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NBN Co Limited Special Access Undertaking

Macquarie Telecom Pty Limited (“**Macquarie**”) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (“**ACCC**”) in relation to its supplementary consultation paper concerning the above.¹ Macquarie considers that NBN Co’s Special Access Undertaking (“**SAU**”) is an essential and fundamental element of the emerging NBN regulatory environment. As such, it is very important that the SAU is examined carefully before the ACCC makes its decision on whether to accept or reject the SAU.

This submission is set out in two main parts. The first addresses some broad matters relating to the SAU. The second responds to each of the consultation questions raised in the Consultation Paper.

Comments on Broad Matters

Macquarie wishes to raise three broad matters which are of concern:

- the inadequacy of regulatory oversight;
- the proposed 30 year term of the SAU; and
- the conferral of powers on the ACCC.

The Inadequacy of Regulatory Oversight

A key purpose of the SAU is to establish longer term certainty in relation to the terms of supply and acquisition of what are expected to be “monopoly communications services”. As with any statutory monopoly, there is a fundamental requirement that the monopoly be adequately regulated. Absent effective and transparent regulation, past experience demonstrates that poor consumer outcomes will inevitably prevail. With this basic proposition in mind, it is unacceptable that the SAU is framed with the effect that the ACCC, as economic and sector-wide regulator, is prevented from exercising on-going supervision of the activities of NBN Co.

¹ ACCC, NBN Co Limited Special Access Undertaking, Supplementary Consultation Paper, February 2012 (“**Consultation Paper**”)



That the SAU with its scant detail, if accepted, would prevent the ACCC from considering concerns raised in the future by access seekers about competition issues is, in and of itself, a compelling reason for the ACCC to reject the SAU. It cannot be the case that the long-term interests of end-users will be enhanced by a “set and forget” framework that the SAU proposes that effectively sidelines the industry regulator from ongoing oversight. It is not the case that the only way to ensure “regulatory certainty” for NBN Co is to have it shielded from ACCC oversight. Indeed, for the SAU to be “reasonable” and therefore capable of acceptance, it must include mechanisms for on-going effective review of its activities by the regulator. Indeed, absent such a mechanism, experience demonstrates that it is basically impossible for a monopoly provider to do anything over time other than operate to maximise its own commercial interests over and above those of its customers.

Accordingly, it is not reasonable for the ACCC to accept an SAU that does not set out clear and effective measures to ensure that the regulator has an on-going role to protect and promote the long-term interests of end-users. As it stands, the NBN Co SAU does not deliver this outcome and must therefore be rejected.

30 year Term of the SAU

Macquarie notes that NBN Co proposes that the SAU has an effective life of 30 years. It is presumed that such a term is proposed on the basis of providing access seekers with regulatory certainty and at the same time supporting NBN Co’s long-term view of its business activities. While Macquarie prefers regulatory certainty to uncertainty, it is of the view that 30 years is simply too long. This view is based on the dynamic nature of the communications sector which is driven by on-going technological developments. In addition, Macquarie’s concern with the 30 year term is exacerbated by inadequate provisions in the SAU regarding the review of the SAU and the discretion that is afforded to NBN Co regarding the review of particular aspects of the SAU together with the SAU’s inadequate regulatory oversight.

Conferral of Powers on the ACCC

Macquarie is concerned that Clause 6 of the SAU regarding regulatory recourse, essentially confers powers and functions on the ACCC in respect of the resolution of disputes. Such powers and functions are in relation to *inter alia*:

- timeframes for ACCC decision making;
- timeframes for parties to respond;
- substantiation of decisions; and
- publication of decisions.

Macquarie is concerned that the SAU proposes to dictate how the ACCC can make decisions and resolve disputes. The ACCC is an independent statutory body established under Part II of the *Competition and Consumer Act 2010* (“**CCA**”). While the ACCC may assist in the settlement of disputes between access seekers and access providers, nothing within the CCA compels the ACCC to make a determination within any time frame stipulated in a commercial agreement between two parties. Rather, the ACCC’s function as arbitrator should consider all relevant matters and carry out a diligent investigation within reasonable time constraints in accordance with its legislative authority. For this reason, Macquarie submits that any provisions in the SAU which seek to impose conditions on the ACCC’s decision making process should be removed from the SAU.



Responses to Consultation Questions

In this section, Macquarie has addressed each of the consultation questions as set out in the Consultation Paper. For ease of reference, each consultation question or related group of questions has been reproduced in a shaded text box which is then followed by Macquarie's response. The consultation questions are set out under section headings taken from the Consultation Paper.

2.1 Establishing an Effective Regulatory Framework

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

Macquarie is concerned that the relationship between the SAU and NBN Co's wholesale broadband agreement ("**WBA**") is not delivering outcomes that promote the long-term interests of end-users. As a fundamental framing document, the SAU should have been submitted to the ACCC for its scrutiny and approval prior to access seekers being asked to commit to a long-term access agreement with NBN Co. With the ACCC's approval of the SAU, access seekers would have the comfort and confidence to enter into the WBA. Instead, NBN Co expects access seekers to enter into the WBA while the SAU has not been approved by the ACCC.

As noted in the Consultation Paper, the SAU does not contain a set of indicative terms that may be negotiated with an access seeker. Macquarie would prefer that the SAU contains indicative terms thereby ensuring that they are scrutinised by the ACCC. Such terms would include, for example, billing arrangements and credit worthiness assessment. While these matters are raised in Schedule 11 of the SAU, they are not expressed as indicative terms nor are they in a substantive form which would be suitable for ACCC scrutiny. Furthermore, the SAU does not contain any effective measures to deliver future competitive outcomes absent regulatory oversight.

3.1 Regulatory Recourse Disputes

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

At the outset, it must be acknowledged that the full range and extent of disputes that might arise between an access seeker and the effective monopoly access provider, i.e., NBN Co, are impossible to comprehensibly list. As a result of this situation, it is not particularly productive to attempt a "crystal ball" exercise of describing each and every possible dispute whilst attempting to ensure that there is an effective response to deliver competitive outcomes to each and every scenario. Rather, Macquarie submits that it is better practise to establish a recourse mechanism that allows the regulator to consider, and if thought necessary, use the range of regulatory available tools (i.e., binding rules of conduct ("**BRC**") and access determinations) in accordance with the particular market circumstances as



presented. These tools would, of course, only be exercised following an open and transparent inquiry and after the usual practise of publishing draft and then final reasons for any action.

Given the profound absence of any such over-arching regulatory framework in the SAU, Macquarie has fundamental concerns with the scope of the regulatory recourse process as envisaged by the SAU. For example, the effect of Clause 6.1(a)(i) is that the regulatory recourse process will cease to apply once an access seeker enters into an access agreement. Given that it is the intention of access seekers to enter into access agreements, and that many have already done so, it is unacceptable that the regulatory recourse process has been developed, drafted and set out in the SAU when in effect it will never be used. Macquarie believes that the SAU should in principle set out provisions for a regulatory recourse process which will co-exist with an access agreement.

While outside the SAU, the ACCC has powers *inter alia* to make access determinations, such determinations are out-ranked by an access agreement under the current legislative framework. As such, it would seem that access seekers have little effective recourse to the ACCC once they have entered into an access agreement.

