

nbn Special Access Undertaking Variation 2022 – Supporting submission

Part H: Guide to the SAU and other background materials

November 2022

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Structure of Submission

This Submission describes the proposed material changes to the SAU and explains why this comprehensive package of regulatory obligations and constraints meets the relevant statutory criteria by which such an SAU variation must be assessed. The Submission also describes the specific commitments proposed in respect of the First Regulatory Cycle (FY24 to FY26). Detailed information can be found in the following chapters:

Executive summary and key narratives	Introduction	Part A chapter 1
	Summary of how the Variation addresses ACCC and industry feedback	Part A chapter 2
	State of competition	Part A chapter 3
	Demand for higher speeds will continue to grow	Part A chapter 4
	The rationale for investing in fibre	Part A chapter 5
	The Variation supports economically efficient outcomes	Part A chapter 6
Pricing and price controls	Pricing structure and levels	Part B chapter 7
	Weighted Average Price Control and other pricing commitments	Part B chapter 8
Non-price terms	Incorporation of MTM technologies	Part C chapter 9
	Service quality commitments	Part C chapter 10
	Service level reporting and transparency	Part C chapter 11
	Carry over Module 1 commitments and Accounting Separation	Part C chapter 12
ACCC roles and powers	Replacement Module provisions	Part D chapter 13
	nbn proposes an expanded role for the ACCC	Part D chapter 14
	Price review mechanism	Part D chapter 15
Key inputs to nbn's Regulated Revenue Requirement	Recovery of initial costs	Part E chapter 16
	Regulatory Asset Base and nbn's cost allocation approach	Part E chapter 17
	WACC	Part E chapter 18
Efficiency of nbn's Expenditure and Demand Forecasts	Cost pass-through mechanism	Part F chapter 19
	Expenditure assessment framework	Part F chapter 20
	Specific commitments in respect of the First Regulatory Cycle	Part F chapter 21
	Expenditure forecasts	Part F Appendix A
	Demand forecasts	Part F Appendix B
Statutory assessment	The Variation satisfies the Statutory Criteria	Part G chapter 22
	Statutory role of the ACCC	Part G chapter 23
Guide to the SAU and other background materials	Overview of the SAU	Part H chapter 24
	nbn's mandate and regulatory framework	Part H chapter 25
	Statement of Expectations	Part H chapter 26



26 An overview of the SAU

26.1 Scope of the current SAU

nbn's current SAU is a key part of the regulatory framework under which **nbn** has operated since 2013.

Incorporating a modular structure, the more detailed terms apply for the first ten years (the Initial Regulatory Period and rollout phase) and a set of higher-level principles apply for the remainder of the SAU term (the Subsequent Regulatory Period).

As **nbn** approaches the end of the Initial Regulatory Period, the current SAU requires **nbn** to lodge RMAs every three to five years. A key part of each such application will be the financial forecasts for the upcoming Regulatory Cycle.

nbn's SAU is a key part of the regulatory framework designed to meet the following objectives:

- support the delivery of Government policy objectives for **nbn**;
- enable a sustainable and competitive retail environment;
- support efficient use of the network;
- support continued efficient investment to lift the digital capability of Australia;
- provide **nbn** with the opportunity to recover efficiently incurred costs; and
- provide **nbn** with the flexibility to respond to market dynamics.

The current SAU covers Layer 2 access services provided over **nbn's** Fibre, Fixed Wireless and Satellite networks; ancillary services that facilitate the supply of those services, and sets out commitments in relation to the Facilities Access Service. The acceptance of the current SAU followed a multi-year engagement between **nbn**, the ACCC, RSPs and other stakeholders to ensure it provided appropriate regulatory settings for the rollout of the **nbn** network and access to the services provided over the network.

nbn has operated under the terms of the current SAU since its acceptance in December 2013¹.

