' category. That is, the customer engagement model does not apply to the ongoing level of capital expenditure or to discrete projects undertaken by NBN Co.

NBN Co must periodically review the operation of the customer engagement model and it may propose a variation of the model to the ACCC.¹⁸⁰ The ACCC is required to make a determination on NBN Co's proposal and it may determine that customer engagement requires no variation or propose a variation that differs from NBN Co's proposal.¹⁸¹ The ACCC is not able to propose a variation to the customer engagement model unless NBN Co submits an initial variation proposal.¹⁸² Customer engagement is suspended while the ACCC is making its determination on NBN Co's proposal,¹⁸³ which may have implications for NBN Co's incentives to submit appropriate variation proposals.

6.6.2 Operating expenditure

Under the SAU, NBN Co will be permitted to recover all operating expenditure that meets a number of principles. These principles are described in further detail in section 4.4.4.2 of the December 2011 consultation paper.

In its submission, NBN Co states that:

- A lowest total cost of ownership approach involves looking at the total costs of a particular project and selecting a combination of capital and operating expenditures that lower the total cost of a project — this approach may not lead to the lowest possible operating expenditure, but would still result in value for money when viewed against the totality of capital and operating expenditure over the life of the asset.¹⁸⁴
- A linkage to the *Statement of Expectations*¹⁸⁵ is appropriate as this document contains a number of statements which require NBN Co to incur costs in a particular manner or which require NBN Co to report about costs.¹⁸⁶

¹⁷⁹ Ibid, p. 4.

¹⁸⁰ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 9 (Review and Variation of Aspects of SAU), clause 2.1.

¹⁸¹ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clauses 2.2 and 2.3.

¹⁸² Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 2.4(a).

¹⁸³ Ibid, Schedule 9 (Review and Variation of Aspects of SAU), clause 2.5(a).

¹⁸⁴ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 126.

¹⁸⁵ The *Statement of Expectations* is available at:
http://www.dbcde.gov.au/funding_and_programs/national_broadband_network

The Synergies report argues that the objective of achieving value for money and lowest overall total cost of ownership is consistent with operating cost efficiency.¹⁸⁷ It also argues that NBN Co will have strong incentives to be productively efficient during the initial cost recovery period.¹⁸⁸

The ACCC notes that NBN Co's approach to the prudence of operating expenditure does not include any scope for regulatory oversight of operating expenditure levels. It appears that NBN Co will be responsible for determining whether operating expenditure satisfies the operating expenditure principles. This approach differs from other common regulatory frameworks which generally provide regulatory oversight of the quantum of operating expenditures that can be recovered through access prices.

The ACCC also notes that the prudence mechanisms do not appear to provide a basis for classifying expenditure items as capital or operating expenditure. This may create incentives to classify particular capital expenditure as operating expenditure if the conditions for deeming capital expenditure as prudent are more onerous than the conditions for deeming operating expenditure as prudent (or vice versa).

6.6.3 Deemed prudent expenditure

The SAU exempts certain expenditures from the prudence mechanisms by including 'deemed prudent' categories of capital and operating expenditure.¹⁸⁹ NBN Co will be able to recover all expenditure associated with a deemed prudent category.¹⁹⁰ The deemed prudent categories specified in the SAU are:¹⁹¹

- the interim satellite and transit arrangements;
- the contracts entered into between Telstra and NBN Co;
- the contracts entered into between Optus and NBN Co;
- the first release trial sites (including the Tasmania Tri-Area service arrangements);
- network changes funded or underwritten by a third party;
- urgent and unforeseen network design variations, changes or enhancements;
- capital expenditure less than a minor expenditure limit (initially \$100 million); and

¹⁸⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 126.

¹⁸⁷ Synergies Economic Consulting, *Advice on NBN Co Ltd's Special Access Undertaking*, January 2012, p. 5.

¹⁸⁸ Ibid.

¹⁸⁹ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 8 (Prudence), clauses 4 and 10.3.

¹⁹⁰ Ibid, Schedule 8 (Prudence), clause 2.

¹⁹¹ Ibid, Schedule 8 (Prudence), clause 4.1.

- operating expenditure associated with a requirement specifically imposed on NBN Co by law or by shareholder Minister, or a force majeure event.

In its submission, NBN Co considers that these expenditure categories should be deemed to have been prudently incurred to reflect the fact that it has been instructed to provide certain capabilities in certain timeframes, and where it is constructing a network (and business) from scratch.¹⁹² NBN Co further states that some of these expenditures reflect pre-existing NBN Co commitments, all of which were entered into on a strict arms-length basis and subject to normal, robust commercial tensions.¹⁹³

The ACCC notes that the deemed prudent categories appear to potentially allow a broad range of expenditure to be excluded from the prudency mechanisms. The extent to which particular expenditure is not subject to the prudency mechanisms is likely to reduce the overall effectiveness of the prudency arrangements.

The ACCC also notes that it appears that NBN Co will be responsible for determining whether particular expenditure items are associated with a deemed prudent category, and therefore which expenditure items are not required to satisfy the prudency mechanisms. This may create incentives for NBN Co to include certain expenditure in a deemed prudent category where it may not otherwise have been included.

Will the prudency mechanisms proposed by NBN Co be effective in encouraging prudent capital expenditure by NBN Co? Are they an effective substitute for ACCC oversight of expenditure?

Are the *Network Design Rules* sufficiently detailed to ensure that they will only allow prudent capital expenditure to be included in the RAB?

Will the proposed customer engagement model be effective in encouraging prudent capital expenditure over the proposed term of the SAU? Are there examples of other industries where customer engagement has been effective? Should customer engagement processes apply to other aspects of NBN Co's proposed prudency mechanisms?

Will the operating expenditure principles proposed by NBN Co be effective in encouraging prudent operating expenditure by NBN Co? Are they an effective substitute for ACCC oversight of expenditure? Are there any other aspects of the SAU that may encourage prudent operating expenditure?

Are the 'deemed prudent' categories reasonable? Are these categories sufficiently defined to ensure that they only encompass prudent expenditure?

Is the annual compliance process sufficient to assess compliance with the prudency commitments? Is sufficient information provided by the annual compliance reports to enable the ACCC to determine whether expenditure has been prudently incurred?

