



## Proposed variation to the NBN Co Special Access Undertaking: extension of expiring non-price provisions

On 8 May 2019, NBN Co submitted a proposed limited variation to its Special Access Undertaking (SAU) in accordance with section 152CBG of the *Competition and Consumer Act 2010* (CCA). Through this SAU variation, NBN Co is seeking to extend a number of non-price provisions that are due to expire on 30 June 2019. NBN Co seeks to extend these provisions in their current form for the remainder of Module 1, which will operate until 30 June 2023.

The ACCC must assess the SAU variation against the criteria specified in section 152CBD(2) of the CCA. Based on this assessment the ACCC must either accept or reject the SAU variation.

The ACCC seeks comments from interested stakeholders on the SAU variation. We would welcome comments on any aspect of the SAU variation, having regard to the supporting submission NBN Co has also provided.

The purpose of this note is to provide relevant background and overview of the SAU and the expiring non-price provisions, the legislative framework for ACCC assessment of SAU variations and details on making submissions.

We note this SAU variation is strictly limited to the specific non-price provisions that are due to expire. It does not include any of the changes proposed in NBN Co's previous SAU variation (withdrawn in November 2018), which focussed on expanding the scope of the SAU's service, product and pricing provisions to include FTTB, FTTB and HFC services.<sup>1</sup>

### Background

The SAU forms a key part of the regulatory framework that sets out price and non-price terms and conditions for regulating access to the National Broadband Network until 2040. The ACCC accepted NBN Co's SAU in December 2013 following an extensive consultation process. The SAU adopts a modular structure, whereby certain provisions apply for different periods of time. Module 1 of the SAU applies from the commencement of the SAU to 2023. However, a number of non-price provisions in module 1 will expire on 30 June 2019.

The provisions that are due to expire relate to three areas: endorsement of network design changes, dispute resolution and the product development forum. In assessing these provisions in 2013, the ACCC considered they were relatively unique and that some experience of their operation is required to assess whether they are operating as intended and producing the intended outcomes for NBN Co and access seekers.<sup>2</sup> The ACCC also noted that the provisions could be extended through an SAU variation, or on expiry of the terms, be subject to commercial negotiations or regulatory determination.<sup>3</sup>

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<sup>1</sup> Further information on previously proposed SAU variations can be found on the ACCC website.

<sup>2</sup> ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, p. 59

<sup>3</sup> ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, p. 60

## Overview of the expiring non-price provisions

NBN Co proposes to extend the operation of the following SAU provisions:

- Clauses 1D.8 to 1D.12 – processes for obtaining customer endorsement of network design changes not specified as permitted variations
- Clause 1H.5 and Annexure 1 to Schedule 1H – requirements for NBN Co to specify dispute resolution arrangements in its wholesale broadband agreement and processes for appointment and ACCC approval of dispute resolution advisors and pool members
- Annexure 1 to Schedule 1I – the Product Development Forum Rules, which cover forum membership, submissions and assessment of new product ideas and consultation processes.

### *Customer endorsement of network design changes*

One of the key prudency conditions under the long-term revenue constraint methodology (LTRCM) specified in the SAU is the prudent design condition. Broadly speaking, in order for capital expenditure to meet the prudent design condition it must be 'materially consistent' with the network design rules or a permitted variation in the first instance.

In addition, the network design rules can be changed for reasons other than those specified in the permitted variations through a customer engagement and endorsement process. Some of the key elements of this process are as follows:

- Procedures for identifying and selecting network design options
- Criteria for assessing network design options
- Procedures for consulting with and seeking endorsement of network design changes from access seekers and customer advocacy groups
- A dispute resolution mechanism in cases where customer endorsement cannot be reached.

In its assessment of these provisions in 2013, the ACCC considered that the customer engagement and endorsement processes for network design changes should encourage efficient investment. This was because access seekers and consumer advocacy groups would be able to inform NBN Co about whether network design choices are efficient and deliver network capacity and service quality that end-users desire and for which, they are willing to pay.<sup>4</sup>

In its supporting submission, NBN Co considers that extending the current provisions until the end of module 1 would continue to encourage efficient investment in and the operation of the NBN. In particular, these provisions would ensure that any network changes reflect the needs of access seekers and end-users.<sup>5</sup>

We note the customer engagement and endorsement processes for network design changes have not been used since the SAU has been in operation. All network design changes to date have occurred through the permitted variations.

### *Dispute Resolution*

The SAU dispute resolution provisions set out the framework for parties to follow in the event that a dispute cannot be resolved commercially within a specified timeframe. Key elements of the dispute resolution provisions include the following:

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<sup>4</sup> ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, pp. 98-99

<sup>5</sup> NBN Co, *nbn supporting submission – Variation to the NBN Co Special Access Undertaking*, 8 May 2019, p. 12

- A requirement that NBN Co include provisions in its standard form access agreement (ie, the wholesale broadband agreement) for the mediation and arbitration of disputes by independent experts
- Specification of roles and obligations of the resolution advisor and pool members
- Processes for appointing and obtaining ACCC approval of the resolution advisor and pool members
- Processes for the formation of a panel in the case that panel arbitration is required to resolve a dispute.