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

No. Macquarie does not believe that the regulatory recourse process as set out in Clause 6 will result in the effective resolution of disputes. This is because:

- Clause 6 does not have effect once an access seeker enters into an access agreement;
- it is impossible to fully establish up-front the range of competition issues that may potentially unfold over the coming years in light of the SAU; and
- an ACCC access determination or a BRC will not have effect where an access agreement exists.

Accordingly, Macquarie considers that the regulatory recourse process as proposed in the SAU is not reasonable.

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

Macquarie understands that save for “non-material refinements”, the SAU proposes that the ACCC must choose between the terms proposed by each party to a dispute. Macquarie does not consider this to be appropriate as it limits the ACCC’s capacity to resolve disputes in an effective manner. Macquarie believes that it would be inappropriate for the ACCC to be forced to make a choice between two proposals if it did not support the proposals of either party. Macquarie reiterates its concern that the SAU proposes to dictate how the ACCC can make decisions and resolve disputes.



Underlying this concern is the fact that the national broadband network is expected to become a fundamental building block in the operation of the Australian economy as it transitions to a broader digital economy. As such, disputes between access seekers and NBN Co will likely give rise to issues about broader competition and consumer outcomes. Decisions about these issues cannot be left to the regulator to simply choose between option A or option B. On the contrary, the regulator must be permitted to analyse the facts, consider the relevant positions of all parties and make decisions that are in the longer term interests of end users. Accordingly, for the SAU to be “reasonable”, it must ensure the ACCC is unfettered in exercising dispute resolution activities.

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

Macquarie is concerned that NBN Co’s commitment in Clause 6.1(h) may extend only to a commitment to amend the WBA as opposed to a commitment to amend an executed access agreement. Macquarie is strongly of the view that any ACCC decision should be reflected in both the WBA and in an executed access agreement.

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

No. Macquarie does not believe that the regulatory recourse dispute resolution provisions contained in NBN Co’s proposed SAU are consistent with the legislative criteria in section 152CBD of the CCA. In particular, Macquarie notes that under section 152CBD (2)(b)(ii), the ACCC must not accept an undertaking unless it is satisfied *inter alia* that the terms and conditions as they relate to the obligations referred to in section 152AXB, i.e., an obligation to supply if requested, are reasonable. Macquarie submits that it is not reasonable for the regulatory recourse dispute resolution provisions contained Clause 6 of the SAU to cease to have effect once an access seeker enters into an access agreement.

3.2 Term, Variation, Withdrawal and Extension of the SAU

Are the commitments in the SAU likely to satisfy the legislative criteria for the proposed term of the SAU? Please identify those commitments that do. Are there commitments in the SAU that are unlikely to satisfy the legislative criteria for the proposed term of the SAU? Please identify these commitments. Do the obligations in the SAU for NBN Co to review the SAU and give variations to the ACCC mean that the commitments in the SAU are likely to be reasonable and in the long-term interests of end-users for the proposed term?

As per its response to the previous question, Macquarie notes that under section 152CBD (2)(b)(ii), the ACCC must not accept an undertaking unless it is satisfied *inter alia* that the terms and conditions as they relate to the obligations referred to in section 152AXB, i.e., an obligation to supply if requested, are reasonable. Macquarie interprets this requirement of “reasonable” as the legislative criteria, i.e., the “legislative criteria” is that the provisions in the SAU must be reasonable.



Macquarie has interpreted “commitments in the SAU” as referred to in the above consultation question to mean the commitments in Clause 7.3(b) of the SAU regarding a review of aspects of the SAU. That is, the consultation question is concerned with whether these review commitments satisfy the legislative criteria of being reasonable.

Macquarie considers that several matters concerning the review of the SAU cannot be considered reasonable. These are discussed below.

- SAU Review Period

It is likely that the substantive review of the SAU will not occur prior to 30 June 2027 unless the NBN is declared to be built and fully operational before this date. Macquarie is of the view that the proposed timing of the SAU review is not reasonable and that such a review should be conducted with certainty within a shorter timeframe. Macquarie suggests that a review which is triggered five years following the ACCC’s acceptance of the SAU would be appropriate.

It may appear trite, however, it is the case that the markets in which NBN Co is to be a substantial player are yet to be fully understood. As such, it is in Macquarie’s view appropriate from a public policy perspective for the independent regulator to be given a central role to determine future competition and consumer market matters.

- Scope of the SAU Review

The review of the SAU will encompass the customer engagement process and the Product Development Forum (“PDF”) process and other matters as specified in Schedule 9. Other specified aspects of the SAU as specified in Clause 3.3(b) may be reviewed at the discretion of NBN Co, for example, price control arrangements and reporting arrangements. Macquarie is of the view that NBN Co should commit to review the items specified in Clause 3.3(b) as these are important matters particularly given that NBN Co will be the sole supplier of wholesale services. That is, the review of these matters should be mandatory rather than discretionary. If not mandatory, there is a concern that a review of these important matters might never take place.

- Independence of the Review

The review of the items specified in the SAU will be conducted by NBN Co. This is unreasonable. Macquarie is concerned that the integrity of any such review would be compromised if NBN Co alone conducts the review. Moreover, it is not clear how key interested parties, i.e., access seekers and the ACCC would have any role in the SAU review process. Macquarie submits that it is simply not reasonable that NBN Co alone would review, for example, its approach to the prudence of its capital and operating expenditure.

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

No. Macquarie does not believe that the good faith review obligation in Clause 1.2 is sufficient to address its concerns with the SAU review framework as discussed in response to the previous consultation questions. Macquarie reiterates its concern about the integrity of any review of the SAU which is undertaken by NBN Co alone.



4.1 Common Approaches to the Operation of the SAU

Are there any significant issues caused by references to 'the WBA' or other documents in the SAU? Have references to 'the WBA' or 'Access Agreements' been used appropriately in the SAU? Have the terms 'Access Seeker' and 'Customer' been used appropriately in the SAU?

The Consultation Paper notes that the references in the SAU to WBA / Access Agreements and Access Seeker / Customer may in some instances be ambiguous and lead to confusion. Macquarie agrees with this position and suggests that the use of these terms should be reviewed by NBN Co with a view to eliminate any ambiguity. Of some concern to Macquarie is the possibility that NBN Co may reflect the outcome of ACCC decisions in the WBA but not in executed access agreements.

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

The SAU is essentially a statement of commitments that NBN Co is willing to give to access seekers. *Prima facie*, Macquarie is of the view that recitals or assertions of fact in the SAU can assist in understanding the strength and context of the commitments that NBN Co is prepared to give. However, such recitals or assertions of fact should not be open to interpretation.

4.2 Common Approaches Relating to Obligations

Are there any other systems, documents and processes that should be included in the SAU? Are the features or qualities that NBN Co has specified for these systems, documents and processes appropriate?

In terms of process, the SAU should adopt a regulatory oversight framework which ensures that BRCs and access determination decisions as made by the ACCC flow through as amendments to the SAU. Further, with respect to other systems, documents and processes to which NBN Co has committed in the SAU to develop, Macquarie is concerned that there is no evident means by which they may be scrutinised by the ACCC. Macquarie submits that the ACCC should have a role in ensuring that these systems, documents and processes are appropriate and importantly not detrimental to the interests of access seekers.



Has NBN Co proposed to undertake consultation at appropriate times in the SAU? Do the consultation processes cover the issues that are likely to require input from access seekers, the ACCC or the general public? Are the consultation processes set out adequate? Do they give interested parties sufficient time to consider and comment on issues? Do the consultation processes sufficiently set out the obligations of NBN Co to communicate/provide reasons for its decisions? Is the extent to which the SAU requires NBN Co to take into account material provided through consultation processes sufficient?

