

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Consultation Paper

**NBN Co Special Access
Undertaking Variation**

Public Version

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Section 1. EXECUTIVE SUMMARY

- 1.1 Access to reliable, high-speed internet will underpin Australia’s digital future and is essential to ensuring Australians do not end up on the wrong side of a global digital divide. Gigabit services are becoming the norm globally, and will be the minimum expected service in the near future. The Statement of Expectations clearly sets out the Government’s expectations that NBN Co deliver on this opportunity:

The enduring purpose of the NBN is to provide fast, reliable and affordable connectivity to enable Australia to seize the economic opportunities before it and service the best interests of consumers.¹

- 1.2 This is already being achieved in New Zealand, where 90% of connections are on 300 Mbps and above² – only 0.6% of NBN connections are at this level.³ Optus is committed to driving Australia forward to the Gigabit future, but we need support from the national wholesale network. All stakeholders – wholesalers, retailers, regulators and Government – need to commit to this bold vision if we are to deliver the network and services that Australians need.
- 1.3 NBN Co’s Special Access Undertaking (SAU) has an important role to play in delivering on these objectives. Optus firmly believes it is possible for the SAU to provide pricing and service standards that support positive outcomes for NBN Co, RSPs, customers and achieve the Government’s objectives. A balancing of all these interests is the cornerstone of any SAU assessment and will result in win-win-win outcomes for all. To achieve this, we must as an industry focus on delivering better *value and quality* to customers – to encourage customers to move up the value chain.
- 1.4 Unfortunately, the latest SAU Variation does not share this vision. While the latest SAU Variation is an improvement on the previous proposals – there are improvements in price terms and regulatory design elements – these changes are insufficient for the SAU to be deemed reasonable and are not sufficient to deliver the digital future which we all want to achieve and which is in the long-term interest of end-users.
- 1.5 This SAU Variation falls short on key aspects related to pricing, service standards and the processes for determining these through future regulatory cycles and the wholesale broadband agreement.
- 1.6 There remains a clear pricing trend in the SAU Variation to bifurcate the market into entry level 25 Mbps services and higher priced 100 Mbps services. It appears the intent of the proposed pricing is to move the wholesale 50 Mbps price towards 100 Mbps over time, while maintaining the current price level through the 25 Mbps wholesale product. Optus does not support this trend.
- 1.7 Pricing should focus on making higher speed tiers more attractive to customers. Many customers buy high priced mobile handsets because they *see value in the product*. In order to move more households onto higher speed tiers (and grow revenue for NBN Co), we must as an industry *increase the value to consumers* of higher speed tiers.
- 1.8 Rather than using the carrot of increasing value for higher speed tiers, NBN Co relies on the stick to move customers up by making the most popular 50 Mbps product more expensive and forcing consumers to choose between 25 Mbps speeds or to pay more

¹ Minister for Communications, Minister for Finance, NBN Co Ltd Statement of Expectations, 19 December 2022, p. 1.

² <https://company.chorus.co.nz/file-download/download/public/2416>

³ ACCC NBN Market Indicator Report Sept 2022, Table 5. Sum of 500M, UltraFast and 1000M customers.

for 100 Mbps. Optus expects that the majority of its existing 50 Mbps will opt to move down to 25 Mbps rather than pay more for 100 Mbps – particularly where many households still suffer from underperformance and technical line limitations. This is not the outcome we want, nor the outcome NBN Co wants, nor should it be the outcome the ACCC allows.

- 1.9 Service levels and network quality are key for Australians to experience increasing *value* for the NBN connection. Service levels must, at a minimum, be set to meet the reasonable standard expectations of everyday Australians. It is not reasonable for a customer to experience seven dropouts a day and NBN not accept this as a fault. It is not acceptable that a household can buy 100 Mbps but must achieve less than 12 Mbps before NBN considers this to be underperformance. Optus believes that reasonable Australians would disagree and expect line performance to be improved.
- 1.10 Optus is disappointed that after more than 18 months of preparation and engagement on the SAU Variation NBN Co does not appear to have been given significant consideration to the approach to service standards.
- 1.11 It is not reasonable for NBN Co to only commit to service levels set in 2020 when it has spent billions of dollars in upgrading the network and is forcing consumers to pay more. The improved technology will have improved quality of service benefits that should be passed through to end-users.
- 1.12 With the current level of network experience, it is not a surprise that so few households are adopting higher speed plans. Better quality services are more attractive to consumers and improves consumer welfare. The SAU must aim higher to address these issues.
- 1.13 Finally, RSPs provide 8.7 million NBN services to Australian households and businesses.⁴ Certainty for RSPs is critical to the efficient operation of their business. Optus has concerns over the timing of this SAU process and its interaction with WBA5 and expectations around implementing these changes by 1 July. We are now almost at March and have no certainty over what price and service changes will occur on 1 July. The current SAU Variation and proposed WBA5 is likely to result in significant price increase for most of the market at 1 July, without sufficient time for industry to implement price changes and little notification to consumers of the upcoming price increases.

⁴ ACCC NBN Wholesale Market Indicators Report, September 2022. <https://www.accc.gov.au/regulated-infrastructure/telecommunications-and-internet/national-broadband-network-nbn-access-regulation/nbn-wholesale-market-indicators-report/september-quarter-2022-report>

Section 2. PRICING AND PRICE CONSTRUCTS

- 2.1 The November 2022 update of the SAU Variation has made some inroads on industry pricing concerns but further improvements are still required if the SAU can be assessed as being reasonable and promoting the LTIE.
- 2.2 The pricing structure proposed in the new SAU reflects the same structure put forward in NBN Co's March 2022 SAU Variation proposal. Namely:
- (a) A new flat monthly charge construct for residential grade 100 Mbps and higher speed offers. These speed tiers currently make up less than 20% of NBN residential grade services.
 - (b) For most other residential grade offers of 50 Mbps or less (covering more than 80% of current NBN residential grade services), new bundled offers that provide for access and a CVC utilisation allowance.
 - (c) CVC allowances in the bundled offers (excluding the 12/1 Mbps products) could be adjusted every 6 months. This would be an automatic adjustment equal to 50% of the change in average aggregate peak CVC utilisation for a preceding 6 month period (i.e. the current measurement period) compared to the previous measurement period divided by two (with the adjustment to be applied for a 6 month period until the next adjustment date).
 - (d) Changes to its entry level broadband pricing to provide closer alignment of the 25 Mbps offer to the 12 Mbps offer (compared to the existing SAU and WBA4 commercial offers).
 - (e) A proposed new 12 Mbps voice-only offer priced initially at \$12 per month.
- 2.3 Optus raised concerns about NBN Co's pricing proposal, namely that:
- (a) NBN Co has failed to provide evidence to demonstrate that the proposed prices promote the LTIE. The first test – that prices reflect the efficient cost of the service – is not established due to there being no connection between the prices proposed and the BBM supplied by NBN Co.
 - (b) The SAU pricing results in material price increases for consumers. Namely, that Optus' previous views on the market implications because of the proposed SAU pricing have not changed, including that:
 - (i) Customers that remain on the NBN 50 Mbps tier could see significant retail price increases over the next two years.
 - (ii) A material number of the existing NBN 50 Mbps customer base will likely move down to the NBN 25 Mbps speed in order to maintain their current retail spending.
 - (iii) There will be limited movement to the 100 Mbps and above tiers due to the high price point of the 100 Mbps tier and the large price steps between the 100 Mbps service and beyond. For example, while there may be an incentive to move customers to the 100 Mbps service based on the initial price point, this effect may soon be negated by the price growth through the SAU.
 - (iv) Inefficient bypass of the NBN by mobile services will increase due to the perceived poor value of the NBN.

- (c) As such, none of these outcomes necessarily promote the LTIE and are therefore not reasonable.
- 2.4 NBN Co has made some small changes and improvements since the March 2022 SAU proposal, including:
- (a) Reduction in the 100 Mbps price level. The proposed shift to AVC-only offer is retained, with pricing for the Home Fast (100/20 Mbps) service reduced to \$55 (down from \$60).
 - (b) Small increase in included CVC within the 50 Mbps bundle. Included CVC has increased to 2.5 Mbps (up from 2.45 Mbps, however still below current CVC inclusion in existing WBA4 bundled offer). However the increased price point above existing WBA4 bundled offer is retained.
- 2.5 However, it is important to note that the relevant legal threshold is whether the proposed SAU is reasonable and promotes the LTIE. It does not matter if the current proposal is an improvement on previous versions. Notwithstanding the improvements, the pricing proposal does not materially address the concerns raised in our previous submission. As such, the proposal still is not reasonable and still does not promote the LTIE.

Forcing end-users to upgrade does not promote the LTIE

- 2.6 There remains a clear pricing trend in the SAU Variation to bifurcate the market into entry level 25 Mbps services and higher priced 100 Mbps services. It appears the intent of the proposed pricing is to move the wholesale 50 Mbps price towards 100 Mbps over time, while maintaining the current price level through the 25 Mbps wholesale product.
- 2.7 The combined impact of these movements is to effectively force the majority of the market down to 25 Mbps speeds in order to maintain current retail prices; or to force end-users to pay more to move to 100 Mbps speeds.
- 2.8 A key test of reasonableness is whether the SAU proposal reflects behaviours that would occur in an efficient competitive market – behaviours that would indicate allocative, productive and dynamic efficiencies. In an efficient market, firms do not have the ability to force end-users to move products. Rather consumers move products by choice, by seeing value in moving to upgraded products. In other words, the quality-adjusted price decreases. It is noteworthy that the trend for consumers to see value in more expensive products is observed everyday in the mobile market, with many consumers more than willing to pay almost \$2,000 for a premium mobile handset which cost less than a fifth of that a decade ago.⁵
- 2.9 Consumers are willing to pay more for handsets because they see *increased value* in the product. This is the challenge for NBN Co – ensuring that consumers see *increased value* in the 100 Mbps product so that they are *willing* to pay more for NBN services.
- 2.10 There is nothing wrong with trying to move the market to accept 100 Mbps as the base product. This is in fact occurring in most other markets around the world and is a trend that Optus encourages. It is vital to ensure Australia experiences the social and economic benefits of broadband.
- 2.11 However, unlike in other markets like New Zealand, the revised SAU continues to attempt to coerce end-users onto 100 Mbps rather than encouraging consumers to choose 100 Mbps. Optus remains concerned that the attempt to push the market to 100

⁵ iPhone 5 original starting price in 2012 was USD199, compared to iPhone 14 Pro Max starting at USD1099 in 2023. <https://www.androidauthority.com/iphone-price-history-3221497/>

Mbps by making 50 Mbps unattractive does not promote the LTIE. Rather, NBN Co should be trying to pull consumers up to 100 Mbps by making the product commercially attractive.

- 2.12 For example, NBN Co has made minor improvements to its proposed pricing since the March Variation to reflect comments we have made in the step to 100 Mbps and above. However, the legal test is not whether the November SAU proposal is better than previous SAU proposals – it is whether the proposed pricing is reasonable. Being less unreasonable does not mean the pricing proposal is reasonable.
- 2.13 Optus also cautions that the incentive to move to 100 Mbps based on the initial price point is temporary. While Optus understands that one of the objectives of the price changes is to move consumers onto high-speed tiers, there is a high risk that this effect could soon be negated by the price growth through the SAU.
- 2.14 Optus notes that in addition to the minor reduction in the 100 Mbps and above initial price points since the March SAU proposal, NBN Co has also increased the proposed caps on the annual movement in individual products. For NBN Offers above 100 Mbps, this means that the annual price increases are now subject to price caps based on ‘the greater of CPI or 5%’, compared to ‘the greater of CPI or 3%’ in the March 2022 SAU proposal. Applying the maximum price increases allowed under these price caps, therefore suggest that the November 2022 SAU prices could exceed the proposed March 2022 SAU prices before the end of the next regulatory period, and also well before the ICRA drawdown comes into effect.
- 2.15 Optus, therefore, reiterates it is time to reject the “same for more” price structure, where NBN Co receives revenue growth automatically. Revenue growth should come from a “more for more” model, encouraging customers to move up speed tiers. To achieve this, the *value* differential between standard NBN plans (50 Mbps) and high-speed tier plans (100 Mbps and above) should be reduced. It is not price alone that should be the determining factor for this consideration.

Revised NBN pricing structure and levels

- 2.16 NBN Co submits it has addressed industry concerns and made *“significant additional modifications to its proposed SAU Variation following detailed consultation with the ACCC, internet retailers, consumer advocacy groups and the Government.”*⁶
- 2.17 Optus welcomes the proposed pricing structure across a number of NBN offers, however we consider further work is required to ensure that the starting levels for the new pricing and price control arrangements are appropriately set. As noted above, the relevant test for the ACCC is whether the proposal is reasonable not whether the current proposal is better than the last proposal.
- 2.18 At the very minimum there should be no price increase to the fixed charge of current NBN Bundled Offers available today, without a commensurate improvement to the service quality commitments.
- 2.19 In particular, Optus does not support the proposed change to the 50/20 Mbps Bundled Offer without a commensurate improvement to the service level commitments that apply to NBN services. This will result in an effective price hike on end-users, with a significant proportion of Optus’ NBN customer base to be negatively impacted. **[CiC Begins] [CiC Ends]** It is not appropriate that a significant price hike is imposed on this customer base without any change to the product offer, including any service level commitments. There

⁶ NBN Co, “NBN Co lodges proposed SAU Variation with the ACCC,” Media Release, 30 November 2022, p.1.

should be a significant and tangible 'more for more' requirement that must be met before such a detrimental price shock can be levied.

- 2.20 The application of price control measures is also unnecessarily complex. For example, while commitments are in place to mitigate the potential for unnecessarily price shocks, is not clear that they will constrain the pricing implications imposed on RSPs with different or unique customer profiles.
- 2.21 We further discuss these pricing structure comments in the context of NBN Co's specific pricing proposals below.

The role of higher speed tiers

- 2.22 NBN Co proposes the removal of CVC (capacity) charging and introduction of AVC-only pricing for the Home Fast (100 Mbps) and above wholesale speed tiers within three months of the SAU Variation Date.
- 2.23 Optus welcomes the move to an AVC-only pricing construct.
- 2.24 NBN Co notes that *"having a lower price difference between speed tiers will likely incentivise more end-users to move to a higher speed tier, where that is appropriate for their anticipated level of demand."*⁷ This is particularly true in the context of higher speed tiers for the more price sensitive customer where NBN Co considers that demand for higher access speed tiers will grow at a faster rate than previously forecast.
- 2.25 However, the reasonableness of the AVC-only offers should be assessed with reference to the efficient transition from the mid-tier sub-100 Mbps offers. The key question being whether end-users are incentivised to move up the speed tier mix by choice and not be coercion.
- 2.26 In order for the pricing proposal to be assessed as being reasonable it should reflect the pricing that would be seen in an efficient competitive market. A key component of this is to encourage consumers to move up the value chain by demonstrating that higher priced options offer better value than lower priced options. This is the pricing strategy seen in many global wholesale broadband markets and which should be adopted by NBN Co.