In summary, the current SAU, amongst other things:

1. Establishes Maximum Regulated Prices for all products covered by the SAU, and places controls on how those prices can change over time.
2. Sets out the processes that **nbn** must follow for product development, modification and withdrawal.
3. Defines the processes that **nbn** must follow in order to include capital expenditure in its RAB; to include operating expenditure in the determination of the ABBRR; and the mechanisms by which **nbn** calculates its initial losses and is provided the opportunity to subsequently recover them as revenues increase.

¹ In April 2021, the ACCC accepted a relatively minor variation to the current SAU to extend the expiration date of three non-price provisions set to expire 30 June 2019 to the end of the Initial Regulatory Period, which ends on 30 June 2023.



26.2 Structure of the current SAU

The current SAU has a modular structure, which specifies certain terms in detail for the first ten years of its operation, with others to be established via the lodgement of “Replacement Module Applications” that apply from FY24 onwards, with certain other terms applying until 2040. A high-level overview of the current SAU’s modular structure over the 27 years of its operation is shown in Figure H1 below.

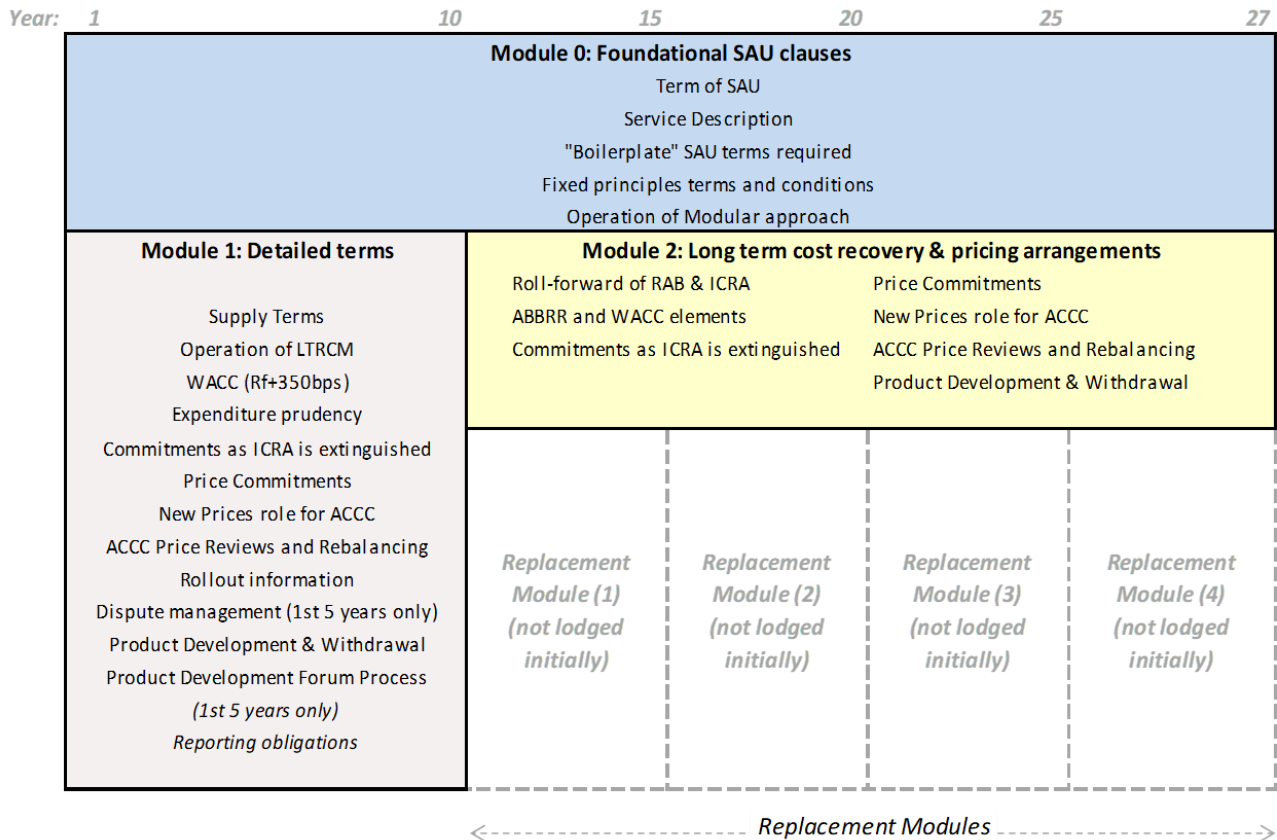


Figure H1. Overview of the modular structure of the current SAU

The current SAU also specifies fixed principles terms and conditions which endure for the full term of the SAU, including that the opening values of the RAB and the ICRA in each forthcoming Regulatory Cycle are to be equal to the closing values of the RAB and the ICRA in the immediately prior Regulatory Cycle.



27 nbn's mandate and regulatory framework

Established as a GBE in 2009, **nbn** has designed, built and now operates the national broadband network as a wholesale-only provider, on an open-access basis.

nbn's mandate is communicated by the Commonwealth Government in a Statement of Expectations (SOE) which is revised and updated over time. In addition to the SOE, **nbn**'s Shareholder Ministers may write to **nbn**'s Board to communicate relevant changes in Government Policy and/or their expectations of **nbn**.

On 22 July 2022, in a letter from the Minister for Communication to the Chair of **nbn**, the Minister noted that **nbn**'s Shareholder Ministers expect to issue a revised SOE to **nbn** reflecting the changes in the policy landscape and operating environment, allowing for a reset in the process and for **nbn** and the ACCC to work positively towards the Variation.

