



Australian
Competition &
Consumer
Commission

NBN Co Limited Special Access Undertaking Consultation Paper

December 2011

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www.accc.gov.au

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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* (CCA) on 5 December 2011. The SAU specifies terms and conditions upon which NBN Co undertakes to supply what it terms the 'NBN Access Service'.

NBN Co has indicated that it intends to provide a submission in support of the SAU to the ACCC.

NBN Co has also specified terms and conditions for access to its services in a 'Wholesale Broadband Agreement' ('the WBA'). The WBA was formulated and made available on NBN Co's website as a Standard Form of Access Agreement that relates to access to NBN Co's services, including the NBN Access Service, on 30 November 2011.

The ACCC must accept or reject the SAU based on the criteria for accepting an undertaking set out in Part XIC of the CCA.¹ In particular, the ACCC must not accept the SAU unless the ACCC has published the SAU, invited submissions to the ACCC on the SAU, and considered the submissions received within the time limit specified for the consultation.²

In this consultation paper, the ACCC sets out the legislative framework for the assessment of the SAU, provides an overview of the SAU and invites submissions on the SAU. Given the complexity of the SAU, it will allow interested parties to provide initial views on particular areas of the undertaking on which parties think the ACCC should focus.

The ACCC intends to release a supplementary consultation paper in February 2012 which will provide further guidance on what it considers to be the key issues associated with the SAU.

This consultation paper also sets out the process that the ACCC intends to follow for the assessment of the SAU. This process will be open and public to allow parties to express their views on the SAU, provide relevant information to assist the ACCC and allow comment on preliminary views formed by the ACCC and its analysis of the SAU. The process the ACCC will follow is set out below.

1.1 Approach to consultation

The ACCC will be issuing two consultation papers. This paper represents the first of these and is aimed only at:

¹ *Competition and Consumer Act 2010*, s. 152CBC(2).

² *Competition and Consumer Act 2010*, s. 152CBD(2)(d).

- providing guidance on the legislative framework;
- providing a summary of the SAU; and
- seeking stakeholders' preliminary views on the SAU to identify the key issues that will be the focus of the supplementary consultation paper.

A second, supplementary consultation paper will be released in early to mid-February 2012. The supplementary consultation paper will go towards gaining a more detailed understanding of stakeholders' views and will focus on more specific issues than this consultation paper. It will also provide guidance on what the ACCC considers to be the key issues associated with the SAU. Submissions to the supplementary consultation paper will be due on 30 March 2012.

If interested parties wish for their views to be taken into account in the formulation of the supplementary consultation paper, submissions to the present consultation paper should be provided by **20 January 2012**. The ACCC strongly encourages parties to provide views prior to this date in order for the supplementary consultation paper to focus on issues of concern to stakeholders.

However, the ACCC will take into account any submissions made to the present consultation paper which are provided at any time before 30 March 2012 in making its decision whether to accept or reject the SAU.

That is, submissions to both consultation papers will be accepted up until **5.00pm, 30 March 2012**.

1.1.1 Commercial-in-confidence material

All submissions 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'.

The ACCC encourages parties to make submissions in a way that facilitates the efficient assessment of their various submissions, including the verification of any facts or data upon which those submissions are based. In this regard, 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.

Should the ACCC not be in a position to efficiently assess a party's contentions, including by receiving the results of independent critical assessments, it will necessarily be constrained in the weight to which it will be able to attach to those contentions. This will particularly be the case where conflicting material that has been critically assessed is also before the ACCC.

1.1.2 Format of submissions

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.

1.1.3 Contact and submission lodgement details

Written submissions from interested stakeholders must 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 9290 1855

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

1.2 Time limit for ACCC assessment of the SAU

The CCA imposes a time limit for the ACCC's assessment of Special Access Undertakings. The ACCC must make a decision within six months of the lodgement of the SAU with the ACCC,³ subject to its ability to extend this period.⁴ If the ACCC does not make a decision within this period, it is deemed to have accepted the SAU.

The ACCC may extend the decision-making period for making its decision by giving a written notice to NBN Co.⁵ Each extension must be for less than three months.⁶ The

³ *Competition and Consumer Act 2010*, s. 152CBC(5).

⁴ *Competition and Consumer Act 2010*, s. 152CBC(7).

⁵ *Competition and Consumer Act 2010*, s. 152CBC(7).

⁶ *Competition and Consumer Act 2010*, s. 152CBC(7)(a).

ACCC must explain in its notice why it was unable to make a decision on the SAU during the original decision-making period.⁷

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 information request under section 152CBB of the CCA — under section 152CBB of the CCA the ACCC may request that NBN Co provide further information to the ACCC about the SAU. The ACCC may refuse to consider the SAU until NBN Co gives the ACCC the requested information.⁸
- the ACCC is waiting for NBN Co to respond to a request for a varied SAU — under section 152CBDA of the CCA the ACCC may also give NBN Co a notice specifying variations to the SAU. If NBN Co makes the requested variations within the time limit given on the notice, then the ACCC will consider the varied SAU as if it was the original SAU.⁹ This means that the ACCC will provide its decision within the time limits for the decision on the original SAU.
- the ACCC is undertaking public consultation on the SAU in accordance with section 152CBD(2)(d).¹⁰

The ACCC notes that, following its analysis of the SAU and the submissions of interested parties, the ACCC intends to publish the findings of its initial analysis in a draft decision. The ACCC will invite further submissions on its draft decision. The ACCC would expect that these submissions would respond to the draft decision, and would not expect a party to raise any further issues that were not raised in response to this initial consultation paper or the supplementary consultation paper.

Taking into account the submissions, the ACCC will form a view on whether to accept or reject the SAU.¹¹ 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.

⁷ *Competition and Consumer Act 2010*, s. 152CBC(7)(b).

⁸ The ACCC also has the power under section 155 of the *Competition and Consumer Act 2010* to obtain information, documents and evidence from any person, if relevant to the ACCC's functions and powers under Part XIC or the *National Broadband Network Companies Act 2011*.

⁹ *Competition and Consumer Act 2010*, s. 152BCDA(3).

¹⁰ *Competition and Consumer Act 2010*, s. 152CBC(6).

¹¹ *Competition and Consumer Act 2010*, s. 152CBC(2).

2 Introduction

2.1 The National Broadband Network

NBN Co is a wholly owned Commonwealth entity that has been prescribed as a government business enterprise.¹² NBN Co was created in order to design, build and operate a new National Broadband Network ('NBN').¹³ The structure and function of NBN Co is established by the *National Broadband Network Companies Act 2011*.

The NBN is intended to deliver high-data rate broadband services at affordable prices to all Australians.¹⁴ This will be achieved by building an access network using a combination of optical fibre, wireless and satellite technologies with the following initial specifications:

- fibre-based coverage with data rates of up to 100 Mb/s to 93 per cent of premises; and
- wireless or satellite coverage with data rates of up to 12 Mb/s to the remaining 7 per cent of premises.¹⁵

On 20 December 2010, the government released its *Statement of Expectations* (SoE) regarding NBN Co.¹⁶ The SoE sets out the government's expectations on a number of matters.

In particular, the SoE provides that the NBN will be a wholesale-only and open-access network, offering wholesale Layer 2 bitstream products on a non-discriminatory basis.¹⁷ It also provides that NBN Co must charge access seekers on the basis of uniform national wholesale pricing.¹⁸ It is envisaged that this will create the opportunity for access seekers to build upon NBN Co's basic offering in order to sell both wholesale services to other retail service providers (that is, bundled, aggregated offerings) and differentiated retail services directly to consumers and businesses.¹⁹

Further information about NBN Co and the NBN may be found at www.nbnco.com.au.

¹² Explanatory memorandum to *National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010*, p. 6.

¹³ Explanatory memorandum to *National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010*, p. 1.

¹⁴ NBN Co, *NBN Co Corporate Plan 2011-2013*, 17 December 2010, p. 11.

¹⁵ NBN Co, *NBN Co Corporate Plan 2011-2013*, 17 December 2010, p. 12.

¹⁶ The *Statement of Expectations* is available at: http://www.dbcde.gov.au/funding_and_programs/national_broadband_network

¹⁷ The Hon Senator Penny Wong and The Hon Senator Stephen Conroy, *Statement of Expectations*, 17 December 2010, p. 2.

¹⁸ The Hon Senator Penny Wong and The Hon Senator Stephen Conroy, *Statement of Expectations*, 17 December 2010, p. 7.

¹⁹ The Hon Senator Penny Wong and The Hon Senator Stephen Conroy, *Statement of Expectations*, 17 December 2010, p. 2.

3 Legislative framework

This section provides an introduction to legislation that governs access to services provided by NBN Co, including:

- the object of the telecommunications access regime;
- an overview of the telecommunications access regime that applies to NBN Co;
- an overview of Special Access Undertakings under Part XIC of the *Competition and Consumer Act 2010* ('the CCA'), and the criteria that the ACCC must apply when assessing such an undertaking;
- an overview of how Standard Forms of Access Agreement (such as the WBA formulated by NBN Co) operate in the telecommunications regulatory regime; and
- an overview of the relationship between Special Access Undertakings and other ACCC functions and powers under the telecommunications access regime.

3.1 Object of the telecommunications access regime

The object of the telecommunications access regime is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.²⁰

This section outlines the matters that the ACCC must have regard to under Part XIC of the CCA when determining whether a particular thing promotes this objective.

3.1.1 Long-term interests of end-users

In determining whether a particular thing promotes the long-term interests of end-users of carriage services, or services supplied by means of carriage services, the ACCC is required to have regard to the objectives of:

- promoting competition in the markets for these services;²¹
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;²² and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which these services are supplied;²³ and

²⁰ *Competition and Consumer Act 2010*, s. 152AB(1).

²¹ *Competition and Consumer Act 2010*, s. 152AB(2)(c).

²² *Competition and Consumer Act 2010*, s. 152AB(2)(d).

- any other infrastructure by which these services are, or are likely to become, capable of being supplied.²⁴

3.1.2 Promoting competition

In determining whether a particular thing is likely to result in the achievement of promoting competition, the ACCC must have regard to the extent to which the thing will remove obstacles to end-users of listed services²⁵ gaining access to listed services.²⁶

The ACCC may also have regard to other relevant matters when determining whether a particular thing is likely to result in the achievement of promoting competition.²⁷

3.1.3 Achieving any-to-any connectivity

The objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.²⁸

3.1.4 Encouraging efficient use of and investment in infrastructure

In determining the extent to which a particular thing is likely to result in encouraging the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available;²⁹
 - whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable;³⁰ and
 - the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks;³¹

²³ *Competition and Consumer Act 2010*, s. 152AB(2)(e)(i).

²⁴ *Competition and Consumer Act 2010*, s. 152AB(2)(e)(ii).

²⁵ Section 152AB(2) of the *Competition and Consumer Act 2010* defines “listed services” as carriage services or services supplied by means of a carriage service.

