

# **nbn** submission to ACCC – Variation to the NBN Co Special Access Undertaking – Draft Decision

28 April 2017





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# 1. Introduction

1. **nbn** refers to the publication of the ACCC's Draft Decision regarding the variation to the NBN Co Special Access Undertaking (**SAU**), as lodged by **nbn** on 27 May 2016.
2. The ACCC's Draft Decision to reject the SAU variation is "on the basis that a limited number of proposed changes to specific non-price terms and conditions do not meet the legislative criteria for assessing the variation", with the ACCC considering that "minor amendments to the proposed changes could be made to address its concerns on these matters".<sup>1</sup>
3. While **nbn** disagrees with the ACCC's draft decision to reject the SAU variation, **nbn** is encouraged by the relatively modest number of issues identified by the ACCC and the ACCC's view that it will be possible to address these issues through minor changes. **nbn** intends to update the SAU for the transition to the multi-technology mix (MTM) model and to engage further with the ACCC and the industry to secure this outcome.
4. To assist the ACCC in its further consideration of the SAU variation, **nbn** has prepared this submission to address the following points:
  - (a) the three non-price matters that are the basis of the ACCC's Draft Decision to reject:
    - (i) the broadened definition of NBN Co Network – section 2;
    - (ii) the removal of the network boundary point definition – section 3;
    - (iii) the Co-existence Period and Remediation provisions for FTTB and FTTN – section 4; and
  - (b) two other matters that the ACCC has sought comment on from interested parties:
    - (i) the rollout progress information commitments – section 5; and
    - (ii) the application of SAU price terms to MTM services – section 6.
5. This submission is intended to be read together with **nbn**'s previous submissions to this process.
6. In due course, and depending on feedback from other interested parties, **nbn** may provide supplementary submissions to assist the ACCC in its further consideration of the SAU variation.

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<sup>1</sup> ACCC, Draft Decision, p.1.



## 2. Broadened definition of NBN Co Network

7. The ACCC's draft decision<sup>2</sup> is that the change to the NBN Co Network definition to include a mechanism for incorporating future technology variants is not reasonable. The ACCC also considers its concern could be addressed by removing the (new) paragraph (g) in that definition.
8. The broadened definition of NBN Co Network was intended to provide an efficient means of allowing new network technologies that satisfied the SAU's service description to be brought within the SAU framework in a more streamlined manner over time. Given that **nbn** has indicated it expects to commercially launch FTTC in the first half of 2018<sup>3</sup>, the issue of incorporating future technology variants into the SAU (beyond FTTB, FTTN and HFC) will manifest in a relatively brief period. In the absence of paragraph (g), **nbn** would need to lodge a subsequent variation to the SAU to incorporate FTTC (and any other future technology variant).
9. **nbn** disagrees with the ACCC's reasoning and is not convinced by the suggestion that these changes are not reasonable. The ACCC's perceptions as to the impact of **nbn's** proposed approach (along with the ACCC's associated reasonableness assessment) significantly overstate the situation.
10. Contrary to the ACCC's assertions, the ability to readily incorporate new technologies within the SAU framework provides access seekers with certainty that new technologies will be brought within the regulatory framework as they are implemented. The draft decision actually deprives access seekers of certainty. In particular:
  - (a) If paragraph (g) of the definition of NBN Co Network is included in the SAU, when **nbn** introduces a Product over a new technology through the process in Schedule 1I, the declared NBN Access Service will be expanded to include Layer 2 services supplied over that new technology;
  - (b) However, **nbn** receives no immediate regulatory benefit from the inclusion of paragraph (g) in the SAU, or consequently, through the expansion of the NBN Access Service to include the new technology. This is because:
    - (i) when **nbn** introduces the suite of products to be supplied over that new technology, it will do so under the process in Schedule 1I;
    - (ii) the pricing of those products will become NBN Offers and will also be ascribed a Maximum Regulated Price (**MRP**) in this process;

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<sup>2</sup> ACCC, Draft Decision, p.23.

<sup>3</sup> **nbn** media release 'nbn reveals first Fibre-to-the-Curb suburbs', 28 February 2017.



- (iii) the ACCC can then intervene and determine an alternative MRP in respect of the introduced FTTC products if it so wishes in accordance with a Resetting Regulatory Determination.