All of **nbn**'s eligible services are declared services and subject to a standard access obligation to supply services on non-discriminatory terms. **nbn**'s SAU is a key part of the regulatory framework that governs price and other terms on which **nbn** supplies services over the **nbn**[®] network to its wholesale customers.

27.1 nbn's policy mandate

nbn was established in 2009 for the purpose of designing, building and operating a national wholesale broadband access network (the **nbn**[®] network) to provide high-speed broadband services to Australian homes and businesses at least cost. **nbn** has been engaged in that activity for over 10 years.

nbn is wholly owned by the Commonwealth of Australia and is incorporated under the *Corporations Act 2001* (Cth). As a GBE, **nbn** is operated in accordance with the *Public Governance, Performance and Accountability Act 2013* (Cth) and is subject to a high degree of Parliamentary scrutiny (e.g., the Senate Standing Committees on Environment and Communications).

As a wholesale-only, open-access broadband network, **nbn** supplies its services to retail service providers (RSPs), who then incorporate these wholesale services into their retail broadband and telephony products for supply to end-users. The *National Broadband Network Companies Act 2011* (Cth) (**NBN Companies Act**)² requires that **nbn** operates on a wholesale-only basis. As a result, **nbn** is entirely dependent on RSPs as a channel-to-market, and is therefore incentivised to support RSPs, promote downstream competition and facilitate access to the **nbn**[®] network. **nbn** is therefore incentivised to continue to invest in its network and to price at levels that maximise demand for **nbn**'s services.

nbn's policy mandate, reflected in successive SOEs, has been to build and operate a national broadband network capable of delivering minimum transmission speeds of at least 25 Mbps download (and proportionate upload speeds) to all premises and at least 50 Mbps download speeds to 90 percent of fixed line premises as soon as possible.³ On 22 July 2022, **nbn**'s Shareholder Ministers indicated that they expect to issue a revised SOE to **nbn** (see chapter 28).

nbn is the default Statutory Infrastructure Provider (SIP) for all of Australia and, where it is the SIP, it must meet legal obligations,⁴ including to connect a premises to the **nbn**[®] network and to meet minimum service speed and

² NBN Companies Act, s 9.

³ Statement of Expectations issued to **nbn** on 8 April 2014 and Statement of Expectations issued to **nbn** on 24 August 2016.

