



Independent Expert Report

nbn SAU Variation Expenditure

October 2023

Final

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Part D Recommendations

1 Part D summary

- Findings taken from the expenditure assessment carried out and described in this Report as well as (brief) comparisons to other jurisdictions and the role the AER takes are used to recommend a process that seeks to build on the existing IOP and SAU Variation processes adopted by NBN Co.
- A Reporting and ACCC Review process is recommended to support ex post assessment of expenditure and ex ante assessment of expenditure proposed for the next regulatory cycle.
- Tools recommended to support the recommended Reporting and ACCC Review process are:
 - o Reporting template (leveraging existing data and information NBN Co has provided to ACCC as part of the assessment described in Part C of this Report),
 - o Benefit framework to articulate targeted benefits and track benefits realisation during the regulatory period (with a focus on LTIE),
 - o Mechanism for change to allow NBN Co to update the ACCC with any material changes at any point mid-cycle during the financial year, and within the regulatory cycle, and
 - o Pre-defined business case requirements to support any new or significant changes to forecast expenditure initiatives. (It is strongly recommended that NBN Co and ACCC adopt a pre-agreed business case process for proposed expenditure items moving forward to assist with expenditure assessments).
- Armed with the pre-existing data and information and the tools recommended for the Reporting and ACCC Review process, ACCC and NBN Co will be supported in establishing and running a robust, comprehensive and adaptable framework for monitoring, reporting and eventual assessment of expenditure from a prudency and efficiency perspective.

2 Context

DLA Piper has instructed Grex Consulting (Grex) to provide an expert opinion on both the efficiency and prudence of NBN Co's proposed capital and operating expenditure forecasts under the SAU Variation for the First Regulatory Cycle (FRC) from 1 July 2023 to 30 June 2026.

Grex's expert opinion on the prudence and efficiency of NBN Co's proposed expenditure forecasts is described in Part C, with the findings taken from the expenditure assessment carried out and described in this Report used to recommend a process that seeks to build on the existing IOP and SAU Variation processes adopted by NBN Co set out in this Part D.

The recommended process seeks to build on the existing IOP and SAU Variation processes carried out by NBN Co to develop a robust, comprehensive and adaptable framework for monitoring and reporting purposes. The recommended process seeks to enable ACCC monitoring and review of the progress of NBN Co's forecast expenditure on a regular basis (annual, monthly or more frequent depending on the metrics and timeframes ACCC and NBN Co will be working to), as well as to compare results with forecasted estimates from the previous forecasted period based on tangible information supported by pre-defined key metrics that provide insight and justify the measurable benefit value that the relevant proposed NBN Co expenditure item is seeking to provide.

The goal of this process is to provide the ACCC consistent, reliable and measurable data on NBN Co's performance and outcomes in line with estimated forecasts and funding, and to allow the ACCC to use this historical data to make informed decisions and monitor NBN Co's activities accurately.

This process in turn provides the ACCC with information that helps inform the next regulatory cycle.

Outside of the delivery to ACCC of the tools and data to support its decision-making process, the recommended process should also be of benefit to NBN Co in the following ways:

- Allows NBN Co to make a case for proposed new or amended expenditure, and to outline proposed targeted benefits for an expenditure item/initiative and how NBN Co expects to achieve these targeted benefits,
- Provides both NBN Co and the ACCC with ongoing information on how current initiatives are tracking, and whether these initiatives are on time and within forecasts,
- Provides NBN Co with a tool for demonstrating clear and measurable benefit value of its initiatives and provides RSPs and the public with clear definitive uses of government-funded programs,
- Enables NBN Co to prepare for any ex post and ex ante processes, and
- Allows NBN Co to notify ACCC of change outside of the Review cycle.

As a final explanatory note, the recommendations made in this section are underpinned by the key assumptions that the new process does not impact NBN Co's business as usual activities, and that the new process does not provide unnecessary information or conflict with previously provided information.

3 Recommended expenditure review process for the First Regulatory Cycle

GreX has been asked by DLA Piper to provide its expert opinion on the systems and processes NBN Co would need to implement in order to provide the information required by the ACCC for the purpose of performing its expenditure review role in the context of the Replacement Module Application / Determination process provided for in the Variation for the subsequent regulatory cycles in Subsequent Regulatory Period, which may include:

- the type and format of information NBN Co should keep, maintain, and provide to the ACCC;
- appropriate assurance measures in respect of that information; and
- appropriate processes for the collecting of this information by NBN Co.

The systems and processes suggested in this Part D will allow the ACCC to make informed changes to the next regulatory review cycle, by improving accountability and tracking the delivery of proposed projects and initiatives, all of which will assist ACCC's review of expenditure from a prudence and efficiency perspective.

The outcomes of the process are to provide:

- **NBN Co** with a simple, holistic tool to:
 - o deliver and explain further tangible information representing key metrics and costs,
 - o elaborate on the proposed benefits that are an outcome of proposed and forecast expenditure, and
 - o deliver a business case to justify the cost-benefit of proposed expenditure items.
- **ACCC** with renewed (modified) regular reports, that:
 - o monitor, track and record data and information to support its assessments,
 - o highlight the benefit metrics laid out by NBN Co's current initiatives, and
 - o measure historical progress across the regulatory cycle.

A new reporting and monitoring process is recommended that includes a new data collection tool and a supporting framework, namely the **Reporting Template**, and the **Benefit Framework**. Together, these provide NBN Co and ACCC with a simple, intuitive, and holistic reporting method that links planned initiatives with benefit outcomes (further described in section 3.6 below).

3.1 Overview

The below illustration of the recommended regulatory monitoring, review and assessment process is further described in the following subsections for the individual components of the recommended process. (GreX has included some annual timeframes in the illustration below which may be subject to adjustment between ACCC and NBN Co depending on the type of metrics and reporting established).

