



Submission to ACCC Consultation Paper

Public version

ACCC Supplementary Consultation Paper on NBN Co
Special Access Undertaking (SAU)

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Introduction

Nextgen welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) February 2012 Supplementary Consultation Paper (**Supplementary Consultation Paper**) on the Special Access Undertaking (SAU) lodged by NBN Co which specifies terms and conditions upon which it undertakes to supply the 'NBN Access Service'.

Under the relevant legislative criteria, the ACCC must make a decision on whether to accept or reject the SAU. This includes consideration of whether the terms and conditions are 'reasonable' and consistent with the 'Category B Standard Access Obligations' in accordance with relevant provisions in the *Competition and Consumer Act 2010 (CCA)*.¹

The rollout of a wholesale-only NBN across Australia will transform the structure of communications markets in Australia, and is designed to promote competition, innovation and better end-user outcomes based on a level playing field for all access seekers. The wholesale terms and conditions of supply for services on the NBN will be important for the development of competition in a range of downstream wholesale and retail markets.

The SAU sets out certain terms and conditions for the supply of NBN Co's 'NBN Access Service' for a proposed 30 year period.

In the current context, the SAU can be considered an important regulatory tool for providing upfront certainty on the terms and conditions of supply for declared services, for both the access provider and access seekers. Getting the appropriate balance in the SAU between certainty, flexibility and effective ongoing regulatory oversight should be a key focus of this inquiry.

There are a number of important issues that warrant careful consideration in this inquiry, many of which were highlighted in the Supplementary Consultation Paper.

This submission is structured as follows:

- Section A summarises some of the key issues and principles that Nextgen considers the ACCC should have particular regard to in its inquiry; and
- Section B provides responses to selected ACCC questions in the Supplementary Consultation Paper (while Nextgen reserves its position on some other questions at this stage).

¹ See sections 152AH and 152AXB of the CCA.

Section A: Key Issues

Regulatory oversight

Given NBN Co's anticipated wholesale monopoly position in the market, the regulatory arrangements that oversee its operation will be critical for establishing a sustainable and competitive industry framework in the emerging NBN environment. The SAU is an important part of this process by providing an avenue for upfront certainty on the terms and conditions for wholesale services supplied over the NBN, and to ensure there are appropriate safeguards into the future.

As noted by the ACCC, the SAU does not contain comprehensive terms and conditions of access to the NBN Access Service; and allows for a certain amount of flexibility with respect to the supply of various services. Provisions in the latest version of the WBA provide for alignment between an accepted SAU and access agreements, and the SAU itself includes a 'Regulatory Recourse Mechanism' for ACCC resolution of certain types of disputes between NBN Co and access seekers.

Given the nature of the SAU and the limitations with the proposed ongoing regulatory oversight mechanisms within it, there is a case (notwithstanding NBN Co's wholesale-only status) for stronger ongoing ACCC regulatory oversight of NBN Co's activities within the SAU itself. In principle and practice these oversight provisions would be intended to work as a 'regulatory backstop' in the event of any unintended consequences or unforeseen market circumstances not anticipated during the SAU assessment or prior to the signing of access agreements. This would allow the ACCC to determine whether regulatory intervention is warranted in the future or not based on the relevant statutory criteria.

Balance between flexibility and certainty

An important consideration in this inquiry is whether the SAU provides the appropriate balance between providing certainty to industry/access seekers about NBN Co's forward activities given its position in the market, and NBN Co with the necessary certainty around the regulatory environment under which it will operate in order to meet its objectives.

The SAU does not contain comprehensive terms and conditions of access for all NBN services, and certainty for access seekers is limited in some areas. For example, the initial 'price controlled offers' are for AVC 12/1, CVC and the NNI, though some services which sit outside these arrangements will be necessary for the supply of services on the NBN (eg. ancillary services, business services). There may not be realistic market alternatives for these other services into the future and/or the degree of substitutability with price controlled services will be limited in many cases. While the SAU sets out broader constraints for these other (non-price controlled offer) services such as the 'Long Term Revenue Constraint' and the 'Individual Price Limit Increase', these will act as a limited constraint in the short to medium term or will not constrain the setting of initial prices.