⁴ *Telecommunications Act 1997* (Cth), Part 19.



network performance requirements. As the SIP for Australia,⁵ **nbn** has an obligation to connect a premises to the **nbn**[®] network upon reasonable request from an RSP (on behalf of a customer), subject to some legal, environmental and technical limitations. It is also required to support the roll-out of telecommunications in new developments, and associated rules requiring developers to provide 'fibre ready facilities' in each building unit or lot in a new real estate development.

nbn's current SAU was developed to support the achievement of the Government's national broadband policy, which also recognises that **nbn** was expected to achieve a commercial rate of return for its Government shareholder. In this regard, successive SOEs issued to **nbn**'s Board since December 2010 have stipulated that **nbn** must operate on a commercial basis. For example, **nbn**'s current SOE issued on 26 August 2021 states:

Taxpayers have made a substantial investment in NBN Co and the Company will operate its business commercially. NBN Co should operate efficiently within its capital constraints and proactively manage costs. It should also, within legal and policy parameters, generate sufficient revenue to support investment in the network to meet end user needs, including in regional and remote areas, as well as appropriate returns to the Commonwealth as shareholder and repaying its loan from the Commonwealth in accordance with contractual arrangements. The Company will utilise available funds to add to shareholder value, targeting ongoing improvements in the Company's return on investment. NBN Co will target an optimal capital structure, with a focus on achieving a standalone investment grade credit rating and delivering an appropriate return to the Commonwealth as shareholder.

Additionally, as a GBE **nbn** is subject to the Commonwealth's GBE Guidelines,⁶ which stipulate an expectation that **nbn** targets a WACC sufficient to cover its cost of debt plus a return on equity equal to the risk-free rate plus a risk premium appropriate to **nbn** as a GBE.

The Variation seeks to ensure that **nbn** will continue to have the opportunity to meet the Government's objectives.

⁵ Except in those geographic areas where an alternative network carrier has been declared the SIP.

⁶ Department of Finance, *Commonwealth Government Business Enterprises – Governance and Oversight Guidelines* (Resource Management Guide No. 126), January 2018: <https://www.finance.gov.au/sites/default/files/2019-12/commonwealth-gbe-governance-and-oversight-guidelines-rmg126.pdf>.

27.2 nbn's regulatory framework

nbn is subject to a high degree of regulation. This includes regulation under the CCA, where Parts XIB and XIC deal respectively with anti-competitive conduct and transparency, and access and non-discrimination.

Part XIC establishes a regime for access to telecommunications services. All of nbn's eligible services are declared services under Part XIC and this part provides for a 'hierarchy of instruments' for the provision of telecommunications services: section 152AA. This hierarchy is shown in Figure H2 below.