Competition in the mid- and high-data usage customer segment

- 2.27 NBN Co notes that it *"observes a strong correlation between the demand for bandwidth and an end-user's speed selection, with average- to high-usage customers typically selecting 50 Mbps or higher speed tier services. This segment accounts for 77% of nbn's users and is critical in ensuring that nbn achieves overall cost reflective prices."*⁸
- 2.28 Furthermore, that:

nbn's pricing proposal in the Variation optimises revenue recovery from this segment via a combination of marginal price increases (at less than the rate of inflation) and reduced pricing relativities between speed tiers, to incentivise upgrades by customers with higher price elasticity for speed. These price changes are expected to shift more cost recovery to this consumer cohort, in turn

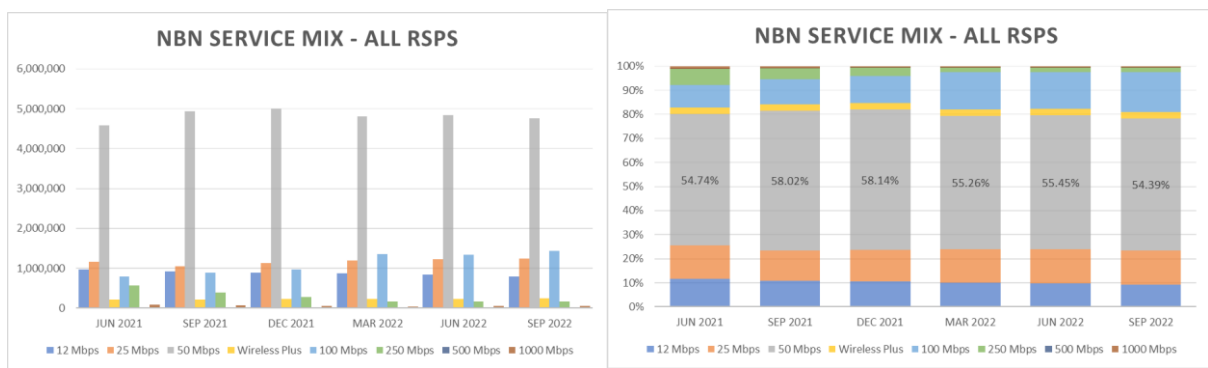
⁷ NBN Co, nbn Special Access Undertaking Variation 2022 – Supporting submission, Part B: Pricing and price controls, November 2022, p.9

⁸ NBN Co, nbn Special Access Undertaking Variation 2022 – Supporting submission, Part B: Pricing and price controls, November 2022, p.11

*reducing upward pricing pressures on more price-sensitive cohorts of nbn's customer base, improving access to the network in the longer term.*⁹

- 2.29 At a high level, this essentially suggests that current prices are retained with price increases initially constrained by CPI. But as noted above, this is not the only relevant factor. Rather, price movements should be decided by consumers who see increased value in higher priced products. Such a decision does not depend on abstract notions like CPI, but rather around product quality and inclusions.
- 2.30 NBN Co's submissions also do not adequately consider the current mix of NBN customers across all speed tiers, nor does it recognise that the 50 Mbps speed tier continues to represent the most popular speed tier acquired by RSPs today. This is also clearly illustrated through information available from the ACCC's NBN SIO RKR Disclosure Tables (see Figure 1).

Figure 1 NBN service mix, quarterly changes since June 2021

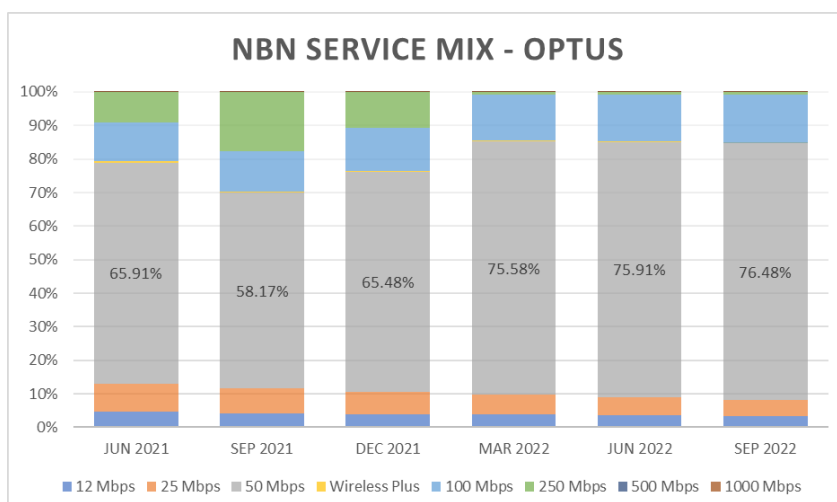


Source: ACCC, Optus analysis. Charts above exclude NBN Sky Muster Plus services

- 2.31 Optus is also concerned with the adverse impact on Optus' NBN service mix, which remains disproportionately skewed to 50 Mbps services for the medium term. A similar analysis based on the ACCC's NBN SIO RKR Disclosure Tables (see Figure 2) clearly highlights this further disparity within Optus' NBN service mix, where Optus' proportion of 50 Mbps services sits well above the industry average.

⁹ NBN Co, nbn Special Access Undertaking Variation 2022 – Supporting submission, Part B: Pricing and price controls, November 2022, p.12

Figure 2 Optus' NBN service mix, quarterly changes since June 2021



Source: ACCC, Optus analysis.

- 2.32 It follows that the initial \$5 increase per service per month (excluding overage additions) is not inconsequential, particularly given that such services are not excluded from any annual price increases (and starting with the commencement of WBA5).
- 2.33 That is not to say that price increases per se cannot be viewed by end-users as justified. The absolute price level should be seen with reference to the value adjusted price level. Optus submits that any price increase should be justified by a commensurate improvement in service levels. The SAU proposal does not do this.
- 2.34 The impact of the proposed NBN pricing will have an immediate impact on Optus' NBN offerings, including a significant proportion of our NBN retail customer base. This issue is further compounded by the timing implications of the introduction of the price changes.
- 2.35 In particular, the timing for the commencement of WBA5 has a significant impact on NBN product management and delivery of customer propositions. The current indicative timeframe is set for 1 July, but can potentially be delayed to a date that is three months following the acceptance of the SAU, creating significant cost uncertainty for RSPs.
- 2.36 At a minimum, the impact of the proposed price changes to the 50 Mbps service alone will result in a \$5 price shock (or 11% increase) per user from commencement, without any consideration for CVC overage. **[CiC Begins] [CiC Ends]**
- 2.37 Optus also notes that the commercial impact also extends more broadly across the entire customer base.

Specific comments on the NBN pricing proposals

- 2.38 NBN Co in its supporting submission, sets out several examples to illustrate the potential impact of price changes from shift to the new proposed pricing arrangements. These wholesale price changes are expected to be implemented within three months of SAU Variation being accepted.
- 2.39 The ACCC Consultation Paper further highlights these include several notable price differences from the current WBA4 offer:¹⁰

¹⁰ ACCC, Proposed variation to the NBN Co Special Access Undertaking, Consultation Paper, January 2023, p.32

- (a) a rise of \$5 per month in the minimum charge for 50 Mbps fixed line and Wireless Plus services from \$45 to \$50
 - (b) \$3 to \$10 per month reductions of the minimum charges of services of 100 Mbps or more
 - (c) \$11 per month reduction in the minimum charge for 25 Mbps services from \$37 to \$26 per month
 - (d) a \$3.10 per month increase in the cost to acquire the 12 Mbps broadband access service
 - (e) the availability of a new voice capacity offer priced at \$12 per month, which is down by \$10.50 per month from the existing commercial offer of \$22.50 per month.
- 2.40 Optus submits that considerable caution should be given when relying on such figures to assess the impact of such price changes, which in many cases can lead to a detrimental impact on end-users. NBN Co also uses Average Combined Charges (ACCs) (across all RSPs) as its proxy to justify its proposed prices, however, this is indicative only for a point in time and does not necessarily reflect the impact on different RSPs.
- 2.41 In particular, Optus raises the following concerns with the NBN pricing proposals:
- (a) The introduction of Flat-Rate Offers is long overdue. It is important that any removal of existing bundle discounts do not adversely affect the initial access prices during the transition to Flat-Rate Offers across all speed tiers.
 - (b) Despite a reduction in minimum prices across some speed tiers, the reduction of CVC inclusions also means that exposure to CVC overage charges may also eventuate in unexpected increases to effective access prices for some RSPs. This is particularly problematic for the 50 Mbps speed tier which faces both a price increase and reduction in initial CVC inclusion.
 - (c) The price convergences between the 12 Mbps and 25 Mbps speed tiers, and the 50 Mbps and 100 Mbps speed tiers, therefore, include artificial incentives for RSPs to move customers to the next speed tier. However these do not consider the opportunity RSPs have to upsell their retail customers to the higher speed tiers, for example not all customers may want, need or have the willingness to pay to move to next speed tier. The proposed direct price increase for the 50/20 Mbps speed tier and 12/1 Mbps speed tier, which are respectively the most popular form and entry level form of data access in the market today remains highly problematic for RSPs.
 - (d) The continuation of CVC charging on the most popular speed tiers appears to be a missed opportunity from NBN Co to address the complicated pricing levels and structure faced by RSPs and their downstream customers.
 - (e) NBN Co's analysis on the proposed pricing changes for the various speed tiers are based on market average CVC usage and does not accurately portray the view faced by individual RSPs. Information on CVC usage is still not available to RSPs to allow for proper analysis on the impact of the proposed changes to NBN access pricing once WBA5 (and similarly the SAU) are expected to commence.
- 2.42 For example, NBN Co's change in price for the 50/20 speed tier and reduction in CVC inclusion, even taking account the move to a CVC utilisation model, will lead to a significant price increase for RSPs and ultimately End-users, with no material improvement in SLAs. Optus is supportive of encouraging End-users to move up speed

tiers however, there needs to be a tangible improvement in Customer Experience to justify the price differential.

Pricing proposal for voice-only, entry level, and Bundled Offers

- 2.43 The SAU Variation introduces the Flat-Rate Offer (i.e. the AVC-only pricing construct) at clause 2B.3.1(a), while the initial bundled CVC TC-4 inclusions are included at clause 2B.3.1(b). During the First Financial Year of the Subsequent Regulatory Period, these are referred to as the Bundled TC-4 Offers, with initial access prices set out at Attachment E, clause 1.2. NBN Co also commits to adjusting the CVC TC-4 inclusions on a biannual basis, every 1 January and 1 July, as set out at clause 2B.5.
- 2.44 As a result, this means speed tiers below 100 Mbps will continue to be subject to overage charges. This is in addition to the reduced CVC inclusions already proposed to apply to each Bundled Offer.
- 2.45 Optus notes that based on the example provided, it is clear that with the exception of the new 12/1 Mbps voice-only service, the effective prices for the remaining speed tier bundles are likely to increase above current levels.
- 2.46 This also potentially sets perverse incentives for RSPs to move to higher speed tiers, with an increasing convergence between the proposed price points for the 50/20 Mbps and the Home Fast (100/20 Mbps) service. Assuming the July 2022 attributed provisioned CVC capacity with the proposed AVC charge and CVC inclusion for the 50 Mbps service, this gives an estimated combined charge of \$54.40¹¹ which is less than a \$1 differential between the two NBN Offers during the Subsequent Regulatory Period.
- 2.47 On this basis, which only looks at a point in time, and in conjunction with its proposed Statement of Pricing Intent, NBN Co appears to make the entrenched assumption that all RSPs will respond to the 'targeted upsell opportunity', that is,

*In regard to its upsell incentives, nbn expects that access seekers will target those consumers on Bundled TC-4 Offers who have higher than average bandwidth consumption – who are expected to be highly correlated with willingness to pay (e.g., consumers with peak hour throughput of at least 0.5 Mbps above the CVC inclusion for an AVC TC-4 50/20 Mbps service) – and encourage these consumers to upgrade to Home Fast (100/20 Mbps) or above flat rate offers, more suitable for their needs. This is partly driven by the overage arbitrage opportunity where access seekers could face a higher wholesale input cost to provide 50 Mbps and below services to high usage consumers, compared to the cost of serving those consumers via a flat rate offer.*¹²

- 2.48 To date, however, the mechanism to assess the impact of changes to the CVC inclusion is yet to be made available. Optus acknowledges there have been good discussions with NBN Co on the reporting metrics to be made available to RSPs, however there is yet to be any tangible information (in the form of information/reports to be provided, not even in dummy form) that has been shared with RSPs. This includes further information on how the utilisation report may impact on individual Tariff List prices, where relevant. It had been anticipated that an example of the CVC utilisation transparency report (for a subset of CSAs) would have been made available to RSPs to ensure that the relevant reporting fields are appropriately captured.

¹¹ Proposed price calculated based on $\$50 + (3.05 - 2.5) \times \$8 = \$54.40$. Assuming no change to the current NBN Bundled Offer, the current monthly access for the same usage would be $\$45 + (3.05 - 2.65) \times \$8 = \$48.20$. This means the proposed 50/20 Mbps price is already above the current NBN price point.

¹² NBN Co, Draft Statement of Pricing Intent, January 2023, p.7

- 2.49 In the interest of fairness NBN Co should commit to recalibrating CVC inclusions prior to the SAU taking effect in July 2023 if it is shown later that NBN Co's guidance understates CVC utilisation and therefore results in higher wholesale charges for July 2023 than was represented. While NBN Co has notified RSPs on the outcome of its latest review for Q3 FY23, which concluded that no change to CVC inclusions is required, it remains unclear how the information provided translates to individual NBN Offers for the reasons as described above.
- 2.50 Given that the majority of Optus' base is on the 50/20 tier, this proposal has a material impact on Optus (and our customers) in the short term. It could lead to significant (and unnecessary) disruption for Optus and its customers in the short term unless an alternative approach can be found. Retail price rises will be inevitable.
- 2.51 At a minimum, Optus also considers the SAU Variation should include a transparency commitment to ensure the provision of such a report to RSPs on a regular basis. Insofar that the commitment to CVC inclusion adjustments is relevant, then this should be accompanied by provision of regular reports on CVC utilisation to ensure RSPs can appropriately forecast and provision sufficient CVC capacity to downstream customers. It would not be in the LTIE that information on adjustments to the CVC inclusions for speed tiers only be provided in updates to the Tariff List. Instead we foresee the Tariff List update set out at Clause 2B.5.1(e) should serve more as the formal update to commercial terms.
- 2.52 Optus therefore acknowledges that while this price convergence is also somewhat temporary during the transition period until proposed CVC overage charges phase out in July 2026, the cost implication to Optus is still substantial. **[CiC begins] [CiC Ends]** It follows that once this transition completes, all NBN speed tiers below 100 Mbps will also be subject to Flat-Rate Offers.