¹⁹² NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 115.

¹⁹³ *Ibid*, p. 61.

Will the prudency mechanisms be effective in encouraging prudent expenditure over the proposed term of the SAU? Will the processes for reviewing the prudency and customer engagement processes ensure that they remain effective over time?

What aspects, if any, of the prudency mechanisms are reasonably necessary to achieve uniform national wholesale pricing?

7 Non-price terms and conditions

This chapter seeks views on the non-price terms and conditions contained in Schedules 11 (Non-price Terms and Conditions) and 12 (Dispute Management Rules) of the SAU. As noted, NBN Co has elected to include only key non-price commitments in the SAU and to describe the detail surrounding these commitments in another document – the WBA. The ACCC reiterates that:

- references that make commitments that rely on or are subject to provisions of the WBA may have the effect of defining the commitments in the SAU only by reference to a document that is not subject to review by the ACCC — the intended effect of these references is sometimes unclear.
- some commitments in the SAU are expressed with respect to ‘Access Seekers’, whilst others are expressed with respect to ‘Customers’; and some are expressed with respect to ‘the WBA’, whilst others are expressed with respect to ‘Access Agreements’ — this may have implications for whom and in what circumstances particular commitments apply.

This chapter is structured as follows:

- Section 7.1 discusses the development of the WBA and Access Agreement change management;
- Section 7.2 discusses dispute management rules;
- Section 7.3 discusses default management;
- Section 7.4 discusses risk management and liability;
- Section 7.5 discusses confidential information;
- Section 7.6 discusses billing, payment and credit management;
- Section 7.7 discusses points of interconnect;
- Section 7.8 discusses access to common property;
- Section 7.9 discusses major NBN upgrades;
- Section 7.10 discusses access to the NBN Co platform; and
- Section 7.11 discusses rollout information and reporting.

7.1 WBA development and Access Agreement change management

Clause 14 of Schedule 11 (Non-price Terms and Conditions) of the SAU contains commitments around the scope and development of the WBA as well as terms and conditions specifying the processes that NBN Co will follow when making changes to executed Access Agreements.

7.1.1 Scope and development of the Wholesale Broadband Agreement

Clause 14.1 of Schedule 11 (Non-price Terms and Conditions) specifies that the WBA will set out all price and non-price terms that apply in connection with NBN Co's services, and the processes for providing NBN Co's customers with operational and technical information relating to those services.

The SAU contains specific commitments regarding the development of the WBA. These require NBN Co to consult with customers in respect of the development of the WBA, including the *NBN Co Operations Manual*.¹⁹⁴

Should the SAU contain commitments around the scope of the WBA? If so, are the current commitments likely to be effective, and are they sufficient and reasonable?

Are the consultation obligations in the SAU relating to development of the WBA reasonable? Should they apply more broadly, to 'Access Seekers' and not just 'Customers'?

Is it sufficiently clear to whom and in what circumstances these commitments apply?

7.1.2 Changes to Access Agreements

The SAU notes that where an Access Agreement sets out a process permitting NBN Co to make changes, NBN Co may make changes in accordance with that process.¹⁹⁵

Where an Access Agreement does not contain a process for making a particular change to an Access Agreement, the SAU sets out a procedure that NBN Co must follow to make changes to the Access Agreement.¹⁹⁶ This process requires NBN Co to notify customers of the proposed change and consider any feedback from the customer as well as the ACCC.¹⁹⁷ NBN Co will then provide the customer with written notice if it decides to proceed with the change, and the date on which the change will be effective (which will be at least 60 business days after the date of the notice).¹⁹⁸ NBN Co acknowledges that before the effective date of change, a customer may seek, and the ACCC may issue, an interim Access Determination or Binding Rules of Conduct

¹⁹⁴ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 14.1(b).

¹⁹⁵ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 14.3(c).

¹⁹⁶ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 14.3(d).

¹⁹⁷ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 14.3(d)(i)-(iii).

¹⁹⁸ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 14.3(d)(iv).

relating to the proposed change.¹⁹⁹ If the ACCC makes such a regulatory document prior to the effective date of the change, then NBN Co undertakes to implement the change only in a manner consistent with the regulatory document.²⁰⁰

Clauses 14.3(d) to (f) of Schedule 11 (Non-price Terms and Conditions) only apply when an Access Agreement does not otherwise specify the terms and conditions as to how particular terms and conditions in an Access Agreement are to be changed. The process set out in clauses 14.3(d) to (f) will therefore not likely apply to changes to all of the terms and conditions of access set out in an Access Agreement.

The ACCC notes that the regulatory recourse provisions outlined in chapter 3 of this supplementary consultation paper would be unlikely to apply in the situation where parties cannot agree on an appropriate change management process and an impasse is reached prior to the execution of a new or varied Access Agreement. This is because the inclusion of a change management process in the SAU appears to have the effect that the area of dispute is ‘covered by’ the SAU and is therefore beyond the scope of the regulatory recourse provision. Once an Access Agreement is executed that is silent on change management, the process included in the SAU therefore becomes the sole avenue for regulatory oversight (absent the ACCC making Access Determinations or Binding Rules of Conduct relating to change management processes).

In relation to the proposed change management process, the ACCC will consider:

- whether there is appropriate consultation prior to a unilateral change being made to an Access Agreement;
- whether the SAU provides an appropriate process for access seekers to propose changes;
- whether the regulatory recourse suggested by NBN Co, that is, access seekers’ ability to seek an interim Access Determination or Binding Rules of Conduct from the ACCC, is appropriate; and
- whether restrictions should be placed on the types of changes that could be subject to the process in the SAU.

The ACCC notes that the change management processes apply to executed Access Agreements, and refer to ‘Customers’ rather than ‘Access Seekers’.

Are customers provided with reasonable notice of changes to be made to their Access Agreements by NBN Co under the SAU?

Are customers provided with a reasonable opportunity to consult with NBN Co regarding possible changes to their Access Agreements? The ACCC notes that clause 14.3 of Schedule 11 (Non-price Terms and Conditions) does not currently set out specific timeframes in which consultation is to occur.

¹⁹⁹ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 14.3(e).

²⁰⁰ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 14.3(f).

Is NBN Co's obligation to 'reasonably consider' any feedback given by a customer or the ACCC reasonable?