²⁶ *Competition and Consumer Act 2010*, s. 152AB(4).

²⁷ *Competition and Consumer Act 2010*, s. 152AB(5).

²⁸ *Competition and Consumer Act 2010*, s. 152AB(8).

²⁹ *Competition and Consumer Act 2010*, s. 152AB(6)(a)(i).

³⁰ *Competition and Consumer Act 2010*, s. 152AB(6)(a)(ii).

³¹ *Competition and Consumer Act 2010*, s. 152AB(6)(a)(iii).

- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope;³² and
- the incentives for investment in:
 - the infrastructure by which the services are supplied;³³ and
 - any other infrastructure by which the services are, or are likely to become, capable of being supplied.³⁴

In determining incentives for investment in infrastructure, the ACCC is required to have regard to the risks involved in making the investment.³⁵

The ACCC may also have regard to other relevant matters when determining whether a particular thing is likely to result in the achievement of encouraging the efficient use of and investment in infrastructure,³⁶ and when determining incentives for investment in infrastructure.³⁷

3.2 Overview of the telecommunications access regime applying to NBN Co

Part XIC of the CCA establishes a telecommunications access regime that is administered by the ACCC. The general purpose of access regimes is to facilitate access to services provided by monopoly or bottleneck infrastructure in order to promote competition in related markets. This section provides an overview as to how the regime facilitates access to services provided by means of the NBN Co network:

- Firstly, NBN Co must only supply services that are declared services (unless the services are not eligible to be declared services).³⁸ Declared services are services that must be supplied to access seekers upon request.
- Secondly, once its services are declared, NBN Co is required to comply with applicable Standard Access Obligations.³⁹
- Finally, NBN Co must comply with Standard Access Obligations in accordance with the terms and conditions specified in applicable Access Agreements, Special Access Undertakings, Binding Rules of Conduct and Access Determinations.⁴⁰

³² *Competition and Consumer Act 2010*, s. 152AB(6)(b).

³³ *Competition and Consumer Act 2010*, s. 152AB(6)(c)(i).

³⁴ *Competition and Consumer Act 2010*, s. 152AB(6)(c)(ii).

³⁵ *Competition and Consumer Act 2010*, s. 152AB(7A).

³⁶ *Competition and Consumer Act 2010*, s. 152AB(7).

³⁷ *Competition and Consumer Act 2010*, s. 152AB(7B).

³⁸ *Competition and Consumer Act 2010*, s. 152CJA(1).

³⁹ *Competition and Consumer Act 2010*, s. 152AXB.

⁴⁰ *Competition and Consumer Act 2010*, s. 152AY.

3.2.1 Declared services

Part XIC provides three means by which services that are supplied by NBN Co, or are capable of being supplied by NBN Co, may become declared services:

- Firstly, the ACCC may decide to declare NBN-related services after conducting a public inquiry.⁴¹
- Secondly, the ACCC may accept a Special Access Undertaking given by NBN Co.⁴²
- Thirdly, NBN Co may publish a Standard Form of Access Agreement relating to access to the service.⁴³

As noted, NBN Co is specifically prohibited from supplying services that are listed carriage services (within the meaning of the *Telecommunications Act 1997*), or that facilitate the supply of listed carriage services, unless these services are declared services.⁴⁴

3.2.2 Standard Access Obligations

Standard Access Obligations under Part XIC require the provision of access to declared services in order for access seekers to provide carriage services or content services using declared services.⁴⁵

Part XIC provides for specific Standard Access Obligations, known as Category B Standard Access Obligations, to apply to declared services provided by NBN Co.⁴⁶ The Category B Standard Access Obligations that apply to NBN Co in respect of declared services are:

- to supply a declared service upon request;⁴⁷
- to provide interconnection to facilities upon request;⁴⁸ and
- to supply any service using conditional access customer equipment that is necessary in order for a service provider to provide carriage services and/or content services by means of the declared service, upon request.⁴⁹

⁴¹ *Competition and Consumer Act 2010*, s. 152AL(8A).

⁴² *Competition and Consumer Act 2010*, s. 152AL(8E).

⁴³ *Competition and Consumer Act 2010*, s. 152AL(8D).

⁴⁴ *Competition and Consumer Act 2010*, s. 152CJA(1).

⁴⁵ *Competition and Consumer Act 2010*, s. 152AA.

⁴⁶ *Competition and Consumer Act 2010*, s. 152AXB.

⁴⁷ *Competition and Consumer Act 2010*, s. 152AXB(2).

⁴⁸ *Competition and Consumer Act 2010*, s. 152AXB(4).

⁴⁹ *Competition and Consumer Act 2010*, s. 152AXB(5).

3.2.3 Compliance with Standard Access Obligations

Carriers and carriage service providers are required to comply with applicable Standard Access Obligations under Part XIC.⁵⁰

The terms and conditions on which a carrier or a carriage service provider is to comply with applicable Standard Access Obligations may be specified in relation to a range of matters. Part XIC provides that these terms and conditions can be set out in a number of different documents, being:

- an Access Agreement,⁵¹ which is an agreement between the carrier (access provider) and an access seeker for the supply of declared services within the meaning of section 152BE of the CCA;
- a Special Access Undertaking that has been accepted by the ACCC;⁵²
- Binding Rules of Conduct,⁵³ which are written rules made by the ACCC where there is an urgent need to make such rules. These rules may specify any or all terms and conditions for compliance with any or all applicable Standard Access Obligations,⁵⁴ or require compliance with any or all applicable Standard Access Obligations in a manner specified in the rules;⁵⁵ and
- Access Determinations,⁵⁶ which are written determinations relating to access to a declared service that are made by the ACCC.⁵⁷ Access determinations may specify any or all terms and conditions for compliance with any or all applicable Standard Access Obligations.⁵⁸

Part XIC establishes a hierarchy between the documents to allow parties to identify which terms and conditions for compliance with the Standard Access Obligations are to apply in relation to a declared service, particularly in the event of inconsistency between the documents. In relation to compliance with the Standard Access Obligations, the hierarchy under Part XIC establishes that terms and conditions about a particular matter contained in a document higher in the above list will prevail over terms and conditions about that same matter specified in a document lower in the list. For example, an access provider must comply with terms and conditions in relation to a particular matter that are specified by an Access Agreement, even if terms and conditions about the same matter are contained in any Special Access Undertaking, Binding Rules of Conduct or Access Determination.⁵⁹

⁵⁰ *Competition and Consumer Act 2010*, ss. 152AZ and 152BA.

⁵¹ *Competition and Consumer Act 2010*, s. 152AY(2)(a).

⁵² *Competition and Consumer Act 2010*, s. 152AY(2)(b).

⁵³ *Competition and Consumer Act 2010*, s. 152AY(2)(c).

⁵⁴ *Competition and Consumer Act 2010*, s. 152BD(1)(a).

⁵⁵ *Competition and Consumer Act 2010*, s. 152BD(1)(b).

⁵⁶ *Competition and Consumer Act 2010*, s. 152AY(2)(d).

⁵⁷ *Competition and Consumer Act 2010*, s. 152BC(1).

⁵⁸ *Competition and Consumer Act 2010*, s. 152BC(3)(a).

⁵⁹ *Competition and Consumer Act 2010*, s. 152AY.

3.2.4 Non-discrimination obligations

Part XIC imposes non-discrimination obligations upon NBN Co and other designated superfast network providers.⁶⁰

The requirements of the non-discrimination obligations relating to NBN Co are that:

- NBN Co must not discriminate between access seekers in complying with its Category B Standard Access Obligations, and in the carrying on of activities related to the supply of declared services;⁶¹ and
- NBN Co must not discriminate in favour of itself in the supply of declared services.⁶²

The ACCC has recently published draft explanatory material on its website relating to these non-discrimination obligations. This draft explanatory material provides guidance on when NBN Co may or may not offer different terms and conditions of access between access seekers. Broadly, the guidance states that:

- if NBN Co offers different terms and conditions to access seekers in different classes (e.g. with different operational or technical requirements, or purchasing different products); or
- if any differences in the offer of terms and conditions to access seekers within the same class are consistent with the long-term interests of end-users,

the ACCC will consider that NBN Co has not breached the non-discrimination provisions.

The explanatory memorandum to the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011* notes that the ACCC would refer to its explanatory material in assessing a Special Access Undertaking.⁶³

For further information about the ACCC's approach to assessing compliance with the non-discrimination obligations under Part XIC, please refer to the draft explanatory material available on the ACCC website:

<http://www.accc.gov.au/content/index.phtml/itemId/998536>.

3.2.5 NBN Co conduct authorised under Part XIB

Part XIB of the CCA establishes a special regime for regulating anti-competitive conduct in the telecommunications industry that applies in addition to Part IV of the CCA.

⁶⁰ *Competition and Consumer Act 2010*, ss. 152AXC and 152AXD.

⁶¹ *Competition and Consumer Act 2010*, ss. 152AXC(1) and 152AXD(1).

⁶² *Competition and Consumer Act 2010*, s. 152AXC(7).

⁶³ Revised explanatory memorandum to *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011*, p. 12.

This regime is closely related to the telecommunications access regime contained in Part XIC of the CCA. Certain sections of Part XIC refer to conduct of NBN Co that is authorised under Part XIB in order to achieve a consistent approach to regulation of this conduct under both regimes.

NBN Co is authorised under Part XIB to:

- refuse to permit interconnection of facilities at a location that is not a listed point of interconnection⁶⁴ if the refusal is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co;⁶⁵
- refuse to supply designated access services (namely, the Access Virtual Circuit, the Connectivity Virtual Circuit, and the Network-Network Interface services supplied by NBN Co) on a standalone basis if the refusal is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co;⁶⁶ and
- engage in conduct that is reasonably necessary to achieve uniform national pricing of eligible services provided by NBN Co.⁶⁷

The relevant sections of Part XIC that refer to this authorised conduct are set out in sections 3.3.2.1 and 3.3.2.3 of this consultation paper.

3.3 Overview of Special Access Undertakings under Part XIC

This section sets out an introduction and overview to:

- the features of Special Access Undertakings;
- the legislative criteria that the ACCC must apply when assessing a Special Access Undertaking given by NBN Co;
- the effect and enforcement of an accepted Special Access Undertaking; and
- the variation and withdrawal of an accepted Special Access Undertaking.

⁶⁴ A point of interconnect is a geographical location where two or more networks interconnect and exchange traffic. An NBN point of interconnect will be the location where an access seeker will connect its own network to the NBN and provide services to end-user customers. Listed points of interconnect are points of interconnect that are specified in a written list prepared by the ACCC under section 151DB(1) of the *Competition and Consumer Act 2010*. Further detail about NBN Points of Interconnect is available on the ACCC website: <http://www.accc.gov.au/content/index.phtml?itemId=952292>.

⁶⁵ *Competition and Consumer Act 2010*, s. 151DA(2).

⁶⁶ *Competition and Consumer Act 2010*, s. 151DA(3).