Pricing proposal for transition from CVC TC-4 to Flat-Rate Offers

- 2.53 During the transition to Flat-Rate Offers, the proposed NBN Co transitional pricing comprise the following:
- (a) General reduction in the minimum price for AVC speed tiers below 50 Mbps, with the exception of the 12 Mbps broadband and 50 Mbps services. These also include an initial reduced CVC inclusions in each bundle.
 - (b) Adjusted CVC overage charges, reducing by \$1 per year until its proposed removal from 1 July 2026. This applies to TC-4 CVC charges only, not TC-1 and TC-2 CVC charges. The annual reductions in CVC charges do not apply to 12/1 and 25/5 Mbps Satellite services.
 - (c) Additionally, NBN Co also proposes committed adjustments to the CVC TC-4 inclusions every six-month period. These will be based on actual utilisation for each Bundled TC-4 Offer Group supplied to all RSPs.
- 2.54 Absent the removal of the CVC component for speed tiers below 100 Mbps, NBN Co proposes CVC operational improvements via the introduction of 'as utilised' rather than 'pre-provisioned' CVC charges across the 12, 25 and 50 Mbps fixed line and fixed wireless wholesale speed tiers. This is a welcome improvement; however Optus reiterates that greater transparency on the committed CVC inclusions should be supported by equivalent NBN CVC utilisation reporting to enable RSPs to manage the services it offers to its downstream customers.
- 2.55 These annual reductions in CVC overage charges leading to the complete removal of CVC charges and introduction of AVC-only pricing across the 12, 25, 50 Mbps fixed line and fixed wireless wholesale speed tiers by 1 July 2026 – apply to TC-4 CVC charges

only, not TC-1 and TC-2 CVC charges. The annual reductions in CVC charges do not apply to 12/1 and 25/5 Mbps Satellite services.

- 2.56 Figure 3 below sets out the CVC overage price path until its planned removal altogether in July 2026, after the end of the first regulatory period. However, Optus submits that improvements to this price path should be considered. As a first best option, it should consider the removal of CVC altogether to allow for all NBN TC-4 speed tiers, or alternatively to adopt a smoother glidepath. This would limit any potential price shocks for customers as the transition to the new NBN pricing constructs take effect.

Figure 3 NBN Co proposed pricing: CVC overage price path to 2026

Table B3. Transitional pricing for CVC TC-4 overage charges*

Dates	CVC TC-4 Overage maximum price
1 July 2023 – 30 June 2024	\$8.00 per Mbps
1 July 2024 – 30 June 2025	\$7.00 per Mbps
1 July 2025 – 30 June 2026	\$6.00 per Mbps
1 July 2026 onwards	\$0.00 per Mbps

* Does not apply to Satellite services

Source: NBN Co

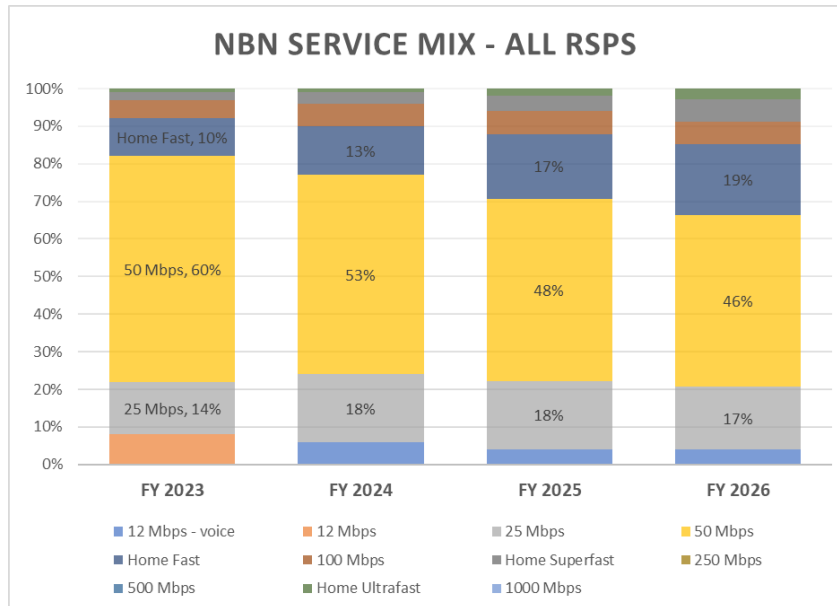
- 2.57 As recognised in its Draft SPI, NBN Co considers that in meeting its objective of maximising efficient network access and usage, it would be beneficial to incentivise users to migrate to higher speed tiers as *“High-data users would be more economically served on flat rate offers, rather than bundled offers, which would lead to those users contributing a sufficient upfront charge to recover an equitable amount of shared and common cost, as well as an appropriate amount of the bandwidth cost they incur on the network.”*¹³
- 2.58 However this also make the presumption that all high-speed users are also high-data users, but that users on the 50 Mbps are not the same type of high-data users.
- 2.59 NBN Co similarly forecasts most of its base will remain below 100 Mbps by the end of the first regulatory cycle (see Figure 4), and that the forecast average monthly CVC overage per user (below 100 Mbps) is expected to increase from 0.36 Mbps in FY24 to 0.50 Mbps in FY26.¹⁴ This equates to approximately \$654m in CVC overage revenue over the first regulatory cycle period.¹⁵

¹³ NBN Co, Draft Statement of Pricing Intent, January 2023, p.7

¹⁴ CVC overage estimate is derived from NBN Co's supporting materials. See: NBN Co, Forecasts in support of nbn's SAU Variation, Public Version.

¹⁵ Based on the sum of NBN Co forecast CVC overage revenue for the period FY24 to FY26.

Figure 4 NBN Co TC-4 service mix forecast , FY23 to FY26



Source: NBN Co, Draft Statement of Pricing Intent

2.60 It follows that, on balance, all end-users (irrespective of speed tier and data usage) would be best served on flat rate offers.

Impact on Optus of NBN proposed pricing changes

2.61 As discussed throughout this section, Optus has highlighted concerns with multiple elements of NBN Co’s proposed pricing changes and price transparency measures.

2.62 The following sets out some additional commercial implications for Optus, as a result of:

- (a) Timing delays – uncertainty with timing on the commencement of WBA5 has potential flow-on implications for Optus’ development and release of NBN retail propositions.
- (b) Price convergence – while the initial price hike in nbn50 will have significant commercial implications for Optus in the short term, the opportunities for upsell to nbn100 must reflect the appropriate non-price propositions.

Insufficient notice period for changes to be introduced

2.63 **[CiC Begins] [CiC Ends]**

2.64 During the transition period between WBA4 and commencement of WBA5, there remains RSP uncertainty with regards to when NBN Co’s proposed pricing changes, including changes to its product construct, will commence. For example, **[CiC Begins]**

[CiC Ends]

2.65 Under these circumstances, we do not believe that the proposed 3 months' notice for implementation SAU after acceptance by the ACCC provides sufficient lead-time for Optus and the rest of industry to execute to the changes proposed under the SAU. We propose that a notice period of at least 6 months be provided to ensure the market is adequately prepared, which aligns to NBN Co's previous expectation that agreement on the SAU would be reached prior to 2023 when setting out timelines for SAU implementation.

2.66 **[CiC Begins] [CiC Ends]**

Short term price shock in nbn50 but opportunity for nbn100

2.67 Optus estimates that the access cost increase on nbn50 is anticipated to result in a **[CiC begins] [CiC ends]** increase to retail prices across the market.

2.68 While access cost reductions on the nbn100+ plans along with certainty of cost (AVC-only) is very welcome, the majority of end-users will be asked to pay significantly more for no additional benefit in service quality or performance improvements.

2.69 Optus submits that the change in price for the 50/20 speed tier and reduction in CVC inclusion, even taking account the move to a CVC utilisation model, will lead to a significant price increase for RSPs and ultimately end-users, with no material improvement in SLAs.

2.70 That said, while we do not outright oppose the proposed convergence of pricing to encourage move to the higher speed tiers, the opportunity to upsell to nbn100+ is also mitigated by a number of non-price factors, including:

- (a) Perceived additional benefit to consumers;
- (b) Consumer willingness to pay;
- (c) NBN Co's ability to deliver nbn100+

2.71 NBN Co should be looking to promote upgrades to higher speed tiers to improve their profitability compared to just passing on price rises to Australian consumers. Price rises should be justified on the basis of extra value delivered to consumers instead.

NBN Co commitments for price certainty and transparency still fall short

2.72 Following the industry roundtable on the NBN SAU Variation in August 2022, NBN Co acknowledged it would consider making commitments in the SAU for the inclusion of:¹⁶

- (a) Pricing principles in the SAU including a commitment to maintain a diversity of offers of different price and quality (speed tier), and to take into consideration the recommendations made by its proposed the low-income forum;
- (b) Additional measures to provide more guidance over its future pricing decisions, including an annual tariff filing statement, 3 year pricing roadmap and pricing intentions statement; and

¹⁶ ACCC, ACCC Industry Forum on NBN Co's Special Access Undertaking, Industry Forum Summary 18-19 August 2022, 9 September 2022, p.1

- (c) Rules to apply to discounting so that these practices did not again become a source of cost uncertainty for retailers and consumers.

- 2.73 These constructs are primarily set out in the SAU Variation at Schedule 2B and discussed below.
- 2.74 In general, while NBN Co has made some improvements to its pricing framework to ensure certainty and transparency, Optus considers it still falls short in several areas. Pricing for NBN access services should be subject to greater upfront certainty, for example, the 12 month certainty afforded to annual tariff lists should be supported with a more binding 3 year pricing roadmap.

Pricing principles

- 2.75 The SAU Variation sets out a set of NBN pricing principles (see clause 2B.2.1) to which it states it must have regard to when changing or setting new Prices in the Tariff List and Pricing Roadmap for NBN Offers and Other Charges.
- 2.76 Optus notes that these self-imposed cost recovery requirements should also reflect a commitment to make commensurate improvements to service quality. Efficient and affordable access to NBN is not limited to price, but also the quality of the service being acquired. If it is not fit-for-purpose in ensuring good customer experience when using the service, then price increases (if any) cannot be justified. This should also be the case when setting the initial Prices for eligible NBN Services.
- 2.77 Importantly, these cannot be inconsistent with the legislative criteria set out in the Act, and by which the ACCC must adhere to in their assessment criteria. These also should not be inconsistent with any prevailing NBN Statement of Expectations, as issued by the Government from time to time. For example, the most recent two NBN Statement of Expectations have highlighted improved service and customer experience to be a key policy objective, yet the proposed pricing principles do not take these into account.

Statement of Pricing Intent

- 2.78 Optus welcomes the commitment to publish a statement of pricing intent (SPI) each regulatory cycle by 1 May preceding the first financial year of each regulatory cycle. Furthermore that this should be subject to consultation with RSPs where an updated SPI within a regulatory cycle is required.
- 2.79 However, we also caution the potential that publication of the final SPI that occurs before the replacement model application (RMA) is accepted risks entrenching assumptions that may not necessarily be accepted in the RMA.
- 2.80 Optus considers the SAU pricing and construct should not preclude wholesale products being developed within the next few years that have higher upload speeds. As noted in previous submissions, Optus considers it likely that products with higher upload speeds will need to be developed within the short-medium term in order for broadband services to meet customers' needs. If such wholesale products are likely to be needed in the short-medium term (and Optus considers that they will be) NBN Co should look at developing these now for consideration as part of the SAU pricing construct and for WBA5 negotiations. This is currently not noted for consideration in the draft SPI.

Tariff List

- 2.81 Optus welcomes the commitment to publish a binding annual price list for the following financial year by 1 May each year. We also welcome:

- (a) Changes to a Price or CVC TC-4 inclusion for a NBN Offer or Other Charge cannot be made except in accordance with clause 2B.2.3(d) or as otherwise approved by the ACCC.
- (b) The commitment to adjust CVC inclusions for each Bundled TC-4 Offer (CVC inclusion) twice each Financial Year on 1 January and 1 July each year. These updates to the Tariff List to reflect the new CVC Inclusion and Adjustment Date must be made at least two months prior to the 1 January Adjustment Date, and by 1 May for the 1 July Adjustment Date.
- (c) The requirement to publish a Price Control Compliance Statement (see section 2F.2) by 1 May each year. This is to certify that the Prices included in the Tariff List under clause 2B.2.3 for that Financial Year are consistent with the SAU Price Controls. This also includes a statement on whether the Backward-looking Price Controls in clause 2E.3 have been exceeded in the Financial Year

2.82 Optus also submits that in line with its comments below, there should be limited change to the prices set out in the Pricing Roadmap. RSPs require greater price certainty on NBN Offers in order to ensure that any changes to retail propositions can be appropriately assessed and rollout out to market in a timely manner.

3-year pricing roadmap

- 2.83 Optus welcomes the commitment to publish a 3-year pricing roadmap by 1 May each year. Ideally, the year 2 and year 3 prices should be considered binding insofar that they relate to years within the same regulatory cycle. It would create more price certainty and transparency for RSPs if this was the case.
- 2.84 Absent this, Optus also notes that year 2 and year 3 prices may also be subject to several price control arrangements. Notably, the price control arrangements with respect to annual price increase and the price relativity control. The operation of these controls, whether applied individually or in tandem, risks creating price uncertainty by increasing the complexity on RSPs to adequately forecast NBN pricing in future years.
- 2.85 For example, year 2 and year 3 prices may be subject to annual price increases – such as, the greater of CPI or 5%. While these are initially published in the Pricing Roadmap, there is currently no certainty provided until the publication of the next Tariff List is published on 1 May. This means that a forecast price increase could differ from year 1 to year 2 under several scenarios, including: a divergence in the annual price increase factor considered (if high CPI was applied, but actual CPI was much lower), or there is a significant variance in the ACC that was used to justify the price change.
- 2.86 Ideally, while the Pricing Roadmap sets a price cap for future pricing, and the price relativity control appears to limit any further increase to the year 2 price, there remains the risk that an overly conservative forecast price (ie. set above efficient levels) may disincentivise RSPs from effectively optimising their downstream offers to meet the LTIE. It is Optus' preference for the year 2 and year 3 prices to be binding (with some leeway if market/national/global circumstances change) rather than being indicative.
- 2.87 It follows that confirmation of the year 2 price with 2 months' notice (by 1 May) may not provide RSPs with the sufficient notice period to adjust their retail propositions to best meet their customer cohorts. For example, due to the number and complexity of systems, RSPs ideally need a significant runway to implement any changes that impact the base. The 2 months' notice period provided in the SAU does not provide for this.