Is NBN Co's undertaking to only implement a change that is consistent with an interim Access Determination or Binding Rules of Conduct reasonable?

Are the 'Changes to Access Agreements' provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Please outline those aspects of the provisions that you consider to be reasonable and/or unreasonable.

Is it sufficiently clear to whom and in what circumstances these commitments apply?

7.2 Dispute management

Schedule 12 (Dispute Management Rules) of the SAU requires NBN Co to include terms and conditions in the WBA regarding the processes that will apply for the resolution of disputes that arise under or in connection with an Access Agreement (excluding a 'Prudency Dispute' and a 'Regulatory Recourse Dispute', as defined in Schedule 1 (Dictionary and Interpretation) of the SAU).

These terms and conditions specify that the WBA must include a process for the nomination of a resolution advisor (as opposed to this process being set out in the SAU).²⁰¹ The resolution advisor will then be responsible for selecting a panel of three independent arbitrators from a pool of arbitrators who will be responsible for various aspects of resolving the dispute.²⁰² The SAU also contains commitments about the processes by which arbitrations will take place, including in relation to funding.²⁰³

The ACCC considers that dispute resolution processes should provide for the efficient, consistent and unbiased resolution of disagreements that arise under Access Agreements. When assessing the SAU, the ACCC will need to be satisfied that the dispute management processes specified are unbiased and do not provide an ex post opportunity to frustrate access.

The ACCC also considers that dispute resolution procedures should be documented with sufficient clarity to ensure that parties understand the rights and obligations that arise from them, but with sufficient flexibility that they are able to efficiently resolve a range of disputes of different complexities.

The ACCC notes that the SAU defines 'Dispute' to be a dispute under or in relation to an Access Agreement, excluding those covered by the regulatory recourse or prudency processes.²⁰⁴ The dispute management provisions are expressed as relating to 'Customers', rather than 'Access Seekers' generally.

²⁰¹ Ibid, Schedule 12 (Dispute Management Rules), clause 2.1(b).

²⁰² Ibid.

²⁰³ Ibid, Schedule 12 (Dispute Management Rules), clause 2.1(c)-(f).

²⁰⁴ Ibid, Schedule 1 (Dictionary and Interpretation), p. 16.

Does the SAU enhance the likelihood that reasonable contractual dispute resolution processes will be able to be agreed to in Access Agreements? For example, in the event that access seekers and NBN Co cannot agree to a contractual dispute resolution process, is there sufficient scope for regulatory intervention to resolve the issue?

Does the SAU ensure that access seekers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias?

Are the dispute resolution terms and conditions reasonable and described with sufficient specificity?

Are the provisions relating to the appointment of resolution advisors, selection of arbitrators and timeframes for each stage of the dispute resolution process reasonable?

Do interested parties consider that it is reasonable to conduct arbitrations in accordance with the *Commercial Arbitration Act 2010* (NSW)?

Is the proposed process reasonable, and is it likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances these commitments apply?

7.3 Default management

The SAU describes how NBN Co will exercise its rights under the WBA in relation to defaults by customers.²⁰⁵ As noted in section 4.2.4 of this supplementary consultation paper, the SAU states that before exercising any contractual remedies that are available to NBN Co when a customer defaults, NBN Co will notify the customer.²⁰⁶ The SAU also sets out that NBN Co will cease to apply the contractual remedy as soon as reasonably practicable.²⁰⁷

The default management provision places limits on NBN Co's exercise of contractual rights and will likely ensure that customers have reasonable notice of action commenced under a contract in respect of customer defaults. This could subsequently minimise the period of time that the remedy is exercised.

A further way in which the resolution of contractual disagreements could be assisted would be if parties were also provided with an opportunity to rectify a breach before a contractual remedy was applied. This would involve providing notice to the party in breach of the contract, and then delaying commencement of action for an agreed period of time to give the party in breach an opportunity to rectify that breach. Such provisions were included in the ACCC's model non-price terms and conditions in specified circumstances relating to service suspension.²⁰⁸

²⁰⁵ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 12.

²⁰⁶ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 12(a).

²⁰⁷ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 12(b).

²⁰⁸ ACCC, *Model Non-Price Terms and Conditions – Final Determination*, November 2008, p. 37.

The ACCC notes that these commitments are expressed as applying to ‘the WBA’ rather than ‘Access Agreements’, and to ‘Customers’.

Is NBN Co’s proposed commitment in relation to default management reasonable, and likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitment applies?

7.4 Risk management and liability

The SAU outlines the reciprocal liabilities and indemnities of NBN Co and each of its customers.²⁰⁹ These are described in section 4.3.9 of the December 2011 consultation paper.

NBN Co submits that the management of risks and liability is an issue of key significance to both NBN Co and its customers “each concerned to protect their legitimate business interests by not being liable for the conduct of the other, but equally concerned to limit their liability at a level which enables them to manage their business effectively.”²¹⁰ NBN Co states that the proposed commitments in the SAU give reassurance to customers that certain exclusions and indemnities will be provided for both customers and NBN Co’s benefit, even though specific liability terms may be varied over time.²¹¹

Risk management and liability provisions are important to the access provider as they can protect its legitimate business interests by not being liable for the conduct of access seekers, and better ensure that its network is operated in a safe and reliable manner. However, if NBN Co were to impose comprehensive liability exclusions, it may not be incentivised to establish robust operational processes to minimise the risk of impacts on NBN Co and its customers. If not carefully designed, risk management and liability provisions could impose significant barriers to entry and lead to inefficient outcomes, as access seekers could potentially be made to carry the risk of losses that are not under their sole control. Further, if there are extensive protections in favour of NBN Co, it may result in customers including and enforcing strong protections in downstream customer or end-user contracts, which may result in limited consumer choice and other consumer detriment.

As a general rule, risk management and liability provisions should apply to both the access provider and access seekers, and should place risk with the party which has the ability to manage the risk. Some aspects that a proportionate risk management and liability regime should address include:

- encouraging both the access provider and access seekers to establish robust operational processes to minimise the risk of impacts on both parties;

²⁰⁹ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 13.

²¹⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 90.

²¹¹ *Ibid.*

- not unduly constraining the access provider’s ability to conduct its overall business operations; and
- not placing excessive risk on access seekers which impedes them from entering markets and supplying services to downstream customers or end-users.

