

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

Submission in response to
ACCC Consultation Paper

**Proposed variation to the
NBN Co Special Access
Undertaking: extension of
expiring non-price
provisions**

Public Version

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EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to provide feedback to the Australian Competition and Consumer Commission (ACCC) on the proposed variation to the NBN Co Special Access Undertaking to extend several non-price provisions (the proposed SAU variation).
2. In particular, NBN Co has sought to extend the application of several existing non-price provisions in the SAU accepted in December 2013 from expiring on the 30 June 2019 to the remainder of Module 1 in 30 June 2023. These non-price provisions include:
 - (a) Processes for obtaining customer endorsement of network design changes not specified as permitted variations;
 - (b) Requirements for NBN Co to specify the arrangements for dispute resolution in its WBA, and processes for appointment and ACCC approval of dispute resolution advisors and pool members; and
 - (c) Operation of the Product Development Forum (PDF) Rules, which cover forum membership, submissions and assessment of new product ideas and consultation processes.
3. Optus considers that the operation of the existing non-price provisions for both customer endorsement of network design changes, and the operation of the dispute resolution processes – to raise a customer endorsed network change or to resolve a dispute – have yet to be tested. NBN Co similarly acknowledges that these provisions have not been used since the SAU has been in operation.
4. In contrast, it is clear from Optus' experience with the PDF that it is not operating as anticipated when the terms were approved in 2013. The PDF processes are opaque and often appear to operate as a tick-the-box exercise rather than a true consultation. We also observe that the criteria on which NBN Co assess a PDF proposal is not made known to PDF members, nor does NBN Co provide any assessment of ideas against a set of criteria when finalising PDF decisions.
5. This experience raises doubts as to whether the initial PDF provisions approved in 2013 has resulted in:
 - (a) Products that access seekers want and are willing to pay for;
 - (b) Reduction in information asymmetry;
 - (c) Better information to access seekers about the product developments that are occurring. Such information is necessary to enable RSPs to contribute to this process and prepare their own systems to deal with any new products being introduced; and
 - (d) Provision of an appropriate initial framework for facilitating effective consultation between NBN Co and participants about developing and varying products.
6. Optus submits that the ACCC should not approve a simple roll-over of the existing PDF terms. Rather, the ACCC should commence an inquiry into the existing terms and whether they continue to meet the legislative objectives.

CUSTOMER ENDORSEMENT OF NETWORK DESIGN CHANGES

7. One of the key prudency conditions under the long-term revenue constraint methodology (LTRCM) specified in the SAU is the prudent design condition. That is, if the network change meets this requirement then it would be able to recover its cost of investment in the regulated asset base (RAB).
8. The NBN SAU currently allows NBN Co to make four types of network changes.¹ These include where network changes: are made in accordance with the Network Design Rules; are Permitted Variations from the Network Design Rules; have been endorsed by access seekers and/or the ACCC; or are determined/permitted by the ACCC through an access determination or binding rules of conduct.
9. The proposed variation only relates to the extension for the operation of the Endorsed Network Change Provisions to the end of Module 1.
10. The ACCC in its 2013 Final Decision acknowledged:

*These customer engagement provisions and associated PDF processes should encourage efficient investment. This is because access seekers and consumer advocacy groups (and potentially end-users) would be able to inform NBN Co about whether network design choices are efficient and deliver network capacity and service quality that end-users desire and are willing to pay for.*²
11. As noted in its supporting submission, “Although the SAU already provides for the ACCC to determine or permit network changes even after the scheduled expiry of the Endorsed Network Change Provisions, having a customer engagement process in place provides additional flexibility to nbn, which is in its legitimate business interests.”³
12. However, since this provision has not been used since the SAU has been in operation Optus can make no observations whether its extension is reasonable.

