

NBN Co Special Access Undertaking (SAU)

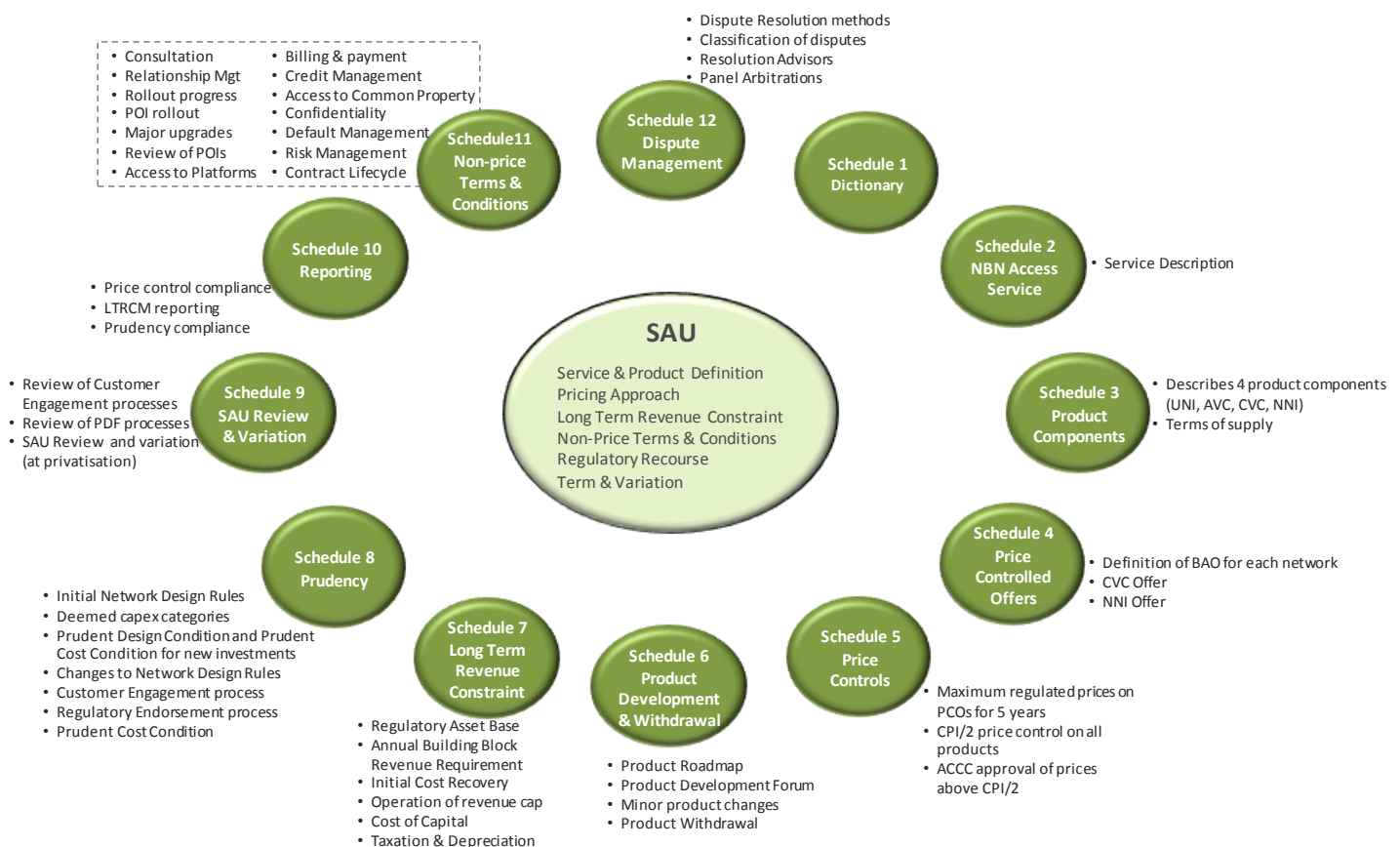
Overview Paper - 5 December 2011

Introduction

NBN Co has lodged its Special Access Undertaking (SAU) with the Australian Competition and Consumer Commission (ACCC). While the ACCC will conduct a formal public assessment process in relation to the SAU, NBN Co has elected to publish the SAU on its website to allow its customers and other interested parties the opportunity to access the full details of its proposed approach as soon as possible.

While the SAU contains the detailed commitments that NBN Co is making in relation to the service description, price and non-price terms for the NBN Access Service, it does not describe the context and rationale for those commitments. NBN Co intends publishing detailed supporting material that provides this context in coming weeks, and in the meantime is making available this summary of the overall approach taken in the SAU and the reasoning behind it to assist the initial review of the SAU by interested parties.

The SAU itself consists of a short core body that contains the key terms of the SAU, with the detailed commitments being contained in 12 schedules. As shown below, each schedule covers a discrete set of commitments. However, the schedules cannot and do not operate in isolation from each other. Rather, commitments made in one schedule interact with and support commitments made in others, and the SAU should be viewed as an integrated proposal.