Low-income forum

- 2.88 Optus notes the proposed establishment of a Low-income forum for stakeholders on a voluntary basis. It is intended that this will convene on an annual basis, with the inaugural meeting of the Low Income and Digital Inclusion Forum in early CY2023¹⁷.
- 2.89 As noted in the Draft SPI, outcomes of this forum are expected to shape NBN Co's pricing strategy and design of NBN Offers, such as entry level products for low-income consumers.¹⁸ However, it remains unclear how any changes are likely to flow through.
- 2.90 Notwithstanding any tangible outcomes, Optus considers that any measures to address low-income pricing should be subject to separate policy discussions.

Discounts

- 2.91 Notification periods for Discounts are at a high-level covered under section 2C.3, which requires NBN Co to provide Customers with at least the following notice of any reduction, removal or cessation of a Discount:
- (a) 1 months' notice for a Short-term Discount; and
 - (b) 3 months' notice for a Long-term Discount.
- 2.92 While Optus welcomes a minimum notification period commitment being included in the SAU Variation, Optus is concerned that this could be circumvented by NBN Co by simply introducing all Discounts for a 6-month period, irrespective of any subsequent extension, to retain the shorter notice period for any future changes.
- 2.93 However, Optus also notes longer notification periods for price changes should be considered. Where pricing changes are of a significant nature or impact on a significant proportion of an RSP's customer bases, it is important that a commensurate notification period is provided. Optus considers that a minimum 6 months notification period is required to enable any end to end changes to propositions where they are required.

Price control arrangements continue to be unnecessarily complex

- 2.94 The SAU Variation introduces a variety of price controls that may be applied. Of particular note, the Tariff List sets out the price ceiling for each NBN Offer and Other Charges that applies in the financial year, while the broad-based WAPC is intended to act as representative of a 'basket' of prices and the 'allowable' increase that may be applied to prices each year.
- 2.95 The SAU Variation also introduces the following price control arrangements to address previous RSP and industry pricing concerns:
- (a) Weighted Average Price Control (WAPC), initially capped at CPI. The WAPC is also subject to the 'use-it-or-lose-it' principle to prevent NBN Co from 'banking' price changes over multiple years
 - (b) Individual price controls, i.e. additional sub-caps for specified NBN Offers. These are intended to apply within and in addition the operation of the WAPC

¹⁷ NBN Co has proposed for the inaugural forum to take place in February 2023.

¹⁸ NBN Co, Draft Statement of Pricing Intent, January 2023, p.6

- (c) Limiting drawdown of the Initial Cost Recovery Account (ICRA) to \$12.5 billion (in 2023 dollars) over the term of the SAU.
- 2.96 Optus considers that price increases, CPI or otherwise, for existing products during a fixed regulatory period does not address the recurring concern for RSPs about cost certainty of NBN Co's wholesale prices.
- 2.97 It follows that while the proposed price control arrangements may seem reasonable in isolation, once considered in combination, it adds an additional level of complexity for RSPs to undertake their own pricing forecasts.
- 2.98 A brief overview of the various price controls and commitments is further set out below.

Weighted average price control

- 2.99 The proposed WAPC methodology is intended to operate in two distinct phases. Like the condition precedent required before ICRA cost-recovery can take effect, the WAPC would remain initially capped at CPI during the first phase. NBN Co currently estimates that the first phase would likely extend until around 2030-32.
- 2.100 The introduction of the WAPC is intended to reduce the predictability and transparency of annual price increases. However, Optus notes the following:
- (a) The individual sub-cap control needs to be set at a lower level, and year to year price increase on individual products should still bear some relationship to observed CPI so that NBN Co cannot increase pricing excessively on a product with a low weighting to overall revenue.
- (b) Price certainty for RSPs and consumers would be promoted if the 3-year pricing roadmap to be published on 1 May was more than just indicative for years 2 and 3, and could be relied on by RSPs as future pricing to aid product and investment decision-making.
- 2.101 While the proposed WAPC methodology may serve to limit excessive price increases, there are still concerns from an RSP perspective that price increases for some NBN offers may still increase above efficient levels. NBN Co has provided a supporting document to illustrate the operation of the WAPC model, however there is insufficient information on the interactions between the various tabs and also the operation of the various SAU price controls without the inclusion of populated input values.¹⁹
- 2.102 As WAPC is a basket price control with individual caps, NBN Co could disproportionately increase some speed tiers. This would impact some RSP's disproportionately given differing customer profiles and does not promote cost certainty for the industry.
- 2.103 For example, the WAPC means that while costs can increase up to CPI at an aggregate level, this does not mean that individual access costs for each product will also change using the same uniform approach, i.e. where a speed tier increase in price within its individual price control by more than CPI, another speed tier offer would need to increase by less than CPI to meet compliance with the WAPC. Further to address low usage customers, there are also additional price caps for individual entry level products. As a result, these can add to the cost certainty issue for industry in their product offering.
- 2.104 Based on this proposal, consumers would likely still see yearly price increases as NBN Co will likely be increasing their prices due to the WAPC. In particular, it would enable NBN Co to force consumer preferences by aggressively repricing individual products.

¹⁹ NBN Co, nbn Weighted Average Price Control Model – WAPC – 2 December 2022.

Due to the unpredictability and uncertainty of this and NBN Co still working through how this would actually work, this will mean RSPs don't have the certainty necessary to forward plan.

- 2.105 Optus therefore considers the basket price control arrangements require some further refinement so that pricing arrangements do provide RSPs with transparency and certainty. To that end, Optus considers that a 3-year forward-looking roadmap will be a critical element of providing such certainty to RSPs.

Individual price controls

- 2.106 Individual price controls apply to all NBN Offers and Other Charges, whereby:

- (a) Price increases for Entry Level Offers are capped at CPI. The designated Entry Level Offers are specified for the relevant regulatory cycle.
- (b) For all other NBN fixed line and fixed wireless TC-4 offers, price increases are capped at the higher of CPI or 5 percent.

- 2.107 While any price increases are only applicable (where relevant) from the next published Tariff List, it is interesting to note that price changes are calculated against the total Average Combined Charge (ACC) for the previous financial year²⁰, and applying the December quarter CPI.

- 2.108 Optus is concerned the use of price controls where variables can be uncertain may risk overstating the potential annual price increase that may be applied. For example, NBN Co may consider applying annual price increase at the 5% level for purposes of setting year 2 and year 3 prices in the pricing roadmap. This then sets the indicative prices for subsequent years which is currently well above historic CPI levels.²¹

- 2.109 However, in establishing the alternative price control threshold for individual price increases, this should also take into account longer term inflation forecasts. The RBA Statement on Monetary Policy continues to recognise that while inflation is currently high and broad-based, "Most medium- and long-term measures remain anchored to the inflation target, suggesting the current high inflation is expected to be relatively short lived."²² This is also supported in the RBA's inflation forecasts which show a considerable decline from Dec-23²³ back towards long-term inflation target levels.

- 2.110 The use of the total ACC as a broad bucket to assess potential price increases can also add undue complexity for RSPs in estimating changes to potential price levels. Notably, we recognise that while NBN Co must disclose forecast total ACC in its 3 year roadmap, it is not clear what values may be considered in any proposed annual price change prior to a published Tariff List, given that the methodology set out in the proposed SAU Variation considers the use of both historic and forecast ACC in its consideration.

²⁰ Given Tariff List updates are required by 1 May each year, NBN Co proposes that ACC is based on actual ACC for period July to March and forecast ACC for period April to June.

²¹ For example, while the CPI rose by 1.9% during the December 2022 quarter, or 7.8% over the 12 month period to December 2022, this is the expected peak with most forecasts expecting a decline in future quarters. See: ABS, Consumer Price Index, Australia, Released 25/01/2023, [Consumer Price Index, Australia, December Quarter 2022 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/australian-bureau-of-statistics/abs.gov.au)

²² RBA, Statement on Monetary Policy – November 2022, p.53

²³ RBA, Statement on Monetary Policy – November 2022, p.68. See also: RBA, Forecast Table – November 2022, [Forecast table – November 2022 | RBA](https://www.rba.gov.au/forecast-table/2022-11/)

Other price controls

2.111 In addition, the individual price controls are also subject to the following:

- (a) TC-4 Price relativity restrictions – which mean subsequent tariff lists must not differ significantly from roadmap prices previously published for that year (i.e. within \$1 per month of the relevant roadmap pricing)
- (b) Restrictions on TC-4 discounts – limited to a combined value of no more than 5% of annual pre-discounted TC-4 revenues (with some exclusions, such as for low income offers) and
- (c) ACCC powers for Pricing Review Events

2.112 The operation of these other price controls are at risk of being superfluous in nature, particularly given the current proposed price control arrangements for setting individual price controls that sit under the WAPC arrangement.

Applying the ICRA drawdown

2.113 Optus welcomes the introduction of the capped ICRA amount and remains cautiously optimistic that the arrangements for recovery of ICRA will be transparent and subject to tight regulatory oversight.

2.114 The role of the ICRA describes a special account used to accumulate any initial unrecovered costs, that is, it allows for the capitalisation of any revenue shortfalls to be carry forward to future periods. Furthermore, that the balance of the ICRA will only start to be recovered once NBN Co's annual revenue from prices exceeds the ABBRR. A statement of the LTRCM and RAB items is also provided to the ACCC at the end of each financial year as part of the process for LTRCM determination.

2.115 NBN Co notes that on current projections under both the current and varied SAU, NBN Co expects to be able to start drawing down ICRA in FY 2029-30.²⁴

2.116 This SAU Variation therefore proposes a significant change to the operation of the ICRA, through the proposed capping of the total ICRA amount allowed to be recovered over the SAU period to be limited to \$12.5 billion. This will be a one-off adjustment to the ICRA, with no mechanism for adjustment other than for inflation indexation.

2.117 Central to this is the effective 'write-down' of the capped ICRA amount (established in Clause 2G.3.1), and is thereby proposed to be allocated accordingly in two parts:²⁵

- (a) Module 2 ICRA – \$1.1 billion (in FY23 dollars) – subject to NBN Co achieving (or being expected to achieve) its Core Services ABBRR for the first time; and
- (b) Module 3 ICRA – \$11.4 billion (in FY23 dollars) – which may be recovered having regard to several principles, including that any Replacement Module Application (RMA) and Replacement Module Determination (RMD) provide NBN Co the opportunity (but not the guarantee) to achieve and maintain a standalone investment-grade credit rating with a stable outlook, and that NBN

²⁴ NBN Co, NBN Special Access Undertaking Variation 2022 – Supporting submission, Part E: Calculation of NBN's Regulated Revenue Requirement, November 2022, p.5.

²⁵ NBN Co, NBN Special Access Undertaking Variation 2022 – Supporting submission, Part A: Executive Summary and Key Narratives, November 2022, p.9.

Co has a reasonable opportunity to recover the full amount of the Module 3 ICRA.

2.118 At the end of each Module period²⁶, the ICRA will also be set to \$0 regardless of whether it has been recovered or not.²⁷

Impact of the ICRA drawdown remains uncertain

2.119 NBN Co has acknowledged that setting the ICRA amount at this \$12.5 billion (in FY23 dollars) will “enable it to set lower wholesale prices in future years than may otherwise be the case if it were seeking to recover all costs associated with building the network.”²⁸ However it is not clear that this is the case.

2.120 Given NBN Co also does not expect to recover this until the latter end of Module 2, it is difficult to assess at this point in time, the reasonableness of the BBM and pass through of ICRA amounts in future years. This means that the risk of price hikes in future Module 2 regulatory cycles; and the transitional issues between the end of Module 2 and start of Module 3.

2.121 The mechanism of the nominal annual drawdown of ICRA is determined by the occurrence of a WAPC Factor Change Year and the Annual ICRA Drawdown Percentage. Until a WAPC Factor Change Year is observed, this value is set at 0.

2.122 In contrast, no further information is given regarding the setting of the Annual ICRA Drawdown Percentage, that is, the percentage value to be applied. It is not clear how the percentage will reflect the ‘reasonable’ recovery aspect required.

2.123 Based on the materials available, it is unclear how the ICRA drawdowns will be applied. For example, in the [Public] 2024-2040 Building Block Model – Core Services – 2 December 2022 (the FY24-FY40 BBM) attachment provided:

- (a) The ‘RAB, ABBRR & ICRA’ calculation sheet currently does not include any line item for ICRA. Although the FY24-FY40 BBM Handbook acknowledges that “The ICRA will no longer continue to accrue from FY2023.”²⁹
- (b) The ‘ICRA’ sheet sets out several unexplained components:
 - (i) There appear to be no formulae links between ICRA and other calculation sheets, including the ‘Output’ sheet where there is a line item for ‘Nominal Annual Drawdown of ICRA’.
 - (ii) The apportionment of the ICRA amount seems to be incorrectly applied. The FY24-FY40 BBM Handbook acknowledges that “The ICRA sheet contains the calculated ICRA drawdown for input into the RAB, ABBRR and ICRA sheet. nbn does not forecast to start recovering the ICRA until approximately 2030-31.”³⁰ As such, the starting ICRA amount to be recovered should be amended to reflect the relevant Module 2 or Module 3 ICRA.

²⁶ Module 2 and Module 3 will expire on 30 June 2032 and 30 June 2040, respectively.

²⁷ See: Clauses 2G.3.1(e) and 3B.3.5(c).

²⁸ NBN Co, “NBN Co lodges proposed SAU Variation with the ACCC,” Media Release, 30 November 2022, p.4.

²⁹ NBN Co, nbn FY24-FY40 Building Block Model handbook, December 2022, p.15.

³⁰ NBN Co, nbn FY24-FY40 Building Block Model handbook, December 2022, p.12.

- (iii) It is unclear on what basis the allocation factors³¹ for each FY has been determined for the recovery of ICRA.

2.124 It therefore remains to be seen how the ICRA drawdown will be applied in practice and impact on future NBN access pricing.

Transparency and oversight considerations

2.125 Finally, Optus reiterates that industry acceptance of the SAU will depend in part on NBN Co providing greater transparency over cost recovery assumptions and how NBN Co allocates costs and capital to relevant products and pricing. NBN Co must provide clarity and accountability over what proportion of revenue is going to pay down NBN's debt and what is going into funding NBN's "prudent and efficient" expenditure and to deliver NBN a reasonable rate of return.