⁶⁷ *Competition and Consumer Act 2010*, s. 151DA(4).

3.3.1 Features of a Special Access Undertaking

Part XIC allows NBN Co to give a Special Access Undertaking to the ACCC in certain circumstances.⁶⁸ NBN Co may choose to give such an undertaking to the ACCC in connection with the provision of access to a listed carriage service, or a service that facilitates supply of a listed carriage service.⁶⁹

Part XIC provides that a Special Access Undertaking must satisfy certain requirements and include certain commitments. It may also include other commitments.

Firstly, the undertaking must:

- specify the expiry time of the undertaking;⁷⁰ and
- be in a form approved in writing by the ACCC.⁷¹

Clause 7 of the SAU given by NBN Co refers to the expiry time of the undertaking.

Secondly, the undertaking must state that NBN Co:

- agrees to be bound by Category B Standard Access Obligations;⁷² and
- undertakes to comply with the terms and conditions specified in the undertaking in relation to the Category B Standard Access Obligations.⁷³

Clause 1 of the SAU given by NBN Co refers to the application of Category B Standard Access Obligations and how NBN Co will comply with any applicable Category B Standard Access Obligations.

Thirdly, an undertaking given by NBN Co may also state that NBN Co will:

- engage in specified conduct in relation to access to the service, and will do so on such terms and conditions as are specified in the undertaking;⁷⁴ and
- engage in specified conduct in relation to certain other matters (such as developing new eligible services or enhancing a declared service).⁷⁵

The SAU given by NBN Co includes commitments to engage in specified conduct in relation to a range of matters, such as commitments made in Schedule 6 (Product Development and Withdrawal).

⁶⁸ *Competition and Consumer Act 2010*, ss. 152CBA(1)(b) and (2).

⁶⁹ *Competition and Consumer Act 2010*, s. 152CBA(2).

⁷⁰ *Competition and Consumer Act 2010*, s. 152CBA(6).

⁷¹ *Competition and Consumer Act 2010*, s. 152CBA(4).

⁷² *Competition and Consumer Act 2010*, s. 152CBA(3A)(a).

⁷³ *Competition and Consumer Act 2010*, s. 152CBA(3A)(b).

⁷⁴ *Competition and Consumer Act 2010*, s. 152CBA(3B).

⁷⁵ *Competition and Consumer Act 2010*, s. 152CBA(3C).

In addition, an undertaking may provide for NBN Co to extend, or further extend, the expiry time of the undertaking, provided:

- any extension is approved by the ACCC;⁷⁶ and
- the undertaking sets out the criteria to be applied by the ACCC in deciding whether to approve any extension.⁷⁷

Clause 7 of the SAU given by NBN Co concerns extension of the operation of the undertaking.

Finally, an undertaking may:

- provide for the ACCC to perform functions or powers in relation to the undertaking;⁷⁸ and
- provide that a term or condition specified in the undertaking is a fixed principles term or condition for a certain period of time.⁷⁹

The SAU given by NBN Co provides for the ACCC to perform various functions or powers in relation to the undertaking, such as ACCC approval of certain price increases proposed by NBN Co under clause 4 of Schedule 5 (Price Controls). However, the SAU does not specify any fixed principles terms and conditions.

3.3.2 Legislative criteria for assessment of a Special Access Undertaking

After assessing a Special Access Undertaking, the ACCC is required to make a decision to accept or to reject the undertaking.⁸⁰ If the ACCC does not make a decision about the undertaking within six months after receiving the undertaking, or this period as extended,⁸¹ the ACCC is taken to have made a decision to accept the undertaking at the end of the six month period.⁸²

The criteria that the ACCC must apply when making a decision to accept or reject the SAU given by NBN Co are set out in the following sections.

3.3.2.1 Criteria for acceptance of a Special Access Undertaking

In deciding whether to accept or to reject a Special Access Undertaking, the ACCC must not accept the undertaking unless:

⁷⁶ *Competition and Consumer Act 2010*, s. 152CBA(9)(a).

⁷⁷ *Competition and Consumer Act 2010*, s. 152CBA(9)(b).

⁷⁸ *Competition and Consumer Act 2010*, s. 152CBA(10A).

⁷⁹ *Competition and Consumer Act 2010*, s. 152CBAA(1).

⁸⁰ *Competition and Consumer Act 2010*, s. 152CBC(2).

⁸¹ *Competition and Consumer Act 2010*, s. 152CBC(7).

⁸² *Competition and Consumer Act 2010*, s. 152CBC(5).

- it has published the undertaking and invited people to make submissions⁸³ and considered any submissions made within the specified time limit;⁸⁴
- it is satisfied that the undertaking is consistent with any Ministerial pricing determination;⁸⁵
- it is satisfied that the terms and conditions specified in the undertaking about compliance with the Category B Standard Access Obligations are consistent with these obligations⁸⁶ and are reasonable;⁸⁷
- it is satisfied that any conduct specified by the undertaking in relation to access will promote the long-term interests of end-users,⁸⁸ and the related terms and conditions are reasonable;⁸⁹ and
- it is satisfied that any conduct specified by the undertaking in relation to certain matters (such as developing new eligible services or enhancing a declared service) will promote the long-term interests of end-users.⁹⁰

In order for the ACCC to make a decision to accept the SAU, the ACCC must be satisfied of each of the above matters for the period that the SAU is in operation. As discussed in section 4.1.8 of this consultation paper, NBN Co has proposed that the SAU shall operate until 30 June 2040.

However, the ACCC is not required to be satisfied that price-related terms and conditions are consistent with the Category B Standard Access Obligations, or are reasonable, if these price-related terms and conditions are reasonably necessary to achieve uniform national pricing of eligible NBN services.⁹¹

The ACCC is also not required to be satisfied that terms and conditions are consistent with the Category B Standard Access Obligations, or are reasonable, if the terms and conditions relate to certain conduct by NBN Co (relating to interconnection and bundling of access services) that is authorised under Part XIB of the CCA.⁹² This authorised conduct is discussed further in section 3.2.5 of this consultation paper.

The ACCC further notes that there is no Ministerial pricing determination in force at this time.

⁸³ *Competition and Consumer Act 2010*, s. 152CBD(2)(d)(i).

⁸⁴ *Competition and Consumer Act 2010*, s. 152CBD(2)(d)(ii).

⁸⁵ *Competition and Consumer Act 2010*, s. 152CBD(2)(c).

⁸⁶ *Competition and Consumer Act 2010*, s. 152CBD(2)(b)(i).

⁸⁷ *Competition and Consumer Act 2010*, s. 152CBD(2)(b)(ii).

⁸⁸ *Competition and Consumer Act 2010*, s. 152CBD(2)(ca)(i).

⁸⁹ *Competition and Consumer Act 2010*, s. 152CBD(2)(ca)(ii).

⁹⁰ *Competition and Consumer Act 2010*, s. 152CBD(2)(cb).

⁹¹ *Competition and Consumer Act 2010*, s. 152CBD(5A)(d).

⁹² *Competition and Consumer Act 2010*, s. 152CBD(5C)(b).

3.3.2.2 Criteria for assessing whether terms and conditions are reasonable

In determining whether particular terms and conditions are reasonable, the ACCC must have regard to:

- whether the terms and conditions promote the long-term interests of end-users;⁹³
- the legitimate business interests of NBN Co, and NBN Co's investment in facilities used to supply the declared service concerned;⁹⁴
- the interests of persons who have rights to use the declared service concerned;⁹⁵
- the direct costs of providing access to the declared service concerned;⁹⁶
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;⁹⁷ and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.⁹⁸

However, in determining whether terms and conditions are reasonable, the ACCC is not limited to having regard only to the matters listed above.⁹⁹

The matters that the ACCC is required to have regard to when assessing whether a particular matter promotes the long-term interests of end-users are set out above in section 3.1.1.

3.3.2.3 Reasons for which the ACCC must not reject a Special Access Undertaking

Part XIC prescribes three reasons for which the ACCC must not reject a Special Access Undertaking.

Firstly, if the undertaking contains price-related terms and conditions that are reasonably necessary to achieve uniform national pricing of eligible NBN services, the ACCC must not reject the undertaking for a reason that concerns the price-related terms and conditions.¹⁰⁰

Secondly, if certain conduct by NBN Co (relating to interconnection and bundling of access services) is authorised under Part XIB of the CCA, the ACCC must not reject

⁹³ *Competition and Consumer Act 2010*, s. 152AH(1)(a).

⁹⁴ *Competition and Consumer Act 2010*, s. 152AH(1)(b).

⁹⁵ *Competition and Consumer Act 2010*, s. 152AH(1)(c).

⁹⁶ *Competition and Consumer Act 2010*, s. 152AH(1)(d).

⁹⁷ *Competition and Consumer Act 2010*, s. 152AH(1)(e).

⁹⁸ *Competition and Consumer Act 2010*, s. 152AH(1)(f).

⁹⁹ *Competition and Consumer Act 2010*, s. 152AH(2).

¹⁰⁰ *Competition and Consumer Act 2010*, s. 152CBD(5A)(c).

the undertaking for a reason that concerns this conduct.¹⁰¹ This authorised conduct is discussed further in section 3.2.5 of this consultation paper.

Finally, if the ACCC has accepted a Special Access Undertaking given by a person that contains fixed principles terms or conditions that are in effect, the ACCC must not reject another undertaking given by this person in relation to the same service for certain reasons relating to corresponding fixed principles terms or conditions.¹⁰²

However, the ACCC notes that no Special Access Undertaking containing fixed principles terms or conditions has been given by NBN Co and accepted by the ACCC.

3.3.3 Effect and enforcement of an accepted Special Access Undertaking

If the ACCC makes a decision to accept a Special Access Undertaking, the undertaking will have three effects:

- Firstly, the undertaking would specify some or all of the terms and conditions upon which NBN Co must comply with applicable Category B Standard Access Obligations, subject to the hierarchy of terms and conditions for compliance with these obligations that is discussed in section 3.2.3 of this consultation paper.
- Secondly, Access Determinations and Binding Rules of Conduct that are made by the ACCC would have no effect to the extent of inconsistency with the undertaking.¹⁰³
- Finally, NBN Co would be required to comply with all commitments set out in the undertaking, subject to the hierarchy of terms and conditions for compliance with these obligations that is discussed in section 3.2.3 of this consultation paper. Compliance with Standard Access Obligations in accordance with these commitments is a carrier licence condition and service provider rule.¹⁰⁴ Failure to comply is subject to penalties specified in the *Telecommunications Act 1997*.

Part XIC also provides for the ACCC, and other parties whose interests are affected by a Special Access Undertaking that is in operation, to enforce the undertaking in the Federal Court.¹⁰⁵ If the Federal Court is satisfied that the person who gave the Special Access Undertaking has breached the undertaking, it may make any or all of the following orders:

- an order directing the person who gave the undertaking to comply with the undertaking;¹⁰⁶

¹⁰¹ *Competition and Consumer Act 2010*, s. 152CBD(5C)(a).