As noted above, in light of the unknown nature of possible future competition concerns arising from NBN Co decisions, it is impossible to ensure reasonable competition outcomes via the SAU unless the ACCC is provided an effective on-going and uninhibited role. As such, Macquarie is very concerned with the adequacy of consultation processes as set out in the SAU. Consultations are confined to only certain matters and there is no description of the proposed consultation processes. In addition, Macquarie believes that in principle interested parties should be consulted on matters which may affect them.

In this context, Macquarie submits that the SAU should address consultation with interested parties more broadly in terms of a commitment to consult on appropriate matters and the process of consultation that would apply. The consultation process should also address the extent to which NBN Co takes into account material provided through consultation, the publication of consultation material and the communication of supporting reasons for NBN Co decisions. Clearly the ACCC must have an on-going role under the SAU to deliver competitive outcomes.

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

Yes. As noted above, Macquarie is strongly of the view that the ACCC should have greater oversight of consultation processes within the SAU. The SAU is virtually silent on consultation processes let alone on the opportunity for the ACCC to assess whether they have been effective. As per its response to the previous group of consultation questions, Macquarie submits that the SAU should address consultation with interested parties more broadly. As it stands, the SAU does not deliver a reasonable oversight framework for NBN Co's monopoly activities and as such must be rejected.

Do the publishing obligations in the SAU provide sufficient detail and types of information? Is there other information that access seekers or other members of the public would require in relation to the supply of the NBN Access Service? Is the proposed timing and location of publication appropriate?

Macquarie notes that the SAU sets out a variety of publishing obligations and commitments which will apply to NBN Co. For example, NBN Co is committed to publish:

- the NBN Prudency Implementation Paper (Clause 5.8 Schedule 8);
- formal submissions to a product idea (Clause 8.2 Product Development Forum Processes); and
- the Product Roadmap (Clause 2, Schedule 6).



While Macquarie welcomes NBN Co's commitment to publish such information, Macquarie is concerned that the SAU gives no commitment as to where this information will be published (such as on NBN Co's website), the format of its publication or when such information might be published (such as on a quarterly basis or within seven days of its receipt). Accordingly, Macquarie suggests that the publication obligations in the SAU are not reasonable and should be tightened.

Macquarie is also concerned that there is no obligation in the SAU for NBN Co to publish certain information which would be of interest to access seekers. For example, Macquarie notes that there is no obligation in the SAU for NBN Co to publish information concerning:

- the prices for the services that it offers; and
- the performance and quality of its services.

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

Macquarie reserves its position on this matter.

5.1 NBN Access Service

What services supplied by NBN Co fall outside the scope of this service description? Are there any services supplied by NBN Co for which this is unclear? Does the SAU provide terms and conditions of access in relation to all the services which NBN Co supplies that downstream users require in order to supply carriage services or content services? Does the service description in the SAU sufficiently describe the service that NBN Co purports to supply? Are there any missing essential elements in the service description? Does the service description in the SAU accurately describe the service? Are there any elements of the service description that are unclear or ambiguous? How does the service description for the NBN Access Service compare against the principles that the ACCC has previously specified for service descriptions? Is the service description sufficiently technology neutral to remain applicable as technology changes in the future, particularly given the proposed term of the SAU? Is an appropriate interconnection protocol specified in the service description? How should appropriate mechanisms for handling congestion in shared network elements be specified? What are appropriate mechanisms? Should a stand-alone low committed information rate product suitable for voice-only services be supplied?

Macquarie has several concerns relating to NBN Co's commitments in the SAU with regard to the NBN access service. These include:

- the detailed description of the NBN access service is not contained within the SAU and is therefore outside the purview of the ACCC's scrutiny; and
- there are no descriptions in the SAU of the ancillary services which would necessarily be required by access seekers in order to provide services to end-users, such as equipment installation, equipment repair, equipment removal, physical access to POIs etc.



Macquarie is also concerned by the bundling of NBN Co's access service components. For example, an access seeker is not permitted to order a UNI-V on a standalone basis as per Clause 3.3 of the Product Catalog Schedule to the WBA. This would appear to prevent access seekers from self-supplying services and seeking competitive services.

5.2 Product Components

Is the 'Product Component' construct reasonable? What are the effects of the product component-based product construct on downstream markets in which carriage services or content services are supplied? Is the definition of 'Product Component' to include product components other than the AVC, CVC, UNI and NNI appropriate? What is the effect of including product components identified within the Initial Product Roadmap or offered for supply by NBN Co at the date of acceptance of the SAU in the definition of 'Product Component'? Does the limitation that the NBN Access Service is only to be supplied through the 'Product Components' adversely affect the supply of the NBN Access Service to access seekers? Are the definitions of the AVC, CVC, UNI and NNI satisfactory and complete? Are the Clauses around product components likely to remain reasonable for the proposed term of the SAU?

Macquarie has several concerns relating to NBN Co's commitments in the SAU with regard to the NBN product components. These include:

- the detailed description of the product components is not contained within the SAU and is therefore outside the purview of the ACCC's scrutiny; and
- whether NBN Co is committed to provide additional, i.e., new and varied product components given that its commitment at Clause 1.3 of Schedule 3 is subject to the WBA which is outside the purview of the ACCC's scrutiny.

5.3 Ancillary Services

Are the definitions of the ancillary services accurate and complete? Are there ancillary services supplied by NBN Co which would fall outside the scope of the definition but which should be included? What are the consequences of the exclusion of the ancillary services, for example, the Facilities Access Service, from the NBN Access Service? Is it sufficiently clear which commitments in the SAU do and do not apply to ancillary services?

Macquarie is concerned that the SAU does not contain any detailed descriptions of the ancillary services. Accordingly, such descriptions are not subject to the ACCC's scrutiny. It is therefore not clear what commitments NBN Co makes in relation to such services. Moreover, the absence of details concerning ancillary services is likely to impact the setting of appropriate charges for these services.



5.4 Service Levels

Are the commitments in the SAU with regard to service level regimes sufficient to ensure that the SAU promotes the long-term interests of end-users and is reasonable for the proposed term of the SAU? Should service levels be specified in the SAU for the NBN Access Service? Is the process described in the SAU appropriate for the development of a service level regime? Are the quality criteria specified by NBN Co (network performance, service delivery, communication with customers and planned and unplanned event management) sufficient to define the service level regime for the fibre network? Are there additional criteria that should be specified? Should the service level regime also apply to the wireless and satellite networks?

Macquarie is concerned that the NBN access service description does not include service quality standards or performance level standards. While it is noted that NBN Co commits to introducing a service level regime for the fibre network, this is not, in Macquarie's view sufficient. In particular, it is not clear whether this service level regime would be subject to any ACCC oversight or access seeker review. Macquarie is of the view that the SAU should specify service levels for the NBN access service and that the actual performance of the service against such service levels should be monitored by NBN Co and reported to the ACCC.

5.5 Product Development and Withdrawal

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

No. Macquarie has concerns with many aspects of product development as set out in the SAU which would constrain effective product development and to that extent would not promote efficient investment in network capacity and network upgrades. Such concerns are addressed in Macquarie's responses to the consultation questions in this section which follow.