2.126 Under the current SAU, Schedule 1E sets out the details of NBN Co's LTRCM methodology to be applied during the Initial Regulatory Period. This includes details on calculation of the ABBRR, ICRA, Regulated Revenue and Cost of Capital. Schedule 2C sets out the details of how adjustments to NBN Co's LTRCM may be applied during Subsequent Regulatory Period.

2.127 The LTRCM is based on a building block model commonly adopted in regulated utilities. The LTRCM currently set out in the SAU was developed to ensure that details of NBN Co's ABBRR, RAB and ICRA were transparent during the Initial Regulatory Period. The operation of the LTRCM means that expenditures on all NBN networks (including MTM networks) have been included in the RAB, and thus the LTRCM model, and the RAB and ICRA values determined annually by the ACCC include all of NBN Co's prudently incurred costs and the revenues earned across all technologies.

2.128 A key update in this SAU Variation is the effective capping of the value of the ICRA in FY 2022/23 dollar terms, adjusted for inflation in future years. The purpose of this objective is for NBN Co to reach a point where it can earn its ABBRR, including an appropriate ICRA amount, so that it is able to finance new investments, operate the network efficiently, and provide a suitable return to shareholders.

2.129 A further complication is the fact that the RAB is intended to encompass all services, including Competitive Services which have been carved out from the SAU, and therefore not to be disclosed in the RAB – despite recognition there may be shared costs in the network to be allocated to both Core and Competitive services.

2.130 Optus therefore considers that the ACCC will need to play a significant role in overseeing NBN Co's BBM and cost allocation framework. Much of this information is likely to remain commercially sensitive to NBN Co and unlikely to be shared with RSPs to adequately assess the reasonableness of both the inclusion of "prudent and efficient" expenditure and its downstream allocation of costs to derive "efficient" costs.

2.131 As such, Optus considers that NBN Co has failed to provide evidence to demonstrate that the proposed prices promote the LTIE. The first test – that prices reflect the efficient cost of the service – is not established due to there being no connection between the prices proposed and the BBM supplied by NBN Co.

³¹ See: Column D in NBN Co, [Public] 2024-2040 Building Block Model – Core Services, 'ICRA' sheet, November 2022.

The RAB does not demonstrate efficient costs condition

2.132 The BBM as provided, does not provide any view of how revenue requirements will be allocated to each service.³² Instead, the BBM only uses Revenue (albeit only disaggregated at a high level to: Core, Competitive or RBS) in its Input sheet.

2.133 It follows that there are two important categories of services for consideration of the RAB, which will affect the treatment of such services and their SAU obligations:³³

- (a) Core Services – where Core Services Revenue is defined to include all Revenue earned by NBN Co, with the explicit exclusion of Revenue earned from the supply of Competitive Services; and any amounts received under the Regional Broadband Scheme.
- (b) Competitive Services – where Competitive Services are defined to include (until otherwise re-categorised as a Core Regulated Service³⁴) the following services:
 - (i) NBN Co Enterprise Ethernet;
 - (ii) NBN Co Satellite Mobility for Large Commercial Passenger Aircrafts; and
 - (iii) NBN Co Business Satellite Service.

These also include any other product or service categorised as a 'Competitive Service' in accordance with clause 2G.6.4

2.134 The SAU Variation also sets out that where new products and services fall within the scope of an existing Competitive Service or Core Regulated Service.

2.135 Put simply, NBN Co makes clear that:

While all of nbn's eligible services are declared and subject to regulation, not all eligible services are subject to the terms of the SAU in the same way. nbn proposes that most Core Regulated Services will be covered by the SAU Core Services WAPC.³⁵

2.136 A key difference is that Competitive Services are exempt from a number of SAU obligations, including, the product development and withdrawal processes, the obligation to publish a Tariff List, nor be subject to Maximum Regulated Prices or a WAPC.

2.137 Notably, NBN Co relies on both the RAB and a Core Services RAB Portion for cost recovery and determining permitted pricing changes. To facilitate this arrangement, NBN Co proposes to establish an accounting separation framework under the SAU.

2.138 NBN Co is also required to publish a Tariff List on an annual basis, with the list made available by no later than 1 May of each Financial Year (and including each of the relevant components set out at Clause 2B.2.3).

³² For comparison, the Fixed Line Services Model used by the ACCC in past Fixed Line FADs provides within one of the relevant tabs, the relevant service prices that can be derived as a result of any input changes to the FLSM.

³³ NBN Co, NBN Special Access Undertaking Variation 2022, November 2022, Attachment C (Dictionary).

³⁴ Like Core Services, Core Regulated Services means all products and services supplied by NBN Co other than the Competitive Services.

³⁵ NBN Co, NBN Special Access Undertaking Variation 2022 – Supporting submission, Part E: Calculation of NBN's Regulated Revenue Requirement, November 2022, p.14.

2.139 It should also be noted that while the above listed Competitive Services are currently proposed to be subject to commitments in relation to accounting separation and transparency (see Clause 21.6), it should also be made clear that any other services, deemed to be Competitive Services after commencement of the SAU Variation, should also be subject to similar accounting separation and transparency commitments.

Section 3. NON-PRICE TERMS

- 3.1 Optus welcomes the opportunity to provide comment on the proposed approach to service standards in NBN Co's SAU variation. Service standards are critical non-price commitments in the WBA that directly impact consumer experience.
- 3.2 Including benchmark services standards in the SAU Variation was a key outcome of discussions between industry, NBN Co and the ACCC, as it is key to include such commitments in the SAU to provide a clear link between price and quality of service. Optus submits without clear commitments in the SAU, it is not possible to assess whether price are reasonable.
- 3.3 The ACCC has specifically sought comment on whether the proposed benchmark service standards for the first regulatory period address current issues that could be impacting NBN consumers and, are reasonable. In addition, the ACCC has asked whether there is sufficient clarity and certainty with regards to service quality in the proposed benchmark service standards.³⁶
- 3.4 Optus submits that the service standards proposed are not reasonable and are not capable of being accepted by the ACCC. These sub-par service standards, combined with the proposed price increases, results in the SAU Variation being unreasonable and not in the LTIE. Optus' views are set out below.

Benchmark service standards do not address current consumer issues

- 3.5 The proposed benchmark service standards for the first regulatory period do not address current issues impacting NBN consumers and therefore, are not reasonable. Optus also does not consider there is sufficient clarity and certainty with regards to service quality.
- 3.6 In Optus' experience current issues impacting the NBN consumer experience include:
- (a) Poor service performance, including dropouts and poor speed;
 - (b) the impact of co-existence, including lower PIR objectives for services in co-existence areas and uncertainty about the end of co-existence; and
 - (c) Extended delays in Network Activity/Remediation.
- 3.7 We also have concerns about programs NBN Co has implemented regarding technology upgrades (such as Fibre Connect and COAT programs) which can be subject to separate arrangements outside of the service standards in the WBA.
- 3.8 These issues and inadequacies in relation the existing WBA framework and proposed benchmark services standards are discussed further below.

Poor service performance

- 3.9 Optus continues to be concerned about customer experience issues related to dropouts and poor speed performance and inadequate obligations in the existing WBA and proposed benchmark service standards for dealing with these issues.

³⁶ ACCC Consultation Paper – Section 5.11.3

- 3.10 In relation to dropouts, these continue to be a significant problem affecting customers including those on other technologies, not just FTTN and HFC. Existing obligations and processes are inadequate to deal with these issues because:
- (a) The fault threshold remains too high;
 - (b) There is lack of clarity between what is considered a dropout and an outage; and
 - (c) RSPs can be limited in their ability to take proactive action to address these issues; and
 - (d) There is not obligation on NBN Co take proactive action on dropouts.
- 3.11 Optus notes that even with the proposed reduction in fault threshold, what is proposed in the SAU Variation benchmark service standards still remains worse than fault thresholds that existed in WBA3. The changes in dropout fault thresholds can be seen in the table following.

Figure 5 History of Dropout Thresholds

Date	Tech	# Dropouts - Performance Incident (monitoring)	# Dropouts - Fault (fixing)
WBA3	All Tech	N/A	>5
WBA4 (Dec 2020)	FTTN only	5-9	>9
WBA4 update (Jul 2021)	FTTN only	4-9	>9
WBA4 update (Feb 2022)	FTTN + HFC	4-9	>9
Proposed SAU Variation / WBA5 (2023)	FTTN + HFC	4-7	>7

Source: NBN Co

- 3.12 Besides concerns about the thresholds relating to dropouts, Optus has continued to raise the issue with NBN Co that ‘Dropout’ is not defined and it is not clear when a loss of service is considered a dropout or an outage.
- 3.13 In addition, RSPs are also limited in their ability to take proactive action to address dropouts and cannot provide a consistent quality of service experience across all technologies. Firstly, NBN Co could share more information with RSPs to support them in better monitoring service performance for dropouts. We are aware that NBN Co is able to identify dropouts and has better dropout data available, but this is not shared with RSPs.
- 3.14 RSPs are also limited in their ability to raise a proactive fault (that is, without an inbound contact from the customer about the issue) because fault thresholds without a customer contact are higher than those in the table above. It is common for customers with a 4G backup service in their modem not to realise that their NBN service is dropping out because the 4G backup service switches on. Therefore, they don’t contact their RSP to report the issue. However, because there is a higher threshold for RSPs to proactively raise a fault for dropouts RSPs are unable to do so and dropouts may continue without being address. There are also volume caps on the number of proactive cases we can raise.

- 3.15 Optus also notes the existing WBA or proposed benchmark service standards do not contain obligations on NBN Co to proactively address issues such as dropouts. NBN Co has the ability to identify wholesale services experiencing dropouts and could take action to address these yet does not do so.

NBN PIR objectives are not reasonable

- 3.16 In relation to poor speed performance, Optus considers that the existing WBA and proposed service level standards do not have appropriate PIR/CIR objectives for line performance for what is supposed to be a high-speed broadband network. Such objectives and commitments in the WBA are not clearly defined and are not what customers expect for a high-speed broadband network that is built and fully operational.
- 3.17 For example, a PIR objective of 25/5 Mbps for FTTN/B services for all bandwidth tiers 25/5 Mbps and above is simply too low.³⁷ This is not in line with consumer expectations and not in line with the statutory target of 50/10 Mbps for 90% of fixed line NBN services.³⁸
- 3.18 Where such objectives are set too low, there is no recourse for a customer (or RSP) for poor speed performance. A fault cannot be raised and there are no consequences for NBN Co. The lack of appropriate objectives for a high-speed broadband network continues to be a problem and fails to support a better service experience in line with customer expectations.
- 3.19 As noted above, Optus supports the move to higher speed tiers. In fact, we view it is vital to deliver the benefits of the NBN to all Australians. However, the lack of quality and service commitments by NBN Co for higher speed services limits the incentives for customers to upgrade. In order to incentivise households to move, this must be addressed.

Impact of co-existence can be significant

- 3.20 End-users whose lines are in areas with co-existence still face reduced line performance objectives and a lack of certainty as to when the co-existence will end. These end-users can experience poor speeds without the prospect of NBN Co addressing this issue because of lower PIR Objectives for lines affected by co-existence. This impacts the users' experience, their service quality, the potential activities they are able to do with their service and limits the ability of RSPs to offer higher speed tiers to these consumers.
- 3.21 Optus notes provisions in the proposed SAU Variation relating to lines (FTTN, FTTB and FTTC services) that may be experiencing co-existence (e.g. clause 1A.4.4, Module 1, Schedule 1A; Dictionary definition 'PIR objective') do not provide any improvements or assurance above that in the existing WBA. That is, FTTN/B and C services affected by co-existence will still continue to be subject to lower PIR objectives before a fault can be raised for line performance problems.
- 3.22 These weak objectives can add delay to addressing line performance issues in the long term. That is, an end-user's line could be achieving the PIR objective for lines in co-existence, but, once co-existence ceases, fails to achieve the higher PIR Objective that otherwise applies. Only then can Faults / Performance Incidents be raised to address this line underperformance which could then be subject to a further extended timeframe for Network Activity.

³⁷ NBN Co, WBA Dictionary, 'PIR Objective'.

³⁸ Section 360S, Telecommunications Act 1997.

- 3.23 In addition, there is a lack of certainty about when the co-existence period will cease. While we note NBN Co has advised in its WBA Roadmap that its goal is for co-existence to no longer be an issue in the first quarter of calendar year 2024, this is not a firm commitment, and until such time as co-existence does cease, end-users affected by co-existence are subject to these weaker obligations (PIR objectives and Network Activity clauses) from NBN Co.
- 3.24 Optus considers the proposed benchmark service standards fail to address the issue of co-existence for customers, and fail to provide certainty over when co-existence will cease to apply.

Extended delays for Network Activity / Remediation

- 3.25 Optus submits that customers whose lines require Network Activity (that is, remediation) often experience extended delays in having that Network Activity performed. Network Activity is the work necessary to ensure a line can achieve the PIR/CIR Objective or to address a Performance Incident.³⁹ The proposed benchmark service standards do not provide any different commitments or obligations in relation to Network Activity than the existing WBA4 service standards. Therefore, the proposed benchmark service standards do nothing to address this consumer issue.
- 3.26 Currently in the WBA service level schedule, Network Activity is subject to a Performance Objective metric which includes long timeframes.⁴⁰ The Network Activity performance objective metric specifies that NBN Co should meet a performance objective of 90% for Network Activity for a TC-4 ordered product performed within the TC-4 Target Network Activity Date – which is 375 Business Days from its Network Activity Designation Date where that date is after 30 June 2021. Where the Network Activity Designation Date is between 1 December 2020 and 30 June 2021, the timeframe is 500 Business Days.⁴¹
- 3.27 This gives timeframes of around 18 months or 2 years for remediation work to be completed (subject to any clock stoppages) noting that target dates can be repeatedly pushed out. **[CiC begins] [CiC ends]**
- 3.28 This continues to be an existing issue for customers and the existing WBA framework has no consequences for NBN Co failing to undertake Network Activity in a timely manner. NBN Co only has to meet this 18-month timeframe 90% of the time to achieve the performance objective. These timeframes have been insufficient in providing any certainty to RSPs or customers in when lines will be addressed and limits what plans an RSP could offer the end-user. This continues to be a poor customer experience issue.

Concerns about Fibre Connect and COAT Programs

- 3.29 Upgrading existing copper based lines to fibre is a key requirement to ensuring that all households can experience superfast broadband lines – and is key to ensuring NBN can move its revenue targets to sustainable levels. Optus supports the move to upgrade lines for FTTP. However, we have very serious concerns over the manner in which NBN Co is proposing to do so.
- 3.30 NBN Co has implemented programs focussed on technology upgrades and Optus has concerns about key aspects of these programs which can sit outside of any formal

³⁹ See definition of 'Network Activity' in WBA Dictionary.