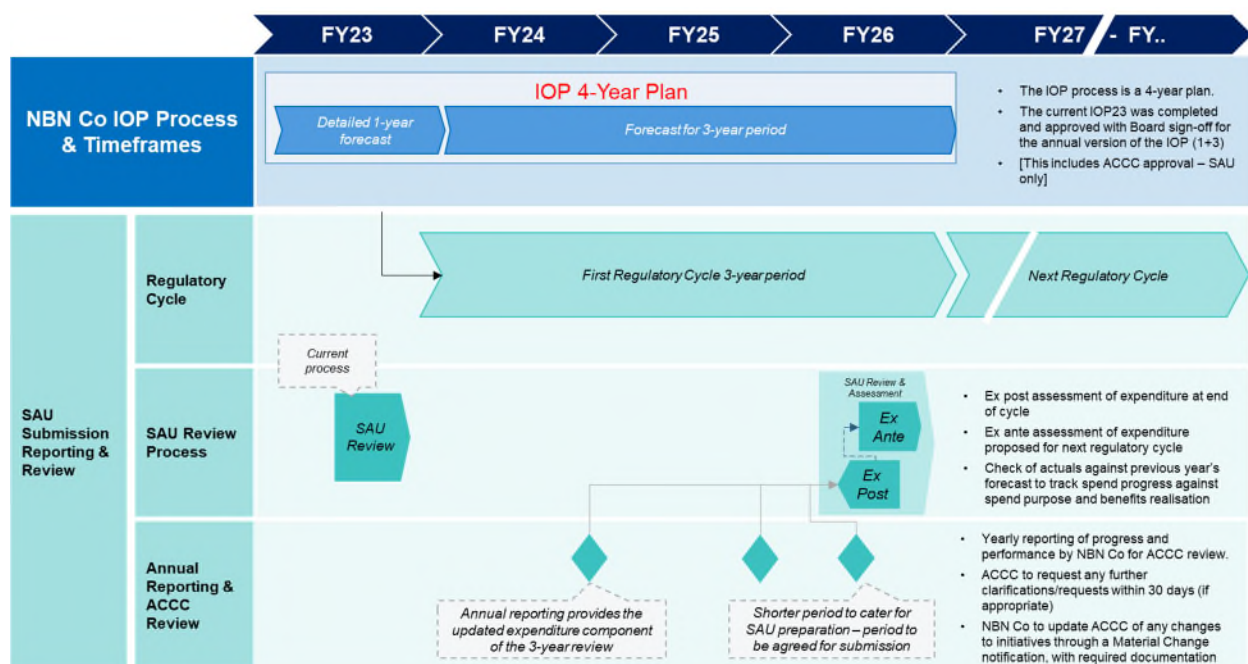


Figure 1 Recommended process to prepare for and review expenditure (Source: Grex)

3.2 “NBN Co IOP Process & Timeframes”

The IOP Process is an internal NBN Co process, comprising of a 4-year (‘1+3’ year) plan that refreshes every year with renewed forecasts. It is a pre-determined process that has existed in NBN Co for a number of years.

The current iteration, ‘IOP23’ was completed and approved with NBN Co Board sign-off for the annual version of the IOP process.

This includes capex and opex forecasts for its expenditure initiatives for the next three years i.e., FY24-FY26 (see Figure 1 above), aligned with the timeline for the First Regulatory Cycle. At the end of the FRC, the ex post process will assess the original forecasts provided by IOP23, against the actuals provided by NBN Co throughout the FRC to create a comparison between actuals and original forecasts wherever practicable.

3.3 “Regulatory Cycle”

This swim lane in the illustration is used to contextualise where the recommended Reporting & ACCC Review would take place.

Running for a period of 3 years, the First Regulatory Cycle (FRC) will start from FY24 and end in FY26, when the ex ante expenditure review process will be completed. The information received through the NBN Co IOP Process for the FRC is recommended to feed through to the SAU Review Process and the Reporting & ACCC Review.

3.4 “SAU Review Process”

The SAU Review Process described in this phase follows the existing SAU process as defined/recommended by the SAU Variation and the regulatory framework.

The expenditure assessment carried out in this Report falls under the current process of review of the SAU Variation being carried out by ACCC. The SAU Review relates to the First Regulatory Cycle which commenced on 1 July 2023, with a review and assessment carried out in FY26 (i.e., the final year of the FRC).

The recommended future SAU Review and assessment is carried out in two forms, the ex post and the ex ante process, and can be summarised as follows:

- Ex post assessment of expenditure at the end of the regulatory cycle, and
- Ex ante assessment of expenditure proposed for the next regulatory cycle.

The ex post and ex ante reviews and assessments are intended to run concurrently, with the ex post review starting just before the ex ante process. This timing is designed so that the end results of the ex post will feed into the decision-making process of the ex ante review and assessment.

The “Reporting and ACCC Review” is intended to feed historical and tracking data into the SAU Review and Assessment process.

The ex post and the ex ante processes are recommended to have a suitable timeframe to conduct a review in the final year of the FRC, and would require NBN Co and the ACCC to finalise the duration of the review period. This is driven by the timing set out in the Replacement Module Application / Determination process provided for in the SAU Variation.

It is recommended that NBN Co will continue to provide actuals data leading up to the ex post and ex ante processes (up until the review begins), and provide a forecast for the remaining months of the financial year i.e., FY26 for the FRC. The format would include ‘x’ months of actuals followed by ‘y’ months of forecasts (‘x+y’ process).

Ex Post Review

The ex post is part of the ACCC’s review of NBN Co’s actual capital expenditure to determine to what extent NBN Co’s expenditure items may be included in the RAB as part of the Replacement Module Application / Determination process provided for in the SAU Variation.

The ex post review process is a two-part process, beginning with a final submission from NBN Co, followed by a review process from the ACCC.

The review will look at the accumulated historical data (actuals) and compare it to NBN Co’s original capex forecasts from the IOP Process provided at the start of the FRC. The review will assess whether NBN Co delivered on their forecasted targets and provide this assessment to the ex ante process i.e., the decision making process.

NBN Co will provide a summary of its progress, goals and hurdles over the regulatory period, with a rationale for outcomes linked to any changes in spend or impacts on forecasts. This will include a summary of the remaining regulatory period and any justifications for final actuals varying from the original forecasts.

NBN Co is also presented with an opportunity to provide ACCC with any recommendations moving forward. ACCC in turn will use this information in the ex ante process to support its own decisions and recommendations moving forward, before a final decision is made.

Ex Ante Review

The ex ante review process can be defined in two parts; a decision-making process based on the result of the ex post review, and a regulatory review process that informs or proposes requirements for the next regulatory cycle moving forward.

This process is also recommended to begin at a suitable timeframe before the end of the regulatory cycle, to allow sufficient time for decisions to be made by ACCC in conjunction with NBN Co that may shape and inform the next regulatory cycle. Further context is provided in the Replacement Module Application / Determination process provided for in the Variation for the subsequent regulatory cycles in the Subsequent Regulatory Period.

The decision-making process is informed by the ex post review, tracking spend progress against spend purpose and benefits realisation i.e., 'Prudent and Efficient' assessment of the forecasted and actual capex in the context of the Replacement Module Application / Determination process provided for in the Variation for the subsequent regulatory cycles in the Subsequent Regulatory Period.

3.5 Review

3.5.1 “Reporting & ACCC Review”

It is recommended that a Reporting & ACCC Review framework is established to support a robust, comprehensive and adaptable reporting and monitoring process for FY24, FY25 and the third financial year of the First Regulatory Cycle. The latter reporting period may need adjustment compared to fuller financial year reporting so as to accommodate a period of actuals and a period of forecasts for the remainder of the financial year, with the results feeding into the ex post review; and will include the results of the actuals provided create a clear and comparable value informed by the IOP forecasts submitted at the start of the regulatory cycle and renewed annually.