11. In light of **nbn's** obligations to consult and the ACCC's pricing oversight, it is not clear to us how these changes can be characterised as unreasonable by the ACCC, or that they represent a "significant departure from the current and accepted framework" or that this aspect of the variation "does not provide a sufficient level of certainty to access seekers".<sup>4</sup>
12. **nbn** also highlights that the current variation process, despite being limited in scope and largely mechanical in nature, has taken the ACCC 10 months to reach the draft decision stage.
13. This unnecessarily long timeframe is compounded by the fact that the ACCC has not issued Procedural Rules under section 152ELA of the CCA, which would potentially provide a more streamlined path for securing the approval of future SAU variations.
14. In the absence of paragraph (g) being added to the definition of NBN Co Network, **nbn** will forego the opportunity to include new technologies within the SAU's product and pricing framework unless it submits a formal variation each time. However, this is a relatively inefficient process and is not without regulatory cost to **nbn** and access seekers. As such, **nbn's** preference is to avoid otherwise unnecessary and time-consuming SAU variations in the future for changes that are overwhelmingly mechanical in nature, such as the introduction of a new technology without broader changes to the substantive framework for economic regulation established by the SAU. On this basis, **nbn** submits that the ACCC should reconsider its position on the inclusion of paragraph (g) within the definition of NBN Co Network.
15. With future variations, the ACCC needs to take steps to ensure that the variation process becomes as streamlined as possible, with a view to promoting regulatory certainty and process efficiency for all stakeholders.

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<sup>4</sup> ACCC, Draft Decision, p.21.



### 3. Removal of network boundary point definition

16. The ACCC's draft view<sup>5</sup> is that the change to remove the network boundary point definition is not reasonable and that this definition should be reinstated.
17. We maintain, consistent with our previous submissions on 27 May 2016, 26 August 2016 and 29 September 2016 that the definition of the NBN Access Service is clear and it is redundant to have a separate network boundary point definition in the SAU Variation that is duplicative in nature. Furthermore, the network boundary for each technology is defined in a detailed way in the WBA and this document is the appropriate vehicle to define the technical characteristics of each technology. **nbn** is not convinced by the ACCC's reasoning that the removal of this definition would not be reasonable.
18. Nonetheless, **nbn** has considered the ACCC's suggestion to reinstate the provision and has concluded that it is workable, but only on the understanding that the SAU provision is necessarily high level in nature and that the operational detail of the network boundary point applicable to each network type is appropriately left to the WBA.
19. As set out in **nbn**'s supplementary submission of 29 September 2016, "it would be problematic to include a much more detailed network boundary point definition in the SAU (such as WBA2's definition of 'NBN Co Network Boundaries', which is different to the description in WBA2 of NEBS boundaries) because such a definition would need to incorporate by reference, or draw on technical details from, **nbn** technical documents, in which case the definition cannot be confidently expected to remain appropriate over the term of the SAU".<sup>6</sup>

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<sup>5</sup> ACCC, Draft Decision, p.23.

<sup>6</sup> **nbn**, Supplementary Submission, p.7.



## 4. Co-existence Period and Remediation

20. The ACCC's draft view<sup>7</sup> is that it is appropriate for the SAU variation to include specific Co-existence Period and Remediation provisions, but that it is not reasonable to lock these in for the remainder of the SAU term. The ACCC also considers its concerns could be addressed by removing the provisions from Module 2 and limiting the application of the provisions to a fixed period within Module 1.
21. Within the context of the ACCC's suggestion, **nbn** submits it would be reasonable (for the reasons set out below) for the provisions to apply for the duration of Module 1 – that is, until 30 June 2023, given **nbn's** natural incentives around co-existence and remediation activities. Any shorter period would create additional (and unnecessary) transaction costs and deprive **nbn** of regulatory certainty.
22. In particular
- (a) **nbn already faces natural incentives to minimise co-existence time and to undertake remediation:** As acknowledged by the ACCC in the draft decision, **nbn** "is likely to initially have strong incentives to end the co-existence period and remediate copper lines in a timely manner in order to increase uptake of higher value services and promote increased traffic on the NBN".<sup>8</sup>

These incentives will persist for the duration of Module 1, as previously recognised in the ACCC decision to accept the original SAU.<sup>9</sup> This is due, in large part, to the 'long term revenue sufficiency risk' faced by **nbn**, which relates to **nbn's** ability to earn sufficient revenue over the long term to fully recover its costs, including an appropriate return on capital. Given the significant up-front investment required and dependence on growth in take-up and usage over time, **nbn** expects to face significant long term revenue sufficiency risk (well beyond the end of the initial network rollout and migration). It is highly unlikely that **nbn's** incentives in connection with the Co-existence Period and Remediation (and more broadly) would change prior to the end of Module 1.

**nbn's** incentives (complemented by requirements placed on **nbn** via the Statement of Expectations from its Shareholder Ministers) are to address all remediation issues in a timely manner (taking into consideration the complexity of the issues involved). To do otherwise would risk undermining **nbn's** reputation with access seekers and end-users, which would work against **nbn's** commercial interests, particularly in an environment in which **nbn** is facing increasing infrastructure based competition.