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

The provisions of Schedule 6 Product Development and Withdrawal do not apply to product components covered by or contemplated within the Initial Product Roadmap. Macquarie notes that the Initial Product Roadmap comprises a very wide range of product releases which in turn includes a wide range of product components. *Prima facie*, the development, variation and withdrawal processes as set out in Schedule 6 do not apply in respect of a wide range of product components. Accordingly, Macquarie is concerned by such a large carve-out of product components. This begs the question "To what does Schedule 6 intend to apply?"



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

Macquarie understands that the SAU draws a distinction between customers and access seekers. The essence of the distinction is that customers are a subset of access seekers who are subject to an access agreement. That is, access seekers consist of (i) customers who are subject to an access agreement and (ii) other persons who are not subject to an access agreement presumably because while they may have requested services they are not yet subject to an access agreement.

Macquarie is not concerned that only customers would be able to participate in the Product Development Forum. This is because those participating in the PDF would be those who would have experience in the use of NBN Co's services. The corollary is that those who would be excluded from the PDF would be those who have not had experience in the use of NBN Co's services. Moreover, there would appear to be no barrier for those access seekers who are not customers to contribute to the PDF via the Public Ideas Forum.

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

Clause 4(a) of Schedule 6 essentially defines "minor" as having "no material adverse impact on Customers". Inevitably, determining whether a product variation or enhancement is minor requires a judgement to be made in the circumstances in which the variation or enhancement is raised.

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

Macquarie notes that Clause 3.4 of Schedule 6 sets out 15 criteria for NBN Co to have regard to when determining whether to develop a product idea. Macquarie considers this criteria to be workable subject to an over-arching framework of ACCC assessment of future issues and provided that NBN Co applies this criteria at all times expeditiously. Macquarie is, however, concerned by the degree of discretion that NBN Co is permitted by the SAU with regard to product development. In the extreme, the SAU would permit NBN Co to choose not to develop any product ideas.

Do the processes by which NBN Co will determine whether to develop, and consult with customers on, product ideas provide an appropriate balance between the interests of NBN Co and its customers? Are the PDF Processes likely to provide for effective and transparent engagement between NBN Co and its customers regarding product development?

Macquarie has some concerns with the degree of discretion that NBN Co has and could use to stifle product development. However, given that NBN Co is a wholesale-only operator it will have an incentive to develop products and services in line with the demands of access seekers. This is, of course, in stark contrast with Telstra in its role as a provider of wholesale services. Leaving aside the carve-out of the product components covered by or contemplated within the Initial Product Roadmap, Macquarie is broadly satisfied with the



processes by which NBN Co proposes to develop product ideas and to consult with customers. Macquarie does, however, remain concerned by the discretion that NBN Co is afforded in relation to this matter.

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

As noted in the Consultation Paper, there does not appear to be any dispute resolution process in the SAU that would apply to disputes arising in relation to the product development process. Macquarie believes that this must be addressed by revisiting in general the dispute resolution processes in the SAU.

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

Macquarie has a concern with Clause 5.6 of the PDF Processes which opens the way for NBN Co to have additional rights to use and disclose confidential information. *Prima facie* this Clause does not balance rights and obligations between NBN Co and customers and as such is, in Macquarie's view, not reasonable.

Macquarie submits that the absence of the ACCC's scrutiny of the multiparty agreement and the potential imbalance of rights and obligations between NBN Co and customers would discourage customers participating in the PDF.

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

Macquarie does not consider the review process for the customer engagement and Product Development Forum Processes to be appropriate. This is because of the discretion that NBN Co may exercise over the review process. Macquarie submits that all of the review provisions in the SAU need to be aligned. In particular, as with usual market inquiry processes, a full and open process ought to be adopted by NBN Co.

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

Macquarie notes that the provisions of Schedule 6 Product Development and Withdrawal do not apply to product components covered by or contemplated within the Initial Product Roadmap. As such, it is uncertain whether NBN Co would adopt any process in relation to the potential withdrawal of a wide range of products supplied by NBN Co. Macquarie does not believe that such an uncertain situation would be an appropriate balance between the interests of NBN Co and its customers.



There is little detail in the SAU about how NBN Co proposes to consult with customers concerning the withdrawal of products. Macquarie considers that NBN Co should be required to consult with customers particularly with regard to the factors listed at Clause 5.3(b) of Schedule 6.

Should product withdrawal be subject to dispute resolution procedures?

Macquarie considers that the provisions in the SAU concerning product withdrawal are not in keeping with a reasonable over-arching framework. Macquarie believes that product withdrawal should be subject to dispute resolution procedures. This is because the withdrawal of a product by NBN Co has the potential to have a major detrimental impact on customers and any customer should have the right to have an ensuing dispute dealt with in a transparent and expeditious process.

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

No. Macquarie does not believe that the commitments in the SAU product development, variation and withdrawal are appropriate and in the long-term interests of end-users for the proposed term of the SAU. Macquarie is of this view on the basis of various concerns which have been expressed in responses to the preceding consultation questions including:

- the carve-out of the wide range of product components from the provisions of Schedule 6;
- no over-arching regulatory oversight;
- the absence of dispute resolution processes; and
- NBN Co's discretion concerning the review process.

6.1 Price Structures

What are the potential impacts of NBN Co's proposed price structures on downstream markets? Will NBN Co's proposed price structures promote the efficient use of and investment in infrastructure? Are the proposed price structures reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Are the proposed price structures reasonably necessary to achieve uniform national wholesale pricing?

NBN Co's price structures are fundamentally important to the success of broadband deployment and usage in Australia. NBN Co's price structures will also impact on how retail, wholesale and downstream markets will develop.

Macquarie notes that NBN Co has adopted a two-part pricing model for its key product components, i.e., a fixed charge for the AVC component and a usage based charge for the CVC component. Macquarie has some concerns with the pricing of the CVC component, in particular:



- the requirement as per NBN Co's Product and Pricing Overview to purchase the CVC in minimum lots of 100 Mbps which creates for access seekers an effective barrier to entry;
- the specification of CVC pricing conditions in the Product and Pricing Overview which is outside the purview of the ACCC's scrutiny; and
- the likelihood that the cost of the CVC per user will actually increase as end-user demand for bandwidth increases which does not allow access seekers to reach scale economies.

At a more general level, Macquarie is concerned by the absence of any monitoring mechanism by which the appropriateness of NBN Co's pricing structure can be assessed and, if necessary, provide an opportunity for corrective action to be taken. This emphasises the need for a more effective monitoring and reporting regime to be introduced into the SAU.

6.2 Initial Prices

Is the scope of the initial prices included in the SAU likely to provide sufficient certainty to access seekers to make efficient investments? Should the SAU specify initial prices for a broader range of NBN Co's products? Are the maximum regulated prices for NBN Co's price controlled offers likely to be reasonable? In particular, do these prices decrease the possibility of price shocks for access seekers and end-users in migrating to the NBN? Is the 'anchor' effect of the price controlled offers likely to provide reasonable certainty to access seekers over prices for other products NBN Co intends to offer at the commencement of the SAU?

Macquarie notes that the SAU sets maximum regulated prices for a range of NBN Co services which will apply for an initial five year period. Macquarie is, however, concerned by Telstra's NBN pricing plans which were recently announced. Of particular concern is Telstra's decision not to offer services which would require it to acquire from NBN Co the basic 12/1 Mbps AVC. This means that the largest access seeker and market leader will not acquire the basic AVC. On this basis, Macquarie believes that the scope of the services to which the initial prices apply should be broadened to include a much wider range of AVCs.