⁴⁰ NBN Co WBA, Service Levels Schedule nbn™ Ethernet Product Module, clause 5. "Network Activity" was previously called "Remediation" prior to WBA4.

⁴¹ Clause 5.1, Service Levels Schedule, NBN Co Wholesale Broadband Agreement. "TC-4 Target Network Activity Date" is defined in the WBA Dictionary.

frameworks. As a general comment, we often find NBN Co's implementation of programs such as Fibre Connect and COAT does not give due regard to input from RSPs. Issues then arise (which could result in poor consumer experience) and only then are steps taken to consider RSPs' input.

- 3.31 Under the original COAT (Change of Access Technology) program, once a premises appeared on the COAT HFL, the RSP had 12 months to move the customer to a new NBN technology, before the old technology switched off by NBN Co. This was not an opt-in program for the end-user. During that time, the end-user was prohibited from switching RSPs on their existing NBN technology via a service transfer. Optus argued such a requirement was anti-competitive. We understand that NBN Co is now reviewing the COAT program and during this time has lifted the restriction on end-users switching RSPs.
- 3.32 The Fibre Connect program is an opt-in program to upgrade FTTN/FTTC premises to FTTP technology. Optus has three main concerns with this program. The first is that NBN Co insists on commencing billing 7 days after the installation of the new technology, even if the new service has not yet been activated. This means RSPs can be double-billed for services (this concern also relates to the COAT program as well). Secondly, NBN Co proposes on levying a \$200 fee where an end-user downgrades their speed plan from the required 100Mbps speed tier or ceases their service (for example, the end-user moves premises). This fee has a significant commercial impact if RSPs do not pass it on to end-users.
- 3.33 Finally, NBN Co proposes a 5% threshold over which it will charge the \$200 fee for service downgrades / cancellations (that is, if 100 end-users downgraded/churned their service, NBN Co would charge \$200 for 95 end-users). Optus considers it unreasonable for end-users to be penalised if they move, particularly as 10%-15% of households move each year. NBN Co has since revised this threshold to 10% for the first year and has indicated they will consult on this as part of the WBA5 consultation process.

Other issues remain

- 3.34 Optus notes in relation to performance, that there are other matters where NBN Co continues to perform poorly, such as Accelerated Connections. This matter is regularly raised by Optus and has been an issue for years. We note Accelerated Connections were intended to support retail service obligations such as Consumer Service Guarantee connection timeframes. While Optus is implementing CSG Waivers for new customers, it remains a poor customer experience if end-users have delays in the connection of their service.
- 3.35 Optus considers that the above issues are not addressed by the proposed SAU framework or benchmark services standards for the first regulatory cycle.

Proposed Benchmark Service Standards are unreasonable

- 3.36 The ACCC sought particular feedback on whether the proposed benchmark service standards for the first regulatory cycle are reasonable. The benchmark service standards proposed for the First Regulatory Cycle (Attachment I, Module 4) incorporate some relatively minor changes from the existing Service Standards in WBA4. These include:
- (a) Reduced completion advice timeframes;
 - (b) Higher performance objectives for completion advice and service transfers;
 - (c) Lower service fault threshold for dropouts on FTTN/HFC;

- (d) Change in utilisation management threshold and longer measurement timeframe; and
 - (e) Reporting on network utilisation and operational reporting.
- 3.37 However, the vast majority of these changes will not have any meaningful impact on end-users' real world experience. We note the following:
- (a) Completion advice (for connections and service transfers, access component modifications not requiring an appointment and CVC modifications) are done by automated system processes and should have had a lower delivery timeframe some time ago.
 - (b) In relation to higher performance objectives for completion advice and service transfers, we note **[CiC begins]** **[CiC ends]**. NBN Co already comfortably achieves the existing timeframes and performance objectives, so we consider adjusting the timeframes and performance objectives for these automated processes, simply reflects existing performance and does not amount to any real improvement.
 - (c) Optus reiterates its previous comments in relation to lower service fault thresholds for dropouts, that dropouts remain a concern and are a poor consumer experience, and this proposal does not adequately address the issue, given that this is still a worse fault threshold than WBA3. Further, the period over which dropouts are measured (specified as including the two previous calendar days) should be longer – that is, 7 days.
 - (d) The change in utilisation management threshold (from 70% in WBA4 to 90%) and longer measurement timeframe (30 continuous minutes on three separate days within a rolling 30-day period) is not overall positive. While the 30-day period is more appropriate, the increase in the threshold from 70% to 90% is less than ideal. This threshold should ideally be set consistent with CVC utilisation trends where customer impacts are observed (i.e. at the CVC utilisation rate that a customer starts experiencing congestion – the shared backhaul thresholds should be consistent with this).
- 3.38 Given the above, Optus considers that the proposed 'enhancements' from the existing WBA service standards will only have limited impact on real world consumer experience and will not have any meaningful impact for the majority of customers continuing to experience quality of service issues with their NBN services.

Are the benchmark service standards reasonable and promote the LTIE

- 3.39 Optus notes that the proposed benchmark service standards also do not include the following from the current WBA:
- (a) Performance objectives for network activities, voiceband reinstatement and transition reversals;
 - (b) Service levels for services NBN Co no longer provides (e.g. multi-cast);
 - (c) Service levels of services provided on an individual contract basis (e.g. enhanced fault rectification); and
 - (d) Operational targets.

- 3.40 Optus has also discussed extensively how it considers:
- (a) The proposed benchmark service standards do not adequately address current consumer issues; and
 - (b) The proposed 'enhancements' will not lead to any meaningful improvement for the overwhelming majority of customers experiencing quality of service issues.
- 3.41 In considering the benchmark service standards, on balance, Optus does not consider that these benchmark service standards are reasonable and promote the LTIE.
- 3.42 The benchmark service standards are based on the existing service standards in WBA4 which Optus considers are no longer fit for purpose now that the network is built and fully operational. There remain gaps that fail to address existing consumer issues of poor service performance, poor consumer experience as a result of co-existence and extended Network Activity delays. Programs are implemented without due regard for RSP feedback with arrangements or other service levels that often sit outside of the WBA.
- 3.43 Further, the proposed 'enhancements' in the benchmark service standards are not likely to translate to any meaningful improvement in experience for the majority of end-users. The changes proposed above do not represent any real improvement to RSPs or to end-users that would justify the effective increase in price that will result from NBN Co's proposed pricing changes as part of the SAU Variation.
- 3.44 Significantly, Optus considers the benchmark service standards fail to require proactive action and information sharing by NBN Co to address service issues nor do they support RSPs in proactively addressing service and customer experience issues. It fundamentally lacks obligations to ensure NBN Co's network and the services they provide are fit for purpose.
- 3.45 Optus notes that RSPs are subject to the consumer guarantees in the Australian Consumer Law, which would require that when supplying retail broadband services, RSPs guarantee that those services will be:
- (a) Provided with due care and skill;
 - (b) Fit for any specified or particular purpose (express or implied), including being of sufficient quality to achieve desired results, and
 - (c) Provided within a reasonable time (when no time is set).
- 3.46 However, it is difficult for RSPs to address these aspects of consumer guarantees where RSPs are limited in their ability to take proactive action, either because the relevant information is not provided to RSPs and proactive action is subject to limitations or restrictions (such as different fault thresholds or volume caps). Optus considers a proactive approach to quality of service issues is essential to ensuring that wholesale services are delivered in a way that promotes the LTIE.
- 3.47 The failure of the proposed benchmark service standards to address current consumer issues or support proactive action from RSPs leaves RSPs unable to address consumer issues quickly and effectively and directly undermines competition in retail markets. It stops RSPs competing on customer service features or implementing new products or plans for higher speed services. It also means RSPs cannot operate efficiently themselves if they don't have the necessary information to monitor service performance.
- 3.48 Further, failure by NBN Co address performance issues (either by better service standards, supporting proactive RSP action or undertaking its own proactive action) appears inconsistent with the objective of encouraging efficient use of and investment in

infrastructure and is not in the interests of those with rights to use the services concerned. This is particularly the case where key issues such as dropouts, poor speed, co-existence or remediation delays prevent end-users from using services supplied over that infrastructure and prevent RSPs from taking proactive action to supply reliable, high-speed services, better quality of service or consistent quality of service across all technologies.

- 3.49 These issues directly impact the way RSPs operate, add unnecessary cost and lead to higher prices for consumers. RSPs must use more resources and more complex processes to try and glean information that enables monitoring service issues in an attempt to provide better quality of service. RSPs are also limited in their ability to offer a better quality of service experience for end-users. RSPs spend more time following up on extended delays in Network Activity where resolution dates are repeatedly pushed out (and in managing consumer experience) and in trying to address service issues when NBN Co does not take proactive action. Where lines cannot achieve necessary line rates, RSPs cannot offer end-users reliable high-speed plans.
- 3.50 RSPs have argued throughout the SAU Variation development process that there needs to be a clear link between pricing and quality. If pricing changes are going to result in higher prices, consumers should expect to receive better experience from NBN Co – both in terms of performance and in service quality, including how issues are addressed. Capital expenditure should result in service quality improvements which should be reflected in service standards for the first regulatory cycle.
- 3.51 Optus firmly believes that NBN Co's price increases need to be reflected in a new approach to benchmark service standards for the first regulatory cycle in order to promote the LTIE.

Benchmark service standards need new approach

- 3.52 Optus considers that benchmark service standards should have a clear focus on each individual service while reflecting the capital improvements that NBN Co has made to the network. As such, Optus considers that service standards in any SAU variation should be underpinned by the following principles:
- (a) Minimum service level standards should be included in the SAU;
 - (b) Service standards should be set with an individual focus, not just a broad network approach.
 - (c) Service standards should reflect capital expenditure and improvements by NBN Co now that volume rollout is complete.
 - (d) Service standards, performance objectives and rebates should incentivise NBN Co to proactively address services that are failing to meet service standards.
 - (e) Service standards should encourage proactive action by NBN Co as much as possible, especially in relation to service performance and availability, and should not rely on customer action (e.g. reporting dropouts). This is consistent with ensuring that services are supplied on a fit for purpose basis.
 - (f) Performance incidents should be subject to a consistent rebate framework.
- 3.53 In addition, as part of a more proactive approach to addressing service issues, Optus considers that NBN Co needs to provide more and better information to RSPs about quality-of-service matters. While NBN Co now provides the service health summary to

RSPs, it has some inadequacies, for example, there is insufficient stability performance data.

- 3.54 NBN Co should have an obligation to provide RSPs with a daily update on the service performance for all services to enable RSPs to take proactive measures to rectify the root cause. Optus is aware such data exists, but, that NBN Co has been reluctant to share this data with RSPs, although regularly references it in their justification for network outages and other process and service changes.
- 3.55 An example of this is the introduction of Dynamic Line Management and SOS/ROC, where NBN Co used the performance data to highlight the benefits of implementing these features on their network but did not make the source data available to RSPs to verify the stated benefits.
- 3.56 Optus is disappointed that after more than 18 months of preparation and engagement regarding the SAU Variation the approach to service standards does not appear to have been given significant consideration by NBN Co. Optus submits that in considering the proposed SAU Variation it is timely to reconsider the approach to service standards as these are likely to form the basis of service standards and the approach to service standards throughout the life of the SAU.
- 3.57 Optus does not think it is reasonable nor will promote the LTIE to accept the proposed SAU Variation with the current benchmark service standards.

Service Standard framework also requires clarification

- 3.58 Optus considers some aspects of the general obligations regarding service standards in the Main Body of the proposed SAU Variation require some clarification. There is a general obligation in Module 0 (the Main Body) for NBN Co to develop a Service Standards Proposal containing:
- (a) Benchmark Service Standards; and
 - (b) A date by which NBN Co proposes to include in the SFAA published in accordance with Clause 8, an obligation to meet or exceed Service Standards which are no less favourable to access seekers than the proposed Benchmark Service Standards.⁴²
- 3.59 Optus generally supports the obligation in clause 5.6 for NBN Co to develop Benchmark Service Standards for each Regulatory Cycle (noting we expect that additional or different service standards could be negotiated as part of the WBA processes). We consider reviewing these each regulatory cycle and establishing new benchmark service standards will be appropriate.
- 3.60 However, Optus would welcome some clarity from the ACCC as to how it considers the phrase 'no less favourable' should be interpreted. Further while clause 5.6 contains an obligation for NBN Co to specify the date by which it must include in the SFAA it has to publish under clause 8 of the SAU, an obligation to meet or exceed Service Standards that are no less favourable to Access Seekers than the Benchmark service Standards, there are no time parameters around this obligation.

⁴² See Clause 5.6, Module 0, Main Body SAU.

3.61 Optus' further comments on addressing mid-cycle service standard events are discussed in relation to the ACCC's roles and functions.

Section 4. ACCC ROLES AND POWERS

4.1 This section discusses issues related to the regulatory processes proposed in the SAU Variation, including proposed changes to the:

- (a) General regulatory framework and replacement module process; and
- (b) Post-2032 arrangements

General regulatory framework and modular structure

4.2 Optus supports the improvements made to the replacement module process, including:

- (a) Assessment criteria that reflect legislative criteria, and
- (b) Powers for the ACCC to consider specified matters ahead of a regulatory cycle.

4.3 However, on balance we consider there are a number of concerns that mean the proposed process is not reasonable and does not promote the LTIE. These concerns include:

- (a) Deeming provisions that could lead to decisions being made without adequate consultation or consideration of information; and
- (b) Insufficient information obligations on NBN Co.

4.4 In combination, the deeming provisions and a lack of information obligations on NBN Co could lead to NBN Co being able to frustrate the replacement module process to its own advantage by failing to provide relevant information and relying on the deeming provisions. As such, the process as proposed in the SAU Variation is not reasonable and does not promote the LTIE. These issues are discussed further below.

Reflecting legislative criteria is an improvement

4.5 Optus has long held the view the most appropriate way of ensuring that the SAU remains fit for purpose and ultimately promote the LTIE is to include matters that reflect legislative criteria.⁴³ While the proposed process does not exactly mimic legislative processes, the matters to which the ACCC is to have regard when making a RMD are largely identical to the matters that the ACCC must consider under section 152CBA(2), including whether the terms are “reasonable”.⁴⁴ The addition of the power to “take into account any other matters it thinks are relevant” when making an RMD provides further comfort that the scope of the ACCC’s RMD powers during the Subsequent Regulatory Period are fit for purpose.⁴⁵ Optus’ support for this approach is premised on the understanding that an RMD would be a decision under the SAU rather than under the CCA.