Objectives and background to the SAU

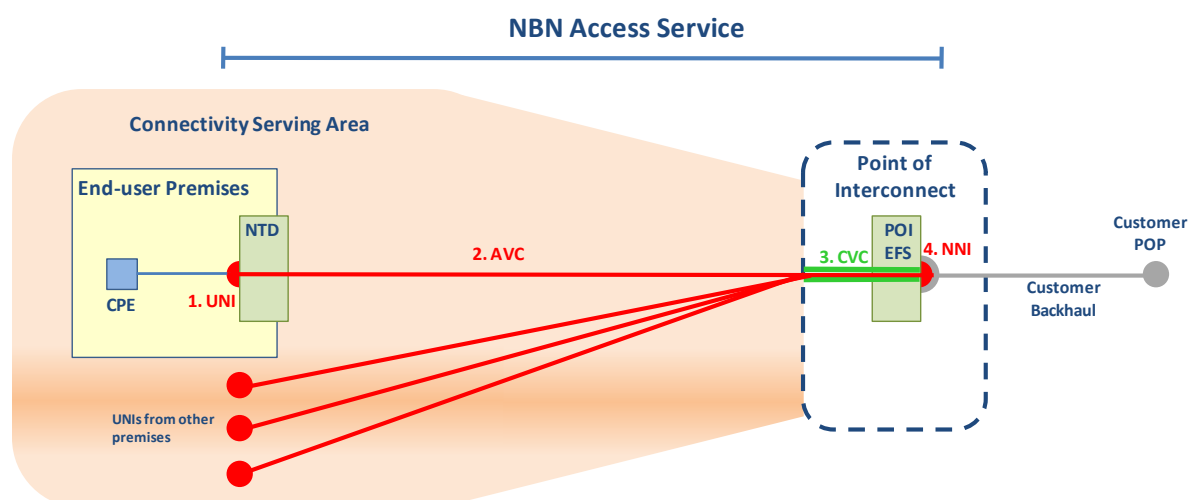
- NBN Co has been directed by the Government to develop the NBN to provide a layer 2 wholesale bitstream service to achieve a particular coverage, speed and technology mix, to apply a Uniform National Wholesale Pricing (UNWP) approach and to operate as a commercial entity.
- The NBN is now a practical reality in the Australian telecommunications industry and it has been NBN Co's consistently expressed intention to lodge a SAU, and to operate using both a SAU (if accepted) and a Standard Form of Access Agreement (SFAA, in the form of its Wholesale Broadband Agreement) as permitted by NBN Co's access regime.
- NBN Co has developed the SAU with two objectives in mind:
 - to provide an appropriate degree of certainty to Access Seekers, their End Users and NBN Co about the access services being offered, and how the price and non-price terms and conditions of access (including the framework for long term cost recovery) will be regulated over the short, medium and long term; and
 - to provide the long term framework reasonably necessary to achieve uniform national wholesale pricing of eligible services supplied by NBN Co to Access Seekers.
- As compared to an alternative that may rely on future access determinations by the ACCC, the SAU is the preferable regulatory mechanism because it can:
 - provide long term regulatory certainty earlier and with more consistency than may be possible via the alternative; and
 - be more procedurally efficient than the alternative.
- NBN Co is lodging the SAU following a 2 year process of engagement with industry stakeholders and the ACCC in relation to products, price and non-price terms and conditions and a range of technical and operational matters. As part of this process, NBN Co has also received and considered feedback provided in response to the 28 July 2011 SAU discussion paper.

Design of the SAU

- The SAU is comprised of three elements: service description; price-related terms and conditions; and non-price related terms and conditions.
- Consistent with the objectives of regulatory certainty and UNWP, the high level design of the SAU includes:
 - a 30 year term with a mid-term review;
 - broad coverage of NBN Co services;
 - explicit interaction with the Wholesale Broadband Agreement (WBA); and
 - utilisation of a series of largely self-executing rules, but with specific powers conferred on the ACCC.

Service description

- NBN Co has developed the NBN Access Service to give effect to the key directions from the Government, in its role as shareholder, to:
 - connect 93 per cent of Australia homes, schools and businesses with fibre-to-the premises technology with speeds up to 100Mbps, with the remaining premises to be served by a combination of next generation fixed wireless and satellite technologies with peak speeds of at least 12Mbps; and
 - supply open and non-discriminatory access to wholesale services, at the lowest levels in the network stack necessary to promote efficient and effective retail level competition, via Layer 2 bitstream services.
- The SAU defines NBN Co's commitment to supply the NBN Access Service through the use of Product Components (AVC, CVC, UNI and NNI), which cannot be withdrawn by NBN Co:



- This approach is consistent with approaches endorsed by the ACCC, overseas regulators and industry and facilitates NBN Co's overall SAU objective of setting up a long term framework to achieve UNWP of eligible services supplied by NBN Co to its customers.
- NBN Co's use of Product Components promotes competition by providing flexibility for Access Seekers on how they configure services offered to End Users.
- The requirement to acquire all Product Components is appropriate for sound technical and operational reasons, and it is also supported by approaches taken in other jurisdictions.
- The NBN Access Service is consistent with the requirements that the ACCC has previously indicated would be necessary for a layer 2 broadband service to promote the long-term interests of end-users.