Also of note, in impacting on the risk faced by the access provider, risk management and liability provisions may impact upon an assessment of the regulated cost of capital.

NBN Co has expressed its liability and indemnity commitments by reference to the WBA.

The interaction between the SAU and the WBA may have a significant impact on the risk management and liability provisions in the SAU. Clause 13(a) of Schedule 11 (Non-price Terms and Conditions) of the SAU sets out terms and conditions in relation to liability for indirect losses arising from or in connection with the WBA, “except as expressly provided by the WBA.” Further, the obligations set out in clauses 13(c)(i) to (iv) in relation to indemnity are also “subject to...the terms of the Wholesale Broadband Agreement.” This may allow NBN Co to modify the liability and indemnity commitments set out in the SAU by including ‘limiting’ terms and conditions in the WBA. This, in turn, could have the effect of diluting or rendering ambiguous the commitments made by NBN Co in the SAU.

Further, and as noted in section 4.1.2 of this supplementary consultation paper, whether a reference in the SAU is to ‘WBA’ or ‘Access Agreement’ has implications for whom and in what circumstances the liability and indemnity commitments are intended to apply.

The ACCC notes that these clauses refer to ‘Customers’ rather than ‘Access Seekers’.

Do the risk management and liability provisions clearly describe the types of liability (that is, the legal responsibilities, duties and obligations) of each party?

Do the risk management and liability provisions clearly describe the indemnities (that is, the circumstances where one party will compensate the other party for the losses resulting from the first party’s actions)?

Does the scope of the proposed risk management and liability regime enable NBN Co and its customers to efficiently operate and invest in their services, networks and facilities?

Are the risk management and liability provisions, reasonable and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

7.5 Confidential information

The SAU outlines the circumstances in which confidential information relating to NBN Co's customers may be disclosed and used by NBN Co.²¹² NBN Co's commitments in this regard are outlined in section 4.3.10 of the December 2011 consultation paper.

NBN Co submits that the commitments “give Customers reassurance that their confidential information will not be used or disclosed in ways which are unjustified or would harm their interests, whilst giving NBN Co the rights to use and disclose that information that it will need to deliver services under the WBA and comply with its regulatory obligations.”²¹³

A confidentiality regime should ensure that both the access provider and access seekers are assured their confidential information will be protected. In the context of vertical integration, there may be competition concerns if the access provider were to use the confidential information of its downstream competitors (that is, access seekers) to its advantage. In the NBN Co context however, this should be less of a concern.

The ACCC notes that the proposed confidentiality regime is subject to the provisions of the WBA. For example, clause 11.2(b) of Schedule 11 (Non-price Terms and Conditions) of the SAU states that “NBN Co will only use confidential information disclosed by a Customer to NBN Co for...purposes that are otherwise contemplated by...the Wholesale Broadband Agreement...”. This could mean that the circumstances in which confidential information may be disclosed or used by NBN Co under the SAU is largely within NBN Co's own control, through the confidentiality terms included by NBN Co in the WBA.

NBN Co has made confidentiality commitments to its ‘Customers’ in the SAU, as opposed to ‘Access Seekers’.

Is the proposed confidentiality regime appropriate, taking into account the wholesale-only structure of NBN Co? Do the confidential information provisions clearly describe NBN Co's and its customers' rights and obligations in respect of the disclosure and use of customer confidential information?

Are the confidential information provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

²¹² NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 11.

²¹³ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 90.

7.6 Billing, payment and credit management

The SAU addresses issues relating to billing and payment, and credit management. In particular, the SAU requires NBN Co to include billing dispute processes and a *Credit Policy* in the WBA.

7.6.1 Billing and payment

The SAU requires NBN Co to include billing dispute processes in the WBA.²¹⁴ The SAU also requires the WBA to give customers the right to withhold payment of disputed amounts in certain circumstances, and for NBN Co to pay interest to customers that have overpaid NBN Co.²¹⁵

NBN Co submits that this clause provides assurance to customers that NBN Co is incentivised to provide accurate and timely billing, and that customers have protection from the effects of any billing errors.²¹⁶

The billing and payment provisions should balance the ability of the access provider and access seekers to operate their respective services, networks and facilities in an economically efficient manner by:

- creating an incentive for the access provider to provide accurate and timely billing to customers, who require this data to bill end-users; and
- including processes that enable billing disputes to be resolved in a fair and timely manner to discourage vexatious claims by both the access provider and access seekers, and to minimise the likelihood of disputes arising in future.

The ACCC notes that NBN Co's commitments do not impose specific requirements for the content of the billing dispute processes (nor do they define what a billing dispute is). NBN Co has stated that its billing and payment commitments will be contained in the WBA. NBN Co may therefore have significant discretion to set these details in the WBA. As a result, the scope of both NBN Co and its customers' rights and obligations under the SAU with respect to billing and payment disputes may be unclear.

The ACCC notes that these commitments are made with respect to 'the WBA' rather than 'Access Agreements', and to 'Customers' rather than 'Access Seekers'.

Do the billing and payment provisions clearly describe NBN Co's commitments in respect of billing and payment disputes? Is it sufficiently clear to whom and in what circumstances the commitments apply?

²¹⁴ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 8.1.

²¹⁵ Ibid, Schedule 11 (Non-price Terms and Conditions), clauses 8.2 and 8.3.

²¹⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 89.

Do the billing and payment provisions create an incentive for NBN Co to provide accurate and timely billing?

Are the billing and payment provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

7.6.2 Credit management

The SAU requires NBN Co to develop, publish and maintain its *Credit Policy* as part of the WBA.²¹⁷ The SAU requires the *Credit Policy* to set out certain information, including about matters such as NBN Co's requirements for reviewing and assessing the ongoing creditworthiness of customers,²¹⁸ and the circumstances in which NBN Co may require a customer to provide or vary a financial security and apply or vary a credit limit in respect of a customer.²¹⁹

NBN Co submits that it faces significant credit risk in the supply of NBN services due to:

- the novelty of the NBN and NBN services;
- uncertainty as to the demand for those services; and
- the potential diversity of NBN Co's customers.²²⁰

The ACCC notes that NBN Co will be supplying wholesale services to retail service providers, who will then provide retail services to end-users. Any credit risk to NBN Co from its customers (that is, retail service providers) will likely depend, at least in part, on the extent to which any potential payment default by end-users impacts upon the retail service providers themselves.