On the issue of non-price terms, the SAU does not contain a detailed set of stand-alone non-price terms and conditions or principles. Rather it is intended to be complementary

with the WBA where a more detailed set of non-price terms is contained (which forms the basis for signing an access agreement with NBN Co). There are likely to be good reasons for many issues of detail around non-price terms to be included in the WBA. However, as the ACCC does not have direct oversight of the WBA, a key question for consideration is whether more 'key' non-price terms, conditions and/or principles should be included in the SAU, particularly those which may have implications for competition. The balance between these matters in the SAU and WBA, and the interaction between the two, should be examined further in this inquiry.

The importance of competitive wholesale markets

The design of NBN Co's products/services/prices will impact on the development of competition in complementary markets downstream from its activities.

As a wholesale-only platform, NBN Co itself will not directly sell to end-users but instead its customers (carriers and service providers) buying wholesale products will be the channel to end-users. This includes Retail Service Providers (RSP's) as well as customers who specialise in providing wholesale service solutions and inputs with the goal of bringing others to market in order to service end-users.

The existence of competitive wholesale markets downstream from NBN Co's layer 2 services will be important for promoting a competitive and sustainable communications sector into the future, including at the end-user level. In this inquiry, and as part of any monitoring or review functions it has into the future with respect to the SAU, the ACCC should consider the extent to which NBN Co's products and pricing encourage the development of competition in complementary downstream wholesale and retail markets.

Monitoring and review arrangements

An important issue for the ACCC to consider in its assessment of the SAU is the adequacy and scope of the review arrangements, and how they will interact with the planned legislative review and NBN Co's anticipated future change in ownership.

The SAU contains commitments to review various matters relevant to the SAU. This includes periodic reviews of the customer engagement and Product Development Forum (PDF) processes and an NBN Co review of certain aspects of the SAU's operation within the 'SAU Review Period' (eg. Prudency, RAB, WACC), which includes the discretion for NBN Co to widen its scope to additional matters.

The inclusion of review mechanisms in the SAU is appropriate for ensuring that NBN continues to meet its various objectives. However, these review mechanisms should be more independently initiated and administered by the ACCC, the 'SAU Review' should have specific regard to the development of competition in complementary downstream markets, the criteria to be applied should be settled in the SAU and there should be a clearer process for industry consultation.

To supplement these review arrangements, it will be important to ensure that NBN Co is subject to adequate monitoring and reporting. The SAU proposes certain obligations in

this regard (Schedule 10 and Schedule 11). As a matter of principle, it would be preferable for adequate monitoring and reporting obligations to be settled in the SAU to provide certainty upfront for the ACCC, NBN Co and the industry more broadly; however, as the ACCC has noted, certain record keeping rule and information gathering powers are otherwise available to it. Either way, it will be important for the ACCC to be able to collect the necessary information for it to continually monitor compliance, and as relevant inputs to its review function.

Section B: Responses to selected ACCC questions

Establishing an effective regulatory framework

Are there any 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?

To provide as much certainty as possible, parties should have the opportunity to consider and review the outcomes of a completed SAU process before being asked to sign a long term access agreement. There are provisions in the existing WBA which provide for the extension of the Agreement Term, and there is also a process under way (Contract Development Process or 'CDP') to resolve key issues ahead of the next iteration(s) of the WBA.

As noted by the ACCC,² the SAU does not contain comprehensive terms and conditions of access to all NBN services. Many of the detailed terms and conditions are either contained in the WBA or will be at the discretion of NBN Co to determine over time within certain broader regulatory constraints in the SAU (eg. The Long Term Revenue Constraint, Individual Price Limit Increase, PDP etc). The balance between certainty and flexibility is an issue that should be tested in this inquiry. As noted in the Section A of this submission and in response to specific ACCC questions, there are areas where the SAU should provide more upfront certainty for access seekers, such as for business services, ancillary services as well as the establishment of more effective, ongoing regulatory oversight and review arrangements.

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.

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?

² ACCC, Supplementary Consultation Paper, p.9.