Macquarie is also concerned by the limited extent to which details of prices for different product components and ancillary services are set out in the SAU. Such details appear to be set out in the Product Catalog which is a schedule to the WBA and therefore outside the scope of the ACCC's scrutiny.

Does the setting of prices for new product components and product features provide a reasonable balance between the interests of NBN Co and its customers? Should the SAU set out principles and/or a more detailed process by which NBN Co will set prices for new products? Should the ACCC have a role in relation to setting initial prices for new products? Is the 'anchor' effect of currently supplied products likely to provide reasonable certainty to access seekers over the initial prices for new products introduced throughout the proposed term of the SAU?

Macquarie is of the view that provided there is a sufficient base of "anchor" services, NBN Co may be afforded some flexibility in the setting of prices for new services. However, it must be established that the ACCC has a more general on-going oversight concerning the setting of



prices for NBN Co's services. The degree of such oversight may be eased if NBN Co was to commit to a relatively detailed price setting process which should be set out in the SAU.

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

No. NBN Co's commitment to consult with customers on prices is limited to prices for new product components and associated product features through the product development forum. This limitation means that NBN Co will not consult with customers on prices for the wide range of products and components which are captured by the Initial Product Roadmap because such products and components are outside the scope of the PDF.

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

No. Macquarie understands that the dispute resolution processes as set out in Clause 6 of the SAU will cease to have effect for a given access seeker once the access seeker enters into an access agreement with NBN Co. As such, the dispute resolution processes would not be likely to ensure that prices are set reasonably over the proposed term of the SAU.

6.3 Price Controls

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

Macquarie has concerns with several aspects of the price controls in the SAU. As noted above, such concerns include:

- the relatively limited scope of the price controlled offer, i.e., this should be expanded to include a wider range of AVCs;
- the limited on-going oversight afforded to the ACCC on setting prices for NBN Co's services;
- the limited scope of NBN Co's consultation with customers on price setting;
- the carve-out of price setting from the dispute resolution processes; and
- NBN Co's sole discretion to review the price control arrangements which apply to the services it supplies.

On the basis of these concerns, Macquarie believes that access seekers' certainty to make efficient investments is significantly compromised.



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

It seems remarkably inconsistent that NBN Co seeks to reserve a right to increase prices following regulatory review yet it consistently refuses its customers to have a like right. This again demonstrates the fundamental unreasonableness of the SAU and the need for it to be rejected by the ACCC.

Of course, in principle, Macquarie accepts that NBN Co should seek the ACCC's approval to increase prices by an amount greater than the price controls would ordinarily allow so long as access seekers have a concomitant right to seek reductions. Macquarie is, however, very concerned that the SAU would contemplate putting restrictions or conditions on the ACCC's decision making powers. That is, the ACCC's powers and functions are defined by legislation and the SAU should not dictate its scope of operation.

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

Macquarie does not consider the process for NBN Co to review the price controls at the SAU review period to be reasonable. This is because such a review is commenced and undertaken at NBN Co's sole discretion. Macquarie submits that this is an outrageous proposition and again reflects the underlying lack of an over-arching regulatory framework. To address this imbalance, Macquarie believes that the ACCC should have the ability to initiate a review of the price controls, particularly in response to concerns which may be raised by access seekers.

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

Macquarie reserves its position on this matter.

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

Macquarie reserves its position on this matter.



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

Macquarie has a concern with the treatment of bundles as set out in the SAU. In particular, Macquarie is concerned with NBN Co's apparent discretion to decide alone the construct of bundles. This could, for example, enable NBN Co to offer services in bundles which may result in access seekers being forced to buy components of a bundle that they do not require.

6.4 Long-term Revenue Constraint

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

Macquarie accepts in principle NBN Co's long-term revenue constraint ("LTRC") methodology to the extent that it enables NBN Co to recover its prudently incurred costs and enables initial prices to be set at levels which the market can bear. However, Macquarie is concerned that the LTRC methodology is not supported by any economic modelling of how it may work. Macquarie believes that such modelling would be used *inter alia* to identify the points in time when the "initial cost recovery account" reaches its maximum and when it is fully exhausted. This would allow appropriate monitoring and control of NBN Co's prices. Unless the LTRC methodology is supported by appropriate degree of economic modelling, Macquarie considers that the methodology cannot be considered reasonable.

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

Macquarie considers that the LTRC methodology encompasses all relevant costs and revenues. That is, the cost and revenue items which are included in the methodology appear to be appropriate and reasonable.

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

Macquarie considers NBN Co's approach to deferring cost recovery through the proposed initial cost recovery mechanism is reasonable. This approach gives NBN Co the flexibility to set initial prices at levels in the early years of NBN Co's operations at levels which the market can bear. The consequence is that prices must be greater than costs in later years to enable the initial losses to be recovered. As noted above, how this is expected to work should be supported by appropriate economic modelling.

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

The LTRC will not allocate costs and revenues to specific services, rather total costs are matched to total revenues. Macquarie is not concerned with this because the intention of the



LTRC is to set affordable prices across a range of services rather than setting economically efficient prices for each service. Moreover, any cost and revenue allocation process which is necessary to allocate costs between services is necessarily subjective and incurs additional cost.

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

Macquarie understands that NBN Co proposes to recover an annual allowance for construction-in-progress costs. NBN Co's rationale for this is that it accounts for financing costs. Macquarie believes that this approach is not appropriate on the basis that construction-in-progress costs are capital costs and should not be treated as operating costs. That is, construction-in-progress cost should be treated as part of the capital investment which should be recovered by NBN Co over successive accounting periods.

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

Prima facie, the methodologies for determining depreciation and tax allowances as set out in Schedule 7 appear to be reasonable. However, Macquarie is concerned with the following:

- the frequency by which change occurs in tax laws and how the SAU will reflect anticipated changes; and
- NBN Co's discretion to review and make changes to these methodologies.

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

Macquarie is of the view that NBN Co's LTRC methodology should be supported by economic modelling. Such modelling should include the following:

- the balance of the "initial cost recovery account" over successive accounting periods;
- how and when the LTRC acts as a constraint on price increases for price controlled offers;
- the impact of different treatments for construction-in-progress costs; and
- the impact on the revenue requirement arising from changes in assumptions relating to estimated costs and demand for services.

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

No. As noted above, Macquarie is of the view that NBN Co's LTRC methodology should be supported by economic modelling.



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

Macquarie considers that two key aspects of the long-term revenue constraint methodology are reasonably necessary to achieve uniform national wholesale pricing. These are:

- the mechanism to defer costs and to subsequently recover them over time; and
- the matching of total cost to total revenue as opposed to cost and revenue allocation to specific services.

These aspects give NBN Co flexibility to set uniform national pricing by allowing cross-subsidies across different time periods and across different services.

6.5 WACC

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

Macquarie notes the simplicity of NBN Co's approach to the WACC which is calculated as the risk free rate plus a 350 point premium. In particular, it is noted that the risk free rate is measured as the mean yield on 10 year Commonwealth Government Securities. Macquarie is, however, concerned about the following aspects of NBN Co's approach to the WACC:

- the approach results in a higher WACC than would otherwise occur which seems at odds with NBN Co's public ownership and NBN Co's role as a legislated monopoly; and
- the absence of a mechanism for the periodic independent review of the WACC.