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<sup>7</sup> ACCC, Draft Decision, p.34.

<sup>8</sup> ACCC, Draft Decision, p.34.

<sup>9</sup> ACCC, NBN Co Special Access Undertaking: Final Decision, 13 December 2013, p. 96.



- (b) **The 5-year period applicable to some provisions in the SAU should be a secondary consideration only in the ACCC's assessment:** The PDF Processes, Endorsed Network Change process and Dispute Management provisions in the SAU, as it currently applies, will expire at the end of the financial year that is five years after the SAU Commencement Date. The ACCC has drawn a parallel between these provisions applying for a limited period and the ACCC's view that the Co-existence Period and Remediation provisions should also apply for a limited period.

Fundamentally, **nbn** submits that the applicable period for the Co-existence Period and Remediation provisions should be determined primarily by reference to **nbn**'s incentives, as per the incentive discussion above. Nonetheless, if the same approach were to be used, and the Co-existence Period and Remediation provisions were to apply until the end of the financial year that is five years after the First SAU Variation Date (assuming this date occurs in the 2017-18 financial year) then the provisions would apply until 30 June 2023, which is the end of Module 1.



## 5. Rollout progress information

23. The ACCC's draft view<sup>10</sup> is that "in most respects NBN Co's proposed variation represents an improvement to NBN Co's rollout information commitments". The ACCC also notes (in regard to the specific changes to the 3-year construction plan and monthly ready for service plan, and removal of the 1-year construction plan) that the ACCC "seeks to better understand the extent to which the proposed changes strike the right balance between providing information as early as possible while ensuring its accuracy."
24. **nbn** maintains the points made in its previous submissions regarding the appropriateness of the rollout progress information commitments in the SAU variation, including our response to ACCAN's supplementary submission. As highlighted in **nbn**'s supplementary submission in relation to the SAU variation on 29 September 2016<sup>11</sup>:

*"It is appropriate that the SAU contains a set of commitments regarding the rollout information **nbn** will make available to access seekers, with sufficient flexibility for **nbn** to respond to changes to its rollout planning processes and evolving customer requirements. The SAU is not intended to limit information that **nbn** has an incentive to provide including detailed rollout information to assist customers to plan and market the sale of services using the **nbn**<sup>TM</sup> network."*

25. Consistent with this, it is simply incorrect to characterise the specific changes to the 3-year construction plan and monthly ready for service plan, and removal of the 1-year construction plan, as a reduction in the current SAU commitments.
26. In particular:
- (a) the SAU variation extends the coverage of rollout information to the MTM technologies, and expands the timeframe over which the Monthly RFS forecasts will be provided, which is one of the key pieces of information required by access seekers. The reports that are currently being provided include:
    - (i) a 3-year rollout plan;
    - (ii) a Monthly RFS Rollout Plan (MRP);
    - (iii) Proposed Footprint List (PFL);
    - (iv) Historical Footprint List (HFL);
    - (v) Historical Region Rollout List (HRRL) (released weekly); and

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<sup>10</sup> ACCC, Draft Decision, p.44.

<sup>11</sup> **nbn**, Supplementary Submission, p.10.



- (vi) POI Plan;
- (b) the commitments made in the SAU are non-exhaustive and non-limiting. The SAU does not preclude **nbn** from providing additional rollout information to its customers, as it has already done over the life of the SAU. **nbn** has incentives to provide access seekers with as much reliable rollout information as possible and this is what **nbn** has done, including through information provision outside of the SAU framework. In fact, access seekers are already being provided with MTM rollout information consistent with the SAU variation, as well as information over and above those commitments. Critically, access seekers are not hampered by the fact that there is an existing accepted SAU and other information is being provided outside the formalised structure of the SAU. There is a strong alignment in incentives between **nbn** and access seekers, along with high levels of customer engagement by **nbn**, which drive our approach to the disclosure of rollout information over and above the SAU baseline;
- (c) **nbn** has made the following (non-exhaustive) enhancements to its information disclosures, which have been over and above the SAU framework requirements:
  - (i) a new customer information platform is now available for access seekers, which includes information that is updated on a daily basis;
  - (ii) an Information Agreement is now available for access seekers who are not currently customers of **nbn** to obtain access to the rollout information;<sup>12</sup> and
  - (iii) the provision of a range of additional reporting to assist with management of disconnection dates and changes to interim POIs.