Where there are clear differences between forecasts and actuals post NBN Co's submission (of actuals for the pre-agreed prior period, be it annual, monthly or more frequent as agreed by ACCC and NBN Co), the ACCC can ask for any further clarifications or requests for information, including a justification as to why this is the case through its record keeping rule (RKR) processes (further details of which are set out in section 4 below).

Outside of the Review period, should NBN Co be required to update the ACCC of any significant changes to its initiatives, NBN Co can do so through an official Material Change notification process, which will require updated forecasts, supporting documentation and a clear and well-defined business case where required (further details of which are set out in section 3.6.3 below).

The reporting and ACCC review portion of the process achieves this through the new data collection tools as defined in the following section.

The outcome of this process is a submission from NBN Co and a review from the ACCC. This forms a transparent process and does not anticipate or require the ACCC to intervene or approve NBN Co's submission.

3.6 New tools and framework to support assessment

It is recommended that new data collection tools and frameworks are established by ACCC and NBN Co to support the recommended process of ex ante and ex post review and assessment.

3.6.1 Reporting template

A “Reporting Template” is recommended to be designed as a simple and intuitive tool to provide clear linkages between benefit and performance improvement, and service levels.

It is recommended that NBN Co develop a reusable template for regular reporting with the ACCC and use it to provide the ACCC with actuals for the previous time period i.e., financial year, or the remaining months prior to the ex post and ex ante process.

The template would build off existing capital expenditure categories (metrics) that have been previously provided by NBN Co to the ACCC through the process undertaken to prepare this Report as well as other previously established processes. Whilst the ex post review is limited to capex, analysis of actual operating expenditures will inform the ex ante assessment of forecast opex. The template would also include additional metrics and further levels of detail that have previously not been provided or required on a yearly basis.

Where information (items/unit costs) has not been previously provided, NBN Co will complete the template by filling in missing values. It is not expected that NBN Co would require any significant work to be done to complete this template, as these metrics would already be available at NBN Co through its own internal processes.

The template should include (as a minimum):

- Volume, unit, cost & performance (benefit targets and realisation) metrics, and
- A mechanism for change (to notify the ACCC).

The purpose of compiling the new, more comprehensive metrics, are:

- to create tangible costs that can provide insight and links to real and tangible benefits,
- to provide further layers of detail on the drivers of expenditure (aimed at assisting an expenditure review by ACCC),
- to add further layers of accountability and responsibility, and
- for the Benefit Framework to provide these metrics with a link back to the total costs proposed by NBN Co for their rollout initiatives.

Through the development of a formal and more diligent reporting process, the aim is to create an environment for NBN Co to prepare for the ex post and ex ante process because the same structures and reporting process would be required for the SAU Review. NBN Co would therefore be preparing for the ex post review far ahead of time due to the reporting process, while providing the ACCC with actuals.

3.6.2 Benefit framework

A “Benefit Framework” is recommended to be established and used in conjunction with the Reporting Template to assess individual initiatives for the impact each initiative has on the network or end-user (including LTIE) and the viability of each initiative (cost/benefit). It will allow NBN Co to closely align their projected spend to direct and indirect benefits, justifying their metrics and costs previously provided to the ACCC. Explanations and illustrations for ACCC and NBN Co of the ways in which benefits are identified, established as part of a broader business case

framework and managed on an ongoing basis could be based on the NSW state government's detailed approach.¹

The benefit realisation metrics derived from the Benefit Framework would be incorporated into the Reporting Template, with an illustrative guide to benefit realisation provided in Figure 2 below:

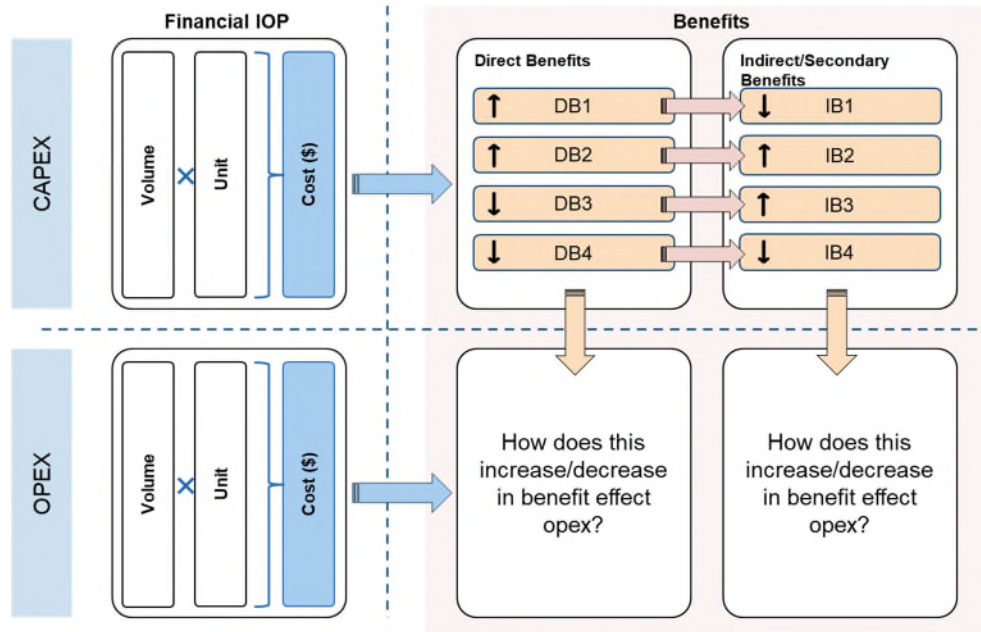


Figure 2: Illustrative example of how the Benefit Framework links both capex and opex metrics with direct and indirect benefit realisation.

With support from the Benefit Framework, the reporting template will provide a link across detailed metrics for defined capex and opex expenditure categories, and subcategories, which will include:

- Expenditure forecast,
- Volume forecast,
- Unit forecast, and
- Performance forecast.
- Benefit forecast
- Direct benefits, and
- Indirect (secondary) benefits.

The Benefit Framework will close the gap between expenditure set aside to achieve each initiative, and the resulting benefit obtained from pursuing the respective initiative, i.e., the link between cost and benefit. This will form a strong basis for any business case presented by NBN Co to the ACCC and has been defined and explained in detail in Section 3.7.

3.6.3 Mechanism for Change

To allow for unforeseen circumstances or any changes to initiatives to be communicated to ACCC on a prompt basis, NBN Co will be provided with a mechanism for change. This will allow NBN

¹ There is a wealth of information about benefits – a good starting point is NSW Treasury – TPP18-06 NSW Government Business Case Guidelines, with examples of defining benefits included in the Appendices.

Co to update the ACCC with any material changes at any point mid-cycle within the regulatory cycle.

Any changes to existing NBN Co initiatives or for the addition of new initiatives, will require NBN Co to notify the ACCC.

Upon internal approval of the change, NBN Co will notify the ACCC of the following, or provide the following:

- any material changes,
- any changes to the forecasted budget,
- submit supporting documents, and
- provide a business case (in accordance with the requirements of the process for the form and content of a business case).