¹⁰² *Competition and Consumer Act 2010*, s. 152CBAA(5)(h).

¹⁰³ *Competition and Consumer Act 2010*, ss. 152CBIA and 152CBIB.

¹⁰⁴ *Competition and Consumer Act 2010*, ss. 152AZ and 152BA.

¹⁰⁵ *Competition and Consumer Act 2010*, s. 152CD(2).

¹⁰⁶ *Competition and Consumer Act 2010*, s. 152CD(3)(a).

- an order directing the person who gave the undertaking to compensate any other person who has suffered loss or damage as a result of the breach;¹⁰⁷ and
- any other order that the Court thinks appropriate.¹⁰⁸

3.3.4 Variation and withdrawal of a Special Access Undertaking

Part XIC provides for a person that has given a Special Access Undertaking to vary or withdraw the undertaking while it is in operation.

If a person gives a variation of a Special Access Undertaking to the ACCC,¹⁰⁹ the ACCC must decide whether to accept or reject the variation.¹¹⁰ In assessing a variation, the ACCC must apply the criteria that apply to the assessment of an undertaking,¹¹¹ which are set out in section 3.3.2 of this consultation paper.

A person may also withdraw a Special Access Undertaking given by the person while the undertaking is in operation by giving written notice to the ACCC.¹¹² If the service to which the undertaking relates is not a declared service (other than by virtue of acceptance of the undertaking by the ACCC), the person must also inform the ACCC in writing, at least 12 months before giving the notice to the ACCC, that the person proposes to withdraw the undertaking.¹¹³

There is no provision under Part XIC for the ACCC to otherwise vary or set aside the terms of a Special Access Undertaking once it has been accepted by the ACCC.

3.4 Overview of Standard Forms of Access Agreement

Part XIC provides for an NBN Corporation to formulate and publish open offers to provide access to its services.¹¹⁴ The terms and conditions that comprise these offers are known as Standard Forms of Access Agreement.

If a Standard Form of Access Agreement is available on NBN Co's website, at the request of an access seeker NBN Co is obliged to enter into an Access Agreement with an access seeker on the terms and conditions contained in the Standard Form of Access Agreement.¹¹⁵ Publication of a Standard Form of Access Agreement by NBN Co on its website also has the effect of declaring its services.¹¹⁶ A Standard Form of Access Agreement therefore provides one means by which an access seeker may obtain access, and once executed, for NBN Co to comply with applicable Category B Standard Access Obligations.

¹⁰⁷ *Competition and Consumer Act 2010*, s. 152CD(3)(b).

¹⁰⁸ *Competition and Consumer Act 2010*, s. 152CD(3)(c).

¹⁰⁹ *Competition and Consumer Act 2010*, s. 152CBG(2).

¹¹⁰ *Competition and Consumer Act 2010*, s. 152CBG(3).

¹¹¹ *Competition and Consumer Act 2010*, s. 152CBG(4).

¹¹² *Competition and Consumer Act 2010*, s. 152CBI(2).

¹¹³ *Competition and Consumer Act 2010*, s. 152CBI(2)(b).

¹¹⁴ *Competition and Consumer Act 2010*, s. 152CJA(2).

¹¹⁵ *Competition and Consumer Act 2010*, s. 152CJA(2).

¹¹⁶ *Competition and Consumer Act 2010*, s. 152AL(8D).

At the time of publication of this consultation paper, NBN Co has formulated and published four Standard Forms of Access Agreement:

- the First Release Sites Trial Agreement;
- the First Release Satellite Service (Trial) Agreement;
- the Interim Satellite Service Agreement (First Release); and
- the Wholesale Broadband Agreement (WBA).

Each of these Standard Forms of Access Agreement are available on NBN Co's website at the time of publication of this consultation paper.

Entry into an Access Agreement based on a Standard Form of Access Agreement is a commercial decision for persons who may wish to provide services utilising the NBN Co Network. Part XIC does not provide a role for the ACCC in relation to the formulation of a Standard Form of Access Agreement, and the ACCC is not assessing the terms and conditions contained in any Standard Form of Access Agreement as part of its assessment of the SAU given by NBN Co, except to the extent they form part of, or are incorporated into, NBN Co's SAU.

The ACCC notes that a person who has signed an Access Agreement based on a Standard Form of Access Agreement may, until such Access Agreements conclude, not be able to obtain access to the NBN Co Network in accordance with terms and conditions which may be specified by the ACCC in any Binding Rules of Conduct or Access Determinations applying to NBN Co, to the extent that any terms and conditions in these documents are inconsistent with the Access Agreement.¹¹⁷

The ACCC published an open letter on its website on 11 November 2011 in relation to concerns expressed by a number of access seekers about opportunities to seek recourse to the ACCC in respect of terms and conditions of access to the NBN Co network.¹¹⁸ In this letter, the ACCC expressed the view that the commitment made by NBN Co to reduce the term of the WBA to 12 months had mitigated the ACCC's immediate concerns in this respect, and allowed NBN Co and industry to focus on the formal assessment of NBN Co's SAU. The ACCC also stated that it is committed to ensuring that there is an effective regulatory framework in place as soon as is practicable and ideally prior to the expiry of the 12 month term of the WBA.

3.5 Relationship between Special Access Undertakings and ACCC powers under Part XIC

The ACCC notes that the SAU lodged by NBN Co does not set out comprehensive regulated terms and conditions for access to NBN Co's services.

¹¹⁷ *Competition and Consumer Act 2010*, ss. 152BDB and 152BCC.

¹¹⁸ ACCC, *Letter to access seekers*, 11 November 2011, available at: <http://www.accc.gov.au/content/index.phtml?itemId=1016880>.

However, the ACCC also notes that it has the ability to specify additional regulated terms and conditions in regulatory documents such as Binding Rules of Conduct or Access Determinations, subject to the hierarchy established under Part XIC that is discussed in section 3.2.3.

Additional regulated terms and conditions specified by the ACCC may address a broad range of matters, particularly where the SAU does not address a matter. For example, when making an Access Determination, the ACCC may address any matters relating to access to a declared service.¹¹⁹ Some examples of matters that may be addressed by the ACCC in an Access Determination are set out in section 152BC(3) of the CCA. The ACCC may also specify fixed principles provisions that must be included in subsequent Access Determinations.¹²⁰

If the ACCC does specify additional regulated terms and conditions, it is generally required to have regard to similar considerations when making Access Determinations and Binding Rules of Conduct to those that apply when making a decision to accept or to reject the SAU.¹²¹

¹¹⁹ *Competition and Consumer Act 2010*, s. 152BC(1).

¹²⁰ *Competition and Consumer Act 2010*, ss. 152BCD(1).

¹²¹ For example, the ACCC must consider the promotion of the long-term interests of end-users under section 152BCA(1)(a) of the *Competition and Consumer Act 2010* when making Access Determinations, and under section 152BDAA(1)(a) when making Binding Rules of Conduct (unless it is not reasonably practicable to do so, having regard to the urgent need to make the Binding Rules of Conduct).

4 Overview of the Special Access Undertaking and issues for comment

The SAU is designed with general commitments that are made by NBN Co set out in initial clauses, and with the implementation of these commitments through more specific undertakings being contained in 12 Schedules attached to the SAU.

As discussed in section 3.3.3 of this consultation paper, 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.¹²²

A brief overview of the terms and conditions specified in the SAU is provided below.

The ACCC seeks submissions from interested parties that address the following general questions about the SAU.

Issues for comment

Please provide views on the conduct, terms and conditions included in the SAU. In your response, please have regard to the statutory criteria outlined in section 152CBD of the CCA and summarised in section 3.3.2 of this consultation paper.

Is Schedule 1 incorporated into the SAU with sufficient clarity and certainty?

Do the definitions adopted in Schedule 1 provide for effective operation of other commitments included in the SAU?

Are the definitions in Schedule 1 reasonable and consistent with current industry practice?

4.1 Preliminaries

The initial clauses of the SAU:

- concern mandatory features of a Special Access Undertaking; and
- set out a range of commitments, including by reference to the Schedules to the SAU.

These clauses are discussed in turn, below.

¹²² *Competition and Consumer Act 2010*, s. 152BB(1).

4.1.1 Background

The Background section of the SAU sets out a number of recitals by NBN Co. In particular, clause H states that the SAU contains price-related terms and conditions that are reasonably necessary to achieve uniform national wholesale pricing.

4.1.2 Compliance

Clause 1 of the preliminaries to the SAU sets out specific commitments about the application of Part XIC:

- Clause 1.1 refers to the application of Category B Standard Access Obligations to the NBN Access Service.
- Clause 1.2 discusses how NBN Co will comply with any applicable Category B Standard Access Obligations.

For more information about Category B Standard Access Obligations and mandatory elements of a Special Access Undertaking, please refer to sections 3.2.2 and 3.3.1 respectively of this consultation paper.

4.1.3 NBN Access Service and Product Components

Clause 2 of the preliminaries to the SAU concerns the service that is the subject of the undertaking:

- Clause 2.1 states that the SAU is given in relation to the NBN Access Service, which is defined in Schedule 2 (NBN Access Service).
- Clause 2.2 sets out how NBN Co proposes to supply the NBN Access Service.
- Clause 2.3 describes the supply of product components in accordance with Schedule 3 (Product Components) as the means by which NBN Co will supply the NBN Access Service.
- Clause 2.4 refers to ancillary services which will be supplied subject to the terms of the SAU, and the relationship of these services to the NBN Access Service.
- Clause 2.5 relates to the introduction, variation and withdrawal of product components and product features in accordance with Schedule 6 (Product Development and Withdrawal).
- Clause 2.6 refers to the WBA, and outlines commitments about the terms that will be contained in Standard Forms of Access Agreement.
- Clause 2.7 states that NBN Co will provide each customer with the option to align the terms of its Access Agreement with the terms of the SAU, subject to NBN Co's non-discrimination obligations. The process for aligning the terms of an existing

Access Agreement with the terms of the SAU is described in clause F3 of the WBA.

The Schedules to the SAU referred to above are discussed in more detail in other sections of this consultation paper:

- Schedule 2 (NBN Access Service) is discussed in section 4.2.1.
- Schedule 3 (Product Components) is discussed in section 4.2.2.
- Schedule 6 (Product Development and Withdrawal) is discussed in section 4.2.4.

Ancillary services are also discussed in more detail in section 4.2.5 of this consultation paper.

4.1.4 Pricing Requirements

Clause 3 of the preliminaries to the SAU relates to the price of access to the NBN Co network:

- Clause 3.1 sets out a commitment to price access products in accordance with this section of the SAU.
- Clause 3.2 contains a commitment to price certain access products in accordance with Schedule 5 (Price Controls).
- Clause 3.3 sets out the limits on changes in the prices of access products and ancillary services, including limitations that are determined in accordance with Schedule 5 (Price Controls).
- Clause 3.4 sets out how NBN Co will determine initial prices of access products and ancillary services, along with the exclusive limitations that will apply under Schedule 5 (Price Controls) and Schedule 7 (Long Term Revenue Constraint Methodology).