NBN Co also states that it is necessary to balance the management of this risk with the need to avoid unduly restricting access to the NBN, which NBN Co submits "risks damaging competition in the market and therefore the interests of end-users."²²¹ NBN Co proposes that the SAU commitment to develop and comply with a credit policy will provide clarity on NBN Co's rights and obligations in respect of credit management.²²²

NBN Co further submits that the SAU commitments will give it flexibility to tailor its approach to credit management over time, while striking a balance with customers'

²¹⁷ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 9(a).

²¹⁸ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 9(c)(i).

²¹⁹ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 9(c)(iii).

²²⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 89.

²²¹ Ibid.

²²² Ibid.

need for certainty as to the credit management requirements that they will be subject to.²²³

The ACCC notes that the SAU does not prescribe how NBN Co must review and mitigate credit risk over the term of the SAU. NBN Co submits that this is intended to enable it to retain flexibility to respond to changes in customer circumstances over time.²²⁴ While this may enable NBN Co's credit management commitments to remain reasonable over the proposed 30 year term of the SAU, it may also create uncertainty about the scope of NBN Co's rights and obligations.

The ACCC considers that a credit management system should provide both the access provider and access seekers with certainty, in order for them to efficiently operate and invest in their respective services, networks and facilities, and:

- take into account the access provider's interest in managing its financial risks; and
- not frustrate an access seeker's ability to obtain access or impede access seekers from developing and conducting their business operations to compete for the supply of services to end-users.

The ACCC notes that NBN Co commits to comply with a *Credit Policy* that will form part of the WBA. This may affect the scope of the commitments being made by NBN Co in the SAU and raise potential issues in a similar way to references to the WBA.

The ACCC notes that NBN Co's commitment is made with reference to 'the WBA', rather than 'Access Agreements', and describes credit management requirements for its 'Customers', rather than 'Access Seekers'.

Do the credit management provisions clearly describe NBN Co's rights and obligations in respect of credit management? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Do the credit management provisions enable NBN Co to respond to changes in customer circumstances over time?

Are the credit management provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

7.7 Points of interconnect

The SAU addresses matters concerning the location of Points of Interconnect.

Firstly, the SAU states that the initial POI locations are set out in the ACCC's list in force as determined by section 151DB of the CCA.²²⁵ Section 151DB of the CCA

²²³ Ibid.

²²⁴ Ibid, pp. 89-90.

²²⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 3 (Product Components), clause 6.7(c).

requires the ACCC to prepare a written list of POIs,²²⁶ and publish a list in force on its website.²²⁷ The ACCC may vary the 'list in force'.²²⁸ However, the ACCC must not vary this list except with the agreement of NBN Co.²²⁹ The ACCC considers that the initial POI locations on the list in force will promote the long-term interests of end-users and will be reasonable, as these POI locations reflect the ACCC's advice to government on the number and location of the initial POIs for the NBN that would best meet the long-term interests of end-users.²³⁰

Secondly, the SAU requires NBN Co to review the locations of POIs as follows:

- NBN Co will commence a review of the locations of POIs every five years.²³¹
- NBN Co may also conduct a review of POI locations at any other time provided that it has not commenced a review within 12 months of the completion of any other POI review.²³²
- NBN Co must consult with the ACCC and access seekers in relation to the criteria to be applied in the review.²³³ On completion of a POI review, NBN Co is able to open, close or relocate a POI with the ACCC's prior approval.²³⁴

NBN Co has undertaken that the POI review process will have certain qualities or features, such as consultation with the ACCC and access seekers. The manner and the extent to which NBN Co will consider input to this consultation is unclear. However, this uncertainty may be mitigated by other factors, as NBN Co is required to comply with the Category B SAOs, which includes an obligation for NBN Co to permit interconnection to its facilities upon request, and ACCC approval is required prior to NBN Co relocating, closing or adding a POI.

The ACCC considers that any consultation by NBN Co regarding POIs should be broad. Access seekers who have not signed an Access Agreement may have rights to access services supplied by means of NBN Co infrastructure under the Category B SAOs, so it appears desirable that their input to this consultation also be considered. Similarly, providers that supply backhaul to NBN Co POIs, but do not purchase services from NBN Co, should be included in the consultation.

Is the specification of the POI locations sufficient to promote the long-term interests of end-users, comply with the Category B SAOs, and likely to be reasonable, and remain reasonable over the proposed term of the SAU?

²²⁶ CCA, s. 151DB(1)(a).

²²⁷ CCA, s. 151DB(3).

²²⁸ CCA, s. 151DB(1)(b).

²²⁹ CCA, s. 151DB(2A).

²³⁰ Further information about the initial POI locations can be found in section 4.3.4 of the December 2011 consultation paper and on the ACCC website at: <http://www.accc.gov.au/content/index.phtml?itemId=952292>.

²³¹ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 6.1(a).

²³² Ibid, Schedule 11 (Non-price Terms and Conditions), clause 6.1(b).

²³³ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 6.2.

²³⁴ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 6.4.

Will the proposed POI review mechanism ensure that the locations of POIs promote the long-term interests of end-users and comply with the Category B SAOs over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

Should the SAU include a commitment that NBN Co will permit interconnection at its facilities, including the POIs it owns and controls directly and those it leases from Telstra, consistent with its obligation under section 152AXB(4) of the CCA?

Are the circumstances and criteria for the creation of a temporary POI adequate?

Should the SAU include a commitment that temporary POIs will close and provide details about the criteria, timeframe and processes for closure?

7.8 Access to common property

The SAU outlines that NBN Co will be responsible for procuring access to ‘common property’ in particular circumstances.²³⁵ NBN Co’s submission states that it will not transfer this responsibility to customers as access seekers have raised concerns about the potentially high cost to customers of negotiating access to property required for purposes related to the WBA.²³⁶

The ACCC notes that the obligation in the SAU for NBN Co to procure access to common property is not limited to purposes relating to the WBA. The ACCC further notes that NBN Co is only responsible for procuring access to common property where required by NBN Co and its personnel. The commitment does not extend to a situation where access is required by other persons, such as NBN Co’s customers.