4.6 Optus also welcomes the proposed powers for the ACCC to consider specified matters ahead of each regulatory cycle, in particular, the proposal to enable the ACCC to determine Benchmark Service Standards.⁴⁶ Optus also considers that the proposed power for the ACCC to conduct an ex-post review of NBN Co’s capex would appear to

⁴³ Optus September 2022 submission, citing ACCC May 2022 Consultation Paper

⁴⁴ There is an additional criteria set out in section 152

⁴⁵ Draft clause 5.8

⁴⁶ Draft Clause 21.2.1

introduce a useful mechanism to provide further oversight over NBN Co's expenditure decisions thereby helping to promote economic efficiency objectives. Optus accepts that regulatory certainty demands that certain matters such as the re-categorisation of Core and Competitive Services should generally happen infrequently.

- 4.7 However, the suitability of confining certain matters to be considered only at the time of the replacement module process should be assessed in the context of their impact on competition and the LTIE. This is particularly necessary given the potential for regulatory cycles of 4 or 5 years. In this context, Optus does not consider that the proposed powers relating to service standards go far enough to ensure an appropriate cost-quality relationship for NBN services throughout a regulatory cycle. The proposed power for the ACCC to intervene to change benchmark services standards, is, in Optus view, too narrow to meet the LTIE criteria. Optus provides further comment below under the section on "ACCC functions and powers".

Deeming provisions are unreasonable

- 4.8 In regard to the proposed process for assessing a replacement module, Optus remains concerned about the proposal to deem acceptance of NBN Co's RMA if the ACCC does not issue an RMD at least 20 business days before the end of the regulatory cycle.⁴⁷ Optus submits that there are significant information asymmetries between ACCC, industry and NBN Co, and the proposed timeframes and deeming provision may allow NBN Co to game this deadline.
- 4.9 That said, Optus accepts that a deadline to the ACCC's assessment will be important to provide industry with sufficient certainty to plan for a regulatory cycle. However, Optus does not consider a deeming provision appropriate where there is a lack of information obligations on NBN Co or consequences for failing to respond to information requests.
- 4.10 Optus considers that a number of the proposed new process arrangements relating to the provision of information material to regulatory decision making fall short of what would be considered reasonable. For example, Optus welcomes the proposed commitment from NBN Co to consult with Access Seekers and Consumer Advocacy Groups prior to lodgement.⁴⁸ However, the benefit of this consultation would be improved if NBN Co is required to explain how / why it has or has not addressed stakeholders' concerns rather than simply to summarise these views in a consultation report as currently proposed. Similarly, while the power for the ACCC to issue a "Draft Replacement Module Determination" will help promote certainty over the ACCC's expectations for the matters to be included in a RMA, NBN Co should be required to explain how and why it has or has not proposed RMA terms that align with a Draft Replacement Module Determination.⁴⁹

Additional information obligations are required

- 4.11 Optus also submits that there should be a prescribed list of materials and documentation that must be submitted by NBN Co as part of an RMA. Establishing an agreed list of information may help reduce any disputes as to what information the ACCC must have before it commences its assessment thereby avoiding delays arising from unnecessary information requests. While it may not be appropriate to have a "stop the clock" provision concerning all ACCC information requests during an RMA, it may be suitable where NBN Co does not provide such prescribed information. The current proposed processes do not have enough obligations or serious consequences if NBN Co fails to respond

⁴⁷ Draft clause 5.9 (d)

⁴⁸ Draft clause 5.7

⁴⁹ Draft clause 5.11

appropriately to ACCC information requests. Therefore, if deeming provisions or other measures are needed to provide certainty to NBN Co, we consider these need to be balanced with stronger information obligations or consequences for failure to provide information to ensure an RMA is subject to robust assessment.

- 4.12 Optus welcomes the inclusion of a power for the ACCC to consult on a RMD,⁵⁰ although suggests that express reference to this should be included under final draft clause(s) relating to the RMD power. That said, Optus observes that the potential for the long and repeated consultation processes that have characterised this SAU Variation may be reduced in future by including the process improvements discussed above. Information and consultation timeframe requirements should be streamlined and designed with a view to minimising the potential for NBN Co to delay outcomes while maximising the efficiency of broader industry engagement.
- 4.13 Optus supports the concept of the replacement module process and considers that a number of the new roles and powers proposed for the ACCC in relation to its assessment of a replacement module will help ensure that the SAU remains fit for purpose over the duration of the Subsequent Regulatory Period.
- 4.14 However, if the new “self-contained” assessment framework is to be accepted, then Optus urges that the above concerns about deeming provisions and lack of information obligations and consequences for failure to provide necessary information be addressed. The ACCC (and RSPs) must have the necessary information available at the time the ACCC commences its assessment of an RMA. The availability of a sufficiently comprehensive set of information should support the ACCC in carrying out its regulatory functions in a manner that will improve the responsiveness of the SAU in the longer term.

Post-2032 Arrangements

- 4.15 The proposed SAU Variation appears to retain the ACCC’s general power to consider matters under section 152CBA(1) of the CCA in making an RMD in the post-2032 Regulatory Period. However, the ACCC’s power to “reset” the framework appears subject to certain limitations on what must be included and the contents of matters that may be included in an RMD.⁵¹ These include that the ACCC must determine the Regulated Revenue and specific elements of the ABBRR, ICRA and cumulative inflation factor for each Financial Year of that Regulatory Cycle in accordance with draft clause 3B.3 (Annual Regulated Revenue Allowance”), which requires that an RMD must:
- (a) Allow NBN Co a reasonable opportunity to earn revenue in a regulatory cycle equal to sum of the Annual Regulated Revenue Allowance for each Financial Year in that Regulatory Cycle (in terms of net present value)
 - (b) Set the Annual Regulated Revenue Allowance to allow NBN Co a reasonable opportunity to achieve and maintain a “standalone investment grade credit rating” with a stable outlook from “Moody’s, Fitch Ratings; and Standard and Poor’s”.⁵²
- 4.16 If implemented correctly, the modular structure of the SAU should allow a sufficient degree of regulatory certainty for NBN Co while providing flexibility for the SAU to adapt to changes in the market over time. While Optus supports the stated intent of enabling the ACCC to reset the regulatory framework to apply post-2032, Optus is concerned

⁵⁰ Draft clause 6.1 states that the ACCC may consult on “matters arising in connection with the performance or exercise of functions and powers conferred on the ACCC”

⁵¹ Draft clause 5.10 (a) and (b)

⁵² Draft clause 3B.3.1

about the potential for some of the proposed general principles set out in draft Module 3 to curtail the ACCC's discretion to effectively deliver on this objective. In particular, Optus considers that draft clause 3B.3 ("Annual Regulated Revenue Allowance") may result in unintended price shocks post-2032.⁵³

- 4.17 As the ACCC has observed, the reference to the need for the ACCC to ensure that NBN Co has a reasonable opportunity to achieve and maintain a "standalone investment grade credit rating" introduces assessment criteria outside the traditional scope of Part XIC. Should NBN Co be required to repay significant debt to obtain such a credit rating the ACCC may be obliged to allow NBN Co to seek to over recover its costs by dramatically raising prices post-2032. Optus shares the ACCC's concerns that the potential for inefficient pricing is increased by the apparent lack of any requirement that NBN Co has or would continue to invest or operate efficiently.⁵⁴ Further, we observe that the concept of supporting a stated investment rating has never been accepted in any telecommunications regulatory decision under Part XIC of the Act. Now is not the time to deviate from almost 30 years of regulatory precedent.
- 4.18 The suitability of a regulatory framework depends largely on the circumstances that may exist at the time it is being designed. NBN Co states that the regulatory module application process "is intended to provide NBN Co with a degree of flexibility in relation to the term of each Regulatory Cycle so that NBN Co can account for uncertainties (e.g., demand and revenue uncertainty) *that may exist at the time the particular RMA is lodged*, or to reflect other relevant changes in external circumstances that support a particular length for a Regulatory Cycle".⁵⁵ The ACCC has also noted that the ability to set different lengths for each Regulatory Cycle "allows for different incentives to apply to NBN Co depending on the circumstances at the time" and that it is "appropriate to determine these issues at the time, considering NBN Co's circumstances".⁵⁶
- 4.19 It follows that sufficient flexibility must be available for the ACCC to determine the regulatory framework to apply post-2032 at the time. The approximately nine years until the proposed commencement of Module 3 means that the nature of the regulatory arrangements required at that time is inherently uncertain. Optus notes that proposed draft clause 3B.3 appears to ignore the Government's recent confirmation that NBN would remain in public hands for the foreseeable future.⁵⁷ Therefore, Optus considers the inclusion of this criteria would appear presently unjustified.
- 4.20 In Optus view, given the inherent uncertainty of the future state of the market, the preferable regulatory approach would be to provide the ACCC with the greatest degree of flexibility to determine the post-2032 regulatory framework at that time. This would preferably be by way of the legislative processes and criteria set out under the CCA. Optus does not oppose the introduction of a self-contained set of criteria for Module 3 where it is based, to the greatest extent practicable, on existing legislative criteria. This would appear to be satisfied as long as the ACCC's general power to make an RMD applies in the Post-2032 Regulatory Period.
- 4.21 Utilising the replacement module process will ensure a degree of continuity of utility style regulation of the NBN network. In this context, the prescription of matters to be included in a RMD should be limited to those matters that relate to ensuring the ongoing effectiveness of this utility style model, such as the RAB, the ABBRR and an allowance for NBN Co to earn a reasonable rate of return on prudent and efficient investments.

⁵³ ACCC Consultation paper, p.19

⁵⁴ ACCC Consultation paper, p.8

⁵⁵ Nbn SAU supporting submission, Part D – page 7

⁵⁶ ACCC Final Decision on SAU 2013, p.12

⁵⁷ NBN Co Ltd Statement of Expectations; 19 December 2022, p.1

4.22 However, the principles guiding the design of the framework should not be overly detailed, particularly on matters that “may” be covered in a RMD under Module 3, such as in relation to pricing or service standards.⁵⁸ The detail of the approach to crucial price and non-price terms will be more suitably reassessed by the ACCC closer to 2032, with the ACCC issuing a “Statement of Approach” sufficiently early in the regulatory cycle to provide clarity over its preferred general approach to the detailed provisions of a RMD.⁵⁹

⁵⁸ In regard to service standards, and in response to the ACCC’s question on p.64 of the Consultation Paper, Optus does not consider that draft clause 5.10(b)(iv) and (d) provide sufficient assurance that the ACCC may undertake mid-cycle regulatory review mechanism and/or introduce a service performance incentive scheme for a regulatory cycle of the post-2032 regulatory period.

⁵⁹ Draft 5.8 of SAU Variation

Section 5. SPECIFIC ACCC FUNCTIONS AND POWERS

- 5.1 The proposed SAU Variation includes a number of new roles and powers for the ACCC to utilise mid-regulatory cycle during the Subsequent Regulatory Period (Module 2) as opposed to in the course of the replacement module process.
- 5.2 Optus acknowledges that some of the proposed changes, particularly relating to assessment of NBN Co's expenditure, appear to respond to industry concerns raised through previous consultation processes.⁶⁰
- 5.3 The proposed new roles and powers tends to be confined to specific issues or regulatory processes and NBN Co is not proposing to include a broad power or discretion for the ACCC to intervene.⁶¹ As a general principle, the SAU should provide sufficient flexibility for the ACCC to intervene where there is reasonable justification to do so. Given a regulatory cycle may extend for 5 years and the market remains dynamic, Optus considers that the specific roles and powers must be sufficiently robust to enable the SAU framework to adapt mid-cycle and respond to unforeseen developments.
- 5.4 Beyond this, given that the SAU may remain in place until 2040, Optus submits that a broad power or discretion to intervene must be included as a backstop for the ACCC to intervene to address critical issues that may arise over the SAU term. Such a broad power should be based as closely on the ACCC's statutory powers as possible and at the very least ensure that the ACCC may assess whether the SAU continues to promote the long-term interest of end-users (LTIE) if and when required.⁶²
- 5.5 Where new specific powers and functions are preferred, Optus submit that these should be designed to be as simple as practicable with a view to minimising any conflict with the ACCC's existing powers under the CCA. Optus notes that certain of the new powers and functions relating to the replacement module process provide that the ACCC have regard to the matters it must take into account when making an access determination.⁶³ However, many of the proposed powers relating to mid-cycle reviews continue to be unduly complex and narrow in scope with numerous qualifications that serve to limit the scope of the ACCC's discretion.
- 5.6 Optus notes that the ACCC's discretion in making an access determination is limited by, among other matters, the need to have regard to the "legitimate business interests" of a carrier, the "direct costs of providing access to the declared service" and "the operational and technical requirements necessary for the safe and reliable operation of a carriage service".⁶⁴ Therefore, the ACCC should consider where, if possible, reference to the matters relevant to the ACCC's power to make access determinations may be included to strengthen mid-cycle functions and powers.
- 5.7 Once the ACCC accepts a variation from NBN Co, there is no provision under Part XIC of the CCA for the ACCC to vary or set aside the varied terms. Therefore, and particularly given the long-term applicability of the SAU, concerns about the substantive price and non-price terms should be addressed through this SAU Variation process.

⁶⁰ ACCC Consultation Paper, p.48

⁶¹ ACCC Consultation Paper, p.21

⁶² Division 5 of Part XIC, CCA; and in particular relevant sections of s.152CBD and s.152CBD

⁶³ Section 152BCA of the CCA

⁶⁴ Section 152BCA(3C) of the CCA

Optus reiterates that it is mistaken to believe that these concerns may be remedied down the track by including multiple functions and powers.⁶⁵

- 5.8 Optus agrees with the ACCC's approach to assessing the sufficiency and effectiveness of the proposed functions and powers. Optus provides feedback on those proposals that Optus considers raise some concerns below.

Cost pass-through mechanisms require clarity and refinement

- 5.9 NBN Co is proposing a mechanism to "pass-through" costs to the WAPC basket. The costs must result from one of a "clearly defined" set of events that causes a "material change" (1% of Nominal Core Services ABBRR for that financial year) in NBN Co's costs of supply (or where the ACCC otherwise determines).⁶⁶
- 5.10 Optus considers clarification on the scope of "likely increment in costs" is necessary to provide further certainty.⁶⁷ Optus also supports the clarifications provided in relation to passing through costs resulting from Government policy notices including that capex incurred and forecast Opex will only be deemed prudent to the extent that they implement the details of the project or program specified in the notice.⁶⁸ However, Optus notes that the ability to cap expenditure appears to be unnecessarily predicated on the formality that the maximum amounts be specified in a Government notice.
- 5.11 Optus does not agree with the proposed approach to pass-through costs relating to changes in Benchmark Service Standards proposed by NBN Co (NBN Service Standards Change Event). It appears that draft clause 2D.6 would allow NBN Co to withdraw a Benchmark Service Standard proposal simply on the basis that the ACCC does not accept its cost pass-through application. This is because the NBN Co will only pass-through the allowed amount where it has notified the ACCC that it wishes to proceed with the Benchmark Services Change Proposal.
- 5.12 If this interpretation is correct, this provision would appear to act as a disincentive to NBN Co proposing changes to service standards that are based on prudent and efficient costs. It also would appear to allow NBN Co to shift responsibility for improvements in services standards to the ACCC, thereby undermining the utility of any NBN Co initiated mid-regulatory cycle review of Benchmark Service Standards.⁶⁹ Optus considers this approach is unreasonable.