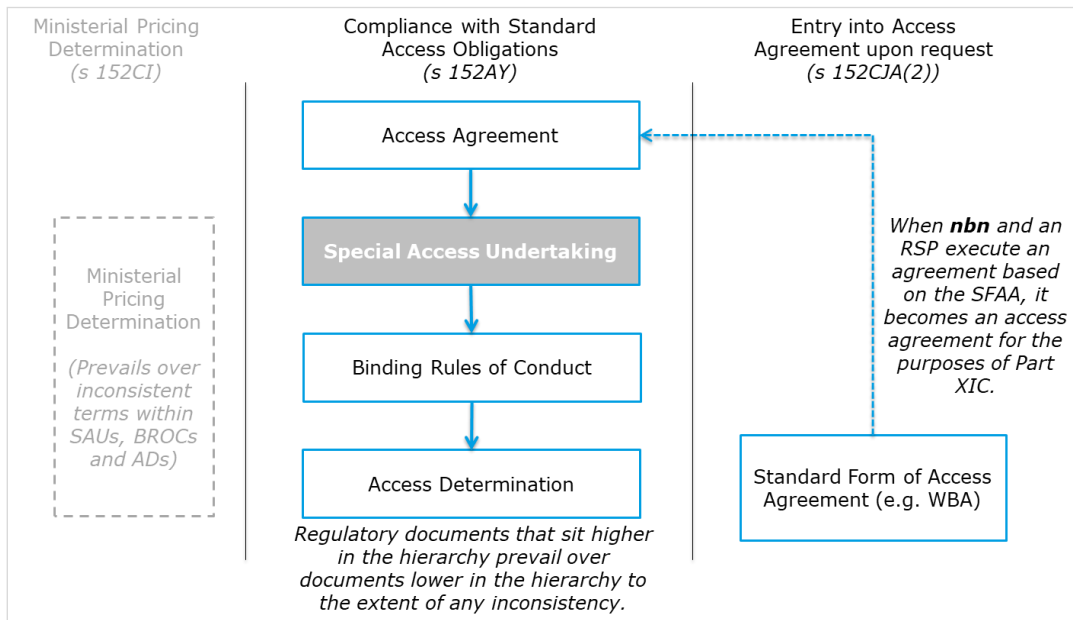


Figure H2. Order of precedence of regulatory documents applicable to nbn under Part XIC of the CCA

These access instruments, in order of precedence from highest to lowest, are:

- **Access Agreements**, which are commercial contracts between the access provider (for nbn declared services) and an access seeker that set out commercially negotiated terms and conditions of supply: section 152BE;
- **Special Access Undertakings** given by the access provider and accepted by the ACCC, which are documents given by the access provider proposing the terms and conditions on which it will offer access to its services: s 152CBA;
- **Binding Rules of Conduct**, which are written temporary rules made by the ACCC in relation to the supply of a declared service, where there is an urgent need to make such rules, specifying any or all of the terms and conditions for compliance with any or all of the SAOs in Division 2 of Part XIC of the CCA, or specifying a manner in which a service provider is to comply with the SAOs: section 152BD; and
- **Access Determinations**, which are written determinations made by the ACCC relating to access to a declared service, which may specify any or all of the terms and conditions for compliance with any or all of the SAOs, or any other terms of access: section 152BC.

The regulatory framework favours commercially negotiated Access Agreements. That is, any terms made by the ACCC (or set out in the SAU) are intended to operate as a 'fall back' that parties can rely on if they are unable to otherwise reach an agreement.

The commitments in the current SAU, as well as in the Variation, complement the existing WBA commitments to ensure that RSPs and end-users know what to expect from nbn services, and to achieve an appropriate balance between regulatory certainty and commercial responsiveness for RSPs, end-users and nbn.



28 Statement of Expectations

As a GBE, the principal responsibility of **nbn** is to build and operate the **nbn**[®] network in accordance with its SOE and Government policy more broadly. Successive SOEs addressed to **nbn** have set out the Government's objectives and strategic direction for **nbn**, with the current SOE issued by **nbn**'s previous Shareholder Ministers on 26 August 2021.⁷

Following the election of a new Commonwealth Government in May 2022, the Minister for Communications wrote to the Chair of the ACCC and the Chair of **nbn** on 22 July 2022. These communications expressed a desire for the continuation of the SAU variation process and for **nbn** and the ACCC to work positively towards the new SAU variation. This letter also signalled the Government's intention to retain **nbn** in public ownership for the foreseeable future, expand full-fibre access to more homes and businesses, and ensure that **nbn** delivers for consumers and facilitates productivity.

The model of economic regulation proposed by **nbn** in this Variation has had regard to the relevant government policy objectives⁸ as set out in the SOEs that apply to **nbn** and the ACCC as well as the broader policy landscape and environment since the March Variation was lodged.

28.1 Letters from the Shareholder Ministers in July 2022

Following the election of a new Commonwealth Government, the Minister for Communications wrote to the Chair of the ACCC and the Chair of **nbn** on 22 July 2022 (**July 2022 Letters**). The July 2022 Letters expressed a desire for and a commitment to the continuation of the SAU variation process. The letter to the Chair of **nbn** stated that a continuation of the SAU variation process offers "the best prospect of an outcome that services the long-term interests of consumers, which is the priority of the Government".⁹ The letters provide guidance to the ACCC and **nbn** on the Government's expectations for the SAU variation process.