The Schedules to the SAU referred to above are discussed in more detail in other sections of this consultation paper:

- Schedule 5 (Price Controls) is discussed in section 5.5.1.
- Schedule 7 (Long Term Revenue Constraint Methodology) is discussed in section 5.2.5.

4.1.5 Long-term revenue constraint methodology

Clause 4 of the preliminaries to the SAU relates to the methodologies used to determine the overall revenues that NBN Co may earn for providing access to its network:

- Clause 4.1 establishes a commitment to price access products in accordance with an overall revenue limit determined under this section and Schedule 7 (Long Term Revenue Constraint Methodology).
- Clause 4.2 concerns the methodology used to determine overall revenues that will apply from the commencement of the SAU.
- Clause 4.3 concerns the transition of this methodology to the methodology that will apply later in the operation of the SAU.
- Clause 4.4 concerns the methodology used to determine overall revenues that will apply later in the operation of the SAU.
- Clause 4.5 concerns the costs that NBN Co may include in its overall revenues in accordance with the rules specified in Schedule 8 (Prudency).

The Schedules to the SAU referred to above are discussed in more detail in other sections of this consultation paper:

- Schedule 7 (Long Term Revenue Constraint Methodology) is discussed in section 4.4.1.1.
- Schedule 8 (Prudency) is discussed in section 5.5.4.

4.1.6 Non-price terms and conditions

Clause 5 of the preliminaries to the SAU relates to other non-price matters covered by the SAU:

- Clause 5.1 sets out a list of non-price related matters and a commitment by NBN Co to comply with Schedule 11 (Non-price terms and conditions) in relation to these matters.
- Clause 5.2 requires NBN Co to comply with the rules established by Schedule 12 (Dispute Management Rules) that NBN Co has proposed for the resolution of disputes under an Access Agreement.
- Clause 5.3 provides for NBN Co to undertake annual reporting on specific aspects of the SAU to the ACCC in accordance with Schedule 10 (Reporting).

The specific commitments referred to above in relation to the non-price terms and conditions set out in clause 5.1(a) to (n) of the SAU are discussed in section 5.4 of this consultation paper.

The Schedules to the SAU referred to above are discussed in more detail in other sections of this consultation paper:

- Schedule 12 (Dispute Management Rules) is discussed in section 5.4.1.

- Schedule 10 (Reporting) is discussed in section 5.6.

4.1.7 Regulatory recourse

Clause 6 of the preliminaries to the SAU sets out a mechanism for NBN Co and Access Seekers to seek resolution of specific disputes about terms and conditions of access by the ACCC:

- Clause 6.1 confers powers on the ACCC to resolve disputes about certain terms and conditions that arise between NBN Co and Access Seekers prior to execution of an Access Agreement, and sets out a dispute notification and resolution procedure, including strict timeframes to be followed by the ACCC and the parties to the dispute.
- Clause 6.2 sets out criteria that the ACCC must apply when making a decision to resolve a dispute, as well as certain restrictions upon decisions of the ACCC.
- Clause 6.3 requires NBN Co to publish regulatory recourse decisions made by the ACCC on the NBN Co website. NBN Co must also include terms and conditions determined by the ACCC under a regulatory recourse decision in its WBA and provide an opportunity for existing Access Seekers to elect to adopt the terms and conditions in certain circumstances.

The ACCC notes that this conferral of power under the SAU supplements the existing ACCC powers to make Binding Rules of Conduct and to make Access Determinations that are discussed in section 3.2.3 of this consultation paper.

4.1.8 Term, variation, withdrawal and extension of the SAU

Clause 7 of the preliminaries to the SAU relates to when the SAU operates, and how it may change or cease to operate:

- Clause 7.1 provides for the SAU to commence when accepted by the ACCC.
- Clause 7.2 provides for the SAU to expire on 30 June 2040.
- Clause 7.3 states that NBN Co may request the ACCC to vary the SAU at any time, and outlines the reviews that NBN Co must undertake in accordance with Schedule 9 (Review and variation of aspects of SAU).
- Clause 7.4 concerns how NBN Co may withdraw the SAU during its operation.
- Clause 7.5 provides for NBN Co to request ACCC approval for an extension of the term of the SAU, and sets out the criteria to be applied by the ACCC when considering such a request.

Schedule 9 (Review and variation of aspects of SAU) of the SAU is discussed in more detail in section 5.7 of this consultation paper.

4.1.9 Interpretation

Schedule 1 (Dictionary and Interpretation) of the SAU sets out a range of definitions and rules that are designed to be used for interpretation of the undertaking.

4.2 Service description and products

The scope of NBN Co's commitments in the SAU is limited to the service described in the SAU as the subject of the undertaking. It is therefore important that the service description is accurate and complete. Related to this, it is important that the intended distinction between a service's description, versus the terms and conditions on which that service is supplied, is clear.

4.2.1 NBN Access Service

The service description in Schedule 2 (NBN Access Service) of the SAU describes the 'NBN Access Service', which is specified as a Layer 2 service supplied on the NBN Co network for the purpose of enabling an access seeker or downstream service provider to supply carriage services or content services.¹²³ The service is provided on the part of the NBN Co network between the end-user premises and the relevant point of interconnect (POI). It is made up of 'Product Components', which are discussed in section 4.2.2 of this consultation paper.

Schedule 1 (Dictionary and Interpretation) of the SAU states that Layer 2 refers to the 'data link' layer of the open system interconnection (OSI) model for computer communications. The SAU specifies that the NBN Access Service will also include some components from Layers 1 ('physical') and 3 ('Internet Protocol') in the OSI model.¹²⁴ Clause 1.2 of Schedule 3 (Product Components) states that limited Layer 3 awareness may be incorporated to support services such as voice telephony, multicast, and priority encoding.

The description of the NBN Access Service means that NBN Co supplied 'ancillary services', which are discussed in section 4.2.5 of this consultation paper, are excluded from its scope. Similarly, the scope of the NBN Access Service does not include, and NBN Co does not supply:

- end-user equipment;
- backhaul services from NBN Co POIs to retail service provider POIs; and
- content or applications.

¹²³ 'Carriage service' and 'content service' are defined in the Schedule 1 (Dictionary and Interpretation) of the SAU to have the meanings given by section 7 of the *Telecommunications Act 1997*.

¹²⁴ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 2 (NBN Access Service), clause 2.

4.2.2 Product components

The NBN Access Service is delivered by means of several components (known as ‘Product Components’). These are defined as:

- the product components described in clause 1.1 of Schedule 3 (Product Components) (and outlined in section 4.2.2.1 of this consultation paper);
- 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 (outlined in section 4.2.2.2 of this consultation paper);
- the product components identified within the ‘Initial Product Roadmap’, which is defined in Schedule 1 (Dictionary and Interpretation) (outlined in section 4.2.2.3 of this consultation paper); and
- any new and varied product components introduced by NBN Co pursuant to Schedule 6 (Product Development and Withdrawal) (outlined in section 4.2.2.4 of this consultation paper).

4.2.2.1 Product Components in clause 1.1 of Schedule 3 of the SAU

Clause 1.1 of Schedule 3 of the SAU lists four basic product components:

- a **User Network Interface (UNI)**:¹²⁵ the (physical interface) where the end-user’s equipment connects to NBN Co’s network, either a data port or a voice port. There will be a UNI at every end-user’s premises.
- an **Access Virtual Circuit (AVC)**:¹²⁶ an Ethernet-based Layer 2 virtual connection that carries traffic to and from an end-user on the fibre, wireless, or satellite network. It can be configured at various capacities. While end-users on the fibre network can associate their AVC with either data or voice ports, end-users on wireless or satellite networks are limited to data ports only. An access seeker will need at least one AVC for each end-user to whom it supplies services.
- a **Connectivity Virtual Circuit (CVC)**:¹²⁷ Ethernet-based Layer 2 virtual capacity for the transport of customer traffic from multiple end-users within a ‘Connectivity Serving Area’ to the access seeker’s network. The CVC will come in a range of capacities. An access seeker will need a separate CVC for each Connectivity Serving Area in which it serves customers, and at least one CVC for each POI at which it interconnects. A ‘Connectivity Serving Area’ is defined as the geographical region addressable using a single CVC.

¹²⁵ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 3 (Product Components), clause 2.

¹²⁶ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 3 (Product Components), clause 3.

¹²⁷ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 3 (Product Components), clause 4.

- a **Network-Network Interface (NNI)**:¹²⁸ the physical interface between NBN Co's network and the access seeker's network at a POI.

Schedule 1 (Dictionary and Interpretation) provides that some of these components will have features that are configurable, for example, data rate for the AVC, capacity of the CVC or traffic class. These configurable features are known as 'Product Features'.

4.2.2.2 Product components available at the SAU commencement date

Schedule 1 (Dictionary and Interpretation) of the SAU incorporates into the definition of 'Product Components' any product components that are being offered by NBN Co at the date on which the SAU comes into operation. This is defined by clause 7.1 of the preliminaries to the SAU to be the day on which NBN Co receives written notice of the acceptance of the SAU from the ACCC.

Clause 1.3 of Schedule 3 further states that the Product Components to be supplied by NBN Co on and from the commencement of the SAU are not limited to those described in clause 1.1 of Schedule 3 (that is, the four basic product components listed above).

4.2.2.3 Product components identified within the Initial Product Roadmap

This part of the definition of product components incorporates any product components mentioned within the definition of 'Initial Product Roadmap' in Schedule 1 (Dictionary and Interpretation).

The relevant definition lists the product releases that NBN Co plans to launch between 2011 and 2015. These fall into three categories corresponding to NBN Co's fibre, wireless and satellite networks:

- fibre – broadband & telephony, multicast, business services, service enhancements, enterprise Ethernet service;
- wireless – broadband, business enhancements and multicast; and
- satellite – broadband, multicast and enhancements.

'Enhancements' are not defined.

4.2.2.4 New or varied product components

Clause 1.3 of Schedule 3 (Product Components) of the SAU states that NBN Co may introduce new product components through the product development process. The product development process is outlined in section 4.2.4 of this consultation paper. The new or varied product components will be covered by the definition of 'Product Component'.

¹²⁸ NBN Co, *Special Access Undertaking*, 5 December 2011, Schedule 3 (Product Components), clause 5.