Price review mechanisms

- 5.13 The current SAU includes a general price review mechanism which NBN Co proposes to remove on the basis that it is no longer necessary due to the WAPC.⁷⁰ Instead, NBN Co proposes new price review mechanisms including powers for the ACCC to:
- (a) Change prices during a regulatory cycle when:
 - (i) the ACCC "reasonably considers that the prices are inconsistent with NBN Co's Statement of Pricing Intent" or

⁶⁵ Optus July 2022 submission, p.36

⁶⁶ Draft clause 2D.4 of the SAU Variation

⁶⁷ Draft clause 2D.5.4

⁶⁸ ACCC Consultation Paper, p.48

⁶⁹ Draft Module 2, Schedule 21.2.1 (c)

⁷⁰ NBN supporting submission – Part D – chapter 15

- (ii) NBN Co is applying “discounts to more than 50% of AVC TC-4 products” during a financial year (together “Price Review Events”).⁷¹
 - (b) Determine the maximum price of a NBN Offer or Other Charge that is new or ceased to be “zero-priced” within 24 months of that occurrence⁷²
 - (c) Ensure compliance of Prices in the Tariff List with NBN Co’s pricing obligations.⁷³
- 5.14 Optus has some concerns about these processes (discussed below) and considers they require some further improvement to be effective.

The scope of Price Review Events is too narrow

- 5.15 Optus considers that the scope of Price Review Events is very narrow and limits the effectiveness of the ACCC’s oversight of pricing during a regulatory cycle. Further, the ACCC’s power to issue a rectification plan is unduly constrained by the requirement that the ACCC allow NBN Co to achieve maximum revenue for the WAPC before the rectification plan applies.⁷⁴ In effect this would appear to mean that any rectification must be revenue neutral which may prevent any price reduction through a rectification plan.
- 5.16 Given that the Tariff List is only applicable for 1 year, allowing NBN Co 40 business days to propose a rectification plan would appear to be disproportionate. A tighter timeframe of a maximum of 20 business days is preferred. Further clarification on how and when new prices would be included in a Tariff List mid-cycle and any impact that these changes may have on pricing for the remainder of the regulatory cycle is also required.

Maximum price processes require further clarity

- 5.17 The proposed revised definition would appear to diverge from the statutory drafting and mandate that the ACCC *must*, in all cases, take these factors into account when making its Determination. Without further explanation as to why this should be the case, Optus considers that this proposal could unduly restrict the ACCC’s power to reset prices.

Tariff compliance processes should be improved

- 5.18 The proposed SAU Variation also contemplates a power for the ACCC to intervene to ensure that pricing complies with a published Tariff List.⁷⁵ The ACCC can issue a notice to NBN Co requiring NBN Co to demonstrate compliance with the relevant criteria (WAPC formula, Individual price controls etc). If NBN Co does not provide sufficient evidence of compliance, then the ACCC may determine whether NBN Co has complied.
- 5.19 While this proposal provides welcome ACCC oversight of pricing compliance during a regulatory cycle, it includes too many procedural steps, particularly given that a Tariff List is only in place for 1 year. Optus considers that the process would be more efficient if NBN Co was required to demonstrate compliance at the time it issued its Tariff List.
- 5.20 Furthermore, while it appears that NBN Co is obliged to update the Tariff List where the ACCC finds non-compliance there is no timeframe specified within which NBN Co is

⁷¹ Draft clause 2C.4.2

⁷² Draft clause 2F.5

⁷³ Draft clause 2F.6

⁷⁴ Draft clause 2C.4.2(g)(iii)

⁷⁵ Draft clause 2F.6

required to do this update. The ACCC should not have to rely on its enforcement powers to ensure NBN updates the Tariff List in a timely manner.

Cost allocation approach remains concerning

- 5.21 Optus has previously raised concerns about NBN Co's proposed approach to cost allocation between Core and Competitive Services. Optus is particularly concerned that NBN Co had too much discretion to allocate "shared costs" in a manner that would enable NBN Co to recover costs more readily associated with its Competitive Services via pricing of Core Services, resulting in cross subsidisation. Further, the proposal that the ACCC would only be provided with a Cost Allocation Manual (CAM) until 30 days after the SAU Variation date is unreasonable given its relevance to determining the regulatory cost base and the application of SAU price controls.⁷⁶
- 5.22 Optus welcomes NBN Co's publication of a draft of its April 2022 CAM along with the SAU Variation. While the approach to cost allocation may not have changed significantly since NBN Co submitted its proposed SAU Variation on 29 March 2022, it would have been preferable if NBN Co could have updated the CAM to reflect any material changes that may result from the most recent version of the SAU Variation.
- 5.23 Based on a review of the draft CAM, Optus considers that the allocation of 'Shared costs' remains vague.⁷⁷ The CAM explains that "these costs are allocated to services through the application of a suitable allocator shared costs (i.e., costs that are not directly attributable to a Core Regulated Service or Competitive Service) will be allocated to reflect causal relationships between supplying services and incurring costs, unless establishing a causal relationship would require undue cost or effort in which case an alternative suitable allocator will be used". Then principles governing the allocation of capex (allocation factor) and opex are applied largely based on the number of premises passed/connected, the provisioned bandwidth or revenue in the case of opex.⁷⁸
- 5.24 Optus recognises that the detail of cost allocation can be complex. Accordingly, and to promote regulatory alignment and certainty, Optus reiterates its view that the CAM should be subject to ACCC review prior to and/or contemporaneously with its assessment of the SAU Variation.⁷⁹ That said, Optus notes the proposed introduction of accounting separation commitments and associated ACCC oversight should provide further assurance that costs between core and non-core services are allocated in a way that promotes efficient pricing and ultimately competition in downstream markets.⁸⁰
- 5.25 The categorisation of services as either Core or Competitive will determine how costs associated with the supply of those services is allocated.⁸¹ New services are to be categorised through the replacement module process and the ACCC can also recategorize existing services via an RMD. If the ACCC does so then it must also determine a consequent allocation of building block cost. Optus considers that the ACCC's powers to recategorize services appear fit for purpose.

⁷⁶ Optus July 2022 submission, p.35

⁷⁷ Defined as are costs that are not specific to one service category or cannot be directly assigned to a specific service category

⁷⁸ Draft April 2022 CAM; further shared capital costs "are allocated proportionally based on (one of) the number of premises passed, the number of premises connected or the amount of provisioned bandwidth depending on the allocation percentages for that year in the model"

⁷⁹ Draft clause 2G.6.3

⁸⁰ Module 2, Schedule 2I.6.3 & 2I.6.4

⁸¹ NBN Co has categorised enterprise ethernet, business satellite and satellite mobility services as non-cores services (unless and until the ACCC re-categorises them as core services). All other services, including all services supplied to residential premises, are initially categorised as core services.

- 5.26 Optus considers that allocating the full ICRA balance to Core Services would appear to increase the risk of price shocks post-2032. The ICRA included losses associated with the full cost of building the network, that is, both Core and Competitive Services. ICRA to Competitive Services should be allocated to Core and Competitive services using an appropriate cost allocator.

Service Standards processes are inadequate for mid-cycle events

- 5.27 In addition to the power for the ACCC to determine Benchmark Service Standards ahead of each regulatory cycle, NBN Co proposes a power for the ACCC to review and change Services Standards during a regulatory cycle. The proposed SAU Variation provides the ACCC with the power to require NBN Co to propose changes to the Benchmark Service Standards in a narrow set of specified circumstances; namely where such a change is required for RSPs to comply with:
- (a) New or amended retail regulation or
 - (b) To address systemic and unforeseen issues.⁸²
- 5.28 NBN Co states that “the proposal minimises any risk of any market mismatch between market expectations of services standards and those delivered by nbn and is therefore in the LTIE”.⁸³ Optus’ concerns about NBN Co’s proposed approach to Services Standards are set out in detail in section 4 of this submission. Optus submits that there is already a considerable “mismatch” between market expectations of service standards and those delivered by NBN Co and in particular, those proposed under the SAU Variation.
- 5.29 The proposed mid-cycle review power appears likely to only be triggered in a very narrow set of circumstances. The procedural steps and thresholds are overly complex and considerably dilute the ACCC’s power to intervene. For example, the ACCC’s power to review a service standard due to a “systemic service standard event” appears to require that all access seekers experience a recurring “material adverse impact” due to a matter for which NBN is responsible and that the ACCC “acting reasonably” considers that NBN has not taken reasonable steps to address the impact.⁸⁴ The determination power is further qualified by the need for the required change to be “necessary and proportionate” to address the systemic issue.⁸⁵ The criteria does not include reference to the impact on end-users, which would be more aligned with an LTIE assessment.
- 5.30 Further, Optus considers the definition of Systemic Service Standard Event requires further clarity. It is defined as a new event or circumstance:
- (a) Arising during a regulatory cycle that results in a recurring material adverse impact on access seekers’ access to a service standards product due to a matter for which NBN Co is responsible; and
 - (b) In respect of which the ACCC considers, acting reasonably, that NBN Co has not taken reasonable steps to address the recurring material adverse impact on access seekers.
- 5.31 It is unclear how a Systemic Service Event takes into account matters that may not otherwise be addressed by the benchmark service standards but which have a detrimental impact on consumer experience. For example, programs such as the Fibre upgrade program and the COAT program may be subject to service standards that sit

⁸² Draft clause 21.2.2

⁸³ NBN supporting submission – Part G; p.26

⁸⁴ Attachment C (Dictionary)

⁸⁵ Draft clause 21.2.2(e)

outside the WBA. It is unclear if programs perform poorly and contribute to poor consumer experiences could be addressed under these mid-cycle processes. Similarly, if an issue occurs that is a poor consumer experience but which does not result in poor performance against the benchmark service standards, whether that would be able to be addressed with any new service standards or in some other way. An example of this is the Unify issue, where because of delays completing connections, NBN Co simply stopped accepting orders (including in circumstances where consumers had no service at the premises), therefore no connection service standards were triggered.

- 5.32 While slightly less complex, the proposed retail regulation limb (“Retail Services Standard Regulation”) of the mid-cycle review power would only be triggered where it can be established that the retail regulation necessitates a change to a service standard *if those access seekers are to be capable of complying* with that mandatory service standard.⁸⁶ Different access seekers may have different capacities to comply with new regulations and the application of a threshold that seeks to incorporate an assessment of a common capacity to comply would appear highly fraught.
- 5.33 Further, the process for the ACCC to exercise these powers appears to be unnecessarily restrictive. While reasonable timeframes for the ACCC to make a determination may be appropriate there is no justification for a deeming provision for ACCC Service Standard Determinations. Optus also consider that the “clock should stop” to enable the ACCC to consult with RSPs or Consumer Advocacy Groups on any ACCC Service Standard Determination.
- 5.34 At present, the mid-cycle review power will not be sufficient or effective enough to address any mismatch between market expectations and NBN Co’s deliver of service standards or to deal with issues that can arise and have detrimental impacts on end-users. In combination with the inadequacy of the cost pass-through mechanism for NBN Service Standards Change Events, Optus considers that the approach to mid-cycle reviews, regulatory oversight and the ACCC’s roles and powers regarding Service Standards under the SAU Variation is not reasonable nor in the LTIE.
- 5.35 Optus urges reconsideration and changes to such processes to ensure they are capable of addressing new service standard issues and meeting end-users expectations of service standard delivery over the long term, including post-2032.

Powers to request information and undertake consultation

- 5.36 Optus welcomes the inclusion of a general power for the ACCC to request information from NBN Co that it considers reasonably necessary to assess NBN Co’s compliance or exercise its functions or powers conferred under the SAU.⁸⁷ Optus notes previous comments on the need for consequences if NBN Co fails to provide or respond to such information requests where this could frustrate consultation processes or the replacement module process.
- 5.37 Similarly, Optus supports the proposed general power for the ACCC to consult interested parties on matter arising in connection with the SAU, including in connection with the exercise of its functions or powers.⁸⁸ In combination these new information gathering and consultation powers have the potential to promote transparency and accountability over NBN Co’s SAU performance and improve the effectiveness of the ACCC’s new functions and powers.

⁸⁶ Draft clause 21.2.2

⁸⁷ Draft clause 6.3

⁸⁸ Draft clause 6.1 and 6.4

Reporting

- 5.38 Module 4 of the SAU Variation includes a number of new reporting commitments to apply in the first regulatory cycle of the Subsequent Regulatory Period with many mirroring those in WBA 4. The reports include, among others:
- (a) Monthly reports in relation to the proposed network utilisation management commitments.
 - (b) Quarterly reporting on shared network for the purposes of promoting transparency over investment in network capacity and performance.
 - (c) An annual report on NBN Co's implementation of initiatives to improve access for low-income consumers.⁸⁹
 - (d) Annual expenditure and price reporting detailing NBN's Capital and Operating Expenditure and whether any pricing for Core Services exceeded prices set out in the Tariff List for that year.⁹⁰
 - (e) NBN Co's proposed accounting separation compliance (post- 31 March 2024).
- 5.39 Optus supports these new reporting commitments as useful measures to promote transparency and regulatory oversight over NBN Co's performance under the SAU. Optus also notes that these proposals are supported by the new general power for the ACCC to request information from NBN Co referred to above.
- 5.40 However, Optus considers that more robust reporting arrangements are required to ensure sufficient oversight of NBN Co's compliance with service standard commitments. At the very least, Optus suggests that the monthly report to retailers relating to congestion, network availability, and connection and assurance performance should be maintained as it provides useful status updates on current network performance issues that directly affect RSPs' supply of retail services.
- 5.41 As noted above under the discussion of the replacement module process, Optus also considers that the proposed commitment to provide the ACCC with a report on its consultation with stakeholders at the time it submits an RMA should include explanations as to why NBN has or has not adopted stakeholder feedback rather than simply providing a summary of the consultation.

⁸⁹ Module 2, Schedule 2B.7

⁹⁰ Draft clause 2F.7