Are the situations where NBN Co proposes to take responsibility for procuring access to common property reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

7.9 Major NBN upgrades

The SAU sets out how NBN Co defines and will undertake ‘major NBN upgrades’ to the NBN Co network.²³⁷ These commitments are described in section 4.3.6 of the December 2011 consultation paper.

²³⁵ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 10. ‘Common property’ is defined in Schedule 1 (Dictionary and Interpretation) of the SAU.

²³⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 90.

²³⁷ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 5.

NBN Co states that the proposed commitments in the SAU are “designed with the aim of understanding, and assisting Customers to minimise, disruption to existing services and the cost impact for Customers (and therefore End Users of their services).”²³⁸

The provision of information about infrastructure upgrades should enable the access provider and access seekers to plan for the ongoing efficient operation of and investment in their respective services, networks and facilities. This information will also enable access seekers to have notice of end-users that will be affected and enable them to order replacement products (if relevant), minimising service disruption.

The ACCC notes that there is some uncertainty about the scope of NBN Co’s commitment to provide information to customers likely to be ‘materially adversely affected’ by a major NBN upgrade, as it is not clear when a customer would be ‘materially adversely affected’.

The ACCC also notes that if accepted, NBN Co’s commitments would operate for the term of the SAU, and appear to apply to any upgrade to the NBN infrastructure. It may be that the effect of upgrades change as industry circumstances and technology evolve over time. Infrastructure upgrades may also change the nature of the NBN infrastructure itself by:

- providing for greater capacity, such as improved gigabit passive optical network (GPON) equipment; and
- enabling different forms of access to the NBN, such as services that utilise wavelength division multiplexing (WDM) technology.

The ACCC notes that NBN Co has committed to provide information about major NBN upgrades to its ‘Customers’, rather than to ‘Access Seekers’ more generally.

Does the proposed process for how NBN Co will inform and consult with customers in relation to major NBN upgrades assist customers with the planning and provision of services to end-users? Are the proposed timeframes for providing notice of upgrades adequate? Do the matters that NBN Co will consult on assist customers to minimise disruptions to existing services?

Does the proposed process for how NBN Co will inform and consult with customers in relation to major NBN upgrades minimise the operational and cost impact on the provision of services by customers?

To what extent do the commitments about major NBN upgrades in the SAU affect incentives for investment in downstream markets?

Should NBN Co also supply information to, and consult with, access seekers or the general public about major NBN upgrades?

²³⁸ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 87.

Are the commitments reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

7.10 Access to NBN Co platform

The SAU addresses aspects of access by customers to the ‘NBN Co platform’.²³⁹ The SAU requires NBN Co to establish the NBN Co platform and for the WBA to set out the basis on which customers may access this platform.²⁴⁰ The NBN Co platform will be designed to enable customers to perform certain business transactions, including the submission of orders for product components, assurance transactions and billing transactions.²⁴¹

The SAU also requires NBN Co to make available to its customers certain information in relation to the NBN Co platform, known as ‘NBN Co platform information’.²⁴² This includes information about the NBN Co platform itself, and the terms on which customers may connect to and interface with this platform.²⁴³

NBN Co submits that the NBN Co platform will assist customers to manage their business processes.²⁴⁴ NBN Co also states that the implementation and design of the platform and the terms on which customers can access the platform will be transparent, “which ensures that Customers operate on a level playing field in their operational interactions with NBN Co.”²⁴⁵

The SAU is the first undertaking considered by the ACCC under Part XIC of the CCA that includes commitments about operational and business support systems. It is likely that the content and functionality of such a system will significantly impact upon the ability of the access provider and access seekers to effectively and efficiently manage and operate their services, networks and facilities. Consequently, such a system should effectively satisfy the interests of access seekers to efficiently access and use NBN infrastructure and services, and also the access provider’s interest in efficiently delivering its services to customers, in order to promote competition in related markets over the longer term.

The drafting of the clauses around access to the NBN Co platform may again raise issues relating to references in the SAU to the WBA, as NBN Co proposes to include the basis on which customers may access the NBN Co platform in the WBA.

²³⁹ ‘NBN Co platform’ is defined in Schedule 1 (Dictionary and Interpretation) of the SAU.

²⁴⁰ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clause 7.1.

²⁴¹ Ibid, Schedule 11 (Non-price Terms and Conditions), clause 7.2.

²⁴² Ibid, Schedule 11 (Non-price Terms and Conditions), clause 7.3.

²⁴³ Ibid.

²⁴⁴ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 89.

²⁴⁵ Ibid.

The ACCC notes that NBN Co has expressed this commitment by reference to ‘the WBA’, rather than ‘Access Agreements’, and ‘Customers’ as opposed to ‘Access Seekers’.

Do the SAU provisions clearly describe NBN Co’s commitments in respect of access to the NBN Co platform?

Are NBN Co’s commitments in respect of access to the NBN Co platform in the long-term interests of end-users? Are they likely to remain so over the proposed term of the SAU?

Does the proposed content and functionality of the NBN Co platform assist customers to efficiently invest in and operate their services, networks and facilities?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

7.11 Rollout information

The SAU describes how NBN Co will enable access seekers, customers and end-users to monitor the rollout of the network.²⁴⁶ NBN Co commits to provide:

- construction and service rollout progress information, in order to give customers greater visibility and certainty as to the progress of the rollout;²⁴⁷ and
- POI rollout progress information, as information about the progress of the POI rollout is significant for business planning by access seekers and customers.²⁴⁸

The provision of rollout information should give access seekers clarity and certainty as to the progress of the rollout of the network and enable access seekers to efficiently operate and invest in downstream services, networks and facilities. The ACCC would expect that detailed rollout schedules would provide sufficient information to allow access seekers to manage workforce planning for their own customer migration.²⁴⁹ This information will also provide access seekers with notice of end-users that will be affected by each stage of the migration and enable them to order replacement products (if relevant), minimising service disruption.

Does the proposed process for how NBN Co will provide information about the rollout of the network assist access seekers and customers to efficiently invest in and operate their services, networks and facilities? Are the proposed timeframes for providing information adequate? Is the information that NBN Co will provide adequate? Is it sufficiently clear where this information will be published?