4.2.2.5 General terms in relation to Product Components

Schedule 3 of the SAU also specifies various terms in relation to the supply of the Product Components:

- Components will only be made available where service coverage has been made available under the roll out of the NBN. This requires the end-user's premises to be serviceable (as determined by NBN Co), that the access seeker's network be connected to the relevant POI, for testing to be complete and the access seeker to have fulfilled any other requirements in any Access Agreement.
- NBN Co will not supply an AVC if there is no UNI available for use by the access seeker. Similarly, NBN Co will not allow more than one access seeker to supply services to an end-user where there is only one UNI located at the end-user's premises. Where there are multiple UNIs, the end-user can obtain services from more than one access seeker.
- NBN Co reserves the right not to supply an AVC to an end-user where the supply of the AVC would exceed the relevant maximum data transfer rate for the NBN Co network termination unit at the end-user's premises.
- NBN Co can include conditions in its WBA in relation to the exercise of an option to use the UNI and associated AVC voice capacity to avoid inefficient allocation of those resources.
- NBN Co will specify the POI for each geographical area and publish a list of their locations. NBN Co may specify temporary POIs.

4.2.3 Process for setting service levels

Clause 14.2 of Schedule 11 (Non-price terms and conditions) of the SAU sets out a process for setting service levels.

The SAU 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 further service levels.

In clause 14.2(a), 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.

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.¹²⁹

¹²⁹ Clause 14.2(b) refers to clause 3.7 of Schedule 6 (Product Development and Withdrawal) of the SAU.

4.2.4 Product development and withdrawal

Schedule 6 (Product development and withdrawal) of the SAU sets out the processes by which NBN Co will introduce into supply, vary and withdraw from supply product components and product features.

Clause 1(b) of Schedule 6 of the SAU sets out categories of product components and features that will not be subject to the product development and withdrawal processes in the SAU.

Clause 3 of Schedule 6 states that 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 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.

Annexure 1 to Schedule 6 establishes the Product Development Forum Processes, which set out the rules and processes that govern how NBN Co will engage with customers through the Product Development Forum. The Product Development Forum Processes set out, amongst other things:

- the process for customers to submit a product idea to NBN Co;
- confidentiality and intellectual property rights terms and conditions;
- criteria to which NBN Co may have regard when determining whether to develop a product idea submitted by a customer; and
- tools (including workshops and inviting formal submissions) that NBN Co may use to consult with customers on the development of its own or customers' product ideas.

The SAU states that NBN Co will consult with customers in accordance with the Product Development Forum Processes, including on prices and service levels, before offering any new product or implementing a product variation.

Clause 3.2 of Schedule 6 states that NBN Co will not vary the Product Development Forum Processes, except in accordance with the review and variation processes set out in Schedule 9 (Review and variation of aspects of SAU) of the SAU (discussed in section 4.6 of this consultation paper). In summary, under clause 2 of Schedule 9 (Review and variation of aspects of SAU), NBN Co will submit certain information to the ACCC every five years during the SAU period about its Product Development Forum Processes. As part of this submission, NBN Co may propose a variation to its Product Development Forum Processes. The ACCC may either approve a variation proposal or require a variation different to that proposed by NBN Co. If NBN Co does not propose a variation, the ACCC can determine that the processes require no variation.

Schedule 6 of the SAU also states that NBN Co will:

- establish a Public Ideas Forum to allow all interested parties to contribute to discussions on product development and industry trends; and
- at the beginning of each financial year, publish a product roadmap on its website, setting out the product components and product features offered by NBN Co at that time and the product components and product features that it intends to offer over the following three years.

Clause 4 of Schedule 6 states that NBN Co may carry out minor product variations to product components or product features where NBN Co determines, acting reasonably, that it will have no material adverse impact on customers. NBN Co will comply with the prudency requirements in Schedule 8 (Prudency) and will notify customers of the proposed change through the Product Development Forum and the product roadmap. The withdrawal of the supply of a product component or a product feature will not be treated as a minor product variation.

Clause 5 of Schedule 6 states 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 component or product feature. Clause 5.3(b) sets out the criteria to which NBN Co will have regard when considering whether to withdraw a product component or product feature.

Clause 5.3(a) states that NBN Co will provide its customers with no less than 12 months notice before withdrawing a product component or product feature.

Clause 5.2 of Schedule 6 specifies that NBN Co will not withdraw a product component or product feature, in conjunction with introducing a similar product component or product feature, for the purposes of avoiding the price controls set out in Schedule 5 (Price Controls) of the SAU.

Clause 5.1(b) states that NBN Co will not withdraw the product features that comprise the basic access offer (outlined in section 4.4.1.1 of this consultation paper) within the first five years of the SAU term.¹³⁰

4.2.5 Ancillary services

Clause 2.4(b) of the preliminaries to the SAU states that ancillary services do not form part of the NBN Access Service. However, clause 2.4(a) states that NBN Co will offer to supply the ancillary services to customers.

The SAU includes a definition of ancillary services in Schedule 1 (Dictionary and Interpretation), which specifically includes services known as the Facilities Access Service and the Systems Interfacing Service. The Facilities Access Service and the Systems Interfacing Service are also defined in Schedule 1 (Dictionary and Interpretation).

¹³⁰ NBN Co's basic access offer is defined in section 4.4.1.1 of this consultation paper.

The SAU also provides for other conduct, terms and conditions specified in the SAU about price controls, revenue limits, reporting obligations, and non-price terms and conditions to apply to ancillary services.

4.3 Non-price terms and conditions

Schedules 11 (Non-price terms and conditions) and 12 (Dispute Management Rules) of the SAU contain the commitments that NBN Co is making with respect to non-price terms and conditions. These commitments cover the following matters, which are outlined in more detail in the following sections of this paper:

- Dispute management;
- Default management;
- Contract change management and development;
- Points of interconnect;
- Rollout information and reporting;
- Major NBN Upgrades;
- Access to NBN Co Platform;
- Billing, payment and credit management;
- Risk management and liability; and
- Confidential information; and
- Access to Common Property.

4.3.1 Dispute management

Schedule 12 (Dispute Management Rules) of the SAU sets out a dispute resolution process based on independent arbitration to settle disputes between NBN Co and its customers under Access Agreements. Clause 2.1(e) proposes that these disputes will be adjudicated by an arbitration panel.

Arbitration panel members will be appointed from a pool of arbitrators by a resolution advisor under clause 2.2(a). Under clause 2.1(b), NBN Co states it will ensure that the WBA contains a process for the appointment of resolution advisors and to resolve disagreements between NBN Co and its customers regarding these appointments. According to clause 2.1(c), resolution advisors and panel members are appointed for a maximum of two years and may be reappointed.

Clause 2.1(b) states that the panel first decides whether a dispute is a bilateral or industry-relevant dispute. For bilateral disputes, clause 2.1(e) allows the parties to choose to have the dispute resolved through panel arbitration, expert determination or mediation whereas industry-relevant disputes are resolved by arbitration only. Where a dispute has been found to be an industry-relevant dispute, clause 2.1(d) permits the arbitration panel to allow other customers to join the dispute where these customers have a sufficient interest in the subject matter and are likely to be materially affected. If other customers do not join the industry-relevant dispute, the dispute is reclassified under clause 2.1(e) as a bilateral dispute.

For disputes that proceed to arbitration, clause 2.2(b) states that NBN Co will ensure that arbitration disputes are conducted in accordance with the *Commercial Arbitration Act 2010* (NSW), except to the extent that its non-mandatory provisions are excluded or varied. The SAU does not explain by what method these non-mandatory provisions are to be excluded or varied. Under clause 2.2(c), awards made by the panel will be published on NBN Co's website, excluding any confidential information.

In addition, clause 2 of Schedule 11 (Non-price terms and conditions) provides that NBN Co will include terms in the WBA requiring both NBN Co and its customers to specify points of contact within their respective organisations to facilitate the resolution of issues.

4.3.2 Default management

Clause 12 of Schedule 11 (Non-price terms and conditions) of the SAU specifies how NBN Co will exercise its rights under the WBA in relation to defaults by a customer.

The clause provides that before NBN Co applies any contractual remedies available for customer default under the WBA, it will notify the customer. It also provides that NBN Co will cease to apply those remedies as soon as reasonably practicable.

4.3.3 Contract change management and development

Clauses 1 and 14 of Schedule 11 (Non-price terms and conditions) of the SAU set out NBN Co's commitments in relation to the management of the WBA, service levels and Access Agreements. The provisions relating to service levels are discussed in section 4.2.3 of this consultation paper.

4.3.3.1 Wholesale Broadband Agreement

Clause 14.1 of Schedule 11 (Non-price terms and conditions) of the SAU specifies that the WBA will set out:

- all price and non-price terms that apply in connection to NBN Co's services; and
- processes for providing NBN Co's customers with operational and technical information in relation to those services.

Clauses 1 and 14.1(b) of Schedule 11 also provide that NBN Co will undertake consultation with the ACCC, access seekers and NBN Co's customers in relation to the future development of the WBA.

4.3.3.2 Access Agreements

Clause 14.3 of Schedule 11 (Non-price terms and conditions) of the SAU sets out how NBN Co may make changes to Access Agreements. Under this clause, NBN Co may change Access Agreements in accordance with the terms of the Access Agreements. This is in addition to NBN Co's rights under:

- the product development and withdrawal processes in Schedule 6 (Product development and withdrawal) of the SAU; and
- the provisions of the SAU that permit NBN Co to set and vary prices.

Clause 14.3(b) states that NBN Co will give prior written notice of the proposed change to the relevant customer and the ACCC.

If there is no process specified in the Access Agreement for making the particular change, NBN Co will follow the process in clause 14.3(d). This involves notification in writing to the customer and consultation with the customer. If NBN Co subsequently decides to proceed with the change, it will notify the customer in writing of the date on which the change will take effect. This date must be at least 60 business days after the date of the notice.

According to clause 14.3(d), access seekers are able to seek ACCC intervention about a proposed change. This clause specifies that if the ACCC makes an Interim Access Determination or Binding Rule of Conduct relating to the proposed change before the change takes effect, NBN Co commits to implement the change in a manner consistent with the instrument made by the ACCC.

4.3.4 Points of interconnect

Clause 6.7 of Schedule 3 (Product Components) of the SAU sets out the basis on which NBN Co will specify the locations of POIs.

Clause 6.7(c) states that the initial POI locations are set out in the ACCC's list in force as determined by section 151DB of the CCA.

In December 2010, the ACCC released its 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. The development of this advice was performed in conjunction with NBN Co and included a public consultation. Following the release of this advice, NBN Co developed a list of 120 initial POIs based on criteria developed in the ACCC's advice to government and a set of network planning rules based on these criteria. The ACCC subsequently commenced a public confirmation process in respect of the 120 POI locations proposed by NBN Co.

As an outcome of these processes, a list of 121 proposed initial POIs can be found on the ACCC's website. This list is not a 'list in force' of POIs for the purposes of section 151DB of the CCA. While the ACCC and NBN Co have agreed the general locations of these 121 POIs, NBN Co is still in the process of:

- for those POI locations where NBN Co will use Telstra's facilities – determining, in consultation with Telstra, whether these locations meet network design criteria to be suitable for use as a POI (in terms of available space, and supplies of water and power); and
- where NBN Co will build its own facilities – determining the availability of suitable sites.