DISPUTE RESOLUTION PROVISIONS

13. The SAU dispute resolution provisions set out the overarching the framework for parties to follow in the event that a dispute cannot be resolved commercially within a specified timeframe. The dispute resolution process including the appointment of resolution advisors and pool members have been designed to ensure that it remains independent and unbiased. However since the SAU has been in operation, Optus is not aware of any disputes that have undergone this process.
14. The proposed variation relates to the extension for the operation of the Dispute Resolution Provisions to the end of Module 1.
15. The ACCC in its 2013 Final Decision acknowledged:

The ACCC considers that the dispute resolution provisions in the SAU incorporate sufficient safeguards to ensure that decision-makers will be

¹ Clause 1D.6

² ACCC, 2013, NBN Co Special Access Undertaking, Final Decision, December, p.99

³ NBN Co, 2019, Variation to the NBN Co Special Access Undertaking, NBN Supporting Submission, May, para 46

*independent and free from bias, and will therefore promote the long-term interests of end-users.*⁴

16. As noted in its supporting submission, “Accordingly, nbn considers that the extension of the Dispute Resolution Provisions, and the efficient, consistent and unbiased resolution of disputes that these provisions facilitate, would promote the interests of access seekers, the legitimate business interests of nbn and nbn’s investment in facilities used to supply declared services.”⁵
17. However other than the appointment and reappointment of resolution advisors and pool members, there have been no relevant disputes that have applied this provision since the SAU has been in operation. Since there has been no practical application of these provisions, it is difficult to conclude whether they are reasonable or not.

PRODUCT DEVELOPMENT FORUM (PDF) PROCESSES

18. A key element of Module 1 in the SAU includes the product development and withdrawal provisions to ensure access seekers and consumer advocacy groups can participate in product development and to provide ACCC oversight of product withdrawal.
19. NBN Co has submitted that there has been extensive use of PDF processes which have delivered an appropriate level of certainty and consistency to PDF participants and encouraged transparency and consultation in the development of product ideas.⁶ For these reasons NBN Co proposes that the operation of the existing PDF processes be extended until 30 June 2023.
20. Optus notes the comments made by the ACCC when approving the initial PDF provisions in 2013 that these commitments in the SAU will:
 - (a) Increase the extent to which, over the SAU term, NBN Co develops products that access seekers want and are willing to pay for;
 - (b) Reduce information asymmetry;
 - (c) Better inform access seekers about the product developments that are occurring. This will allow them to contribute to this process and prepare their own systems to deal with any new products being introduced; and
 - (d) Provide an appropriate initial framework for facilitating effective consultation between NBN Co and participants about developing and varying products.
21. And finally, we note that the ACCC considered that the operational experience gained over the five year duration of the PDF processes will provide a basis on which to consider the processes to be applied to the product development forum in the future.⁷
22. To assist the ACCC in this task, namely to base its assessment on whether PDF processes should continue unamended on actual experience of the PDF over the last five years, we provide below observations and learning from dealing with the PDF.

⁴ ACCC, 2013, NBN Co Special Access Undertaking, Final Decision, December, p.106

⁵ NBN Co, 2019, Variation to the NBN Co Special Access Undertaking, NBN Supporting Submission, May, para 60

⁶ NBN Co, 2019, Variation to the NBN Co Special Access Undertaking, NBN Supporting Submission, May, par. 68-71.

⁷ ACCC, 2013, NBN Co Special Access Undertaking, Final Decision, December, p.77-8