²⁴⁶ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 11 (Non-price Terms and Conditions), clauses 3 and 4.

²⁴⁷ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 87.

²⁴⁸ Ibid.

²⁴⁹ ACCC, *Assessment of FANOC’s Special Access Undertaking in relation to the Broadband Access Service – Draft Decision*, December 2007, p. 109.

Should NBN Co commit to providing construction and service rollout progress information to 'Access Seekers' as well as 'Customers'?

8 Enforcement of SAU commitments

Section 152CD of the CCA provides that the ACCC or a person whose interests are affected by an undertaking may apply to the Federal Court to enforce the undertaking. The Federal Court may make an order against the service provider if it considers that the provider has breached any terms of the undertaking.

This chapter seeks views on issues relating to parties' abilities to enforce the commitments set out in the SAU. For the SAU to impose effective constraints on NBN Co, the commitments in the SAU must be enforceable. Otherwise, NBN Co would have no incentive to comply with the commitments in the SAU.

NBN Co's submission states that the high-level design of the SAU utilises 'a series of largely self-executing rules, but with specific powers conferred on the ACCC'.²⁵⁰

In relation to enforcement, the submission states:

Provided that NBN Co complies with its obligations under the SAU, then Customers will have a remedy under the WBA in the event that NBN Co fails to comply with an obligation that it has committed to observe in the SAU (e.g. a failure to publish a construction rollout plan). If NBN Co fails to include an appropriate obligation in the WBA, thereby depriving a Customer of a remedy under the WBA, then this would be a breach of its obligations under the SAU and the Customer would be able to enforce the terms and conditions of the SAU accordingly.²⁵¹

The chapter seeks views on two broad issues:

- Firstly, for the commitments in the SAU to be enforceable, they must be defined in sufficient clarity that a breach could be identified.
- Secondly, sufficient information must be available to the ACCC and affected persons in order that they are able to detect a breach.

8.1 Clarity of obligations

In order to satisfy this requirement, the terms, conditions and conduct specified in the SAU will need to use language to specify a commitment that is clear and unambiguous, so that the Court will be able to determine whether or not there has been a breach of the SAU. If the language used to draft a commitment is subject to multiple possible

²⁵⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 20 December 2011, p. 2. The specific powers conferred on the ACCC include: the power to select between the options nominated by the parties under the 'regulatory recourse' process; the power to approve proposals to increase prices by more than CPI/2 per cent annually; the power to decide the outcome of disputes in relation to the prudence of network changes; the power to determine the effectiveness of the customer engagement and product development processes and to decide whether to accept or reject any NBN Co proposal to change these processes during the 5-yearly review; the power to accept or reject proposed variations to the SAU; and the power to approve or reject proposed changes to POIs.

²⁵¹ *Ibid*, p. 76.

interpretations, then it will be difficult to determine what commitment has actually been made and therefore whether NBN Co has failed to comply.

Similarly, it is important that commitments are specified in sufficient detail to fulfil the objectives of the SAU and provide regulatory certainty to access seekers and access providers. For example, if a commitment is only partially specified in the SAU, with the remainder of the commitment set out in some other document, it would be difficult to enforce because the content of that commitment would be subject to modification by the author of the other document.

8.2 Monitoring and reporting

NBN Co's submission notes that the ACCC will monitor compliance with the rules over the term of the SAU.²⁵² It is likely that this compliance function will require suitable record keeping and reporting arrangements to be put in place.

Schedule 10 (Reporting) of the SAU requires NBN Co to provide information annually to the ACCC relating to the price-related terms and conditions specified in the SAU.

Broadly, Schedule 10 of the SAU requires NBN Co to report:

- its compliance with the price controls in the SAU;²⁵³
- information and forecasts about its cost base and revenues;²⁵⁴ and
- its compliance with the SAU prudency arrangements.²⁵⁵

NBN Co has also included some additional reporting requirements under Schedule 11 (Non-price Terms and Conditions) of the SAU that relate to the rollout of the network. These reporting requirements are outlined in section 7.10 of this supplementary consultation paper.

NBN Co does not appear to make any submissions in support of its approach to reporting and compliance in the SAU.

The SAU does not appear to require NBN Co to report information about its compliance with other aspects of the SAU, such as the commitments about non-price terms and conditions.

However, it may not be necessary for the SAU itself to require NBN Co to furnish all information to the ACCC that is necessary to ensure compliance with the SAU. The ACCC has a range of other information gathering powers that it may be able to utilise to ensure compliance, such as:

²⁵² Ibid, p. 28.

²⁵³ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 10 (Reporting), clause 1.

²⁵⁴ Ibid, Schedule 10 (Reporting), clause 2.

²⁵⁵ Ibid, Schedule 10 (Reporting), clause 3.

- the power to make record-keeping rules apply to NBN Co under section 151BU of the CCA, where these rules will contain information that is relevant to the operation of Part XIC of the CCA, or to the operation of the *National Broadband Network Companies Act 2011* (Cth); and
- the power to obtain documents, information and evidence from NBN Co or another person in accordance with section 155 of the CCA where the ACCC has a reason to believe that NBN Co or that person is capable of furnishing information, producing documents or giving evidence that is relevant to a designated communications matter.²⁵⁶

Are the commitments made by NBN Co in the SAU sufficiently clear and unambiguous that they will be enforceable by a Court?

Does the design of the SAU provide effective arrangements for enforcement of the commitments in the SAU?

Does the SAU include sufficient reporting commitments to assess compliance with the SAU? If not, what other reporting obligations would be required, and how should these obligations be established?

²⁵⁶ ‘Designated Communications Matters’ under section 155(9) of the CCA include the performance of a function, or the exercise of a power, conferred on the ACCC by or under Part XIC of the CCA or the *National Broadband Network Companies Act 2011* (Cth).

Glossary

Access Agreements – An agreement between a carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid Access Agreement are set out in section 152BE of the *Competition and Consumer Act 2010*.

Access Determinations – Written determinations made by the ACCC relating to terms and conditions for access to a declared service.

AVC (Access Virtual Circuit) – An Ethernet-based Layer 2 virtual connection that carries traffic to and from an end-user on the fibre, wireless, or satellite network.