Key uses for this change mechanism are listed below:

- for initiatives that are no longer relevant/valid,
- to include new initiatives or change to initiatives, and/or
- to be conducted with the discretion of the ACCC.

3.7 Business case requirements

A business case is a document that outlines the justification for a proposed project or initiative from a business perspective. It presents a detailed analysis of the costs and benefits of the project, including financial, operational, and strategic considerations. The purpose of a business case is to help decision-makers determine whether or not to proceed with the project by providing a comprehensive evaluation of the risks and rewards associated with it.

There are many different types of business cases depending on the organisation in question². However, items that are generally present across any type of organisation include:

- Business need: clear rationale for investment which addresses a need based on an identified priority, outcome and business case objective,
- Options or responses: long-list options that could be utilised to address the business need (including “doing nothing”),
- Cost-benefit analysis: analysis of benefits against costs to obtain a Benefit Cost Ratio (BCR), which is used to analyse and rank prospective options,
- Financial analysis: to determine financial feasibility and affordability of the options,
- Commercial analysis: to determine whether the options/solutions can be procured, supplied and maintained at the service level proposed, and
- Management analysis: to confirm that the solution put forward is deliverable, and that governance and systems are in place to optimise value and be modified if required in response to ongoing monitoring and evaluation.

The diagram below illustrates the high-level requirements of an NSW Treasury business case across the initial 3 stages.

² It is noted NBN Co is a government business enterprise (GBE) and is therefore expected to operate on a commercial basis.

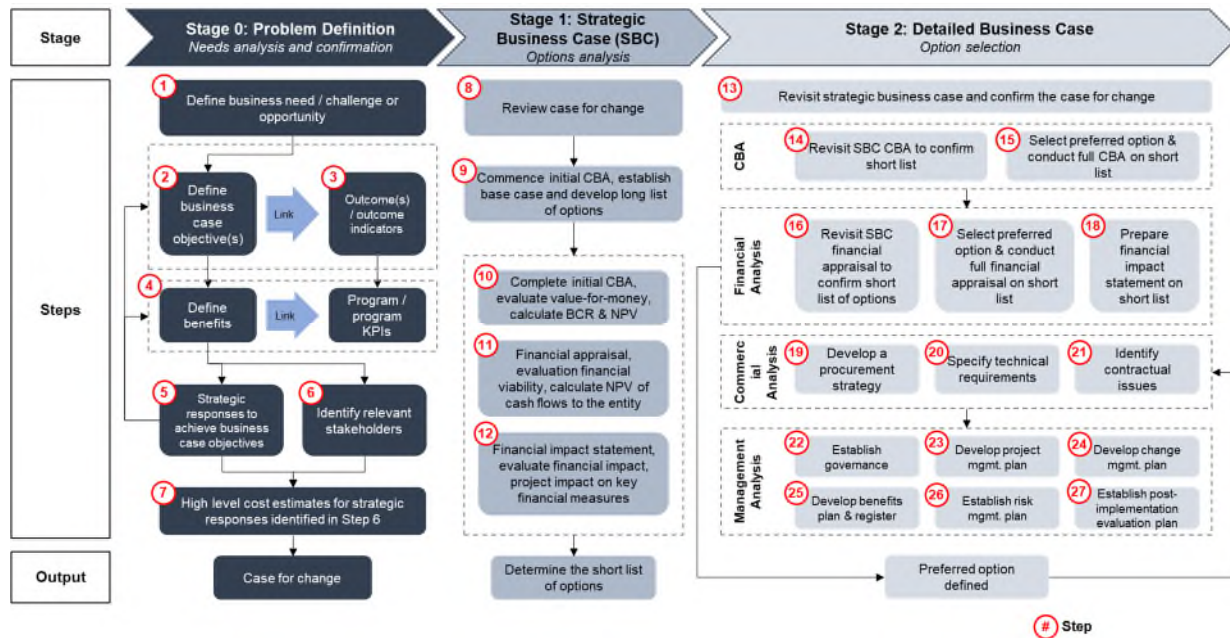


Figure 3 NSW Treasury Business Case Requirements³

It is strongly recommended that NBN Co develop business cases for expenditure items proposed, working with ACCC to develop a pre-agreed framework for the business case, including any practicable templates. As outlined above, there are multiple examples of this used in similarly regulated environments, and Part C of this Report has identified multiple areas where business cases have not been developed to support expenditure items and programs established by NBN Co.

³ NSW Treasury – TPP18-06 NSW Government Business Case Guidelines

4 Record Keeping Rule

As an adjunct to and complementary with the above recommended process, the ACCC is proposing to develop a new record keeping rule (RKR).

This initiative follows several recent ACCC review and consultation processes that raised issues regarding transparency in reporting of NBN Co and other Superfast Broadband Access Service (SBAS) providers.

The intent behind the RKR and associated public reporting is to increase the transparency of reporting by NBN Co and in the future that of Superfast Broadband Access Service (SBAS) providers.

The proposed benefits of a monitoring and reporting framework applying across NBN Co and other large scale wholesale broadband networks, and future public reporting, are intended to complement operational reporting between NBN Co and RSPs under wholesale access agreements and NBN Co's Special Access Undertaking (SAU). Also, greater public transparency of NBN Co along with improved operational reporting between NBN Co and retailers, is intended to improve outcomes for end users over time and reduce overall costs relating to the management of faults and outages, among other things including but not limited to expenditure.

ACCC may use the RKR to help established the monitoring and reporting framework recommended in this Part C, which is in addition to the powers the ACCC under the SAU.

5 Other jurisdictions

5.1 UK, Canada and New Zealand

For the purposes of a (brief) comparison of the above recommended process to other jurisdictions, the table below provides a summary comparison of the expenditure-related monitoring methods and levels of public and private information disclosure required in the comparable jurisdictions of UK, Canada and NZ.