NBN Co is in the process of confirming these locations with the ACCC. Once final confirmation of the sites to be used as POIs has occurred, the locations will be specified by the publication (on the ACCC website) as the ACCC's 'list in force' for the purposes of section 151DB.

Clause 6 of Schedule 11 (Non-price terms and conditions) sets out the basis on which NBN Co will review the locations of POIs over the term of the SAU. NBN Co is required to commence a review of the locations of POIs every five years during the term of the SAU, and may also conduct a review at any other time provided that it has not commenced a review within 12 months of the completion of any other POI review. Prior to a review, NBN Co must develop the criteria that it will apply in conducting a review and it must consult with the ACCC and access seekers in relation to these criteria. NBN Co must also publish on its website a consultation paper outlining the criteria to be applied and the locations and proposed timing for the opening, relocating or closing of any POI, and invite submissions to the paper.

Subject to the completion of a POI review, NBN Co is able to open, close or relocate a POI with the ACCC's prior approval. The ACCC must make a decision within 60 business days of an NBN Co request and may consult with any person (including access seekers) in making its decision.

According to clause 6.7(d) of Schedule 3 (Product Components), NBN Co may also specify temporary POIs that are not set out in the ACCC's list in force. In general, the clauses relating to the review of POI locations do not apply in respect of temporary POIs.

4.3.5 Rollout information and reporting

Under clause 3 of Schedule 11 (Non-price terms and conditions) of the SAU, NBN Co has made certain commitments to enable access seekers, customers and end-users to monitor the rollout of the network.

NBN Co has made the following commitments to enable the monitoring of the rollout:

- Construction rollout plans: under clause 3.1, by 31 March each year, NBN Co will publish a plan which identifies the geographic areas where the NBN will be rolled

out over the next three-year period; when this construction will commence; and the number of premises in those areas. Clause 3.2 commits NBN Co to publish a similar one-year construction rollout plan on a quarterly basis.

- Monthly ready for service rollout plan: under clause 3.3, on a monthly basis, NBN Co will publish a plan which identifies the geographic areas where NBN Co has entered the design and construction phase; when the NBN will be ready for service in that area; the number of premises in that area; and a list of the premises in that area expected to be ready for service within the next six month period.
- Historical Footprint List: under clause 3.4 NBN Co will publish a list that sets out the premises within geographic areas covered by the NBN Co fibre and wireless networks that are live on a weekly basis.

The SAU provides that once the NBN is declared to be built and fully operational by the Minister, the above commitments will cease to operate.

Clause 4 of Schedule 11 provides that NBN Co will publish a 'Points of Interconnect Plan' which contains updates to the status of the established POIs. This plan will be published on a quarterly basis until the completion of the initial POIs, and on an annual basis after the completion of the initial POIs. Clause 4(b) specifies a range of information that the Points of Interconnect Plan will include.

4.3.6 Major NBN Upgrades

Clause 5 of Schedule 11 (Non-price terms and conditions) sets out a number of commitments made by NBN Co about how it will undertake certain upgrades to the NBN Co Network, which NBN Co defines as 'Major NBN Upgrades'.

Major NBN Upgrades are defined in this clause as those upgrades that are listed in the 'NBN Program of Works' which, as a consequence of the upgrade:

- require customers to take particular actions to continue to use an access service;
- result in an access service no longer being supplied; or
- require material capital expenditure by customers.

However, Major NBN Upgrades do not include upgrades that constitute an 'Emergency NBN upgrade'.

Clauses 5(b) to 5(d) of Schedule 11 set out the specific commitments that NBN Co makes in relation to Major NBN Upgrades:

- Firstly, NBN Co commits to provide at least 6 months notice of a Major NBN Upgrade to all customers.
- Secondly, NBN Co commits to provide copies of an implementation plan for the upgrade, known as a 'Major Upgrade Plan', to certain customers.

- Finally, NBN Co commits to consult with, and reasonably consider feedback from, those customers who have been provided with a Major Upgrade Plan.

4.3.7 Access to NBN Co Platform

Clause 7 of Schedule 11 (Non-price terms and conditions) concerns access by customers to the NBN Co Platform:

- Clause 7.1 states that NBN Co will establish the NBN Co Platform and that the WBA will set out the basis on which customers may access this platform.
- Clause 7.2 states that NBN Co will design the NBN Co Platform to enable customers to perform certain business transactions, including the submission of orders for product components, assurance transactions and billing transactions.
- Clause 7.3 describes the information that NBN Co will make available to its customers in relation to the NBN Co Platform. This information, known as NBN Co Platform information, includes information about the NBN Co Platform itself, and the terms on which customers may connect to and interface with this platform.

4.3.8 Billing, payment and credit management

Clauses 8 and 9 of Schedule 11 (Non-price terms and conditions) of the SAU deal with billing and payment and credit management matters.

In clause 8.1, NBN Co commits to include billing dispute processes in the WBA. Clause 8.2 states that NBN Co will ensure that the WBA gives customers the right to withhold payment of disputed amounts if the customer reasonably raises a billing dispute prior to the date on which payment is due, subject to detailed terms in the WBA addressing such disputes and withholdings. Clause 8.3 then states that NBN Co will ensure that the WBA requires NBN Co to pay interest to customers if it is determined through the billing dispute processes that the customer has overpaid NBN Co.

Clause 9 provides that NBN Co's credit policy will be developed, published and maintained as part of the WBA, and that NBN Co will comply with the credit policy. According to clause 9, NBN Co will ensure that the credit policy sets out information about:

- NBN Co's requirements for reviewing and assessing the ongoing creditworthiness of customers;
- the points in time or the circumstances when NBN Co may review and assess the creditworthiness of a customer;
- 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; and

- the circumstances in which NBN Co may enforce a financial security provided by a customer.

4.3.9 Risk management and liability

Clause 13 of Schedule 11 (Non-price terms and conditions) of the SAU outlines the liabilities and indemnities of NBN Co and each customer to each other.

Clause 13 first sets out the types of liability, that is, the legal responsibilities, duties and obligations of each party. Clause 13(a) states that neither NBN Co nor a customer will be liable to make payments to the other party for any and all 'indirect losses' arising from or in connection with the WBA, except as expressly provided by the WBA. Further, clause 13(b) provides that NBN Co will ensure that both NBN Co and each customer's liability to the other party for all losses under, arising from, or in connection with the WBA is not limited in respect of:

- negligent or wilful acts or omissions that cause death or personal injury; or
- negligent or wilful acts or omissions that cause damage to tangible property.

Clause 13 then describes the circumstances where one party will indemnify or compensate the other party for the liability arising from the first party's actions. Clause 13(c) states that NBN Co will ensure that the WBA requires both NBN Co and a customer to indemnify the other party on demand if certain circumstances arise. Subject to the terms of the WBA, the indemnifying party will pay the indemnified party an amount equal to all losses suffered and incurred by the indemnified party where the losses arise from or are in connection with:

- any breach by the indemnifying party of the confidentiality provisions of the WBA;
- any claims by a third party alleging an infringement of the intellectual property rights of that third party; or
- any death or personal injury of any person in connection with the WBA.

4.3.10 Confidential information

Clause 11 of Schedule 11 (Non-price terms and conditions) of the SAU broadly outlines the circumstances in which customer confidential information may be disclosed and used by NBN Co.

Clause 11.1 provides that confidential information will only be disclosed to a third party if required by law or permitted under the SAU or the WBA. Clause 11.2 states that NBN Co will only use confidential information for the purpose of exercising NBN Co's rights and performing its obligations under the SAU or a WBA, or for purposes that are otherwise contemplated by the SAU, WBA or any other agreement between NBN Co and the customer.

Clause 11.3 then sets out certain information that is deemed to be confidential. This is information in connection with a customer or any third party receiving downstream services from that customer, whether generated by NBN systems or otherwise obtained from that customer. Aggregated information that does not identify that customer or third party is excluded from the definition.

4.3.11 Access to Common Property

Clause 10 of Schedule 11 (Non-price terms and conditions) outlines the circumstances where NBN Co will be responsible for procuring access to ‘Common Property’, which is defined in Schedule 1 (Dictionary and Interpretation).

Under clause 10, NBN Co commits to take responsibility for procuring access to common property:

- to supply a product component or associated product feature;
- to perform works in relation to the NBN Co network or, where permitted by law, any third party network; and
- to exercise its rights or perform its obligations in respect of procuring access to common property.

4.4 Price-related terms and conditions

The SAU contains NBN Co’s commitments on how it will set prices and how prices will vary over the SAU period. NBN Co is proposing a variation on the standard building block model, which allows it to roll-forward losses in order to recover them in later years, supplemented by caps on the rate of price increases.

Schedule 5 (Price controls) sets out the price control mechanisms that limit NBN Co’s ability to increase prices for its products. Schedule 7 (Long Term Revenue Constraint Methodology) specifies the process that NBN Co will follow to calculate the amount of revenue it will earn over the SAU period through its prices, including its approach to determining weighted average cost of capital (WACC). Schedule 8 (Prudency) contains NBN Co’s commitments relating to the prudency of expenditure.

4.4.1 Price controls

Schedule 5 (Price controls) of 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; and
- the price controls that will apply to each of NBN Co’s product components and product features over the SAU term.

The SAU only includes maximum regulated prices for the price controlled offers as specified in Schedule 5. The SAU does not include initial maximum regulated prices for any other of its product components, product features or ancillary services.¹³¹

4.4.1.1 Price controlled offers

Schedule 4 (Price Controlled Offers) of the SAU defines the ‘price controlled offers’. The price controlled offers are as follows:

- The **basic access offers**, which represent NBN Co’s entry level access products over the fibre, satellite and wireless networks. The SAU specifies the product components and features that apply to this offer over each network.
- The **CVC offer**, which includes any symmetrical Traffic Class 4 CVC offered by NBN Co. Traffic Class 4 is defined by NBN Co as a Traffic Class that is targeted towards best effort applications.
- The **NNI offer**.

Clause 2 of Schedule 5 sets out the maximum regulated price for each of the price controlled offers. Clause 3.2 of 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.

4.4.1.2 CPI/2 price control

Clause 3 of Schedule 5 (Price controls) of 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’. The SAU sets out a process that NBN Co will use to calculate the individual price increase limit for each product component, product feature and ancillary service.

Clause 3.2 of Schedule 5 states that the price controls in Schedule 5 do not apply to:

- the setting of initial prices for new product components, product features or ancillary services;
- the introduction of new charges for product components, product features or ancillary services; or

¹³¹ 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.

- any notional change in price resulting from the removal or reduction of any discount, rebate, allowance or credit applicable to a product component, product feature or ancillary service.

As noted in section 4.2.4 of this consultation paper, initial prices for new product components, product features and ancillary services will be the subject of customer consultation through the Product Development Forum. Further, clause 3.3 of Schedule 5 states that NBN Co will not avoid the operation of the price controls by the arbitrary removal or reduction of any discount, rebate, allowance or credit applicable to a product component, product feature or ancillary service.