ACCC – Australian Competition and Consumer Commission.

AER – Australian Energy Regulator.

Basic Access Offer – NBN Co defines this as NBN Co's entry level access link offering over each NBN Co network.

Binding Rules of Conduct – Written rules made by the ACCC specifying any or all terms and conditions for compliance with any or all applicable Standard Access Obligations or require compliance with any or all applicable Standard Access Obligations in a manner specified in the rules. These rules are made when there is an urgent need to do so.

Building Block Model – A methodology used to calculate regulated business' revenue requirements.

Carriage Service – This is defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

CCA – *Competition and Consumer Act 2010*.

Conditional Access Customer Equipment – This is defined under section 152AC of the *Competition and Consumer Act 2010* as customer equipment that consists of or incorporates a conditional access system that allows a service provider to determine whether an end-user is able to receive a particular service; and either: is for use in connection with the supply of a content service; or is of a kind specified in regulations.

Connectivity Serving Area – NBN Co defines this as a geographical region that is addressable using a single Connectivity Virtual Circuit.

CPI – Consumer Price Index.

CVC (Connectivity Virtual Circuit) – NBN Co defines this as an Ethernet-based Layer 2 virtual capacity for the transport of customer traffic from multiple end-users within a Connectivity Serving Area on an aggregated basis and presented at the

Network-Network Interface at the Point of Interconnect associated with that Connectivity Serving Area.

CVC Offer – NBN Co defines this as any symmetrical Traffic Class-4 Connectivity Virtual Circuit offered by NBN Co.

Data Rate – The number of binary bits per second of data passing through an interface during a given time.

Eligible Service – Section 152AL of the *Telecommunications Act 1997* defines this as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons).

Facilities Access Service – Described by NBN Co as a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a point of interconnect for the purpose of interconnecting their network with the NBN Co network.

Gigabit passive optical network (GPON) – An optical-access system based on Internet Protocol that lets multiple homes or businesses in a neighbourhood share fibre from a service provider's central office.

Initial cost recovery account – Described by NBN Co as the account used to accumulate any initial unrecovered costs.

Initial Product Roadmap – Described by NBN Co as the list of fibre, wireless and satellite product releases that NBN Co plans to launch between 2011 and 2015.

Layer 1 – Described by NBN Co as the physical layer of the OSI model.

Layer 2 – Described by NBN Co as the data link layer of the OSI model.

Layer 2 bitstream – A point-to-point data stream with defined interface protocol. It is independent of the underlying network technology and the services running over it.

Layer 3 – Described by NBN Co as the network internet protocol layer of the OSI model.

Listed carriage service – A carriage service of the type listed in section 16 of the *Telecommunications Act 1997*.

Long-Term Revenue Constraint Methodology – The method for determining the allowed revenues of NBN Co, as set out in Schedule 7 of the SAU.

Multicast service – A service which enables content to be transmitted simultaneously to multiple parties, but is carried as a single stream as far into the network as possible.

NBN Co – NBN Co Limited and NBN Tasmania Limited.

NBN Access Service – Described by NBN Co as a Layer 2 service supplied on the NBN Co network between and including: a User Network Interface on a network termination device; and the Network-Network Interface at the point of interconnect associated with the relevant network termination device, for the purpose of enabling an access seeker or another service provider that is a customer of an access seeker to supply carriage or content services.

Network Design Rules – Described by NBN Co as documents in relation to the design of NBN Co networks that NBN Co provides to the ACCC for the purposes of the ACCC’s consideration of a Special Access Undertaking given by NBN Co.

Network Termination Device – The device on the customer end of an access network used to send and receive signals sent across the physical access medium.

NNI (Network-Network Interface) – A physical interface between the NBN Co network and the access seeker’s network at the point of interconnect.

Open System Interconnection model (OSI Model) – The framework developed by the International Standards Organisation to provide worldwide standards for computer communications.

POI (Point of Interconnect) – The geographical point where traffic stops being carried on the network of the access-seeker and is given to the network owned by NBN Co to carry.

Price Controlled Offers – NBN Co defines this as the offers comprising product components and product features which are subject to a price control in respect of the period between the SAU commencement date and 30 June 2017.

Product Components – NBN Co defines these as specific services by which NBN Co will supply the Fibre Access Service.

Product Features – NBN Co defines these as the features of a product component that are made available by NBN Co and which are selectable and configurable by the customer in respect of that product component (for example, data transfer rate or traffic class associated with an Access Virtual Circuit).

Product Development Forum – NBN Co describes this as the primary forum through which customers may submit new product ideas, provide input on the development of new and existing products and obtain information from NBN Co on its current and future product offerings.

SAU (Special Access Undertaking) – A voluntary undertaking given to the ACCC by a supplier of a telecommunications service specifying the terms and conditions upon which they agree to supply a listed carriage service or a service which facilitates the supply of a listed carriage service.

Standard Form of Access Agreement – A document published on the NBN Co website which sets the terms and conditions which NBN Co is obliged to enter into in

an Access Agreement with an access seeker upon request, and declares the services to which it relates.

Statement of Expectations – A statement released by the Australian Government on 17 December 2010, which set out the government’s expectations for NBN Co in implementing the NBN policy.

Systems Interfacing Service – Described by NBN Co as a service for the establishment, testing, operation and maintenance of a connection to the NBN Co platform.

Uniform National Wholesale Pricing – For the purposes of section 151DA(5) of the *Competition and Consumer Act 2010*, the requirement for NBN Co to supply or offer to supply the same price-related terms and conditions for eligible services to service providers and utilities throughout Australia.

UNI (User Network Interface) – the physical interface where the end-user’s equipment connects to NBN Co’s network, either a data port or a voice port.

WBA (Wholesale Broadband Agreement) – The WBA sets out comprehensive price and non-price terms that apply in connection to NBN Co’s services; and the processes for providing NBN Co’s customers with operational and technical information in relation to those services. The WBA is a Standard Form of Access Agreement.

WACC (Weighted Average Cost of Capital) – A method for calculating the minimum required cost of capital for a company. This method is calculated by using a weighted average of the costs of the sources of funding for a company.

Wavelength division multiplexing (WDM) – A way to increase the capacity of an optical fibre by transmitting different signals at different wavelengths at the same time.