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

As noted above, Macquarie is concerned that there is a risk premium applied to the risk free rate given NBN Co's public ownership and NBN Co's role as a legislated monopoly. These factors would suggest that there is no basis for a risk premium to be applied to derive an appropriate WACC for NBN Co. A periodic review mechanism over the term of the SAU would help to ensure that the value of a risk premium is appropriate, i.e., the risk premium could be valued at zero.

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

Macquarie reserves its position on this matter.



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

Macquarie reserves its position on this matter.

Is it reasonable that the SAU does not set out a process for periodically reviewing the WACC approach within the SAU period? Is the process for NBN Co to review the WACC approach at the SAU review period likely to ensure NBN Co's WACC remains reasonable over time?

Macquarie believes that the WACC should be periodically reviewed, for example, every three years over the SAU period. Moreover, such a review should not be at the sole discretion of NBN Co. At the least, such a review should be subject to ACCC oversight.

6.6 Prudency

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

Macquarie has concerns with many aspects of the prudency mechanisms which are proposed by NBN Co. These concerns include:

- the wide scope of the deemed prudent expenditure;
- NBN Co's sole discretion to conduct a review of its approach to prudency of expenditures;
- the limited scope for ACCC oversight;
- the limited scope for customer engagement in the prudency mechanisms; and
- the focus on "historical" as opposed to "forecast" expenditure and the impact this may have on NBN Co's incentives.

Given these concerns, Macquarie believes that the prudency mechanisms as proposed by NBN Co cannot be substituted for ACCC oversight.

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

Macquarie reserves its position on this matter.

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

Macquarie understands that NBN Co's proposed customer engagement model does not apply to the on-going level of capital expenditure or to discrete projects undertaken by NBN



Co. While Macquarie would welcome greater customer engagement in the prudency mechanisms *per se* it would prefer that the ACCC had greater oversight of this process.

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

Macquarie understands that the relevant expenditure principles are that NBN Co will ensure “value for money” and the “lowest total cost of ownership”. While Macquarie has no concerns with such principles *per se*, they are not comprehensive and they are not sufficient to give access seekers comfort that NBN Co’s expenditures will be prudent. Macquarie reiterates that it would prefer that the ACCC had greater oversight of this process.

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

Macquarie is of the view that the “deemed prudent” categories are too broadly defined. Such broad categories would appear to carve-out a large part of NBN Co’s expenditures from prudency scrutiny. Accordingly, Macquarie does not consider the “deemed prudent” categories to be reasonable. Whether or not such categories exist because NBN Co was instructed to incur them or that they reflect pre-existing commitments has no bearing on whether the costs incurred are reasonable.

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

Macquarie understands that the annual compliance process essentially involves NBN Co’s chief financial officer (“**CFO**”) to certify that NBN Co’s capital and operating expenditure of the preceding year has been prudently incurred. While a certification by such a responsible company officer is important, Macquarie is not satisfied that this necessarily gives comfort that NBN Co’s capital and operating expenditure has in fact been prudently incurred. Macquarie’s concerns with the annual compliance process include:

- an absence of specified criteria that the CFO will apply in making the certification;
- apparently no independent review or audit to assess the prudency of NBN Co’s capital and operating expenditure;
- the historical view of prudently incurred expenditure, i.e., there is no consideration of forecast expenditures which might avoid excessive or inefficient expenditure being incurred in the first place;
- apparently no content in the annual report other than the CFO’s certification; and
- apparently no action or consequence if the CFO cannot certify that NBN Co’s capital and operating expenditure has been prudently incurred.



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

No. Given the concerns that it has with the prudency mechanisms as discussed above, Macquarie does not believe that the prudency mechanisms will be effective in encouraging prudent expenditure over the proposed term of the SAU. Of particular concern is the following:

- a potentially large carve-out of incurred expenditure from prudency scrutiny;
- the historical view of prudently incurred expenditure; and
- the apparent absence of consequence if NBN Co's capital and operating expenditure is not prudently incurred.

Macquarie does not believe that the processes for reviewing the prudency and customer engagement processes ensure that they will remain effective over time. This is because:

- NBN Co has sole discretion to conduct a review of its approach to the prudency of its expenditures; and
- there is limited scope for customer or ACCC engagement in the prudency mechanisms.

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

The achievement of uniform national wholesale pricing ("**UNWP**") requires NBN Co to have flexibility to set prices which may involve cross-subsidisation between different geographies, services, customers and time periods. Macquarie does not see a link between the prudency mechanisms and UNWP.

7.1 WBA Development and Access Agreement Change Management

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

Macquarie has no concern *per se* with the SAU containing commitments around the scope of the WBA. However, as discussed above in section 2.1, Macquarie would prefer that the SAU contains indicative terms and conditions which would be scrutinised by the ACCC. This would then give access seekers comfort and confidence to enter into the WBA.

Are the consultation obligations in the SAU relating to development of the WBA reasonable? Should they apply more broadly, to 'Access Seekers' and not just 'Customers'? Is it sufficiently clear to whom and in what circumstances these commitments apply?

Macquarie supports NBN Co's commitment to consult with "customers" on the development of the WBA. However, this seems disingenuous given that "customers" by definition are



persons which have already entered into the access agreements. That is, a person must first sign the WBA and would then be entitled to have NBN Co consult with them. Macquarie is of the view that consultation obligations should apply more broadly to “access seekers”. Macquarie considers that concerns with the WBA consultation process would be obviated if the SAU were to contain indicative terms and conditions which would be scrutinised by the ACCC.

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

Macquarie is concerned with the ambiguity in the SAU concerning NBN Co’s notice to Customers of changes to their access agreements. A 60 business day notice applies if the WBA does not have a change process specified. *Prima facie*, this would appear reasonable but what is “reasonable” would depend to some extent on the change that is being made. On the other hand, if the WBA does have a change process specified, the notice period would be in accordance with that process if there is in fact a specified notice period. As such, it is not possible to assess whether a notice period of changes to access agreements is reasonable when it is not specified. Macquarie reiterates that its concern would be obviated if the SAU were to contain indicative terms and conditions which would be scrutinised by the ACCC.

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

No. If the WBA does not have a change process specified, there is no specified timeframe for consultation to occur. On the other hand, if the WBA does have a change process specified, the consultation would be in accordance with that process if there is in fact a specified consultation framework. As such, it is not possible to assess whether a consultation process is reasonable when it is not specified. Macquarie reiterates that its concern would be obviated if the SAU were to contain indicative terms and conditions which would be scrutinised by the ACCC.

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

Macquarie supports NBN Co’s obligation to reasonably consider any feedback given by a customer. However, this only applies in the situation where the WBA does not have a change process specified.

Of considerable concern to Macquarie is NBN Co’s obligation to ‘reasonably consider’ any feedback given by the ACCC. As noted above, under the section headed “Comments on Broad Matters”, Macquarie is strongly of the view that NBN Co should be obliged to make changes to existing access agreements (and not merely the WBA) arising from any of the following:

- an ACCC approved SAU;
- an ACCC access determination; and



- a BRC promulgated by the ACCC.

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

No. Refer to Macquarie's response to the previous question.

Are the 'Changes to Access Agreements' provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Please outline those aspects of the provisions that you consider to be reasonable and/or unreasonable. Is it sufficiently clear to whom and in what circumstances these commitments apply?