23. Optus considers that the operation of PDF processes has highlighted areas of concern and that a full review of these processes is now warranted. Optus's particular concerns with PDF processes include:
- (a) A lack of transparency around PDF processes, consultation and decisions;
 - (b) Lack of clarity when a proposal will be subject to PDF consultation or 'industry consultation';
 - (c) Inconsistency and a lack of oversight in processes, including no specified timeframes in which a PDF proposal must be acknowledged or considered; and
 - (d) Limitations on what will be considered by the forum, with inadequate fora to raise proposals that would otherwise address common customer experience issues.
24. Optus' concerns with the PDF processes stem from our experiences over the last 5 years and, in particular, recent experience in lodging proposals to address customer experience issues.
25. This experience demonstrates that the outcomes expected in 2013 have not come to fruition. Optus submits the ACCC should not simply roll over the existing PDF clauses, rather it should conduct a full inquiry into the PDF design and operation to ensure the PDF promotes the legislative objectives.
26. Specific examples are discussed below.
27. **[CiC]**
28. **[CiC]**
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31. **[CiC]**
32. **[CiC]**
33. We consider this experience raises questions about:
- (a) The scope and limitations of the PDF;
 - (b) The lack of formal fora in which RSPs can raise such ideas (if NBN Co considers they do not fall within the terms of the SAU); and
 - (c) Lack of timeframes for a formal response from NBN Co addressing the proposal.
34. **[CiC]**
35. **[CiC]**
36. **[CiC]**
37. Optus considers this example highlights that:
- (a) PDF processes are not robust;
 - (b) Where there are no specified timeframes for acknowledgement or response proposals can go unaddressed; and

- (c) It is easy for NBN Co to defer matters to WBA negotiations rather than address them more promptly, when, in fact, it is not clear this should be a matter for WBA negotiations.
38. It is disappointing that such decisions appear to be opaque, when PDF processes are supposed to encourage transparency.
39. Other matters sit outside of the PDF and appear to be subject to no oversight at all. This includes NBN Co's Discounts, Credits and Rebates List. There are no formal processes or oversight governing the Discounts, Credits and Rebates which means that NBN Co can change these quickly, without consultation, to the detriment of RSPs and ultimately their customers. It is not clear to Optus on what basis NBN Co decides to put a matter through the PDF or to utilise commercial discussions outside the SAU framework.
40. These examples highlight that there are insufficient obligations on NBN Co, either in the WBA or the related regulatory framework, to consider measures that address customer experience. This is detrimental to RSPs and their customers, even where RSPs have identified and proposed measures that could assist the customer experience.

Assessing whether variation is reasonable

41. NBN Co submits that the variation proposed to the SAU is "very minor and limited to extending the operation of the Expiring Provisions".⁸ However, in considering whether the variation should be accepted, it is necessary to consider the operation of the relevant provisions in practice. The ACCC should consider whether the proposed extension of these terms is consistent with the category B SAOs and the extent to which this would be considered reasonable.⁹
42. The 'reasonableness' criteria are set out in s. 152AH of the CCA and requires that in determining whether something is 'reasonable' the ACCC must have regard to:
- (a) Whether the terms and conditions promote the LTIE of carriage services or of services supplied by means of carriage services;
 - (b) The legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;
 - (c) The interests of persons who have rights to use the declared service;
 - (d) The direct costs of providing access to the declared service;
 - (e) The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
 - (f) The economically efficient operation of a carriage service, a telecommunications network or a facility.
43. It is clear from Optus' experience with the PDF that it is not operating as anticipated when the terms were approved in 2013. The PDF processes are opaque and appear to operate as a tick-the-box exercise rather than a true consultation. We also observe that the criteria on which NBN Co assess a PDF proposal is not made known to PDF

⁸ NBN Co, 2019, Variation to the NBN Co Special Access Undertaking, NBN Supporting Submission, May, para 17.

⁹ AS required by s. 152CBD(2)(b)(ii). 'Reasonableness' criteria is set out in s. 152AH of the Competition and Consumer Act 2010.

members, nor does NBN Co provide any assessment of ideas against a set of criteria when finalising PDF decisions.

44. This experience raises doubts whether initial PDF provisions approved in 2013 has resulted in:
- (a) Products that access seekers want and are willing to pay for;
 - (b) Reduction information asymmetry;
 - (c) Better information to access seekers about the product developments that are occurring. This will allow them to contribute to this process and prepare their own systems to deal with any new products being introduced; and
 - (d) Provision of an appropriate initial framework for facilitating effective consultation between NBN Co and participants about developing and varying products.
45. Optus submits that the ACCC should conduct a thorough review of the PDF processes and not simply roll-over the existing terms.