Clause 3.4 of Schedule 5 states that if NBN Co offers product components, product features or ancillary services as a bundle for a particular price, then NBN Co will not increase the price of the bundle by more than CPI/2 in any financial year.

Clause 4 of Schedule 5 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. Further, under clause 3.3(b) of Schedule 9 (Review and variation of aspects of SAU), NBN Co may, at its discretion, review the nature of any price control arrangements at the SAU Review Period (described in section 4.6 of this consultation paper). The SAU provides that if NBN Co proposes to vary the price control arrangements after the SAU Review Period, the ACCC will assess NBN Co's proposed variation in accordance with sections 152CB and 152CBH of the CCA.

4.4.2 Long-term revenue constraint

Schedule 7 (Long Term Revenue Constraint Methodology) of the SAU contains the methodology that NBN Co will follow to determine the amount of revenue it will recover over the SAU period through the prices it charges access seekers.

4.4.2.1 Annual revenue requirement

Clause 4 of Schedule 7 (Long Term Revenue Constraint Methodology) of the SAU specifies that NBN Co's annual revenue requirement is based on a building block model and consists of five components: operating expenditure, a return on assets, regulatory depreciation, a net tax allowance and an annual construction in progress allowance. The building block model is a pricing model frequently used in regulated industries and is designed to ensure that the regulated entity will recover (or will be expected to recover) all of its costs over time.

Under clause 4, all operating expenditure that is considered to be prudent is included in the annual revenue requirement.¹³² The return on assets in each year is determined by the WACC (calculated according to clause 7) and the opening regulatory asset base for that year. Clause 3 specifies that the regulatory asset base will be rolled forward each

¹³² Prudence of operating expenditure is discussed in section 4.5.4. of this consultation paper.

year to reflect new prudently incurred capital expenditure,¹³³ asset disposals and regulatory depreciation.

Clause 8 provides for a real straight line approach to calculating regulatory depreciation. The value of regulatory depreciation in each year is calculated by using the residual asset values and asset lifetimes for a range of asset types.

Clause 8 also sets out the method for calculating the net tax allowance. The net tax allowance is calculated using an estimate of taxable profits (based on NBN Co's revenue and operating, interest and taxation depreciation expenses) and the corporate tax rate.

4.4.2.2 Initial cost recovery and building block periods

Under a standard building block model, prices are generally set to recover the annual revenue requirement in each year. However, clause 5 of Schedule 7 allows NBN Co to initially set prices at a level lower than that required to recover its annual revenue requirement and to incur revenue shortfalls. Under this clause, any revenue shortfalls are included in what NBN Co terms the initial cost recovery account for recovery later in the SAU period.

Once it has recovered all of its initial revenue shortfalls and enters what it terms the building block revenue period, NBN Co will base its prices more directly on its annual revenue requirement. Clause 6 states that in each year during the building block revenue period, NBN Co will be able to recover its annual revenue requirement and any revenue variation carried over from the previous year. This clause specifies that the revenue variation is the difference between the regulated revenue and the amount of revenue actually collected for that year.

4.4.3 Weighted average cost of capital

Clause 7.1 of Schedule 7 (Long Term Revenue Constraint Methodology) of the SAU states that NBN Co's return on capital will be determined using the WACC. Clause 7.2 states that the nominal WACC will be calculated by applying a 350 basis point premium to the risk free rate. Clause 7.2 of Schedule 7 states that 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.

According to clause 3.3(a) of Schedule 9 (Review and variation of aspects of SAU), NBN Co must review the approach to the WACC at the SAU Review Period (refer to section 4.6 of this consultation paper). The SAU provides that NBN Co will submit a SAU variation to the ACCC that addresses the matters identified during the SAU review. The ACCC will then assess the variation in accordance with sections 152CB and 152CBH of the CCA.

¹³³ Prudence of capital expenditure is discussed in section 4.5.4. of this consultation paper.

4.4.4 Prudence of expenditure

Schedule 8 (Prudence) and Schedule 10 (Reporting) of the SAU sets out the basis on which NBN Co will classify capital expenditure and operating expenditure as prudent and efficient. NBN Co will include all expenditure it classifies to be prudent into its long-term revenue calculation to be recovered through its prices to access seekers (see section 4.4.2 of this consultation paper).

Schedule 8 contains a number of conditions and principles that NBN Co is required to satisfy in order to classify expenditure as prudent. These are outlined below.

4.4.4.1 Capital expenditure

Under clause 1.2 of Schedule 8 (Prudence) of the SAU, capital expenditure will be prudent if NBN Co satisfies both of the following conditions:

- Prudent Design Condition — capital expenditure that is materially consistent with, or within the scope of, or is a permitted variation to, the *Network Design Rules* will satisfy this condition.
- Prudent Cost Condition — capital expenditure that is incurred using competitive tendering and procurement processes that comply with the NBN Co Procurement Rules will satisfy this condition.

Clause 3 establishes the initial design scope in respect of the NBN Co fibre, satellite and wireless networks. The initial design scope covers the broad dimensions of the network design and covers matters such as the network footprint, the primary technology utilised, and the data rate capabilities of each network.

Under clause 3.1(b), NBN Co is required to ensure that the *Network Design Rules* satisfy this initial design scope. The *Network Design Rules* will then form the design and technology baseline from which capital expenditure incurred by NBN Co will satisfy the prudent design condition.

The initial *Network Design Rules* have been provided to the ACCC on a commercial-in-confidence basis. NBN Co has indicated to the ACCC that it will provide a public version of these shortly.

Under clause 5, NBN Co is permitted to change or update the *Network Design Rules* if relevant design changes are endorsed through a customer engagement process or endorsed by the ACCC. Clauses 6 and 7 set out the processes that NBN Co must follow to seek endorsement of a network change from its customers or the ACCC.

The NBN Co Procurement Rules have not yet been provided to the ACCC. Under clause 9.3, NBN Co is required to ensure that the Procurement Rules contain a competitive tendering and procurement process that:

- seeks to generate an efficient and competitive outcome by encouraging a reasonable and proportionate amount of competitive tension and minimising the possibility of collusion amongst tender participants;

- contains clear processes for the calling, conducting, assessing and rewarding of tenders;
- clearly specifies the basis for the payment and the undertaking of the works and services that accord with good industry practice; and
- contains a process for managing contracts that accords with good industry practice.

Under clause 9.3(c), every five years during the SAU term NBN Co must obtain an assessment from an independent expert on the extent to which the Procurement Rules remain consistent with good industry practice.

4.4.4.2 Operating expenditure

Under clause 10 of Schedule 8 (Prudency) of the SAU, operating expenditure that NBN Co incurs will be prudent to the extent that:

- NBN Co ensures that operating expenditure is incurred in a manner that seeks to achieve value for money and the lowest total cost of ownership; and
- NBN Co otherwise manages and controls operating expenditure in a manner consistent with the *Statement of Expectations* and any other regulatory requirements applicable to procurement by NBN Co.

NBN Co may also incur operating expenditure in connection with the supply of services to NBN Co by a third party. Clause 10.2 of Schedule 8 requires NBN Co to also satisfy the Prudent Cost Condition in respect of this operating expenditure.

4.4.4.3 Deemed prudent categories

Clauses 4 and 10.3 of Schedule 8 (Prudency) of the SAU identify a number of ‘deemed prudent’ categories of capital and operating expenditure that will automatically be deemed to have satisfied the relevant prudency conditions or principles. NBN Co will be able to recover all expenditure associated with these deemed prudent categories. The categories are:

- 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 the third party;
- urgent and unforeseen network design variations, changes or enhancements;
- capital expenditure less than a minor expenditure limit (initially \$100 million); and

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

4.4.4.4 Annual compliance process

Schedule 10 (Reporting) of the SAU requires NBN Co to submit annual compliance reports to the ACCC that certify that NBN Co has incurred capital and operating expenditure in accordance with Schedule 8.

4.5 Reporting and compliance

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.

Under clause 1, NBN Co is required to submit a report which certifies that the price payable for the basic access offer, CVC offer, and the NNI offer did not exceed the maximum regulated price for that offer in the previous financial year.

The report must also certify that any changes in the price payable by any customer in respect of a product component, associated product feature or ancillary service did not exceed the individual price increase limit in the previous financial year.

Under clause 2.1, NBN Co is required to submit annually information to the ACCC relating to:

- the regulated asset base and the initial cost recovery account (such as opening and closing values, expenditures, depreciation, and the components of the WACC); and
- revenues during the building block revenue period (such as regulated revenue, revenue variation and the carry forward revenue adjustment).

Under clause 2.2, NBN Co must also provide forecasts of most of these figures prior to each financial year during the building block revenue period. That is, NBN Co is not required to provide forecasts during the initial cost recovery period (see section 4.4.2.2 of this consultation paper for a description of the difference between periods).

Under clause 3, NBN Co is required to submit a report annually which certifies that the capital expenditure included in the regulated asset base, and the operating expenditure included in the annual building block revenue requirements, has been prudently incurred in accordance with Schedule 8 (Prudency).

4.6 Review and variation

Schedule 9 (Review and variation of aspects of SAU) of SAU contains mechanisms for reviewing and varying certain aspects of the SAU at various points in the SAU period.

Clause 2 states that NBN Co will submit certain information to the ACCC every five years during the SAU period about its Product Development Forum processes

(discussed in section 4.2.4. of this consultation paper) and its customer engagement processes (discussed in section 4.4.4. of this consultation paper). This clause also allows NBN Co, as part of its submission, to propose a variation to its Product Development Forum and customer engagement processes. The purpose of this process is to allow the ACCC to determine whether the Product Development Forum and customer engagement process are resulting in effective customer engagement between NBN Co and its customers and to assess any variation proposed by NBN Co.

Clauses 2.2 and 2.3 set out the timelines and processes the ACCC must follow in its assessment of the Product Development Forum and customer engagement processes, or any proposal by NBN Co to vary these processes. It also specifies the matters the ACCC must have regard to and the form that an ACCC determination on this matter may take. In summary, the ACCC may either approve a variation proposal or require a variation different to that proposed by NBN Co. If NBN Co only submits the Product Development Forum and customer engagement information and does not propose a variation, the ACCC can only determine that the processes require no variation.

Further, clause 3 states that NBN Co will undertake a review of the SAU 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. If this period has not commenced by 30 June 2027, NBN Co will undertake the SAU review between 1 July 2027 and 30 June 2028.

As part of this SAU review, NBN Co will review certain matters relating to the prudence of expenditure and regulatory asset base and annual revenue requirement calculations. At its discretion, NBN Co may also review other pricing matters as part of the SAU review.

Following the SAU review period, NBN Co will submit a SAU variation to the ACCC that addresses the matters identified during the SAU review. The ACCC would then assess the variation in accordance with sections 152CB and 152CBH of the CCA.

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.

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.

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.

SoE (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 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.