No. Macquarie does not believe that the "changes to access agreements" provisions are reasonable nor are they likely to remain reasonable over the proposed term of the SAU. This is essentially because the SAU does not contain definitive terms for such provisions. That is, Clause 14.3(c) allows NBN Co to set out a change process in the WBA which would *prima facie* override the change process set out in Clause 14.3(d). In addition, as noted above, NBN Co should be obliged to make changes to an access agreement arising from any of the following:

- an ACCC approved SAU;
- an ACCC access determination; and
- a BRC promulgated by the ACCC.

Unless NBN Co is so obliged, Macquarie submits that there is no effective regulatory oversight on changes that NBN Co may make to access agreements.

7.2 Dispute Management

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

No. Macquarie is concerned that the SAU does not contain sufficient detail to ensure that reasonable contractual dispute resolution processes will be able to be agreed to in access agreements. Merely stating that NBN Co commits to ensuring that the WBA will contain certain processes is, in Macquarie's view, insufficient. Macquarie is also concerned that there are no details in the SAU regarding the process by which NBN Co and the relevant customer may agree to resolve a dispute through expert determination or mediation.



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

No. The SAU cannot ensure that access seekers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias when the SAU does not set out sufficient detail of the proposed dispute resolution process. Macquarie reiterates its view that dispute resolution processes in the SAU require a review.

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

No. Macquarie reiterates that there is insufficient detail in the SAU on dispute resolution terms and conditions for it to be considered reasonable. For example, the process by which NBN Co and the relevant customer may agree to resolve a dispute through expert determination or mediation. This means that the process is ambiguous and potentially subject to the discretion of NBN Co.

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

No. The SAU merely commits NBN Co to ensure that the WBA will contain provisions concerning the nomination and appointment resolution advisors. As such, the SAU contains insufficient detail which means that the process is ambiguous and potentially subject to the discretion of NBN Co. Accordingly, in Macquarie's view, this is not reasonable.

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

Macquarie has no concerns *per se* with the SAU adopting the arbitration process from the *Commercial Arbitration Act 2010 (NSW)*.

Is the proposed process reasonable, and is it likely to remain reasonable over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances these commitments apply?

Macquarie does not consider that the dispute resolution process as set out in the SAU is reasonable. This because there is insufficient detail of the process specified in the SAU which means that the process is ambiguous and potentially subject to the discretion of NBN Co. Macquarie believes that its concern with the dispute resolution process would be obviated if the SAU were to contain more details which would be scrutinised by the ACCC.



7.3 Default Management

Is NBN Co's proposed commitment in relation to default management reasonable, and likely to remain reasonable over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances the commitment applies?

Macquarie is of the view that NBN Co's commitment to default management is not reasonable and will remain unreasonable over the proposed term of the SAU. This view is based on the ambiguity of Clause 12 of Schedule 11. In particular, Macquarie's concerns include the following:

- Clause 12 only applies if the WBA gives NBN Co certain rights: there is no provision if the WBA does not give such rights to NBN Co; and
- the provisions of Clause 12 are expressed in insufficient detail, for example, there are no details concerning how customers will be notified or in what timeframes.

Macquarie believes that its concerns with default management would be obviated if the SAU were to contain more details which would be scrutinised by the ACCC.

7.4 Risk Management and Liability

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

Macquarie considers that the risk management and liability provisions do not clearly describe the types of liability of each party. This is because the relevant provisions of Clause 13 of Schedule 11 are subject to terms expressed in the WBA. With an incomplete WBA it is simply not possible to identify the extent of each party's liability. Macquarie believes that its concerns with risk management and liability would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

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

Macquarie considers that the risk management and liability provisions do not clearly describe the indemnities of one party to the other. This is because the relevant provisions of Clause 13 of Schedule 11 are subject to terms expressed in the WBA. With an incomplete WBA it is simply not possible to identify the extent of the indemnities. Macquarie believes that its concerns with risk management and liability would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

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

No. Macquarie considers that the scope of the proposed risk management and liability regime does not enable NBN Co and its customers to efficiently operate and invest in their



services, networks and facilities. This is because the relevant provisions of Clause 13 of Schedule 11 are subject to terms expressed in the WBA which in turn is not complete and not subject to ACCC scrutiny.

Are the risk management and liability provisions, reasonable and are they likely to remain reasonable over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Macquarie is of the view that the proposed risk management and liability provisions are not reasonable and will remain unreasonable over the proposed term of the SAU. This is because the proposed provisions are subject to an incomplete WBA. Macquarie reiterates that its concerns with risk management and liability would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

7.5 Confidential Information

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

Macquarie does not consider that the proposed confidentiality regime as set out in the SAU is appropriate. This is because the confidentiality provisions are not set out in detail and are subject to the terms expressed in the WBA which in turn is not complete. Macquarie's concerns with confidential information would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

Are the confidential information provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances the commitments apply

No. Macquarie is of the view that the confidential information provisions are not reasonable and will remain unreasonable over the proposed term of the SAU. This is because the confidentiality provisions are not set out in detail and are subject to the terms expressed in the WBA which in turn is not complete. Macquarie reiterates that its concerns with confidential information would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny



7.6 Billing, Payment and Credit Management

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

No. Macquarie is of the view that the billing and payment provisions do not clearly describe NBN Co's commitments in respect of billing and payment disputes. This is because there is insufficient detail of the process specified in the SAU which means that the process is ambiguous and potentially subject to the discretion of NBN Co. Macquarie's concerns with billing and payment would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

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

Macquarie notes that the SAU makes provision for NBN Co to pay interest to a Customer through the Billing Dispute Processes if the Customer has overpaid an invoice. *Prima facie* this provision appears to give NBN Co an incentive to provide accurate and timely billing. However, this incentive is watered down to the extent that the Billing Dispute Process itself is not set out in detail nor is the way in which interest is defined, applied and paid. This means that the process is ambiguous and potentially subject to the discretion of NBN Co. Macquarie reiterates that its concerns with billing and payment would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

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

No. Macquarie is of the view that the billing and payment provisions are not reasonable and will remain unreasonable over the proposed term of the SAU. This is because there is insufficient detail of the process specified in the SAU which means that the process is ambiguous and potentially subject to the discretion of NBN Co. Macquarie reiterates that its concerns with billing and payment would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

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

No. Macquarie is of the view that the credit management provisions do not clearly describe NBN Co's rights and obligations in respect of credit management. This is because there is insufficient detail of the credit management process specified in the SAU which means that the process is ambiguous and potentially subject to the discretion of NBN Co. For example, Macquarie considers that access seekers ought to know through the SAU the circumstances under which NBN Co may require a customer to provide a financial security. Macquarie's concerns with credit management would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.



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

No. Macquarie is of the view that the credit management provisions do not enable NBN Co to respond to changes in customer circumstances over time. This is because the credit management provisions are not set out in detail. Macquarie reiterates that its concerns with credit management would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

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

No. Macquarie is of the view that the credit management provisions are not reasonable and will remain unreasonable over the proposed term of the SAU. This is because there is insufficient detail of the process specified in the SAU which means that the process is ambiguous and potentially subject to the discretion of NBN Co. Macquarie reiterates that its concerns with credit management would be ameliorated if the SAU were to contain more details which would be subject to the ACCC's scrutiny.