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.

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

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?

Within the SAU (Clause 6) NBN Co is proposing to confer powers and functions on the ACCC in addition to its existing regulatory powers under Part XIC of the CCA ('Regulatory Recourse Mechanism'). The mechanism as proposed would allow the notification of a dispute with the ACCC if an access seeker and NBN Co were unable to reach agreement on a matter relating to the negotiation of an access agreement.

While the conferral of more powers on the ACCC within the SAU itself is appropriate to ensure more effective independent regulatory oversight, the mechanism as currently specified is limited to a range of circumstances which will constrain its effectiveness. For example, as understood the mechanism will not be available:

- once an access seeker has signed an agreement with NBN Co (the timing of which may not practically be within its control given commercial considerations);
- for non-price terms and conditions not covered in the SAU (which may be difficult to establish given some non-price terms may be covered 'to some extent' in the SAU but fleshed out in more detail in the WBA); and
- for price related terms and conditions announced 'prior to the commencement of the SAU'.

Further, as the ACCC has noted it is not clear that disputes arising from the renegotiation of an access agreement (or a replacement one) would be captured by this mechanism.³

These limitations will reduce the effectiveness of this oversight mechanism in practice and while the ACCC may still be in a position to make Access Determinations (AD) and Binding Rules of Conduct (BROC) it is not clear that an access seeker would have recourse to the outcomes of these decisions in practice if it had already signed an access agreement (notwithstanding the flow-through mechanism in the WBA and the operation of NBN Co's non-discrimination obligations).

Given the long timeframes involved and the fact that certain NBN Co products and services have not yet been released, it is difficult to precisely predict in which circumstances a more overarching regulatory oversight mechanism will be necessary into the future. However, given NBN Co's position in the market and the policy objectives, there is a case (notwithstanding NBN Co's wholesale-only status) for stronger ongoing

³ ACCC, Supplementary Consultation Paper, p.13.

ACCC regulatory oversight of its activities within the SAU itself. In principle and practice these oversight provisions would be intended to work as a 'regulatory backstop' in the event of any unintended consequences or unforeseen market circumstances not anticipated during the SAU assessment or prior to the signing of access agreements. This would allow the ACCC to determine whether regulatory intervention is warranted in the future or not based on the relevant statutory criteria.

The SAU Regulatory Recourse Mechanism sets out the various procedures and timelines under which the ACCC must make decisions in relation to a dispute, including that it must choose between the positions put forward by an access seeker or NBN Co. The ACCC, as the independent regulator with experience in dispute resolution, should have more discretion in how it handles disputes which are notified to it (price and non-price), including timeframes for decision making and ability to vary, or develop its own position in response to the facts at hand, particularly in the event of more complex disputes.

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?

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?

NBN Co has proposed a 30 year term for the SAU and has specified a number of review processes that it will govern within this period.

It is difficult to foresee what the market will look like at the end of this period. In the event that a 30 year undertaking term is approved (which is something that should be tested in this inquiry) it is imperative that there are more effective ongoing regulatory oversight mechanisms and review arrangements built into the SAU.

The SAU contains commitments to review various matters relevant to the SAU, including periodic reviews of the customer engagement and PDF processes, and an NBN Co initiated review of certain aspects of the SAU's operation within the 'SAU Review Period'.

The inclusion of review mechanisms in the SAU is appropriate for ensuring that NBN continues to meet its various objectives. However, these review mechanisms should be more independently initiated and administered by the ACCC, the 'SAU Review' should have specific regard to the development of competition in complementary downstream markets, the criteria to be applied should be settled in the SAU and there should be a clearer process for industry consultation. The ACCC should also have the ability to initiate review of price controls at the SAU review period to ensure they continue to meet the relevant statutory criteria.

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?

The SAU is given by NBN Co in relation to the 'NBN Access Service', a Layer 2 service between the end-user and the relevant POI.