A significant amount expenditure-related detail is presented to regulators by operators which could be compared to NBN Co in UK and NZ. For example, Chorus is required to produce a document similar in nature to NBN Co's Initial Cost Allocation Manual, which describes the methodology regarding cost allocation. Chorus's documentation consists of 248 pages of detailed cost allocation inputs, methodology, and outputs across opex only.⁴ NBN Co's equivalent document proposes to provide only its methodology, which is documented in 14 pages across both capex and opex.⁵

⁴ Commerce Commission, 2023, https://comcom.govt.nz/__data/assets/pdf_file/0033/253599/Analysys-Mason-report-for-Chorus-Documentation-of-opex-allocation-for-the-BBM-Opex-workstream-including-responses-to-notice-to-supply-information-Model-version-3-31-22-March-2021.pdf

⁵ NBN Co, 2022, nbn initial Cost Allocation Manual

Comparison	ACCC	UK Ofcom	Canada CRTC	NZ ComCom
Equivalent Regulated Entity	NBN Co	Openreach (owned by BT)	Various wholesale providers	Chorus
Regulation	SAU	Wholesale Fixed Telecoms Market Review 2021-2026	CRTC Regulatory Framework	Price Quality & Information Disclosure
Regulatory Reporting & Frequency	LTRCM Annual –	Regulatory Financial Statements – Annual	Canadian wholesale broadband providers are not required to report expenditure-specific information to the regulator or publicly (outside of financial reporting and accounting requirements). Instead, CRTC’s regulatory framework focuses primarily on the provision of access to wholesale broadband services to internet service providers (ISPs) on a non-discriminatory basis, and on ensuring that wholesale broadband rates are fair and reasonable through facilities-based competition regulation, specified access rates and terms & conditions, set wholesale rates, and disaggregated wholesale high-speed access service (new)	PQ, ID-Only, and ID reports – information on network management must be disclosed annually, no later than 5 months after the end of a disclosure year
Information Required for Public Disclosure	<ul style="list-style-type: none"> - LTRCM - BBM including RAB & ABBRR 	<p>For Markets with Significant Market Power (SMP Markets):</p> <ul style="list-style-type: none"> - Revenue, volumes, price, opex, capex (mean capital employed and return on capital employed) - Market-specific information requirements such as operating costs and mean capital employed across granular components (e.g., lead-in ducts internal and external) 		<p>Among significant other levels of Price Quality (including RAB) and Information Disclosure requirements, Chorus must disclose information regarding asset and network management, including:</p> <ul style="list-style-type: none"> - Self-assessment report on asset management capability - Explanation on the link between historical and forecast capex and: forecast opex; and network quality performance

Comparison	ACCC	UK Ofcom	Canada CRTC	NZ ComCom
		<ul style="list-style-type: none"> operating costs and MCE) - RAB Model for Area 3 		<ul style="list-style-type: none"> - Opex and capex based on standardised formats and categories - Information about the network - Information about forecast capacity and utilisation and demand
Information Required for Private Disclosure to Regulator	As above, with commercially sensitive information included	<ul style="list-style-type: none"> - Data and models supporting the RFS (directly from CostPerform - BT's cost allocation software) - A breakdown of costs attributed using previously allocated costs (PAC) methodologies - A mapping between the operating cost and MCE of each cost component and the operating cost and MCE cost categories from the market performance summary - A breakdown of grant funding and associated 		<ul style="list-style-type: none"> - Expenditure and supporting information forecast for years 4-5 - Forecasts of assets to be replaced in next five years - ID-only asset register - Active forecast connections by service level - Forecast demand by POI area - Connection numbers

Comparison	ACCC	UK Ofcom	Canada CRTC	NZ ComCom
		expenditure by asset category - Other market-specific information for a number of SMP Markets		

Table 1: Comparison of Monitoring Across UK, Canada & NZ

Curriculum Vitae

Please see enclosed our Curriculum Vitae.

Declaration

We have made all the enquiries that we believe are desirable and appropriate. No matters of significance that we regard as relevant have, to our knowledge, been withheld from the Court.

Date: 16 October 2023

Signed:



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Michael Hart
Director
GreX Consulting Pty Ltd



.....

Gareth Simmons
Director
GreX Consulting Pty Ltd

Project Team Member	Profile
<p>Michael Hart</p>	<p>Michael is a commercial and corporate development executive with substantial experience in commercial strategy and telecommunications infrastructure arrangements across Australia, NZ, Europe and SE Asia.</p> <p>Michael has extensive industry knowledge, with a detailed understanding of existing and future technologies, as well as expertise in program management, stakeholder engagement, commercial and technical matters across the ICT industry.</p> <p>Michael has in-depth understanding of the deployment of fixed and mobile infrastructure following his time leading nbn's Fixed Wireless program and running site acquisition of 2,000+ sites across regional Australia coupled with recent engagements across Australia focused on improvements to mobile coverage to support various State Government initiatives and funding commitments.</p>
<p>Gareth Simmons</p>	<p>Gareth has over 25 years' experience in developing & implementing successful commercial and technical strategic initiatives across IT&T and Infrastructure industries across Australia, NZ, Europe and SE Asia.</p> <p>He has extensive commercial contract and negotiation expertise, as well as detailed technical knowledge and experience.</p> <p>Gareth has held numerous senior executive roles with responsibility for commercial & contract management, as well as technology strategy & operations, across a number of Telco & infrastructure operators in international and Australian markets. Areas of capability and expertise include:</p> <ul style="list-style-type: none"> • Commercial & Technology strategy • Complex Contract negotiations and implementation • Contracts and partnerships • Operations & Service Management • Business transformation • M&A & Due diligence • Local / State / Federal Government • Regulatory and compliance



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AUM/1228291083.3

11 October 2023

Dear Michael and Gareth

Letter of Instruction - ACCC assessment of NBN Co proposed variation to Special Access Undertaking

- 1 We act for the Australian Competition and Consumer Commission (**ACCC**).
- 2 The purpose of this letter is to instruct you to provide the ACCC with expert advice in relation to its statutory decision on whether to accept or reject a variation proposed by NBN Co Limited (**NBN Co**) to its special access undertaking (**SAU**) that was submitted to the ACCC by NBN Co on 29 November 2022 (**November 2022 Proposed Variation**). Specifically, your expert advice is sought in relation to:
 - 2.1 the prudence and efficiency of the expenditure forecasts proposed by NBN Co in the November 2022 Proposed Variation for the first regulatory cycle, being 1 July 2023 to 30 June 2026 (**First Regulatory Cycle**); and
 - 2.2 the systems and processes NBN Co would need to implement in order to provide the information required by the ACCC for the purpose of the ACCC's review and determination of NBN Co's expenditures in the Replacement Module Application / Determination processes for regulatory cycles in the period from 1 July 2023 to 30 June 2032 (**Subsequent Regulatory Period**) other than the First Regulatory Cycle, as provided for by the Variation.
- 3 You are instructed to undertake analysis and provide advice in relation to the particular matters set out below.
- 4 Please find enclosed with this letter a brief of relevant documents. Tab references in this letter correspond with the index of documents set out in Annexure A.

Background

- 5 NBN Co (an Australian Government owned corporation) owns and operates Australia's national broadband network (**NBN**).
- 6 Part XIC of the *Competition and Consumer Act 2010* (Cth) (**CCA**) establishes a regime for third party access to telecommunications infrastructure services. Under that regime, NBN Co has previously submitted to the ACCC an undertaking, referred to as a 'special access undertaking', to govern third party access to NBN Co's infrastructure services provided by means of the NBN until 2040.