7.7 Points of Interconnect

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

Macquarie is reasonably satisfied that the initially specified POI locations are sufficient to promote the long-term interests of end-users, comply with the Category B SAOs, and are likely to be reasonable. This is because these POI locations are those which have been determined by the ACCC following its review. Whether the initially specified POI location will continue to remain reasonable over the proposed term of the SAU is questionable and as such, the adequacy of the POI locations should be subject to review.

Will the proposed POI review mechanism ensure that the locations of POIs promote the long-term interests of end-users and comply with the Category B SAOs over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Macquarie welcomes the POI review mechanism as set out in the SAU. In particular, Macquarie notes that the ACCC exercises regulatory oversight on the opening, relocating and closing of POI locations. Macquarie notes that NBN Co proposes to consult with the ACCC and with access seekers on the criteria to be applied by NBN Co in conducting a POI review. While such consultation is welcome, Macquarie is concerned that the scope of the consultation does not extend to the actual POI review. That is, Macquarie considers that NBN Co should be obliged to seek the views of access seekers and the ACCC in forming a view on the opening, relocating and closing of POI locations. In addition, other interested parties such as backhaul service providers should also be included in such consultation.



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

NBN Co is obliged to permit interconnection at its facilities including its POI consistent with its obligation under section 152AXB(4) of the CCA. Whether or not the SAU includes a statement of this commitment does not affect this statutory obligation. Macquarie considers that the inclusion of this commitment in the SAU would be desirable for the sake of completeness although it is not necessary.

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

No. Macquarie notes that the SAU permits NBN Co at its sole discretion and in accordance with the WBA to *inter alia* specify temporary POIs. Apart from this, there are no other details set out concerning temporary POIs in the SAU. This suggests that NBN Co would have the discretion to make a wide range of decisions concerning temporary POIs including the circumstances and criteria for the creation of a temporary POI. On this basis, Macquarie is of the view that the circumstances and criteria for the creation of a temporary POI are not adequate.

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

Yes. As it is currently drafted, the SAU appears to give NBN Co the sole discretion to decide all relevant matters concerning temporary POIs. Macquarie considers this to be inappropriate as access seekers and others such as backhaul service providers may be materially affected by a decision made by NBN Co concerning temporary POIs. Accordingly, Macquarie is of the view that the SAU should include a commitment that temporary POIs will close and should provide details about the criteria, timeframe and processes for their closure.

7.8 Access to Common Property

Are the situations where NBN Co proposes to take responsibility for procuring access to common property reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Macquarie notes that the SAU commits NBN Co to procure access to common property essentially for its own purposes. Macquarie is concerned that once NBN Co has procured access to a given common property, NBN Co could then be in a position to frustrate an access seeker's ability to gain access to that property. As such, Macquarie would prefer that the SAU also contains a commitment that NBN Co would not interfere with the rights of access seekers who seek access to common property.



7.9 Major NBN Upgrades

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

Macquarie understands that the SAU firstly commits NBN Co to determine if a proposed NBN upgrade will (i) materially adversely impact a customer and (ii) require a customer to commit major capital expenditure. If so, NBN Co will then consult with the customer. While Macquarie welcomes NBN Co's commitment to consult with customers, it is concerned that the terms "materially adversely impact" and "major capital expenditure" are not defined. The concern arises because the meaning of such terms is essentially relative to the size of the customer. That is, what is material and major to one customer may be immaterial and minor to another.

Are the proposed timeframes for providing notice of upgrades adequate?

Macquarie notes that the notice period to which NBN Co is committed is "no less than 6 months". Whether or not this period is adequate is largely dependent on the extent to which the upgrade will impact a customer.

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

Macquarie welcomes NBN Co's commitment to give notice to, and consult with, customers in relation to major NBN upgrades. While such commitments may assist in managing a customer's operations and costs it does not necessarily mean that the impact on the customer will be minimised. For example, if a customer were to have 12 months notice rather than 6 months notice it may result in a less costly customer impact being reached.

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

As noted above, Macquarie welcomes NBN Co's commitment to give notice to, and consult with, customers in relation to major NBN upgrades. While such commitments may not be ideal for every situation which may arise, the commitments are, in Macquarie's view, conducive to making investments in downstream markets.

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

Macquarie is of the view that NBN Co should as a principle consult with all affected parties about major NBN upgrades. Depending on the nature of the NBN upgrade, this may involve a narrow or a broad scope of consultation. Macquarie considers that NBN Co should make a



judgement on the scope of consultation provided on a case by case basis provided that all affected parties are consulted.

Are the commitments reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Macquarie is broadly satisfied that NBN Co is committed to give adequate notice to, and consult with, customers in relation to major NBN upgrades. However, Macquarie would note that in fulfilling such commitments, NBN Co should:

- consider the meaning of the terms “material” and “major” against the size of the customer; and
- consult with all affected parties.

7.10 Access to NBN Co Platform

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

No. The SAU merely commits NBN Co to set out in the WBA the basis on which customers may connect to and access the NBN Co platform. As such, Macquarie considers that the SAU provisions do not clearly describe NBN Co’s commitments in respect of access to the NBN Co platform. Macquarie believes that its concern with access to the NBN Co platform would be obviated if the SAU were to contain more details which would be scrutinised by the ACCC.

Does the proposed content and functionality of the NBN Co platform assist customers to efficiently invest in and operate their services, networks and facilities? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Macquarie has no concerns *per se* with the proposed content and functionality of the NBN Co platform.

7.11 Rollout Platform

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

Macquarie has no concerns *per se* with the proposed process for how NBN Co will provide information about the rollout of the network. As this process has already commenced, it is



evident that NBN Co publishes this information on its website. However, to avoid any doubt, it would be appropriate for this to be specified in the SAU.

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

Macquarie does not believe that it is necessary for NBN Co to commit to providing construction and service rollout progress information to 'Access Seekers' as well as 'Customers'. This is because such information is being published on NBN Co's website and is available to the public. Moreover, there is nothing in the SAU which would suggest that rollout progress information is intended to be withheld from access seekers.

8.2 Monitoring and Reporting

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

No. Macquarie is of the view that various commitments made by NBN Co in the SAU are not sufficiently clear and unambiguous that they will be enforceable by a Court. This view is based on the fact that there are many instances in the SAU where NBN Co's commitment is subject to terms to be set out in the WBA. Specific instances have been discussed in this submission, for example, NBN Co's commitments regarding:

- consultation with customers on the development of the WBA; and
- default management.

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

No. Macquarie is of the view that the design of the SAU does not provide effective arrangements for enforcement of the commitments in the SAU. This is because there are many instances in the SAU where NBN Co's commitment is subject to terms to be set out in the WBA.

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

No. Macquarie is of the view that the SAU does not include sufficient reporting commitments to assess compliance with the SAU. This is essentially because the reporting commitments in the SAU are not comprehensive as they focus on price related matters. To enable an assessment of NBN Co's compliance with the SAU, the reporting requirements must address all of NBN Co's commitments, particularly those concerning non-price related matters. That is, the SAU should include a comprehensive monitoring and reporting regime.

Closing

Macquarie welcomes the opportunity to make this submission. Macquarie has discussed herein various concerns that it has with NBN Co's SAU. Such concerns are primarily with regard to the inadequate regulatory oversight that the SAU provides. On this basis alone, Macquarie submits that the ACCC must conclude that the SAU is not reasonable and must therefore not accept the SAU.

Macquarie would welcome an opportunity to discuss this submission with you. In the meantime, please do not hesitate to contact me should you have any queries.

Yours sincerely



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