The NBN Access Service as defined by NBN Co does not include certain additional services which an access seeker will also need to purchase in order to supply downstream services to end-users on the NBN (eg. facilities access services); instead in the SAU these are classified these as 'ancillary services'. It also does not incorporate NBN Co's Multicast service which is being developed via a separate industry consultation.⁴ NBN Co has indicated that this service must be acquired in addition to a standard Ethernet bitstream service supplied by the same access seeker who is providing the Multicast service (NBN Co submits this is for technical reasons and End-User Experience reasons); and has proposed pricing for this service.

Notwithstanding the separate consultation, there is a case that the development of this product/pricing structure warrants consideration in this inquiry given it may become an important building block for end-user offerings, and/or will have an impact on competitive service offerings and the bundling of service offerings in the market. It is difficult to predict how the supply conditions and price terms for this service will impact on downstream markets. This is another reason why it is important to ensure there is effective ongoing regulatory oversight within the SAU in order to address any competitive implications at a later point, and as an alternative to bringing certain issues within the SAU explicitly.

⁴ NBN Co released a paper in August 2011 titled 'Multicast: Feature, Technology and Pricing Overview for Multicast over Fibre'.

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?

The ACCC has identified a potential inconsistency between the preliminaries of the SAU which states NBN Co will *only* supply the four components listed in clause 1.1 of Schedule3 (UNI, AVC, CVC, NNI) and NBN Co's submission which notes that the NBN Access Service will be supplied *initially* through these four components. The SAU does not appear to include a commitment to supply these additional components as they are introduced. This is an issue that warrants further clarification.

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?

The SAU defines 'Ancillary Services' to include the 'Facilities Access Service' and the 'Systems Interfacing Service'.⁵ Clause 2.4(b) of the preliminaries of the SAU states that 'ancillary services' do not form part of the NBN Access Service but that it will offer to supply these to customers subject to the SAU, and the revenues earned will be captured by the Long Term Revenue Constraint Methodology. Schedule 5, Clauses 3.1 and 3.2 of the SAU indicate that the Individual Price Limit Increase (of CPI/2 annually) will apply to ancillary services, but that exceptions to this include the setting of the initial price, the introduction of a charge where previously it had been \$0.00 or where the price change involves the reduction, removal or cessation of the application of a discount, allowance, rebate or credit applicable to that service.

⁵ The Facilities Access Service is defined as "a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a Point of Interconnect for the purposes of interconnecting their network with the NBN Co Network"

The ACCC notes that the implication of its approach towards ancillary services may be that NBN Co intends for them not to become 'declared' services if the SAU is accepted, and given that, NBN Co will not be subject to the Category B SAO's in relation to these services (absent them being declared by the ACCC or NBN Co publishing a SFOAA that relates to the service on its website).⁶

NBN Co has published an Information Paper⁷ on its Facilities Access Service which provides an overview of the long-term Facilities Access Service that will be supplied by NBN Co to Access Seekers under the WBA. The release of this further information to industry on these matters is welcome. However, to provide greater certainty to all parties into the future on the ongoing obligations and pricing with respect to these services, it is appropriate to consider bringing these more clearly into the scope of the SAU, or at least provide further clarification of the proposed approach to these services (including with respect to non-discrimination obligations).

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?

As noted by the ACCC, the SAU does not specify any service levels, nor make commitments to comply with service levels set out in another document. The SAU⁸ states that NBN Co intends to introduce further service levels from time to time and will, by no later than 30 June 2012, in respect of the NBN Co Fibre Network introduce a service level regime dealing with matters including network performance, service delivery, communication with Customers and planned and unplanned event management. It also states that in addition to Clause 3.7 of Schedule 6 (Product development and withdrawal), NBN Co will maintain and periodically update a service level regime in respect of those Product Components and associated Product Features for which a service level is introduced; and that NBN Co will consult with customers about the nature and extent of further service levels.

⁶ ACCC, Supplementary Consultation Paper, p.30.

⁷ NBN Co, *Facilities Access Service – Overview of the NBN Co Facilities Access Service*.

⁸ NBN Co SAU, Schedule 11, Clause 14.2.