- 7 On 13 December 2013, the ACCC accepted the SAU from NBN Co, which governs the principles for the regulation of wholesale access to the National Broadband Network (**NBN**) until June 2040 [**Tab 1**].
- 8 On 9 April 2021, the ACCC accepted a variation to the SAU which (among other things) extended the expiration date of three non-price provisions from 30 June 2019 to 30 June 2023 (**April 2021 Variation**) [**Tab 2**].
- 9 In the second half of 2021, the ACCC held an industry roundtable and a series of working groups and consultations to discuss various proposals for a further variation of the SAU. Subsequently, on 22 December 2021, the ACCC released a summary paper [**Tab 3**] which detailed the key issues discussed during this process, including the following five key outcomes:
 - 9.1 NBN Co has the opportunity to earn the minimum revenues it needs to meet its legitimate financing objectives, including to transition to a stand-alone investment grade credit rating;
 - 9.2 NBN end-users are protected from price shocks and from prices that are higher than necessary in later years;
 - 9.3 the regulatory framework provides incentives for NBN Co to operate efficiently and promote use of the NBN;
 - 9.4 NBN access seekers have greater certainty over the costs that they will face when using the NBN; and
 - 9.5 there is a clear and robust quality of service framework so access seekers and end-users know what to expect from NBN services, including a review mechanism so that service standards remain fit for purpose.
- 10 On 29 March 2022, NBN Co submitted a variation to the ACCC which (among other things) sought to include significant changes to its product and pricing commitments, the framework for its cost recovery, and rules for how the ACCC assesses network expenditure (**March 2022 Proposed Variation**) [**Tab 4**]. On 23 May 2022, the ACCC released a consultation paper in relation to the March 2022 Proposed Variation and invited stakeholder submissions as part of that process [**Tab 5**]. However, on 27 July 2022, NBN Co wrote to the ACCC and withdrew the March 2022 Proposed Variation [**Tab 6**].
- 11 NBN Co subsequently submitted the November 2022 Proposed Variation to the ACCC on 29 November 2022 [**Tab 12**], which included a revised framework for the determination of required revenues and price controls for the Subsequent Regulatory Period (other than the First Regulatory Cycle), and updated forecasts of expenditure (including capital expenditure and operating expenditure), required revenues and price controls for the First Regulatory Cycle. For present purposes, the key elements of the November 2022 Proposed Variation include the following.
 - 11.1 It seeks to govern the terms and conditions relating to access to the NBN in the Subsequent Regulatory Period. In particular, it provides for the periodic review and determination of expenditure forecasts, the rolled forward value of the regulatory asset base, the annual building block revenue requirement for each financial year and

required revenues for the forthcoming 'regulatory cycle' using a building block cost approach.

- 11.2 It specifies detailed proposed terms of access, including expenditure forecasts, required revenues and resultant price controls, for the First Regulatory Cycle.
- 12 On 13 January 2023, the ACCC released a consultation paper in relation to the November 2022 Proposed Variation and invited stakeholder submissions as part of that process [Tab 13]. Section 4 of the paper provides an overview of NBN Co's proposal. The general regulatory framework and modular structure proposed by NBN Co is discussed at section 5.1. A discussion of the expenditure criteria proposed by NBN Co, is set out at section 5.7 and a discussion of the proposed reporting requirements is set out at section 5.12.
- 13 The ACCC released a draft decision on the November 2022 Proposed variation on 2 May 2023 [Tab 17]. Submissions to the draft decision closed on 30 May 2023.
- 14 On 14 August 2023, NBN Co withdrew the November 2022 Proposed variation and lodged a further SAU variation proposal with the ACCC (**August 2023 Proposed Variation**) [Tab 18].
- 15 We note that the subject of your expert report will be the expenditure forecasts contained in the November 2022 Proposed Variation, as set out in paragraph 16.

Instructions

- 16 You are instructed to prepare a report setting out an expert opinion on:
- 16.1 the efficiency and prudence of NBN Co's proposed capital and operating expenditure forecasts for the First Regulatory Cycle (i.e., 1 July 2023 to 30 June 2026) as set out in the November 2022 Proposed Variation;
- 16.2 the systems and processes NBN Co would need to implement in order to provide the information required by the ACCC for the purpose of performing its expenditure review role in the context of the Replacement Module Application / Determination process provided for in the Variation for the subsequent regulatory cycles in Subsequent Regulatory Period, which may include:
- (a) the type and format of information NBN Co should keep, maintain, and provide to the ACCC;
 - (b) appropriate assurance measures in respect of that information; and
 - (c) appropriate processes for the collecting of this information by NBN Co.

Prudence and efficiency

- 17 In requesting your expert opinion on the 'prudence' and 'efficiency' of NBN Co's proposed capital and operating expenditure forecasts for the First Regulatory Cycle, as set out at 16.1, we note that the Federal Court and Australian Competition Tribunal have provided guidance on the interpretation and application of these terms, in the context of assessing the expenditure of regulated infrastructure service providers. Relevantly:

- 17.1 **Prudence** has been held to be concerned with the exercise of sound judgement, being careful to avoid undesired consequences and managing carefully and with economy.¹
- 17.2 **Efficiency** has been considered in terms of the nature or timing of expenditure, including the extent to which there is evidence that, as far as practicable, the expenditure reflects optimal planning and design, and competitive costs, taking account local factors and the defined service standards for the business.²
- 17.3 While, in principle, a distinction could be drawn between the 'efficient costs' and 'prudent costs', in practice these concepts are often interlinked, such that a simultaneous assessment of the prudence **and** efficiency has been considered appropriate.³ For example, a prudent process is likely to be one that considers alternative options for undertaking an augmentation. Such a process may select the least cost option for that augmentation (all other factors being equal), ie, a prudent process may result in an efficient outcome.⁴
- 18 The following extract from the Australian Competition Tribunal decision in *EnergyAustralia and Others [2009] ACompT 8* informative, which discusses the approaches to assessing prudence and efficiency adopted by the experts in that matter and accepted by the Tribunal as being uncontroversial, may be informative for the purposes of undertaking your assessment as set out in 16.1:⁵

Wilson Cook was retained by the AER to, amongst other things, make recommendations it considered necessary for the fixing of appropriate levels of expenditure in the context of cl 6.5.6 of the Transitional Rules. Volume 1 of the first Wilson Cook report sets out the opex objectives and criteria in cl 6.5.6(a) and (b) and, noting that its terms of reference did not define 'prudence' or 'efficiency', states that it adopted the following approach:

We first noted that the objective of the review was in essence to assess the DNSPs' expenditure proposals and report to the AER on whether in our opinion the forecast expenditure reasonably reflected the efficient costs of a prudent DNSP working in the circumstances of the DNSP concerned.

We noted that to ensure adequacy or effectiveness, a prudent operator might undertake more work than otherwise considered necessary but to ensure efficiency it might undertake less and thus a balance between the two is required.

We noted that prudence has connotations of exercising sound judgement especially concerning one's own interests, being careful to avoid undesired consequences, being cautious or circumspect in one's conduct, managing carefully and with economy.