In its assessment of these provisions in 2013, the ACCC noted that these provisions act as appropriate safeguards to ensure that decision-makers will be independent and free from bias, and will therefore promote the long-term interests of end-users. The ACCC also noted that the appointment of decision makers who are independent and free of bias is necessary to ensure impartial decision-making, and thus to promote the efficient, consistent and unbiased resolution of disputes.<sup>6</sup>

These provisions have been used a number of times since the commencement of the SAU to appoint (and re-appoint) a resolution advisor and pool members. Previous and current versions of NBN Co's wholesale broadband agreement have specified dispute resolution processes, as required by the SAU. However, we understand there has not been any dispute that has required use of these provisions.

In its supporting submission, NBN Co noted that the provisions provide a useful framework for guaranteeing that any disputes that will arise in the future are resolved in an impartial and unbiased manner (e.g. through an independent resolution advisor, pool members and panel members). NBN Co also consider these provisions will promote the efficient resolution of disputes, by creating a predictable and well-established framework for resolving such disputes in a timely manner.<sup>7</sup>

#### *Product Development Forum Processes*

The product development forum (PDF) processes aim to promote innovation in NBN Co's development of product ideas. The SAU includes general obligations to consult with its customers and consumer advocacy groups on new products before they are introduced and to consider product ideas initiated by industry. These general obligations will operate for the duration of module 1. However, the detailed PDF processes are due to expire on 30 June 2020.

The key elements of the PDF processes are as follows:

- Requirements for membership of the PDF
- Processes for participants to submit product ideas
- Criteria for how NBN Co will assess product ideas and processes for providing information about this assessment
- Consultation processes and how NBN Co considers feedback on the development of product ideas (such as through workshops and submissions).

The ACCC considered in its initial assessment on the SAU that these provisions should encourage transparency and consultation in the development of product ideas. It stated that

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<sup>6</sup> ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, p. 106

<sup>7</sup> NBN Co, *nbn supporting submission – Variation to the NBN Co Special Access Undertaking*, 8 May 2019, p. 14

they are likely to be in the interests of access seekers and end-users as it should encourage the development of products that are valued by access seekers and end-users.<sup>8</sup>

In their supporting submission, NBN Co consider the detailed PDF processes have been used extensively since the commencement of the SAU to consult on a large number of new products including on a number of product ideas contributed by access seekers. NBN Co also consider these processes provide a range of mechanisms for access seekers and consumer advocacy groups to become involved in the product development process and provide a level of certainty and consistency to PDF participants.

We also note that the PDF has been used extensively by NBN Co to consult on matters, not just related to new products. This includes NBN Co's consultation on a range of pricing initiatives, including the high-speed and entry level product bundles currently being offered.

### **ACCC assessment**

The ACCC must assess NBN Co's SAU and any variations as governed by Part XIC of the CCA. Section 152CBD of the CCA sets out the statutory criteria which must be applied before acceptance of the variation. The ACCC must assess a variation against the legislative criteria set out in section 152CBD(2) of the CCA. Broadly, the ACCC must not accept the variation unless:

- the terms and conditions specified in the variation in relation to compliance with the category B SAOs are consistent with those obligations and are reasonable
- any conduct that is specified in the variation in relation to access referred to in section 152CBA(3B) will promote the long term interests of end-users (LTIE), and the related terms and conditions are reasonable, and
- any conduct that is specified in the variation in relation to certain matters referred to in section 152CBA(3C) will promote the LTIE.

### **Consultation and next steps**

NBN Co's SAU variation and its supporting submission are available on the ACCC website.

We encourage industry participants and other interested parties to make submissions, including reasons to support their views during a three-week consultation period. We would welcome comments on any aspect of the SAU variation, having regard to the supporting submission NBN Co has also provided.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The confidential version of the submission should clearly identify the commercial-in-confidence material by bookending the confidential material with an appropriate symbol of 'c-i-c'. The public version should ensure that all confidential material has been removed and replaced with 'c-i-c'. The ACCC has prepared guidelines for parties wishing to submit confidential information to communications inquiries.

The ACCC-AER information policy: the collection, use and disclosure information sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website.

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<sup>8</sup> ACCC, *NBN Co Special Access Undertaking Final Decision*, 13 December 2013, p. 78

The ACCC prefers to receive submissions in electronic form, in either PDF or Microsoft Word format which allows the submission text to be searched. Submitters should ensure that redacted information is not searchable or otherwise able to be disclosed.

Please email submissions by **5pm Monday, 10 June 2019** to [nbn@acc.gov.au](mailto:nbn@acc.gov.au) and copy to:

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