Price-related terms and conditions

- NBN Co has developed a package of price-related terms and conditions that is intended to:
 - provide the long term framework necessary for uniform national wholesale pricing;
 - provide the opportunity for recovery of prudently incurred costs over time;
 - encourage the economically efficient take up and usage of NBN Co's products; and
 - strike a balance between pricing certainty for Access Seekers and pricing flexibility for NBN Co, having regard to the need to account for evolving technology, applications and demand.
- The price-related terms and conditions meet these objectives through the interaction of:
 - initial pricing, fixed for 5 years, for a set of basic products that compares favourably to wholesale costs of supply on legacy networks (including for voice only services), are uniform across NBN Co's fibre, wireless and satellite access networks to the greatest extent possible, and serve to anchor the prices of higher speed and functionality products;
 - an individual price increase limit of CPI/2 that applies on an annual basis with no carry forward to subsequent years to each of NBN Co's Product Components, Product Features and Ancillary Services (NBN Co can set the initial prices for new Product Components, Product Features and Ancillary Services, and can request ACCC approval for an exception to the CPI/2 annual price increase limit subject to satisfying certain criteria); and
 - a Long Term Revenue Constraint Methodology, supported by a set of prudence commitments, that constrains NBN Co over time to recovering no more than its prudently incurred costs of supply (noting that this constraint will not directly affect product pricing in the short to medium term because of the extent of initial cost under-recovery).

Non-price related terms and conditions

- The SAU covers a range of non-price related terms and conditions.
 - **Term of the SAU** – 30 years, to deliver regulatory certainty and stability to NBN Co and Access Seekers by committing to key principles, parameters, methodologies and processes associated with delivering services over that period.
 - **Interaction with the WBA** – the SAU does not exhaustively cover all non-price terms and conditions which will be included in the WBA, but it does cover those which NBN Co anticipates will be of key importance to its Customers. The SAU also contains commitments in relation to changes to the WBA over time.
 - **Regulatory recourse** – the SAU confers powers and functions on the ACCC (using subsection 152CBA(10A) of the CCA) to create a transparent and efficient mechanism which can be used by an Access Seeker or NBN Co where agreement cannot be reached in respect of non-price terms and conditions not covered by the SAU or price-related terms and conditions (where pricing is announced by NBN Co after the SAU Commencement Date).
 - **Product development and withdrawal** – the SAU sets out the processes that NBN Co will follow in developing and withdrawing products over time;
 - **Dispute management rules** – the SAU includes the key principles for dispute management so that NBN Co and Customers have certainty of access to a stable dispute resolution process.
 - **Other non-price terms and conditions** – a range of other non-price terms and conditions are included in the SAU. These are expressed so as to be principles-based, product-neutral, and non-exhaustive.
 - **Review and variation of the SAU** – a number of aspects of the SAU are subject to review: Customer engagement every 5 years; and prudency arrangements, Weighted Average Cost of Capital (WACC) and potentially a number of other matters prior to privatisation (and in any event around mid-way through the SAU term).

Legislative framework for assessment of the SAU

- Subsection 152CBD(2) of the Competition and Consumer Act 2010 (CCA) provides that the ACCC must not accept a SAU unless the ACCC is satisfied that:
 - the terms and conditions of the SAU are consistent with Category B standard access obligations (SAOs) in section 152AXB;
 - the terms and conditions of the SAU are reasonable; and
 - the SAU is consistent with any Ministerial pricing determinations.
- However, in accordance with subsections 152CBD(5A) and (5C) of the CCA, the ACCC must not reject the undertaking for a reason that concerns:
 - price-related terms and conditions, or
 - a refusal to permit interconnection at a location that is not a listed POI, or
 - a refusal to unbundle the supply of designated access services (being an access virtual circuit (AVC) service or a connectivity virtual circuit (CVC) service; or a network-network interface (NNI) service; or a user network interface (UNI) service; or a voice telephony facilitation service),
 - where the relevant price-related terms and conditions or refusals are reasonably necessary to achieve uniform national pricing of eligible services supplied by a NBN corporation to service providers and utilities.

Reasonableness of the SAU

- The terms and conditions of the SAU promote the long-term interests of end-users, by promoting competition, achieving any-to-any connectivity and encouraging efficient investment in and use of infrastructure as compared to the counterfactual of having terms of access set out via an access determination and/or SFAAs alone. NBN Co submits that the regulatory certainty provided by the SAU strikes an appropriate balance between the legitimate interests of NBN Co and Access Seekers using the NBN Access Service.
- NBN Co has identified a number of price-related terms and conditions in the SAU that are reasonably necessary for achieving UNWP.
- In accordance with subsection 152CBD(5A) of the CCA, NBN Co submits that the ACCC cannot reject the SAU for a reason related to these terms and conditions of the SAU (because they are reasonably necessary to achieve UNWP).
- NBN Co accordingly submits that the ACCC should be satisfied that the terms and conditions in the SAU are reasonable (in accordance with the statutory criteria set out in section 152AH of the CCA).