Prudence is often best judged by the absence of evidence suggesting a lack of it. In the case of electricity networks, imprudence might be most discernible if there was evidence of failure to invest adequately, accompanied by identified adverse consequences, and is thus best assessed retrospectively.

Where we considered that there was an appropriate balance between these factors, prudence and efficiency, we have said in the text that the expenditure is "reasonable". Where we found

¹ *EnergyAustralia and Others [2009] ACompT 8* at [137].

² *EnergyAustralia and Others [2009] ACompT 8* at [137].

³ *EnergyAustralia and Others [2009] ACompT 8* at [137] – [138].

⁴ *EnergyAustralia and Others [2009] ACompT 8* at [138].

⁵ *EnergyAustralia and Others [2009] ACompT 8* at [137]-[138].

identifiable instances of imprudent expenditure, an imprudent failure to make expenditure or of what appeared to be inadequate provision for future expenditure, we have identified them.

We considered efficiency in terms of the nature or timing of expenditure and looked for evidence that as far as practicable the expenditure reflected optimal planning and design and competitive costs taking account of local factors, 'good electricity industry practice' and the defined security of supply and service standards of the DNSP concerned.

We interpreted good electricity industry practice to be the exercise of that degree of skill, diligence, prudence and foresight reasonably to be expected of a distribution business working under the prevailing conditions consistent with applicable regulatory, service, safety and environmental objectives.

The approach to the cl 6.5.6(c) concepts of 'efficient' and 'prudent' adopted by Wilson Cook in Volume 1 of its first report is non-controversial. Indeed, as may be seen from the following extract from a May 2008 NERA report (the first NERA report), Wilson Cook's approach to prudent and efficient is consistent with the approach taken by EA's own economic consultant when advising it on its preparation of its June 2008 regulatory proposal):

In principle, a distinction could be drawn between the 'efficient costs' required by the first criteria and 'the costs that a prudent operator [...] would require', as set out in the second criteria,... . However, the structure of clauses 6.5.6(c) and 6.5.7(c) effectively rules this out for the purposes of the AER's assessment of the expenditure forecasts. If such a distinction were to be drawn (ie, if the AER considered that the forecasts reflected the costs a prudent operator would require, but not the efficient costs) then the forecasts could not simultaneously satisfy the first two expenditure criteria.

This conclusion begs the question of the relationship between efficiency and prudence. ... the efficient timing of investment is conditional on the view taken as to the probability distribution of asset failure, which is inherently uncertain. A prudent DNSP may take a more pessimistic view of the probability of asset failure, and decide to replace assets earlier. Such replacement is both prudent (since it reflects a degree of risk-aversion) and efficient (based on the DNSP's view of the probability distribution).

... efficiency is a dynamic process. Whether or not a firm is operating on the efficiency frontier is also something that cannot be objectively verified. The reference to a 'prudent operator' in the expenditure criteria provides some guidance as to how efficiency may be identified in practice. We have already identified that a key aspect of prudence is the process followed by the DNSP. An important dimension of the prudence of a process is the degree to which it is motivated by (or reflects) improvements in efficiency. A process that is motivated by efficiency will in turn ensure that the DNSP moves closer to the efficiency frontier, even though that frontier will itself be moving.

For example, a prudent process is likely to be one that considers alternative options for undertaking an augmentation. The motivation behind that process is to select the least cost option for that augmentation (all other factors being equal), ie, it is an efficient option.

Matters to be considered

- 19 In providing your expert opinion on the question set out at 16.1 please consider:
 - 19.1 Whether the relevant expenditure forecasts are prudent *and* efficient.
 - 19.2 Any information provided by NBN Co in response to any requests you make for the purpose of preparing your report, including in any conferences with NBN Co that you attend for this purpose.
 - 19.3 The objective of the telecommunications access regime in Part XIC of the *Competition and Consumer Act 2010* (Cth) to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

- 19.4 Relevant government policies and directives relevant to NBN Co, the implication of those policies and directives on forecast expenditure.
- 19.5 The approaches and methodologies adopted by NBN Co in determining its forecast expenditure and whether those approaches and methodologies reflect sound industry and regulatory practice.
- 19.6 Whether the materials or methodologies contained in the materials provided by NBN Co in support of its expenditure forecast (e.g. demand forecasting, forecast input costs including wages, and proposed service levels etc.) are based on sound technological, economic or financial logic, and reflect sound industry and regulatory practice.
- 19.7 NBN Co's proposed cost allocation approach to allocating costs between its 'core' and 'competitive' services.
- 19.8 Sound regulatory approaches to expenditure reviews.
- 19.9 Any other matters you consider relevant.

Federal Court of Australia Expert Evidence Practice Note

- 20 As this matter may become litigious, we enclose a copy of the Federal Court of Australia's *Expert Evidence Practice Note (GPN-EXPT) (Practice Note)*, which includes the *Harmonised Expert Witness Code of Conduct* and the *Concurrent Expert Evidence Guidelines*.
- 21 Please carefully read the Practice Note and ensure that any report you provide in this matter complies with it. You are required to act impartially, and not as an advocate for the case of the ACCC.
- 22 Further, in providing any report, you should also:
 - 22.1 expressly confirm that you have read and agree to be bound by the Practice Note;
 - 22.2 include a curriculum vitae setting out full details of your relevant qualifications, experience and expertise;
 - 22.3 include a copy of these instructions;
 - 22.4 set out a list of all documents and information that you have relied upon in preparing your report;
 - 22.5 expressly state all assumptions that you have made in preparing the report and the reasons for making those assumptions;
 - 22.6 give reasons for each opinion that you express in the report;
 - 22.7 qualify any opinion expressed in the report if you consider your report may be incomplete or inaccurate without the qualification;

22.8 qualify any opinion expressed in the report if you are unable to form a conclusive opinion because of insufficient research, insufficient information, or for any other reason; and

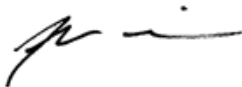
22.9 at the end of the report, include a declaration in the following terms:

'I have made all the enquiries that I believe are desirable and appropriate. No matters of significance that I regard as relevant have, to my knowledge, been withheld from the Court.'

23 If you change your opinion after giving us any report in this matter, you must provide a supplementary report.

Please feel free to contact us to discuss. We look forward to working with you.