In the July 2022 Letters, the Minister conveyed the Government's views about the variation process. Specifically, the Minister noted:

- that a varied SAU should reflect the changes in the policy landscape and operating environment since the March variation was lodged;
- the Government's intentions for **nbn** to remain in public ownership for the foreseeable future, the expansion of full-fibre access to more homes and businesses, and ensuring the **nbn** delivers for consumers and facilitates productivity; and
- that **nbn** should have regard to these changes as well as the concerns about the March Variation proposal which the Minister did not consider to be fit for purpose, and supported the withdrawal of the March Variation and the submission of a revised proposal capable of being accepted by the ACCC and which delivers pricing certainty for RSPs.

⁷ Previous Statements of Expectations have been issued to **nbn** from its Shareholder Ministers in 2010, 2014 and 2016. An interim statement of expectations was also issued in 2013.

⁸ *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 5 per Barwick CJ at p. 61; Gibbs J at p. 62 and Mason J at p. 82

⁹ Letter to Ms Cass-Gottlieb, ACCC Chair from The Hon Michelle Rowland MP dated 22 July 2022 and letter to Ms McKenzie, NBN Co Limited Chair from The Hon Michelle Rowland MP and The Hon Katy Gallagher dated 22 July 2022:

<https://www.accc.gov.au/system/files/Letter%20from%20the%20Minister%20for%20Communications.pdf>.



The letters also indicate that **nbn**'s Shareholder Ministers expect to issue a revised SOE to **nbn** reflecting the changes in the policy landscape and operating environment.

In correspondence with ACCC, the Minister also noted that that the enduring purpose of the **nbn**[®] network should be to provide fast, reliable and affordable connectivity and that they are confident that **nbn** “*shares this objective, in conjunction with its broader mission to satisfy the needs of the Australian people and foster an inclusive and globally competitive society*”.¹⁰

28.2 Statement of Expectations issued to nbn

The current version of the SOE was issued by **nbn**'s previous Shareholder Ministers on 26 August 2021. The SOE is broadly expressed, requiring **nbn** to meet the current and future broadband demand of households and businesses while achieving certain service, competition, commercial, stakeholder and transparency objectives (within the parameters of its relevant legal and regulatory obligations).

In particular, the current SOE provides, among other things:

- that within legal and policy parameters, **nbn** should generate sufficient revenue to support appropriate levels of investment in the network to meet the current and future needs of Australians, wherever they live;
- that **nbn** will reliably and affordably meet the current and future broadband needs of households and businesses, including in regional and remote Australia, foster productivity and innovation, and support our goal for Australia to be a leading digital economy and society by 2030;
- that **nbn** build and operate a national broadband network capable of delivering minimum transmission speeds of at least 25 megabits per second (Mbps) download (and proportionate upload speeds) to all premises and at least 50 Mbps download speeds to 90 percent of fixed-line premises as soon as possible; and
- that **nbn**, as the default Statutory Infrastructure Provider (**SIP**) for all of Australia, meet legal obligations, including in relation to minimum service speeds and network performance requirements.

As noted above, the July 2022 Letters issued by **nbn**'s Shareholder Ministers indicate that **nbn**'s Shareholder Ministers expect to issue a revised SOE in due course that reflects the objectives of retaining **nbn** in public ownership for the foreseeable future, expanding full-fibre access to more homes and businesses, and ensuring **nbn** delivers for consumers and facilitates productivity.¹¹

¹⁰ Letter to Ms Cass-Gottlieb, ACCC Chair from The Hon Michelle Rowland MP dated 22 July 2022, p. 2.

¹¹ Letter to Ms McKenzie, NBN Co Limited Chair from The Hon Michelle Rowland MP and The Hon Katy Gallagher dated 22 July 2022: <https://www.infrastructure.gov.au/sites/default/files/documents/nbn-co-sau-letter-to-nbn-co.pdf>.