27. In response to the ACCC's assessment of various service delivery agreements between **nbn** and Telstra, **nbn** also provides additional network rollout information to access seekers and the ACCC on a voluntary basis, to mitigate the potential for Telstra to gain an advantage in supplying broadband services due to its involvement in these agreements.<sup>13</sup> This includes **nbn** supplementing the rollout reporting provided to access seekers so as to provide additional guidance on progress towards RFS and construction completion dates in HFC rollout areas where Telstra is acting as **nbn's** service delivery partner.<sup>14</sup>

28. **nbn** also already voluntarily provides the ACCC with information, such as the Monthly RFS Plan and ad hoc rollout information, on the basis that the ACCC would like to remain informed about the progress of the rollout.

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<sup>12</sup> See, <http://www.nbnco.com.au/sell-nbn-services/information-agreement.html>

<sup>13</sup> See, <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/accc-assessment-of-nbn-telstra-service-delivery-agreements>

<sup>14</sup> See, <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/accc-assessment-of-nbn-telstra-service-delivery-agreements/update-on-nbn-co-and-telstra-reporting-initiatives>



29. We believe our current approach of making commitments where it is possible to do so (e.g. to extend the period of the monthly ready for service plan), while providing detailed information where it is practical to do so (as we already do in the actual monthly ready for service plans provided to access seekers) is an appropriate approach.
30. **nbn** reserves the right to make further submissions on this matter in response to any access seekers submissions that may be made as part of this consultation process.



## 6. Application of SAU price terms to MTM services

31. The ACCC's draft view<sup>15</sup> is that it "considers there are strong arguments in favour of extending the application of the existing SAU price terms and conditions to the MTM services" and "that this proposal is unlikely to materially change the assessment upon which the original SAU was accepted in 2013." The ACCC is now seeking comments on "its draft view that there are grounds for it to be satisfied that the proposed variation to apply the SAU pricing terms to MTM services is reasonable."
32. In our May 2016 Supporting Submission, we addressed the application of the SAU price terms to MTM services as part of an overall assessment of the variation (section 5) and in more detail against the relevant statutory criteria (section 6.4).

33. For example,

- (a) at paragraph 160:

*"The SAU's modular, incentive-based framework that applies over the period to 30 June 2040 applies to the MTM, including:*

- (a) *the price control schedules – the variation includes the initial MRPs for FTTB, FTTN and HFC products (which are consistent with the initial MRPs in the SAU for FTTP, wireless and satellite products), with the same arrangements for determining MRPs over time and the same ACCC reserve powers in regards to new pricing, price rebalancing and pass through of tax changes;*
- (b) *the RAB, LTRCM and related reporting schedules (Module 1 only); and*
- (c) *the product development and withdrawal schedules (which set out the operation of the modular framework)."* [Emphasis added]

- (b) at paragraph 247:

*"The variation promotes the interests of access seekers on a non-discriminatory basis by providing certainty as to:*

- (a) *the starting prices for a broad range of FTTB, FTTN and HFC services (NBN Offers and Other Charges);*
- (b) *the maximum increases in **nbn's** prices for these services over time (the CPI-1.5% Individual Price Increase Limit);*

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<sup>15</sup> ACCC, Draft Decision, p.65.



- (c) the ACCC's reserve powers in regard to pricing for new NBN Offers and Other Charges and price rebalancing; and
- (d) *the long-term revenue cap that will constrain, in any event, **nbn** prices for these services to recover no more (on an expected NPV basis) than **nbn**'s prudently incurred costs, including an appropriate return on capital (the LTRCM).*  
[Emphasis added]

34. **nbn** notes the ACCC's statement in the Draft Decision that it "does not agree with NBN Co's submission that the application of the existing price terms to MTM services is outside the scope of the ACCC's assessment of the proposed variation to the SAU."<sup>16</sup> **nbn** has never made such a submission – we have simply sought to highlight examples<sup>17</sup> where interested parties have not heeded the ACCC's earlier advice to "clearly explain the link between the varied terms and unvaried terms if making submissions on terms that have not been marked up as varied terms."<sup>18</sup>
35. It is also important to clarify that any such consideration in relation to the existing price terms needs to occur in the context of the ACCC's assessment of MTM services only. The price terms that apply to existing services are unaffected by the SAU variation and consequently are beyond the scope of the ACCC's assessment here. Accordingly, the ACCC's analysis needs to clearly be linked to the scope of the variation which is the focus of the ACCC's assessment process.
36. **nbn** reserves the right to make further submissions on this matter in response to any access seekers submissions that may be made as part of this consultation process.

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<sup>16</sup> ACCC, Draft Decision, p.58.

<sup>17</sup> **nbn**, Supplementary Submission, p.2.

<sup>18</sup> ACCC, Consultation Paper, p.15.