Yours sincerely



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Annexure A: Brief of Documents

Tab	Document	Date
1.	NBN Co Special Access Undertaking (including all variations)	13 December 2013
2.	ACCC Decision regarding NBN Co Special Access Undertaking Variation	9 April 2021
3.	ACCC Summary Paper – Industry Roundtable Discussions	22 December 2021
4.	NBN Co March 2022 Proposed Variation and supporting documents	Various
5.	NBN Co Letter to ACCC withdrawing March 2022 Proposed Variation	27 July 2022
6.	NBN Co Confidential BBM Model (provided to you by separate file transfer link)	29 March 2022
7.	NBN Co BBM Handbook	March 2022
8.	Summary of NBN Co updated integrated operating plan (IOP) information	Undated
9.	Updated NBN Co Confidential BBM Model (provided to you by separate file transfer link)	8 August 2022
10.	Castalia memo titled 'ICRA Adjustment Concept'	18 July 2022
11.	NBN Co November 2022 Proposed Variation and supporting documents	29 November 2022
12.	ACCC Consultation Paper re November 2022 Proposed Variation and supporting documents	13 January 2023
13.	NBN Co Confidential BBM Model (provided to you by separate file transfer link)	2 December 2022
14.	Papers presented over period January to May 2022 to NBN Co's executive committee regarding the progressive development of IOP23, comprising:	Various

	<ul style="list-style-type: none"> • IOP23 Exco Overview Strategic and Operational Guidance – Exco – 19 January 2022 • IOP23 Top Down Financial Guidance – Exco – 2 February 2022 • IOP23 IAP Build Profile - Exco – 9 February 2022 • IOP23 Business Products - Exco – 9 February 2022 • IOP23 New Developments - Exco – 9 February 2022 • IOP23 Usage & Demand Profile - Exco – 9 February 2022 • IOP23 Network Capacity Management - Exco – 23 February 2022 • IOP23 TC4 Base Management and IAP Take Up – Exco 2 March 2022 • IOP23 WFP Initial Submission – Exco – 2 March 2022 • IOP23 Network Lifecycle Planning - Exco – 9 March 2022 • IOP23 WFP [Final Submission] - Exco – 23 March 2022 • IOP23 TC4 Base Management and IAP Take Up - Exco – 23 March 2022 • IOP23 C&A Optimisation (Trucks Rolls Reduction Initiatives) - Exco – 30 March 2022 • Update on Initial FY23 Financial Position – ExCo – 13 April 2022 • IOP23 IER Prioritisation – Exco 13 April 2022 • RTC & Activations Changes – Exco - 13 April 2022 • IOP23 CX Update - Exco – 27 April 2022 • IOP23 Finance Overview & Kick Off - Exco – 10 May 2022 • IOP23 Key nbn strategic priorities + metrics - Exco – 10 May 2022 • IOP23 Customer Products & Marketing- Exco – 10 May 2022 • IOP23 Operations- Exco – 10 May 2022 • IOP23 Regional Development & Engagement [RDE] – Exco 11 May 2022 • IOP23 Network Engineering & Security [NES] – Exco 11 May 2022 • IOP23 Systems Engineering & Operations [SEO] – Exco 11 May 2022 • IOP23 Risk Profile – Exco – 11 May 2022 • Corporate Business Units - Exco – 11 May 2022 • Integrated Operating Plan FY22-26 Draft 10 – ExCo – 18 May 2022 	
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	<ul style="list-style-type: none"> Future Workforce update – ExCo 18 May 2022 	
15.	NBN ACCC Briefings (including NBN Co document number):	
	IOP23 Expenditure Overview (document “001”)	16 December 2022
	IOP23 – Network Roadmap (002)	17 January 2023
	IOP23 – Fixed Line Upgrade (003)	17 January 2023
	IOP23 - SEO (004)	13 January 2023
	IOP23 – Demand Forecast Methodology (005)	13 January 2023
	IOP23 – Labour Costs (006)	18 January 2023
	IOP23 – Regional Upgrades (007)	18 January 2023
	IOP23 – Truck Rolls (008)	19 January 2023
	IOP23 – New Developments (009)	19 January 2023
	IOP23 – Capacity (010)	19 January 2023
	IOP23 – Business Upgrades (011)	19 January 2023
	RFI – FY23 Opco Report Dec-22 Final (012)	15 February 2023
	RFI – FY23 Opco Report Jan-23 Final (013)	15 February 2023
	IOP23 – Risk Management Framework (018)	6 March 2023
	RFI – IT Investment Business Case (021)	24 March 2023
	RFI – Project Risk Guidelines (022)	24 March 2023
	RFI – BM 154 21 September 2021 11 Fixed wireless and satellite upgrades (023)	28 March 2023
	CR 12 14 June 2022 – Fixed Wireless and Satellite Upgrade Funding Agreement (024)	28 March 2023
	Additional information 21 April 2023 (025)	24 April 2023
	SMCG nbn HST Program Findings – Final (026)	24 April 2023
	Additional information UPDATED 26 April 2023 (027)	26 April 2023
	Board Paper 20th March 2023 DAA (028)	26 April 2023
	Fibre Connect, Minister’s Office briefing for 16 March 2023 (029)	26 April 2023
	RFI - Grex consolidated - nbn Response 26 April (030)	26 April 2023

	nbn Special Access Undertaking Variation 2023 - Expenditure Review – follow-up material, 7 July 2023 (031)	7 July 2023
	Annexure 1 - N2P On-demand and Forced migration scenarios 230630 (032)	7 July 2023
	Annexure 2 - Fixed Wireless High Speed Tiers, TechCo Presentation (033)	7 July 2023
	Annexure 3 - FW Extended TD-LTE Range (034)	7 July 2023
	Annexure 4 - nbn HST Program Followup SMCG Final Report (035)	7 July 2023
	Annexure 5 - Extract of risk summary tables June 2022 from Exco pack (036)	7 July 2023
	Annexure 6 - Extract of risk summary tables from 20230622 FWSUP Program Review	7 July 2023
16.	Expenditure review – comments from NBN Co	19 April 2023
17.	ACCC Draft Decision on November 2022 Proposed Variation	3 May 2023
18.	NBN Co August 2023 Proposed Variation and supporting documents	16 August 2023



EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
 - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
 - (c) the *Evidence Act 1995* (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
 - (d) Part 23 of the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”); and
 - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the *Evidence Act*).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the *Evidence Act*); and
 - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness¹ should, at the earliest opportunity, be provided with:
 - (a) a copy of this practice note, including the Code (see Annexure A); and
 - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

¹ Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the *Federal Court Rules*. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
 - (a) acknowledge in the report that:
 - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
 - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
 - (b) identify in the report the questions that the expert was asked to address;
 - (c) sign the report and attach or exhibit to it copies of:
 - (i) documents that record any instructions given to the expert; and

- (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

- 7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:
- (a) who should prepare any joint-report;
 - (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
 - (c) the agenda for the conference of experts; and
 - (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference (“**conference report**”).

Conference of Experts

- 7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.
- 7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:
- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
 - (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
 - (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.
- 7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
 - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

² Approved by the Council of Chief Justices' Rules Harmonisation Committee

- knowledge of the expert, been withheld from the Court;
- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
 - (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
 - (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

- 6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

- 7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique³ will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

³ Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
 - (a) the agenda;
 - (b) the order and manner in which questions will be asked; and
 - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
 - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
 - (c) the experts will take the oath or affirmation together, as appropriate;
 - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
 - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
 - (f) the judge will guide the process by which evidence is given, including, where appropriate:
 - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
 - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
 - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
 - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
 - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.
17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.