It is important that NBN Co provides customers with commitments around service levels to ensure that access seekers can meet their various obligations. Service levels are also important to enable access seekers to undertake the necessary network planning and product design for downstream markets and customers. While NBN Co's intention to consult further with its customers on these issues is welcome, it is not clear at this stage that the current commitments in the SAU with regard to the service level regimes are sufficient. It would be preferable for service levels to be specified in the SAU for the NBN Access Service, or that the SAU contained commitments in this area that is linked with another document (eg. WBA) where detailed service level commitments could be introduced at a later point.

Product Development and Withdrawal

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

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

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)?

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

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?

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?

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

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?

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?

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?

Should product withdrawal be subject to dispute resolution procedures?

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?

Schedule 6 (Product Development and Withdrawal) of the SAU sets out the processes by which NBN Co will introduce, vary and withdraw the product components and product features that it supplies.

As noted by the ACCC, there appear to be a number of exclusions from these processes (eg. product components and product features covered by or contemplated within the Initial Product RoadMap, and minor variations for enhancements) which have the effect of exempting a broad range of NBN Co's products from the product development and withdrawal provisions in the SAU. The ACCC notes that, in particular, it appears that the Initial Product Roadmap is sufficiently broad to cover, or contemplate, almost any new product component or product feature NBN Co may introduce, and NBN Co appears to have discretion over whether a product variation or enhancement is minor.⁹ This raises the issue of whether the effective 'carve out' of products and services which will apply to these arrangements apply is too broad. Further, there does not appear to be effective independent dispute resolution processes in the SAU that would apply to disputes arising in relation to the PDP.

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?

In its supporting submission to the SAU¹⁰, NBN Co has explained that the key element of its overarching pricing strategy is a two part pricing approach comprising an access component in the form of an AVC charge and a usage component in the form of the CVC charge. ARPU will initially be driven mostly by AVC revenue but over time it will be driven to a greater extent by CVC revenue as usage of the NBN increases. NBN Co submits that this pricing strategy should allow NBN Co to balance, over time, the competing needs of maintaining high rates of take up of the NBN (through affordable AVC prices) with high rates of usage of the NBN (through affordable CVC prices).

This pricing structure has been designed with a number of objectives in mind, including encouraging initial migration, the recovery of costs and the delivery of uniform national wholesale prices. In its Corporate Plan, NBN Co has outlined assumptions around data usage projections. NBN Co should further explain its view on the expected impact that this two-part pricing structure is likely to have on the nature and extent of competition in downstream markets and the structure of end-user pricing over time as average usage

⁹ ACCC, Supplementary Consultation Paper, p. 33.

¹⁰ NBN Co SAU Supporting Submission, p. 49.

increases, including if the data usage projections exceed or fall short of its forecasts. This is another area where an SAU review at the appropriate time could examine the impact of this pricing structure on downstream markets.

Initial Prices for New Products

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?

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?

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?

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?

The SAU provides pricing commitments ('price controlled offers') for AVC 12/1, CVC and the NNI for the initial five year period. NBN Co has discretion/flexibility with respect to setting prices for other services, subject to other broader constraints.

An important consideration in this inquiry is whether the SAU provides the appropriate balance between providing certainty to industry/access seekers about NBN Co's initial set of prices, and the flexibility for NBN Co to make future product and pricing decisions to meet its various objectives. While the initial price controlled offers cover the basic building blocks for services, some services which sit outside these arrangements will be necessary for the supply of services on the NBN (eg. ancillary services, business services), there may not be realistic market alternatives for these into the future and/or the degree of substitutability with price controlled services is limited. While the SAU sets out broader constraints for the pricing of non price controlled offers, such as the 'Long Term Revenue Constraint' and the 'Individual Price Limit Increase', these will act as a limited constraint in the short to medium term or will not constrain the setting of initial prices. Whether the scope of the price controlled offers is broad enough should be examined in this inquiry.

The SAU also needs to set out key principles and a detailed process by which NBN Co will set prices for new products, particularly those without realistic market substitutes. This

is particularly important given the limitations of the PDP with respect to dispute resolution mechanisms (and that products/prices listed on the Initial Product Roadmap are potentially outside the scope of this forum).

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?

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?

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?

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?

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?

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

If there is a mechanism in the SAU which allows NBN Co to increase prices by more than a specified price control, the ACCC (as proposed in the SAU) is the appropriate decision-maker on this. However, as the independent regulator the ACCC should have more flexibility in making its decision on an NBN Co request rather than specified timeframes and an accept or reject test, particularly for more complex matters. The ACCC should also have the ability, in consultation with NBN Co, to initiate review of price controls at the SAU review period to ensure they continue to meet the relevant statutory criteria and relevant policy objectives.

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?

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?

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

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

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

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

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?

The inclusion of processes in the SAU to consult with customers and scope for ACCC review when NBN Co proposes to make changes to an Access Agreement is appropriate. However, as noted by the ACCC, the process set out in clauses 14.3(d) to 14.3(f) will not likely apply to changes to all of the terms and conditions of access set out in an Access Agreement. Clause 14.3(c) of the SAU states: "Where an Access Agreement sets out a specific process in accordance with which NBN Co can make a particular change to the Access Agreement, then NBN Co may make that particular change in accordance with that specific process". Further, it is unclear the extent to which the regulatory recourse provisions would apply in the situation where parties cannot agree on an appropriate changes management process prior to the signing of a long term WBA. The ACCC should seek to clarify these issues in this SAU inquiry and reach a view on whether the extent of these exclusions is appropriate.

NBN Co has proposed timeframes for providing customers with notice of changes to their access agreements, for example a 60 day notice applies if the WBA does not have a change process specified. The commitment from NBN Co to provide such a notification in this event is welcome, but it is difficult to ascertain whether 60 days will be a reasonable timeframe in all cases without knowing what type of change is being proposed, particularly if it is a complex change that may warrant ACCC scrutiny (and therefore could be subject to an IAD or BROCC). It should also be made clearer what sort of consultation arrangements NBN Co will put in place with industry in these circumstances.

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?

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

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

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?

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

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

The SAU requires NBN Co to including billing dispute processes in the WBA, which means they are effectively outside the ACCC's consideration of the SAU. Under NBN Co's current approach, any concerns or issues with the detailed billing, payment and credit management arrangement would presumably be resolved in the CDP ahead of the signing of long term agreements. It may be appropriate for the ACCC to consider some of the 'key principles' that should govern the operation of these provisions, and their consistency with non-price terms for other declared services.

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?

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?

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?

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

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

The SAU addresses matters concerning the location of NBN POI's, including the specification of initial POI locations (consistent with the ACCC's 'list in force' developed using the 'Competition Criteria'), the circumstances under which NBN Co will conduct a review of POI locations and arrangements for temporary POI's. The SAU requires NBN Co to review the POI locations every five years, or at any other time it sees fit (provided it has not commenced a review within 12 months of the completion of any other POI review); and to consult with the ACCC and access seekers in relation to the criteria to be applied in the review. On completion of a POI review, NBN Co is able to open, close or relocate a POI with the ACCC's prior approval.

The specification of the POI locations based on the ACCC's 'Competition Criteria' is likely to promote the LTIE, comply with the Category B SAO's and be reasonable, particularly as it is based on a thorough review of these matters by the ACCC (which included extensive industry consultation). It is appropriate that there are arrangements in the SAU for the future review of POI locations, including to account for new market circumstances and the development of competition, and that the ACCC has independent oversight of these matters (as the SAU states that ACCC approval is required prior to NBN Co relocating, closing or adding a POI). The SAU states that NBN Co will consult with the

ACCC and access seekers in relation to the 'criteria' to be applied in the review, however this should extend to involvement in the substance of the review itself, to ensure the ACCC is able to make a well informed decision.

The SAU should also more clearly outline how the proposed arrangements with respect to POI's interact (or are consistent) with the provisions in Clause 13 of the WBA (separate from the transitional commitments in 13.2(b)) which state that NBN Co has the ability to relocate, close or replace a POIs, and any such decision by NBN Co cannot be disputed.

On the issue of NBN Co's obligations under s.152AXB(4), to the extent that the inclusion of this commitment in the SAU itself would make this obligation clearer this should be considered.